

THE LEGAL REGIME OF ISLANDS IN THE SOUTH CHINA SEA



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Marius Gjetnes

Department of Public and International Law

University of Oslo

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1. INTRODUCTION

1.1. The South China Sea dispute

The South China Sea (Hereinafter SCS) is a semi-enclosed sea covering an area of some 800 000 square kilometres and 90 percent of its circumference is rimmed by land.¹ The SCS has long been appreciated for its rich fishing grounds and as a strategic waterway linking the Pacific and Indian Oceans. Motivated by security concerns and economic interests, littoral states began in the late 1950s to make overlapping sovereignty claims to SCS islands. The SCS however, did first attract international attention in the 1970s when geological studies suggested the possibility of large petroleum and natural deposits beneath the seabed.² The littoral States have since engaged themselves in a complex web of competing claims to island territories, maritime jurisdiction and access to fisheries.

Four main groups of features are situated in the SCS; the Pratas (Dungsha) and the Macclesfield bank (Zhungsha) to which China and Taiwan claim Chinese sovereignty, the Paracels (Xisha) of which China/Taiwan and Vietnam contest each others claims and finally the Spratlys (Nansha) which are contested between China/Taiwan, Vietnam, Malaysia and the Philippines. In addition some of the features are situated in the exclusive economic zone (EEZ) claimed by Brunei. Another feature called Scarborough Shoal situated north of the Spratlys, is claimed by China/Taiwan but situated within the claimed EEZ of the Philippines. The existence of overlapping claims to sovereignty over a variety of offshore features makes the SCS dispute extremely complex. The sovereignty dispute in the Spratlys has evolved into stalemate with all the claimant states except for Brunei, having established military garrisons on some of the features.³

¹ J. R. Morgan and M. J. Valencia, *Atlas for Marine Policy in South-East Asian Seas* (Berkeley, University of California Press, 1983), at 3-4.

² Christopher C. Joyner, "The Spratly Islands Dispute: Rethinking the Interplay of Law, Diplomacy, and Geo-politics in the South China Sea", *The International Journal of Marine and Coastal Law*, Vol. 13, No.2 (1998), at 193, (Hereinafter cited as Joyner, 1998).

³ China occupies nine of the features and has deployed some 260 marines there, while Taiwan occupies the biggest feature (Itu Aba) and has stationed about 110 soldiers there. Vietnam has stationed at least 600 troops on 25 of the features. The Philippines currently has 595 marines stationed on 9 features and Malaysia has stationed about 70 soldiers on three of the features. See Joyner, 1988. Reportedly Taiwan has withdrawn its military troops from Itu Aba as late 1999, and the Taiwanese Coast Guard now governs the Island. *South China Morning Post*, 13.12.99.

The Spratly islands comprise approximately one hundred and fifty features in the SCS and none of the littoral states have yet obtained acceptance for their claims to sovereignty to them.⁴ Moreover, all the sovereignty claims to the Spratlys have weaknesses, and thus each nation must know that its claim may not ultimately or completely prevail if the dispute were to be presented to a tribunal or arbitrator. Thus, and because of widespread distrust for modern tribunals the littoral states are likely to either seek a military solution or attempt to negotiate the question of sovereignty and their maritime boundaries. It is highly unlikely that they will be willing to risk all in a tribunal ruling which tend to create winners and losers. The explosiveness of the sovereignty issue is of course due to the assumption that the features will generate continental shelves and EEZs.⁵ Some experts have suggested disregarding the sovereignty issue totally and depriving the Spratly features of any weight in maritime delimitation due to the complex situation of claims.⁶ At any rate, the sovereignty issues are only half of the problem because the maritime zones and continental shelves must be delimited as well. This is also a very complicated task, where many difficult preliminary issues have to be unravelled before the central problem of finding an equitable solution can be addressed.⁷

All the littoral states now strive to gain the strongest possible position for the maritime delimitation settlement. However, before the maritime boundary issues can be addressed it must also be decided whether or not the islands can generate any maritime zones of their own. On the one hand, if some of the islands can generate maritime zones, and possibly even the extensive 200 nautical mile zone or a continental shelf, this would strongly influence the maritime delimitation in the SCS. If, on the other hand they are not granted maritime zones of their own,

⁴ There are 148 named ones according to a recent survey by David Hancox and Victor Prescott “A Geographical Description of the Spratly Islands and an Account of Hydrographic Surveys Amongst Those Islands”, *International Boundaries Research Unit, Maritime Briefing*, Vol. 1, No. 6, (1995). (The number of features seems to vary a lot, and at the most one map mentions 191 different named features in the group. Much of this variation can be explained by uncertainty as to what are and are not the Spratlys).

⁵ In this regard it should be noted that the sovereignty issues are especially complex due to one of the principles of international law that has come to have considerable influence on the establishment of a valid title to sovereignty, namely that a “juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled”. See R. Y. Jennings, *The Acquisition of Territory in International Law*, (Manchester University Press, Manchester, 1962), at 28.

⁶ Mark J. Valencia, Jon M. Van Dyke and Noel A. Ludwig, *Sharing the Resources of the South China Sea*, (Hague: Martinus Nijhoff, 1997), at 18 ff. (Hereinafter cited as Valencia, Van Dyke and Ludwig).

the isolated insular outcroppings scattered throughout the sea will have minimal effect on maritime delimitation. Moreover, they will then have less importance to the littoral states since the features themselves are of little value.

The phenomenon of expanding national maritime limits started in the post-World War II era largely stimulated by the desire to exploit offshore oil resources and brought with it the need for legal rules and procedures which would guide States in delimiting overlapping claims. The delimitation of maritime boundaries is however difficult because many countries have not defined their maritime claims and often where they have done so, their claims are subject to multiple overlaps. The importance of this issue is evident considering the enormous economic values at stake. Moreover this is an issue many governments in the near future will have to face since by Feb. 1988 only approximately 140 maritime boundaries have been agreed while the total estimate of necessary maritime boundaries is between 410-440 potential ones.⁸ The SCS dispute is a long-standing conflict, which includes elements of non-defined and overlapping claims. This and the fact that at least seven⁹ states are involved make it a difficult conflict in which all concerned with stability in the region has an interest.

1.2. Scope of study

The sovereignty issues in the SCS are extremely complex and as cited by Ian Townsend Gault, “too much ink have been spilled on that issue” without making progress. The normal approach to solving a dispute such as the SCS dispute would be to first settle the sovereignty issues for then to start negotiation the maritime delimitation. This is, however, not the only possible approach to the problem. The dispute over the Spratly features is mostly or maybe in its entirety actuated by

⁷ The provisions of the LOS Convention dealing with delimitation of continental shelves and EEZs states that the delimitation shall be effected by agreement on the basis of international law according to the sources of international law spelled out in Article 38 of the Statute of the International Court of Justice in order to find an equitable solution. (Articles, 74 and 83 of the LOS Convention)

⁸ Martin Pratt, “Resources-Boundaries-Whose oil is it anyway?, International boundaries and hydrocarbon production”, *Petroleum Review*, (02/98) at 35.

⁹ In addition to the claimant States already mentioned, France and Britain also have claims, which are neither officially proclaimed, nor abandoned. See, Geoffrey Marston, “Abandonment of Territorial claims: The cases of Bouvet and Spratly Islands”, *British Yearbook of International Law* (1986), at 344 ff.; Further, Indonesia is another party involved since the claims of Vietnam and China overlap with Indonesia’s continental shelf and EEZ claim in the area north-east of Natuna. See Brice M. Clagett, “Competing Claims of Vietnam and China in the Vanguard Bank and Blue Dragon Areas of the South China Sea: Part II”, *Oil Gas Law and Taxation Review*, (U.K.) 1995, No. 11, at 422.

questions regarding the features' legal effect on zones of national maritime jurisdiction and the delimitation of maritime boundaries. The entitlement of maritime zones is an issue quite separate from the sovereignty issue and sovereignty of the islands need not necessarily be settled before the legal effect on zones may be established. Thus, this study will look beyond the sovereignty issue in order to determine, what according to international law constitutes an island and further, on the basis of which principles do islands generate maritime zones.

The principles of International Law have been thought to play a key role in resolving the dispute, however they may not necessarily provide a set of answers to absolutely every issue. Moreover, neither legal processes nor political negotiations have so far been successful in dispute resolutions. However, the littoral states' acceptance of the United Nations Convention on the Law of the Sea,¹⁰ (Hereinafter LOS Convention) and the Convention's entry into force in 1994, makes it most likely to assume that the legal rights put down in the Convention will be a major tool in solving the dispute.¹¹ To what degree the states actually will comply with the provisions of the Convention is nevertheless uncertain, and moreover a question on the political level.

This study is neither intended to define the maritime areas that each claimant state is entitled to according to international law, nor does it intend to draw maritime boundaries in the SCS. The intention is to identify the features known as the Spratly Islands¹² and determine whether or not they can independently generate any maritime zones, hence, what significance those islands really have in the dispute. Article 121 of the Los Convention, the regime of islands, stipulates the basic rules regarding islands in international maritime law. According to article 121.2, all islands qualifying the legal definition of an island found in article 121.1 is entitled to maritime zones of national jurisdiction. However, the entitlement to the extensive maritime zones, i.e., the 200-nautical-mile Exclusive Economic Zone (EEZ) and the Continental Shelf does not follow

¹⁰ UN Doc. A/CONF.62/122, (1982), United Nations, Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index.

¹¹ China deposited ratification on 7 June, 1996, Brunei on 5 Nov., 1996, Malaysia on 14 Oct., 1996, The Philippines on 8 May, 1984, and Vietnam on 25 July 1994, <http://www.un.org/Depts/los/los94st.htm> ; Taiwan is not recognised as a state in the UN system and thus cannot become a party to the Convention.

automatically from island status, as defined in article 121.1. An exception is stated in article 121.3.

Considerable doubt is however, connected to the understanding of those rules, especially Article 121.3. The rules regarding the definition of an island and islands' entitlement of maritime zones is a highly disputed area of international law, and no tribunal has ever decided in general upon these specific issues of maritime law.¹³ In order to decide whether or not some specific features should be entitled to maritime zones it is thus necessary first to conduct an analysis of the rules providing the definition of an island and islands entitlement to maritime zones. Only when a reasonable interpretation of those rules has been derived is it possible to determine which maritime zones the specific features may generate.

Thus, the first step and primary part of this study will be to analyse the rules of the LOS convention in order to find the proper content of the rules that govern the regime of island in international law. The obvious starting point in this regard will be the Vienna Convention on the Law of Treaties.¹⁴ In its Article 31 (1), the general rule of interpretation, it states that "a treaty should be interpreted *in good faith*, in accordance with the *ordinary meaning* to be given to the

¹² There exists various descriptions on what and where are the Spratlys. They may be identified as being composed of the islands located between latitude 4° to 11°30' N and longitude 109°30' E, stretching approximately 1000 kilometres from north to south, which would leave them 650 kilometres from the Vietnamese coast, 1000 kilometres from China, 100 kilometres from the Philippine Palawan island, 250 kilometres from the Sabah coast and 160 kilometres from Malaysia's Sarawak coast. See Marwyn Samuels, *Contest for the South China Sea*, New York: Methuen, 1982.

¹³ Taking into consideration the eminent role of the International Court of Justice, the newly established International Tribunal of the Law of the Sea and arbitrators in the definition of the law applicable to the delimitation of maritime boundaries, a similar contribution to the clarification of article 121 of the LOS Convention might be considered a possibility. However, there are a number of circumstances, which may cause tribunals and arbitrators to not always address the issue of article 121 even if it is raised by one of the parties to the proceedings. The cases concerning maritime delimitation which have been decided until now, have not assessed article 121 of the LOS Convention in any detail. Moreover, it seems from the existing case law that a tribunal or an arbitrator will refrain from discussing the legal status of the islands involved if they have the possibility to do so. In the Arbitration on the delimitation of the continental shelf (France v. UK) (1978) Misc. 15, Cmnd. 7438; (1979) 18 I.L.M. at 397. (Hereinafter cited as Franco-British Arbitration), France and The United Kingdom disagreed whether Eddystone Rock was an island or a low-tide elevation. In deciding on this issue the Court of Arbitration did not express itself on this particular point, but limited itself to noting that France had accepted Eddystone Rock as a relevant basepoint during earlier negotiations. Further in the Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen, (Denmark v. Norway) I.C.J. Reports 1993, p. 38, (Hereinafter cited as Jan Mayen Case), the I.C.J. ignored the issue whether or not Jan Mayen could qualify as an island in the legal definition by stating that the Danish did not specifically contend this otherwise presumably relevant issue.

¹⁴ Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, U.N. Doc. A/Conf.39/27, reprinted in 63 *American Journal of International Law*, 875 (1969).

terms of the treaty *in their context* and in the light of its *object and purpose*” (*Italics added*). Supplementary means of interpretation are found in Article 32, which refers to the preparatory works of the treaty and the circumstances of its conclusion, and Article 33, which refers to treaties authenticated in more than one language. I will not further elaborate on the method of treaty interpretation except to note that the treaty text itself enjoys special authority among the legal sources of international law.¹⁵ This is based on the fact that all states are sovereign and as such are only obligated by the treaties they themselves are parties to. This entails that when interpreting a treaty one needs to be cautious with interpretations that do not strictly follow the text itself. Thus, the main goal when interpreting a treaty is to try to find the meaning embodied in it by the parties.

The ambiguity of the provisions of the LOS Convention might be resolved by resort to the dispute settlement system of the LOS Convention,¹⁶ or by a consensus of State practice derived from application of the rule. Thus, an analysis of case law and state practice must also be reviewed in order to find some interpretations of the provisions and determine whether or not the convention’s provisions represent general international law or if any superseding rules have been developed. In this regard this thesis will also briefly take into consideration the principle of proportionality in maritime boundary delimitation.¹⁷ This principle will not be discussed in any detail, but it cannot be ignored when one is to determine islands’ significance in a maritime dispute.

The second step of this thesis will be to apply those rules to the features of the South China Sea known as the Spratly Islands. In all cases of maritime delimitation it is necessary to establish in the first place which claims to maritime zones that have a legal basis and can be upheld. A survey of the status of the Spratlys will identify the possible claims to maritime zones that can be made in the dispute. Resolving the question whether or not the Spratly features have the capacity to

¹⁵ Reference is made to Article 38 of the Statute of the International Court of Justice.

¹⁶ LOS Convention, Part XV, Articles 279-99.

¹⁷ As opposed to the equidistance principle which in general states that the delimitation line between two states should be the median line between the coasts, the proportionality principle applies in maritime delimitation involving islands and states that where an island materially affects an equidistant boundary, the equity of that situation should be judged in terms of the proportionality between the extent of the influence of the island and its significance. Thus the influence of the Spratly Islands to the SCS dispute is not only combined to their capacity to generate maritime zones but also to their overall significance as islands.

generate maritime zones of their own might therefore be a valuable contribution to the process of finding a solution to the SCS dispute. Moreover, the littoral states might when the status of the Spratlys are determined have an incitement to redefine their claims and promulgate maritime legislation in accordance with the LOS Convention.¹⁸

The salience of the Spratly islands in the dispute over maritime territory in the South China Sea will to a great extent hinge on their capacity to generate an EEZ and a Continental Shelf. If they cannot generate such zones, then most of the South China Sea will be delineated in accordance with distance to the mainland coasts, and their offshore islands and an area of High Seas will remain in the middle of the sea. If, on the one hand any of the Spratlys have a right to an EEZ and a continental shelf, then the high seas area will disappear or at least be strongly reduced. In addition the islands will probably be given partial effect in the delimitation of maritime zones between them and the coasts of Vietnam, East Malaysia, Brunei and the Philippines.¹⁹ This means that the delimitation will depend on resolution of the sovereignty dispute. If, on the other hand the Spratly islands have a right only to 12-nautical mile territorial waters and a contiguous zone, then there will remain a High Seas area in the Spratlys. Moreover, the Spratlys will then most likely not have any effect on the delimitation of maritime zones beyond 12 nautical miles from their shores. In this case it may be possible to undertake the overall delimitation without necessarily resolving the sovereignty issue first. For these reasons the interpretation of article 121, and especially article 121.3 is of fundamental importance to the overall conflict in the South China Sea.

It must however, be remembered that the concepts applicable in the SCS dispute in regard of the maritime delimitation are basic rules of the law of the sea. It is settled law beyond shadow of a doubt that coastal states generate zones of seabed jurisdiction. The doctrine of the continental shelf, which stretches to at least 200 nautical miles, was examined by the I.C.J. in the 1969 North Sea Continental Shelf Cases. The Court came to the conclusion that the doctrine had been part of international customary law since 1958.²⁰ As for the doctrine of the exclusive economic zone it is

¹⁸ A problem in common for many of the maritime disputes in the Asian region is that the disputes tend to escalate because international obligations are being interpreted “as one chooses”.

¹⁹ Reference is made to chapter 4.4. of this thesis.

²⁰ North Sea Continental Shelf Cases, I.C.J. Reports, 1969, p. 3, Para. 22; 41 ILR, at 29, 51.

more difficult to establish a precise time for the rule's emergence to a customary norm²¹, but it is believed that it must have occurred by 1975 at the latest.²²

This thesis will in the following of this chapter, give an introduction of all claimant States and their claims in the SCS. This introduction is vital and necessary in order to understand the complexity of the conflict but also to understand the importance of islands and their influence in the conflict. Chapter two will give an overview of the regime of islands in international law but most effort will be put into chapters three and four which will conduct an interpretation of the rules regarding the definition of an island and islands' entitlement to maritime zones. In chapter five I will apply the rules derived from chapters three and four to a selection of the Spratly Islands in order to find out whether or not they may generate maritime zones, and if so which those zones are. Because of the limited data on the Spratly features available and the limited scope of this thesis it is not possible to conduct a thorough analysis of all the Spratly features. This thesis will therefore concentrate on the capacity of the Spratly features to generate extensive maritime zones, i.e. exclusive economic zone and continental shelf and thus only treat the features that are documented thoroughly to seem relevant in this regard.

1.3. Claims and parties to the conflict

The claimant States in the SCS dispute all have different bases for their claims to land features and maritime zones in the contested area. The claims to sovereignty over the various features in the SCS and to the maritime areas therein are mostly based on acts of discovery, historic use and occupation. However, the emergence of the United Nations Convention on the Law of the Sea²³ in the 1970s also have given incitement to put forward claims to huge maritime zones.

²¹ Customary International Law are rules generally accepted among States through long and consistent practice, which also includes an *opinio juris*, meaning a recognition by States of a certain practice as Obligatory. This set of rules is legally binding on all States.

²² Ian Townsend Gault, "Legal And Political Perspectives On Sovereignty Over The Spratly Islands." Paper prepared for the Workshop on the South China Sea Conflict Organised by the Centre for Development and Environment, University of Oslo, Oslo, April 24-26, 1999, at 8.

²³ United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, entered into force 16 November 1994, UN Doc. A/CONF.62/122 (1982), reprinted in United Nations, *The Law of the Sea, Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index* (UN Sales No. E.83.V.5, 1983), (Hereinafter cited as LOS Convention).

1.3.1. China

China's claim to sovereignty over the islands in the SCS rest on historical grounds of discovery and occupation, and she has put forward much documentation supporting the Chinese claim. Some records say that Chinese marines discovered the Spratly Islands more than 2100 years ago in the time of the Han Dynasty.²⁴ The Spratlys are also mentioned in Chinese records from the Sung Dynasty (12th century),²⁵ and China claims that she began to exercise jurisdiction over the Spratlys as early as during the Ming Dynasty (14-17th century).²⁶ Chinese presence in the Spratly area is even more documented from the 19th century onward. Fishermen from Hainan and other parts of southern China often visited these islands, and findings of houses and tombstones on some Spratly islands indicate that some small scale settlement actually have been present in the past.²⁷

However, notable problems of authenticity and accuracy exist and moreover the Chinese occupation and use of the islands has been interrupted on several occasions. In the late 18th century British troops ran over and destroyed several pirate camps located on some of the islands.²⁸ The British in 1877 laid down claims to two of the features in the area, Spratly Island and Amboyna cay.²⁹ Then in 1933, France made a formal claim to all of the Spratly features within an area delineated by specific co-ordinates.³⁰ They also established *de facto* physical control of seven of the larger features.³¹ Japan was next to establish a presence in the Spratly area basing its claims with sovereignty to Taiwan. By the late 1930s, Japan had a submarine base on both Itu Aba and Namyit Island in the Tizard Bank area so the French and Japanese occupied land side by side.³² As a result of its defeat in the Pacific War, however Japan renounced all rights to the Spratlys in the Treaty of Peace signed in 1951.³³ This treaty did not however, make any resolution as to who owned the Spratlys. In recent years, China along with other littoral states

²⁴ Ji Guoxing, "The Spratly Disputes and Prospects for Settlement", *Institute of Strategic and International Studies (ISIS) Paper*, (Malaysia, 1994), at 2, (Hereinafter cited as Ji Guoxing, 1994).

²⁵ Marwyn S. Samuels, *Contest for the South China Sea* (New York, Methuen 1982), at 15-16.

²⁶ Ji Guoxing, 1994, at 3.

²⁷ Haller-Trost, R., *International Law and the History of the Claims to the Spratly Islands* 10 (South China Sea Conference, American Enterprise Institute, Sep 7-9, 1994), at 11, (Hereinafter cited as Haller-Trost, 1994).

²⁸ Wolfgang Schippke, "The History of the Spratly Islands in the South China Sea", DC3MF, downloaded from, http://www.425.dxn.org/dc3mf/1s0_h.html, (Hereinafter cited as Schippke).

²⁹ Geoffrey Marston, "Abandonment of Territorial claims: The cases of Bouvet and Spratly Islands", *British Yearbook of International Law* (1986), at 344.

³⁰ *Ibid.*

³¹ Haller-Trost, 1994, at 13.

³² Haller-Trost, 1994, at 15; Schippke, op cit.

has backed her claims to the islands with a military presence. When the first feature was occupied in 1988 this led to a clash with Vietnamese forces resulting in the sinking of three Vietnamese vessels killing 72 people.

The Chinese are faced with one crucial problem when trying to establish proof of historical title to validate acquisition of territory in international law. Contemporary international law has construed a rule of discovery accompanied by continuous and effective acts of occupation.³⁴ The Chinese record does not provide compelling evidence of such effective occupation in the case of China's claim to the Spratlys.³⁵

China has also asserted another type of claim, the nine interrupted lines, which seemingly puts the entire SCS under Chinese exclusive jurisdiction.³⁶ Chiang Kai-Shek's government³⁷ published this claim in 1947, and the PRC later took it up. The nine dots can now be seen on all maps of China. Chinese statements and actions indicate that China actually claims all the waters and resources within the nine lines that swing deeply into the SCS running along the coasts of the other littoral states. One way of interpreting this claim is to consider it a claim for "historic title", which in very particular circumstances is accepted in international law.³⁸ The International Court of Justice (Hereinafter I.C.J.) in the *Fisheries case* accepted a similar claim, where Norway was awarded the waters adjacent to its fringing island coast as historic waters.³⁹ A follow up of this regime was given by the I.C.J. in the *Gulf of Fonseca case*, where the Gulf of Fonseca was

³³ San Francisco Peace Treaty, Sept. 8, 1951, 158 B.F.S.P. 536.

³⁴ Malcolm N. Shaw, *International law*, (4th Ed.) Cambridge: University Press, 1997, at 338-50 (Hereinafter cited as Shaw); In the *Island of Palmas Case*, (U.S. v. Netherlands), 1928, 2 Reports on International Arbitral Awards 829, the Permanent Court of Arbitration stated that discovery of an island does not suffice to establish sovereignty, and that discovery must be followed by an effective and continuous display of authority over the island. Further, in the *Legal Status of Eastern Greenland Case*, (Denmark v. Norway), 1933 PCIJ (Series A/B), No. 53, the Permanent Court of International Justice held that two elements were essential in the standard of what constitutes "effective": The intention and will to act as sovereign, and some actual exercise or display of authority.

³⁵ Bennett, Michael, "The People's Republic of China and the use of International Law in the Spratly Island Dispute", (1992) 28 *Stanford Journal of International Law*, at 425-50.

³⁶ Valencia, Van Dyke and Ludwig, at 24.

³⁷ Chiang Kai-Shek was the leader of the Republic of China (ROC) which fled to Taiwan in 1949 after having lost a civil war against the communists in Mainland China. The communists since have represented Mainland China as the Peoples Republic of China (PRC), and Chiang Kai-Shek's government has represented Taiwan as the Republic of China (ROC). The two governments still claim to be the rightful government to all of China.

³⁸ LOS Convention, Article 15; R. R. Churchill and A. V. Lowe, *The Law of the Sea*, (2nd ed.), Manchester University Press, 1988, at 36-7.

³⁹ *Fisheries Case* (UK v. Norway), I.C.J. Reports 1951, p. 116, Para. 130.

accepted as an historic bay and the waters inside as historic waters.⁴⁰ Another way of interpreting the nine dots is to see it as a claim only to all islands within the lines. Maritime zones would then have to be delineated with due consideration to those islands.

The validity of the Chinese nine-dot claim is strongly contested. The international Law Commission⁴¹ prepared a study in 1962, which concluded that three factors should be considered in determining whether a historical claim is valid.⁴² Those three factors were the exercise of authority over the area, the continuity over time of this exercise of authority and the attitude of foreign states to the claim. The present evidence does not seem sufficient to support a Chinese historic claim. Claims to historic waters must have been officially announced to the entire world, and a considerable effort must have been made to enforce such claims.⁴³ The fact that China has never clarified the nature or the legal basis of its claim makes it unlikely that it can be accepted as having any legal foundation.

In 1992 China issued a law on the territorial sea and contiguous zone.⁴⁴ Article two of this legislation identifies both the Paracels and the Spratlys as Chinese territory,⁴⁵ but interestingly enough only states that the maritime zones of the claimed Spratly Islands will be published at another time.

1.3.2. Taiwan

The involvement of the Republic of China (ROC) to the SCS conflict increases the complexity of the issue as it still officially claims to be the legitimate government of all of China. The legal bases for Taiwan's claims in the SCS are China's longstanding historic ties to the islands and

⁴⁰ Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras; Nicaragua intervening), I.C.J. Reports 1992, p. 351, Para. 588, (Hereinafter cited as Gulf of Fonseca Case).

⁴¹ The International Law Commission (ILC) was established by the UN General Assembly in 1947 with the declared objective of promoting the progressive development of international law and its codification. The commission is composed of eminently qualified publicists and is recognised as a major contributor to the development of international law. See Shaw, at 93 ff.

⁴² Juridical Regime of Historic Waters, Including Historic Bays, 14 U.N. GAOR, U.N. Doc. A/CN. 4/143 (1962).

⁴³ R. R. Churchill and A. V. Lowe, *The Law of the Sea*, (2nd ed.), Manchester: University Press, 1988, at 36-7.

⁴⁴ Joyner, 1998, at 200.

⁴⁵ Law of the People's Republic of China on the Territorial Sea and Contiguous Zone, reprinted in *UN Law of the Sea Bulletin*, 21 (1992), at 24-7, (The Chinese law became effective on 25 February 1992).

they thus mirror those of China.⁴⁶ It could however very well be argued that it is the other way around since the ROC came before the PRC, hence this is the scope of the problem since both governments claim to be the government of China. There are two possible ways of viewing the claims on behalf of the ROC. One is that the actions of the ROC must be considered done on behalf of China, the other that the claims represent a separate unit that Taiwan can pursue when and if they be granted independence.

The ROC was the first government to established a physical presence on the Spratlys after the Japanese withdrawal after World War II, and it has occupied the largest island in the Spratly group, Itu Aba, constantly since 1956.⁴⁷ The unchallenged physical Taiwanese presence on this island for more than four decades might individually support a legal claim to sovereignty over the feature, however the Taiwanese claim has been rejected consistently by other states. The ROC has further relied on the post-war treaties (San Francisco Treaty of 1951 and ROC-Japan Treaty of 1952) to support claims that Japan relinquished its claims to the Spratlys in favour of China at the end of the war.⁴⁸ This assumption is however weak due to that international tribunals have judged Japans occupation illegal under international law and that Japan thus cannot have transferred any legal title upon any other country. It is a general principle of international law that a state cannot transfer a better right than itself possesses.⁴⁹

As late as 1993 Taiwan issued “Policy Guidelines in the South China Sea”, which asserted Chinese sovereignty over the Spratlys, the Paracels, Macclesfield Bank and the Pratas.⁵⁰ Some recent reports have suggested that China and Taiwan have made an effort to co-operate in international discussions of the Spratly issue.⁵¹ If this is true, it will be a step in the rights direction towards a solution to the SCS dispute. No international forum can accept both governments of China, and the ROC and the PRC must therefore settle the dispute in regard of Taiwan’s status or at least put together some kind of coalition to represent all of China before negotiations can be advanced multilaterally in the SCS.

⁴⁶ Joyner, 1998, at 200.

⁴⁷ Joyner, 1998, at 200.

⁴⁸ Greg Austin, *China’s Ocean Frontier: International law, military force and national development*, Canberra: Australian National University, 1998, at 143, (Hereinafter cited as Austin).

⁴⁹ R. Y. Jennings, *The Acquisition of Territory in International Law*, Manchester: University Press, 1963, at 96.

⁵⁰ Policy Guidelines in the South China Sea, reprinted in, 19 *Marine Policy* 408 (1995).

1.3.3. Vietnam

Vietnam's claims to sovereignty over the SCS islands stem from historic activities during the Nguyen dynasty (17-19th century),⁵² although court documents from the reign of King Le Thanh Tong (15th century) have also been held to prove that at least the Spratlys were considered Vietnamese territory already then.⁵³ The government of Vietnam issued in 1979 and 1982 two white papers (Vietnam's sovereignty over the Hoang Sa [Paracel] and Trung Sa [Spratly] Archipelagos), where all its historical evidence is compiled.⁵⁴ Vietnam's evidence is however weak due to its failure to specifically identify and distinguish between the Spratlys and the Paracels, which are treated generically. As with the Chinese claim, also the Vietnamese claim meets considerable doubt in regard of the authenticity and accuracy of the historical records.⁵⁵

Vietnam's sovereignty claim to the Spratlys is also based on a cession of a French claim to the islands made in 1933. However, the French did never achieve acceptance for their claim and it is thus not likely that there exists any lawful title of which Vietnam can claim by right of cession from France.⁵⁶ The French did get some kind of recognition of their claim from the British. However, even if the French had established legal title to the features they claimed there is no evidence to support that those rights were passed on to Vietnam when the latter was granted independence in 1954.⁵⁷ Vietnam has not laid down claims to maritime zones in the SCS but it has drawn straight baselines along its coast and these baselines are subject to objections by many states. Maybe most important, it is a known fact that the prolongation of the Vietnamese continental shelf covers some of the southern Spratly area. This is an issue that will have to be taken into consideration when delimiting the SCS irrespective of who obtains sovereignty to the features there situated.

⁵¹ Valencia, Van Dyke and Ludwig, at 30.

⁵² Joyner, 1998, at 201.

⁵³ Valencia, Van Dyke and Ludwig, at 30.

⁵⁴ Joyner, 1998, at 201.

⁵⁵ Valero, M.C., "Spratly Archipelago Dispute: Is the Question of Sovereignty Still Relevant?", (1994) 18 *Marine Policy* 314, at 320-2.

⁵⁶ Joyner, 1998, at 201.

⁵⁷ Austin, at 140.

1.3.4. The Philippines

The Philippine claim is more recent than those of China and Vietnam and is principally justified on “discovery” of certain islands by the Philippine businessman, Thomas Cloma in 1947.⁵⁸ Cloma proclaimed the creation of a new island State, which he called “Kalayaan” (Freedom-land) in 1957, however no government ever recognised this new State. Moreover it is vital for the Philippines that the islands became *res nullius*⁵⁹ after the Japanese had abandoned them after World War II. This is the only way that Cloma could have acquired any legal right to the features.⁶⁰ The fact that no new owner of the islands was identified in the 1951 peace treaty is not, however, sufficient for the islands to become *res nullius*. The Japanese abandonment is non-disputable, but it cannot be presumed on behalf of the other claimants because abandonment cannot be presumed by reason of non-use, but must be effected voluntarily.⁶¹

Cloma’s occupation lasted only a couple of months, and the claim was immediately challenged by China, Vietnam and France. Considering the former, and the fact that nothing indicates that Cloma was acting on authority from the government,⁶² which is a vital necessity in acquisition of territory, the claim hardly qualifies the modes of acquisition recognised under international law. Nevertheless, the Philippines have supported their claim by gradually occupying features with military garrisons and in 1978 issued a decree formalising their occupations and claims but also making a claim to a territorial jurisdiction over the sea, seabed and airspace within the boundaries of Kalayaan.⁶³

The Philippines also asserts that its continental shelf extension is a basis for its claim to the Spratlys. This claim however finds difficulty in meeting the requirements of natural prolongation as stipulated in the LOS Convention because the deep Palawan Trough separates the Spratlys from the Philippine archipelago.⁶⁴ Moreover, the continental shelf provisions of the LOS

⁵⁸ Samuels, at 81-6.

⁵⁹ *Res nullius* indicates a territory without an owner. See Shaw, at 335 ff.

⁶⁰ One additional method of establishing title to territory, which is not *terra nullius*, is prescription. Such a claim rests however, on the implied consent from the former sovereign and thus any protests from the dispossessed sovereign will completely block such a claim. See Shaw, at 343-4.

⁶¹ Jon M. Van Dyke and Robert A. Brooks, “Uninhabited Islands: Their Impact on the Ownership of the Oceans Resources”, *Ocean Development and International Law* 12 (1983), at 267-70.

⁶² Valencia, Van Dyke and Ludwig, at 35; Ji Guoxing, 1994, at 12.

⁶³ Austin, at 154.

⁶⁴ Valencia, Van Dyke and Ludwig, at 35.

Convention refers only to the seabed and subsoil and is not an instrument for claiming title to features that are permanently above sea level.⁶⁵

1.3.5. Malaysia

Malaysia claims 12 islands and features in the Spratly area and justifies its claim on continental shelf extension and recent discovery and occupation. Malaysia's continental shelf claim stems from its own continental shelf act, which it issued in 1966 and in 1969.⁶⁶ It was however, first with its new map on its territorial waters and continental shelf boundaries published in 1979 that it also claimed the islands situated on the shelf.⁶⁷ Malaysia's claim to the Spratly features based on its continental shelf seems to suffer from the same misconception as the Philippine claim, namely that a state possessing a continental shelf also possesses sovereign rights over land formations arising from that shelf. Contemporary international law does not honour such a claim.

Malaysia's claim based on discovery and occupation is largely based on its 1979 map of its territorial waters and continental shelf boundaries.⁶⁸ The presumption in this Malaysian claim may be that the islands were *res nullius* and that the actions by Malaysia constituted effective occupation for the purpose of acquiring sovereignty. The main weakness of Malaysia's claim may be that its occupation and exploitation is relatively recent and that its claim has been consistently rejected by the other littoral states. In 1980 Malaysia declared a 200 nautical mile EEZ but it did in this proclamation not define the outer limits of the continental shelf zone.⁶⁹

1.3.6. Brunei

Sources seem to be at variance in regard of Brunei's claims in the Spratlys. Some say that Brunei claims two features in the spratly group and that its claim apparently is based on the prolongation of its continental shelf,⁷⁰ while others say that Brunei does not claim any features but only a

⁶⁵ LOS Convention, Article 76 and 77; Joyner, 1998, at 203.

⁶⁶ Haller Trost, 1994, at 32, (Malaysia's Continental Shelf Act defines the continental shelf as the seabed and subsoil of submarine areas adjacent to the coast of Malaysia up to 200 metres deep or the limit of exploitability).

⁶⁷ Valencia, Van Dyke and Ludwig, at 36.

⁶⁸ Austin, at 155.

⁶⁹ Ibid.

⁷⁰ Valencia, Van Dyke and Ludwig, at 38.

continental shelf and an EEZ.⁷¹ This controversy can, however, to some degree be explained with the fact that one (Louisa reef) of the two features situated within the Brunei an claimed continental shelf does not show above sea level, and thus legally is considered part of the continental shelf.

The Brunei an continental shelf claim stretches beyond 200 nautical miles, however its claim to an extended continental shelf does not seem to be in consistence with the provisions of the LOS Convention due to that the Palawan Trough interrupts such a prolongation.⁷² In 1982 Brunei claimed a 200 nautical mile fishing zone and in 1984 it claimed a 200 nautical mile exclusive economic zone. This indicates recognition of the LOS Convention provisions and if Brunei also were to define its continental shelf claim according to the convention it would make a good example and could possibly even convince the other claimants to do the same.

1.4. What is at stake?

The regional States effort in regard of obtaining maritime jurisdiction in the SCS is not so much founded upon the desire to exploit newly discovered resources. On the contrary the waters of the SCS are and have been used by the littorals for centuries and thus represent a vital element of the region's basis of existence. Much is at stake for all parties involved and it is thus not likely that anyone will ease their attitude towards "bagging a peace of the lot".

1.4.1. Fisheries

The SCS encompasses a dense system of several hundred coral reefs in what is often claimed to be the most bio-diverse of the world's seas,⁷³ and the SCS represents the main source of the animal protein for all the littoral states.⁷⁴ More significantly the animal protein from fisheries is said to contribute approximately 65 % of the total animal protein consumed in states such as The

⁷¹ Ji Guoxing, 1994, at 9.

⁷² Valencia, Van Dyke and Ludwig, at 38.

⁷³ John W. McManus, "The Spratly Islands: A Marine Park?", *Ambio*, Vol. 23, No. 3, (1994), at 181, (Hereinafter cited as McManus, 1994).

⁷⁴ Ian Townsend Gault, "Legal And Political Perspectives On Sovereignty Over The Spratly Islands." Paper prepared for the Workshop on the South China Sea Conflict Organised by the Centre for Development and Environment, University of Oslo, Oslo, April 24-26, 1999, at 1.

Philippines and Malaysia,⁷⁵ moreover the need for animal protein in the region is steadily rising with population growth and urbanisation. The total catch of tuna and shrimp in and around the SCS is amongst the largest in the world,⁷⁶ and thus represents a vital resource for the region both for domestic consume and export. Conclusively if vast areas of the SCS should fall within one of the states' national jurisdiction giving that one state exclusive rights to the resources therein, it would have enormous consequences for the other claimant states.

1.4.2. Hydrocarbon resources

The SCS is believed to contain considerable amounts of petroleum and gas resources although some argue that the reports are greatly exaggerated.⁷⁷ The limitation on existing data on geology and geochemistry in the area makes it reasonable to assume that the figures often cited by Chinese sources are exaggerated or at least highly speculative. In addition much of the resources would only be representing a long-term potential since there currently does not exist methods of profitably exploiting resources due to the complex geological structures in the waters of the SCS. Moreover, drilling will have to be conducted if even resources can be proven to exist, and serious oil companies are unlikely to drill for oil until they know on whose continental shelf they are drilling. However, this does again not explain why non-regional scientific institutions would be very optimistic about the potentials.⁷⁸ In any event it is not hard to imagine that all the littoral states, (especially after the Asian economic crisis [1997-99]), will have a great interest in trying to put as much as possible of these potential resources within national jurisdiction.

1.4.3. Strategic sea lanes

Multiple strategically important commercial and military sea-lanes straddle through the SCS and they are not only of vital importance to the states in the region as linking north-east Asia's sea-borne trade with the rest of the world, but also relied upon by globally operating merchant ships and navies.⁷⁹ In 1994, more than 200 ships passed through the area daily⁸⁰ and the frequency is

⁷⁵ McManus, 1994, at 182.

⁷⁶ Stein Tønnesson, "Resolving the South China Sea Conflict", Draft Report to the Norwegian Ministry of Foreign Affairs, (15 Feb. 1998) at 15.

⁷⁷ Valencia, Van Dyke and Ludwig, at 9; Joyner, 1998, at 207.

⁷⁸ Valencia, Van Dyke and Ludwig, at 9.

⁷⁹ Joyner, 1998, at 194.

probably higher today. What they all have in common is that they all depend upon that freedom of navigation prevails in the area. Hence, when or if the SCS claimants manage to settle the maritime delimitation or establish co-operative regimes for resource management, they will also need to reassure the outside powers that the freedom of navigation will not be threatened. Moreover the SCS is known to be an area troubled by piracy, and as long as no state enjoys jurisdictions in those waters the fighting of pirates remains a difficult task.

1.4.4. The environment

Fisheries are virtually unregulated in the SCS, and the over-fishing of species constitutes a constant threat to the survival of the fish-stocks. Moreover some fishing communities reportedly use cyanide and dynamite to catch fish in the coral reefs, with the inevitable result that all forms of life are being exterminated on the reefs.⁸¹ The building of military structures is destructive because it destroys the reefs, and the presence of military on the islands is also of concern because they tend to engage in environmentally damaging activities such as shooting turtles and seabirds, raiding nests and also fishing with explosives. The SCS also faces enormous environmental hazards in consequence of being shipping route for oil and even nuclear waste, which could be released in the event of an accident or military clash in the reef studded waters. All these factors represent a major threat to the environment of the SCS and moreover once these environmental hazards are in play no one is to say when it might even be too late to rescue the complex ecosystem therein.

1.4.5. National security and prestige

The end of the cold war, which brought with it the collapse of the Soviet Union and the withdrawal of US forces in the region, led to at least a temporary strategic vacuum in the SCS.⁸² The race for acquisition of the SCS features and its adjacent waters is therefore by some seen as of great military strategic value. Further, lots of prestige is also necessarily at stake in the conflict since any withdrawal of current claims would be considered a defeat. However, as has been

⁸⁰ McManus, 1994, at 181.

⁸¹ Stein Tønnesson, "Resolving the South China Sea Conflict", Draft Report to the Norwegian Ministry of Foreign Affairs, (15 Feb. 1998) at 15.

⁸² Joyner 1998, at 194.

pointed out a possible solution is to freeze the sovereignty claims in order to get beyond what seems to be a stalemate, and most important such an approach makes it possible for the states to maintain their claims and not “lose face”.

2. REGIME OF ISLANDS

2.1. History

The regime of islands has for decades been an issue of great interest for all subjects concerned with the law of the sea. It is thereby no surprise that the issue also was given special attention during the negotiation of the LOS Convention. After about nine years of negotiations, the third United Nations Conference on the Law of the Sea resulted in one single provision concerning the issue, Article 121 the regime of islands.

Article 121

Regime of Islands

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

This provision provides rules for the identification of an island, and for the generation of maritime space of islands. The complexity and problems concerning “insular formations”⁸³ have however, not come to an end due to this provision. Still there are many unclear issues which the development of international law faces and eventually must settle. Moreover the provisions are made subject to several different interpretations by states, which makes the regime of islands an even more complex issue. Furthermore, in general, the nature of international legal processes does not support the possibility of swift changes. On the contrary, the development of rules in international law is a time-consuming process.

⁸³ Offshore features that qualify as islands under the legal definition are often referred to as having “insular status”.

For the purpose of entitlement to areas of maritime jurisdiction, the term “island” was first examined in the 1930 League of Nations Conference for the Codification of International Law.⁸⁴ Here an island was defined as “*an area of land, which is permanently above high water mark*”. In article 10 of the Convention on the Territorial Sea and the Contiguous Zone (Geneva 29 April 1958), the definition was modified to read, “*A naturally formed area of land, surrounded by water, which is above water at high tide*”. The significance of islands and thus the need for a more precise definition had by then become evident due to the amount of island states gaining independence from colonial powers. In addition, the international community had become more concerned with establishing fishing zones, and with the resources that could be found under the adjacent seabed.

Article 10.2 of the Convention on the Territorial Sea and the Contiguous Zone provided that the territorial sea of an island was to be measured in the same manner as other land territory. This also provided maritime spaces for the island features. Entitlement to a contiguous zone of maximum 12 nautical miles was given in article 24 of the same convention, and entitlement to a continental shelf followed in the Convention on the Continental Shelf, Articles 1 and 2. The United Nations Conference on the Law of the Sea in 1958 (UNCLOS I) which resulted in the four Geneva Conventions, did not agree on the breadth of the Territorial Sea. Neither did the second conference in 1960 (UNCLOS II). It was not until the third UNCLOS, which lasted from 1973 to 1982 that also the breadth of the territorial sea successfully was defined.

The problem of defining islands for the purpose of claiming maritime zones was also an issue given much attention during the third UNCLOS. On the one hand proposals for giving all islands the same status as continental territory were submitted.⁸⁵ On the other hand, it was proposed that the maritime zones of islands be limited, depending on factors such as size, habitation and population.⁸⁶ Further, since the drafting of the 1958 Conventions, the law of the sea had been introduced to an additional maritime zone, namely the exclusive economic zone that substantially increased the limits of national jurisdiction seawards. The regime of EEZ’s was at the time of the

⁸⁴ League of Nations Conference for the Codification of International Law, League of Nations Document C 230. M. 117.1930.V (1930), at 219.

⁸⁵ Clive R. Symmons, *The Maritime Zones of Islands in International Law*, The Hague: Martinus Nijhoff, 1979, at 12-15, (Hereinafter cited as Symmons, 1979).

⁸⁶ Symmons, 1979, at 12-15

drafting of the LOS Convention already considered customary international law, and was thus a vital part of the new Convention. However the implementation of an exclusive economic zone for all features satisfying the traditional definition of an island would mean unjustifiable encroachments on the high seas. The definition of an island from the 1958 Convention on the Territorial Sea and the Contiguous Zone was adopted literally but to remedy the implementation of the EEZ, the drafters of the 1982 Convention introduced a limitation of certain islands to the entitlement of a continental shelf and an exclusive economic zone. Article 121.3 reads “rocks which cannot sustain human habitation or economic life of its own shall have no exclusive economic zone or continental shelf”. This can make a big difference. A tiny island in the middle of the ocean with no other land within 400 nautical miles can generate 125,600 square nautical miles of EEZ, roughly 1.75 times the land area of the UK. A rock in a similar situation gets only 450 square nautical miles of maritime space. This helps to explain why there are so many disputes concerning sovereignty over tiny, uninhabited islands which in them selves are of almost no value.

Only the features, which truly qualify as islands according to article 121.1 may generate a maritime zone of its own and only the features coming clear of the exceptions in the “rocks paragraph” in 121.3, may generate the extensive maritime zones. It is only if the Spratly Islands are capable of generating EEZ's and continental shelves that the state with sovereignty to those islands can gain ownership to the resources in the seas and under the seabed of the large Spratly area.

2.2. The influence of baselines

Although the baseline issue is separate from issues related to definitional aspects of an island and generation of maritime zones, the issue cannot be ignored when dealing with the maritime space of offshore features. The normal baseline according to Article 5 of the LOS Convention is “*the low-water line along the coast as marked on large-scale charts officially recognised by the coastal State*”. It is from the baseline the maritime zones are measured and thus the baseline must be settled in order to determine any maritime zone. Thus, and because the normal baseline is subject to modifications due to certain geographical conditions⁸⁷, the determination and the

⁸⁷ Art. 7 and 47 of the LOS Convention (Straight and Archipelagic baselines).

drawing of baselines will affect the maritime zones. The drawings of baselines are also contested in the SCS dispute.

The effect of the baselines is however not limited to features that qualify as islands under the legal definition. If so-called non-insular features are situated inside the territorial sea of an island, those features can be used as basepoints, pushing the baseline further seaward thereby granting a greater area of ocean space to national jurisdiction.⁸⁸ Many of the features of the Spratly group are non-insular features situated in the territorial sea of islands within the group. The breadth of the maritime zones of the features, which qualify as islands in the Spratly group, may therefore be influenced by the presence of non-insular features.

2.2.1. Reefs and Atolls

In the LOS Convention special treatment is given to coral reefs and atolls. When dealing with the issue the drafters of the 1982 Convention gave them legal status similar to the low-tide elevations. Article 6 of the Convention, states as follows: *“In the case of islands situated on atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea is the seaward low-water line of the reef, as shown by the appropriate symbol on charts officially recognised by the coastal state”*.⁸⁹ This provision moves the baseline for measuring the coastal zones seaward from the low-water line of the core island (the traditional rule) to the reef line further seaward. Although the reefs are not in any circumstances given true insular status, they nevertheless can influence the breadth of the maritime zones and thus may also have an effect on maritime boundary delimitation.

Fringing reefs are not legally defined in the LOS Convention, nor indeed are atolls as such. Such reefs have a distinct geographical connotation, and it has been argued that they not necessarily be

⁸⁸ Art. 6 and 13 (1) of the LOS Convention (Low tide elevations, reefs and atolls). Reference is made to paragraph 3.9 of this thesis.

⁸⁹ In a study on baselines prepared by the UN Office for Ocean Affairs and the Law of the Sea some definitional aspects were defined. “Reef” is a mass of rock or coral which either reaches close to the sea surface or are exposed at low tide. “Fringing reef” is a reef attached directly to the shore or continental land mass, or located in their immediate vicinity. “Atoll” is ring shaped reef with or without an island situated on it surrounded by the open sea that encloses or nearly encloses a lagoon. UN Office for Ocean Affairs and the Law of the Sea, *Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea*, Appendix I (Glossary and Technical Terms), at 47. (1989)

required to have an above water elevation.⁹⁰ The LOSC regime appears to give such reefs specific recognition in that they may differ from low-tide elevations in being “usually covered by water” and so may not even be (always) visible at low-tide. However, the LOSC wording mentioning that the “low-water line” is to be the baseline of the reef, implies that submerged reefs are excluded from such baseline considerations, as they must be drying in the sense that they must be above at some point in order to possess a low-water line. As against this it has been argued for practical reasons that in the case of reefs as marked on normal charts, the seaward edge of the reef should be regarded as the equivalent of the seaward low-water line of the reef. The negotiating history can here be of some support. The word used until 1976 was “seaward edge” of the reef,⁹¹ and this change from “seaward edge” to “low water line” supports the interpretation that submerged reefs are excluded.

The situation may be even more complicated if one is to give special meaning to the mention of “fringing reefs” as well. There are examples of national legislation spelling out the meaning of the phrase, saying that “fringing reefs means reefs attached to, or located in the immediate vicinity of the coast, or any coastal lagoon”.⁹² Another mention of reefs is made in article 47 (1) of the LOS Convention, which states that “drying reefs of an Archipelago” may be used as connecting basepoints. The definitional difficulties do not, however, seem to cause practical problems in this regard, because the wording “drying reefs” presumably must be interpreted to exclude the submerged reefs and reefs awash.

The South China Sea is, but many are not adequately surveyed, documented or published on the necessary official charts to qualify for the advantage of extending jurisdiction seawards. Furthermore, while the extension of the baseline to the edge of the reef may have important local impacts, it is unlikely to affect significantly the overall maritime boundary delimitation.

⁹⁰ L. L. Herman, “The Modern Concept of the Off-Lying Archipelago in International Law”, *XXIII Canadian Yearbook of International Law*, (1985), at 191.

⁹¹ United Nations, *United Nations Convention on the Law of the Sea 1982, A Commentary II*, Centre for Ocean Law and Policy, (London: Martinus Nijhoff, 1993), at 93.

⁹² Belize Maritime Legislation, *UN Law of the Sea Bulletin* No. 21, at 4.

2.3. Which maritime zones can be generated by islands

In general, according to article 121 paragraph 2 of the LOS Convention, islands can generate ocean space just as continental landmasses do.⁹³ Any island coming within the “island definition” in Article 121.1⁹⁴ is entitled to its own territorial sea and contiguous zone. However, the entitlement to the more extensive zones, the exclusive economic zone and the Continental shelf, are limited due to the exceptions stated in Article 121.3.⁹⁵

2.3.1. Territorial sea and Contiguous zone

According to Article 3 of the LOS Convention,⁹⁶ the territorial sea of an island stretches to a maximum of 12 nautical miles measured from the baseline of that island. The territorial sea is legally an extension of the State’s territorial sovereignty. According to Article 2, the State is given exclusive sovereignty to the airspace over this area as well as its waters, seabed and subsoil.⁹⁷ One modification to this exclusive sovereignty is stated in Article 17 which states that ships of all States has a right to innocent passage through the territorial sea.

The Contiguous zone, however, according to Article 33 of the LOS Convention, stretches to a maximum of 24 nautical miles measured from the baseline, but the jurisdiction in this zone is limited to exercising rights concerning customs, fiscal issues, immigration or sanitary laws and regulations.⁹⁸ Thus this zone is irrelevant in terms of access to natural resources found in the waters, the seabed or the subsoil.

⁹³ “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”.

⁹⁴ “An island is a naturally formed area of land, surrounded by water, which is above water at high tide”.

⁹⁵ “Rocks, which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf”.

⁹⁶ “Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from the baselines determined in accordance to this Convention”.

⁹⁷ 1. The sovereignty of a Coastal State extends beyond its land territory and internal waters [...] to an adjacent belt of sea, described as the territorial sea.

2. This sovereignty extends to the airspace over the territorial sea as well as to its bed and subsoil.

⁹⁸ 1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea. (b) Punish infringement of the above laws and regulations committed within its territory or territorial sea.

2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.

2.3.2. Exclusive economic zone

According to Article 57 of the LOS Convention, the Exclusive Economic Zone of an island stretches to a maximum of 200 nautical miles from the baseline of that island. Most importantly, the state has sovereign rights for the purpose of exploiting and exploring the natural resources, whether living or non-living, of the sea, seabed and subsoil in that area.⁹⁹ Rights in regard of construction and use of artificial islands, scientific research and preservation of the environment as well as obligations in regard to conservation and utilisation also apply. In this zone however, other States have the freedom of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to those freedoms.¹⁰⁰

2.3.3. Continental shelf

According to Article 76 of the LOS Convention, the Continental Shelf of an island also stretches to a distance of 200 nautical miles from the baseline, but has the potential to take up even greater areas seaward if it is naturally prolonged beyond 200 nautical miles.¹⁰¹ The natural prolongation according to Article 76, is the outer end of the continental margin, which comprises the submerged prolongation of the landmass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. The natural prolongation is further limited to 350 nautical miles from the baselines from which the breadth of the territorial sea is measured, or 100 nautical miles from the 2500 metre isobath, which is a line connecting the depth of 2500 meters. The right to the shelf and its resources does not include the superjacent waters or the air space above those waters.¹⁰²

2.3.4. Internal waters

Islands do also hold the possibility of generating internal waters. According to Article 8 of the LOS Convention, “*the waters on the landward side of the baseline of the territorial sea form part of the Internal Waters of the State.*” The State, in these waters, has sovereignty equal to its land

⁹⁹ LOS Convention, Art. 56.

¹⁰⁰ LOS Convention, Art. 58

¹⁰¹ The concept of “natural prolongation” was recognised by the I.C.J. in the North Sea Continental Shelf Cases: Delimitation of the continental shelf between Denmark, the Fed. Rep. of West Germany and The Netherlands. (1969 I.C.J. 3, 22, Para. 18.)

¹⁰² LOS Convention, Article 78.

territory and the territorial sea.¹⁰³ The internal waters however differ from the territorial sea primarily in that there does not exist any right of innocent passage in these waters. One modification to this rule is stated in Article 8 (2), which allows innocent passage through internal waters where those waters are effectuated by straight baselines and was not previously considered internal waters.

¹⁰³ LOS Convention Art 2 (1).

3. THE DEFINITION OF AN ISLAND

3.1. General

Article 121.1 of the LOS Convention, which reads “ *an island is a naturally formed area of land, surrounded by water, which is above water at high tide*” provides us with the legal definition of an island. Yet there is still some doubt related to what is covered by the definition. What lies within the meaning of the conventional text as to, “an area of land, a natural formation, surrounded by water and above water at high tide”, can and has been interpreted differently by various nations. Further there are other circumstances which are not explicitly spelt out in the definition but nonetheless could be of importance. The questions of size, geological structure and geographical position have earlier been seen as important for the definition of an island, and in addition special attention has also been given to islands prior to colonial domination and control.

The term “island” from a geographical viewpoint may encompass a variety of insular characteristics from sandbanks to large landmasses, depending on the functional purpose of the application. The approach here will concentrate on the definition of islands for the purpose of claims to surrounding waters, although the definition in regard to other purposes might also be of interest.

3.2. Status in International law

Many countries have said that they view the Convention as expressing in general the customary international law that applies to ocean issues.¹⁰⁴ The International Court of Justice has ruled that certain parts of the Convention now are customary international law.¹⁰⁵ It does not seem to be doubted that this applies to article 121.1 as well as the regimes of the territorial sea, the exclusive economic zone and the continental shelf. However, it should be noted that parts of the Convention may not be universally accepted, and that regional practice can sometimes alter norms that are accepted elsewhere.

¹⁰⁴ As of 1998 there were 140 parties to the LOS Convention.

¹⁰⁵ Case Concerning the Continental shelf (Libya/Malta), I.C.J. Reports 1985, p. 13, Para. 34, (Hereinafter cited as Libya Malta Case); Land, Island and Maritime Frontier Dispute Case I.C.J. Reports 1992, p. 351, Para. 383 (Hereinafter cited as Gulf of Fonseca Case).

How the terms of the provisions of the LOS Convention ultimately will be interpreted will eventually depend on the actual maritime claims made by nations on behalf of the offshore features they have sovereignty to, and the extent to which those claims are accepted by other States.

3.3. An area of land

The requirement that an island in the true juridical sense must constitute an area of land has long been stated. Underlying this requirement are two factors. Firstly, that a formation must have at least an attachment to the seabed, and secondly that the formation should partake of the nature of “terra firma”¹⁰⁶ and have an equivalent degree of permanence.¹⁰⁷ The flora of offshore features has created complicated questions of definition to these requirements. For instance an anchored ship can without doubt be considered to have some kind of attachment to the seabed, however the ship is unquestionably a manmade feature and surely cannot be considered terra firma so as to constitute an island.

International law does not require that an insular feature must have absolute permanence. This seems reasonable due to the fact that even the “natural” islands are permanent only in a relative sense and as such may disappear.¹⁰⁸ The meaning of land, even where undoubtedly naturally formed, can cause legal definitional problems. In a case before the Supreme Court of the United States one of the difficulties concerning a formation known as “Dinkum Sands” was whether it could be considered an island when its composition appeared to consist of alternating layers of frozen sea-ice and gravel deposits from long shore drift.¹⁰⁹ The Court concluded that Dinkum Sands did not meet the standard for an island because it did not meet the above high tide requirement, and it thus did not rule on the issue whether or not Dinkum Sands qualified as an area of land. The Court added however, that there could not be found any precedent for deeming Dinkum Sands as island during the period when it *is* above mean high water, which might indicate that it did not consider Dinkum Sands as fulfilling the “area of land” criteria.

¹⁰⁶ Hodgson, “Islands, normal and special circumstances” Gamble and Pontecorvo (Eds.) *Law of the Sea: The Emerging Regime of the Oceans*, U.S.A., 1973, at 148, (“...the island must be land-dirt, rock, organic matter or a combination thereof”).

¹⁰⁷ Papadakis, *The International Legal Regime of Artificial Islands*, Leyden: Sijthoff (1977) at 91, (Hereinafter cited as Papadakis).

¹⁰⁸ Johnson, “Artificial Islands” (1951) *4 International Law Quarterly*, at 203, 214.

This could open for an acceptance of also volcanic islands or other unstable features being islands in a legal sense, and that they thus, despite the lack of permanence can generate maritime zones of their own. Certainly an island can because of erosion, a natural catastrophe or enemy action be changed, and no longer fit the requirements of an island in accordance to international law. The question arising then would be, if the feature should lose its status as an island and the regime it constitutes. Article 7, paragraph 2 of the LOS Convention¹¹⁰ states that “straight baselines can be drawn to and from unstable natural conditions of the coastline”, and that “these baselines should remain effective until changed by the coastal state in accordance to this Convention.” An analogous interpretation of article 7 would suggest that the maritime zones in such cases would remain effective until changed by the coastal state.

If, however, the island is situated too far from the coastline to be included in a baseline the situation will be more complex. It can very well be argued that maritime zones already drawn cannot be ignored even if the feature loses its status as an island. This result seems reasonable by the fact that any other interpretation would mean that maritime zones could come and go making it impossible to maintain stability of international maritime boundaries. It can also very well be argued that such a result is contrary to international rules of interpretations stating that a treaty cannot be interpreted in a way that it leads to a result that is unreasonable and absurd.¹¹¹ If, however, no maritime zones have been drawn or officially proclaimed at the time that the island loses its status, such rights are probably lost.

For a feature to qualify as an island it has been argued that it must be of the nature of territory.¹¹² This qualification is not intended to mean that the feature literally must be a portion of territory, or a true tract of land as a “natural” island is, but that it must have the essential characteristics of a portion of territory.¹¹³ As for what essential characteristics are required, it has been suggested that the capability of being subject to the sovereignty of a state, and degree of permanence similar

¹⁰⁹ *Us v Alaska*, No 84 US Supreme Court June 19, 1997 (<http://supct.law.cornell.edu/supct/html/84ORIG.ZS.html>).

¹¹⁰ United Nations, *The Law of the Sea*, United Nations Convention on the Law of the Sea (1983).

¹¹¹ Vienna Convention on the Law of Treaties, Article 32 (b).

¹¹² See Hodgson, *op. cit.*

¹¹³ Papadakis, at 105.

to that possessed by a natural island should be sufficient.¹¹⁴ Most of the Spratly features are coral reefs and small rocks composed of stone and sand and it cannot be doubted that such maritime features are areas of land in the meaning of article 121.1.

3.4. Naturally formed

The definition of an island prescribes that the feature must be naturally formed. This condition should effectively rule out all kind of artificial or manmade features from the definition. However the definition raises problems of interpretation due to the use of the words “naturally formed” rather than “naturally created”.¹¹⁵ During the negotiation of the Law of the Sea Convention, many supported the view that also artificial features should partake the definition of an island provided that they consisted in a true piece of land, *terra firma*.

There are many examples in recent times of states having attempted to preserve true insularity for a small formation through artificial building-up processes. On the tiny volcanically formed island Kolbeinsøy off Iceland, the Icelandic authorities have reportedly, because the island is said to be in danger of being eroded back below sea level, planned to cement it together to prevent the sea from eroding the last few remaining rocks.¹¹⁶ Maybe more dramatically, in the late 1980s it was reported that Japan feared that its southernmost islet of Okinotorishima, consisting at high tide only of two small peaks, was in danger of disappearing. This could result in Japan losing up to 160 000 square miles of seabed and fishery jurisdiction.¹¹⁷ One of these peaks was reportedly no more than 20 inches to 3 feet above high water, and both are situated on an otherwise submerged reef which is itself some 10 feet under water. In 1988 Japan commenced efforts to keep these peaks above high water by surrounding them with wave absorbing steel blocks and concrete rising higher than the enclosed natural reefs themselves.¹¹⁸

Although the expression “naturally formed” in the provision might be considered referable, either to the type of material composing the insular formation or to the way an insular formation is

¹¹⁴ Papadakis, at 105.

¹¹⁵ Hodgson, “Islands, normal and special circumstances”, Gamble and Pontecorvo (Eds.) *Law of the Sea: The Emerging Regime of the Oceans*, U.S.A., 1973, at 148.

¹¹⁶ The Daily Telegraph, 25\4\1985.

¹¹⁷ In 1977 Japan had declared a 200-mile EEZ around it, The Daily Telegraph 20\10\1988.

¹¹⁸ Pacific Stars and Stripes, 16\11\1989, The Daily Telegraph, 20\10\1988.

created, the usual academic view has been that lack of direct human intervention in whatever form is the vital criterion for insular status.¹¹⁹ Under this definition artificial islands, however composed, showing above water at high tide do not qualify for the juridical status of an island. In the cases of Kolbeinsøy and Okinotorishima it is clear that the measurements taken are not for island building purposes but strictly for land protection purposes. Although human intervention is present in those cases, it seems clear that measurements to preserve insular status are highly different from any similar attempts to create insular status, and should not disqualify the features legal status.¹²⁰ An easy way of settlement may be created in such cases if one asks the question, what came first, the island or the human intervention.

Finally, it is must be added that many islands are in fact coral islands, formed over centuries, by gradual accretion of skeletons of the coral polyp in temperate waters, creating first reefs, and then by further elevation islands. It is further a fact that a high percentage of the Spratly features indeed are such coral islands. Although such islands are in no sense geologically part of the seabed, they are nevertheless “naturally formed”, and it has never been doubted that they can generate maritime zones as do “normal” islands.¹²¹

3.4.1. Artificial Islands

The insertion of the words “naturally formed” in the definition of an island clearly and finally excluded artificial islands and their potential to generate any maritime zones. Article 5(4) of the 1958 Continental Shelf Convention provided that such installations and devices, though under the jurisdiction of the coastal State, “do not possess the status of islands and that they have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea of the coastal state”. Nevertheless, these issues have been subject to discussion and have met considerable resistance in certain regions of the world.¹²² In order to put the issue beyond doubt, the following provision was included in the 1982 Convention on the Law of the Sea: *Artificial*

¹¹⁹ Papadakis, at 93; Symmons, 1979, at 36.

¹²⁰ Clive Symmons, “Some Problems Relating to the Definition of Insular Formations in International Law: Islands and Low-Tide Elevations” *International Boundaries Research Unit Maritime Briefing* Vol.1, No.5, (1995) at 3, (Hereinafter cited as Symmons, 1995).

¹²¹ Derek W. Bowett, *The Legal Regime of Islands in International Law*, (New York: Oceana Publications, Inc., 1979), at 5.

*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.*¹²³

In order to grant artificial structures some kind of adjacent jurisdiction the artificial structures were granted safety zones of 500 metres.¹²⁴ These zones are to be publicised, and all ships must respect them, but they are in no sense a territorial sea.

Many of the Spratly features are no doubt partly or entirely artificial islands. Some even totally submerged features have by building up processes become large island forts used by military personnel for various purposes. Other examples are the building of airstrips and harbours and other installations on small low tide elevations for the purpose of creating islands. Such features although they now have an above water elevation, clearly are artificial islands incapable of generating maritime zones beyond a security zone of 500 metres.

It is however, interesting to take notice of the thesis of Gidel, which states as follows: “If not the artificial island qualify the definition of an island, perhaps it may qualify the entitlement to a continental shelf or an exclusive economic zone”.¹²⁵ Although this seems to be a “long shot”, it could be argued that these features should generate territorial seas or contiguous zones, considering that reefs and low-tide elevations, due to certain circumstances, have some influence on the generation of maritime zones. It is quite obvious though that support for this view cannot be found in the LOS convention, but must be based on other sources of law. Artificial islands might however be a useful contribution as evidence when attempting to claim an ocean area on ground of historic title.¹²⁶

¹²² Jayewardene, at 9; Knight, Gary “International Legal Aspects of Deep Draught Harbour Facilities”, *loc. cit.*, p. 386-389; Papadakis, at 91.

¹²³ LOS Convention, Articles 60 (8) and 80.

¹²⁴ LOS Convention, Articles 60 (4) and 80.

¹²⁵ Clive R. Symmons, *The Maritime Zones of Islands in International Law*, The Hague: Martinus Nijhoff, 1979, at 46 referring to, Gidel B., *Le Droit international public de la mer*, at 684 (1934).

¹²⁶ LOS Convention, Article 15 states that the median line principle applies in maritime delimitation of the territorial sea between states with opposite or adjacent coasts, except where its necessary on grounds of historic title or other special circumstances to delimit the area in variance therewith. Article 10, which deals with the drawing of baselines off coasts having “bays” in paragraph 6, states that the limitations in regard of the drawing of baselines in art. 10 do not apply to historic bays.

3.4.2. Dwellings built on piles

The “Stilt Villages” are the kind of artificial features that probably have the most equitable reasons for having insular status, although the features have just a token attachment to the seabed and have little of the true characteristics of *terra firma*. Taking into account that one of the aims of the LOS Convention regarding the regime of islands, is that sea areas adjacent to the “island” should be for the benefit of the population thereof, it could seem justified to grant stilt villages maritime zones.

The International Law Commission in its report prior to the first UNCLOS stated that dwellings built on piles formed the sixth possible case of an “island”, and that it had to be decided how such villages should be treated.¹²⁷ They also added that the problem was important for Southeast Asia, where such villages often were bases for drug traffickers, smugglers and pirates, and that if such villages had no territorial sea around them, nothing could be done to suppress such activities.¹²⁸ Nevertheless the arguments were inadequate, and the drafters of the convention wanted the artificial structures to be incapable of generating maritime zones. To grant them maritime zones would make it too easy for states to make unjustifiable encroachments on the high seas.

It seems however, that despite the clarifications of the rules regarding artificial islands nations still tend to create artificial islands by building up processes for the purpose of claiming title to maritime areas. The Spratly islands are unfortunately not an exception.

3.5. Surrounded by, and above water at high tide

The requirement of being surrounded by water is clearly the less important of the definition. If the island is somehow connected to the mainland by a sandbar or even through the building of a causeway, the feature presumably will not be considered an island. Such features will then simply constitute an integral part of the coastline. The coastal state may then use this feature for the determination of its baselines¹²⁹, and still be entitled to zones in the areas seaward of the feature.

¹²⁷ Yearbook of the International Law Commission, Vol. 1 (1954), at 91.

¹²⁸ *Ibid.* at 91.

¹²⁹ LOS Convention, Articles 6, 7 and 13.

So this aspect of insular definition is not likely to be a problem, at least not for the Spratly islands which are mid ocean islands.

The requirement of being above water at high tide is probably a more controversial criterion of true insular status. Moreover, this may show to be very important in regard of the Spratly Islands because during monsoon waves regularly wash over large parts of the features of the SCS. It thus seems vital to determine what it takes for a feature to be above water at high tide.

At the 1930 Conference an island was defined as “permanently above high water mark”.¹³⁰ The view of some was that the words “under normal circumstances” should be added, because of the instability of the tides.¹³¹ In the discussion at the first UNCLOS the U.S. proposed that the definition should be redefined as “a naturally formed area of land, surrounded by water which is above water at high tide”.¹³² The U.S. further held that the proposals of an island being above the high water mark “under normal circumstances” and “permanently” were conflicting. The U.S. proposal was ultimately adopted and implemented as Article 10 of the Convention on the Territorial Sea and the Contiguous Zone (1958), however the conversion did not seem to clarify the limits of the concept of high tide. As noted above this definition was adopted unchanged as paragraph 121.1, in the LOS Convention (1982), but still without a clarification of the high-tide issue.

The wording can be interpreted to imply a regular pattern of low-tide surfacing meaning that the feature can be submerged at least one half of every 24 hours.¹³³ The lack of a tidal datum in the provision is what causes the problem. It may be argued that there are two basic types of tests for determining insularity in international law. One seemingly maximalist (apparent absolute permanence above water) and the other more moderate based on a mean criterion, usually either on a mean tide or a mean spring tide test.¹³⁴ Recent delimitation practice¹³⁵ involving definition

¹³⁰ United Nations Convention on the Law of the Sea, A Commentary, Volume III, at 324-339.

¹³¹ Ibid.

¹³² U.N. Doc. *Official Records*, Vol. III, at 242.

¹³³ U.N. Doc. *Official Records*, Vol. II, at 186; Exceptionally, States have specified a time-scale for low-tide elevation surfacing, See e.g. the Finnish legislation “*above sea level more than one half day per year on the average, at low-water level during the 10-year period preceding when this law takes effect*”.

¹³⁴ Symmons, 1995, at 19.

of insular formations shows that even in neighbouring continental European States, practice can vary as to their perceived definition in international law and so add to maritime jurisdictional problems.

In the Franco-British Arbitration Case on the Western Approaches, Britain argued that Eddystone Rock, a small and barren rock only a couple of feet above the surface, constituted an island because part of the rock was permanently uncovered at mean high water springs.¹³⁶ Britain maintained that “mean” high water spring tides was the criterion for determining whether a particular geographical feature has the legal status of an island. They further held in their support that this was the practice of many states.¹³⁷ France maintained that International Customary Law made no distinction between different types of tide, and that an island is a natural piece of land which stays permanently above water. They further contended that the British concept of high water was questionable because of the large number of states, including France, which took high water only to mean the limit of the highest tide.¹³⁸ Nevertheless the case concerned determination of the basepoints in the western channel area, and the arbitration court did not view the possible status of Eddystone rock as an island to be directly relevant for the case. They therefore refrained from commenting on this vital aspect of the definition of an island. It was submitted by the court, however that the British viewpoint was to be preferred as being the most moderate of the two possibilities, and more in accordance with the limited preparatory documents of the first UNCLOS on this topic.

The Franco-British arbitration itself does not give any state survey on the definition of the high tide criterion, but certainly it appears to be a significant practice amongst English-speaking nations with a common law heritage to adopt the norm contended by the UK.¹³⁹ The US, on the other hand uses the mean high-water line test, i.e. an “average height of all the high-water” at a

¹³⁵ E.g. Franco-Belgian delimitation agreements in 1990\91, [“Belgium used as its chart datum the mean low water spring tide, calculated over the internationally recognised period of 18, years, while the French used the lowest astronomical tide. (Which was 30 cm. Lower.)”] Symmons 1995, at 18.

¹³⁶ Arbitration on the delimitation of the continental shelf (France v. UK) (1978) Misc. 15, Cmnd. 7438; (1979) 18 I.L.M. at 397. (Hereinafter cited as Franco-British Arbitration), Para.124.

¹³⁷ Franco-British Arbitration, Para.122.

¹³⁸ *Ibid*, Para.138.

¹³⁹ See. E.g. the legislation of Micronesia, Ireland, New Zealand Cook Island, Papua New Guinea, Fiji and Belize. (UN Law of the Sea Bulletin, No 21, 3) where “island” is defined as being “above water at mean high-water spring tides”.

particular location over a considerable period of time, preferably of 18-19 years.¹⁴⁰ Recent practice from Namibia uses the “lowest astronomical tide” as the low water line¹⁴¹, however, the “mean high water” criterion is also used directly by at least one State¹⁴² and other states seem to have inconsistent practices.¹⁴³

From an interpretative point of view, the dropping of the word “permanently” from the finalised 1958 Convention text did not mean that the condition was excluded. The text “is above water at high-tide” taken literally arguably implies permanence of above high-tide status from the very word “is”, and necessarily suggests continuing existence above the sea surface. A judgement from the Supreme Court of the United States is supportive of this view.¹⁴⁴ The island called “Dinkum Sands” referred to above, did not meet the standard for an island because it was frequently below mean high water. The court further stated that to qualify as an island, a feature must be above high water except in abnormal circumstances. This interpretation seems reasonable, however it seemingly would also exclude the features of the Spratlys that would cover by monsoon waves since the monsoon hardly can be considered an abnormal circumstance.

As has been cited by Clive Symmons, “the silence on the issue of tidal datum for insular definition in the relevant international Conventions, as well as the diversity of State practice, make it difficult to detect any definite conventional or customary rule on this vital issue”.¹⁴⁵ However, it is at least clear that an island must have a sufficient degree of “permanence” above high water in just the same way that a low-tide elevation must have the same status at low tide.¹⁴⁶ Moreover there are some signs in recent State practice that states with different tidal criteria may

¹⁴⁰ Symmons, 1995, at 23, referring to Shalowitz, 1964: 173-4 (Vol.2).

¹⁴¹ UN Law of the Sea Bulletin, No. 16, December 1990: 18.

¹⁴² Kuwait, by a decree of December 1967: “above water at mean high springs”, Symmons, 1995, at 23

¹⁴³ Australian practice seems inconsistent of its 1970 legislation with its 1983 Proclamation under section 7 of the *Seas and Submerged Lands Act. 1973* (Commonwealth Gazette, No. 52 4/2/1983) where in clause 1 the term “low tide elevation” is to have “the same meaning as in the 1958 Convention, but low-water and indeed low tide is to mean *lowest astronomical tide*”. (it. added)

¹⁴⁴ U.S. Supreme Court, (United States v. Alaska), Judgement of June 19, 1997.

¹⁴⁵ Symmons, 1995, at 23.

¹⁴⁶ Ibid.

in any case be “inclined to compromise on the issue by applying an equitable solution to a dubious above water formation so as to reflect, in part at any rate, both disputants viewpoints.”¹⁴⁷

3.6. Sufficient size

The criterion of size has not in the past featured in the definition of an island, and size is not a part of the definition of an island according to the LOS Convention. At least one commentator had prior to the first UNCLOS stated that not every single high tide formation, no matter what size, should generate territorial waters. However, at that time other issues were of more importance, and the size criterion was not given much attention until the negotiations during the third UNCLOS. A number of suggestions for defining islands, islets and rocks measured in square kilometres were put forward, but several delegates were in favour of status quo. The ones in favour of a change referred to the inequitable benefits which might accrue to coastal states with small or uninhabited islands scattered over a wide oceanic area, and that a barren rock might create an economic zone larger than the land territory of many states and larger than the economic zones of many coastal states.¹⁴⁸ On the other hand the ones against a categorisation of islands in terms of size, contended that there was a grave danger of discounting many islands of both absolute and relative importance in doing so.¹⁴⁹ In respect of the particular criterion of size it was held that this criterion would lead to inequitable results. This because there were on the one hand, many large islands which were uninhabitable or completely uninhabited, and on the other hand small islands with dense population, which depended heavily upon the seas.¹⁵⁰

It seems therefore that size, as such was abandoned as a possible criterion of insular status, and that the traditional 1958 definition, now adopted in the 1982 Convention, is to remain. However size may indirectly still be important because the geological phenomenon of a “rock” has been singled out for special treatment in regard of being the compromise of the negotiations on the size issue during the third UNCLOS. Article 121.3 of the LOS Convention, which states that “rocks which cannot sustain human habitation or economic life of their own shall have no exclusive

¹⁴⁷ *Ibid*, at 28, referring to, The Belgian –French agreement on delimitation of territorial sea and continental shelf signed on 8\10\1990; D. H. Anderson, “Recent Boundary Agreements in the Southern North Sea”, *International and Comparative Law Quarterly*, 41 (1992), at 414-16.

¹⁴⁸ U.N. Doc. *Official Records*, Vol. II, at 280.

¹⁴⁹ *Ibid*, at 288.

¹⁵⁰ *Ibid*.

economic zone or continental shelf," might leave the opportunity open to attach size as a relevant criterion, not for the acceptance of insular status, but for the generation of the extensive maritime zones.¹⁵¹

3.7. Geological structure and geographical position

The recent origin of the idea that geological structure and geographical position may be relevant when considering whether or not an island can generate maritime zones, was set out in the O.A.U. *Declaration on Issues of the law of the Sea* in 1973.¹⁵² According to draft article 2.2, "The marine spaces of islands considered to be non-adjacent (not situated in the proximity of the coast), are to be delimited on the basis of relevant factors taking into account "equitable criteria". These equitable criteria should relate, inter alia to "such islands geographical configuration and their geological and geomorphologic structure, whether the islands are situated on the continental shelf of another State, or in the proximity of its marine space, and, whether due to their situation far from the coast, they may influence the equity of the delimitation."¹⁵³

The drafters of the O.A.U. further suggested that islands situated on the continental shelf of another state should not generate extensive maritime zones.¹⁵⁴ Where an island in addition was situated far from the mainland of the state holding the sovereignty, it was held that the feature should only be entitled to a security zone of 500 metres.¹⁵⁵ This is interesting in regard to the spratly islands since it could mean that the islands would generate different maritime zones depending on the geographical position of the state holding the sovereignty.

3.8. The relevance of political criteria

In a historical perspective, islands have been the subjects of some of the earliest colonial conquests. Whether or not an island has "independence from foreign or colonial domination" were together with the "geographical structure and geographical position" the two residual criteria, introduced at UNCLOS three, alleged to be relevant to the capacity of islands to generate

¹⁵¹ See chapter three of this paper.

¹⁵² Organisation for African Unity, "Declaration on Issues on the Law of the Sea" (submitted to the U.N. Seabed Committee in 1973); U.N. Doc. A/CONF.62/33; *Official Records*, vol. III, at 63.

¹⁵³ U.N. Doc. A/CONF.62/33; *Official Records*, Vol. III, at 64.

¹⁵⁴ *Ibid.*

maritime zones. It should be noted that, in essence, neither of these criteria was explicitly used in respect of the definitional aspects of insular formations in the final conventional text.

It was reflected in many of the proposals that measurements had to be taken in order to prevent colonial states from taking further advantage of islands under their control by obtaining maritime zones. However, to deprive those islands of any kind of ocean space would leave the seaward areas open to conquest by other states or the areas might be plundered by the long distance fishing fleets of the world. This could again increase the uncertainty of economic viability for the islands, and make the attainment of independence more difficult.¹⁵⁶ To remedy this it was suggested that maritime zones should be granted also to islands without independence, and that the right to the resources of the territory should be vested the inhabitants for their own exclusive benefit in accordance with their needs and requirements.¹⁵⁷

In the Franco British Arbitration, France argued in relation to the British Channel Islands that the legal classification of islands should take into account, inter alia, their “variable political circumstances”, and so sought to convince the Arbitration Court that the Channel Islands were different from “islands or archipelago States” because they were not directly responsible for their foreign relations.¹⁵⁸ Britain on the other hand held that the Channel Islands, having their own legislative, fiscal and legal system, their own courts, administration and postal system, in effect were independent.¹⁵⁹ In the ruling the Court noted that “notwithstanding the absence of continental shelf designation powers residing in the Channel Islands, the islands possessed a large degree of autonomy.”¹⁶⁰ However it concluded that they only constituted island territories of the United Kingdom, and not “*semi-independent states*” entitled in their own right to their own continental shelf.¹⁶¹

The I.C.J. further pointed out in the North Sea Continental Shelf Cases, “there is no legal limit to the considerations states may take into account for the purpose of making sure that they apply

¹⁵⁵ Ibid.

¹⁵⁶ U.N. Doc. *Official Records*, Vol. II, at 288.

¹⁵⁷ Symmons, 1979, at 59, referring to U.N. Doc. A/CONF.62/C.2/L.30.

¹⁵⁸ Franco-British Arbitration, Para. 158.

¹⁵⁹ Ibid, Para. 171.

¹⁶⁰ Ibid, Para. 184.

equitable procedures”.¹⁶² In the Gulf of Maine case the Court concerned itself with political geography in order to avoid a radically inequitable outcome that might produce catastrophic economic consequences for the population of the countries involved.¹⁶³ It may thus be argued that political criteria now can be considered relevant in a judicial forum. However, not in connection with definitional aspects of “islands”, but for the related purpose of determining the capacity to generate the more extensive maritime zones. Thus even more particular, for qualification of insular formations as basepoints in maritime delimitation issues when taking into account “equitable considerations”.¹⁶⁴ As for the definition of an island, we cannot deduce from this that there exists a special regime for islands under foreign or colonial domination. However, what we might argue is that mere political criteria may be taken into account in delimitation issues, by reference to the LOS Convention Art 15, “special circumstances”¹⁶⁵ or the concept of “relevant circumstances”¹⁶⁶ set by customary law.

3.9. Low-tide elevations

We find the definition of a low-tide elevation in Article 13 (1) of the LOS Convention. This article states, “A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low-tide, but submerged at high-tide [...]”. Accordingly we see that the insular requirements mentioned above in regard to the definition of an island, also apply to low tide elevations, although with the notable exception of having to be above the surface at high tide like an island.

The term low-tide elevation is regarded as referring collectively to shoals, reefs and drying rocks, offshore features that are exposed at low tide, but submerged at high tide. In regard to low tide elevations we need also to distinguish between “drying rocks and shoals” and “rocks awash”.

¹⁶¹ *Ibid*, Para. 186.

¹⁶² North Sea Continental Shelf Cases, (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands) I.C.J. Reports, 1969, p. 3, Para 50, (Hereinafter cited as North Sea Continental Shelf Cases).

¹⁶³ Delimitation of the Maritime Boundary in the Gulf of Maine Area, (Canada v. U.S.) I.C.J. Reports, 1984, p. 246, Para 327, (Hereinafter cited as Gulf of Maine Case).

¹⁶⁴ Franco-British Arbitration, Para. 187.

¹⁶⁵ LOS Convention, Article 15, governs delimitation of the territorial sea between States with opposite or adjacent coasts, and states that the “median line principle” is the appropriate measurement except where “*it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a which is at variance therewith*”.

Rocks awash are formations which are just awash at low tide, meaning that the waves will wash over them even at low-tide, whilst, the “drying rocks and shoals” are regarded as those which sometimes are submerged and at other times emerged and dried.¹⁶⁷ The “above water” requirement in the definition of low tide elevations arguably must have the same content as the one in the definition of an island, meaning that the low-tide elevation except in abnormal circumstances must show above low water. Thus, shoals, banks and similar submerged features do not strictly fall within the scope of the regime.

The regime for low-tide elevations does not prescribe that such features may generate any maritime zones of their own, but if situated in the territorial sea of the mainland or another island, the low-tide elevation may be used for the measurement of the baseline of that territorial sea.¹⁶⁸ Furthermore the use of the phrase “that elevation” in the provision, makes it clear that it is the one low tide elevation actually not exceeding the territorial sea, which can be used as measurement for the baseline.¹⁶⁹ Accordingly you cannot find another low tide elevation situated within the limits of the territorial sea as measured from the first low tide elevation, and use that elevation for measuring the baseline of the territorial sea. Low-tide elevations can also be used in the regime of straight¹⁷⁰ or archipelagic¹⁷¹ baselines, although these regimes introduce special characteristics for the elevation. Straight baselines may be drawn to and from low-tide elevations on which lighthouses or similar installations are built, or if the drawing of such a baseline “has received general international recognition”. Archipelagic baselines may be drawn to low-tide elevations on which “lighthouses or similar installations which are permanently above sea level have been built”, or such elevations located within the territorial sea of an island.

In the judgement on the 1969 North Sea Continental Shelf Cases the I.C.J. in determining the course of a delimitation line intended to effect an equal division of the particular area involved between two coasts, showed how no account need be taken of the presence of islets, rocks and

¹⁶⁶ Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen, (Denmark v. Norway) I.C.J. Reports 1993, p. 38, Paras. 54-58, (Hereinafter cited as Jan Mayen Case).

¹⁶⁷ Jayewardene, Hiran W., *The Regime of Islands in International Law*, Dordrecht: Martinus Nijhoff, 1990, at 7, (Hereinafter cited as Jayewardene).

¹⁶⁸ LOS Convention, Article 13, No. 1, I.f.

¹⁶⁹ LOS Convention, Article 13, No. 1, The preparatory documents also excludes this possibility. A/CONF.13/39, at 186-187.

¹⁷⁰ LOS Convention, Article 7 (1).

minor coastal projections.¹⁷² The Chamber in the 1984 Gulf of Maine Case also held that potential disadvantages were inherent to any delimitation method which took tiny islands, uninhabited rocks or low-tide elevations as basepoints for the drawing of a line intended to effect an equal division of a given area.¹⁷³ The present case law seems to attach little or no importance to low tide elevations in delimitation matters. Accordingly, if a low-tide elevation is situated outside a territorial sea, it creates no jurisdictional advantages for its owner, and is no more than a navigational hazard. Moreover it is questionable if low-tide elevations situated outside territorial waters can be subject to State appropriation at all.¹⁷⁴ Conclusively the presence of low-tide elevations in the South China Sea will only have importance if situated in the territorial sea of an island, and their impact if so situated will overall only be limited to serving as basepoints in a baseline regime.

3.10. Concluding remarks

Although much debate can still be aroused in regard to the definitional aspects of an island, a lot of the controversies must be considered settled by the provisions of the LOS Convention. The incorporation of the definition from the Geneva Convention of 1958 to the 1982 Convention further indicates that the issue is settled law leaving little room for speculation. The different practices among states with regard to the “above water at high tide” criterion can however cause some tension, because that it does not seem to exist any definite conventional or customary rule on this issue. Absolute permanence above water does not seem to be the intended rule, however it may very well be argued that features, both islands and low-tide elevations, regularly washed over by the waves fail to qualify the criterion of article 121.1. Nevertheless, in the end, the major controversies will most certainly be concentrated around the interpretation of article 121.3 and the generation of extensive maritime zones.

¹⁷¹ LOS Convention, Article 47 (1).

¹⁷² North Sea Continental Shelf Cases, Para 57.

¹⁷³ Gulf of Maine Case, Para 222.

¹⁷⁴ *Minquiers and Ecrehos Case*, I.C.J. Reports 1953, p 47, where the court stated that “it is *lex lata* that territory in order to be capable of appropriation of sovereignty must be situate permanently above high water mark and not consist for example of a drying rock only uncovered at low tide, unless it is already within territorial waters of appropriative territory”.

4. ARTICLE 121.3 OF THE LOS CONVENTION

4.1. General

Article 121.3 of the LOS Convention identifies a subcategory of islands that do not generate extended maritime zones, “*Rocks, which cannot sustain human habitation or economic life of their own, shall have no exclusive economic zone or continental shelf*”. The terms used in this paragraph are not otherwise defined in the convention and commentators have speculated substantially about how the vague terms of this paragraph should be interpreted.

The big controversy combined with the understanding of the different phrases of article 121.3 of the LOS Convention, is the main element of the question of whether or not the Spratly Islands can generate maritime zones beyond a territorial sea. This chapter will firstly determine the status of the provision, secondly try to identify some reasonable interpretations of the terms, and especially survey current practice in order to establish some precise meanings of the content of the rule.

4.2. Status in International Law

The rule regarding “rocks” originated during the third UNCLOS and was not put down in a conventional text until the LOS Convention (1982) that is somewhat new to the law of the sea.¹⁷⁵ This however, does not mean that it may not still represent existing customary international law. For instance, the Continental Shelf Convention of 1958 already provided limitations for the use of islands in generating continental shelves. Article 6 of the convention stated that disputes over zones created by islands are to be settled by agreement of the parties involved, and further that “special circumstances” may require limitations on the ocean space generated by the islands. These special circumstances were not defined in the Convention, thus one commentator¹⁷⁶ has noted that size, position and importance may well be decisive when assessing whether or not any particular island should be taken into account when forming a sea boundary. Further, the Court in the Franco British Arbitration in regard of the Channel Islands stated that “location” was a special

¹⁷⁵ The LOS Convention came into force in 1994, when being signed by the 60th State.

¹⁷⁶ Commander R. H. Kennedy of the United Kingdom, delegate at the 1958 Geneva Conference, “Brief remarks on Median Lines and Lines of Equidistance and the Methods Used in Their Construction” a paper distributed with the compliments of the United Kingdom Delegation to the Conference on the Law of the Sea, April 2, 1958 at 7-8.

circumstance in the meaning of article 6 of the Convention on the Continental Shelf.¹⁷⁷ This illustrates that also prior to the “rocks” paragraph in the 1982 Convention, there were made restrictions on the capability of islands to generate maritime zones.

The entry into force of the Convention strengthens the argument that the limitations on entitlements of features defined as such rocks, is customary international law. If it is not part of customary international law, a non-party to the convention might argue that any rock feature within its sovereignty that otherwise qualifies as an island, be entitled to all maritime zones. Nevertheless such an entitlement, if it were claimed, would probably not be rewarded with a significant maritime zone since small features regularly have been discounted or even ignored in maritime delimitation issues brought before tribunals or arbitrators.¹⁷⁸ The status of Article 121 of the LOS Convention was addressed in the Jan Mayen Conciliation.¹⁷⁹ Interestingly the Conciliation Commission found that article 121 of the then Draft Convention reflected “*the present status of international law on this subject*”. The Commission did however not indicate how it reached this conclusion. In this regard it is also interesting to note that in a case from The Supreme Court of Norway, the court seems to have discussed the substance of the rule in Article 121.3 without examining in fact if the rule was applicable.¹⁸⁰ Since Norway was not a party to the Convention at that time, Article 121.3 could only be applicable if it represented part of customary international law.

However, in order to determine if a customary rule has emerged it is vital to not only find out if there exists a long consistent practice affirming it, but just as important to demonstrate that there exists a common obligation amongst states to comply with the rule, the so-called “*opinio juris*”. *Prima facie* this may seem to be an impossible task considering the great amount of states claiming extended maritime zones to their tiny outcroppings of the oceans. We might however argue that these wide claims to ocean areas are not being held because the states do not think they

¹⁷⁷ Franco British Arbitration, Para 104.

¹⁷⁸ Libya Malta Case; Case Concerning the Continental Shelf, (Tunisia v. Libyan Arab Jamahiriya) I.C.J. Reports, 1982, p. 4, (Hereinafter cited as Tunisia Libya Case); Gulf of Fonseca Case; Franco British Arbitration.

¹⁷⁹ Continental Shelf Area between Jan Mayen and Iceland (Jan Mayen Continental Shelf), Report and Recommendations to the Government of Iceland and Norway of the Conciliation Commission of 19-20 May 1981, (62 International Law Reports (1981), p. 108.

¹⁸⁰ Supreme Court of Norway, Judgement of 7 May 1996, Rt. 1996, p. 624. (Norway ratified the LOS Convention on the 24th of June 1996).

are bound by article 121 (3), but are more a result of the geographical variation of the islands that claims are being made on behalf of. In several cases states have accepted that their somewhat tiny but otherwise inhabitable insular formations have been granted a much lesser maritime area than is actually possible according to what the contemporary rules should summon.¹⁸¹ However even if article 121.3 should represent general international law the use of a 121.3 rock in an agreement to delimit the maritime boundary between states is not contrary to international law because article 121.3 is not *jus cogens*. States can freely agree among themselves on a delimitation line that may even be inconsistent with general or conventional international law unless third states are adversely affected.

The widespread participation by states in the UNCLOS negotiations, the large number of states parties to the convention, the refusal to use the right to make reservations to the article and the widely held view that the normative provisions of the convention reflects general international law, are all arguments that article 121.3 now could be considered general international law. However, taking into account the variety of different understandings of the article and the different interpretations of it made by states it is hard to show convincing evidence that the rule is more than conventional law.

4.3. Meaning of “rock”

Although the term “rock” is not defined in the LOS Convention, it appears from the context that a rock is a particular type of island. Probably, we can assume that ordinary definitions of both rock and island are applicable.

Webster’s Third New International Dictionary provides the following definition: “A mass of stone lying at or near the surface of the water” and “ a barren islet”.¹⁸² The Navigation Dictionary,¹⁸³ an official U.S. publication considered authoritative by mariners, defines an island as a “tract of land smaller than a continent, completely surrounded by water.”¹⁸⁴ The Navigation

¹⁸¹ See chapter 4.4.3 of this study.

¹⁸² *Webster’s Third International Dictionary* (Springfield, Mass: G and C. Merriam Co, 1971); Hodgson and Smith “The Informal Single Negotiation Text (Committee II): A Geographical Perspective,” *Ocean Development and International Law* 3 (1976) at 230 (“it is fairly obvious that “rock” is intended to refer to a small sized island”).

¹⁸³ United States Naval Oceanographic Office, *Navigation Dictionary*, 2d ed. (1969), at 114.

¹⁸⁴ *Ibid.*

Dictionary further defines an “islet” as “a very small and minor island” and a “rock” as “an isolated rocky formation or a single large stone, usually one constituting a danger to navigation. It may always be submerged, always uncovered, or alternatively covered and uncovered by the tide.”¹⁸⁵

The definition from the Webster dictionary suggests a pure geological description of the term by referring to “mass of stone”, but adds a more cultural-geologic description when it also describes it as a “*barren islet*”. The Navigational dictionary provides a definition also purely geological by reference to “large stone”, but adds also a more ambiguous description with the wording “*rocky formation*”. We see that the dictionary definitions unfortunately are somewhat ambiguous in their language, and conclusively they do not independently seem to bring a consensus to the meaning of “rock” in the context of Article 121 (3).

It might be argued that the term “rock” should be given a purely geological definition.¹⁸⁶ Such a strictly literal interpretation would limit the coverage of paragraph 3 to formations that are actually rocks without any accompanying land. Other barren and uninhabitable insular formations, such as cays and atolls, would in this case be considered “islands” no matter how small they are, and would generate an Exclusive Economic Zone regardless of whether they can sustain habitation or economic life. Since this result is manifestly absurd, the purely geological definition of “rock” must be rejected in the interpretation of article 121.3. It would be unreasonable, and not in consonance with the intention of the parties to UNCLOS III if one geological type of uninhabitable tiny insular formation should be excluded from rights that other types of uninhabitable tiny insular formations have. Thus, logic seems to require that the term “rock” be given a definition that is not strictly geological.

One recent paper prepared by an U.S. law firm employed by Vietnam asserted that “the overwhelming majority of commentators have argued that the term should be interpreted as

¹⁸⁵ Ibid.

¹⁸⁶ Hodgson and Smith, *The Informal Negotiating Text (Committee II): A Geographical Perspective*, 3 *Ocean Development and International Law*, 225 (1976).

including any small island”.¹⁸⁷ This interpretation however, does not clarify the term much since the term ”Small Island” is just as vague as the original.

Having said that the term “rock” in article 121.3 denotes any type of “Small Island”, it is important not to lose sight of the fact that rocks must still comply with the requirements of the proper definition of an island found in article 121.1. There is no difference between “rocks” and “islands” in respect of the requirement that they must be “an area of land”, “naturally formed” and “surrounded by water and above water at high tide”.

If then the difference between an island and a rock must merely be based on the broader concept of “land”, is the difference then to be founded in size and the geological substance? A number of suggestions for how to define islands, islets and rocks on the basis of size were submitted during the third UNCLOS, but none attained sufficient support. However, despite the fact that classification on the basis of size was not adopted it was neither decided that this was not to be the case. The above-mentioned judgement of the Supreme Court of Norway certainly seems to put considerable weight to the size argument.¹⁸⁸ One of the arguments of the appellants in this case was that the baseline, from which the outer limit of the fishery zone of Svalbard was measured, was not in accordance with international law on three counts. One of them was that Abel Island on which a basepoint was located was an uninhabitable rock within the meaning of article 121.3 of the LOS Convention. The Court held that Abel Island, an Island of 13.2 square km. was too large to be a rock, and that this *independently* had to exclude Abel from being a rock within the meaning of article 121.3. The Court further stated that it found support for this in state practice.¹⁸⁹

The ruling of the Norwegian Court in this case seems to have been inspired by the I.C.J. ruling in the Jan Mayen Case where the Court indirectly stated that because of its size alone Jan Mayen is not a rock, in the legal sense of the term, and for that reason considered the question of habitation and economic life irrelevant. The Court’s reasoning was based on the fact that Jan Mayen is 54,8 kilometres long, far larger than the types of features under consideration at UNCLOS III for

¹⁸⁷ Clagett, Brice M. “Competing Claims of Vietnam and China in the Vanguard Bank and Blue Dragon Areas of the South China Sea”, 1995 *Oil and Gas Law and Taxation Review*, at 375.

¹⁸⁸ Supreme Court of Norway, Judgement of 7 May 1996, Rt. 1996, p. 624.

¹⁸⁹ *Ibid.* Unfortunately the reasoning in the judgement stops at this point with no further references to the alleged practice.

inclusion in article 121.3.¹⁹⁰ It may accordingly be argued that the requirement of “rock” can be seen as an isolated part and that the term applies to all kinds of features smaller than a certain size. What this size limit may be is difficult to clarify but a rock as defined in article 121.3, certainly seems to describe a feature smaller than the island of Jan Mayen.

4.4. “Sustain Human habitation”

Article 121.3 of the LOS Convention further operates with the phrase “sustain human habitation or have economic life of its own”. This phrase also gives rise to various questions of interpretation. It indicates that two categories of “rocks” exist: (1) those that cannot sustain human habitation or economic life of their own, and (2) those that can sustain either or both.¹⁹¹ However, what does it take to sustain human habitation?

The concept of the extended maritime zones was accepted in the 1982 Law of the Sea Convention because it seemed appropriate to allow coastal populations to have a primary right and responsibility to exploit and manage resources in the waters and on the continental shelf adjacent to their coasts. Where there is no indigenous population, this logic does not seem to apply, and the extended maritime zones should therefore not be permitted. This underlying purpose of the development of the extensive maritime zones indicates that it is not reasonable to operate with a category of islands that can sustain economic life if it cannot also sustain human habitation. The object of the conventional rule in Article 121.3 might have been to establish the sustainability of human habitation as an obligatory, minimum requirement for small islands. To accord an uninhabitable small island a right to an EEZ on the basis of an ability to sustain an economic life of its own would mean that this economic life had to be carried out by people living elsewhere. This would not be in accordance with the purpose of the EEZ regime, which is to accord rights and responsibilities to the populations of the lands that generate the zones.

¹⁹⁰ Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen, (Denmark v. Norway) I.C.J. Reports 1993, p. 38, Para. 61.

¹⁹¹ Van Dyke, Jon M. and Bennett, Dale, “Islands and the Delimitation of Ocean Space in the South China Sea” 10 *Ocean Yearbook*, (1993), at 78.

If we look to the official texts of the article in other languages we find that the Chinese as well as the Arabic text seem to link the requirements of human habitation and economic life.¹⁹² However, we find from the *travaux préparatoires* that the phrase read “human habitation *and* economic life” (italics added) in the early stage of the negotiations. Thus the choice of *or* seems to have been deliberate. This admittedly weakens the argument above, and seems to provide the view that a feature does not need to sustain human habitation if it can have an economic life of its own without such habitation.¹⁹³

The criterion, “sustain human habitation” may not inevitably require that the insular feature should have been, or currently be, inhabited. The *ability* to sustain habitation seems to be enough. Nevertheless, it seems that the only practicable and equitable way of judging such ability is to look at past and present habitation. With the use of sophisticated techniques it will in the future be possible to sustain habitation on any kind of feature, and thus one will seemingly need to define the minimum size of a “population”. One term that can provide a good indication of the required size of human habitation, used recently by many commentators, is “stable community”.¹⁹⁴ A common sense approach of this term would give some indication of what is expected. The authors of this term argue that five persons would clearly be too few, but that a population of fifty could very well be seen as enough.

¹⁹² It can be noted in this regard that the Norwegian translation also seem to link the requirements due to the presence of one, but only one, comma. The Norwegian translation reads: “Klipper som ikke kan gi grunnlag for menneskelig bosetting eller selvstendig næringsvirksomhet, skal ikke ha noen eksklusiv økonomisk sone eller kontinentalsokkel”. This one comma could be interpreted to imply that the conditions of human habitation and economic life must *both* be fulfilled. Some discussion arose on this among the Norwegian translators. However, the sentence could not be written in proper Norwegian grammar without any comma, and if two commas had been employed, then the sentence would have indicated far more clearly than in the English, French and Spanish versions that the two requirements are alternative. The sentence would then have read: “Klipper som ikke kan gi grunnlag for menneskelig bosetting, eller selvstendig næringsvirksomhet, skal ikke ha noen eksklusiv økonomisk sone eller kontinentalsokkel”. The translators seem to have decided that the language differences justified the amendment and that the Norwegian language did not allow retaining the vagueness of the English text.

¹⁹³ U.N. Doc. *Official Records*, Vol. III at 195. The word “or” was introduced only during the third session of the conference in the Informal Single Negotiation Text. In a later session one state suggested that the word “or” should be interpreted as “and” but the suggestion was disregarded.

¹⁹⁴ Jon Van Dyke, Dale Bennett, “Islands and the delimitation of ocean Space In the South China Sea” 10 *Ocean Yearbook*, (1993) at 79; Heins, Jenny “The Role of Insular Formations in the Generation and Delimitation of Maritime Zones” *Sea Changes* (Cape Town) 2, (1985).

It is interesting to note that the distinguished writer Gidel already in 1934 gave a somewhat more specific description of habitability.¹⁹⁵ In his definition an island had to have “natural conditions” that permitted “stable residence of organised groups of human beings”. This definition certainly seems to require the presence of fresh water, cultivable soil and perhaps even other resources. Considerations of equity certainly supports this argument since if the feature itself did not need to have sufficient resources to support human habitation, any kind of feature might qualify the requirement because it is obviously possible to bring out supplies to the features that they do not themselves possess.

An argument supportive of claiming the presence of fresh water, soil and other resources in order for a small island to generate a right to an EEZ, is the fact that historic use of surrounding waters can provide good indication of a population's reliance on the area and may serve to block competing claims. It seems clear, however, that a population residing in the territory that generates the zones must have undertaken this utilisation. In the Fisheries Case (1951), Norway held that the adjacent waters of the Norwegian coast were historically relied upon by the natives, and with this reasoning Norway was granted full jurisdiction to the vast ocean areas that fell inside its controversial straight baselines.¹⁹⁶

One view that apparently seems somewhat radical is that of Johnson.¹⁹⁷ He suggests that, for example in the case of a lighthouse; the fact that it is actually inhabited may enhance its status. Johnson's view does not seem to be practically applicable in the clarification of the habitation condition given the fact, mentioned above, that it clearly is possible to actually inhabit any kind of rocky feature if a nation is willing to expend sufficient resources.¹⁹⁸ Further the fact that a criterion of actual habitation was not explicitly included in article 121.3 should indicate that Johnson's reasoning hardly could find support.

¹⁹⁵ Clive R. Symmons, *The Maritime Zones of Islands in International Law*, The Hague: Martinus Nijhoff, 1979, at 46 referring to, Gidel B., *Le Droit international public de la mer*, at 684 (1934).

¹⁹⁶ Fisheries Case (UK v. Norway), I.C.J. Reports 1951, p. 116, Para. 140-3; LOS Convention, Article 15. Delimitation of the territorial sea between States with opposite or adjacent coasts which, states that the median line principle applies except where “*it is necessary by reason of historic title [...] to delimit the territorial seas of the two states in a way which is at variance therewith*”. Also Art. 10 (6) “*historic bays*”.

¹⁹⁷ Johnson, “Artificial Islands” 4 *International Law Quarterly*, 1951, at 205.

¹⁹⁸ I.L.C. Yearbook 1954, Vol. 1, at 93. Francois, the special rapporteur of the I.L.C. (deliberations 1954) expressly disagreed with the British proposal of “effective occupation and use” because in his view any rock could be used as a weather observation post or a radio station, and in this sense all rocks are capable of occupation and control.

Another question in regard of habitation is whether or not the kind of population matters. One might argue that the profession and employment of the inhabitants are irrelevant, but one might on the other hand require that the people living on the island are supported by the natural resources of the feature itself, and are not dependent on provision of necessities from the outside. This would require that at least some of the population be at least partially employed in the primary sector (agriculture, fishing, and water supply). The above-mentioned paper prepared by an U.S. law firm asserts that the “human habitation” formula requires at least the possibility of a permanent civilian population, and that soldiers and lighthouse keepers are not sufficient.¹⁹⁹ The *travaux preparatoires* seem also to support the interpretation that personnel stationed on an island for preservation and scientific purposes should not be taken into account. To interpret the habitability requirement to mean that the feature must be able to sustain a “stable population of civilians” is perhaps to move too far from the textual meaning of the provisional wording. However, in light of the object and purpose of the provision this interpretation seems reasonable. If an island should be attributed large areas of maritime jurisdiction because it is reasonable to allow its inhabitants to exploit and preserve the area because they seem best suited to do so; huge areas of maritime jurisdiction should not apply to islands where there is no such population.

The *travaux preparatoires* do *not* seem to require that human beings reside permanently on the feature.²⁰⁰ Thus, the requirement does not require that the island must have an actual habitation, only that habitation is possible. Thus an island will not automatically be disqualified from generating an EEZ by the fact that only scientific personnel inhabit it. It must be argued that the island cannot sustain other kinds of habitation. Further controversy can arise with regard to the length of time that human beings need to reside on a feature for this to be called habitation. It may be argued that fishermen who use an island as shelter during the best fishing season do not qualify as inhabitants. They merely use it as a “pit stop” and if one were to argue that every feature that could give shelter to human beings would qualify under article 121.3, the clause itself would lose meaning. Human habitation must mean more than just shelter. Further if the necessary means for human survival i.e. fresh water, food and shelter are so limited that it would only be

¹⁹⁹ Clagett, Brice M. “Competing Claims of Vietnam and China in the Vanguard Bank and Blue Dragon Areas of the South China Sea”, 1995 *Oil and Gas Law and Taxation Review*, at 375.

²⁰⁰ U.N. Doc. *Official Records* Vol. III at 71.

capable of supporting habitation for a limited period of time, this does not seem to validate the criterion of *sustaining* human habitation.

The actual content of the “sustain human habitation” requirement does not yet seem to have been clarified. Still it should be possible to rule out some rocks, i.e., small islands. In order to prove that an island is inhabitable, it ought to be possible to prove some kind of physical presence of human beings, either in the past or the present, and not only of scientific personnel or military troops. Although actual habitation is not necessary, some kind of practical test must be fulfilled to prove habitability. In this case it will clearly be easier to argue that an island can sustain human habitation if it has actually been inhabited. In addition to proof of physical presence, this presence should be of a kind that makes it reasonable to assume that a “stable community” of human beings could live permanently on the island. This means in turn that the most essential needs for the survival for human beings must be available. The essential such needs are food, fresh water and shelter. The availability of food, fresh water and shelter may thus be chosen as the main characteristic of an island that is capable of sustaining human habitation.

4.5. “Economic life of its own”

Article 121.3's other requirement; “*economic life of its own*” adds even more ambiguity to the question of what it takes for an island to have a right to an EEZ and a continental shelf. Does the “of its own” phrase refer to economic life on the island itself, or can resources in the adjacent waters and the subsoil be taken into account? Further, what is a proper definition of economic life? Does any kind of economic activity count? Moreover, as with the human habitation requirement the question is if the island should be required to have sustained economic life in the past or present or if it would be enough to make it seem likely that it can sustain economic life in the future.

To add a test of economic viability to the requirements that an island must fulfil in order to generate an EEZ may cause problems since the adjacent waters of a feature may serve as basis for economic life and thus may convert an otherwise useless piece of land into a territory of great economic importance. Logically, therefore an economic viability test may cause injustice by its

preclusive application.²⁰¹ This for example, was evident from statements at UNCLOS III by representatives from certain pacific islands. The Fijian delegate pointed out that in certain parts of the world remote islands might have no viable land based economy, but could have significant economic development based uniquely on their fishing industry.²⁰² The “economic life of its own” criterion might therefore be fulfilled if the waters around a certain island provide sufficient fishing opportunities.

A strict literary interpretation of 121.3 would indicate that fisheries do not qualify. An island/rock must “of it’s own” be capable of sustaining economic life. Further, the use of the present tense in the article, “cannot” sustain economic life, supports an interpretation with focus on the present situation, meaning that if the resources are proven to be present but are not currently in use, the feature fails to qualify. However, the words “able to sustain” must indicate that actual use of the resources is not necessary and that the presence of resources which can support an economic life is sufficient. Moreover, the fact that the word “rock” was used in paragraph 121.3 might imply that the restrictions given in the requirements on habitation or economic viability should not be emphasised too much because there already exists a curtailment in the use of the word “rock” instead of island. Hence one might conclude that the requirements are not vested in past or present, not even future actual occurrences, but in an evaluation of the island as a physical feature. Actual occurrences are not in themselves proof of anything, but can be used as arguments that islands pass certain tests. Supportive to this view is also the aforementioned Judgement of the Supreme Court of Norway.²⁰³ The court stated that Abel Island did not fall within the scope of the exceptions of article 121.3, partly because it would be able to support a significant Polar bear hunt if such hunting had not been prohibited for conservation reasons. The Court further stated that the requirement could hardly be fulfilled, when it was the prohibition as such and not the physical opportunities on the island that that prevented it from sustaining an economic life of its own.²⁰⁴

²⁰¹ Symmons, *op. cit.* at 53.

²⁰² U.N. Doc. *Official Records*, Vol. II, at 283.

²⁰³ Supreme Court of Norway, Judgement of 7 May 1996, Rt. 1996, p. 624.

²⁰⁴ *Ibid.*

The mere existence of a natural resource cannot, however, be enough. It must be argued that the resource can represent economic value over a certain period of time. If not, then a state could sell an otherwise useless piece of rock to a private who wanted to own an isolated island, and then claim that the price paid represented proof of economic life. It would also be possible to break off and sell coral from an otherwise worthless, uninhabitable reef and claim that this was proof of economic life. If such sales would help an island satisfy the economic life criterion, then the whole concept of article 121.3 would be undermined. Thus it needs to be some kind of restriction as to the kind of economic activity required. The *travaux préparatoires* mention that military or other governmental installations do not satisfy the requirement of economic life.²⁰⁵ A more complex question is tourism since in this case an island is not sold only once, and not (necessarily) destroyed as when coral is broken off, but can be utilised repeatedly over a long period of time to people who pay for just looking.

Fish, tourism and oil are not the only disputable sources of economic life. A small island can also gain economic value from utilisation for navigation, communication or as a weather station. And in the age of the Internet and satellite communication, it might be possible to set up a lucrative software business, for instance a virtual casino, anywhere. This latter argument should, however, be rejected since again it would remove all meaning from article 121.3. Moreover, in this case it is not the island itself or its territorial waters that serve as basis for the economic life. The same business could be set up anywhere. The words “of its own” suggest that the islands own resources must provide at least part of the basis for its economic life. This does not, of course, mean that the feature must have complete self-sufficiency.²⁰⁶ If an island is uninhabited but has natural resources that may be exploited, and such exploitation requires human activities on the island itself or in its territorial waters it seems that the “economic life” criterion is being fulfilled.²⁰⁷ Support from the outside must be allowed in order to realise the economic value an island may hold.

²⁰⁵ U.N. Doc. *Official Records*, Vol. III at 284.

²⁰⁶ U.N. Doc. *Official Records*, Vol. III at 288, In statements from several States it was strongly suggested that self-sufficiency was not required by the provision.

²⁰⁷ In the Jan Mayen Case the Norwegian fishing fleet were exploiting the waters around the uninhabited island of Jan Mayen.

As article 33 of the Vienna law of treaties prescribes, one may also obtain further clarification by analysing the official texts of article 121.3 in other languages. The French and Spanish texts refer respectively to “une vie économique propre” and “vida económica propia”, which both is synonymous with an economic life of its own.²⁰⁸ Those texts thus closely follow the English version allowing the meaning to include support of necessities from outside as long as the economic life is based on the economic value or resources of the feature itself. The Russian text uses the phrase “samostoiatel`noi khosiaistvennoi deiatel`nosti”, which may be translated as self sustaining economic activity.²⁰⁹ The Chinese text however, employs the phrase “wei chi” which is translated as “sustain”, but does not use the phrase “zhi sheng wei chi” which means, “self sustaining”.²¹⁰ The Chinese text does thus not seem to require the ability to survive independently.

It seems thus; that “economic life of its own” should be interpreted as allowing some sort of support. The main requirement must be that the feature itself represents economic value in the sense that it has resources that are utilised for economic activity. In this connection the reference to the island must include of its 12 nautical-mile territorial sea since this will belong to the island regardless of whether it satisfies 121.3 or not.

Because “economic life” and “human habitation” are directly linked to human activities and developments that may vary over time, it follows that the meaning of article 121.3 is likely to do the same. Consequently some features that would previously be entitled to extended maritime zones may today fail the requirements of article 121.3 and vice versa. The point may be best illustrated by imagining a small island in the middle of an ocean where huge amounts of exploitable hydrocarbon resources are being discovered under the seabed within that island’s 12 nautical-mile territorial waters. Prior to the finding the feature would fail to pass the economic life requirement in article 121.3. However, the new circumstances will, if the natural resources can be exploited, provide the island with an ability to sustain an economic life of its own for a long period of time. If, however there does not exist techniques to exploit the resource the feature

²⁰⁸ Charney, Jonathan I, “Rocks that cannot sustain human habitation”, *American Journal of International Law* Vol. 93, 1999, at 871.

²⁰⁹ Ibid.

²¹⁰ Ibid.

seemingly will be categorised as an article 121.3 rock because the classification depends upon the circumstances at the moment of the claim.

Paradoxically, the presence of exploitable hydrocarbon resources within an island's 12 nautical-mile territorial zone could thus help it fulfil the economic life criterion so it would gain a right to a full 200 nautical-mile continental shelf and EEZ, and thus in turn become an economic goldmine. This paradox could be a serious matter in the case of the Spratlys. If some of the claimant states expect or hope to discover oil in the immediate vicinity of the islands they claim, then they may hope to gain a significant extra bonus in the form of a continental shelf and EEZ. And then they will have no incentive to clarify their maritime zone claims or resolve disputes over maritime delimitation before the oil has been found. This danger would have been eliminated if 121.3 had said "and" instead of "or". Then the economic life requirement would not have been a sufficient condition for gaining a right to extended maritime zones, and small islands would have needed to satisfy both the human habitation and economic life requirement.

4.6. Practice with regard to the interpretation of Art. 121 (3)

Because the language of article 121 of the LOS Convention is ambiguous and since many states may never become party to the Convention, it is of outermost necessity to review the practice of states, Tribunals and Courts of Arbitration in order to find some specific interpretation of the provision and determine what international law standards govern claims to maritime zones based on insular formations. It has to be noted though that most of the practice that has been produced so far governs mainly delimitation of maritime zones and as such do not specifically deal with the definitional aspect of islands. However, the practice taken into account in this scope governs maritime delimitation where islands are involved, and it most certainly indicates some views of the entitlement to maritime zones as well.

4.6.1. Judicial decisions and Arbitrations.

The International Court of Justice has been conferred several cases of maritime delimitation where small island formations have been distorting elements. In the North Sea Continental Shelf Cases, which delimited the continental shelf between Denmark, West Germany and the

Netherlands, the tribunal stated that “islets, rocks and minor coastal projections” should be ignored in delimiting the continental shelf boundaries.²¹¹ This early boundary decision thus rejected the notion that all islands should generate equal zones. Although the I. C. J. recognised that the Territorial Sea and Continental shelf Conventions did not differentiate formally among islands, it concluded that their size and location are inevitably factors in determining their impact on maritime boundaries.²¹²

In the Case Concerning the Continental Shelf between Tunisia and Libya²¹³, the court determined that Kerkennah, an island of 180 square km. and a population of 15000 should be given only half effect in delimiting the continental shelf boundary between the two states.²¹⁴ The Court in this judgement, seemingly succeeded the ruling from the North Sea Continental Shelf Cases, but found that Kerkennah, because of its considerable size and position had to be taken into account as a relevant circumstance in the delimitation.

In the Gulf of Maine Case²¹⁵ between the United States and Canada, the court ruled that Seal Island off the south west coast of Nova Scotia should be given only half effect in drawing the maritime boundary of that region, even though the island is inhabited all year round.²¹⁶ The court stated that “Seal Island together with its smaller neighbour Mud Island by reason both of *its dimension* and, more particularly, of its *geographical position*, cannot be disregarded”.²¹⁷ (Italics added) In the Libya v. Malta case the court ruled that equitable principles required that the tiny uninhabited island of Filfla²¹⁸, belonging to Malta and situated three miles south of the main island, “should not be taken into account at all” in determining the boundary between the two

²¹¹ North Sea Continental Shelf Cases, Para 57.

²¹² Ibid.

²¹³ Tunisia Libya Case, Para. 129.

²¹⁴ Tunisia Libya Case, Para. 128. Shoals and low-tide elevations varying from 9 to 27 km. in width surround Kerkennah Islands. Those features were also taken into account when constructing the half effect line.

²¹⁵ Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area, (U.S. v. Canada), I.C.J. Reports 1984, p. 246, (Hereinafter cited as Gulf of Main Case).

²¹⁶ Gulf of Maine Case, Para. 222.

²¹⁷ Gulf of Maine Case, Para. 222, Seal Island is some two-and a half miles long and rises to a height of some 50 feet above sea level. The Island further lies only nine miles inside the closing line of the gulf and therefore occupies a commanding position in the entry to the gulf.

²¹⁸ Van Dyke Morgan and Gurish, “The Exclusive Economic Zone of the Hawaiian Islands: When do Uninhabited Islands Generate an EEZ?” *San Diego Law Review*, Vol. 25, 1988, “Filfla has been used for target practice in previous years and is now a bird sanctuary.” Referring to an interview with Arvid Pardo in Honolulu, Hawaii May 18, 1988.

countries.²¹⁹ The main island of Malta was also given only partial effect because of its small size in relation to Libya's broad coast. Malta's main island is 122 square miles in land area, and has a population of 350 000, yet it was not considered to have full power to generate extended maritime zones when opposed by larger land areas.

More recently in the Gulf of Fonseca Case, the court ruled that none of the islands in dispute namely, El Tigre, Menguera and Menguerita, or any of the other islands present in the gulf should affect the delimitation of the maritime boundaries.²²⁰ The court found that the waters inside the gulf, except from a 3-mile territorial sea belt, should be subject to joint sovereignty amongst the States.²²¹ Menguerita is an uninhabited island which lacks fresh water, is covered with vegetation and has an overall area of 26 hectares. Menguera is covered with vegetation and has an elevated and rocky coastline. It measures 6 km. from north to south and 3,7 km. from east to west. The highest point is 480 metres above sea level, and it has an overall area of 1,58 hectares.

The Franco-British Arbitration is one of the most significant recent arbitrations with regard to islands and boundary delimitation. The case concerned the delimitation of the maritime boundaries of Eddystone Rocks, the Channel Islands and the Scilly Isles, all belonging to the United Kingdom. Two issues, which are of specific importance to the present discussion, were decided. First, the tribunal rejected the arguments made by the United Kingdom that the Channel Islands generated a continental shelf independent of the English and French shelves.²²² The tribunal found that the Channel Island could not generate full maritime zones as sought by the British, but that the inhabited islands of Jersey and Guernsey constituted "special circumstances"²²³ and would generate continental shelf enclaves of 12 miles.²²⁴ Significantly the tribunal ignored all the other small rocks and isles in the Channel Islands that were not inhabited.²²⁵ Secondly, the Court held that the Scilly Isles which consist of 48 islands of which 6 are inhabited, should be given half effect in the maritime delimitation. For the purpose of this

²¹⁹ Libya Malta Case, Para. 64.

²²⁰ Gulf of Fonseca Case, Paras. 390-5.

²²¹ Gulf of Fonseca Case, Paras. 369-420, the waters in the Gulf of Fonseca was characterised as jointly owned historic waters.

²²² Franco-British Arbitration, Para 190.

²²³ According to the Continental Shelf Convention, Art. 6.

²²⁴ Franco-British Arbitration, Para. 202.

²²⁵ *Ibid*, Para. 184.

measurement, the tribunal constructed one set of baselines using the Scilly isles and one set that ignored them. The triangle thereby created was then divided in two to create the half effect line. Interesting to note is also that the tribunal justified its use of this half effect approach partly because of the economic and political conditions on the islands.²²⁶

The Arbitration tribunal that decided the maritime boundary dispute between Guinea and Guinea-Bissau²²⁷ in 1985 made two rulings involving islands relevant to this analysis. First, it appears to have given no role to Guinea's small islet of Alcatraz. The tribunal seemed to be concerned with placing Alcatraz on the right side of the median line, but did not even address the idea that Alcatraz itself should be given a maritime zone.²²⁸ Second, the tribunal did include the coastlines of Guinea-Bissau's large offshore islands in measuring the overall coastlines of the two countries to determine their proportionality and thus to evaluate whether an equitable solution had been achieved by the line chosen.²²⁹

In summary, recent judicial decisions and arbitrations have been relatively consistent in refusing to give full effect to small insular formations in delimiting maritime boundaries. These situations however, govern mostly the delimitation of maritime areas where maritime zones of opposite or adjacent states overlap. Where there exists no such overlap, and the maritime zones of an apparently tiny uninhabited feature only makes encroachment of the high seas, we might find that the issue is treated differently. States would have less incitement to take action against unjustifiable encroachments on areas of the high seas, which have no particular interest for them other than being an area that in general should be for the benefit of humankind. In the SCS however we are looking at huge overlaps if some or any of the spratly features may generate extensive maritime zones.

²²⁶ Bowett, Derek B, *The Legal regime of Island in International Law*, Dobbs Ferry, New York: Oceana Publications, 1979, at 223-24, (Hereinafter cited as Bowett, 1979).

²²⁷ Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau (Award of 14 February 1985), *International Legal Materials* 25 (1986): 252, (Hereinafter cited as Guinea Guinea-Bissau Case).

²²⁸ Guinea Guinea-Bissau Case, Paras. 103, 106-7.

²²⁹ Guinea Guinea-Bissau Case, Para. 120.

4.6.2. State practice applying Art 121 (3)

One of the most significant disputes with regard to the interpretation of article 121(3) involves the insular formation called Rockall in the North Atlantic, which the United Kingdom has claimed as a continuation of British territory.²³⁰ Rockall is a single outcrop of granite measuring approximately 200 feet (61 metres) in circumference and reaching about seventy feet (21 metres) high.²³¹ It lies some 160 nautical miles from the British territory of St. Kilda off the Outer Hebrides of Scotland and some 200 nautical miles from the Irish coastal country of Donegal.²³² Its sheer, steep granite surface makes it habitable only for the heartiest of seaweed and seabirds.

In section one of the Fisheries Limits Act of 1976, Britain proclaimed that “British fishery limits extend 200 miles from the baselines from which the breadth of the territorial sea adjacent to the United Kingdom, the Channel Islands and the Isle of Man is measured.”²³³ Later a nautical chart attached to a notice to mariners plotted a 200 nautical mile around Rockall.²³⁴ Ireland, Iceland and Denmark all made objections to the declared zone on the basis of article 121(3). A protest issued by Ireland in 1977, for instance cites an earlier version of what became article 121(3) as evidence that international law prohibits rocks and islets without economic life or human habitation from generating an EEZ. The statement concluded, “The British claims [...] that their fishery limits can be reckoned from Rockall as though it was part of the mainland is directly contrary to the views of majority of the Worlds States as to the rules of international law.”²³⁵ In connection to its accession to the LOS Convention Britain later redefined the fishery zone limit off Rockall.²³⁶ The United Kingdoms roll back on their fishery zone certainly indicates that it was considered that Rockall was not a valid basepoint for such limits under 121 (3).

²³⁰ Symmons, 1979, at 135, (quoting the statement of the Irish Government Services: “The United Kingdom seeks to justify their claim to jurisdiction over the continental shelf of the Faeroe Plateau surrounding Rockall on grounds that it is geomorphologically linked with the West Scottish coast.”).

²³¹ Symmons, 1979, at 51; O Donnell, “Rockall –The Smallest British Isle”, 23 *Sea Frontiers* (1977) at 342.

²³² Ibid.

²³³ Fishery Limits Act of 1976, reprinted in 2 F. F. Durante & W. Rodino, *Western Europe and the Development of the Law of the Sea* (United Kingdom) L.22.12.1976 (1984).

²³⁴ Symmons, 1979, at 261.

²³⁵ Symmons, 1979, at 126.

²³⁶ Anderson, D. A, “British Accession to the UN Convention on the Law of the Sea”, 46 *International and Comparative Law Quarterly*, 1997, at 778. (Citing a statement by the Foreign and Commonwealth Secretary; the limit of the fishery zone was redefined accordingly in the Fishery Limits Order 1997 Statutory Instrument 1997 No. 1750 of 22 July 1997).

South Africa has claimed twelve tiny guano islands off the Namibia coast (Southwest Africa).²³⁷ Each island is close to shore, and houses used by guano prospectors and fishing groups are built on ten of them. The islands have gained renewed interest recently because diamonds and natural gas may be found in their vicinity. Because these rocks are so close to the coast and have been used historically, it probably is acceptable to use them as basepoints provided that they belonged to Namibia. However they are also claimed by another nation, thereby making it more difficult to determine whether the islands should generate extended maritime jurisdiction at all. One commentator recently presented the argument that these islands support a “stable community of people” because of the fishing groups that use them.²³⁸ The commentator nevertheless concluded that the equitable solution would be to allow the islands to generate only 12-mile enclaves, not full 200 nautical mile zones.

Another very much debated case is the French claim of a 200 nautical mile zone around Clipperton Island directly south of Acapulco, Mexico.²³⁹ Clipperton Island is a flat coral atoll with one volcanic rock rising at one end. The circumference of the closed ring of coral limestone is about 12 kilometres and the average width of the ring about 200 metres.²⁴⁰ The island has little vegetation and has been of interest in earlier eras only for its guano deposits. If France were required to prove that Clipperton could sustain a human habitation or an economic life of its own, it would be difficult to show that the island has in fact sustained a population and economic life from its guano. Very small communities lived together in uncertain conditions between 1892 and 1917, but their survival depended upon constant outside support. The island does not appear to have an “economic life of its own” today, and it is doubtful whether anyone ever made any profit from its guano.²⁴¹

The maybe most extensive claims to maritime zones are those of the Latin American countries that claim 200 nautical mile territorial seas off the coasts of their territories. Brazil has claimed a

²³⁷ Brand “The Legal Relevance of South African Insular Formations Off the SWA/Namibian Coast”, *Sea Changes* No. 4, 1986, at 88-105.

²³⁸ *Ibid* at 100.

²³⁹ Decrete No. 78-147 du 3 Fevrier 1978, *Portent Creation, en Application de la loi du 16 Juillet 1976 d`uneZone Economic du Lerge des Cotes de l`ile de Clipperton*, reprinted in F. Durante & W. Rodino, *Western Europe and the Development of the Law of the Sea (United Kingdom)* L.22.12.1976 (1984).

²⁴⁰ Van Dyke Jon M. and Brooks Robert A. “Uninhabited Islands: Their Impact on the Ownership of the Oceans` Resources”, *Ocean Development and International Law Journal*, Volume 12, 1983 No. 3-4, at 36.

200 nautical mile territorial sea “measured from the low-water line of the continental and insular coast of Brazil”.²⁴² This claim would appear to include the distant St. Peter and St. Paul Rocks which are uninhabited rocky formations lying about 535 nautical miles from the Brazilian coastal city of Natal.²⁴³ Chile has similarly laid down a claim for a 200 nautical mile zone measured from its coast and islands.²⁴⁴ The claim appears to include the uninhabited island of Sala y Gomez which is some 3900 feet (1,2 Km.) long and 500 feet (152 metres) wide and is located over 1790 nautical miles from the Chilean coastline.²⁴⁵ In 1985 Chile extended its claim for a continental shelf extending to a distance of 350 nautical miles from Sala y Gomez.²⁴⁶ The United States protested to this claim, but only on the grounds that the claim failed to meet the terms of article 74 of the LOS Convention.²⁴⁷ Nothing was mentioned about the fact that the claim was based on an offshore feature that hardly can meet the terms of article 121 (3).

Extensive maritime claims can also be found in the Pacific. New Zealand proclaims an EEZ around “the coast of New Zealand, including the coast of all islands”. The claim includes the Kermadec island group, which lie some 535 nautical miles from The North Island of New Zealand. The only inhabitants on this “rocky group” of islands are about ten New Zealanders who staff the meteorological station on Raoul, the northernmost islet in the chain.²⁴⁸ New Zealand also claims 200 nautical mile zones around the uninhabited Chatam, Antipodes and Campbell Islands to the east and south of the main islands.²⁴⁹

Mexico has laid claim to a 200 nautical zone around the Revilla Gigedo Island group, which includes the uninhabited Clarion Island, also known as Santa Rosa. This island is some five miles (8 km) long, 1,8 miles (3 km) wide and rises to an altitude of 388 feet (118 metres).²⁵⁰ It faces the

²⁴¹ *Ibid*, at 287.

²⁴² Presidential Decree No. 1098, The Limits of the Territorial Sea, art. 1 (March 10, 1970) reprinted in U.N. ST/LEG/Ser.B/16 at 3.

²⁴³ The Columbia Lippencott Gazetteer of the World, 45 (L. Seltzer ed. 1962), at 1643.

²⁴⁴ Presidential Declaration, Sovereignty over the continental shelf, art 1 (June 23, 1947) reprinted in 2 A. Szekely Latin America and the Development of the Law of the Sea, Chile 13 (1980).

²⁴⁵ The Columbia Lippencott Gazetteer of the World, 45 (L. Seltzer ed. 1962), at 1649.

²⁴⁶ Ramakrishna, Bowen and Archer “Outer Limits of Continental Shelf: A Legal Analysis of Chilean and Ecuadorian Island Claims and U. S. Response”, 11 *Marine Policy* 1, 58, 61 (1987), at 63.

²⁴⁷ *Ibid*.

²⁴⁸ Pacific Islands Yearbook 209 (Carter ed. 1981), at 233.

²⁴⁹ New Zealand Ministry of Foreign Affairs, The Law of the Sea and New Zealand, Information Bulletin No. 10 (1984).

²⁵⁰ Pacific Islands Yearbook, 370 (J. Carter Ed. 1984).

open Pacific Ocean and if permitted to generate an EEZ, would take up great sea areas unobstructed by other maritime claims in the west. In contrast to this claim, however, Mexico does not take into account the Alijos Rocks to the north of the Revilla, which rise only to an altitude of 12 feet (4 metres). Mexico appears to endorse article 121 (3) with respect to smaller rocky insular formations, but not larger ones and this practice thus is supportive to the interpretation that rocks of a certain size should not come within the scope of article 121.3.

Fiji also must be added to the group of nations claiming extensive zones for small rock-alike features offshore. Fiji claims an EEZ around Ceve-I-Ra, also known as Conway Reef, which is a six and a half-acre uninhabited sandy Cay located some 270 nautical miles from the nearest Fijian territory.²⁵¹

4.6.3. Bilateral Treaties

Some bilateral treaties may also be of support when attempting to clarify the meaning of Article 121.3, and to determine the significance of islands in maritime disputes. Argentine and Chile recently settled a dispute concerning islands off the coast of Tierra del Fuego in the Beagle Channel.²⁵² The larger inhabited islands in the channel are fringed by many smaller uninhabited rocks and islets, which are included in the agreement. The parties agreed that the smaller Chilean islets be given less than full effect. Thus this agreement seems to follow the trend set by the I.C.J. and Arbitration Courts.

In delimiting their boundary in the South China Sea, Indonesia and Malaysia gave reduced value to Indonesia's Natuna Islands, apparently because of their remoteness and size and perhaps out of a sense of fairness to Malaysia, which did not have a "corresponding insular formation" off its coast.²⁵³ Similarly, Colombia and Panama gave "reduced weight" to Colombia's Malpelo Island when they delimited their Pacific Ocean boundary, possibly on account of its small size and distant location.²⁵⁴

²⁵¹ Broder & Van Dyke, "Ocean Boundaries in the South Pacific", 4 U *Harvard Law Review*, 1 (1982), at 40-42.

²⁵² Treaty of Peace and Friendship, Chile-Argentina, reprinted in, 24 *International Law Materials*, 11,12 (1985).

²⁵³ Jayewardene, at 418-19, referring to the agreement of 27 October 1969, *International Boundary Series*, Series A, no 1, U.S. Geographer, Department of State.

²⁵⁴ Jayewardene, at 451.

Especially interesting for the current issue, might be the continental shelf boundary agreements between Abu Dhabi and Qatar²⁵⁵ and between Italy and Tunisia²⁵⁶. In both agreements enclaves were drawn around the islands on the “wrong side” of the median line, but the islands were not otherwise allowed to influence the drawing of the boundary. The circular enclaves in mention gave the islands 12 nautical miles territorial seas. This follow-up of the decision in the Anglo-French Arbitration certainly indicates that islands situated either on the wrong side of a median line boundary or otherwise within jurisdictional limits of another State will not be influential in the delimitation of a maritime boundary.

In the continental shelf boundary agreements between Iran and U.A.E. (Dubai) and between Iran and Qatar, a seemingly different approach was taken when the off lying islands were ignored totally in the delimitation because the ownership of the islands were disputed and the status of the islands were indeterminate.²⁵⁷ These two agreements and also the Abu Dhabi-Qatar agreement may be argued especially relevant for the SCS dispute because they treat islands in maritime delimitation in the Persian Gulf, which like the SCS is a semi-enclosed sea. It is not inconceivable that there could be developed a special regime for how to deal with maritime delimitation in regard of islands situated within semi-enclosed seas. At present, however there is not sufficient practice to argue that such a regime has been developed. It cannot be denied, though, that the solutions reached in the above mentioned agreements could serve as models for the negotiators of the SCS dispute.

The maritime boundary between the Norwegian island of Jan Mayen and the country of Iceland was determined partly by agreement and partly by a Conciliation Commission established by the two nations.²⁵⁸ Jan Mayen is 30 miles long and 2 miles wide. Norway maintains a radio and meteorological station on the island, but it is otherwise unpopulated. Jan Mayen is only 290 miles from Iceland, but the commission approved the agreement of the two nations granting Iceland its

²⁵⁵ Jayewardene, at 408-9, 437-38, discussing the agreement of 20 March 1969 published in *International Boundary Series*, Series A, no. 18 U.S. Geographer, Department of State.

²⁵⁶ Bowett, 1979, at 273, discussing the agreement signed on 20 August 1971, which entered into force on 6 December 1978.

²⁵⁷ Jayewardene, at 482.

full 200 nautical mile maritime zone, implicitly recognising that small Jan Mayen has substantially less capacity than much larger Iceland to generate such a zone.²⁵⁹

In the Adriatic Sea a number of small islands lying between Italy and Yugoslavia were given partial effect in delimitation.²⁶⁰ The island of Kharg was similarly given half effect in the delimitation between Iran and Saudi Arabia.²⁶¹ Further examples of islands given partial or no effect in boundary delimitation are between Indonesia and Singapore,²⁶² Iran and Qatar,²⁶³ Bahrain and Saudi Arabia,²⁶⁴ Iran and the United Arab Emirates,²⁶⁵ and Canada and Denmark (Greenland)²⁶⁶.

4.7. Concluding remarks

Van Dyke and Brooks²⁶⁷ have come to the conclusion that it would have been desirable if the negotiators at UNCLOS III had examined the issue of islands once again before settling for the vague text of article 121.3. The vagueness must probably be ascribed to the fact that many nations possessed uninhabited islands, and thus had no incitement to limit the possible gains from possessing such islands. Vagueness was therefore preferred. Hodgson²⁶⁸ has pointed out that many of the isolated islands of the world are either uninhabited or are populated by non-indigenous inhabitants. He thus found that the Howland, Jarvis and Baker islands belonging to the U.S.A. could not sustain a permanent population due to lack of drinkable water and fertile soil. He also pointed out the problems in definitional aspects concerning similar other remote islands that merely has a caretaker population, i.e., are inhabited by only military or scientific

²⁵⁸ Conciliation Commission on the Continental shelf Area between Iceland and Jan Mayen, *International Legal Materials*, 20 (1981).

²⁵⁹ As opposed to this, Norway has not laid down any claim to extended maritime zones around Bouvet Island in the southern ocean and this probably indicates that it considers this island to be a rock within the meaning of article 121 (3). Bouvet Island is not inhabited and is considerably smaller than Jan Mayen.

²⁶⁰ Jayewardene, at 412-13.

²⁶¹ Bowett, 1979, at 215.

²⁶² Jayewardene, at 373-74 (referring to the agreement of May 25, 1973, I.B.S. Ser. A., No. 60).

²⁶³ Jayewardene, at 395 and 402 (referring to the agreement of Sept 20, 1969, I.B.S. Ser. A., No. 25).

²⁶⁴ Jayewardene, at 397-98 (referring to the agreement of Feb. 22, 1958, reprinted in, 7 *International & Comparative Law Quarterly*, 518 (1958).

²⁶⁵ Jayewardene, at 405-07 and 426 (referring to the agreement of Aug. 31, 1974, I.B.S. Ser. A, No. 63).

²⁶⁶ Jayewardene, at 431-32 (referring to the agreement of Dec. 17, 1973, I.B.S. Ser. A, No. 72).

²⁶⁷ Van Dyke Jon M. and Brooks Robert A. "Uninhabited Islands: Their Impact on the Ownership of the Oceans' Resources", *Ocean Development and International Law Journal*, Volume 12, No. 3-4, (1983) at 288.

²⁶⁸ Hodgson, "Islands, normal and special circumstances", Gamble and Pontecorvo (Eds.) *Law of the Sea: The Emerging Regime of the Oceans*, U.S.A., 1973, at 148.

personnel, but he did not say how one were to treat such islands. Van Dyke, Morgan and Gurish in a survey of the North-western Hawaiian Islands concluded that the U.S. position, that every insular formation is entitled to generate an EEZ was not consistent with article 121.3. They further argued that the habitability requirement should be interpreted as “supporting a stable community of permanent residents”.²⁶⁹

Because it seems that article 121.3 was drafted with the following idea: “I cannot exactly define what I mean, but show me an offshore territory and I will let you know if it is a paragraph 3 rock”²⁷⁰ the article needs to be interpreted with an amount of discretion. The solution may be found in general rules of interpretation, notably that any interpretation must be made in good faith and take all relevant circumstances into account.

The practice of states show that nations tend to assert broad claims to extended maritime zones based on small islands, especially when the islands are somewhat contiguous or near the nation’s mainland. However, many states seem to have taken inconsistent positions with regard to their various island possessions. Much of this inconsistency must however be explained in terms of the location of the islands although some must also be explained in terms of size. In regard to the bilateral agreements the nations seem to ascribe considerable weight to the argument of size. The case law dealing with the issue has shown that size and location are highly relevant factors, at least when settling overlapping maritime boundaries.²⁷¹ Much indicates that these norms also will apply where there is no overlapping claim. Thus, and because of the large number of objections to nations broad claims to maritime zones based on tiny uninhabited features, the practice does not seem sufficient to document that any superseding rule different from the conventional rule has been established. It should however, be argued that the practice is supporting that the criterion of size will have to be considered when applying article 121.3 and that it in some cases even may be decisive.

²⁶⁹ Van Dyke Morgan and Gurish, “The Exclusive Economic Zone of the Hawaiian Islands: When do Uninhabited Islands Generate an EEZ?” *San Diego Law Review*, Vol. 25, 1988.

²⁷⁰ Albert W. Koers and Bernhard H. Oxman, *The 1982 Convention on the Law of the Sea*, (The Law of the Sea Institute, University of Hawaii: Honolulu, 1984), at 345.

²⁷¹ See Jan Mayen Case and Libya Malta Case.

Even though, the lack of objectivity of the drafting of the “rocks” paragraph will probably lead to further dispute rather than solutions it seems that some references can be made to how the terms of article 121.3 should be interpreted. First, there seems to be a limitation in the use of the word “rock” in the sense that some islands, viz. Jan Mayen, will not need to satisfy article 121.3 because of their size alone.²⁷² Second, since the word “and” in the early drafts of the convention text was replaced by “or” in the final text, it seems clear that each of the “human habitation” and “economic life” criteria are in themselves sufficient, and that it is not necessary to satisfy both. Third, neither of these two requirements needs to be fulfilled in practice; it suffices to pass a test that proves they can be fulfilled. Fourth, when applying article 121.3 one should submit islands to certain tests. The key tests are if it can provide fresh water, food and shelter to human inhabitants and if it possesses sufficient resources of its own to sustain economic life and that this is sustainable over a reasonable period of time. Fifth, some sort of outside support should be allowed in realising an island's economic opportunities since in most cases this is necessary in order to realise an economic potential. Sixth, some kinds of “economic” activity such as government-paid military occupation or scientific work, navigational aid, and activities that in no way are using local resources, cannot be accepted as proof of economic viability. Seventh, certain types of inhabitants such as soldiers and persons stationed for scientific and preservation reasons cannot be accepted as proof of sustaining human habitation. And eight, the status of features may vary over time because the criteria in article 121.3 will themselves be subject to change as new technologies and life conditions emerge.

Although no defined formula exists for determining when an island has the capacity to generate extensive maritime zones a proposal from the distinguished writer Ely is of great interest. He suggests that the cut-off point should be such as to deny recognition to an islet if its land area is less than a stated ratio to the area of its territorial sea.²⁷³ Such a definition would not leave room for big controversy although in some cases it can be argued having an inequitable effect where population, political importance and use could be distorting elements. However such inequity

²⁷² Some State practice seems to support such an interpretation as well. At least Norway and Mexico seem to distinguish between “rocks” with different size.

²⁷³ Yearbook of the International Law Commission, Vol. 1, (1954) at 93.

could to some extent be balanced with the existence of the provisions in the LOS Convention granting sovereignty to territory based on historical use.²⁷⁴

Finally it should be noted that it must be clear that in the case of the Spratly Islands it is totally unlikely that any of them after a maritime boundary delimitation will be allocated full 200 nautical miles maritime zones. This, because, as delimitation practice shows, small islands has far less capacity to generate such zones than the, in this case, much larger opposed coasts. In addition many of the features also are situated less than 200 nautical miles from the surrounding coasts. This means, that if the trend of “enclaving islands” in maritime delimitation practice is followed, these features would risk to be allocated no more than 12 nautical miles territorial seas even if they could qualify the requirements spelt out in Article 121.3.²⁷⁵ This does not affect in any way the individual features capacity to generate maritime zones, but is obviously relevant in deciding the significance of the Spratly features in the SCS dispute. This thesis does not however intent to elaborate on these particular problems but it should be mentioned that they are circumstances that should be taken into consideration in the quest for finding an equitable solution to the SCS dispute.

²⁷⁴ LOS Convention, Articles 15 and 10 (6).

²⁷⁵ Reference is made to chapter 4.6 of this thesis.

5. APPLICATION TO THE SPRATLYS

5.1. Introduction

The above sections have analysed the definition of an island in international law. Specially the meaning of article 121.3 of the LOS Convention in light of its negotiating history, some interpretations of its terms, the decisions made by tribunals and arbitrators, and the practices of nations that have interpreted and applied the terms. The following will apply the above-mentioned analysis to the different features of the South China Sea constituting the Spratly Islands.²⁷⁶ This survey will identify, at least in theory whether or not some or any of the features can claim maritime zones of jurisdiction, if so, which those zones are.



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Geogr... nds”, *IBRU Maritime Briefing*, Vol. 1, No. 6 (1995); Valencia, Van Dyke and Ludwig, *Sharing the Resources of the South China Sea*, Hague: Martinus Nijhoff, 1997; J.R.V. Prescott, “Maritime Jurisdiction in the South East Asia: Commentary and Map”, *East West Centre Environment and Policy Institute Research Report*, No. 2, Honolulu, (1981); Jon M. Van Dyke, Dale L. Bennett, “Islands and the Delimitation of Ocean Space in the South China Sea”, *Ocean Yearbook*, Vol. 10 (1993).

The Spratlys consist of about 150 features scattered over a huge area in the Southern part of the SCS, and each and every one must be examined independently in order to discuss its capacity for generating maritime zones. The first task is to decide how many islands there are in the Spratlys, i.e., how many satisfy the requirement of article 121.1 in the LOS Convention. Estimates here vary between 20 and 46.²⁷⁷ As earlier mentioned this survey will not however, conduct an analysis of all the spratly features but only treat a selection of the features. Since generation of extensive maritime zones is what is of most importance to the Spratly dispute, it seems expedient to include only the features that are documented thoroughly to allow a justifiable analysis with regard to the application of article 121.3. Notwithstanding, that any feature which obviously does not come within the scope of article 121.3 is excluded from this analysis.

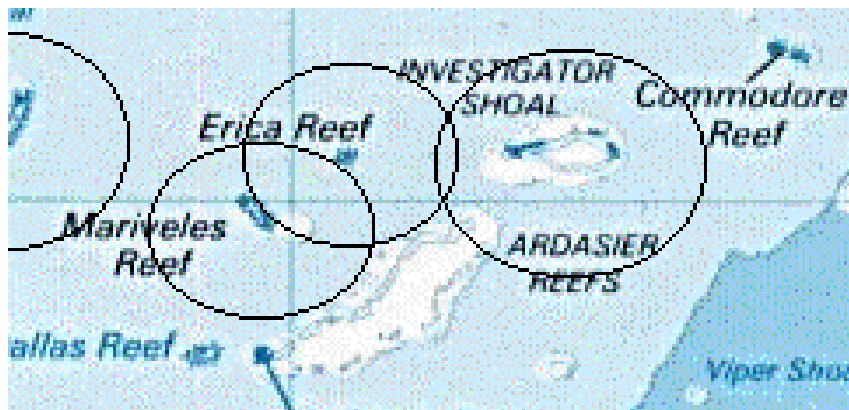
First of all, a problem that all the Spratly features have in common is that during the monsoon waves regularly wash over a large part of the features. There exists however, no precise information on how high an elevation a feature must have to escape this problem, and further, the lack of precise information on the impact of the monsoon waves makes it difficult to solve this particular issue. However, as earlier noted the intended rule of being above water at high tide according to article 121.1 does not seem to require absolute permanence above high water. It thus can reasonably be assumed that this will not cause big definitional problems in regard to the Spratly Islands or any other island for that matter. This issue will therefore not be further discussed.

Second, it is clear that the Spratlys are not (such as Jan Mayen) big enough to escape the requirements defined in 121.3. The Spratly Islands are very small islands that, in accordance with the argument made under chapter 4.3.1 of this thesis, must be seen as analogous to what article 121.3 calls “rocks”. The interpretation derived from the Jan Mayen case does not give any precise indication as to the size needed for an island to escape the requirements defined in 121.3, only

²⁷⁷ Hancox and Prescott, “A Geographical Description of the Spratly Islands and an Account of Hydrographic Surveys Amongst Those Islands”, *IBRU Maritime Briefing*, Vol. 1, No. 6 (1995); Ji Guoxing, “The Spratly Disputes and Prospects for Settlement”, *Institute of Strategic and International Studies (ISIS) Paper*, (Malaysia, 1994); Bennett, Michael, “The People’s Republic of China and the use of International Law in the Spratly Island Dispute”, (1992) 28 *Stanford Journal of International Law*, at 425-50.

that Jan Mayen is big enough. Jan Mayen is 373 square km. The largest feature in the Spratlys, Itu Aba is only about 0,5 square km. None of the Spratly features has an elevation of more than 6-8 meters, whilst the highest point on Jan Mayen is 2277 meters. Thus, it cannot with any convincing effect be argued that the Spratlys fall within the same category as Jan Mayen. It will therefore be necessary for those of the Spratly features that satisfy 121.1, and thus qualify as “islands”, to also satisfy one or the other of the two requirements in 121.3 in order to generate extensive maritime zones.

5.1.1. Mariveles reef



This drying reef lying in the southern part of the Spratly area has a shape that resembles a teaspoon with the handle-pointing south-east.²⁷⁸ The total area of the reef and lagoon is 17 square km. This steep-to reef completely encloses a lagoon at each end although the south-eastern lagoon is only one-third the size of the north-western lagoon. There is a sand-cay 1-2 metre high between the two lagoons. This cay which has some rocks that stand above high water is reported to be occupied by Malaysia, which also has 20 soldiers stationed here. Mariveles reef thus fits into the island category according to article 121.1, and has capacity to generate a territorial sea and a contiguous zone according to article 121.2.

Some of the fringing reefs of this feature show above water at low tide and may therefore be used as base-points in the baseline for measuring its territorial sea. A belt of internal waters will thus

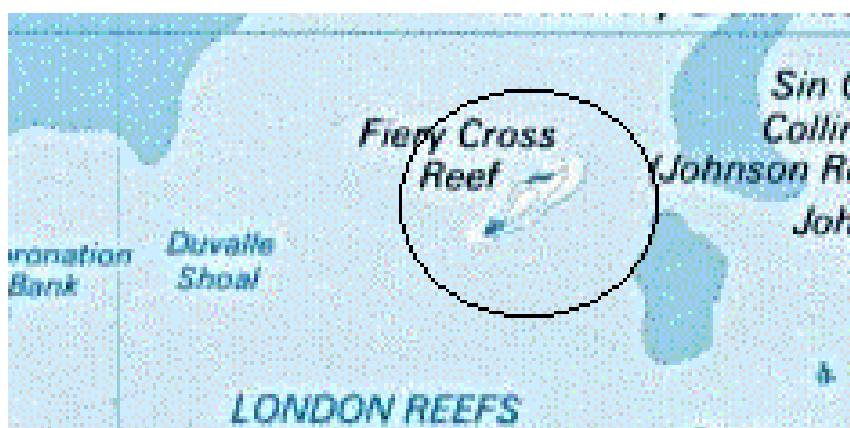
²⁷⁸ The maps on the different Spratly features are based on American Oceanographers map no. 801947 (R001177) 4-92. All measurements show the limits of the territorial sea for the specific feature(s).

appear between the cay and its surrounding reefs and the total maritime belt will reach beyond 12 nautical miles from the low water line of the cay itself. Assuming one state alone is granted sovereignty to Mariveles reef as well as the nearby Erica reef and Investigator shoal which both also are reported to be high tide elevations, a continuing zone may be drawn around all three features as one zone is overlapping the other. If however sovereignty to the features should fall on different hands it will be necessary to delimit the territorial seas between them.

At present Malaysia occupies the reef and thus there would be no need for delimitation between the reef and the opposing coast. However since sovereignty to the feature is disputed, Malaysia may not be granted sovereignty to the feature and then delimitation will be necessary.

As to the question whether or not Mariveles reef should be able to generate also an EEZ and a continental shelf it should firstly be noted that Malaysian soldiers inhabit Mariveles reef. It can be argued that this presence of military personnel indicates that the feature can sustain human habitation. However, the mere fact of inhabitants is not sufficient to qualify the article 121.3 requirements. Moreover, as specifically derived from the *travaux preparatoires* and from the object and purpose of article 121.3, military troops cannot be used as proof of human habitation. There are no records of any vegetation or any natural resources on this feature. Most importantly the feature does not seem to have available fresh water that could support a human habitation. These geological facts imply that this feature at present cannot support either human habitation or an economic life of its own. Mariveles reef must therefore be regarded as a rock within the meaning of article 121.3, without capacity to generate an EEZ and a continental shelf.

5.1.2. Fiery cross reef

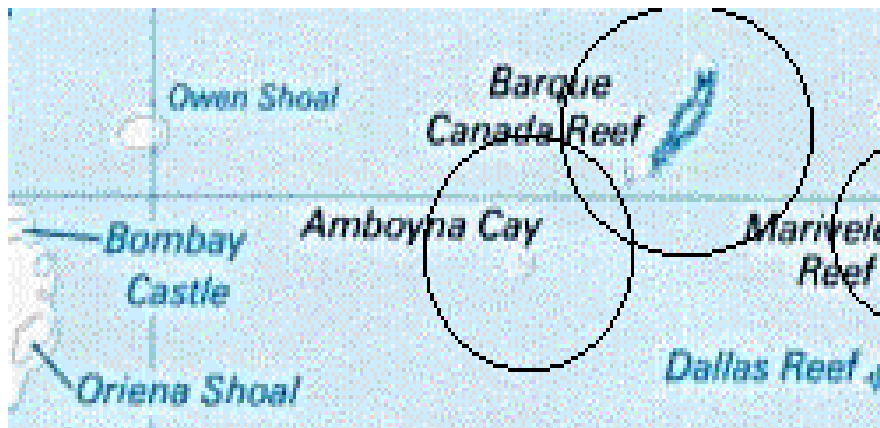


Situated in the centre of the Spratly group, north of the London reefs is Fiery Cross reef. This is a steep-to reef which has a linear shape aligned south-west north-east. Its long axis measures 14

nautical miles while the maximum width is 4 nautical miles giving a total area of 110 square kilometres. Reefs measuring one nautical mile wide surround a lagoon; several patches of coral uncover and between them are channels with depths from 15 to 40 meters. At high tide the whole reef is covered except for a prominent rock one meter high. Some guano deposits are reported to be present. The current occupier, China has built a navy harbour by blasting, piling up and cementing coral. They say however that no soldiers are stationed there. The reef has an airstrip, and a marine observation station was built in 1988. According to one report, coconut, fir and Banyan trees have been planted there as well.

This feature seemingly represents a dubious attempt to create an island capable of generating extensive maritime zones. The single rock that stands above water at high tide however, classifies the feature as an island and it can thus generate a territorial sea and a contiguous zone. This single rock that is the only naturally formed part of the feature standing above water is however, clearly incapable of supporting any human habitation since it lacks fresh water and fertile soil. It might be argued that the navy harbour, the airstrip and the marine observation station represent evidence of economic activity on the feature and that it thus qualify the requirement of sustaining economic life of its own. However, as derived from the *travaux preparatoires* of article 121.3 such installations cannot be used as evidence of economic life. Moreover, it would not be the island of its own that could sustain economic life if no local resources are being used. Since there does not exist documentation supporting that any natural resources are present on Fiery Cross reef, the reef seems incapable of sustaining such life. Conclusively, this feature must be classified as an article 121.3 rock, which can as a maximum generate a 12 nautical mile territorial sea and a contiguous zone.

5.1.3. Amboyna cay



Situated south east of the London reefs, this cay has an area believed to be 1,58 hectares and the height of the cay above high water is about 2,4 metres. In 1864 there was one metre of guano at the western edge of the reef. British sailing directions of 1988 still describe the western half of the cay as being covered with a bed of guano. The cay is encompassed by an irregular coral platform up to 360 metres wide that dries in parts. The coral banks extend 800 metres and 550 metres respectively from the Northwest and Northeast edges of the reef surrounding the cay. The cay has little vegetation but an obelisk about 2,7 metres high stands on the south-west corner. A heavily fortified lighthouse has been operational since May 1995 and one report even says that Malaysia has drawn territorial seas around this cay.

Since Amboyna cay is a naturally formed area of land with an elevation above water at high tide it clearly can generate a territorial sea and a contiguous zone. Since the nearby and also Malaysian occupied Barque Canada reef also is reported to have a high tide elevation their respective territorial seas will overlap to some degree. Those two features are however also claimed by the Philippines, China/Taiwan and Vietnam and the outcome of the sovereignty issue may thus require delimitation between the features.

In regard to extensive maritime zones the lack of tillable soil and fresh water on Amboyna cay however, makes it totally unfit to support a human habitation. The fact that there is no record of any previous or present inhabitants supports this conclusion. Except for the presence of guano, which is known to be a useful fertiliser, no natural resources are reported on this feature. However, even if these guano deposits would show to be substantial, the cost of digging out and transporting to the fertiliser market would be prohibitive. Thus it must be argued that Amboyna cay cannot sustain an economic life of its own. Moreover, since Malaysia has drawn territorial seas around it but not extensive maritime zones we might deduce that Malaysia itself does not

consider it to be capable of generating extensive maritime zones. Conclusively, Amboyna cay must be classified as an article 121.3 rock without capacity to generate an exclusive economic zone or a continental shelf

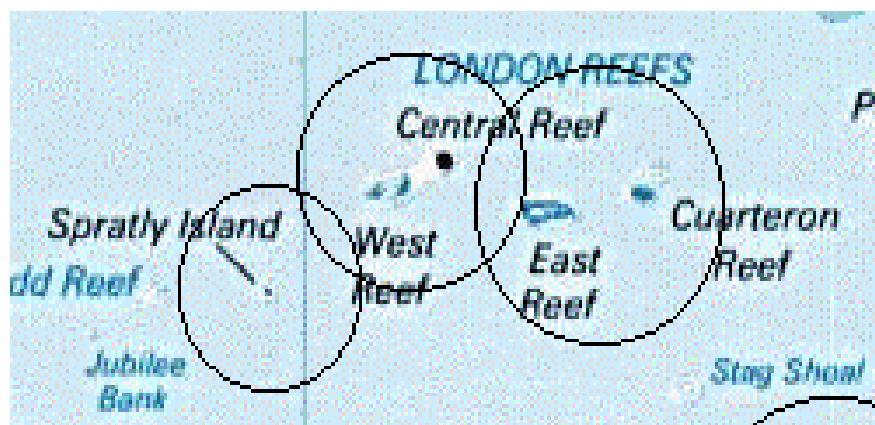
5.1.4. Swallow reef



At the southern tip of the Spratly area lies Swallow reef, which is a narrow belt of coral about 3,5 nautical miles in length and an area of about 6,2 hectares. It encloses a shallow basin and there are some rocks, which stand above water at the east and south-east section of the reef. There is a small treeless cay standing 2 metres high on the south rim of this reef around which Malaysia has drawn territorial seas. The reef maintains a beacon and 70 Malaysian soldiers are stationed there. It has a fishing port and a 15-room resort, including a 1,5-km. airstrip. It has also been reported that soil is imported and that trees have been planted there in recent times.

Clearly, Swallow reef is an island which may generate a territorial sea and a contiguous zone. Its prospects of generating extensive maritime zones are more doubtful. The Malaysian soldiers stationed there indicate that human habitation is possible but cannot be used as proof of a sustainable human habitation. Moreover, the feature clearly does not seem to be equipped with natural resources sufficient to sustain humans. The feature is clearly unfit for agriculture, it does not have sufficient access to fresh water and its nakedness makes it useless as shelter for humans. It should thus be argued that it fails to qualify the human habitation requirement. In regard of the economic life criterion, as earlier noted all military installations should be disregarded. The presumed presence of a hotel must however be taken into consideration. It should firstly be noted that there is some disagreement about the actual status of this so-called 15-room resort because some reports claim that it in fact is a barrack for soldiers. Nevertheless, even if it should be a hotel, a hotel is something you can build on any type of feature, even a submerged one. Thus, and since such economic activity is not based on resources the island itself possesses, it seems doubtful that it is the island that generates the economic life of its own. Conclusively it should be argued that Swallow reef lacks capacity to sustain human habitation or economic life “of its own”, and thus must be classified as an article 121.3 rock.

5.1.5. London reefs



Spratly Island is the feature that by custom provides the collective name to the islands, reefs and shoals of the South China Sea and it is part of what is called London reefs lying in the south western part of the Spratly area. The island has a shape of a triangle with a base aligned north-east south-west measuring 750 meters and the apex 350 metres distant. It has an area of about 13 hectares and stays 2,4 meters above water at high tide. It was covered with bushes, grass, birds and guano according to a survey from 1963. The same survey also mentions a 5,5 metres high obelisk that stands at the southern tip. The island reportedly has a 600-meter landing strip, a power plant, a lighthouse and perhaps also a fishing port.²⁷⁹

Since Spratly island clearly is a naturally formed area of land surrounded by and above water at high tide, it cannot be questioned that it is an island that can generate a territorial sea and a contiguous zone. Further, Spratly islands territorial sea overlaps with those of the other features of the London reefs and thus marks a circle around the whole group. If different states are granted sovereignty to features of the group it will also be necessary to delimit the territorial seas between them. At present Vietnam occupies Spratly island, West reef, Central reef and East reef while China occupies Cuarteron reef.

Spratlys possibility of generating extensive maritime zones, however, needs further consideration. There are no indications that the island has been or is currently populated. The

²⁷⁹ Chien Chung, "Economic Development of the islets in the South China Sea", Paper delivered at the SCS Conference, American Enterprise Institute, Washington DC, 7-9 Sept., 1994, p. 15.

presence of mammals of some kind in the past may be an argument supportive to sustainability of human inhabitants, however clearly insufficient as proof of human habitation. The fact that the mammals once ceased to exist there could in fact imply that the feature is unfit for land based life. Nevertheless the limited access of fresh water will certainly be a huge problem for any human settlers. It thus should be argued that the requirement of being able to sustain human habitation is not fulfilled. Whether or not it can sustain economic life of its own must be seen in connection to that the island has a power plant a landing strip and a lighthouse. The mere fact that a power plant has been constructed indicates that some economic activity is going on. However, as above noted the activity, in order to qualify as proof of economic life in the meaning of article 121.3, must be of a different kind than preservation, military and scientific purposes. Unless some economic viable activity is proven to exist or to be possible, which presently is not the case, the conclusion must be that Spratly Island is by definition a rock as described in article 121.3 and thus incapable of generating extensive maritime zones.

5.1.6. North Danger reefs



The North Danger Reefs mark the northern tip of the Spratly group and Northeast cay and Southwest cay are the most prominent features there. Northeast cay measures 1,2 nautical miles along its main axis and measures 0,5 nautical miles at its widest. It has a height of 3 metres, its area is about 7 hectares and it dries to one meter. Only 320 meters south of Northeast Cay there is a feature that stands two metres above high water. This feature which is called Shira Islet is a pronounced hummock with a circumference of about 90 meters. The reef between Northeast Cay and Shira Islet dries at low water. Northeast cay is believed to contain guano deposits, and in 1984 it supported a beacon. In the early 1980s the cay was heavily wooded with trees up to 9 metres high and it is still reportedly covered with coarse grass. The Philippines occupies the cay but no reports mention that they have any soldiers stationed here.

This feature is undoubtedly an island capable of generating a territorial sea and a contiguous zone, however two other features situated within 12 nautical miles from Northeast cay must be taken into account when measuring its maritime zones. North reef and South reef are both features with above low-water elevations and may thus be used as basepoints for the measurement of the territorial sea.²⁸⁰ The territorial sea of Northeast cay will thus be measured from the low water line of the reefs and leave a belt of internal waters on the inside between the cay and the reef.

The question then is if it has capacity to generate an EEZ and a continental shelf. The fact that the feature has coarse grass vegetation and *maybe* some guano deposits is clearly not sufficient for sustaining neither a human habitation nor an economic life. The lack of natural resources on this feature, especially the lack of tillable soil and fresh water makes it highly unlikely that the feature could be able to sustain human habitation or economic life of its own. The fact that there has been no human habitation there neither in the past or present also supports this conclusion. The conclusion must be that Northeast cay thus fails to meet the conditions of article 121.3 and must be considered as a rock without capacity to generate extensive maritime zones.

Southwest cay, which is the second prominent feature of the North Danger reefs, has a length of 650 meters and a width of 280 metres, giving an area of about 12 hectares. It is 4-6 meters high, has an oval shape and a fringing reef partly above water at high tide. It was reportedly a breeding place for birds in 1963 when it was covered with trees and guano. Export of guano was once carried out on a considerable scale. On the Southeast side there is a 12 meters high “mast” and two wells. Vietnam erected its first lighthouse in the Spratlys here in October 1993, and may have built an airstrip as well. In the early 1980s the cay was heavily wooded with trees up to 9 metres high and the cay is reportedly still covered with coarse grass. Undoubtedly a territorial sea and a contiguous zone apply to this cay. Moreover, the fringing reef if situated wholly or partly at a distance not exceeding the breadth of the territorial sea may be used as the baseline for measuring the cay actual territorial sea giving an area of internal waters on the inside of the reef and a territorial sea beyond. There will also be an extensive overlap of territorial seas not only between Southwest Cay and Northeast Cay but also with the Thitu reefs in the south.

²⁸⁰ LOS Convention, Article 13.1

In regard to generation of extensive maritime zones, the fact that export of guano has earlier been carried out on a considerable scale indicates that the cay at least in the past was sustaining some type of economic life. However, as noted above the cost of digging out and transporting guano to the market would be prohibitive. Thus and because the application of article 121.3 is connected to the time of the claim, even if guano might perhaps have been exploited profitably at some time in the past the guano deposits cannot sustain economic life today. The feature does not have any other natural resources that could support an economic life and it thus does not seem capable of fulfilling the “economic life” condition. Generation of extensive maritime zones must then be based on the features ability to sustain human habitation.

The feature is currently not inhabited and no reports speak of any prior settlement. The presence of fresh water and vegetation cannot in itself be considered sufficient to qualify the requirement of sustaining human habitation although it indicates that habitation is possible. Moreover, again, the absence of human beings may indicate that human habitation is impossible. The remoteness of the feature however indicates that even if it could provide some humans with food, water and shelter, it could only do so for a limited period of time. Thus and because, there does not currently exist evidence supporting that Southwest cay has the capacity to neither sustain human habitation nor an economic life of its own it seems in an overall evaluation reasonable to conclude that this cay should also be classified as a rock in the meaning of article 121.3 and that it cannot generate extensive maritime zones.

5.1.7. Thitu reefs and Loaita bank



The largest and dominating feature of the Thitu reefs is Thitu Island. This feature is composed of two steep-to coral reefs which surround an elongated lagoon 3,5 nautical miles long with a maximum width of 1,1 nautical miles. Thitu (or Pagassa) Island, which is the second biggest

island in the Spratlys is with its surrounding reefs located north of the Loaita Bank and south of the North Danger Reefs. The island has an elevation of 3,6 metres and an area of about 32 hectares. It was originally covered with low bushes, coconut palms and plantain trees and this is probably still the case since current reports say the island has a variety of flora and fauna. Chinese fishermen in the past occasionally inhabited the island and reportedly some weathermen and maybe even some fishermen now inhabit it. The island is equipped with a 5500 feet landing strip known as the Rancudo airfield, which also has an aircraft parking area, and two (commercial) flights go weekly. Reportedly the island also has a lighthouse, a power plant and a marina.²⁸¹ The Philippines, who occupies Thitu Island, has stationed an approximately 100-man military force there and one report even say that they plan to open the island for tourism.²⁸²

Thitu Island is clearly an island in the legal definition and has capacity to generate a territorial sea and a contiguous zone. However, also here an overlap of maritime zones occur as the territorial sea of Thitu island overlap with the zones of the North Danger reefs in the north and Loaita Bank in the South.

Whether or not it may generate extensive maritime zones must however, be subjected to further consideration. The fact that fishermen have inhabited the island in the past, even if it was on permanent basis or just seasonally, is as earlier mentioned not sufficient to prove human habitation although it indicates that human habitation is possible. The presence of military personnel and weathermen also indicates sustainability however, by definition the requirement of human habitation does not take into account personnel stationed on an island for preservation and scientific purposes. It should however, be argued that the presumed presence of fishermen is of another category. It is difficult to say anything definitive on this point as long as the fishermen's presence is not positively confirmed. Moreover the sources say that *some* fishermen *may* be stationed there. This indicates that they are unlikely to form a stable community. The meaning of "sustain human habitation" must be more than some frequent visits by fishermen. It must mean that, if not stable community then at least a group of humans that make it's living on the island and inhabit it all year. If a population consists of merely fishermen living on the island for certain

²⁸¹ Chien Chung, "Economic Development of the islets in the South China Sea", Paper delivered at the SCS Conference, American Enterprise Institute, Washington DC, 7-9 Sept., 1994, p. 15.

²⁸² "Philippines Plan to Open Spratly Island to Tourism", *Asia Pulse*, 18 Feb. 1999.

periods of the year, this should not be sufficient to qualify the requirement in article 121.3. The question is then if the fishermen are only finding shelter on the islands for a certain period of the year, or if they live their permanently. A key to resolving this question might be to examine if whole families are living on the islands, or if fishermen go regularly back to see their families, who live in other places. All that can be said in this regard is that it has never been reported that any families have been living permanent on any of the Spratly islands.

If we assume that the fishermen do not live permanently on Thitu Island with their families, then the actual presence of human beings on Thitu in the past and present does not seem to validate the point that this island can sustain human habitation. This does not necessarily mean that the feature lacks capacity to sustain human habitation. Even though the volatile habitation as such does not positively prove that the feature has capacity to sustain human habitation it may be possible to argue that it can do so. To validate such arguments it is necessary to examine if the island has fresh water, if it can produce food, and provide shelter. Some vegetation is reported on Thitu Island, however it seems doubtful that it has tillable soil that can allow the production of food to sustain a human habitation. Even though the feature with its sparse resources is able to support some humans with food for a limited period of time this does not seem to validate that human habitation is *sustainable* in the meaning of article 121.3. The most necessary means for sustaining human habitation is the presence of fresh water and the existence of fresh water is an indication that human habitation may be possible. It cannot, however, be seen as sufficient proof of that the feature can *sustain* human habitation. It seems though in an overall evaluation that Thitu Island lacks capacity to sustain human habitation or at least that no evidence sufficient to prove such habitation currently is available.

Thitu Island's prospect of sustaining economic life of its own must also be considered separately. The military and scientific constructions on the island are arguments of an economic life; however, as stated above such installations do not qualify as proof in the context of article 121.3. More relevant is the question of what would be the case if the Philippines were to open the island for tourism. A tourism industry of some size arguably must be considered as economic life. It is extremely difficult to give a ruling of either or on this particular issue. One could however assume that in an overall consideration, economic life based on tourism cannot be sufficient in the context of article 121.3 because it is obvious that any feature whatever geological and geographical circumstances may be used for such purposes. Another issue is that this kind of economic life is necessarily dependent upon support from a mainland or similar for administration and transport. The "of its own" phrase of article 121.3 suggests that economic life

must be based on the feature's own natural resources but adds that some sort of support from the outside should be accepted in order to realise an island's resources. It may thus be argued that this type of support from the outside thus must be accepted.

The case in regard of tourism as well as fisheries and production of oil is that local resources are being used. If an island has local natural resources that can support a sustainable economic life one should think that the conditions of article 121.3 is fulfilled. The question then, however, is if this economic life can be said to be generated by the island "of its own" if the island as such does not have a necessary role to play in the economic activities. If a factory ship, a hotel built on stilts on a submerged reef, or an oil platform could serve the purpose as well – or better, then it seems doubtful that it is the island that generates the economic life of its own. Conclusively it should be argued that Thitu Island does not fulfil the condition of sustaining human habitation or economic life and thus is incapable of generating extensive maritime zones.

Another feature of the Thitu reefs that require mentioning is Subi reef. Shaped roughly like a diamond this reef measures 3,7 nautical miles in length and 2,7 nautical miles in width and is situated south west of Thitu Island. Subi reef is naturally above water only at low tide. It surrounds a lagoon and China has constructed three-storey buildings, wharves and a helipad there. This feature thus represents one of the most appalling examples of dubious attempts to put ocean space under national sovereignty. Subi reef is beyond doubt a low tide elevation, which under no circumstances has the capacity to generate any maritime zone of its own. However, the Chinese creation of what obviously must be classified as an artificial island, may award the appropriation of a 500-meter security zone.²⁸³ Subi could however be used as a base point in the baseline for measuring the breadth of the territorial sea of the nearby Thitu Island. At present however, the Philippines occupies Thitu Island and if they were granted sovereignty to that island, Subi reef, which is occupied by China and situated within its territorial sea, must probably be considered a part of Thitu island and thus Philippine sovereign territory.

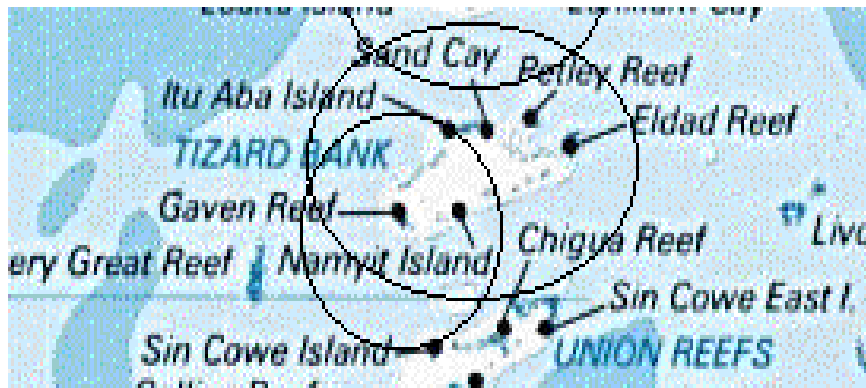
South of Thitu reefs lies Loaita bank of which Loaita Island is the most prominent feature. Situated south on a quadrant shaped reef, Loaita Island has an area of about 6 hectares and stands

²⁸³ LOS Convention, Article 60 (5).

1-2 metres above high water. Reportedly it was covered with mangrove bushes, coconut palms and other small trees in 1933. The same reports also say that a beacon has been operational here, but includes no indication on who built it. The Philippines currently occupies the island, which appears to be a feature that can generate a territorial sea and a contiguous zone. The two other features of Loaita bank called Lankiam cay and Loaita nan are also reported to have high tide elevations. The territorial sea of Loaita island thus will overlap with the zones of those features and they again all overlap with the zones around Thitu reefs in the north and the Tizard bank in the south.

In regard to generation of extensive maritime zones it should only briefly be noted that, even though there reportedly still is some vegetation on this feature, the remoteness of the feature, the lack of accessible fresh water and tillable soil makes it very unlikely that the feature could have capacity to sustain human habitation. The fact that the island had an operational beacon there may represent some economic activity, however even if it had been operational today it would not prove economic life in the meaning of article 121.3. Conclusively, based on the total lack of natural resources Loaita Island must be classified as an article 121.3 rock.

5.1.8. Tizard bank



South of Thitu reefs and Loaita bank lies the Tizard bank. Gaven reefs mark the western end of this large bank and the larger northern reef, roughly diamond shaped with an area of 86 hectares, dries in parts to 1,2 metres and has one large rock that stands 1,9 metres above high water. This reef is marked by a sand dune about 2 meters high, which has been called Gaven Island. The smaller southern reef has an area of 67 hectares and dries in some parts to one meter. Gaven reefs thus qualifies the island definition according to article 121.1 and can generate a territorial sea and a contiguous zone. It must also be mentioned that the territorial sea of Gaven reefs will overlap with those of several other features located nearby. The result will thus be one big territorial sea

for the whole Tizard group if one State is granted sovereignty to all the features there. If, however the sovereignty to those features should lie on different hands it will be necessary to delimit the territorial seas between the island features.

Although Gaven reef is a tiny reef its prospects for generating extensive maritime zones should be briefly considered. On the reef, a metal frame has been raised on some cemented ground and a two-storey building is placed on top. The current occupier of this reef is China. Having no vegetation or land-based life it must be certain that this feature is incapable of sustaining any human habitation. We can only speculate why a building has been constructed there; It might be a shelter for fishermen or maybe a barrack for soldiers. It must however be clear that this does not make the feature any more sustainable for human beings. As to the economic life criterion, nothing indicates that this feature has natural resources that could provide it with an economic life of its own. Conclusively, Gaven reefs must be deemed an article 121.3 rock that generates no more than a territorial sea and a contiguous zone.

Itu Aba Island is the most prominent feature of the large Tizard bank and the largest of the Spratly Islands with an area of 50 hectares. Its length is about 1400 meters and its width about 370 metres. The island with a height of 3-5 metres also has surrounding reefs that stand above water at high tide. Guano deposits are present, and the island was according to a survey from 1938 covered with shrubs, coconut and mangroves although recent reports claim that also pineapple is cultivated here. Japan used the island as submarine base during the Second World War and the Taiwanese army, which has occupied it since 1956, had until recently 600 soldiers stationed on the island. (The coastguard as of 1999-2000 has replaced the soldiers.) It is further supplied with a lighthouse, a power plant,²⁸⁴ radio and weather station and a concrete landing jetty. Fresh water, although of questionable quality, is also available here and two wells have been constructed at the south-west End. Reportedly, Hainan fishermen annually visited the island in the past (certainly no later than 1956), but no reports can confirm any permanent settlement. A series of former residential sites dating back to at least the Ming and Qing dynasties has reportedly been discovered.²⁸⁵ A Chinese archaeologist has said ancient Chinese inhabited the

²⁸⁴ Cheng-YI Lin, "Taiwan's South China Sea Policy", *Asian Survey*, Vol. 37, NO. 4, April 1997, p. 2.

²⁸⁵ Reuters, Business Briefing, 20-04-1995

former residential sites.²⁸⁶ In August 1993 plans were announced for a 2 km. long airstrip and fishing port, however it is uncertain whether or not the plans have been effectuated.

It cannot be doubted that Itu Aba Island is an island according to article 121.1 and has capacity to generate a territorial sea and a contiguous zone. There are however, four other features in the Tizard bank which reportedly also have high water elevations; Sand cay, Petley reef, Eldad reef and Namyit island. The territorial sea thus marks a circle around the whole bank. This zone may however be subject to several delimitation issues since China occupies Gaven reefs, Taiwan occupies Itu Aba and Vietnam occupies Sand cay, Petley reef and Namyit island. In addition there is also an overlap of zones with the Philippine occupied Loaita bank in the north and the Chinese and Vietnamese occupied Union reefs in the south.

Considerable doubt however, arises in regard to whether or not it may generate an EEZ and a continental shelf. On the one hand, the findings indicating that there earlier has been some sort of settlement on Itu Aba certainly supports the argument that human settlement is possible although it cannot be seen as sufficient proof to qualify the requirement. On the other hand it may be argued that since this habitation at one point clearly ceased, it was hardly sustainable in the first place. Itu Aba is however presently populated and apparently the island to some degree can support a population with fresh water, food and shelter. *Prima facie* the requirement of sustaining human habitation seems fulfilled. However, it should be questioned if it is the island that supports the inhabitants with the necessary means for survival or if their survival there is based upon supplies from the outside. It is known that supply ships go back and forth from the island however it is difficult to determine whether they only bring military equipment or if food and water is a prominent factor. Nevertheless, a population consisting merely of soldiers, scientific researchers or lighthouse keepers are suggested not to be sufficient as proof in the meaning of article 121.3. The population on Itu Aba is mostly soldiers who are stationed there to defend one nation's sovereignty claim and as such do not strictly fall within the meaning of the human habitation requirement according to article 121.3.

²⁸⁶ Reuters, Business Briefing, 20-04-1995

The prior settlement, the large number of soldiers present and the variety of flora and fauna are all arguments supporting that Itu Aba can sustain human habitation. However, none of these circumstances are eligible as proof of sustainability. As earlier mentioned the condition of “human habitation” must mean more than frequent visits. It must mean that a group of humans, that are not stationed for scientific or preservation purposes make its living on the island and inhabit it all year. This does not seem to be the case with Itu Aba. Thus, since the application of article 121.3 is referable to the circumstances at the time of the claim, Itu Aba at present, should be considered not to be able to sustain human habitation.

The question whether or not this island can sustain an economic life of its own is also difficult. The military structures on the island are as noted above irrelevant in this regard, however the presence of a weather station and a radio station must arguably at least be seen as proof of some kind of economic activity. The crucial element in this regard is that the island “of its own” must sustain economic life. If the island itself does not represent a primary part of the substance of such economic life, it arguably cannot be considered to sustain economic life of its own. It seems thus that the presence of a weather and radio station which in principle could be put up anywhere cannot prove that economic life is sustained by Itu Aba of its own and therefore the requirement cannot be fulfilled. In an overall evaluation it thus seems reasonable to argue that Itu Aba is a rock within the meaning of article 121.3 and that it cannot generate an EEZ and a continental shelf.

6. SUMMARY AND CONCLUSIONS

Since all claimants in the SCS dispute have ratified the LOS Convention there exists a legal obligation upon all of them to use that major tool for solving the conflict. The SCS is a semi-enclosed sea and as expressly stated in article 123 of the LOS Convention the co-operation in the exercise of rights and performance of duties is a legal obligation upon all bordering states.

This thesis has identified the criteria that may reasonably be used when applying article 121 of the LOS Convention and applied those to a selection of the Spratly Islands for the purpose of determining each feature's capacity to generate maritime zones. It seems that although it may be questioned how many genuine islands there actually exists in the Spratly area; it cannot be doubted that there are some. However, the LOS Convention has through article 121.3 excluded a large number of the offshore features of the world from generating exclusive economic zones and continental shelves. One of the objects and purposes of the establishment of the extensive maritime zones which were codified in the LOS convention is, that the population and the community living at shore probably is best suited to exploit and preserve the natural resources found therein. Thus, for the Spratlys where there is no such population, the extended maritime zones should not be permitted.

In all cases of maritime delimitation the overall goal is to reach an equitable conclusion.²⁸⁷ The delimitation of the maritime zones in the SCS would no doubt be much more practical if none of the Spratly Islands were granted more than a territorial sea and a contiguous zone. Not only practical in regard to the delimitation of maritime zones between the islands themselves, but also because there will be no need to negotiate boundaries between the Spratly group and the bordering continental territories. Considerations of equity also supports this solution since if one or a couple of islands should have the right of an EEZ and a continental shelf it would give an unreasonable gain for the state holding sovereignty to those particular islands.

²⁸⁷ LOS Convention article 74 dealing with delimitation of the exclusive economic zone, and article 83 which deals with delimitation of the continental shelf. Article 15, which deals with the delimitation of the territorial sea does not specifically state that the goal is to achieve an equitable conclusion, but it cannot be doubted the principle also applies there.

Since it seems that none of the Spratly features at present have proven to be able to sustain human habitation or economic life of their own, the features should be classified as rocks in the meaning of article 121.3 of the LOS Convention. Further, since the principles that govern delimitation of maritime zones do not allow vast areas of ocean space to tiny, uninhabited and otherwise useless features, the Spratlys are unlikely to be a significant factor in the overall delimitation of the SCS. It thus seems reasonable to conclude that it is quite likely that when and if some of the claimant states should succeed in their quest for sovereignty, they would gain little from the victory in terms of recognised maritime zones.

The SCS dispute is likely to cause aggravated tension in the region. Multilateral discussion groups have however been established and have developed a forum for stabilising this tension to some degree. In particular the informal working groups established by Indonesian Ambassador, Hasjim Djalal and Prof. Ian Townsend Gault from the University of British Columbia with annual informal workshops since 1996 have made a substantial effort to create and establish a multilateral forum in the region. The workshops, which began in 1990, have the goal of easing tensions and increasing co-operation among the contesting states. In the last years, attendees have formed working groups devoted to scientific research, resource development, environmental protection, legal issues, and navigational and communication safety. The effect of this forum is however, limited as any solution to the dispute solemnly rests on the shoulders of the claimants themselves who will need to take the initiative to enter formal negotiations.

Most analysis of the SCS dispute agrees that all the sovereignty claims to the Spratly islands have weaknesses. Each nation must therefore know that its claim may not ultimately or completely prevail if the dispute is referred to arbitration. Thus, and because of widespread distrust of Western-dominated international law, some of the claimants may prefer status quo, seek a military solution or attempt to resolve the dispute through bilateral or multilateral negotiations. It is highly unlikely that they will be willing to risk all in a tribunal ruling, which tends to create winners and losers. However, this does not rule out the possibility that a tribunal could be used in order to resolve some distinct questions. The question as to whether or not any of the features has capacity to generate extensive maritime zones certainly is one such question. If the I.C.J. or the new International Law of the Sea Tribunal in Hamburg were asked to resolve this question, its ruling would at the same time be likely to clarify one of the most ambiguous articles in the LOS Convention.

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