

# The Application of Article 121 of the Law of the Sea Convention to the Selected Geographical Features Situated in the Pacific Ocean

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## Abstract

Article 121(3) of the United Nations Convention on the Law of the Sea states that “Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.” If any of the geographical features situated in the Pacific Ocean are considered “rocks” that fail the tests of habitation or economic viability, they will not be entitled to their own 200 nautical mile exclusive economic zone and continental shelf. However, the paragraph and the tests contained in the article give rise to various questions of interpretation, which have become one of the main sources of maritime disputes between the countries concerned. This article examines the interpretation and possible application of Article 121 to five selected insular features that are situated in the Northern, Eastern and Western Pacific Ocean, namely Baker Island, Howland Island, Clipperton Island, Douglas Reef (Okinotorishima) and Marcus Island (Minamitorishima).

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## I. Introduction

1. Article 121, paragraph 3, of the United Nations Convention on the Law of the Sea (hereafter referred to as UNCLOS)<sup>1</sup> states that “Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.” If any of the geographical features situated in the Pacific Ocean are considered “rocks” that fail the tests of habitation or economic viability, they will not be entitled to their own 200 nautical mile (nmi) exclusive economic zone (EEZ) and continental shelf. However, the paragraph and the tests contained in the article give rise to various questions of interpretation. Different applications or interpretations of Article 121 have also become one of the main sources of maritime disputes between the countries concerned. In the Asia-Pacific, China and Japan as well as the Republic of Korea and Japan are in dispute over the application and interpretation of Article 121(3) with regard to the Douglas Reef (Okinotorishima), which is situated in the Western Pacific. While there has not been much reported or written on the potential legal problems concerning the status of the US Pacific remote islands, and their rights to generate a 200 nmi EEZ or to establish a national marine monument 50 nmi from the islands’ baselines from which the breadth of the territorial sea is measured, challenges can be expected once the United States accedes to the UNCLOS. In addition, the recent action taken by the French government to claim the extended continental shelf for Clipperton Island located in the Eastern Pacific also has the potential to give rise to legal problems concerning the application and interpretation of Article 121(3).

2. The purpose of this article is to examine the interpretation and possible application of Article 121, in particular its third paragraph, to five selected insular features that are situated in the Northern, Eastern and Western Pacific Ocean. The five features are Baker Island, Howland Island, Clipperton Island, Douglas Reef (Okinotorishima) and Marcus Island (Minamitorishima).

3. Following this introductory section, recent actions taken by the governments of the United States, France and Japan, respectively, in support of the five insular features’ right to generate maritime zones beyond 12 nmi from the respective normal baselines of each island will first be introduced in Section II. This is to be followed

1 As of 1 June 2010, the Convention (adopted on 30 April 1982, opened for signature on 10 December 1982 and entered into force on 16 November 1994) had 160 parties. For a historical perspective of the convention, visit the website of the UN at [www.un.org/Depts/los/convention\\_agreements/convention\\_historical\\_perspective.htm#Historical%20Perspective](http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm#Historical%20Perspective) (last visited 8 September 2010). For the status of the Convention, visit [www.un.org/Depts/los/reference\\_files/status2010.pdf](http://www.un.org/Depts/los/reference_files/status2010.pdf) (last visited 8 September 2010). For the text of the convention with annexes and the agreement to implement Part XI of the convention, visit [www.un.org/Depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf) (last visited 8 September 2010).

by a brief summary of the development of the “Regime of Islands” at the Third United Nations Conference on the Law of the Sea (UNCLOS III) in Section III, focusing on the proposals made by the participating delegations to amend or delete entirely Article 121(3) of the UNCLOS. In Section IV, the views of the law of the sea experts on interpretation and application of Article 121(3) will be addressed. Several examples of State practices with regard to the application or interpretation of the article will be provided in Section V. Then, in Section VI, the application of Article 121(3) to the five selected geographical features and some remarks on the implications of the current study for the handling of the similar situation in the Sea of Japan, the East China Sea and the South China Sea (SCS) will be discussed. Concluding remarks will be made in Section VII, which ends the article.

## **II. Actions taken by the United States, France and Japan to establish maritime zones beyond 12 nmi for the insular features situated in the Pacific**

4. A number of actions have been taken by the governments of the United States, France and Japan in support of their respective claims to the right of the very small geographical features situated in the North, Eastern and Western Pacific Ocean, far away from the respective mainland, to generate maritime zones beyond the 12 nmi territorial sea that is measured from the normal baselines of the island in question. While there exist a number of similar claims in the Pacific Ocean, only those actions taken respectively by the governments of the United States, France and Japan in relation to the claims for Baker Island and Howland Island (in the North Pacific), Clipperton Island (in the Eastern Pacific) and Okinotorishima and Minamitorishima (in the Western Pacific) will be introduced in this paper.

### **II.A. Actions taken by the United States**

5. On 10 March 1983, US President Ronald Reagan signed Proclamation 5030, which established the EEZ for the United States. The claimed EEZ consists of those areas adjoining the territorial sea of the United States, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands and US overseas territories and possessions. The US EEZ extends to a distance of 200 nmi (370 km) from the baseline from which the breadth of the territorial sea is measured. About 15 per cent of this area lies on the geological continental shelf and is shallower than 200 m. Within its EEZ, the United States has, to the extent permitted by international law, sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources, both living and non-living, of the seabed and subsoil and the superjacent waters with regard to other activities

for the economic exploitation and explorations of the zone, such as the production of energy from the water, currents and winds.<sup>2</sup>

6. On 27 December 1988, President Ronald Reagan, by signing Proclamation 5928, proclaimed the extension of the territorial sea of the United States, the Commonwealth of Puerto Rico, Guam, American Samoa, the US Virgin Islands, the Commonwealth of the Northern Mariana Islands and any other territory or possession over which the United States exercises sovereignty. The US territorial sea therefore extends to a distance of 12 nmi from the baselines of the United States determined in accordance with international law.<sup>3</sup>

7. In September 2004, the US Commission on Ocean Policy published its final report entitled *An Ocean Blueprint for the 21st Century*, in which a map of the US EEZ is attached.<sup>4</sup> In February 2008, the US Oceanic and Atmospheric Administration (NOAA) approved maritime limits for Howland and Baker Islands,<sup>5</sup> and posted on NOAA's nautical charts in April 2008,<sup>6</sup> which shows a 3 nmi line and 12 nmi territorial sea of Howland and Baker Islands. In 1974, Howland Island and Baker Island were established as National Wildlife Refuges (NWR). The terrestrial areas, reefs and waters out to 12 nmi are part of the US NWR system. In September 2006, *Marshalls 201*, a Taiwanese fishing vessel, was taken into possession by admiralty warrant after it was spotted fishing in the US-claimed EEZ surrounding Howland and Baker Islands.<sup>7</sup>

8. On 6 January 2009, President Bush issued Proclamations 8335, 8336 and 8337, collectively establishing the Pacific Remote Islands Marine National Monument, Rose Atoll Marine National Monument and the Mariana Trench National Monument. In each of these Proclamations, the President directed that the Secretary of the Interior assume specific management responsibilities at

- 2 Proclamation 5030, Exclusive Economic Zone of the United States of America, 10 March 1983, 48 Fed. Reg. 10,605, 10 March 1983. The proclamation can be found in J. Ashley Roach and Robert W. Smith, *United States Responses to Excessive Maritime Claims*, 2nd edn. (The Hague/Boston/London: Martinus Nijhoff Publishers, 1996), Appendices, 517–518.
- 3 Proclamation 5928, Territorial Sea of the United States of America, 27 December 1988, 54 Fed. Reg. 777, 9 January 1989. The proclamation can be found in J. Ashley Roach and Robert W. Smith, *ibid.*, Appendices, 51–520.
- 4 For the map of US EEZ, also visit [aquaculture.noaa.gov/pdf/20\\_eezmap.pdf](http://aquaculture.noaa.gov/pdf/20_eezmap.pdf) (last visited 8 September 2010).
- 5 See Metadata: Howland, Baker and Jarvis Islands Maritime Limits ([www.nauticalcharts.noaa.gov/csdl/boundarymetadata\\_How\\_Bak\\_Jar.html](http://www.nauticalcharts.noaa.gov/csdl/boundarymetadata_How_Bak_Jar.html) (last visited 8 September 2010)).
- 6 See Download 3, 12, and 24-Nautical Mile Limits, Office of Coastal Society, NOAA ([www.nauticalcharts.noaa.gov/csdl/limits.html](http://www.nauticalcharts.noaa.gov/csdl/limits.html) (last visited 8 September 2010)).
- 7 See Hearing for Impounded Taiwanese Fishing Vessel to Begin Next Month ([www.illegal-fishing.info/item\\_single.php?item=news&item\\_id=2550&approach\\_id=13](http://www.illegal-fishing.info/item_single.php?item=news&item_id=2550&approach_id=13) (last visited 8 September 2010)).

each monument.<sup>8</sup> The Pacific Remote Islands Marine National Monument includes Howland Island, Baker Island and Jarvis Island, which are administered by the US Fish and Wildlife Service as NWRs. The director of US Fish and Wildlife Service manages the emergent and submerged lands and waters out to 50 nmi from the mean lower water lines of Howland, Baker and Jarvis Islands as units of the Pacific Remote Islands Marine National Monument. This delegation extends the US boundary of the existing wildlife refuge reach of these islands to 12 nmi from the respective mean low water line of each island. Those areas beyond 12 nmi from the mean low water line for which NOAA has primary management responsibility for fishery-related activities are not included in the US NWR system.<sup>9</sup>

9. A number of legal questions can be raised in relation to the recent actions taken by the United States in the North Pacific. While the United States is not yet a party to the UNCLOS, is it legitimate for the United States to establish a marine national monument for Howland and Baker Islands, extending 50 nmi seawards from the baselines from which the islands' territorial sea is measured? Can the US action against the Taiwanese fishing vessel *Marshall's 201* that was arrested in September 2006 for fishing in the US-claimed EEZ of Howland and Baker Islands be challenged? How should Article 121, in particular its third paragraph, be applied and interpreted regarding the right of Howland and Baker Islands?

## II.B. Actions taken by France

10. In February 1978, France proclaimed a 200 nmi EEZ for Clipperton Island by decree<sup>10</sup> and then extended after France ratified the UNCLOS in December 1995.<sup>11</sup> Mexico strongly protested the French EEZ claim. In response to the protest from Mexico, France agreed to allow Mexican vessels to fish in the waters around Clipperton Island. On 22 February 2007, Law No. 2007-224 was published in the French official gazette, prescribing that Clipperton Island should be managed by the Minister in charge of the Overseas Departments and Territories, who delegates his powers to the Higher Commissioner in French Polynesia. The French continental Law (*droit métropolitain*) is also fully applied in Clipperton Island.<sup>12</sup>

8 See Order No. 3284, the US Secretary of the Interior, Washington, DC, 16 January 2009, Sec. 1 (Background), 1.

9 *Ibid.*, 2.

10 French Overseas Departments and Dependencies, Summary of Claims, DoD 2005, 1-M ([www.dtic.mil/whs/directives/corres/20051m\\_062305/french\\_dependencies.doc](http://www.dtic.mil/whs/directives/corres/20051m_062305/french_dependencies.doc) (last visited 15 May 2010)). See also La Zone Economique Exclusive de Clipperton ([www.clipperton.fr/incagen.html?zee.htm~main](http://www.clipperton.fr/incagen.html?zee.htm~main) (last visited 8 September 2010)).

11 Law No 95-1311, 21 December 1995.

12 See Ivan Sache, Clipperton Island (France) ([www.crwflags.com/fotw/flags/cp.html](http://www.crwflags.com/fotw/flags/cp.html) (last visited 8 September 2010)).

11. In 2009, Daniel Pauly pointed out that there is a high, but unknown degree of illegal fishing in the EEZ around Clipperton Island.<sup>13</sup> In June the same year, Michele Alliot-Marie, who is the French interior minister and minister in charge of overseas territories, questioned the practice of allowing Mexican vessels to fish in the French-claimed Clipperton EEZ. Also in 2009, France submitted the preliminary information indicative of the outer limits of the continental shelf beyond 200 nmi of France's Clipperton to the Secretary-General of the UN, in which a map shows not only a 200 nmi EEZ surrounding Clipperton Island, but also two areas of extended continental shelf.<sup>14</sup> Thus, a question can be raised concerning whether or not the actions taken by the French government are consistent with the regulations provided for in the UNCLOS if Clipperton Island fails to pass the test contained in Article 121, paragraph 3, of the Convention.

## II.C. Actions taken by Japan

12. In December 1982, Japan signed the UNCLOS. About six years later, construction was started on an embankment surrounding the Northern and Eastern Islets in Okinotorishima's lagoon, with the islets being strengthened with concrete and also encased in titanium nets. The main reason for these measures was to prevent these two rocks from being submerged. In addition, a maritime observation and an unmanned weather-monitoring station were constructed on the old foundation of the lighthouse. In October 1989, the strengthening of the embankment surrounding the Northern and Eastern Islets was completed.<sup>15</sup>

13. On 16 November 1994, the UNCLOS entered into force. In June 1996, Japan ratified the UNCLOS and the Japanese parliament immediately passed the "Law on the Exclusive Economic Zone and the Continental Shelf".<sup>16</sup> This law stipulated that the EEZ comprises the areas of the sea extending from the baseline of Japan to the line which is 200 nmi from the nearest point on the baseline of Japan and its subjacent seabed and subsoil.<sup>17</sup> The "Law on the Exclusive Economic Zone

13 Daniel Pauly, *The Fisheries Resources of the Clipperton Island EEZ (France)*, in: D. Zeller and S. Harper (eds.), *Fisheries Catch Reconstructions: Islands, Part I* (Fisheries Centre Research Reports 17(5)) (Fisheries Centre, University of British Columbia, 2009) ([www.fisheries.ubc.ca/publications/reports/report17\\_5.php](http://www.fisheries.ubc.ca/publications/reports/report17_5.php) (last visited 18 September 2010)), 35.

14 For the preliminary information, visit [www.un.org/Depts/los/clcs\\_new/submissions\\_files/preliminary/fra2009infos\\_preliminaires\\_clipperton.pdf?q=informations-prliminaires-clipperton-2009](http://www.un.org/Depts/los/clcs_new/submissions_files/preliminary/fra2009infos_preliminaires_clipperton.pdf?q=informations-prliminaires-clipperton-2009) (last visited 8 September 2010).

15 For more information, see Yann-huei Song, *Okinotorishima: A "Rock" or an "Island"? Recent Maritime Boundary Controversy between Japan and Taiwan/China*, in: Seoung-Yong Hong and Jon M. Van Dyke (eds.), *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* (Leiden and Boston: Martinus Nijhoff Publishers, 2009), 145–149.

16 *Law on the Exclusive Economic Zone and the Continental Shelf*, Law No. 74 of 1996 ([www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/JPN\\_1996\\_Law74.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/JPN_1996_Law74.pdf) (last visited 8 September 2010)).

17 See art. 1, para.2, *ibid.*

and the Continental Shelf” also stipulates that the continental shelf extends from the baseline of Japan to the line every point of which is 200 nmi from the nearest point on the baseline of Japan and comprises the seabed and its subjacent subsoil and the areas of sea adjacent seawards to these areas of sea referred to in Article 2, paragraph 1, as prescribed by Cabinet Order and in accordance with Article 76 of the UNCLOS.<sup>18</sup> The same year, Japan passed the “Law on the Exercise of Sovereign Rights related to Fisheries within the Exclusive Economic Zone”.<sup>19</sup> The aim of this law is to prevent fishing by foreign fishermen in the Japanese EEZ. If foreign fishermen are in violation of this law, they will be subject to detention of fishing vessels, arrest of fishing crews, confiscation of catch and fishing tackle and fines.<sup>20</sup>

14. Between 1997 and 2000, in accordance with Article 16, paragraph 2, of the UNCLOS, Japan publicized charts and lists of the geographical coordinates of baselines and deposited copies of these charts with the Secretary-General of the UN.<sup>21</sup> The outer limits of Japanese EEZ are measured seawards 200 nmi from its baselines. The 200 nmi EEZ has also been established for Douglas Reef (Okinotorishima), Marcus Island (Minamitorishima) and other islands and reefs situated in the Western Pacific. Taking Okinotorishima or Minamitorishima as the centre, and describing a radius of 200 nmi, this delineates an EEZ of 400 000 km<sup>2</sup>.

15. In 1999, in accordance with Government Orders No. 193–195, the Japanese government handed over administrative jurisdiction of Okinotorishima from Tokyo City to the former Ministry of Construction. After the restructuring of the governmental organizations in 2001, the administrative jurisdiction over Okinotorishima was moved to the Ministry of Land, Infrastructure and Transport. In 2004, due to the Chinese claim that Okinotorishima, under Article 121 of the UNCLOS, is not an island but rock and therefore cannot claim a 200 nmi EEZ and continental shelf, Japan undertook a series of actions aimed at strengthening its interpretation of the legal status of Okinotorishima as an island, and therefore having the right to generate a 200 nmi EEZ.

18 Arts. 1 and 2 of Japan’s Law on the Exclusive Economic Zone and the Continental Shelf, Law No. 74 of 1996, above n.16.

19 Law on the Exercise of Sovereign Rights related to Fisheries within the Exclusive Economic Zone (Law. No. 76, 1996, amended by Law No. 91, 29 June 2001).

20 See arts. 4, 18–22, *ibid*.

21 These include: Maritime Zone Notification, No. 14, 1997 (LOS of 6 June 1997), M.Z.N. No. 18, 1997 (LOS of 23 June 1998), M.Z.N. No. 20, 1998 (LOS of 19 August 1998), M.Z.N. No. 21, 1998 (LOS of 30 November 1998), M.Z.N. No. 26, 1999 (LOS of 3 June 1999), M.Z.N. N. 28, 1999 (LOS of 28 June 1999) and M.Z.N. 33, 2000 (LOS of 28 March 2000). See *Oceans and the Law of the Sea*, Division for Ocean Affairs and the Law of the Sea, Deposit of Charts, Updated 3 November 2005 ([www.un.org/Depts/los/LEGISLATIONANDTREATIES/depositpublicity.htm](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/depositpublicity.htm) (last visited 8 September 2010)).

16. Towards the end of November 2004, the Ocean Club under the Nippon (Japan) Foundation despatched an expedition to Okinotorishima for study and observation. In December 2004, Ishihara Shintaro, the governor of Tokyo, stated at a press conference that in order to support the status of the EEZ surrounding Okinotorishima, the city of Tokyo would cooperate with Ogasawara fishing association in carrying out fishery development activities in waters around Okinotorishima.<sup>22</sup> On 20 May 2005, Tokyo Governor Ishihara himself toured Okinotorishima to inspect the conservation and management efforts, went snorkelling to see firsthand the condition of the surrounding waters and released Japanese horse mackerel fry to show support for the local fishing industry. In addition to waving the national flag of Japan on the islet, he also kissed an official address plaque saying, “1 Okinotori Island, Ogasawara Village, Tokyo” in Japanese.<sup>23</sup> In August 2005, Japan’s Coast Guard decided to build a lighthouse on Okinotorishima, for the purpose of “islandization” of Okinotorishima and in support of Japan’s claim for an EEZ surrounding it.<sup>24</sup> Also in August 2005, Japan’s Fisheries Agency asked the government for 400 million Yen to research coral reefs in the area surrounding Okinotorishima.<sup>25</sup> Moreover, Japan has taken actions to expel foreign fishing vessels that are found in the claimed EEZ around Okinotorishima. In October 2005, Japan seized the Taiwanese fishing boat *Long Rong No. 2*, releasing it only after the fishermen’s families paid a 4.08 million Yen bond.

17. In November 2008, Japan submitted to the United Nations’ Commission on the Limits of the Continental Shelf (hereafter referred to as CLCS), in accordance with Article 76, paragraph 8, of the UNCLOS, information on the limits of its continental shelf beyond 200 nmi from the baselines from which the breadth of the territorial sea is measured. Among the seven areas claimed by Japan,<sup>26</sup> the Southern Kyushu-Palau Ridge Region and the Minami-Tori Shima Island Region are relevant to the legal status of Okinotorishima and Minamitorishima. The continental margin in the Southern Kyushu-Palau Ridge Region extends to the south along the Kyushu-Palau Ridge, which forms a natural prolongation of Japan’s land mass on the Ridge

22 Ibid.

23 See Governor Takes Trip, *The Statesman* (India), 21 May 2005; Governor Visits Islet to Assert National Claim, *Los Angeles Times*, 21 May 2005; Mr. Notorious Seeks Olympic Boycott and Little Local War, *The Times* (London), 1 June 2005; and Japan: Japan Signals Ownership of Disputed Islets, *Ottawa Citizen*, 21 June 2005.

24 Lighthouse Planned for Disputed Isle, *The Daily Yomiuri* (Tokyo), 25 August 2005.

25 Japan to Research Coral Reefs near Islets at Center of Dispute with China, *Associated Press Worldstream*, 31 August 2005.

26 The seven areas are the Southern Kyushu-Palau Ridge Region, the Minami-Io To Island Region, the Minami-Tori Shima Island Region, the Mogi Seamount Region, the Ogasawara Plateau Region, the Southern Oki-Daito Ridge Region and the Shikoku Basin Region. For Executive Summary of Japan’s submission to the CLCS, visit the UN website at [www.un.org/Depts/los/clcs\\_new/submissions\\_files/jpn08/jpn\\_execsummary.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/jpn_execsummary.pdf) (last visited 8 September 2010).



represented by Okinotorishima. The continental margin in the Minami-Tori Shima Island Region comprises a broad submarine high, which forms a natural prolongation of Japan's land mass represented by Minamitorishima.<sup>27</sup>

18. In February 2009, in response to the Japanese submission to the CLCS, China and the Republic of Korea delivered respectively a *note verbale* to the Secretary-General of the UN, questioning the Japanese position to claim a 200 nmi EEZ and continental shelf for Okinotorishima.<sup>28</sup> In April 2009, at the 23rd session of the CLCS, Japan made a presentation on its submission and the Commission decided that it would be addressed through the establishment of a subcommission. In addition, the Commission, acknowledging that it has no role on matters relating to the legal interpretation of Article 121 of the UNCLOS, decided that it would revert to the matter when it was ready to proceed with the establishment of the Subcommission.<sup>29</sup> In May 2009, at the 15th Session of the International Seabed Authority, a representative from China stated that "a certain country claims continental shelf within and beyond 200 nmi measured from the base point of the rock called 'Oki-no-Tori' in the Pacific Ocean", which is "only a dozen centimeters above sea-level and less than 10 square meters in its original size" at high tide; it could not sustain human habitation or economic life of its own, as specified in Article 121(3) of the UNCLOS. The Chinese representative stated that the action taken by Japan is not consistent with the regulations provided for in the Convention. The Chinese view was endorsed by the representatives from the Republic of Korea and Cote d'Ivoire.<sup>30</sup>

19. At a briefing meeting organized by the International Seabed Authority for members and observers attending the Authority's 15th session,<sup>31</sup> Jia Yu, Deputy Director of the China Institute for Marine Affairs, made a presentation entitled "Safeguarding the Common Heritage of Mankind", in which she expressed doubts about the legitimacy of the claims made by "some states" because the claims contained "obvious deviations from the principles and relevant articles of UNCLOS".

27 See Japan's Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, Paragraph 8, of the United Nations Convention on the Law of the Sea, Executive Summary, submitted by Japan on 19 November 2008, 9 and 14.

28 For China's note verbale CML/2/2009, visit the website of the UN at [www.un.org/Depts/los/clcs\\_new/submissions\\_files/jpn08/chn\\_6feb09\\_e.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/chn_6feb09_e.pdf) (last visited 8 September 2010). For the Korean note verbale MUN/046/09, visit the website of the UN at [www.un.org/Depts/los/clcs\\_new/submissions\\_files/jpn08/kor\\_27feb09.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/kor_27feb09.pdf) (last visited 8 September 2010).

29 UN Commission on the Limits of the Continental Shelf, Twenty-third Session, New York, 2 March–9 April 2009, CLCS/62, paras.54 and 59.

30 Discussions at the 15th Session of the International Seabed Authority, Press Release, International Seabed Authority, SB/15/6, 28 May 2009 ([www.isa.org.jm/en/sessions/2009/press](http://www.isa.org.jm/en/sessions/2009/press) (last visited 8 September 2010)).

31 Seabed Authority Organizing Briefing for Member and Observers Attending Its Fifteenth Session, Press Release, SB/5/10, 2 June 2009 ([www.isa.org.jm/files/documents/EN/Press/Press09/SB-15-10.pdf](http://www.isa.org.jm/files/documents/EN/Press/Press09/SB-15-10.pdf) (last visited 8 September 2010)).

The article she cited is Article 121(3), which states: “Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”<sup>32</sup> Deputy Director Jia expressed her view that:

The CLCS should not consider those submissions in which the coastal States made groundless claims of continental shelf. Using rocks to claim continental shelf constituted an “excessive claim” and an abuse of the right of the coastal States to establishing the limits of their continental shelf. . . . Those excessive claims . . . would reduce the scope of the Area and its resources which were the common heritage of mankind.<sup>33</sup>

20. The representative of Japan responded to the Chinese presentation by describing it as a well-planned presentation “of a political nature”. He also stated that the sessions of the Authority were not the appropriate forum for the discussion of individual submissions to the CLCS.<sup>34</sup> In August 2009, China sent a *note verbale* to the US Secretary-General to reiterate its position that “since the rock of Oki-no-Tori does not have any ground to claim continental shelf, it is not within the mandate of the Commission to make any recommendation on the portions of continental shelf both within and beyond 200 nmi measured from the rock of Oki-no-Tori as contained in Japan’s Submission.”<sup>35</sup> China asked the CLSC not to take any action on the Southern Kyushu-Palau Ridge Region that involves the status and right of Okinotorishima in the Japanese submission.

21. In September 2009, at the 24th session of the CLSC, the Commission decided to establish a Subcommission and instruct the Subcommission to proceed with the consideration of the full submission of Japan. The Commission reiterated that it had no role on matters relating to the legal interpretation of Article 121 of the UNCLOS. After taking into account the communications addressed to the Secretary-General received in relation to the Japanese submission,<sup>36</sup> the Commission decided that “it shall not take action on the part of the recommendations prepared by the Subcommission in relation to the area referred to in the notes verbales [from China and the Republic of Korea] . . . until the Commission decides to do so.”<sup>37</sup> The said area is related to the question whether or not

32 Ibid., 3.

33 Ibid.

34 Ibid., 4.

35 See the note verbale from the Permanent Mission of the People’s Republic of China to the UN dated 24 August 2009, CML/31/2009 (translation).

36 These communications include the notes verbales from China dated 6 February 2009, from the Republic of Korea dated 27 February 2009, from China dated 24 August 2009, from Japan dated 25 March 2009 and 26 August 2009.

37 UN Commission on the Limits of the Continental Shelf, Twenty-fourth Session, New York, 10 August–11 September 2009, CLCS/64, paras.20 and 26 ([daccess-ods.un.org/access.nsf/Get?Open&DS=CLCS/64&Lang=E](http://daccess-ods.un.org/access.nsf/Get?Open&DS=CLCS/64&Lang=E) (last visited 18 September 2010)).

Okinotorishima is entitled to a 200 nmi EEZ and a continental shelf extending to or beyond 200 nmi from its baselines.

22. In December 2009, it was reported that Japan decided to build a quay on Okinotorishima and Minamitorishima, and in early January 2010, a budget of 0.7 billion Japanese Yen was incorporated in the 2010 fiscal budget for the Ministry of Land, Infrastructure, Transport and Tourism. A survey for resources in the waters surrounding Okinotorishima and Minamitorishima will also be conducted soon.<sup>38</sup> These actions were followed by the approval of a new law by the Japanese Diet (the Parliament) that would give the central government, rather than local entities, the authority to manage and control specific remote, uninhabited islets in an effort to expand the Japanese EEZ, which include Okinotorishima and Minamitorishima.<sup>39</sup> In April 2010, it was reported that a national strategy on securing undersea resources is expected to be approved by the Japanese cabinet as early as June 2010. Japan plans to explore the seabed around Minamitorishima for cobalt.<sup>40</sup> Also in April 2010, Japan sent its Maritime Self-Defense Force (MSDF) destroyers to observe the blue-water exercises conducted by the Chinese fleet consisting of ten warships—two submarines, three frigates, two destroyers, a supply vessel, a rescue ship and a tugboat, in international waters between Okinawa Island and Miyakojima and then in the Japanese-claimed EEZ around Okinotorishima.

23. In response to the Japanese actions, China sent its ship-based navy helicopter to circle the Japanese MSDF destroyers as close as 90 m horizontally and 50 m vertically. Japan protested strongly against the action of the Chinese helicopters that occurred on 8 and 21 April 2010.<sup>41</sup> On 15 May 2010, at a meeting held on the sidelines of a foreign ministerial conference among Japan, China and South Korea in Gyeongju, Korea, Japanese foreign minister Katsuya Okada and Chinese foreign minister Yang Jiechi expressed differing opinions on the Chinese naval helicopters' approach to Japanese destroyers. Okada pointed out that the Chinese helicopters flew dangerously close to the Japanese MSDF destroyers,

38 Japan is to Build Quay, Conduct Survey, and Develop Mineral Resources in Okinotori Reef and Other Places, Muzi.com news, 6 January 2010 ([1chinastar.com/news/11/fanti/1590314.shtml?cc=28507](http://1chinastar.com/news/11/fanti/1590314.shtml?cc=28507) (in Chinese) (last visited 13 May 2010)) and Japan Build Port in the Sino–Japanese Disputed Okinotori to Target China, 2 December 2009 ([global.dnnews.com/news/2009-12-02/55099910.html](http://global.dnnews.com/news/2009-12-02/55099910.html) (last visited 8 September 2010)).

39 See Peter J. Brown, China All at Sea over Japan Island Row, *Asia Times*, online, 4 March 2010 ([www.atimes.com/atimes/China/LC04Ad04.html](http://www.atimes.com/atimes/China/LC04Ad04.html) (last visited 8 September 2010)).

40 Sun Wei, Japan to Scour Seabed for Rare Metals: Report, *Global Times*, 27 April 2010 ([world.globaltimes.cn/asia-pacific/2010-04/526217.html](http://world.globaltimes.cn/asia-pacific/2010-04/526217.html) (last visited 8 September 2010)).

41 See China Actions due to Govt Weakness, *The Daily Yomiuri* (Tokyo), 1 May 2010; Chinese Chopper “Ignored Orders”, *The Daily Yomiuri* (Tokyo), 27 April 2010; Chinese Chopper Flies Close to Japanese Destroyer Again, *Jiji Press*, 22 April 2010; 10 Chinese Vessels Seen near Okinawa, *The Daily Yomiuri* (Tokyo), 14 April 2010; LexisNexis news online search, page no. not available.

which is not safe and could lead to accidents that could harm Japan–China relations. In response, Yang said that the incident was the Japanese destroyers’ fault, as they were sailing too close to the Chinese fleet as they monitored it.<sup>42</sup>

24. The helicopter incident gives rise to a number of legal questions that are related to the status and right of Okinotorishima as claimed by Japan and objected by China and other countries concerned, such as South Korea. If the incident occurred in the waters 200 nmi surrounding Okinotorishima, it would become necessary to clarify the legal status of Okinotorishima in terms of the right to generate a 200 nmi EEZ. If Okinotorishima cannot claim a 200 nmi EEZ in accordance with Article 121(3) of the UNCLOS, the waters in question should be considered high sea and the Chinese Navy fleet has the right to conduct blue-navy exercises. If the incident indeed occurred in the Japanese-claimed EEZ around Okinotorishima, it could be interpreted as an action taken by China to challenge the Japanese position. Of course, if one takes the view that foreign navies can conduct exercises in the EEZ of a coastal State, the Chinese action was not of great significance.

25. The cited actions taken by Japan in support of or in relation to the status and right of Okinotorishima and Minamitorishima, in particular, the right to claim a 200 nmi EEZ and continental shelf are closely related to the application and interpretation of Article 121, paragraph 3, of the UNCLOS.

### III. The consideration of the “Regime of Islands” at UNCLOS III

26. Before UNCLOS III (1973–1982) was held, a number of statements, suggestions or proposals relating to the issues of establishing a legal regime of islands had already been made or submitted by the delegations that attended the meetings of Sub-Committee II of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction (abbreviated and known as the Sea-Bed Committee) between March 1971 and November 1973. These statements, suggestions or proposals constituted the preliminary groundwork for the work of UNCLOS III on the specific question of the regime of islands.<sup>43</sup>

27. Being considered as showing “main trends” in the development of a legal regime of islands in the early 1970s, these statements, suggestions or proposals indicated that: (1) the definition of an island as given in Article 10, paragraph 1, of the 1958 Convention on the Territorial Sea and the Contiguous Zone should be retained; (2) the same criteria applicable for the delimitations of the territorial sea and the continental shelf of

42 Japan, China Differ on Helicopter Flyby, NHK online, 16 May 2010 ([www.nhk.or.jp/daily/english/15\\_21.html](http://www.nhk.or.jp/daily/english/15_21.html) (last visited 17 May 2010)).

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

continental land masses should also be applied to islands; (3) islands, in the same manner as continental land masses, should also generate an EEZ or patrimonial sea of their own; and (4) for the purpose of determining the relevant maritime spaces of islands, a series of criteria should be taken into account, including the population, geomorphological structure and configuration and the capacity requirements in particular concerning habitation and economic life.<sup>44</sup>

28. UNCLOS III started in 1973. While ten sessions had been held during UNCLOS III,<sup>45</sup> most of the statements, suggestions or proposals on the regime of islands were made during the second session of UNCLOS III in 1974.<sup>46</sup> Upon the conclusion of the sixth session of UNCLOS III in July 1977, the result of the work of the conference appeared in the Informal Composite Negotiating Text (ICNT), which was informal in character, served purely as a procedural device and only provided a basis for negotiation without affecting the rights of any delegation to suggest revisions in the search for a consensus.<sup>47</sup> The question of the regime of islands was dealt with in Part VIII of the ICNT, which contained only one article, namely Article 121.<sup>48</sup>

44 Para.23, *ibid.*, 21.

45 UNCLOS III was held between 1973 and 1982 with 11 sessions in total that took place in New York, Caracas, Geneva and Montego Bay. The 1st session of UNCLOS III was held in New York, 3–15 December 1973, which was devoted to procedural matters such as the election of officers and the adoption of the rules of procedure. The 2nd session was held in Caracas, 20 June–29 August 1974; the 3rd session in Geneva, 17 March–9 May 1975; the 4th session in New York, 15 March–7 May 1976; the 5th session in New York, 2 August–17 September 1976; the 6th session in New York, 23 May to 15 July 1977; the 7th session in Geneva, 28 March–19 May 1978 and resumed 7th session in New York, 21 August–15 September 1978; the 8th session in Geneva, 19 March–27 April 1979 and resumed 8th session in New York, 19 July–24 August 1979; the 9th session in New York, 3 March–4 April 1980 and resumed 9th session in Geneva, 28 July–29 August 1980; the 10th session in New York, 9 March–16 April 1981 and resumed 10th session in Geneva, 3–28 August 1981; the 11th session in New York, 8 March–30 April 1982; resumed session in New York, 22 and 24 September 1982 and the final session in Montego Bay, Jamaica, 6–10 December 1982. For more information about UNCLOS III, visit the website of the UN at [untreaty.un.org/cod/diplomaticconferences/lawofthesea-1982/lawofthesea-1982.html](http://untreaty.un.org/cod/diplomaticconferences/lawofthesea-1982/lawofthesea-1982.html) (last visited 8 September 2010).

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

47 Document A/CONF.62/WP.10/Add.1, see *Official Records of the Third United Nations Convention on the Law of the Sea, Vol. VIII* (United Nations Publication, 1978), Sales No. E.78. V.4.

48 The article reads: An island is a naturally formed area of land, surrounded by water, which is above water at high tide. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of the present Convention applicable to other

29. Between the seventh and final session of UNCLOS III, held in 1978 and 1982, respectively, a number of suggestions and amendments in relation to the regime of islands had been submitted. Several States, including Japan,<sup>49</sup> Greece,<sup>50</sup> France,<sup>51</sup> Venezuela,<sup>52</sup> the United Kingdom,<sup>53</sup> Brazil,<sup>54</sup> Portugal,<sup>55</sup> Iran,<sup>56</sup> Ecuador<sup>57</sup> and Australia,<sup>58</sup> proposed or gave their support for the deletion of Article 121, paragraph 3. At the same time, a number of States expressed their opposition against the proposal to amend or delete Article 121(3), which include Ireland<sup>59</sup>, Dominican Republic,<sup>60</sup> Singapore,<sup>61</sup> Germany,<sup>62</sup> USSR,<sup>63</sup> Algeria,<sup>64</sup> Korea,<sup>65</sup> Denmark,<sup>66</sup> Mongolia,<sup>67</sup> Turkey<sup>68</sup> and Colombia.<sup>69</sup>

30. Japan gave three reasons to support her position on the deletion of paragraph 3 of Article 121. Firstly, "it was not right to make distinction between islands according to their size or according to whether or not they were habitable." Secondly, the 1958 Convention on the Continental Shelf made no distinction between habitable and uninhabitable islands. Thirdly, many States which declared a 200 nmi EEZ did not make such a distinction either.<sup>70</sup> France supported the Japanese proposal to delete Article 121, paragraph 3, but without providing further explanation. The United Kingdom also proposed that Article 121, paragraph 3, should be deleted because there was no basis in international law to discriminate

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

49 Above n.46, 89 and 105.

50 Above n.46, 90 and 105.

51 Above n.46, 91 and 95.

52 Above n.46, 97 and 103.

53 Above n.46, 105.

54 Above n.46, 107.

55 *Ibid.*

56 Above n.46, 108.

57 *Ibid.*

58 *Ibid.*

59 Above n.46, 91.

60 Above n.46, 98.

61 Above n.46, 105.

62 Above n.46, 106.

63 *Ibid.*

64 Above n.46, 107.

65 *Ibid.*

66 *Ibid.*

67 Above n.46, 108.

68 Above n.46, 109.

69 *Ibid.*

70 Above n.46, 90.

between different forms of territory for the purposes of maritime zone and such discrimination would conflict with the rights of States in respect of their territories.<sup>71</sup> Brazil gave her support to the British proposal on the ground that there was no logical explanation for paragraph 3 of Article 121.<sup>72</sup> However, Korea had difficulty in supporting the deletion of Article 121(3) because it undermined the delicate balance achieved through the long process of negotiations on the regime of islands.<sup>73</sup> USSR was also opposed to the amendments to Article 121 because they would destroy the compromise reached at the previous meetings.<sup>74</sup> Romania, the key country in the process of drafting Article 121 at UNCLOS III, submitted a proposal to amend Article 121 by adding a new paragraph 4, which read as follows: "Uninhabited islets should not have any effect on the maritime spaces belonging to the main coasts of the States concerned."<sup>75</sup>

31. Despite the efforts made by some delegations at UNCLOS III, the regime of islands was dealt with in Part VIII of the UNCLOS, which follows exactly the language of the previous draft as appeared in Part VIII of the ICNT. On 30 April 1982, the Convention was adopted. The United States was the only Western industrialized country to vote against the final treaty. Venezuela, Turkey and Israel also voted no. The USSR and most Soviet bloc countries abstained, as did a few highly industrialized Western nations. Most of the West, including France and Japan, joined the Third World and voted yes. Altogether, 130 nations voted to adopt the treaty and open it for signature. The Convention was opened for signature on 10 December 1982 in Montego Bay, Jamaica. It is worth noting that upon signing of the Convention, Iran placed on the record its understanding in relation to certain provisions of the UNCLOS. The main objective for the Iranian submission was to avoid eventual future interpretation of a number of articles of the Convention in a manner incompatible with the original intention and previous positions or in disharmony with national laws and regulations of the Islamic Republic of Iran. One of the understandings is related to Article 121(3), in which Iran stated that

Islets situated in enclosed and semi-enclosed seas which potentially can sustain human habitation or economic life of their own but, due to climatic conditions, resources restriction or other limitations, have not yet been put to development, fall within the provisions of paragraph 2 of Article 121 concerning "Regime of

71 Above n.46, 105.

72 Above n.46, 107.

73 Official Records of the Third United Nations Conference on the Law of the Sea, Vol. XVI (United Nations Publication, 1984), Sales No. E.84.V.2, summary records of meeting, plenary meeting, 171st meeting, para.4.

74 *Ibid.*, summary records of meetings, plenary meetings, 170th meeting, para.27.

75 Above n.46, 104.

islands”, and have, therefore, full effect in boundary delimitation of various maritime zones of the interested coastal States.<sup>76</sup>

32. Article 121 of the UNCLOS is concerned with the legal regime of islands. The Convention also contains the codification of the then existing customary rules of international law, which include the rights and obligations of the coastal and third States in the territorial sea, contiguous zone, EEZ and the high seas. But not all three paragraphs under Article 121 of the UNCLOS have attained the status of customary international law. Article 121, paragraphs 1 and 2, stipulate the definition and regulations that regard islands as having territorial sea and contiguous zones. These two paragraphs should be considered customary law because of the observation of State practice after the adoption of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, in which most nations accepted being bound by these regulations. Article 10, paragraph 1, of the 1958 Convention on the Territorial Sea and the Contiguous Zone provides that “An island is a naturally formed areas of land, surrounded by water, which is above water at high tide.” In accordance with paragraph 2 of the same article, “[t]he territorial sea of an island is measured in accordance with the provisions of these articles.”<sup>77</sup> In addition, Article 1 of the 1958 Convention on the Continental Shelf provides that “[f]or the purpose of these articles, the term ‘continental shelf’ is used as referring . . . (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.”<sup>78</sup> Thus even non-parties to the UNCLOS but parties to the two conventions mentioned above are bound by Article 121, paragraphs 1 and 2. However, paragraph 3 of Article 121 has not evolved into a rule of customary international law; its application is restricted to the parties of the UNCLOS. The main reasons for the paragraph not becoming a rule of customary international law are (1) the lack of State practice; and (2) the lack of *opinio juris*.<sup>79</sup> The inclusion of paragraph 3 into Article 121, which was new, vague and subject to different interpretations, resulted from debates with no conformable positions at UNCLOS III over the legal status of “rocks” and their rights to have EEZ or continental shelf. In order to qualify as customary international law, Article 121(3) must have resulted from a general and consistent practice of States

76 For the declarations made on signature by Iran, see Declarations and Statements, UNCLOS, in the website of Oceans and Law of the Sea, Division for Ocean Affairs and the Law of the Sea at [www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm#Iran%20Upon%20signature](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#Iran%20Upon%20signature) (last visited 8 September 2010).

77 The Convention was adopted at Geneva on 29 April 1958; entry into force on 10 September 1964; 41 signatories and 52 parties as of 2 October 2010, 516 UNTS 205.

78 The Convention was adopted at Geneva on 29 April 1958; entry into force on 10 June 1964; 43 signatories and 58 parties as of 2 October 2010, 499 UNTS 311.

79 R.R. Churchill and A.V. Lowe, *The Law of the Sea*, 3rd edn. (Manchester: Manchester University Press, 1999), 164; Jonathan I. Charney, Note and Comment: Rocks That Cannot Sustain Human Habitation, 93 *American Journal of International Law* (1999), 872.



followed by them from a sense of legal obligation. But both consistent State practices and *opinion juris* are lacking.<sup>80</sup> While Article 121(3) is not considered a rule of customary international law, it is considered general international law applicable to the entire continental shelf regime. Because the continental shelf regime is also an inherent part of the regime of EEZ, Article 121(3) is binding on States that are not parties to the UNCLOS with respect to the EEZ and continental shelf regimes.<sup>81</sup> In the *Jan Mayes* case (*Denmark v. Norway*), Judge Evensen, in his separate concurring declaration, explicitly affirmed the status of Article 121(3) as part of general international law.<sup>82</sup>

#### IV. Opinions of the selected international legal scholars regarding the interpretation of Article 121(3)

33. Jon M. Van Dyke and Robert A. Brooks have explained that Article 121 of the UNCLOS should be interpreted according to Article 31 of the 1969 Vienna Convention on the Law of Treaties, which provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>83</sup> Because the

80 For more discussion of State practices and opinions of international legal scholars, see above n.15, 170–174.

81 Jonathan I. Charney, *ibid.*, 872.

82 General international law applies to relations between all States and subjects of international law, such as international organizations. It is universally binding. Its legal basis is normally international customary law and multilateral agreements. See *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, the International Court of Justice, 1993, Declaration of Judge Evensen ([www.icj-cij.org/docket/index.php?p1=3&p2=1&PHPSESSID=8911a2102b58edce17272a12ca8ea521&case=78&code=gjm&p3=4](http://www.icj-cij.org/docket/index.php?p1=3&p2=1&PHPSESSID=8911a2102b58edce17272a12ca8ea521&case=78&code=gjm&p3=4), p. 84 (last visited 18 September 2010)).

83 The 1969 Vienna Convention on the Law of Treaties, held at Vienna on 23 May 1969, entered into force on 27 January 1980, UN, Treaty Series, Vol. 1155, p. 331 ([untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf) (last visited 8 September 2010)). Art. 31 of the Convention provides:

- (1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
- (2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
  - (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
- (3) There shall be taken into account, together with the context:
  - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

purposes for establishing coastal EEZs cannot justify claims to EEZs around uninhabited islands situated far away from their coasts, Van Dyke and Brooks have argued that it is not consistent with the main purpose for adopting the UNCLOS for remote rocks or reefs to generate extended maritime zones. Accordingly, only if stable communities of people live on the island and use the surrounding ocean areas, can islands generate an EEZ or a continental shelf.<sup>84</sup> Van Dyke has argued that from the perspective of history, if a rock or reef cannot sustain human habitation permanently for 50 people, then it cannot claim an EEZ or a continental shelf.<sup>85</sup> Other international legal scholars such as Ely,<sup>86</sup> Pardo,<sup>87</sup> Gidel<sup>88</sup> and Hodgson<sup>89</sup> hold similar views.

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

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

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

- 84 See Jon M. Van Dyke and Robert A. Brooks, *Uninhabited Islands: Their Impact on the Ownership of the Oceans’ Resources*, 12 *Ocean Development and International Law* (1983), 286.
- 85 Jon Van Dyke and Dale Bennett, *Islands and the Delimitation of Ocean Space in the South China Sea*, 10 *Ocean Yearbook* (1993), 79.
- 86 Ely stated that “If an island is too small or insignificant to have attracted its owner’s national resources, in terms of population and investments, it is too small to serve as a baseline.” Northcut Ely, *Seabed Boundaries between Coastal States: The Effect to Be Given Islets as “Special Circumstances”*, 6 *International Law* (1972), 219, cited in Jon M. Van Dyke and Robert A. Brooks, above n.84.
- 87 Ambassador Pardo argued that the “equity and reasonableness” that justify the allocation of ocean resources to a coastal State simply do not apply where “no population exists.” Arvid Pardo, *An International Regime for the Deep Sea-Bed: Developing Law or Developing Anarchy?*, 5 *Texas ILJ* (1970), 205, cited in Jon M. Van Dyke and Robert A. Brooks, above n.84.
- 88 Gidel tried to define “habitability” more precisely than others had by stating that to be an “island”, a land formation had to have “natural conditions” that permitted “stable residence of organized groups of human beings.” B. Gidel, 3 *Le droit international public de la mer* (1934), 684, cited in Jon M. Van Dyke and Robert A. Brooks, above n.84, 287.
- 89 Hodgson stated specifically that he felt the word “rocks” in art. 121(3) should be defined in terms of whether a land formation is habitable. Robert D. Hodgson, *Islands, Normal and Special Circumstances*, in: John King Gamble and Pontecorve (eds.), *Law of the Sea: The Emerging Regime of the Oceans* (1973); Robert D. Hodgson and Robert W. Smith, 3 *The Informal Single Negotiation Text (Committee II): A Geographical Perspective*, *Ocean Development and International Law* (1976), 225, cited in Jon M. Van Dyke and Robert A. Brooks, above n.84.

prove that an island or rock can sustain human habitation OR economic activity of its own to be able to claim an EEZ or continental shelf.<sup>90</sup>

35. After examining the *travaux préparatoires* of the UNCLOS III, Charney argued that the habitation referred to in the article does not need to be of a permanent nature, and economic activity does not need to be capable of sustaining a human being throughout the year.<sup>91</sup> In addition, the economic activity referred to in Article 121(3) can also include industry or exploitation of the living or mineral resources found in the territorial sea of the island or rock in question.<sup>92</sup> Moreover, Charney was of the opinion that this economic activity can be a future condition, based on future technological advances. Profits from ocean minerals could support the equipment and staff necessary to extract the resource and to import energy, food and water for a long period of time. Under these circumstances, can a rock claim an EEZ or a continental shelf according to Article 121(3) of the UNCLOS?<sup>93</sup>

36. Charney suggested that a feature would not be subject to Article 121(3) if it were found to have mineral resources, such as oil or gas, or other resources of value such as newly harvestable fishery species, or even a location for a profitable business (such as a casino), whose exploitation could sustain an economy sufficient to support that activity through the purchase of necessities from external sources. Given the compatibility of the French, English, Spanish and Arabic texts of Article 121(3) as well as the ambiguity of the Russian text and the clarity of the Chinese text, Charney held that Article 121(3) of the UNCLOS should be interpreted as permitting the finding of an economic life as long as the feature can generate revenues sufficient to purchase the missing necessities.<sup>94</sup> Charney concluded that changes in circumstances may help those features (reefs or rocks) that are subject to the application of Article 121(3) to obtain the legal status of island and the right to claim EEZs and continental shelves.<sup>95</sup>

37. Barbara Kwiatkowska and Alfred H.A. Soons observed that an increasing number of ocean law and policy commentators held the view that a lighthouse or other aid to navigation built on an island gives the island an “economic life of its own” due to its value to shipping.<sup>96</sup> When discussing the issue of when a rock is uninhabitable, E.D. Brown suggests,

90 Charney, above n.79, 868.

91 Ibid.

92 Ibid., 869.

93 Ibid., 870.

94 Ibid., 871.

95 Ibid., 876.

96 Barbara Kwiatkowska and Alfred H.A. Soons, *Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human habitation or Economic Life of Their Own*, 21 *Netherlands YIL* (1999), 167–168, cited in Robert Beckman and Clive Schofield, *Moving beyond*

The absence of sweet water might provide such a test; but what if supplies reach the rock from the mainland or a desalination plant is installed? . . . [Must] the rock be able to produce the minimum necessities of life independent of outside supplies before it can be regarded as habitable? Would the presence of a lighthouse keeper, supplied from without, provide evidence of habitability?<sup>97</sup>

Accordingly, Brown commented that “. . . Article 121(3) in its present form appears to be a perfect recipe for confusion and conflict.”<sup>98</sup>

38. Barry Hart Dubner cites the following activities in support of the argument that rocks may have an economic life of their own and therefore in accordance with Article 121(3) can generate EEZs and continental shelves: using military forces; occupying and fortifying the rocks where possible; creating structures and markers; creating scientific research stations of sorts; enacting statutes; incorporating the rocks into nearby provinces; publicizing maps showing their respective claims and releasing “historical documents” to back up the territorial claims; allowing tourists and journalists to visit the rocks; granting concessions to oil companies; arresting fishermen; and creating a “tourist resort” complete with hotel and airstrip.<sup>99</sup>

39. Alex G. Gude Elferink, a senior research associate at the Netherlands Institute of the Law of the Sea, indicates that only islands of a very small size qualify as a rock under Article 121(3) of the UNCLOS. While some small islands may qualify as such a rock because of their size, they may still be able to sustain human habitation or economic life of their own. In addition, the available arguments indicate that the threshold that has to be met with regard to sustaining human habitation or having economic life of their own is “rather low and almost certainly is lower than the most far-reaching requirement, a stable community”. Accordingly, it is not necessary to meet both the requirements of human habitation and economic life at the same time, which indicates that “even if the former criterion is only met by the presence of a stable community, economic life of a rock without a stable community would result in it having an EEZ and continental shelf”.<sup>100</sup>

40. Roger O’Keefe argues that the loose drafting of the regime of islands in the UNCLOS may confound the aspirations of many NIEO-inspired delegates at UNCLOS III, because the compromise text of Article 121 allows the appropriation

Disputes over Islands Sovereignty: ICJ Decision Sets Stage for Maritime Boundary Delimitation in the Singapore Strait, 40 *Ocean Development and International Law* (2009), 10.

97 E.D. Brown, *The International Law of the Sea: Volume 1: Introductory Manual* (Aldershot, UK, and Vermont: Dartmouth Publishing Company, 1994), 150.

98 *Ibid.*, 151.

99 Barry Hart Dubner, *The Spratly “Rocks” Dispute—A “Rockapelago” Defies Norms of International Law*, 9 *Temple ICLJ* (1995), 304–305.

100 Alex G. Oude Elferink, *The Islands in the South China Sea: How Does Their Presence Limit the Extent of the High Seas and the Area and the Maritime Zones of the Mainland Coasts*, 32 *Ocean Development and International Law* (2001), 174.

by individual countries of vast swathes of the “common heritage of mankind”. By citing the writings of several international legal scholars, O’Keefe indicates that:

[u]nless an unwritten requirement of “natural capacity” were to be imported, Article 121(3) seems to countenance the grant of maritime zones to almost any skerrick of land that is still high and dry when the [tide] is in. If a country is willing to spend enough money, most islands and even some rocks would be able to support at least token habitation in today’s high-tech world.<sup>101</sup>

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

[A] State that establishes a marine park or protected area around a pristine coral reef should not be penalized by being forced to forego the expansion of its maritime jurisdiction that it would likely have gained from pursuing a more traditional form of economic development. Instead such States should be given an incentive to preserve the marine environment where such preservation is also economically beneficial and thus consistent with the “economic life” criterion of Article 121(3).<sup>102</sup>

42. Hafetz is of the opinion that a proposal to establish a marine preserve around a small island can represent an economically beneficial use of the natural resource. The measures taken by the States, which own the small islands, to protect their surrounding marine environment can yield economic benefits in various forms, including increased fishing stocks, tourist spending, products from coral reefs and health benefits from reduced pollution. Hafetz indicates that such measures can and should satisfy the “economic life of their own” requirement of Article 121(3), therefore enabling a “rock” to achieve the formal legal status of an “island”, and thereby potentially extending a coastal State’s continental shelf and EEZ rights. In addition, Hafetz holds that his interpretation of Article 121(3) is consistent with the text of the UNCLOS, the objectives and aims of the Convention, subsequent developments in international law and the public policy of preserving the marine environment where it is economically beneficial to do so.<sup>103</sup>

101 Roger O’Keefe, *Palm-fringed Benefits: Island Dependencies in the New Law of the Sea*, 45 ICLQ (1996), 412.

102 Jonathan L. Hafetz, *Fostering Protection of the Marine Environment and Economic Development: Article 121(3) of the Third Law of the Sea Convention*, 15 *American University ILR* (2000), 626–627.

103 *Ibid.*, 627.

## V. Selected examples of States practices

43. The most often cited dispute arising from the legal status of an island and its right to claim a 200 nmi EEZ or a continental shelf is the dispute between the United Kingdom and its neighbouring countries over the legal status of Rockall, which is situated in the North Atlantic Ocean, 160 km from the north-west coast of Scotland and is claimed as British territory. In 1976, the United Kingdom passed the Fisheries Limits Act, drawing a 200 nmi maritime zone extending from its baseline as its exclusive fishing zone. Subsequently, the United Kingdom's maritime maps showed a 200 nmi maritime zone surrounding Rockall,<sup>104</sup> which led to objections being raised by Ireland, Iceland and Denmark. Ireland considered the United Kingdom's actions to be in violation of Article 121(3) of the UNCLOS, which stated that rocks without human habitation or economic life of their own were not entitled to an EEZ or a continental shelf.<sup>105</sup> In 1997, the United Kingdom gave up its claim to a 200 nmi EEZ for Rockall when it acceded to the UNCLOS.<sup>106</sup>

44. Another potential dispute can be found in Brazil's claim of an EEZ and a continental shelf for Saint Peter and Paul Rocks, which are made up of 12 small volcanic rocks situated in the South Atlantic Ocean, about 950 km north east of Natal in Pernambuco State, Brazil. The tallest is Southwest Rock, 22.5 m above the water. Saint Peter and Paul Rocks are distributed in an area at sea that is over 350 m from north to south, and 200 m from east to west, with a total size of approximately 10 000 m<sup>2</sup>.<sup>107</sup> A lighthouse was built on Northwest Rock in 1930, with a height of 6 m. Twenty metres to the south of the lighthouse is a simple shelter for army personnel and researchers. Could these rocks generate an EEZ or a continental shelf according to Article 121 of the UNCLOS?

45. On 17 May 2004, Brazil made a submission through the UN Secretary-General to CLCS in accordance with Article 76, paragraph 8, of the UNCLOS, regarding the proposed outer limits of Brazil's continental shelf and its claim of a continental shelf for the Saint Peter and Paul Rocks.<sup>108</sup> There are three figures contained in Brazil's Executive Summary of the submission, which show a 200 nmi EEZ and the outer limit of continental shelf surrounding Saint Peter and Saint Paul archipelago.<sup>109</sup> No third-party notifications had ever been sent to the

104 Clive Symmons, *The Maritime Zones of Islands in International Law* (The Hague: Martinus Nijhoff, 1979), 261.

105 *Ibid.*, 126.

106 Robin Churchill, *United Kingdom Accession to the UN Convention on the Law of the Sea*, 13 *International Journal of Marine and Coastal Law* (1998), 271–273.

107 See [en.wikipedia.org/wiki/St\\_Paul's\\_Rocks](http://en.wikipedia.org/wiki/St_Paul's_Rocks) (last visited 8 September 2010).

108 For the Brazilian submission, visit the website of the UN at [www.un.org/Depts/los/clcs\\_new/submissions\\_files/submission\\_bra.htm](http://www.un.org/Depts/los/clcs_new/submissions_files/submission_bra.htm) (last visited 8 September 2010).

109 For the figures, see Executive Summary of the Submission by Brazil, 17 May 2004, 6–8. For Figure 1—Chart of the outer limit of the continental shelf, visit the website of the UN at [www.un.org/Depts/los/clcs\\_new/submissions\\_files/submission\\_bra.htm](http://www.un.org/Depts/los/clcs_new/submissions_files/submission_bra.htm).

Secretariat of the UN in response to or as a challenge to Brazil's claim for a 200 nmi EEZ and continental shelf for Saint Peter and Saint Paul Rocks in accordance with Article 121(3) of the UNCLOS. On 25 August 2004, the United States sent a notification regarding Brazil's submission, which highlighted the issues of sediment thickness and the Vitoria-Trindade feature. The United States asked CLCS to examine Brazil's sediment thickness data carefully and to take a cautious approach with regard to Vitoria-Trindade feature. There was no mention at all about the legal status of Saint Peter and Paul Rocks.<sup>110</sup> In April 2007, CLCS adopted the "Recommendations of the Commission on the Limits of the Continental Shelf in regard to the submission made by Brazil on 17 May 2004 on information on the proposed outer limits of its continental shelf beyond 200 nautical miles" by a vote of 15 to 2, with no abstentions.<sup>111</sup>

46. Australia claims a 200 nmi EEZ for Heard Island and the McDonald Islands, which are a volcanic group of barren Antarctic islands located in the Southern Ocean, about two-thirds of the way from Madagascar to Antarctica. There is no permanent human habitation and no indigenous economic activity on these islands. But the Australian government allows limited fishing in the surrounding waters.<sup>112</sup> On 15 November 2004, Australia made a submission to CLCS, which contained the information on the proposed outer limits of the continental shelf of Australia beyond 200 nmi from the baselines from which the breadth of the territorial sea is measured. The claim included the areas of Australia's continental shelf beyond 200 nmi in the Kerguelen Plateau Region, which extended seawards from the baselines of Heard Island and McDonald Islands.<sup>113</sup>

47. In April 2008, CLCS adopted its recommendations that confirmed the location of the outer limit of Australia's continental shelf in nine distinct marine

[un.org/Depts/los/clcs\\_new/submissions\\_files/bra04/bra\\_outer\\_limit.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/bra04/bra_outer_limit.pdf) (last visited 8 September 2010); for Figure 2—Chart of lines and limits, visit [www.un.org/Depts/los/clcs\\_new/submissions\\_files/bra04/bra\\_lines\\_limits.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/bra04/bra_lines_limits.pdf) (last visited 8 September 2010); for Figure 3—Map with the fixed points at a distance no greater than 60m from each other, visit [www.un.org/Depts/los/clcs\\_new/submissions\\_files/bra04/brafix\\_points.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/bra04/brafix_points.pdf) (last visited 5 August 2009).

110 United States of America: Notification regarding the Submission Made by Brazil to the Commission of the Limits of the Continental Shelf, CLCS.02.2004. LOS/USA, 9 September 2004 ([www.un.org/Depts/los/clcs\\_new/submissions\\_files/bra04/clcs\\_02\\_2004\\_los\\_usatext.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/bra04/clcs_02_2004_los_usatext.pdf) (last visited 8 September 2010)).

111 See CLCS/54, Statement by the Chairman of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission—Nineteenth Session, New York, 5 March–13 April 2007, para.22, 6.

112 For information about the islands, visit Wikipedia, the free encyclopedia at [en.wikipedia.org/wiki/Heard\\_Island\\_and\\_McDonald\\_Islands](http://en.wikipedia.org/wiki/Heard_Island_and_McDonald_Islands) (last visited 10 September 2010).

113 See Executive Summary of the Submission by Australia, 15 November 2004, p. 12 ([www.un.org/Depts/los/clcs\\_new/submissions\\_files/submission\\_austr.htm](http://www.un.org/Depts/los/clcs_new/submissions_files/submission_austr.htm) (last visited 8 September 2010)).

regions and Australia's entitlement to large areas of shelf beyond 200 nmi.<sup>114</sup> Communications were sent to the Secretary-General of the UN by eight countries,<sup>115</sup> asking CLCS not to take any action with regard to the part of Australia's submission that related to the continental shelf appurtenant to Antarctica in the area covered by the Antarctic Treaty of 1959.<sup>116</sup> But no third-party notifications had ever been sent by any countries to challenge Australia's claim to a 200 nmi EEZ and continental shelf for the islands that have no permanent human habitation or economic life of their own, such as Heard Island and the McDonald Islands, in accordance with Article 121(3).

48. However, it is worth noting that in the *Volga* case (*Russian Federation v. Australia*), Judge Budislav Vukas of the International Tribunal for the Law of the Sea dissociated himself from all statements or conclusions in the judgment of the case which are based on Australia's claim to a 200 nmi EEZ around Heard Island and the McDonald Islands.<sup>117</sup> Judge Vukas was of the opinion that Heard Island and the McDonald Islands have no right to generate a 200 nmi EEZ in accordance with Article 121(3) of the UNCLOS. In his final remarks in the declaration, Judge Vukas wrote:

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

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

If a 200 mile limit of jurisdiction could be founded on the possession of uninhabited, remote or very small islands, the effectiveness of international administration of ocean space beyond national jurisdiction would be gravely impaired.<sup>118</sup>

The annexed map showing Australia's exclusive economic zone around Heard Island and the McDonald Islands . . . confirms that Ambassador Pardo's fear has been borne out.<sup>119</sup>

114 For summary of the recommendations of CLCS in regard to Australia's submission, visit [www.un.org/Depts/los/clcs\\_new/submissions\\_files/aus04/aus\\_summary\\_of\\_recommendations.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/aus04/aus_summary_of_recommendations.pdf) (last visited 8 September 2010).

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

116 For the communications delivered by the eight countries in response to Australia's submission, visit: [www.un.org/Depts/los/clcs\\_new/submissions\\_files/submission\\_au.htm](http://www.un.org/Depts/los/clcs_new/submissions_files/submission_au.htm) (last visited 8 September 2010).

117 The "Volga" Case (*Russian Federation v. Australia*), Prompt Release, Judgment, 23 December 2002, Declaration of Vice-President Vukas, ITLOS Reports 2002 ([www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html) (last visited 8 September 2010)).

118 UN Sea-Bed Committee, Doc. A/AC.138/SR.57, 167.

119 Declaration of Vice-President Vukas, above n.117, para.10.



49. The last selected example of State practices is concerned with the legal status of Snake Island (or Serpents Island) that is situated in the north-western part of the Black Sea, approximately 20 nmi to the east of the Danube delta. The island is above water at high tide, has a surface area of approximately 0.17 km<sup>2</sup> and belongs to Ukraine.<sup>120</sup> The status of Snake Island was important for delimitation of continental shelf and EEZs between Ukraine and Romania. If Snake Island were recognized as an island, but not a rock, Article 121, paragraph 2, of the UNCLOS should be applied, which would give Ukraine the right to claim a 200 nmi EEZ and a continental shelf around Snake Island. On the other hand, if Snake Island were not an island, but a rock, then in accordance with Article 121, paragraphs 2 and 3, of the UNCLOS, it does not have the right to draw a 200 nmi EEZ and a continental shelf, but only a 12 nmi territorial sea.

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

Romania states that according to the requirement of equity – as it results from articles 74 and 83 of the Convention on the Law of the Sea – the uninhabited islands without economic life can in no way affect the delimitation of the maritime spaces to the mainland coasts of the coastal States.<sup>121</sup>

The declaration was confirmed upon Romania's ratification of the Convention on 17 December 1996.<sup>122</sup> On 16 September 2004, the Romanian side brought a case against Ukraine to the International Court of Justice in the dispute concerning the maritime boundary between the two States in the Black Sea.<sup>123</sup>

51. During the proceedings, the two parties disagreed as to the status of Snake Island and its role played in the delimitation of the continental shelf and EEZs in the Black Sea. Romania claimed that Snake Island is a rock incapable of sustaining human habitation or economic life of its own, and therefore should have no EEZ or continental shelf, as provided in Article 121(3) of the UNCLOS. According to Romania, Snake Island should be treated as a "rock" because: "it is a rocky formation in the geomorphologic sense; it is devoid of natural water sources and virtually devoid of soil, vegetation and fauna."<sup>124</sup> Romania claimed that "human survival on the island is dependent on supplies, especially of water, from elsewhere and that the natural conditions there to

120 For more information, visit Wikipedia, the free encyclopedia at [en.wikipedia.org/wiki/Snake\\_Island\\_\(Black\\_Sea\)](http://en.wikipedia.org/wiki/Snake_Island_(Black_Sea)) (last visited 8 September 2010).

121 For Romania's declaration, visit the website of the United Nations at [www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm) (last visited 8 September 2010).

122 Ibid.

123 International Court of Justice, Case concerning Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, 3 February 2009.

124 Para.180, *ibid.*

not support the development of economic activities.”<sup>125</sup> Romania added that “[t]he presence of some individuals, . . . because they have to perform an official duty such as maintaining a lighthouse, does not amount to sustained ‘human habitation’”.<sup>126</sup>

52. Ukraine claimed that Snake Island is indisputably an “island” under Article 121, paragraph 2, of the UNCLOS, rather than a “rock”. Ukraine contended that the evidence shows that Snake Island can readily sustain human habitation and that it is well established that it can have an economic life of its own. It was added that Snake Island has vegetation and a sufficient supply of fresh water, and that Snake Island “is an island with appropriate buildings and accommodation for an active population”.<sup>127</sup> Ukraine also argued that Article 121(3) is not relevant to the delimitation of EEZ and continental shelf between Romania and Ukraine because this paragraph is not concerned with questions of delimitation but is, rather, an entitlement provision “that has no practical application with respect to a maritime area that is, in any event, within the 200-mile limit of the exclusive economic zone and continental shelf of a mainland coast”.<sup>128</sup>

53. On 3 February 2009, the Court delivered its judgment, which divided the sea area of the Black Sea along a line which was between the claims of each country.<sup>129</sup> To the disappointment of many, the Court did not consider the need to consider the issues concerning whether or not Snake Island is an island or a rock, and whether paragraph 2, or paragraph 3 of Article 121 of the UNCLOS should be applied.<sup>130</sup> Another aspect of the Judgment regarding partial effect for Snake Island, which may be of assistance in settling disputes over islands, is beyond the scope of the present study.

## VI. The application and interpretation of Article 121(3) to the five selected islands in the Pacific

54. Section II of this paper addressed the actions taken (1) by the United States in relation to the right of Howland and Baker Islands, which are situated in the North Pacific, to be entitled to a maritime zone that extends 50 or 200 nmi from the baseline of each island from which the US territorial sea is measured, (2) by France in relation to the claim for Clipperton Island, which is located in the Eastern Pacific, to generate a 200 nmi EEZ and a continental shelf that extends beyond 200 nmi from the baseline of the island from which the French territorial sea is measured, and (3) by Japan in support of its claim to a 200 nmi EEZ and continental shelf, and the areas that go beyond 200 nmi from the baselines of Okinotorishima and

125 *Ibid.*

126 *Ibid.*

127 *Ibid.*, para.184.

128 *Ibid.*

129 *Ibid.*, para.219.

130 *Ibid.*, para.187.

Minamitorishima that are located in the Western Pacific. These actions have given rise to, or have the potential to give rise to, a number of legal questions that are related to the application and interpretation of Article 121, paragraph 3, of the UNCLOS. Differing opinions on the application and interpretation have already given rise to maritime disputes in East Asia, in particular between Japan and China. Accordingly, details about these five insular features are provided and examined in this section for the purpose of illustrating the ambiguity found in the article and the need to amend it, in particular its third paragraph.

## VI.A. Howland and Baker Islands

55. Howland Island is an uninhabited coral island situated just north of the equator in the North Pacific Ocean, 1815 nmi (3361 km) southwest of Honolulu, coordinates  $0^{\circ}48' N$  and  $176^{\circ} 38' W$ , about half way between Hawaii and Australia.<sup>131</sup> This island has a land area of  $1.62 \text{ km}^2$ .<sup>132</sup> The length of Howland Island's coastline is 6.4 km. Geographically, Howland Island is part of the Phoenix Islands. For statistical purposes, it is grouped as one of the US Minor Outlying Islands. Howland Island has an elongated shape on a north–south axis. There is no lagoon. In 1874, Howland Island NWR was established by the Secretary of the Interior and expanded in 2009 to include submerged lands out to 12 nmi from the island.<sup>133</sup>

56. Howland Island, together with Baker Island, and Jarvis Island are grouped as a unit in the US Pacific Islands Marine National Monument. These islands were first formed as fringing reefs around islands formed by Cretaceous-era volcanoes. As the volcanoes subsided, the coral reef grew upwards, maintaining proximity to the sea surface. These low coral islands consist of coral rock, shells and sand that support trees, shrubs and grasses adapted to the arid climate at the equator. Howland is surrounded by shallow coral reefs to depths of 110 m, below which the reef slope descends steeply to greater depths. The waters surrounding Howland Island have fish biomass.<sup>134</sup>

57. The island was officially claimed by the United States in 1857. Both US and British companies mined for guano deposits until about 1890. In 1935, a

131 Howland Island, Wikipedia, the free encyclopedia ([en.wikipedia.org/wiki/Howland\\_Island](http://en.wikipedia.org/wiki/Howland_Island) (last visited 8 September 2010)).

132 Different figures of land size of Howland Island are found:  $1.8 \text{ km}^2$  ([en.wikipedia.org/wiki/Howland\\_Island](http://en.wikipedia.org/wiki/Howland_Island) (last visited 8 September 2010)),  $2.6 \text{ km}^2$  ([en.wikipedia.org/wiki/Pacific\\_Remote\\_Island\\_Marine\\_National\\_Monument](http://en.wikipedia.org/wiki/Pacific_Remote_Island_Marine_National_Monument) (last visited 8 September 2010) and  $1.62 \text{ km}^2$  ([en.wikipedia.org/wiki/United\\_States\\_Minor\\_Outlying\\_Islands](http://en.wikipedia.org/wiki/United_States_Minor_Outlying_Islands) (last visited 8 September 2010)). According to the US Central Intelligence Agency, the size of Howland Island is about three times the size of The Mall in Washington, DC ([www.cia.gov/library/publications/the-world-factbook/geos/um.html](http://www.cia.gov/library/publications/the-world-factbook/geos/um.html) (last visited 8 September 2010)).

133 Howland Island National Wildlife Refuge, US Fish and Wildlife Service ([www.fws.gov/howlandisland/](http://www.fws.gov/howlandisland/) (last visited 8 September 2010)).

134 US Fish and Wildlife Service, Pacific Remote Island Marine National Monument ([www.fws.gov/refuges/whm/pdfs/PRIMNM\\_brief.pdf](http://www.fws.gov/refuges/whm/pdfs/PRIMNM_brief.pdf) (last visited 8 September 2010)).

short-lived attempt at colonization began on Howland Island, but was disrupted by World War II and thereafter abandoned.<sup>135</sup> Entry to the island is by permit only. US Fish and Wildlife Service personnel visit Howland Island about every two years, though occasionally scientists and researchers team up to share transportation costs to the island more frequently. Howland Island is only accessible by an eight-day ship voyage.<sup>136</sup>

58. Howland Island has no natural fresh water resources, no indigenous inhabitants and no economic activity.<sup>137</sup> However, the United States claims a 12 nmi territorial sea, 200 nmi EEZ and a marine national monument from the 12 nmi refuge boundaries out to 50 nmi around Howland Island.

59. Baker Island is also an uninhabited atoll located just north of the equator in the North Pacific Ocean about 1700 nmi (3100 km) southwest of Honolulu, coordinates 0°11' 41" N and 176° 28' 46" W, about halfway between Hawaii and Australia. Baker Island's nearest neighbour is Howland Island. The island has a land area of 1.24 km<sup>2</sup> and a 4.8 km coastline.<sup>138</sup> The land area is about two-and-a-half times the size of The Mall in Washington, DC. The United States took possession of Baker Island in 1857. It had a population of four American civilians, who were all evacuated in 1942 after Japanese air and naval attacks. During World War II, Baker Island was occupied by the US military. Since World War II, Baker Island has been uninhabited. Just like Howland Island, public entry is by special-use permit only from the US Fish and Wildlife Service, and is generally restricted to scientists and educators.<sup>139</sup> In 1974, the Baker Island NWR was established, and it was expanded in 2009. On 6 January 2009, the Pacific Remote Islands Marine National Monument was established, which includes Baker Island NWR within its boundary. Baker Island has no natural fresh water resources and no economic activity. However, the United States claims a 12 nmi territorial sea and 200 nmi EEZ and establishes a marine national monument measured from the 12 nmi refuge boundaries out to 50 nmi seawards around Baker Island.

135 Background of the United States Pacific Island Wildlife Refuge, in the US Central Intelligence Agency—The World Factbook—United States Pacific Island Wildlife Refuges ([www.cia.gov/library/publications/the-world-factbook/geos/um.html](http://www.cia.gov/library/publications/the-world-factbook/geos/um.html) (last visited 8 September 2010)).

136 Howland Island National Wildlife Refuge, US Fish and Wildlife Service ([www.fws.gov/howlandisland/](http://www.fws.gov/howlandisland/) (last visited 17 May 2010)).

137 See CIA—The World Factbook, United States Pacific Island Wildlife Refuges ([www.cia.gov/library/publications/the-world-factbook/geos/um.html](http://www.cia.gov/library/publications/the-world-factbook/geos/um.html) (last visited 15 May 2010)).

138 Different figures of land size of Howland Island are found: 1.64km<sup>2</sup> ([en.wikipedia.org/wiki/Baker\\_Island](http://en.wikipedia.org/wiki/Baker_Island)); 1.24 km<sup>2</sup> ([en.wikipedia.org/wiki/United\\_States\\_Minor\\_Outlying\\_Islands](http://en.wikipedia.org/wiki/United_States_Minor_Outlying_Islands) (last visited 13 May 2010)) and 2.1 km<sup>2</sup> ([en.wikipedia.org/wiki/Pacific\\_Remote\\_Island\\_Marine\\_National\\_Monument](http://en.wikipedia.org/wiki/Pacific_Remote_Island_Marine_National_Monument) (last visited 13 May 2010)).

139 Baker Island, Wikipedia, the free encyclopedia ([en.wikipedia.org/wiki/Baker\\_Island](http://en.wikipedia.org/wiki/Baker_Island) (last visited 13 May 2010)).

## VI.B. Clipperton Island

60. Clipperton Island is an uninhabited coral atoll located in the Eastern Pacific Ocean, southwest of Mexico and west of Central America, coordinates 10°18' N and 109°13' W. Clipperton Island was named after the English pirate John Clipperton when he escaped to the island to hide. In 1858, France claimed the island. In 1897, Mexico occupied and claimed the island. Subsequently the two countries submitted the dispute to an arbitrator who ruled in favour of France in 1931.<sup>140</sup> Clipperton Island is now an overseas possession of France. In February 2007, the administration of Clipperton Island was transferred from the High Commissioner of the Republic Polynesia to the Minister of Overseas France.<sup>141</sup> This island has an area of 9 km<sup>2</sup>.<sup>142</sup> Clipperton Island has had no permanent inhabitants since 1945, but it is still visited on occasion by fishermen, French Navy patrols, scientific researchers, films crews and shipwreck survivors. It has also proved a popular site for transmissions by ham radio operators. The only economic activity is tuna fishing in its adjacent waters.<sup>143</sup>

61. A 200 nmi EEZ surrounding Clipperton Island was established by the French government by a decree on 3 February 1978 and extended after the ratification of the UNCLOS by France (Law No. 95-1311) on 21 December 1995. In August 2005, the French authorities announced the opening of the Clipperton EEZ to exploitation in response to the crisis of fishing in French Polynesia and a dramatic increase in illegal fishing by foreign boats in the waters around Clipperton Island. The frigate *Prairlal* of the French Navy conducts fishing inspection in the EEZ of Clipperton Island occasionally.<sup>144</sup>

## VI.C. Minamitorishima and Okinotorishima

62. Minamitorishima (Marcus Island) is a small, isolated island in the Western Pacific Ocean, coordinates 24°18' N and 153°58' E. It lies 1267 km east from the Ogasawara-shotō (Bonin Islands) and around 1800 km south from Tokyo.

140 See Background on Clipperton Island, The CIA World Fact Book ([www.cia.gov/cia/publications/factbook/geos/ip.html](http://www.cia.gov/cia/publications/factbook/geos/ip.html) (last visited 8 September 2010)). For more photos taken in February 2008 and description of Clipperton Island, see TX5C Clipperton Atoll 1978–2008 and Sachs Lab, School of Oceanography, University of Washington, Clipperton Atoll 2008 Study ([www.clipperton2008.org/](http://www.clipperton2008.org/) (last visited 8 September 2010)).

141 Minor French Dependences, Worldstatesmen.org ([www.worldstatesmen.org/Fr\\_minor.html](http://www.worldstatesmen.org/Fr_minor.html) (last visited 8 September 2010)).

142 The total land area of Clipperton Islands is 6km<sup>2</sup> according to the CIA's The World Factbook ([www.cia.gov/library/publications/the-world-factbook/goes/ip.html](http://www.cia.gov/library/publications/the-world-factbook/goes/ip.html) (last visited 8 September 2010)). It is about 12 times the size of The Mall in Washington, DC.

143 Clipperton Island, Wikipedia, the free encyclopedia ([en.wikipedia.org/wiki/Clipperton\\_Island](http://en.wikipedia.org/wiki/Clipperton_Island) (last visited 8 September 2010)).

144 See Ivan Sache, Status of Clipperton Island, 1 November 2009 ([www.crwflags.com/fotw/flags/cp.html](http://www.crwflags.com/fotw/flags/cp.html) (last visited 8 September 2010)).

Minamitorishima is Japan's easternmost territory. The island has no permanent population, but around 30 officials from the Japan Meteorological Agency, the Maritime Self-Defense Force and the Japan Coast Guard are engaged in observation and other activities there.<sup>145</sup> There is an airport available on the island. It takes about 45 min to walk around the island. Triangular in shape, Minamitorishima is a low, reef-fringed coral formation covering an area of 1.2 km<sup>2</sup>. Fringing reefs surround the entire island and extend from 50 to around 300 m in width, enclosing the island within a shallow lagoon. Narrow passages on the southern and northeastern sides connect the lagoon waters with those of the open ocean. The island has an inverted-saucer like profile, consisting of an outer raised rim of between 5 and 8 m in height that descends towards a central depression of 1 m below sea level.<sup>146</sup>

63. Minamitorishima is first mentioned in 1864, given a position by a US survey ship in 1874, and first landed on by Kiozaemon Saito in 1879. Japan officially annexed the island on 24 July 1898. The Treaty of San Francisco (1951) moved the island under American control. Minamitorishima was returned to Japan in 1968. In 1964 the US Coast Guard opened a LORAN-C navigation station on the island, whose mast was until 1985 one of the tallest structures in the Pacific area. The station was transferred to the government of Japan in September 1993. Administratively, Minamitorishima is considered part of Ogasawara village, Tokyo. In January 2009, a plan to investigate the oceans around Japan with the aim of developing seabed minerals that contain rare metals was adopted at a subcommittee of the Advisory Committee for Natural Resources and Energy of the Ministry of Economy, Trade and Industry. As part of the project, the ministry will test-drill cobalt-rich cruse in waters around Minamitorishima and will conduct a basic research in nearby waters within Japan's claimed EEZ.<sup>147</sup>

64. Okinotorishima (Douglas Reef),<sup>148</sup> situated southeast of Japan in the Western Pacific, consists of two rocks—Higashikojima (Eastern Islet) and Kitakojima (Northern Islet)—which are located in the western part of a lagoon surrounded by a submerged coral reef. At high tide, one area of the rocks is roughly the size of a twin-size bed and pokes just 7.4 cm (2.9 in.) out of the ocean. The other is the size of a small bedroom and rises about twice as high.

145 Japan to Turn Island into Resources Development Base, Jiji Press, 20 August 2009, LexisNexis News online search, page no. not available.

146 See Minami-Tori-shima, Oceandots.com, the island encyclopedia ([www.oceandots.com/pacific/minami-tori-shima/](http://www.oceandots.com/pacific/minami-tori-shima/) (last visited 15 May 2010); see also Minamitorishima, Wikipedia, the free encyclopedia ([en.wikipedia.org/wiki/Minamitorishima](http://en.wikipedia.org/wiki/Minamitorishima) (last visited 8 September 2010)).

147 Japan to Develop Seabed Minerals, Jiji Press, 30 January 2009, LexisNexis News online search, page no. not available.

148 For information about the rock, visit Wikipedia, the free encyclopedia at [en.wikipedia.org/wiki/Okinotorishima](http://en.wikipedia.org/wiki/Okinotorishima) (last visited 8 September 2010).

Okinotorishima is Japan's southernmost territory. The total area surrounding the rocks is approximately 7.8 km<sup>2</sup> (3 mi.<sup>2</sup>), most of which is submerged even at low tide. The rocks appear barren, obviously without any terrestrial vegetation. The current artificial dry land areas with their concrete surfaces appear unfit to support terrestrial vegetation either.<sup>149</sup>

65. In the late 1980s, Japan began constructing an embankment around the rocks, encasing in concrete those parts of the rocks above the surface water to prevent Eastern Islet and Northern Islet from being completely submerged. Japan has also constructed an observation structure on the west side of Okinotorishima. After concrete encasing, each of the islets appears as a circle with a diameter of 60 m (about 200 ft.) on detailed satellite images, which would correspond to a land area—although mostly artificial—of 2827 m<sup>2</sup> (0.7 acres) per islet, or 8482 m<sup>2</sup> (2.1 acres) in total.<sup>150</sup> On 22 April 2004, China diplomats stated during bilateral talks with Japan that they regarded Okinotorishima as rocks, not an islet, and did not agree with the Japanese claim of a 200 nmi EEZ for Okinotorishima.<sup>151</sup>

66. Because Okinotorishima is a naturally formed area of land, surrounded by water and above water at high tide, it seems that Okinotorishima can claim island status. Therefore, according to Article 121(2) of the UNCLOS, it can have a 12 nmi territorial sea and a 24 nmi contiguous zone. According to Article 121, paragraphs 1 and 2, there should be no difference between the word “shima” (island) used by Japan and “jiao” (reef) used by China. In other words, it makes no difference whether it is called “Okinotori-shima” or “Okinotori-reef”. What gives rise to greater difficulties in interpretation is whether or not Article 121(3) applies to Okinotorishima. That is, is Okinotorishima a rock incapable of sustaining human habitation or its own economic life?

67. Looking at the current situation of Okinotorishima, although there are two man-made facilities in Okinotorishima's lagoon for the purposes of maritime research and weather observation, they are not sitting on either Northern Exposed Rock or Eastern Exposed Rock, even though the two rocks are naturally formed areas of land surrounded by water and above the water at high tide. The tiny Northern Exposed Rock and Eastern Exposed Rock cannot sustain human habitation and support economic life of their own, and do not have fresh water, food or tillable soil. In addition, there are no fisheries, oil and gas or other mineral with commercial development value in the territorial sea of Okinotorishima. Thus, Okinotorishima has no means of supporting human habitation or

149 For detailed account, see above n.15, 145–176.

150 Above n.148.

151 China's Argument on Japan Island Unacceptable: Fukuda, Jiji Press Ticker Service, 23 April 2004; China Says Okinotorishima a Mere Rock, Not an Island, *The Daily Yomiuri* (Tokyo), 24 April 2004.

economic life of its own. Accordingly, Article 121(3) is applicable to Okinotorishima. In other words, Okinotorishima cannot claim an EEZ or a continental shelf. In addition, man-made constructions and concrete embankments on Northern Exposed Rock and Eastern Exposed Rock cannot be used in support of Japan's claim for island or ocean space because Article 60, paragraph 8, of the UNCLOS states: "[a]rtificial 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." This provision is at Japan's disadvantage in claiming a 200 nmi EEZ or a continental shelf for Okinotorishima.

#### **VI.D. Application and interpretation of Article 121(3) to the five insular features**

68. Article 121 of the UNCLOS has only three paragraphs and reads as follows:

- (1) An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
- (2) Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of the present Convention applicable to other land territories.
- (3) Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

69. Since all of the geographical features examined in this paper, perhaps except Okinotorishima, are naturally formed areas of land, surrounded by water, which are above water at high tide, Howland Island, Baker Island, Clipperton Island and Minamitorishima must be considered islands and therefore can claim a 12 nmi territorial sea and a 24 nmi contiguous zone in accordance with Article 121, paragraphs 1 and 2. If no embankment and concrete encasement had been built around the two features of Okinotorishima (Eastern Islet and Northern Islet), it is likely that Okinotorishima would be submerged at high tide. In this situation, Okinotorishima is not even a rock and cannot claim any maritime zones because none of the three paragraphs of Article 121 apply to this geographical feature.

70. Now the next question that needs to be addressed is whether or not paragraph 3 of Article 121 can be applied to the five features. In other words, should Howland Island, Baker Island, Clipperton Island, Minamitorishima and Okinotorishima be considered "rocks" and therefore not have EEZ or continental shelf? At a briefing meeting organized by the International Seabed Authority for members and observers attending its 15th session held in June 2009, an Indonesian representative explained that four factors distinguish islands from rocks. To be treated as island and be entitled



to the right to generate a 200 nmi EEZ or continental shelf, the geographical feature must “sustain and maintain fresh water; be able to grow vegetation that can sustain human habitation; produce some material that can be used for human shelter; and be able to sustain a human community of at least fifty people.”<sup>152</sup>

71. If the four factors were accepted by the governments of the United States, France and Japan, these five geographical features situated in the Pacific should not have EEZ or continental shelf because they do not have fresh water (except perhaps Clipperton Island), cannot grow vegetation that can sustain human habitation, cannot produce some material that can be used to build human shelter, and fail to sustain a human community of at least 50 people. However, if they fail to pass the tests for sustaining human habitation by providing fresh water, growing vegetation and producing some material that can be used for human shelter, but can prove that they have economic life of their own if not at present but in the future because of their capability to develop fishery, marine eco-tourism or mineral resources found in their adjacent waters or subsoil, could these geographical features have EEZ or continental shelf? It is argued that the answer can be positive based on a literal interpretation of Article 121(3) and in particular taking into account the word “or” contained in the paragraph.<sup>153</sup> Alex G. Oude Elferink and Jonathan I. Charney hold the same view, suggesting that the requirements of human habitation and economic life in Article 121(3) do not have to be met at the same time.<sup>154</sup>

72. Clipperton Island is the largest among the five geographical features examined in the paper. The only economic activity of the island is tuna fishing. The land area of Clipperton Island is 9 km<sup>2</sup>, about 12 times the size of The Mall in Washington, DC and therefore can possibly sustain a fishing community of at least 50 people. With modern technology and facilities being set up in a very short period of time, it is likely for France to build and sustain a human community of 50 people on Clipperton Island. Accordingly, it can be suggested that paragraph 3 of Article 121 does not apply to Clipperton Island and the island can claim a 200 nmi EEZ and continental shelf. If geological conditions are met, it can also extend the boundary of its continental shelf up to 350 nmi measured from its coast. Owing to the smaller size of the other four geographical features, and the difficulties to sustain human habitation or economic life of their own, it can be argued that paragraph 3 of Article 121 should be applied to them, which means that they

152 Seabed Authority Organizing Briefing for Members and Observers Attending Its Fifteenth Session, International Seabed Authority, Press Release, SB/15/10, 2 June 2009, 3.

153 During the discussion at UNCLOS III, the word “and” was replaced by “or”, which makes art. 121, para.3, become more ambiguous for accurate interpretation.

154 Alex G. Oude Elferink, *The Islands in the South China Sea: How Does Their Presence Limit the Extent of the High Seas and the Area and the Maritime Zone of the Mainland Coasts?*, 32 *Ocean Development and International Law* (2001), 174; Jonathan I. Charney, *Note and Comment: Rocks That Cannot Sustain Human Habitation*, 93 *American JIL* (1999), 868.

cannot claim a 200 nmi EEZ or continental shelf. In particular, how can a group of 50 people live on Okinotorishima with a size of less than 4.5 m<sup>2</sup> and without vegetation, fresh water and human shelter?

73. In East Asia, there are a number of territorial and maritime jurisdictional disputes involving offshore geographical features, which include the disputes over Dokdo/Takeshima (Liancourt Rocks) situated in the middle of the Sea of Japan, over Suyan/Ieodo (Socotra Rock) in the East China Sea (hereafter referred to as ECS), over Diaoyutai/Senkaku Islands situated in northeast of Taiwan and west of Okinawa in the East China Sea, over the Huangyan Dao/Panatang Shoal (Scarborough Shoal) situated in the area near Macclesfield Bank of the SCS, over Xisha Islands/Hoang Sa (Paracel Islands) in the northern half of the SCS, over Nansha Islands/Truong Sa/Kalayaan Island Group (Spratly Islands) in the southern half of the SCS, over a number of islands, including Phu Quoa/Koh Tral in the Gulf of Thailand, between Malaysia and Indonesia over the Sipandan and Ligitan Islands in the Sea of Celebes and over Pedra Branca/Pulau Batu Buteh, Middle Rocks and South Ledge in the Strait of Singapore. With the exception of the dispute over ownership of Sipandan and Ligitan Islands between Indonesia and Malaysia,<sup>155</sup> and ownership of Pedra Branca/Pulau Batu Buteh and Middle Rocks between Singapore and Malaysia,<sup>156</sup> these sovereignty and jurisdictional disputes remain unsettled and often give rise to conflict between the countries concerned. In addition, some of these disputes are subject to various interpretations and applications of Article 121(3).

74. The biggest difference between these geographical features and the five selected islands examined in this paper is the issue of sovereignty. There are no sovereignty issues in the discussion of maritime rights and legal status of Howland and Baker Islands, Clipperton Island, Okinotorishima and Minamitorishima. However, most of the insular features located in the Sea of Japan, the East China Sea and the SCS are involved with territorial disputes. This makes it more important for the discussion of the issues concerning application and interpretation of Article 121(3) of the UNCLOS to the disputed geographical features situated in the Sea of Japan, the East China Sea and the SCS. If the United States, France and Japan are able to claim a 200 nmi EEZ and a continental shelf for Howland Island and Baker

155 The International Court of Justice ruled on 17 December 2002 that Malaysia has title to Ligitan and Sipadan. See Case concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment of 17 December 2002 ([www.icj-cij.org/docket/files/102/7714.pdf](http://www.icj-cij.org/docket/files/102/7714.pdf) (last visited 8 September 2010)).

156 The International Court of Justice ruled on 23 May 2008 that sovereignty over Pedra Branca/Pulau Batu Buteh belongs to the Republic of Singapore, that sovereignty over Middle Rocks belongs to Malaysia and that sovereignty over South Ledge belongs to the State in the territorial waters of which it is located. See Case concerning Sovereignty over Pedra Branca/Pulau Batu Buteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment of 23 May 2008 ([www.icj-cij.org/docket/files/130/14492.pdf](http://www.icj-cij.org/docket/files/130/14492.pdf) (last visited 8 September 2010)).

Table 1. The factors that are suggested to distinguish islands from rocks

	Fresh water	Vegetation	Material	Community
Howland Island	No	No	No	No
Baker Island	No	No	No	No
Clipperton Island	No	No	No	No
Minamitorishima	No	No	No	No
Okinotorishima	No	No	No	No

Source: Compiled by the author.

Island, Clipperton Island, and Okinotorishima and Minamitorishima, respectively, it is difficult to prevent other countries from making similar claims. Judging from the recent developments in the Sea of Japan, the East China Sea and the SCS, an increase of maritime disputes in East Asian waters can be expected.

## VII. Concluding remarks

75. At UNCLOS III, a number of States proposed or gave their support for the entire deletion of Article 121, paragraph 3, of the draft Law of the Sea Convention, and those include Japan, Brazil and France. The main reason for submitting the proposal or giving support was the concern about the possible maritime space extended from their small uninhabitable offshore islands. As stated by ITLOS Judge Choon-ho Park, because the geographical circumstances of islands throughout the world are different, ambiguities had to be allowed, in particular, in Article 121(3) of the UNCLOS.<sup>157</sup> Brazil, France and Japan ratified the UNCLOS on 22 December 1988, 11 April 1996 and 20 June 1996, respectively, and are thus bound to abide by all of the provisions of the Convention, including Article 121(3). However, mainly because the article lacks precision and because there exists no official or authoritative clarification of the article, State practice is not consistent. The submissions made to the CLCS by Japan, Brazil, Australia and France, and the recommendations adopted by the Commission to confirm the outer limit of the continental shelves of the States concerned have made it become more confusing with regard to the application and interpretation of Article 121(3). The decision made by the International Court of Justice in the *Case concerning Maritime Delimitation in the Black Sea (Romania v. Ukraine)* in February 2009 not to consider the issue regarding whether or not Snake Island is

<sup>157</sup> See ITLOS Judge Choon-ho Park's paper entitled "The Changeable Legal Status of Islands and 'Non-Islands' in the Law of the Sea: Some Instances in the Asia-Pacific Region" was included and published in *Bringing New Law to Ocean Waters*, edited by David D. Caron and Harry N. Scheiber (Leiden, Netherlands: Martinus Nijhoff Publishers, 2004), Ch. 21, 490–491.

an island or a rock also has left “some stones unturned”, borrowing the words of Judge Choon-ho Park (Table 1).<sup>158</sup>

76. Since there exists no official or authoritative clarification with regard to the application and interpretation of Article 121, paragraph 3, of the UNCLOS, and there are no institutional apparatuses established for reviewing, monitoring and supervising how well State parties observe their duties under the Convention, coastal States are exercising extensive powers to claim larger sea areas by applying or interpreting Article 121(3) in accordance with their national maritime interests. While there does exist the regular Meeting of the State Parties to the Law of the Sea Convention (SPLOS), it is geared towards administrative and financial matters. In addition, there is also an annual review of ocean issues and the law of the sea by the UN General Assembly, which relies on the report prepared by the Secretary-General of the UN as well as the recommendations of the Open-Ended Informal Consultative Process of Oceans and Law of the Sea. The General Assembly’s annual review occasionally pays attention to national ocean policies and developments related to the UNCLOS, but it does not perform the multitude of tasks carried out by the compliance bodies that are established to assist States to meet the letter and spirit of the Convention’s wording.<sup>159</sup> Accordingly, Timo Koivurova suggested that “[i]f UNCLOS had provided an institutional apparatus similar to that of modern conventions, national ocean policies and laws probably would have developed more uniformly and have been more closely related to the wording and expectations of the UNCLOS”.<sup>160</sup> This is another important reason to think about the need to request the convening of a review conference in accordance with Article 312 of the UNCLOS, or the need to amend Article 121 in accordance with Article 313 of the Convention.

158 Ibid.

159 Timo Koivurova, *A Note on the European Union’s Integrated Maritime Policy*, 40 *Ocean Development and International Law* (2009), 172.

160 Ibid.