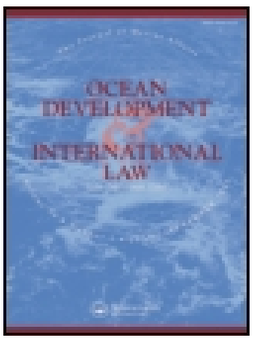

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The Islands in the South China Sea: How Does Their Presence Limit the Extent of the High Seas and the Area and the Maritime Zones of the Mainland Coasts?

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A number of small islands (the Paracel Islands, Pratas Island, the Spratly Islands, and Scarborough Reef) may have a considerable influence on the extent of maritime zones in the South China Sea. The maritime zones of these islands can limit the extent of the high seas and the Area in the South China Sea and the extent of the maritime zones of the mainland coasts. To assess the impact of the islands, it is necessary to establish whether they can generate the full suite of maritime zones. Under international law, some islands do not have an entitlement to an exclusive economic zone and continental shelf. Where islands can generate these maritime zones, a second issue arises, namely, how to delimit these zones with those of the mainland coasts bordering the South China Sea.

Keywords islands, rocks, reefs, low-tide elevations, continental shelf, exclusive economic zone, baselines, delimitation

Introduction

A considerable part of the South China Sea is not located within 200 nautical miles of the mainland coasts.[1] However, most of the area beyond 200 nautical miles from the mainland coasts is within 200 nautical miles from various small islands scattered throughout the South China Sea. These islands are the Paracel Islands, Pratas Island, Spratly Islands, and Scarborough Reef.[2] If all these small islands had an entitlement to an exclusive economic zone (EEZ) and continental shelf, there would appear to be no area beyond national jurisdiction in the South China Sea.[3] However, it has been argued that some or all of these islands are likely to fall under the definition of Article 121(3) of the

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Figure 1.

LOS Convention, which provides that "[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."[4]

Even if it were to be established that all or some of these islands do not fall within the ambit of Article 121(3) of the LOS Convention and are entitled to an EEZ and continental shelf, the actual extent of these zones can only be established after a delimitation with the same zones of the mainland coasts surrounding the South China Sea. It has been suggested that in such a delimitation the islands should receive limited weight.

For instance, Claggett has argued that "[t]here seems no doubt that a court, applying existing principles and precedents, would limit the entitlement of each Spratly and Paracel high-tide elevation to, at most, a 12-[nautical-] mile belt of territorial sea."[5]

This article will focus on these two law of the sea issues and will not address the sovereignty disputes over the islands,[6] although any final delimitation of maritime zones of the South China Sea would require that the sovereignty disputes be addressed. The interest of the coastal states of the South China Sea in the island groups is explained in large part by their (potential) maritime zones having a considerable resource potential.[7] This makes an assessment of the extent of the maritime zones of the islands in the South China Sea an essential element in evaluating any proposal for resolving the sovereignty disputes.[8] Solutions for joint management or dividing the South China Sea that one or more states perceive as giving too little or too much weight to the islands may be difficult to accept. A clearer perception of what are the likely outcomes if the law of the sea is applied to establish the extent of the maritime zones of the islands involved may help in reaching a mutually acceptable solution. For instance, if all of the islands clearly fall under the definition of Article 121(3) of the LOS Convention, states might be persuaded to give up claims for maritime zones of the islands beyond a 12 nautical mile territorial sea.

The first part of this article discusses the general geographic setting of the South China Sea. This is followed by a discussion of the provisions of the LOS Convention on the limits of maritime zones and their delimitation between neighboring states. Next, the entitlement of the various islands groups to maritime zones will be assessed. A key element in this respect will be to establish the impact of Article 121(3) of the LOS Convention. After establishing the maritime zones which can in principle be generated by the islands involved, the question of their delimitation with the maritime zones of the mainland coasts will be addressed. The major findings will be restated in a concluding paragraph.

The General Geographic Setting

The South China Sea is surrounded six coastal states (or seven, if Taiwan is considered as being separate from the People's Republic of China [hereinafter China]): Brunei Darussalam, China, Indonesia, Malaysia, Philippines, and Vietnam. As was noted above, if the islands that are the subject of this analysis are excluded in establishing the extent of the EEZ, there remains a considerable area of high seas in the central part of the South China Sea.[9] It seems likely that at least part of this area might be claimed as part of the legal continental shelf of the mainland coasts under Article 76 of the LOS Convention.[10]

If all the islands under consideration in the present analysis were to generate an EEZ, it would appear that no areas of high seas or Area would be left in the South China Sea. Moreover, the EEZs of the islands would, to a considerable extent, overlap with the EEZ of the mainland coasts surrounding the South China Sea. An EEZ of Pratas Island, which is under the sovereignty of China/Taiwan, would overlap with the EEZ of the Philippines. The EEZ of the Paracel Islands, which are in dispute between China/Taiwan and Vietnam, would overlap with the EEZ of the Chinese island of Hainan and the Vietnamese mainland coast. Scarborough Reef, which is claimed by China and the Philippines, is situated well within the EEZ of the Philippines. An EEZ for the entire Spratly Islands group would overlap with the EEZ of all the coastal states bordering the South China Sea except for that of China/Taiwan.[11] The fact that all of the coastal states

of the South China Sea, except Indonesia, claim one or more of the Spratly Islands makes this the most complex dispute in terms of territorial sovereignty and claims to maritime zones.

The Relevant Provisions of the LOS Convention

The LOS Convention provides the legal framework for establishing the extent of maritime zones in the South China Sea. The convention, which entered into force on 16 November 1994, has been ratified by all of the coastal states of the South China Sea except for Taiwan.[12] The convention does not allow any reservations and exceptions unless expressly permitted by an article of the convention.[13] This implies that the provisions of the convention concerning the entitlement to and delimitation of maritime zones are applicable unabridged between the coastal states of the South China Sea.[14]

Disputes over Territory and Historic Title

The LOS Convention is not intended to address disputes over sovereignty. However, sovereignty disputes can have an impact on the application of the convention's substantial or procedural rules to specific cases. In the case of the South China Sea this concerns, apart from the major uncertainty about the maritime zones of the coastal states, the procedure for making a submission to the Commission on the Limits on the Continental Shelf (CLCS) under Article 76 of the convention[15] and the applicability of the compulsory dispute settlement mechanisms of Part XV of the convention. Under Article 298 of Part XV of the convention, states may declare that they do not accept third party settlement for disputes concerning the interpretation or application of the articles concerning the delimitation of the territorial sea, the EEZ, or the continental shelf or those involving historic bays or historic title. However, such disputes can be submitted to conciliation if one party so wishes, except for those disputes involving the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over territory. None of the coastal states of the China Sea has made a declaration under Article 298. In any case, disputes concurrently involving a dispute concerning sovereignty or other rights over territory appear to be excluded from the reach of the compulsory dispute settlement provisions of the convention.

One basis for China's claim to the waters of the South China Sea is historic title.[16] The LOS Convention does not define the legal regime of historic title or historic waters, although it recognizes these regimes in Articles 10(6), 15, and 46(b).[17] This implies that the regime for such waters is to be determined in accordance with customary international law. In the *Libya/Tunisia Continental Shelf Case*,[18] the International Court of Justice (ICJ) noted that general international law "does not provide for a *single* 'régime' for 'historic waters' or 'historic bays,' but only for a particular régime for each of the concrete, recognized cases of 'historic waters' or 'historic bays.'"[19] The court further noted that this regime is based on acquisition and occupation, which is distinct from the regime of the continental shelf, which is based on rights existing *ipso facto* and *ab initio*.[20] Furthermore, historic title requires the general acquiescence or recognition by other states.[21]

Baselines

The LOS Convention confirms the basic premise of the law of the sea that "[i]t is the land which confers upon the coastal State a right to the waters off its coasts."[22] In order

to be able to make any claim to maritime zones a state has to have a coastline. The normal baseline from which the breadth of all maritime zones is measured is the low-water line along the coast.[23] It can be both the low-water line along a mainland coast or an island coast.

The LOS Convention defines an island as "a naturally formed area of land, surrounded by water, which is above water at high tide."[24] Low-tide elevations, which the convention defines as "a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide," only may be used as a baseline if they are wholly or partly within 12 nautical miles from the mainland or an island.[25] For an island on an atoll or having fringing reefs, the baseline is the seaward low-water line on the reef.[26]

The provisions of the LOS Convention on baselines clearly indicate that elevations of the seabed that are always submerged do not have any role to play in establishing the extent of maritime zones. The construction of artificial islands, installations, or structures over such elevations does nothing to change their status. The convention explicitly provides that artificial islands, installations, and structures do not possess the status of islands, do not have a territorial sea of their own, and do not affect the delimitation of the territorial sea, the EEZ, or the continental shelf.[27]

Article 121(3)

Article 121(3) of the LOS Convention poses an important restriction on the capacity of islands to have an EEZ and continental shelf. In view of the characteristics of the islands in the South China Sea, any assessment of their impact on the extent of maritime zones has to take into consideration Article 121(3).

It is generally acknowledged that Article 121(3) raises a number of complicated interpretative questions, making it difficult to establish to which islands it is actually applicable.[28] The present analysis does not purport to provide a final answer on rocks and islands. Further elaboration of Article 121(3) is possible through state practice or judicial decisions.[29] However, in order to reach a preliminary conclusion concerning the applicability of Article 121(3) to the islands in the South China Sea, it is necessary to seek to narrow the uncertainties surrounding its interpretation.

Two elements can be distinguished from a reading of Article 121(3). One is the size of the island and the other its capacity to sustain human habitation or economic life of its own. The relevance of size is indicated both by the wording of Article 121(3) and its drafting history.[30] Writings on Article 121(3) also indicate the relevance of this criterion. However, a review of the literature indicates that there is no agreement on what the size criterion should be for an island or a rock. A number of authors suggest that a rock is to measure significantly less than the larger islands under consideration in the present analysis.[31] This is illustrated by the reference to Rockall, which measures only 624 m^2, as an example of a typical rock.[32] Other authors consider that features similar in size to the major Spratly or Paracel Islands fall under the definition of rocks.[33] In any case, size in itself is not decisive. An island of certain size may be a rock, but may still be able to maintain human habitation or economic life of its own, thus escaping the scope of application of Article 121(3) of the LOS Convention.

The term "sustain human habitation or economic life of their own" also has given rise to different interpretations. The drafting history of Article 121(3) offers little help. Writers have discussed these terms in considerable detail. One difference of opinion is whether the word "or" has to be interpreted as being conjunctive[34] or disjunctive.[35] An

interpretation in accordance with the ordinary meaning of this term[36] would suggest that the latter interpretation is correct. As far as the question of what constitutes "human habitation or economic life of their own" is concerned, at one end of the spectrum of opinions it is suggested that "economic life" can consist of the presence of a lighthouse or other navigational aids.[37] Whether such presence would really constitute "economic life" can be questioned, as it would seem to render Article 121(3) virtually meaningless. Another approach would be to define "economic life" in terms of an island or its resources significantly contributing to an activity that is economically viable.

The most far-reaching requirement that has been suggested for rocks to be able to have an EEZ and continental shelf is whether they can support a stable community of organized groups of human beings.[38] To justify such a standard it is submitted that the object and purpose of Article 121(3) of the LOS Convention is to prevent small islands, which do not have a population dependent on ocean resources, from infringing on the extent of the Area.[39] However, protecting the community interest in the Area certainly was not the only, and probably not the major, consideration resulting in the adoption of Article 121(3).[40] In any case, there are no indications that there was a consensus at either the Third United Nations Conference on the Law of the Sea or in subsequent practice that "human habitation" has to be interpreted in these broad terms. A less stringent criterion that has been suggested is that the presence of one person on an island may provide an indication that the island can support human habitation.[41] A close reading of Article 121(3) suggests that what is required is the capacity to sustain human habitation and not that a rock is actually inhabited.[42]

State practice, including that of parties to the LOS Convention, suggests a restrictive interpretation of Article 121(3).[43] In general, states take into account islands in establishing the outer limits of the EEZ or continental shelf.[44] An exceptional example of legislation that qualifies the extent of the EEZ or continental shelf is a Mexican Federal Act which provides that islands have a continental shelf and EEZ, but rocks which cannot sustain human habitation or economic life of their own do not.[45] A map of the Mexican EEZ published by the Mexican Foreign Ministry in June 1976 reportedly took into account all islands, except for the Alijos.[46] The United Kingdom decided to roll back its fishery zone limit off Rockall at the time of its accession to the LOS Convention in 1997.[47] It was indicated that "Rockall is not a valid base point for such limits under Article 121(3)" of the convention.[48]

The above discussion indicates that only islands of a very small size qualify as a rock under Article 121(3) of the LOS Convention. Furthermore, some islands that may qualify as such a rock because of their size may still be able to sustain human habitation or economic life of their own. The available arguments indicate that the threshold that has to be met in this respect is rather low and almost certainly is lower than the most far-reaching requirement, a stable community. In any case, the requirements of human habitation and economic life do not have to be met at the same time. This 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.

The Outer Limits of Maritime Zones

The LOS Convention lays down the maximum extent of the territorial sea, the EEZ, and the continental shelf. The territorial sea can extend to 12 nautical miles from the baselines determined in accordance with the Convention and the EEZ to 200 nautical miles

from these baselines.[49] The continental shelf can either extend to 200 nautical miles from these baselines or to the outer edge of the continental margin.[50] Article 76 of the LOS Convention establishes the criteria to determine the outer limit of the continental shelf where it extends beyond 200 nautical miles. Article 76 provides two rules for establishing the outer limit line and two restraint lines, beyond which the continental shelf cannot extend in any case. Due to the dimensions of the South China Sea, these restraint lines probably are of limited significance.[51] The maximum extent of the continental shelf is either a line defined by fixed points not more than 60 nautical miles from the foot of the continental slope, or fixed points at each of which the sedimentary thickness is at least 1% of the shortest distance from such point to the foot of the continental slope.[52]

In order to establish the outer limit of its continental shelf beyond 200 nautical miles from the baselines, a coastal state has to comply with the procedure of Article 76 of the LOS Convention. An important aspect of this procedure is the submission of information to the CLCS.[53] The Rules of Procedure of the Commission have important implications for submissions involving a dispute on the delimitation of the continental shelf between opposite or adjacent states or in other cases of unresolved land or maritime disputes. Such submissions are to be considered in accordance with Annex I of the Rules of Procedure.[54] Annex I precludes, inter alia, that a submission made by any of the states concerned in such a dispute are to be examined and qualified by the CLCS, expect with prior consent given by all states that are parties to such a dispute.[55] A land or maritime dispute may, for example, concern the sovereignty over islands, the existence of a historic title, or the location of a maritime boundary.[56] The provisions of the LOS Convention do not preclude two states from agreeing on the delimitation of their continental shelf beyond 200 nautical miles if there is a dispute with other states excluding a submission to the CLCS.[57]

Under the LOS Convention, both the EEZ and the continental shelf give a state sovereign rights over the natural resources of the seabed and its subsoil.[58] This parallelism between these regimes raises the question of what happens if the continental shelf beyond 200 nautical miles of one state overlaps with the EEZ of another state or if a state argues for different boundaries for both zones within 200 nautical miles.[59] This is a complex question to which no conclusive answer is readily available. The case law, and some state practice, suggest that a different delimitation line is possible for the EEZ and the continental shelf.[60] One implication of such a situation is that one state would exercise jurisdiction over the water-column of the area concerned, and the other state over the seabed and its subsoil.[61]

Delimitation of Maritime Zones between Neighboring States

A first requirement for effecting a delimitation between two coasts is that there be an overlap of relevant maritime zones. Any maritime zone that does not overlap with the same maritime zone of another state belongs to the coastal state.

The delimitation of the territorial sea, EEZ, and continental shelf is addressed in Articles 15, 74, and 83 of the LOS Convention. Article 15 is not of direct relevance for the present analysis because there only exist areas of overlapping territorial sea between the islands involved and not between the islands and the mainland coasts. However, the existence of the territorial sea has one important implication for the delimitation of the EEZ and the continental shelf. In no case can the EEZ or continental shelf encroach upon the territorial sea.[62] All islands that meet the requirements of Article 121(1) of the

LOS Convention are entitled to a 12 nautical mile territorial sea. The outer limit of this territorial sea has to be established, taking into account the provisions on baselines of the LOS Convention set out above.

Articles 74(1) and 83(1) of the LOS Convention do not indicate what substantive rules of delimitation law have to be applied to delimit the EEZ and continental shelf. They only note that delimitation has to be effected on the basis of international law in order to achieve an equitable solution. The ICJ and arbitral tribunals have had the opportunity to address the meaning of these provisions on a number of occasions. This case law indicates that a court or tribunal applying these provisions will decide a case taking into account the same principles and rules of delimitation as exist under customary international law.[63] Customary law has been mostly developed through the case law.

As maritime delimitation law mostly consists of broad principles, it does not make it possible to predict with certainty the outcome of a specific case. Thus, it is only possible to indicate an area within which the boundary is likely to be located, instead of the actual boundary.[64]

An important distinction that has arisen in the case law is between delimitations involving opposite coasts and those involving adjacent coasts.[65] In the case of opposite coasts, the ICJ has consistently held that the starting point for effecting a delimitation should be the establishment of an equidistance line.[66] The practical implications of an initial choice of a provisional equidistance line or some other provisional starting line should not be overestimated. Maritime delimitation law, as applied by the judiciary, allows a wide margin of appreciation in shifting a provisional median line. This makes it altogether likely that different provisional lines may result in the same boundary.[67]

The next step is to assess whether there are any circumstances requiring a shift of this provisional equidistance line. The circumstances that have been taken into account are mainly of a geographical nature. Examples in this respect are the general geographical context, the distance between the relevant coasts, and the existence of a disparity in the lengths of the relevant coasts.[68]

For the delimitations involving the islands in the South China Sea, the latter of these circumstances seems to be by far the most important relevant circumstance. The case law has used the existence of a disparity in coastal lengths in two distinct ways. Because of their different implications these distinctions have to be carefully distinguished. A disparity in coastal lengths was used in the *Gulf of Maine Case*,[69] *Libya/Malta Continental Shelf Case,*[70] and *Jan Mayen Case*[71] to shift a provisional equidistance line to arrive at a boundary. In these cases, the ICJ only made an assessment of the difference in length of the relevant coasts and did not consider the ratio of maritime spaces of each party to assure that this latter ratio was similar to that of the relevant coasts. The reasons for rejecting this consideration were put eloquently by the ICJ in the *Libya-Malta Continental Shelf Case*:

> [T]o use the ratio of coastal lengths as of itself determinative of the seaward reach and area of continental shelf proper to each Party, is to go far beyond the use of proportionality as a test of equity, and as a corrective of the unjustifiable difference of treatment resulting from some method of drawing the boundary line. If such a use of proportionality were right, it is difficult indeed to see what room would be left for any other consideration [. . .]. Its weakness as a basis of argument, however, is that the use of proportionality as a method in its own right is wanting of support in the practice of States,

> in the public expression of their views at (in particular) the Third United Nations Conference on the Law of the Sea, or in the jurisprudence. [72]

The actual methods to establish the amount of shift in each of these cases differed, depending on the particular circumstances of each case.[73]

The disparity of coastal lengths has also been used to establish whether there is a reasonable proportion between the relevant coasts of the parties and the maritime spaces accorded to each of them once a boundary has been selected.[74] The ICJ and arbitral tribunals have applied this test differently in cases where the boundary was arrived at by shifting a provisional equidistance line as opposed to cases where a boundary was arrived at by a different method. In the latter case, specific calculations were made; in the former case this has only been done in the recent *Eritrea/Yemen Arbitration*.[75] As a matter of fact, in the *Gulf of Maine Case*[76] and the *Jan Mayen Case* the ICJ did not address this issue. In the *Libya-Malta Continental Shelf Case*, the court noted that in applying the proportionality test it was not required to endeavor to achieve a predetermined ratio between the relevant coasts and the respective continental shelf areas. The Court limited itself to noting that there was no evident disproportion and, as a result, the proportionality test as an aspect of equity was satisfied.[77]

Entitlement to Maritime Zones in the South China Sea

As far as entitlement to maritime zones in the South China Sea[78] is concerned, the principal question is which islands are entitled to the full suite of maritime zones. For the mainland coasts this is not an issue, although there can be some doubt over the validity of certain baselines that are used by some of the coastal states.[79]

The LOS Convention makes a distinction between three types of seabed elevations: islands, low-tide elevations, and elevations that are never above the level of the sea. In the case of islands, a further distinction is made between rocks in the sense of Article 121(3) of the Convention, which are not entitled to an EEZ and continental shelf, and all other islands that are entitled to such zones.

In the South China Sea a number of elevations that are never above the level of the sea have been mentioned in connection with the claims to territory and maritime zones. One such feature is Macclesfield Bank. A number of similar banks are located to the southwest of Spratly Island: Alexandra Bank, Grainger Bank, Prince Consort Bank, Prince of Wales Bank, Rifleman Bank, and Vanguard Bank. Other submerged banks are nearer to islands in the Spratly Islands or the Paracel Islands, implying that their absence of entitlement to maritime zones is less consequential than for the earlier mentioned features. These latter banks include, inter alia, Owen Shoal and Reed Bank in the Spratly Islands and Bremen Bank in the Paracel Islands. It has been reported that some of these banks have been occupied.[80] The construction of structures over these banks would not change their status (e.g., they are part of the coastal state's maritime zone in which they are located) and such structures themselves are not entitled to any maritime zones except for a safety zone around them.[81]

Although no sovereignty can be claimed over these banks and they are not entitled to maritime zones, they may form part of the historic waters of a state or a state may have historic rights over such areas. However, reviewing the available information in the light of the applicable rules of international law does not indicate that any such claims can be upheld.[82]

There are numerous low-tide elevations in the Spratly and Paracel Islands, including

Bombay Reef, North Reef, and Passu Keah in the Paracel Islands; and Alison Reef, Ardasier Reef, Bombay Shoal, Cornwallis South Reef, Hardy Reef, Hughes Reef, Ladd Reef, and Subi Reef in the Spratly Islands. These low-tide elevations are only to be part of the baseline for measuring the outer limit of the territorial sea if they are within 12 nautical miles of an island.[83] This implies that, for instance, North Reef in the Paracel Islands, which lies beyond this distance from the Amphitrite Group and the Crescent Group, does not have any influence on the extent of maritime zones. If a low-tide elevation is located in the territorial sea of a state, in principle it is only that state which can use this low-tide elevation for establishing the extent of its maritime zones. A claim of another state to such a low-tide elevation is, in principle, impermissible.

The provisions on low-tide elevations and reefs in the LOS Convention have considerable impact on the extent of the territorial sea of a number of insular features in the Paracel and Spratly Islands. Many low-tide elevations are situated wholly or partly within 12 nautical miles of islands and can be used as part of the baseline for measuring the territorial sea.[84] There are a number of atolls in the Spratly and Paracel Islands, raising the question of whether Article 6 of the LOS Convention can be applied. One difficulty is that in most cases there are no fringing reefs on a large part of the perimeter of the atoll.[85] Closing lines may be used across openings in fringing reefs to establish the limit between internal waters and the territorial sea.[86] It has been suggested that if a fringing reef is found only along one side of an island, it would probably be reasonable to use the shortest possible line to close the internal waters.[87] This solution might be applied to some of the features in the Spratly and Paracel Islands.

Even if Article 6 of the LOS Convention is not applicable to these features, in most cases the fringing reefs in the Spratly and Paracel Islands are close enough to an island to be used as the baseline for the territorial sea and other maritime zones. In this case the waters within these features are part of the territorial sea and do not, as is the case under Article 6, form part of the internal waters.

A large number of features in the Paracel and Spratly Islands, Pratas Island, and Scarborough Reef are permanently above water, making them islands in the sense of Article 121(1) of the LOS Convention. However, Article 121(3) directs that certain islands are not entitled to an EEZ or continental shelf. A subdivision of islands into three categories can be made. Some islands seem to fall squarely within the definition of rocks, due to their very limited size. Apart from certain features in the Paracel and Spratly Islands, this would seem to be the case for Scarborough Reef.[88] On the other hand, Pratas Island and the largest islands in the Paracel and Spratly Islands, due to their size and other characteristics, do not appear to fall within Article 121(3).[89] These include, but are not necessarily limited to, Itu Abu, Spratly Island, and Thi Tu in the Spratly Islands and Lincoln Island and Woody Island in the Paracel Islands. Finally, there are a number of islands in the Paracel and Spratly Islands which might or might not fall under Article 121(3) of the Convention.[90] A detailed discussion of each of these islands is beyond the scope of this article and in any case is not required to indicate in broad terms what delimitations might be effected between the Paracel and Spratly Islands and the mainland coasts surrounding the South China Sea.

Delimitation of Overlapping Maritime Zones in the South China Sea

The starting point of any delimitation of maritime zones is to establish the extent to which these zones overlap. In the South China Sea, there are considerable areas within

200 nautical miles from the islands discussed here which do not overlap with the EEZ of the mainland coasts. Such areas form part of the EEZ of the islands.

In the analysis of the delimitation of maritime zones between islands and mainland coasts in the South China Sea, four separate areas have to be distinguished: between Pratas Island and the Philippines; between Scarborough Reef and the Philippines; between the Paracel Islands and the coasts of Vietnam or China; and between the Spratly Islands and the surrounding mainland coasts.[91]

The coastal relationship and distance between the islands in the South China Sea and the mainland coasts indicate that the delimitation of overlapping EEZs is between opposite coasts. This suggests that the starting point of a delimitation should be a provisional equidistance line between the relevant coasts. One difference between the situations in which the case law applied equidistance as a provisional line and the delimitation involving the islands in the South China Sea is that in the latter case the coastal length (and size) of the islands is very limited. Some pronouncements of the ICJ and arbitral tribunals might be taken to suggest that such small islands should not be given any weight, either in the drawing of a provisional equidistance line or in the establishing of the boundary.[92]

However, the situation in the South China Sea differs fundamentally from the circumstances in which the case law considered it acceptable to ignore minor insular features. In the instances in which the case law indicated that small features could be disregarded, the features were only a minor element in an overall delimitation involving longer coasts.[93] In the South China Sea, the islands are one of the principal elements in the delimitation and not an incidental feature in a larger geographical setting. This is especially the case in those areas in which there are no overlapping zones between the mainland coasts and, consequently, there is a need to delimit the overlap of maritime zones between the islands and one of the mainland coasts.[94]

This difference can be illustrated by looking at the effect of giving no weight to an island in establishing an equidistance line in these two instances. Giving no weight to a small island that is relatively close to a larger island or a mainland coast only has a limited effect on the location of the equidistance line. For instance, in the *Libya-Malta Continental Shelf Case*, the ICJ gave no weight to the Maltese islet of Filfla in establishing a provisional equidistance line.[95] However, this provisional equidistance line was still at a very large distance from Filfla.[96] Discounting the islands in the South China Sea in establishing a provisional equidistance line using only the mainland coasts would place such a line very near or even beyond the islands involved.[97]

Another argument that has been advanced to justify giving no weight to the islands in the South China Sea in establishing maritime boundaries is the large disproportion between their relevant coasts and the relevant mainland coasts.[98] The way in which this circumstance has been applied in cases involving opposite coasts indicates that this argument is not convincing. The case law has argued strongly that there is no place for a comparison between the ratios of coastal lengths and maritime spaces of each of the parties in applying this relevant circumstance. Such a comparison has been made to establish whether the boundary arrived at is equitable in cases involving adjacent coasts. However, in decisions involving opposite coasts this has not been done except in one recent case.[99]

Finally, giving no weight to the islands in the South China Sea in a delimitation, i.e., by letting the EEZ boundary coincide with the 200 nautical mile limit of the opposite mainland coast, would seem to run counter to one of the premises of the law applicable to the delimitation of maritime boundaries. In the *Jan Mayen Case* the ICJ observed:

> Nor do the circumstances require the Court to uphold the claim of Denmark that the boundary line should be drawn 200 miles from the baselines on the coast of eastern Greenland, i.e., a delimitation giving Denmark maximum extension of its claim to continental shelf and fishery zone. The result of such a delimitation would be to leave Norway merely the residual part [. . .] of the "area relevant to the delimitation dispute" as defined by Denmark. The delimitation according to the 200-mile line calculated from the coasts of eastern Greenland may from a mathematical perspective seem more equitable than that effected on the basis of the median line, regard being had to the disparity in coastal lengths; but this does not mean that the result is equitable in itself, which is the objective of every maritime delimitation based on law. The coast of Jan Mayen, no less than that of eastern Greenland, generates potential title to maritime areas recognized by international law, i.e., in principle up to a limit of 200 miles from its baselines. To attribute Norway merely the residual area left after giving full effect to the eastern coast of Greenland would run wholly counter to the rights of Jan Mayen and also to the demands of equity.[100]

The underlying assumption is that delimitation is concerned with establishing how an area of overlapping claims has to be divided, taking, in principle, as a starting point its equal division.[101] This equal division may be adjusted in the light of the relevant circumstances of the case.[102] Attributing all of the area of overlap to one of the states involved would run counter to this basic tenet of delimitation law.[103]

The conclusion that follows from this review of the law applicable to the delimitation of the EEZ is that giving no weight to the islands entitled to an EEZ in a delimitation between mainland coasts has to be rejected. What weight should be accorded to each of the island groups depends on the relevant circumstances of each individual case.

A delimitation between Pratas Island and the Philippines has to start with the establishment of a provisional equidistance line. The major factor for shifting such a provisional equidistance line is the large disparity between the coastal length of Pratas Island and the relevant coast of the Philippines. One circumstance in establishing the amount to which the provisional line should be shifted is the presence of the island of Taiwan (and possibly the Chinese mainland coast). Any shift in a provisional equidistance line should leave Pratas Island at least some limited maritime zone beyond an equidistance line between the Philippines and these other coasts.[104] The relatively large distance between Pratas Island and the Philippines would be another argument for not shifting a provisional equidistance line too far in the direction of Pratas Island.

A second delimitation concerns Scarborough Reef. As was argued above, Scarborough Reef probably is a rock in the sense of Article 121(3) of the LOS Convention, obviating a need to delimit the EEZ or continental shelf. If Scarborough Reef does not fall under the sovereignty of the Philippines, the reef is entitled to a 12 nautical miles territorial sea enclaved within the EEZ of the Philippines.

The Paracel Islands are in dispute between China and Vietnam. A resolution of this sovereignty dispute might require a delimitation between the islands and the mainland coasts of one of these states or both states if the islands were to be divided between them. A delimitation between the Paracel Islands and either of the mainland coasts would start with the establishment of a provisional equidistance line. The principal factor for shifting such a provisional equidistance line would be the large disparity between the coasts of the Paracel Islands and the relevant mainland coasts. One circumstance in

establishing the amount to which the provisional line should be shifted is the fact that the maritime zones of the mainland coasts not only overlap with those of the Paracel Islands, but also with each other. Any shift in a provisional equidistance line should leave the Paracel Islands at least some maritime zone beyond this latter equidistance line. This consideration would be mostly relevant in the area between the islands and the mainland coasts.

The EEZs of the Spratly Islands overlap with those of five mainland coasts (Brunei Darussalam, Indonesia, Malaysia, Philippines, and Vietnam). The starting point of any of these delimitations would be to establish a provisional equidistance line. To establish these equidistance lines only those islands not falling under Article 121(3) should be taken into consideration.[105] Any island in the Spratly Islands falling under Article 121(3) of the LOS Convention situated beyond this provisional equidistance line has a 12 nautical mile territorial sea forming an enclave in the EEZ of the mainland coast concerned. Submerged banks in the Spratly Islands are irrelevant for delimitation purposes.

In establishing the shift of a provisional equidistance line to arrive at the boundary, the most significant relevant circumstance is once more the large disparity in coastal lengths. Such a shift would be larger (at least in relative terms) in areas where the islands and the mainland coasts are at a shorter distance. This general proposition is indicated by both the case law and state practice. For instance, if a delimitation between the Spratly Islands and the Philippines were to be required, a boundary might consist of a number of lines connecting points on the outer limits of territorial seas of those islands that have an EEZ. In relation to Vietnam, a delimitation might be effected by a shift of a provisional equidistance line that, at points closest to islands, would still be some distance from the outer limit of their 12 nautical mile territorial sea. It is not without interest that the area that thus would be attributed to the Spratly Islands in any case would in large part appertain to them because it is beyond 200 nautical miles of the mainland coast and/or part of their territorial sea.

One circumstance of a nongeographical nature that might be invoked in connection with a delimitation are hydrocarbon concessions.[106] However, the circumstances surrounding the issuing of licenses do not seem to be of such a nature as to be relevant for establishing the location of a maritime boundary.[107] Another relevant circumstance, which has been invoked from time to time by states, are lines that have been applied for defining the extent of territory or maritime zones. The practice of the states in the South China Sea does not suggest that any such lines have been accepted as representing the extent of historic claims or as representing an equitable boundary for delimiting maritime zones under the LOS Convention.[108]

One final issue of relevance for the delimitation of the maritime zones of the islands in the South China Sea is that the continental shelf of the mainland coasts may extend beyond 200 nautical miles.[109] For instance, it has been submitted that the continental shelf of Vietnam may extend to 350 nautical miles from its baselines.[110] This raises the question whether this should result in a continental shelf boundary different from the EEZ boundary.

One important implication of the existence of continental shelf rights beyond 200 nautical miles in the southern part of the South China Sea would be that these not only can be claimed from the mainland coasts, but also from the Spratly Islands, as in this case they would be situated on the same continental shelf as the mainland coasts. In other words, this does not concern a situation in which a continental shelf beyond 200 nautical miles of a mainland coast has to be delimited against a 200 nautical mile zone from the islands, but a situation in which there is equal entitlement of both of these

coasts. This would suggest that in this case, again, the starting point of a delimitation should be a provisional equidistance line between the relevant coasts and that in general the same arguments apply as set out above in connection with the delimitation of the EEZ. However, one implication of continental shelf entitlement could be that a shift in a provisional median line could result in a continental shelf boundary that in some areas is only within 200 nautical miles from the coasts of the islands, but beyond 200 nautical miles from the mainland coasts. This implies that it would differ from the EEZ boundary.

Conclusions

If anything, the present analysis indicates the complexity of establishing the extent of the maritime zones of the islands in the South China Sea under the law of the sea. In part, this is due to the fact that a number of provisions of the LOS Convention are open to different interpretations. State practice, which may contribute to the clarification of these provisions, is not always abundant.

Although the LOS Convention does not provide a clear-cut answer to some of the law of the sea aspects of the disputes in the South China Sea, it narrows down the available options and interpretations considerably. A legal regime raising certain controversy, which to a large extent is inevitable in view of the complexities of coastal geography, is to be preferred to a situation in which there is no legal restraint on the kind of maritime claims states can advance.

The most important issue in respect of baselines concerns Article 121(3) of the LOS Convention. Although there is a considerable amount of uncertainty concerning the interpretation and application of this provision, it seems that at least some of the islands in the South China Sea have an EEZ and continental shelf. Other insular formations can almost certainly be considered to fall under the sway of Article 121(3). States may also differ over other baseline issues. This concerns, for instance, the question of what reefs can be considered to be fringing reefs in the sense of Article 6 of the LOS Convention. The LOS Convention indicates that the role of low-tide elevations is limited in establishing entitlement to maritime zones and that the submerged banks in the South China Sea do not have any role to play in this respect. It is also unlikely that there exists any historic claim to the waters overlying these banks.

The entitlement of some of the islands to an EEZ and continental shelf severely limits (or may even cancel altogether) the extent of the high seas and the Area in the South China Sea. The parts of the maritime zones of the islands that do not overlap with those of the mainland coasts cannot be the subject of delimitation. On the other hand, in areas of overlap of the EEZ and continental shelf of the islands with those of the mainland coasts there is a need for delimitation. A delimitation between these zones of the islands and the mainland coasts under maritime delimitation law should, in any case, not result in a boundary that coincides with the 200 nautical mile limit of the mainland coast, leaving the islands only the remaining maritime areas.[111] Although at first glance this would seem to greatly enhance the significance of the islands, it should be recognized that a large part of the area bounded by the delimitation lines suggested in this article would also be part of their maritime zones if they would not be given any weight in a delimitation with the mainland coasts. A large part of the area involved is only within 200 nautical miles from the islands and cannot be claimed as part of the EEZ of the mainland coasts. Areas within 12 nautical miles from the baselines of the islands, also those which are rocks in the sense of Article 121(3) of the LOS Convention, are

part of their territorial sea. The presence of low-tide elevations and fringing reefs makes such areas quite extensive.

If it is possible to claim a continental shelf beyond 200 nautical miles under Article 76 of the LOS Convention a number of complications would arise. The Rules of Procedure of the CLCS seem to exclude any submission from being considered without the prior consent of all the states involved in the disputes concerning the South China Sea. The existence of a continental shelf beyond 200 nautical miles would not lead to substantially different outcomes of maritime delimitation between the islands and the mainland coasts. However, there could be a divergence between the EEZ and continental shelf boundaries in certain areas, implying that one state may have jurisdiction over the water-column (EEZ) and another state may have jurisdiction over the seabed and its subsoil (continental shelf).

One might lament the present conclusions, as they point to the importance of some of the islands in the South China Sea. This may strengthen the resolve of the states involved to hold on to or further acquire these island possessions. However, these conclusions follow from an analysis of the LOS Convention, which is generally acknowledged—including by the coastal states of the South China Sea—to be the constitution for the oceans. Any claims that can be validly made on the basis of this instrument should be taken into consideration in working toward a long-term solution for the disputed islands in the South China Sea.

Notes

1. Unless explicitly stated otherwise, all references to the mainland coasts of the South China Sea include the major islands surrounding the South China Sea (i.e., Hainan, Taiwan, Luzon, Mindoro, the Calawan Group, Palawan, Kalimantan (Borneo), and the Natuna Islands).

2. China also claims the waters around Macclesfield Bank. On this issue and submerged banks in general, see infra. There also are a number of small islands off the coast of Vietnam, such as Dao Bach Long Vi in the Gulf of Tonkin and the Catwick Islands in the South China Sea proper. The Gulf of Tonkin falls outside the scope of the present paper. The offshore islands of Vietnam in the South China Sea proper will be taken into consideration in assessing the delimitation between the Vietnamese mainland coast and the Spratly Islands.

3. The United Nations Convention on the Law of the Sea (hereinafter the LOS Convention) of 10 December 1982 (entered into force on 16 November 1994), 21 *International Legal Materials* 1982, p. 1261 distinguishes two areas beyond national jurisdiction. The high seas include all parts of the sea beyond the EEZ (LOS Convention, Article 86). The "Area" is defined as the sea-bed and ocean floor and subsoil thereof beyond the limits of national jurisdiction (LOS Convention, Article 1). As the continental shelf in some areas extends beyond the outer limit of the EEZ, the high seas can overlay either the continental shelf or the Area.

4. See B. Claggett, "Competing Claims of Vietnam and China in the Vanguard Bank and the Blue Dragon Areas of the South China Sea: Part I," 13 *Oil and Gas Law and Taxation Review* 1995, pp. 375–388, at p. 377; L. G. Cordner, "The Spratly Islands Dispute and the Law of the Sea," 25 *Ocean Development and International Law* 1994, pp. 61–74, at p. 69; B. Hart Dubner, "The Spratly 'Rocks' Dispute—A 'Rockapelago' Defies the Norms of International Law," 9 *Temple International and Comparative Law Journal* 1995, pp. 291–331, at p. 323; M. J. Valencia, J. M. Van Dyke and N. A. Ludwig, *Sharing the Resources of the South China Sea* (Martinus Nijhoff Publishers, The Hague, 1997), at pp. 43–44; and D. Whiting, "The Spratly Islands Dispute and the Law of the Sea," 26 *Denver Journal of International Law and Policy* 1998, pp. 897–915, at p. 905.

5. B. Claggett, "Competing Claims of Vietnam and China in the Vanguard Bank and the Blue Dragon Areas of the South China Sea: Part II," 13 *Oil and Gas Law and Taxation Review*

1995, pp. 419–435, at p. 432. See also J. I. Charney, "Central East Asian Maritime Boundaries and the Law of the Sea," 89 *American Journal of International Law* 1995, pp. 724–749, at pp. 741 and 748; J. Greenfield, "China and the Law of the Sea," in J. Crawford and D. R. Rothwell (eds.), *The Law of the Sea in the Asia Pacific Region* (Martinus Nijhoff Publishers, Dordrecht, 1995), pp. 21–40, at pp. 36–37; Valencia et al., supra note 4, at p. 54; and J. M. Van Dyke and D. L. Bennett, "Islands and the Delimitation of Ocean Space in the South China Sea," 10 *Ocean Yearbook* 1993, pp. 54–89, at p. 89.

6. On the sovereignty disputes, see M. Bennett, "The People's Republic of China and the Use of International Law in the Spratly Islands Dispute," 28 *Stanford Journal of International Law* 1992, pp. 425–450; J. Greenfield, *China's Practice in the Law of the Sea* (Clarendon Press, Oxford, 1992), pp. 150–167; I. Scobbie; "The Spratly Islands Dispute: An Alternative View," 14 *Oil and Gas Law and Taxation Review* 1996, pp. 173–183, at pp. 175–178; Teh-Kuang Chang, "China's Claim of Sovereignty over Spratly and Paracel Islands: A Historical and Legal Perspective," 23 *Case Western Reserve Journal of International Law* 1991, pp. 399–420; Valencia et al., supra note 4, at pp. 17–40; G. M. C. Valero, "Spratly Archipelago Dispute; Is the Question of Sovereignty Still Relevant?," 18 *Marine Policy* 1994, pp. 314–344; Van Dyke and Bennett, supra note 5, at pp. 61–75; and Whiting, supra note 4.

7. On the resource potential of the maritime zones of the Spratly Islands, see Valencia et al., supra note 4, at pp. 9–11 and 187–190.

8. See D. Ong, "The Spratlys Dispute over Marine Resources: Time for a New Approach?," 13 *Oil and Gas Law and Taxation Review* 1994, pp. 352–356, at p. 353.

9. See Valencia et al., supra note 4, at p. 264, Plate 11, which indicates the 200 nautical mile limit in the South China Sea without taking into account the Paracel Islands, the Spratly Islands, and Scarborough Reef.

10. On the implications of Article 76, *see infra.*

11. For a detailed description of the Spratly Islands, see D. Hancox and V. Prescott, *A Geographical Description of the Spratly Islands and an Account of Hydrographic Surveys Amongst those Islands* (IBRU, Maritime Briefing, Vol. 1, No. 6 (1995)).

12. Brunei Darussalam ratified the Convention on 5 November 1996; China on 7 June 1996; Indonesia on 3 February 1986; Malaysia on 14 October 1996; Philippines on 8 May 1984; and Vietnam on 25 July 1994. Taiwan cannot become a party to the LOS Convention. The fact that six of the coastal states of the South China Sea are a party to the LOS Convention makes the question whether there are any differences between the convention and customary international law of limited significance.

13. LOS Convention, Article 309.

14. Article 310 of the convention allows states to make declarations and statements. China, Malaysia, Philippines, and Vietnam have made such declarations upon ratification of the convention. See *The Law of the Sea; Declarations and Statements with respect to the United Nations Convention on the Law of the Sea and to the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea* (United Nations, New York, 1997), at pp. 23, 32, 40, and 45. These declarations make some reference to the issues under examination here. However, in view of Article 309 of the convention, these declarations do not affect the impact of the convention's provisions concerning entitlement to and delimitation of maritime zones.

15. See infra.

16. On this claim, see Charney, supra note 5, at pp. 736–737 and, more specifically, Z. Keyuan, "Historic Rights in International Law and in China's Practice," 32 *Ocean Development and International Law* 2001 (this issue).

17. Articles 10(6) and 15 of the LOS Convention in this respect reflect, respectively, Articles 7(6) and 12 of the convention on the Territorial Sea and the Contiguous Zone, of 29 April 1958, entered into force on 10 September 1964 *United Nations Treaty Series*, Vol. 516, p. 205. There is no precursor to Article 46(b) in the 1958 Convention.

18. *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment of 24 February 1982; *ICJ Reports* 1982, at p. 18.

19. Ibid., at p. 74, para. 100.

20. Ibid. In view of the court's delimitation method, no finding on the validity of the Tunisian historic rights claim in the context of the continental shelf delimitation was necessary. Ibid., at p. 77, para. 105 and at p. 86, para. 121.

21. On the role of acquiescence and recognition in this respect, see Y. Z. Blum, *Historic Titles in International Law* (Martinus Nijhoff, The Hague, 1965), at pp. 38–98; I. Brownlie, *Principles of International Law*; Fourth Edition (Clarendon Press, London, 1993), at pp. 159–161; and N. S. Marques Antunes, *Estoppel, Acquiescence and Recognition in Territorial and Boundary Dispute Settlement* (IBRU, Boundary and Territory Briefings, Vol. 2, No. 8 (2000)).

22. *Fisheries Case (United Kingdom v. Norway)*, Judgment of 18 December 1951 *ICJ Reports* 1951, at p. 116, at p. 133. See also *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. the Netherlands)*, Judgment of 20 February 1969, *ICJ Reports* 1969, at p. 51, para. 96 and *Case Concerning the Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment of 19 December 1978, *ICJ Reports* 1978, at p. 36, para. 86.

23. LOS Convention, Article 5. The convention also provides for the possibility of drawing straight lines which can be used as the baseline from which the breath of maritime zones can be measured (Articles 7, 9, 10, and 47). However, these lines in general are generated from the low-water line along the coast. These provisions on straight lines are not of fundamental importance for establishing the extent of the maritime zones of the islands under review in this article.

24. LOS Convention, Article 121(1).

25. LOS Convention, Article 13. Moreover, in certain instances low-tide elevations can be used for establishing straight (archipelagic) baselines (Articles 7(4) and 47(4)).

26. LOS Convention, Article 6.

27. LOS Convention, Article 60(8); see also LOS Convention, Article 11.

28. For a discussion of this provision, see J. I. Charney, "Rocks that Cannot Sustain Human Habitation," 93 *American Journal of International Law* 1999, pp. 863–877; R. Kolb, "L'Interprétation de l'Article 121, Paragraphe 3, de la Convention de Montego Bay sur le Droit de la Mer: Les <<Rochers qui ne se Prêtent pas à l'Habitation Humaine ou à une Vie Économique Propre. . .>>," *40 Annuaire Français de Droit International* 1994, pp. 876–909; and B. Kwiatkowska and A. H. A. Soons, "Entitlement to Maritime Areas of Rocks which Cannot Sustain Human Habitation or Economic Life of Their Own," 21 *Netherlands Yearbook of International Law* 1990, pp. 139–181.

29. See further, A. G. Oude Elferink, "Is it Either Necessary or Possible to Clarify the Provision on Rocks of Article 121(3) of the Law of the Sea Convention?," *The Hydrographic Journal*, No. 92, April 1999, pp. 9–16.

30. For the drafting history of Article 121(3), see S. N. Nandan and S. Rosenne (eds.), *United Nations Convention on the Law of the Sea, 1982; A Commentary, Volume III* (Martinus Nijhoff Publishers, Dordrecht, 1995), at pp. 321–339. The discussion on Article 121 at the Third United Nations Conference on the Law of the Sea suggests that proposals to limit the extent of maritime zones of certain islands served two distinct purposes. One was to deny small islands any entitlement to an EEZ and continental shelf. The other was to deny such islands a role in the delimitation of these zones with neighboring states. The outcome of the discussion between the opponents and proponents of these separate issues is contained in the single provision which became Article 121(3) of the LOS Convention. See also Kwiatkowska and Soons, *supra* note 28, at pp. 180–181.

31. R. R. Churchill and A. V. Lowe, *The Law of the Sea* (3rd edition) (Manchester University Press, Manchester, 1999), at p. 50; D. M. Johnston, *The Theory and History of Ocean Boundary-Making* (McGill-Queen's University Press, Kingston, 1988), at p. 119; L. Lucchini and M. Vœlckel, *Droit de la Mer; Tome 1; La Mer et son Droit; Les Espaces Maritimes* (Pedone, Paris, 1990), at pp. 343–344; Charney, supra note 28, at p. 869; A. H. A. Soons, "The Effects of a Rising Sea Level on Maritime Limits and Boundaries," 37 *Netherlands International Law Review* 1990, pp. 207–232, at p. 218; and C. R. Symmons, *The Maritime Zones of Islands in International Law* (Martinus Nijhoff Publishers, The Hague, 1979), at p. 41.

32. See E. D. Brown, *Sea-Bed Energy and Minerals: The International Legal Regime; Volume 1: The Continental Shelf* (Martinus Nijhoff Publishers, Dordrecht, 1992), at p. 39; Churchill and Lowe, supra note 31, at p. 50 and Symmons, supra note 31, at p. 41.

33. See J. M. Van Dyke and R. A. Brooks, "Uninhabited Islands: Their Impact on the Ownership of the Oceans' Resources," 12 *Ocean Development and International Law* 1983, pp. 265–300, at pp. 286–287. See also the remark in the text at infra notes 38 and 39.

34. Kolb, supra note 28, at p. 906.

35. Kwiatkowska and Soons, supra note 28, at pp. 163–165.

36. Article 31(1) of the 1969 Vienna Convention on the Law of Treaties provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties of 23 May 1969, entered into force on 27 January 1980, 8 *International Legal Materials* 1969, p. 679.

37. Brown, supra note 32, at p. 38 and Kwiatkowska and Soons, supra note 28, at pp. 167–168.

38. See Kolb, supra note 28, at pp. 903 and 906 and Van Dyke and Brooks, supra note 33, at p. 288.

39. Kolb, supra note 28, at p. 901 and Van Dyke and Brooks, supra note 33, at p. 288.

40. See Nandan and Rosenne, supra note 30. See also Charney, supra note 28, at pp. 865–866; S. Karagiannis; "Les Rochers qui ne se Prêtent pas à l'Habitation Humaine ou à une Vie Économique Propre et le Droit de la Mer," 29 *Revue Belge de Droit International* 1996, pp. 559–624, at p. 623; and J. R. Stevenson and B. H. Oxman, "The United Nations Conference on the Law of the Sea: the 1974 Caracas Session," 69 *American Journal of International Law* 1975, pp. 1–30, at pp. 17 and 24–25.

41. Karagiannis, supra note 40, at pp. 573–574.

42. Kwiatkowska and Soons, supra note 28, at pp. 160–161.

43. See Kolb, supra note 28, at p. 899. In principle, state practice is more important for interpreting treaty provisions than legal doctrine.

44. See Oude Elferink, supra note 29, at pp. 9–10. The fact that limited or no weight has been given to islands in the delimitation of maritime boundaries between states does not imply an assessment of whether or not Article 121(3) is applicable.

45. Federal Act relating to the Sea of 8 January 1986, Articles 51 and 63 reprinted in *The Law of the Sea; Current Developments in State Practice* (New York, United Nations, 1987), at p. 56.

46. Symmons, supra note 31, at pp. 125–126. See also W. van Overbeek, "Article 121(3) LOSC in Mexican State Practice in the Pacific," 4 *International Journal of Estuarine and Coastal Law* 1989, pp. 252–267, at p. 262. It seems that the Mexican baselines are under review at the present time.

47. Also, it seems that the United Kingdom did not take into account Shag Rocks and Black Rock in establishing a 200 nautical mile limit off South Georgia in 1993. Although this is not apparent from the relevant legislation (Proclamation (Maritime Zone) No. 1 of 1993 reprinted in *Law of the Sea Bulletin*, No. 24, at pp. 47–48 and The South Georgia and South Sandwich Islands (Territorial Sea) Order 1989 (Statutory Instrument 1989 No. 1995 and Explanatory Note), the chart depicting this outer limit reportedly reflects this treatment of these rocks. See also R. R. Churchill, "Falkland Islands—Maritime Jurisdiction and Co-operative Arrangements with Argentina," 46 *International and Comparative Law Quarterly* 1997, pp. 463–477, at pp. 473–474.

48. Statement by the Foreign and Commonwealth Secretary, cited in D. H. Anderson, "British Accession to the UN Convention on the Law of the Sea," 46 *International and Comparative Law Quarterly* 1997, pp. 761–786, at p. 778. The limit of the fishery zone was redefined accordingly through the Fishery Limits Order 1997 (Statutory Instrument 1997 No. 1750 of 22 July 1997).

49. LOS Convention, Articles 3 and 57.

50. LOS Convention, Article 76(1).

51. The continental shelf can either extend to 350 nautical miles from the relevant baselines or 100 nautical miles beyond the 2500 meter isobath LOS Convention, Article 76(5).

52. LOS Convention, Article 76(4).

53. For an overview of the activities of the CLCS since it became operational in 1997, see Oceans and the Law of the Sea, Reports of the Secretary-General (1999), UN Doc A/54/429, paras. 51–61; (1998), UN Doc A/53/456, paras. 55–69 and (1997), UN Doc A/52/487, paras. 43–53.

54. Rules of Procedure of the Commission on the Limits of the Continental Shelf, UN Doc. CLCS/3/Rev. 2 of 4 September 1998, rule 44(1).

55. Ibid., Annex I, para. 5(a).

56. It may not always be clear if a submission involves a land or maritime dispute and which are the states involved in such a dispute. In the South China Sea, any submission would seem to touch upon the existing land and maritime disputes. The cautious approach the CLCS has taken in formulating its Rules of Procedures on this point suggests that it would likely reach such a conclusion.

57. Such a delimitation would not have legal consequences for these other states and would not resolve the question of establishing the outer limit of the continental shelf in conformity with the LOS Convention.

58. LOS Convention, Articles 56 and 77.

59. On this parallelism between the EEZ and continental shelf, see B. Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the Law of the Sea* (Martinus Nijhoff Publishers, Dordrecht, 1989), at pp. 6–19.

60. See *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment of 12 October 1984, *ICJ Reports* 1984, at p. 267, para. 27 and at p. 291, para. 84.

61. The United Kingdom and Denmark, and Australia and Indonesia have set up such regimes in bilateral delimitation treaties. Agreement between the Government of the Kingdom of Denmark together with the Home Government of the Faroe Islands, on the one hand, and the Government of the United Kingdom of Great Britain and Northern Ireland, on the other hand, relating to the Maritime Delimitation between the Faroe Islands and the United Kingdom of 18 May 1999, reprinted in 14 *International Journal of Marine and Coastal Law* 1999, p. 551 and Treaty between the Government of Australia and the Government of the Republic of Indonesia Establishing an Exclusive Economic Zone Boundary and Certain Seabed Boundaries of 14 March 1997, reprinted in 12 *International Journal of Marine and Coastal Law* 1997, p. 535.

62. For an overview of relevant state practice and case law, see A. G. Oude Elferink, "Does Undisputed Title to a Maritime Zone Always Exclude its Delimitation: The Grey Area Issue," 13 *International Journal of Marine and Coastal Law* 1998, pp. 143–192, at pp. 153–154, 159–160, and 164–165. This proposition was reconfirmed in the *Award of 17 December 1999 in Phase II (Maritime Delimitation) of the Eritrea/Yemen Arbitration*, see especially, Chapter V, paras 160–161, available at www.pca-cpa.org/erye2toc.htm.

63. See *Case Concerning the Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment of 14 June 1993, *ICJ Reports* 1993, at pp. 62–63, paras. 54–57.

64. For an in-depth review of the law of maritime delimitation as applied by the ICJ and international tribunals, see L. Lucchini and M. Vœlckel, *Droit de la Mer; Tome 2, Volume 1; Délimitation* (Pedone, Paris, 1996) and P. Weil, *The Law of Maritime Delimitation—Reflections* (Grotius Publications Limited, Cambridge, 1989).

65. As the delimitations between the islands and the mainland coasts in the South China Sea all concern opposite coasts, only this situation is considered here.

66. In the *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment of 3 June 1985, *ICJ Reports 1985*, the Court at p. 47, para. 62 noted that "it is in fact a delimitation exclusively between opposite coasts that the Court is, for the first time, asked to deal with. It is clear that, in these circumstances, the tracing of a median line between those coasts, by

way of a provisional step in a process to be continued by other operations, is the most judicious manner of proceeding with a view to the eventual achievement of an equitable result." See also *North Sea Continental Shelf Cases*, supra note 22, at p. 36, para. 56 and the *Jan Mayen Case*, supra note 63, at pp. 60–62, paras. 51–53. In cases involving adjacent coasts, the ICJ and arbitral tribunals have directly indicated a boundary, without first establishing a provisional line, which is subsequently shifted to account for the relevant circumstances of the case.

67. Nonetheless, from a doctrine point of view a provisional equidistance line should be preferred over a provisional line coinciding with the 200 nautical mile limit of one of the states involved. The first of these methods is directly linked to the essential task of delimitation, i.e., dividing areas of overlapping claims, whereas the second is not.

68. For a detailed discussion of relevant circumstances see Lucchini and Vœlckel, supra note 64, at pp. 232–282 and P. Weil, supra note 64, at pp. 213–268.

69. *Gulf of Maine Case*, supra note 60, at pp. 336–337, para. 222.

70. *Libya/Malta Continental Shelf Case*, supra note 66, at pp. 49–53, paras. 66–73.

71. *Jan Mayen Case*, supra note 63, at pp. 67–69, paras. 66–70.

72. *Libya/Malta Continental Shelf Case*, supra note 66, at p. 45, para. 58.

73. See *Gulf of Maine Case*, supra note 60, at pp. 336–337, para. 222; *Libya/Malta Continental Shelf Case*, supra note 66, at pp. 49–53, paras. 66–73; and *Jan Mayen Case*, supra note 63, at pp. 67–69, paras. 66–70. For the present analysis it is noteworthy that in the *Jan Mayen Case*, which involved a large difference in coastal lengths, the difference between the ratio of relevant coasts and the maritime zones attributed to each of the parties was very considerable. According to a calculation presented in the dissenting opinion of Judge ad-hoc Fischer, the decision of the court resulted in a 3 to 1 ratio between the maritime zones of Denmark and Norway, whereas the ratio between the relevant coasts was slightly more than 9 to 1. *Jan Mayen Case*, supra note 63, at p. 309, para. 13. In the *Case Concerning the Delimitation of the Maritime Areas between Canada and France*, 31 *International Legal Materials* 1992, p. 1149, at p. 1176, para. 93, there was an even larger disproportion between the relevant coasts as defined by the court. In this case the ratio between the maritime areas of Canada and France was almost equal to the ratio between the relevant coasts. However, the geographical situation of this case is fundamentally different from either the *Jan Mayen Case* or the South China Sea. See also Scobbie, supra note 6, at p. 179. The *Jan Mayen Case* suggests that in a case of an even larger disproportion between the relevant coasts, such as that involving the islands in the South China Sea, the difference between these two ratios can be even greater.

74. See *Canada-France Arbitration*, supra note 73, at p. 1176, para. 93 and *Tunisia/Libya Continental Shelf Case*, supra note 18, at p. 91, para. 131.

75. *Eritrea/Yemen Arbitration*, supra note 62, at Chapter V, paras. 165–168. The tribunal may have chosen to present these calculations because they indicate that the two ratios are nearly similar, making this an argument that indicates to both parties the equitableness of the award. At the same time, the Tribunal stressed that the test of proportionality was not an independent mode or principle of delimitation. Ibid., at para. 165.

76. *Gulf of Maine Case*, supra note 60, at pp. 339–340, paras. 230–231.

77. *Libya/Malta Continental Shelf Case*, supra note 66, at p. 55, para. 75.

78. The factual information on the islands and other features in the South China Sea is based upon Valencia et al., supra note 4, at pp. 227–235; British Admiralty Charts 94 (printed 18 March 1999) and 1201 (printed 15 October 1997); and the map annexed to *Limits in the Seas: No. 99 Straight Baselines: Vietnam* (U.S. Department of State, 1983).

79. This concerns, for instance, the straight baselines established by Vietnam. See Churchill and Lowe, supra note 31, at p. 39; Ong, supra note 8, at p. 353 and J. A. Roach and R. W. Smith, *United States Responses to Excessive Maritime Claims* (Martinus Nijhoff Publishers, The Hague, 1996), at pp. 101–103.

80. Valencia et al., supra note 4, at pp. 227–234.

81. LOS Convention, Article 60(5). Safety zones around artificial islands, installations, and structures are not to exceed a distance of 500 meters around them, except as authorized by

generally accepted international standards or as recommended by the competent international organization.

82. See Charney, supra note 5, at pp. 736–738 and Scobbie, supra note 6, at pp. 174–175.

83. But, see supra note 25.

84. LOS Convention, Article 13 is applicable to all islands, including those falling under the scope of Article 121(3) of the LOS Convention.

85. See the British Admiralty Charts, supra note 78 and Hancox and Prescott, supra note 11, at pp. 3 et seq.

86. P.D. Beazley, "Coral Reefs and the 1982 Convention on the Law of the Sea," in G. H. Blake (ed.), *Maritime Boundaries* (Routledge, London, 1994), at p. 66; S. N. Nandan and S. Rosenne (eds.), *United Nations Convention on the Law of the Sea, 1982; A Commentary, Volume II* (Martinus Nijhoff Publishers, Dordrecht, 1993), at p. 94 and *The Law of the Sea: Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea* (United Nations, New York, 1989), at p. 12.

87. *The Law of the Sea: Baselines*, supra note 86, at p. 12.

88. On Scarborough Reef, see J. R. V. Prescott, *Maritime Jurisdiction in Southeast Asia: A Commentary and Map* (East-West Center, Honolulu, 1981), at pp. 20–21. Although such rocks do not have an EEZ and continental shelf, they should, in principle, receive at least the same treatment as low-tide elevations in establishing the baselines for measuring the breadth of these zones. See Kolb, supra note 28, at p. 899; Kwiatkowska and Soons, supra note 28, at pp. 147–148; and Nandan and Rosenne, supra note 30, at p. 338.

89. See Scobbie, supra note 6, at p. 181. For further information on the characteristics of the islands involved, see the literature cited in supra note vi. Reference is made to inter alia various economic uses of some of these islands and (temporary) habitation. The reported area of these islands is (other figures have also been given): Itu Abu, 0.46 km²; Spratly Island, 750 by 400 meters; and Thi Tu, 0.22 km². Pratas and the largest islands in the Paracel group are somewhat larger that these islands in the Spratly group.

90. If the competing sovereignty claims did not exist, the definition of certain islands as rocks in the sense of Article 121(3) of the LOS Convention would only have a relatively limited influence on the extent of the outer limit of maritime zones of the Paracel and Spratly Islands and the delimitation between these island groups and the mainland coasts. However, if in a division of the islands one of the claimant states would only be attributed features that are likely to be classified as rocks, its part in the maritime zones in the South China Sea would be severely limited.

91. Any potential delimitation between any of these islands (e.g., between Pratas Island and the Paracel Islands or between islands within the Paracel Islands or the Spratly Islands) would start by establishing a provisional equidistance line. The coastal geography of the islands involved in general would suggest only a need for a limited shift in such a provisional line to arrive at a boundary. The presence of other relevant circumstances might also have an impact in this respect.

92. See *North Sea Continental Shelf Cases*, supra note 22, at p. 36, para. 57; *Libya/Malta Continental Shelf Case*, supra note 66, at p. 48, para. 64; and *Eritrea/Yemen Arbitration*, supra note 62, at Chapter V, paras. 147–148.

93. See *North Sea Continental Shelf Cases*, supra note 22, at p. 36, para. 57; *Libya/Malta Continental Shelf Case*, supra note 66, at p. 48, para. 64 and *Eritrea/Yemen Arbitration*, supra note 62, at Chapter V, paras. 147–148.

94. See Scobbie, supra note 6, at p. 179.

95. *Libya/Malta Continental Shelf Case*, supra note 66, at p. 48, para. 64.

96. Subsequently, the court shifted the provisional equidistance line north to such an extent that the initial discounting of Filfla can be considered to be inconsequential in practical terms. For the method applied by the Court to effect this shift, see ibid., at pp. 50–52, paras. 69–73.

97. Moreover, in certain areas such an equidistance line would lie beyond 200 nautical miles from the relevant mainland coasts, making it inappropriate as a boundary for the EEZs of the mainland coasts.

98. See Claggett, supra note 5, at p. 432. See also Charney, supra note 5, at pp. 741 and 748 and Valencia et al., supra note 4, at p. 54.

99. See text supra note 69 et seq. This indicates that calculations making a comparison between the ratios of coastal lengths and maritime spaces cannot be used as a legal argument supporting a division of the South China Sea without giving any weight to the islands under consideration. See Scobbie, supra note 6, at 179. Examples of such calculations are provided by Claggett, supra note 5, at 433 and Valencia et al., supra note 4, at 136. Moreover, these calculations involve all the mainland coasts surrounding the South China Sea and all of the South China Sea, whereas the maritime zones of, for instance, the Spratly Islands do not overlap with those of the Chinese mainland and the island of Taiwan.

100. *Jan Mayen Case*, supra note 63, at p. 69, para. 70. See also the separate opinion of Vice-President Oda in this case, ibid., at p. 101, paras. 44–46.

101. See *North Sea Continental Shelf Cases*, supra note 22, at p. 36, para. 57 and at p. 53, para. 101 and *Gulf of Maine Case*, supra note 60, at p. 313, para. 157 and at p. 328, para. 197. See also Weil, supra note 64, at pp. 58–59.

102. See *Gulf of Maine Case*, supra note 60, at p. 313, para. 157.

103. In some cases this may still be the outcome of a delimitation, for instance, if there is a very limited amount of overlap of maritime zones and a very large difference between the relevant coasts.

104. Support for this approach can be found in the *Libya/Malta Continental Shelf Case*, *supra* note 66, at pp. 50–52, paras. 69–73.

105. Apart from some of the features in the Spratly Islands, this might also concern the Catwick Islands off the Vietnamese coast. Moreover, the Vietnamese system of straight baselines might not be taken into consideration. As the ICJ has indicated, this would not involve a finding on the legality of the system of straight baselines. *Libya/Malta Continental Shelf Case*, supra note 66, at p. 48, para. 64.

106. See *Tunisia/Libya Continental Shelf Case*, *supra* note 18, at pp. 83–84, paras. 117–118 and *Eritrea/Yemen Arbitration*, supra note 62, at Chapter III. In this latter award, the tribunal rejected the relevance of concessions for a maritime boundary because they did not take into account certain islands which had previously been in dispute. The Tribunal considered that some weight had to be accorded to these islands once sovereignty had been determined, certainly in respect of their territorial sea. Ibid., at para. 83. In the *Tunisia/Libya Continental Shelf Case*, the ICJ did take the extent of the concessions into account because they centered around a line, which was also indicated by other circumstances, such as coastal geography. Ibid., at pp. 84–85, paras. 119–120.

107. Concession areas in the South China Sea overlap to a considerable extent. See Valencia et al., supra note 4, at pp. 10–12 and 255.

108. For a discussion of practice pertaining to one such line, see Zou Keyuan, "The Chinese Traditional Maritime Boundary Line in the South China Sea and Its Legal Consequences for the Resolution of the Dispute over the Spratly Islands," 14 *International Journal of Marine and Coastal Law* 1999, pp. 27–55. See also Keyuan, supra note 16.

109. If there is no legal continental shelf beyond 200 nautical miles, the above arguments concerning the delimitation of the EEZ are equally applicable to the delimitation of the continental shelf.

110. Claggett, supra note 5, at pp. 428–430 and Cordner, supra note 4, at p. 69.

111. This conclusion may be somewhat surprising in view of the considerable number of articles arguing against such an outcome. Part of an explanation may be that certain dicta and precedents of the case law have been transposed to the South China Sea without considering the implications of a different factual background.