

## Article 121 of the 1982 Law of the Sea Convention And The Maritime Delimitation In The Straits of Singapore

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### ABSTRACT

*Islands continue to be an important issue for states involved when negotiating maritime boundary claims. The maritime delimitation claim at the Singapore Strait following International Court of Justice's decision in May 2008 on the territorial sovereignty of Pedra Branca and Middle Rocks. This article focuses on the issues of islands and rocks and the entitlement to maritime zones under Article 121 (3) of the 1982 Law of the Sea Convention. Firstly, it uses the historical approach to study the legal regime of island, the maritime zones entitlement of islands and rocks and the ambiguity of Article 121(3). Secondly, the treatment of islands as decided by international courts and tribunals in maritime delimitation when dealing with islands is described. Next, in analysing the position of islands in the area, it considers briefly the possible issues that relate to the delimitation process between relevant states involved in the delimitation of the Singapore Strait. Finally, it discusses the possible legal position in relation to the Article 121 (3) that the countries may advance in the course of negotiation.*

**Keywords :** *maritime entitlements of island; Article 121 of the 1982 Law of the Sea; maritime zone delimitation; international tribunal.*

### ABSTRAK

*Pulau menjadi isu yang penting bagi negara-negara terlibat dalam perbincangan melibatkan tuntutan sempadan maritim. Pembahagian tuntutan zon maritim di Selat Singapura oleh Malaysia dan Singapura adalah rentetan daripada keputusan Mahkamah Keadilan Antarabangsa pada Mei 2008 terhadap penguasaan perairan wilayah Batu Puteh dan Batuan Tengah. Artikel ini memberi tumpuan kepada isu kepulauan dan isu pulau batu serta hak-haknya terhadap zon maritim di bawah Fasal 121, Konvensyen Undang-undang Laut Antarabangsa 1982. Pertamanya, artikel ini menggunakan pendekatan sejarah dalam menerangkan perundangan berkaitan pulau, hak kepulauan dan "pulau" batu serta kesamaran dalam Fasal 121(3). Keduanya, artikel ini akan menjelaskan cara yang digunapakai oleh Mahkamah dan Tribunal Antarabangsa dalam pembahagian zon maritim mengenai isu kepulauan. Seterusnya, perbincangan juga akan dikupas mengenai isu yang berkaitan proses pembahagian zon maritim di selat tersebut. Kesimpulannya artikel ini menengahkan posisi undang-undang yang boleh diambil oleh negara-negara yang terlibat dalam pembahagian maritim di kawasan selat tersebut.*

**Katakunci :** *hak maritim pulau; Artikel 121 Konvensyen Undang-undang Laut Antarabangsa 1982; pembahagian zon maritim; tribunal antarabangsa.*

## INTRODUCTION

The issue of islands were pushed to the fore twice in 2008 at the International Court of Justice. The first being the question of sovereignty of Batu Puteh between Malaysia and Singapore and the second being the central argument in Romania's case concerning Serpents' Island in its maritime delimitation with Ukraine. On May 23 2008, the Court ruled that the sovereignty over Pedra Branca / Batu Puteh lies with Singapore and the sovereignty of Middle Rocks / Batuan Tengah rests with Malaysia. The sovereignty of South Ledge / Tubir Selatan was not decided by the Court, but was concluded that it would belong to the State in the territorial waters of which it belongs to.<sup>1</sup> Meanwhile, the oral arguments on of Romania/Ukraine case were completed in September 2008.

The Court's decision on the territorial sovereignty of the three features has removed an obstacle in the maritime delimitation in Singapore Strait. Discussion on eastern segment of the strait could not previously progress because of the dispute. It should be noted that reports in February 2009 have indicated that Singapore and Indonesia have recently concluded the delimitation of a new maritime boundary in the western section of the Singapore Strait.

Although the case on Batu Puteh was on territorial sovereignty and not on the issue of the island in maritime boundary claim, the statement made by Singapore after the judgement that it will announce its precise coordinate of maritime zones territorial sea and Exclusive Economic Zone (EEZ) raised undoubtedly the question if the particular insular formation qualifies as an island which would entitle it to an EEZ.<sup>2</sup> Pedra Branca (Batu Puteh) is stated by the Court as a small granite island, with an average width of 60m and an area of 8,560 square meters at low tide. It measures 137 metres long and is situated at the eastern entrance of the Singapore Strait. It lies approximately 24 nautical miles to the east of Singapore, 7.7 nautical miles to the south of the Malaysian state of Johor and 7.6 nautical miles to the north of the Indonesian island of Bintan.<sup>3</sup>

Pending the negotiations between the two countries by the Joint Technical Committee, it is to be understood that neither parties should make any unilateral declaration on the entitlement of its maritime zones, including the EEZ. In the light of the present circumstances and the need to delimitate the Strait of Singapore, both parties will undoubtedly analyse the entitlement of the insular formation under the legal regime of island in the 1982 Law of the Sea Convention (1982 LOSC).

<sup>1</sup> Case concerning sovereignty over Pedra Branca / Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgement of 23 May 2008.

<sup>2</sup> Press statement on May 23, 2008 following the International Court of Justice (ICJ) judgment on sovereignty over Pedra Branca and Middle Rocks available from [www.mfa.gov.sg/2006/pressview\\_press.asp](http://www.mfa.gov.sg/2006/pressview_press.asp). Additionally, in reply to a question in Parliament on 21 July 2008, Senior Minister of State for Foreign Affairs Balaji Sadasivan said Singapore would announce 'at an appropriate time' the precise coordinates of the territorial sea and exclusive economic zone that it is claiming around Pedra Branca.

<sup>3</sup> *supra*, note 1, paragraph 16, p 11.

## HISTORY OF THE REGIME OF ISLANDS

The term 'island' was first examined in the 1930 League of Nations Conference for the Codification of International Law.<sup>4</sup> It defined island as "an area of land, which is permanently above high water mark". At the Conference, there were two basic approaches to the definition of island:

- a) The first one was 'an area of land remaining permanently above high tide level with the right to territorial sea irrespective of its area and capability to provide settlement and irrespective of it being naturally formed by nature or by artificial means.'<sup>5</sup>
- b) The second approach recognised island conditional upon it being suitable for 'effective occupation and use'. The second approach, advanced by the United Kingdom was that there is no basis for granting the right to a belt of territorial waters around the rock that does not conform to this condition.<sup>6</sup>

Although the definition was a step towards legally defining what an island is, it did not specifically exclude artificial islands.<sup>7</sup> It is with that in mind that the Special Rapporteur, Professor Francois of The International Law Commission, during the drafting of the Rapporteur's draft for Convention on the Territorial Sea and the Contiguous Zone alerted the members of the Commission that they were dealing with the delicate issue of artificial islands. The work of the Commission is to work on the definition of island from 1930 Codification which in essence, did not specifically exclude artificial islands.<sup>8</sup>

In trying to address the issue of the draft article on islands to specifically exclude any artificial installations, Lauterpacht proposed that the word 'natural' be inserted before areas of land.<sup>9</sup> According to him, that would rule out artificial islands, technical installations, lighthouses and even villages built on piles. Lauterpacht also proposed the words 'in normal circumstances' be inserted before 'permanently above...'. That would cover exceptional cases of low water elevation. In addition, he suggested that the words 'and capable of effective occupation and control' be inserted after 'high water mark'.<sup>10</sup>

<sup>4</sup> League of Nations Conference for the Codification of International Law, League of Nations Document C 230. M.

<sup>5</sup> J. Symonides, The legal status of islands in the new law of the sea in Cominos, H (ed) *The Law of the Sea*, Ashgate and Dartmouth, 2000, p 163.

<sup>6</sup> *Ibid*, p 163.

<sup>7</sup> Bowett, David in *The Legal Regime of Islands in International Law*, Oceana Publications 1979 discussed that the doctrine was well established then that a territorial sea is not generated by an artificial islands such as lighthouse, beacons, oil platform and defence tower or any island artificially formed which, built from sea-bed, provided emerged land-mass. According to him, although there was a claim made by Sir Charles Russell in the Behring Sea Arbitration that lighthouses generate a territorial sea this view was consistently rejected by many quarters including the Institute of Droit International, 1929 Harvard Research Draft on Territorial Waters and by the work of the 1930 Hague Codification Conference.

<sup>8</sup> Yearbook of the International Law Commission, 1953, Vol. I, p 90.

<sup>9</sup> *Ibid*, p 92.

<sup>10</sup> *Ibid*, p 92.

However, he later withdrew the proposal 'and capable of effective occupation and control' in order to avoid a lengthy discussion of the meaning of 'effective' and 'control' but maintained the first two modifications.<sup>11</sup>

Later, under the Convention on the Territorial Sea and the Contiguous Zone (Geneva 29 April 1958), the definition was modified to read:

#### Article 10

1. *An island is a naturally formed area of land, surrounded by water, which is above water at high tide.*
2. *The territorial sea of an island is measured in accordance with the provisions of these articles.*

Article 10 (2) of the Convention on the Territorial Sea and the Contiguous Zone 1958, provided that the territorial sea of an island was to be measured in the same manner as other land territory. This provided maritime spaces for the island features.

Entitlement to a contiguous zone of maximum 12 nautical miles was given in Article 24 of the Convention on the Territorial Sea and the Contiguous Zone 1958. In addition, Article 1 and 2 of the Convention on the Continental Shelf 1958, provided for the entitlement of continental shelf for islands. The United Nations Conference on the Law of the Sea in 1958 (UNCLOS I) which resulted in the four Geneva Conventions, did not agree on the breadth of the Territorial Sea. Neither did the second conference in 1960 (UNCLOS II). It was only at the third UNCLOS, that the breadth of the territorial sea was successfully was defined.

### DEVELOPMENT OF THE LEGAL REGIME OF ISLANDS UNDER UNCLOS III

The problem of defining islands for the purpose of claiming maritime zones was an issue given much attention during the negotiations of UNCLOS III. On the one hand proposals for giving all islands the same status as continental territory were submitted.<sup>12</sup> On the other hand, it was proposed that the maritime zones of islands be limited, depending on factors such as size, habitation and population.<sup>13</sup> The law of the sea then had been introduced to an additional maritime zone, namely the EEZ that substantially increased the limits of national jurisdiction seawards. The regime of EEZ's was at the time of the drafting of the LOS Convention already considered customary international law, and was thus a vital part of the new Convention.

Since the start of the negotiations, the use of small, remote islands as independent bases has become increasingly important and controversial. States have begun to realise

<sup>11</sup> Bowett, see supra note 7, discussed that Gidel was a powerful advocate of occupation and habitation. But Gidel's proposal of habitability is a question of fact and not 'capacity' for habitation as proposed by Great Britain during the discussion during the 1930 Conference, which was hypothetical and not an accomplished text.

<sup>12</sup> C.R. Symmons, *The Maritime Zones of Islands in International Law*, The Hague: Martinus Nijhoff, 1979, p 12-15.

<sup>13</sup> C. Symmons, *The Maritime Zones of Islands in International Law* 1979, p 12-15.

the value of using parts of their territory which has been otherwise ignored to claim continental shelf and exclusive economic zone.

Nonetheless, the implementation of an exclusive economic zone for all features satisfying the traditional definition of an island would mean unjustifiable encroachments on the high seas. The definition of an island from the 1958 Convention on the Territorial Sea and the Contiguous Zone was adopted literally but to deal with the implementation of the EEZ, the drafters of the 1982 Convention introduced a limitation of certain islands to the entitlement of a continental shelf and an exclusive economic zone. After years of negotiations, the third United Nations Conference on the Law of the Sea resulted in one single provision concerning the issue, Article 121 the regime of islands.

### ARTICLE 121 REGIME OF ISLANDS

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

This provision provides rules for the identification of an island, and for the generation of its maritime spaces. In general, any insular formation which comes within the 'island definition' in Article 121(1) is entitled to its own territorial sea and contiguous zone. Paragraph one duplicates article 10 of the Convention on Territorial Sea and the Contiguous Zone 1958. With its description of islands as 'naturally formed area of land', it excludes artificial islands, which are dealt with in Articles 11, 60, 80 and 147(2) of the LOSC. The Article also excludes geographic features as low-tide elevations.<sup>14</sup>

According to article 121 paragraph 2 of the 1982 LOSC, islands can generate ocean space of territorial sea (12 nautical miles from baselines as established under Article 3 of the 1982 LOSC) and contiguous zones (24 nautical miles from baseline under Article 33 of the 1982 LOSC), exclusive economic zone (limit as sets upon in Article 57) and continental shelf (established under Article 76) just as continental landmasses do. However, the entitlement to the more extensive zones, the exclusive economic zone and the Continental shelf, are limited due to the exceptions formulated in Article 121 (3).

<sup>14</sup> Low-tide elevation is governed by Article 13 of the 1982 LOSC.

### AMBIGUITY OF ARTICLE 121 (3)

Article 121(3) reads '*rocks which cannot sustain human habitation or economic life of its own shall have no exclusive economic zone or continental shelf*. According to Brownlie, this is a new principle and raises considerable problems and definitions.<sup>15</sup> Yet, it is an important provision because of its potential to generate for a '*naturally formed area of land surrounded by water,....above water at high tide*' including even tiny island in the middle of the ocean with no other land within 400 nautical miles, an area of 125,664 square nautical miles EEZ.<sup>16</sup> On the contrary, a feature which is deemed a rock in a similar situation gets only 452 square nautical miles of maritime space. This explains why there are so many disputes concerning sovereignty over tiny, uninhabited islands. Most states with offshore island claim that those islands can generate EEZ and continental shelf although one significant exception is the British practice in respect to Rockall. United Kingdom redefined its fishery zone off Rockall, when it ratified the 1982 LOSC in 1995. Rockall, which measures only 624 square metres and 200 nautical miles away from the Scottish coast has been considered as the most notable examples of a rock within the meaning of Article 121(3).<sup>17</sup>

In addition to the significance stated above, the provision also has had an impact on delimitation of maritime zones between neighbouring states. States, in negotiating the establishment of their maritime boundaries, have referred to the provision of 121 (3) to deny an island any weight.<sup>18</sup>

Primarily, among the problems which is associated with the provision is that it is unclear what is intended to be the definition of rocks. It is uncertain if the definition of rocks include all high tide elevations which cannot sustain human habitation or an economic life of their own.<sup>19</sup> It is also vague whether the definition include sub-classification of rocks, which meant that there are some rocks which can and those which cannot sustain human habitation or economic life of its own.<sup>20</sup> Adding to the doubt what is definition of rocks is also the strictly geographical interpretations of rocks.<sup>21</sup> The assortment of geographical conditions also makes it difficult to apply strict rules to interpretation of rocks. The language of the paragraph also clearly refers to '*uninhabitable*'

<sup>15</sup> I. Brownlie, *Principles of Public International Law*, Oxford University Press, 7th Edition,(2008) p 221.

<sup>16</sup> Article 121 (1) of the 1982 LOSC. See also J.R.V. Prescott, and C.H. Schofield, *Maritime Political Boundaries of the world*, 2nd edition, Martinus Nijhoff, 2005, p 249.

<sup>17</sup> D.A. Anderson, 'British Accession to the UN convention on the law of the sea' (1997), *International and Comparative Law Quarterly* 46, p 761.

<sup>18</sup> A.G.U. Elferink, 'Clarifying Article 121 (3) of the law of the sea convention: the limits set by nature of international legal processes' *International Boundaries Research Unit Summer 1998*, p 53.

<sup>19</sup> W.V. Overbeek, 'Article 121(3) LOSC in Mexican state practice in the pacific' 1989 *International Journal of Estuarine and Coastal Law*, No 4, p 253.

<sup>20</sup> C.W. Dundas, 'Towards legal regime for Aves island in the Carribean sea' July 1983 *Commonwealth Secretariat*, London.

<sup>21</sup> J.R.V Prescott and C.H. Schofield, *Maritime Political Boundaries of the World*, p 62.

rocks and not uninhabited rocks. This requirement means that habitation is possible on islands rather than islands must have actual habitation. Further to the confusion of the term 'rocks', it has been argued that the phrase 'of their own' means that a state cannot avoid a rock denied of EEZ and continental shelf by injecting an artificial economic life from its land territory.<sup>22</sup> The vagueness of the text was clearly summed up by Brown as "*a perfect recipe for confusion and conflict*".<sup>23</sup>

The drafting history of UNCLOS III will shed some lights on how the ambiguity of the regime of islands came about. Delegates presented conflicting views on the issue and two opposing views emerged from the preparatory discussions.<sup>24</sup> The group which comprised of islands nations and nations possessing of islands demanded treatment of island maritime zones equal to entitlement of continental land areas. This group which includes Pacific Island<sup>25</sup> nations and Greece<sup>26</sup> introduced draft articles which contained the same definition of islands as Article 10(1) of the 1958 Territorial Sea Convention. This definition made no distinction between island and rocks.

On the other hand, Romania, Turkey and a group of African states presented draft proposals to limit maritime zones generated by islands. According to those countries, maritime zones should be determined according to factors like size, population, and other requirements. Romania proposed that distinction be made to between islets and islands and those islets should not be taken into account when delimiting maritime zones between neighbouring states.<sup>27</sup> Turkey proposed that an island be denied of economic zone and continental shelf if:

- a) it is situated in the economic zone and continental shelf of other states;  
and
- b) it did not contain at least one tenth of the area and population of the state which it belonged to.<sup>28</sup>

A proposal by 14 African states made distinction between islets, rocks and low-tide elevations.<sup>29</sup> According to them, the three features would not be able to generate marine space whereas an island would depend on equitable criteria to claim its marine space. Among the equitable criteria they proposed were size, geographical configuration, geological structure and living conditions which prevent a settlement of population.

<sup>22</sup> D.W. Bowett, 'The Legal Regime of Islands in International Law', p 34.

<sup>23</sup> E.D. Brown, 'Rockall and the limits of national jurisdiction of the United Kingdom: Part 1' 1978, 2 Marine Policy, p 206.

<sup>24</sup> S. Nandan et al (eds) United Nations Convention on the Law of the Sea 1982, A Commentary, Volume 3, Martinus Nijhoff Publishers, 1995, p 331.

<sup>25</sup> UN Doc. A/CONF.62/C.2/L.30 (1974), section A, paragraphs 1-4, III Offi. Record 210 (Fiji, New Zealand, Tonga and Western Samoa).

<sup>26</sup> UN Doc. A/CONF.62/C/L.50 (1974), articles 1 and 2, III Off. Record 227 (Greece).

<sup>27</sup> UN Doc. A/CONF.62/C/L.53 (1974), articles 1 and 2, III Off. Record 228 (Romania).

<sup>28</sup> UN Doc. A/CONF.62/C/L.55 (1974), articles 2 and 3, paragraphs 3 and 4, III Off. Record 230 (Turkey).

<sup>29</sup> UN Doc. A/CONF.62/C/L.62/Rev 1 (1974), articles 1 and 2, III Off. Record 232 (Algeria, Dahomey, Guinea, Ivory Coast, Liberia, Madagascar, Mali, Mauritania, Morocco, Sierra Leone, Sudan, Tunisia, Upper Volta and Zambia).

Further to the ambiguous meaning of rocks, the Article 121.3 of the LOS Convention operates with the phrase "sustain human habitation or have economic life of its own". This phrase also gives rise to various questions of interpretation. It indicates that two categories of "rocks" exist; those that cannot sustain and those that can sustain either or both.

It is interesting to note that the distinguished writer Gidel had in 1934 given a somewhat more specific description of habitability.<sup>30</sup> In his definition an island has to have "natural conditions" that permitted "stable residence of organized groups of human beings". This definition certainly seems to require the presence of fresh water, cultivable soil and perhaps even other resources. Considerations of equity certainly supports this argument since if the feature itself did not need to have sufficient resources to support human habitation, any kind of feature might qualify the requirement because it is obviously possible to bring out supplies to the features that they do not themselves possess human habitation or economic life of their own, and (b) those that can sustain either or both.<sup>31</sup>

Kwiatkowska and Soons<sup>32</sup> are of the view that the words '*cannot sustain*' proves the capacity of rocks to sustain habitation or economic life of their own rather than the factual situation of sustaining or not sustaining habitation or economic life. In other words, the definition refers to uninhabitable and rather than uninhabited island.

In general, the terms '*cannot sustain*', '*human habitation*', '*economic life*' and '*of their own*' essentially allow significant scope for different interpretation. The reference to 'or' between 'human habitation' and 'economic life' has been interpreted both as being 'conjunctive' and 'disjunctive' by different authors in discussing the provision.<sup>33</sup> Given the ambiguous language of the provision, it is not surprising there are serious differences of opinion how those terms should be interpreted.

It is evident from the above that the rules regarding the definition of an island and islands' entitlement of maritime zones is a highly disputed area of international law and no international court or tribunal has ever decided in general upon these specific issues of maritime law. Nevertheless, as mentioned in the first paragraph, the case of maritime boundary delimitation between Romania and Ukraine raised the issue regime of islands yet again before the ICJ. This was indeed an opportunity for the Court to make a ruling on the provision. The main bone of contention was the insular feature known as Serpent's Island. A decision by the ICJ on the issue of whether the island is a rock within Article 121(3), would undoubtedly be an authoritative analysis of the provision.

<sup>30</sup> Symmons, 1979, p 46 referring to, Gidel B., *Le Droit international public de la mer*, 1934 at p 684.

<sup>31</sup> J.M. Van Dyke and D. Bennett, 'Islands and the Delimitation of Ocean Space in the South China Sea' 10 *Ocean Yearbook*, (1993), p 78.

<sup>32</sup> B. Kwiatkowska, and A.H.A Soons, 'Entitlement to maritime areas of rocks which cannot sustain human habitation or economic life of their own' *Netherlands Yearbook of International Law*, XXI, p 139. A.G.U Elferink, 'Clarifying Article 121 (3) of the law of the sea convention: the limits set by nature of international legal processes' p 54.

<sup>33</sup> A.G.U. Elferink, 'Clarifying Article 121 (3) of the law of the sea convention the limits set by nature of international legal processes' p 54.



The ICJ delivered its decision on 3 February 2009<sup>34</sup> and awarded four-fifths of the disputed territory to Romania and the rest to Ukraine. In effect, Romania controls 9,730 square kilometres of the Black Sea continental shelf and the bulk of hydrocarbon in that area. In the case, Romania argued that the Serpent's Island is a rock within Article 121 (3) and as such, is only entitled to a territorial sea. It adds that "presence of some individuals... because they have to perform official duty such as maintaining a lighthouse does not amount to human habitation" and that the island does not form part of the configuration of Ukraine's coast.<sup>35</sup> Ukraine claimed that the islands is "indisputably an island under Article 121, paragraph 2, of the UNCLOS, rather than a rock".<sup>36</sup>

The irony of the decision was that the entire island and rock argument turned out to be a non-issue. According to the Court, "given the geographical configuration and in the context of delimitation with Romania, any Continental Shelf and EEZ entitlement possibly generated by Serpent's Island could not project further than the entitlements of generated by Ukraine's mainland Coast". Alas, the ICJ decided that it was not necessary to determine whether Serpent's Island is a rock or an island in order to delimit the boundary and that the Court does not consider the island relevant for the delimitation of the continental plateau.<sup>37</sup> Thus, the long awaited authoritative interpretation or judicial pronouncement of the provision continues.

#### EFFECT AND TREATMENT OF ISLANDS IN MARITIME DELIMITATION

Apart from the ambiguity Article 121(3) of the 1982 LOSC on what constitute an island, there is also the question of the status of islands in maritime delimitation. Geographical proximity and the emergence of new maritime zones under the 1982 LOSC mean that not all coastal states will be able to claim full extent of maritime zones. Although the Article contains no provisions concerning the situation of islands in the case of delimiting the maritime zones, the 1982 LOSC establishes principles for the delimitation of boundaries between adjacent and opposite states. Article 15 determines the rules for delimitation of territorial sea, which provides that the boundary should be every point which is equidistant from the nearest points from baselines, while Articles 74 and 83 govern the delimitation of EEZ and continental shelf respectively. Both Articles 74 and 83 provide that the "delimitation shall be effected by agreement on the basis of international law in order to achieve an equitable solution."

Drafting history of the Articles shows that the language of both Article 74 and 83 is a compromised text between two different rules of 'equidistance-special circumstances' and 'equity principle' which divided states during negotiations. The formulations contained in both Articles are vague and do not give much guidance to parties in drawing up concrete lines of delimitation.<sup>38</sup> Over the years, the two stage approach of first drawing the equidistant line giving full effect of all features and then the examination of any

<sup>34</sup> Case concerning maritime delimitation in the Black Sea (Romania v Ukraine), Judgement on 3 February 2009.

<sup>35</sup> *Ibid*, para 180-181, p 54.

<sup>36</sup> *Ibid*, para 184, p 55.

<sup>37</sup> *Ibid*, para 188, p 57.

<sup>38</sup> J.Evensen, The delimitation of EEZ continental shelves as highlighted by the International Court of Justice, in Rozakis, C.L and Stephanou, C.A, (eds), *The new law of the sea, Selected and edited papers of the Athens Colloquium on the law of the sea*, Elsevier Science Publishers B.V, 1983, p 110.

particular facts to assess the necessity of an adjustment to achieve equitable results emerged and applied by Courts. The analysis of delimitation method is of course outside the ambit of the article but it is suffice to mention here that the presence of islands constitutes one of the relevant circumstances in maritime delimitation.

In spite of the absence of an authoritative analysis or ruling on Article 121(3), courts and tribunals have found other ways to address the issue of island in maritime delimitation. In the context of islands constituting one of the relevant circumstances, courts in deciding the numerous cases before them, have given islands the half effect, full effect or treated them as enclaved features. In each case, the courts applied different method of treating them in order to determine their effects.

In the *Anglo-French Continental Shelf* case<sup>39</sup>, the distance between Scilly Isles and the mainland of United Kingdom is twice the distance separating the Ushant Island and the French mainland. According to France, these islands constituted special circumstances and thus needs to use a different method other than equidistant. The Court of Arbitration indeed observed that the islands are special circumstances. In the Court's view, giving full effect to Scilly Isles would produce disproportionate effect and turned to a different method to avoid a distorted effect. The Court supported a modification of the equidistant method and stated that the appropriate method is to take account of the Scilly Isles as part of the coastline of the United Kingdom but to give them less than the full effect in applying the equidistance method.<sup>40</sup> The Court first drew an equidistant line without using the offshore islands as a base-point. The next step was to use them as base-point and drawing a boundary line in the middle of the equidistant lines.<sup>41</sup> According to the Court, the difference in distance in an indication of the suitability of the half effect method.<sup>42</sup>

In addition to the treatment given to those islands, the Court also in the same case gave an enclaved solution to the Channel Islands, which is under British sovereignty. On whether the Channels Island should be given the full effect, the Court decided that due to the proximity of the island to the French coast, the full effect would result in "substantial diminution of the area of continental shelf accrued to France."<sup>43</sup> Thus the court adopted the solution of first drawing the median line between the mainland of the two states and then created an enclaved area of the continental shelf to the north and west of the islands.<sup>44</sup> This treatment of enclaving the continental shelf in maritime delimitation was considered a novelty in a maritime delimitation case.<sup>45</sup>

In the *Tunisia / Libya* case<sup>46</sup>, the Kerkenneh Island was given the half effect on the relevant part of the delimitation line defined by the Court. The method of half effect in this case is different than that used in the *Anglo-French Continental shelf* case.<sup>47</sup> In the

<sup>39</sup> Decision on 30, 1977 Judicial and Similar Proceedings: France-United Kingdom: Arbitration on the Delimitation on the Continental Shelf. International Legal Materials 1979, p 244-249.

<sup>40</sup> Ibid, para 249, p 116.

<sup>41</sup> Ibid, para 251, p 117.

<sup>42</sup> Ibid, paragraph 251, p 117.

<sup>43</sup> Ibid, paragraph 196, p 93.

<sup>44</sup> Ibid, para 201-202, p 94.

<sup>45</sup> Bowett, D.W, 1979, p 169.

<sup>46</sup> Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya); Judgement of 24 February 1982.

<sup>47</sup> Y. Tanaka, Predictibility and Flexibility in the Law of Maritime Delimitation, Oregon: Hart Publishing, 2006, p 194.

earlier case, the half effect was used to correct the equidistant line but in this case it was to construct a boundary independent of such line. Here, the Court "created another novelty" using the half effect method.<sup>48</sup>

In *Gulf of Maine*<sup>49</sup> case, the Court determined that the Canadian territory of Seal Island, be given the half effect. Again, the method applied in achieving the half effect awarded in this case is different than that use in *Anglo-French Continental Shelf* award and in *Tunisia / Libya* case.

In *Qatar/Bahrain* case,<sup>50</sup> the Court gave no effect to the island Qit'at Jaradah, a very small, uninhabited island without vegetation, when drawing the equidistant line. The Court considered that a disproportionate effect would be given to the island if its low water lines were to be used for determining the base-point in the construction of the equidistant line.<sup>51</sup>

In summary, judicial decisions and arbitrations have been relatively consistent in refusing to give full effect to small insular formations in delimiting maritime boundaries. However, these situations mostly govern delimitation where the maritime zones of adjacent and opposite countries overlap. The issues may be treated differently if the maritime area affected is the high seas.

In addition to judicial decisions, there is also state practice which applies the Article 121 (3). One of the most significant disputes with regard to the interpretation of the Article is the United Kingdom claim on Rockall, an insular formation in the North Atlantic.<sup>52</sup> It is a single outcrop of granite measuring approximately 200 square feet in circumference and seventy feet high.<sup>53</sup> It lies 160 nautical miles from British territory near Scotland and some 200 nautical miles from Ireland.<sup>54</sup> Its granite nature makes it habitable only for seabirds. Britain claims fishery limits of 200 nautical miles from its baselines.<sup>55</sup> Ireland protested and cited that international law prohibits rocks and islets without economic life or human habitation from generating an EEZ.<sup>56</sup> In connection to its accession to the 1982 LOSC, Britain later redefined the fishery zone limit off Rockall. The practise of states differs from one another due to the location of islands and its sizes and the nature of the islands. Most importantly, states' interests in relation to its maritime space will continue to reflect the diversity of practice.

### EFFECT OF ISLAND IN THE DELIMITATION IN THE STRAIT OF SINGAPORE

It must be observed that most cases which went to third party settlement dealt with islands in maritime boundary delimitation of continental shelf and EEZ. However in this case,

<sup>48</sup> Ibid, p 194.

<sup>49</sup> Case concerning delimitation of the maritime boundary in the Gulf of Maine Area ( Canada/United States of America); Judgement of 12 October 1984.

<sup>50</sup> Case concerning maritime delimitation and territorial questions between Qatar and Bahrain (Qatar v. Bahrain); Judgement of 16 March 2001.

<sup>51</sup> Ibid, para 219, p 104.

<sup>52</sup> Symmons, 1979, p 135.

<sup>53</sup> Symmons, 1979, p 51.

<sup>54</sup> Ibid, p 51.

<sup>55</sup> Fisheries Limits Act of 1976.

<sup>56</sup> Symmons, 1979, p 126.

given the location of Batu Puteh in the Singapore Strait and its proximity to Malaysia, the main delimitation area will likely concentrate on the territorial sea. Moreover, because its location is 7.6 nautical miles north of Pulau Bintan of Indonesia, the main area of delimitation between Singapore and Indonesia will most likely be that of territorial sea. In this respect, Batu Puteh is indeed in a unique position because it is a small territory belonging to Singapore, located 24 nautical miles away from its main coastal state but lies in between and closer to Malaysian and Indonesian territories, in a semi enclosed area. In addition, there is also the issue of Middle Rocks and South Ledge which are situated within the potential maritime boundaries of Malaysia and Indonesia. Hence, the delimitation of maritime boundaries will involve the three relevant parties. Presently, it is likely that negotiations will proceed on bilateral basis first before it culminates into a three parties discussions.

It analyzing the possible effect of Batu Puteh in the delimitation in the Singapore Strait, it is worth recalling two agreements signed by the states involving the area. Malaysia and Indonesia signed an agreement in 1969 on continental shelf boundary, generating a line from point 11, around 12 km from Batu Puteh, heading north east in the South China Seas.<sup>57</sup> In 1973, Singapore and Indonesia signed territorial boundary lines in Singapore Strait.<sup>58</sup>

Since the main delimitation area in question is the territorial sea, Article 15 of the 1982 LOSC applies. The article, states that:-

*'Where the coasts of the two States are opposite and adjacent to each other, neither of the two states are entitled, failing agreement between them to the contrary, to extend the territorial sea beyond the median line every point of which is equidistant from the nearest points of baselines from which the territorial seas of each two states is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.'*

Under the Article, the provision of median line which is equidistant from the nearest baselines does not apply if there are special circumstances which may call for the line to be adjusted. Malaysia and Singapore will no doubt advance their own position on whether Batu Puteh and Middle Rocks can be considered special circumstances in this context, in order to maximize their claim. In addition, they will also need to refer to Article 13 on low-tide elevation when dealing with South Ledge.

Malaysia and Singapore need to negotiate the territorial sea in the Strait based on Article 15. Although it may seem relatively uncomplicated, where an equidistant line is to be constructed, both sides will undoubtedly consider the issue of '*special circumstances*' under the article. A '*special circumstances*', if applicable, will adjust the equidistant line to avoid a disproportionate effect. In this case, Malaysia may argue that Pedra Branca presents a special circumstances, which will deliver a disproportionate effect to the delimitation of territorial water should the equidistant line is used. Singapore, on the other

<sup>57</sup> The Agreement between the Government of Malaysia and the Government of the Republic of Indonesia Relating to the Continental Shelves Between the Two Countries, signed in 1969.

<sup>58</sup> The Agreement Stipulating the Territorial Sea Boundary Lines between Indonesia and the Republic of Singapore in the Strait of Singapore, signed in 1973.

hand may argue that it is not a special circumstances and thus there should not be any adjustment to the equidistant line.

The main contentious issue will of course be the maritime space that Batu Puteh may generate. In the event Singapore claims EEZ for the insular formation, the claim is most likely at the north-eastern side of Batu Puteh into the South China Seas, which is not as enclosed as the other parts of water surrounding the island. The problem that may arise if Singapore claims EEZ under Article 121 of the 1982 LOSC is that the area will encroach into the Indonesia-Malaysia Continental shelf boundary. To complicate matters, Singapore is not a party to the agreement made between Malaysia and Indonesia and neither is it bound by the earlier agreement.

At the outset, it seems to appear that parties will need to argue its position applying Article 121. Singapore, in its earlier statement has indeed indicated the possibility of it claiming the EEZ. This possibly means that it would claim the maritime zones entitlement of Pedra Branca as an island. Malaysia and Indonesia may argue that Pedra Branca is a rock under the article 121 (3) and thus not entitled to the EEZ that Singapore may intend to claim. Malaysia and Indonesia may wish to advance the argument that the article should be strictly applied, thus counter-arguing the EEZ claim by Singapore.

However, such move needs to be undertaken strategically in the light of its application to other insular formation in maritime areas yet to be delimited between the three countries. As such, both Malaysia and Indonesia may need to take a whole different approach by not interpreting strictly article 121(3) at all. Instead, in analyzing the judicial trends on how islands are given effect in delimitation, they may argue for reducing the effect of Batu Puteh in the delimitation because giving full effect to the small insular formation would most likely produce inequitable results. It should be submitted here that judicial trend shows that in delimitation, other factors are taken into relating to the island itself and the maritime area is taken into consideration. Both countries may wish to forward the argument that although Article 121(2) laid down the maritime entitlement of islands, it is a completely separate matter to maritime delimitation. This is in effect is crucial to counter the arguments of another state claiming maritime zones entitlement of its islands in overlapping claims.

### CONCLUSION

In the process of delimiting the maritime boundaries, all the three states being parties to the 1982 LOSC will undoubtedly refer to the Article 121 on legal regime of island during negotiations in order to determine the entitlement of maritime zones of Batu Puteh and also Middle Rocks. The ambiguous nature of the Article as presented earlier will not provide an easy solution. Although it allows for the same maritime zones entitlement for islands similar to that of land territories, the states involved need also to consider the effect of the island in delimiting the maritime area. Arguably all three parties at some point will have to take strategic position in applying the Article 121 in order to best serve their interests.

Meanwhile, before the eventual talks on maritime delimitation, the establishment of the Joint Technical Committee by both countries is seen as a practical progress. It has an important task to implement the Court's decision and oversee the conduct of joint survey works to prepare for the consultations on maritime issues of the features.

The strait where Batu Puteh and the two maritime features of Middle Rocks and South Ledge are situated is generally recognized as a busy shipping route. For that reason, it is important that sovereignty rights over the maritime area are clearly defined. In any event, each of the three countries will need to complete bilateral negotiations first before proceeding to any tripartite discussions.

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