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THE PRINCIPLE THAT THE LAND DOMINATES THE SEA IN THE CONTEXT OF SOUTH CHINA SEA DISPUTES: A CRITICAL APPRAISAL

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ABSTRACT

According to the principle that the land dominates the sea, the land is always the basis for any claim of maritime entitlements. Without a land with a coastline or coastal front under its sovereignty, no state can claim any maritime entitlement. The land here includes not only the continental mainland but also islands which may generate the same maritime entitlements. Nonetheless, certain claimants of the South China Sea have rejected or tried to bend the principle in furtherance of their respective claims. The main objective of the present paper, therefore, is to assess the status of the principle as customary international law and its application to the nine-dash-line claim of China and other claims based on maritime features such as atolls, coral reefs, shoals, and the like. The paper reviews the decisions of the international courts and tribunals on one hand and analyses the relevant provisions of the UNCLOS on the other. The paper also applies interpretative tools to reaffirm the meaning of Article 121 of the UNCLOS: the regime of islands. The paper concludes that the claim of historic rights in the nine-dash-line is not squarely in accord with the principle and that most of the claims on the South China Sea that are based on artificially built structures and land reclamation defeat the letter and spirit of the regime of islands, which is a manifestation of the principle that the land dominates the sea.

Keywords: The Principle That the Land Dominates the Sea, Maritime Entitlements, South China Sea Disputes, Regime of Islands.

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PRINSIP TANAH MENGUASAI LAUT DALAM KONTEKS PERTIKAIAN LAUT CHINA SELATAN: PENILAIAN KRITIKAL

ABSTRAK

Menurut prinsip bahawa 'tanah menguasai laut,' tanah sentiasa menjadi asas untuk sebarang tuntutan hak maritim. Tanpa tanah yang mempunyai garis pantai atau pantai di bawah kedaulatannya, tiada negara boleh menuntut sebarang hak maritim. Tanah di sini termasuk bukan sahaja tanah besar benua tetapi juga pulau-pulau yang mungkin menjana hak maritim yang sama. Namun begitu, pihak yang menuntut di Laut China Selatan telah menolak atau cuba membengkokkan prinsip tersebut untuk meneruskan tuntutan masing-masing. Objektif utama kertas kerja ini, oleh itu, adalah untuk menilai status prinsip tersebut sebagai undang-undang antarabangsa adat yang mengikat semua Negara dan penggunaannya terhadap tuntutan sembilan garis putus-putus China dan tuntutan lain berdasarkan ciri maritim seperti atol, terumbu karang, beting, dan seumpamanya. Makalah ini mengkaji keputusan mahkamah dan tribunal antarabangsa di satu pihak dan menganalisis peruntukan berkaitan UNCLOS di pihak yang lain. Kertas kerja itu juga menggunakan alat tafsiran untuk mengesahkan semula maksud Perkara 121 UNCLOS: 'rejim pulau-pulau.' Kertas kerja itu menyimpulkan bahawa tuntutan hak bersejarah dalam garisan sembilan tidak selaras dengan prinsip dan bahawa kebanyakan tuntutan ke atas Laut China Selatan yang berasaskan struktur binaan buatan dan tebus guna tanah mengalahkan niat dan semangat rejim kepulauan, yang merupakan manifestasi prinsip bahawa daratan menguasai laut.

Kata kunci: Prinsip Bahawa Tanah Menguasai Laut, Hak Maritim, Pertikaian Laut China Selatan, Rejim Pulau.

INTRODUCTION

The very first fundamental principle of the law of the sea is the concept of freedom of the seas, founded on the idea of mare liberum, formulated by the Dutch jurist Hugo Grotius in the seventeenth century. In the eighteenth century, the doctrine of the territorial sea was established in which a State could exercise sovereignty over a belt of the sea adjacent

to its coast.[1] The territorial sea is the first maritime entitlement of a coastal State, and its entitlement is founded on the notion that it originated from the land or the coastline of a State. This is the beginning of the principle that the land dominates the sea.

In the twentieth century, there were extended claims made by states over the seas. More disputes on maritime claims can then be found in the twenty-first century. However, the most highly contested maritime claims are those in the South China Sea. Maritime territorial claims in this part of the world include two main disputes. The first is the nine-dash-line claim of China, which encompasses more than ninety per cent of the South China Sea and overlaps with the exclusive economic zone claims of Taiwan, Vietnam, Indonesia, Malaysia, Brunei, and the Philippines. The second one is the claim of sovereignty over various maritime features in the South China Sea, including the Spratly Islands, Paracel Islands, and Pratas Island, between China, Taiwan, Vietnam, Malaysia, and the Philippines.[2]

The primary objective of this paper is to assess the status of the principle of land dominating the sea as customary international law binding on all States and its application to the nine-dash-line claim of China and other claims based on maritime features such as atolls, coral reefs, shoals, and the like in the South China Sea.

The research methodology applied is primarily doctrinal legal research, an analysis of legal concepts or principles of all types - treaties, conventions, statutes and decided cases. The paper reviews the decisions of the international courts and tribunals on one hand and analyses the relevant provisions of the UNCLOS on the other. The paper also applies interpretative tools, such as textual interpretation and principle of good faith, to reaffirm the meaning of Article 121 of the UNCLOS: the regime of islands.

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1 Malcolm N. Shaw, *International Law* (Cambridge: Cambridge University press, 6th. ed. 2008), 553-644.

2 Zou Keyuan, "China's U-Shaped Line in the South China Sea Revisited," *Ocean Development and International Law* 43, 1 (2012): 18, at 19.

The first part of the paper evaluates the customary international law status of the principle of domination in light of the judicial pronouncements made by the International Court of Justice (ICJ) and how the principle is enshrined in the relevant provisions of the United Nations Convention on the Law of the Sea (UNCLOS) 1982,[3] to which 168 states are parties.[4] The paper then applies the principle to the nine-dash-line claim made by China and assesses whether the claim is in accord with it. The third part of the paper attempts to apply the above principle to the maritime features claimed by various States in the South China Sea by analysing the regime of islands under Article 121 of UNCLOS 1982 and the South China Sea Arbitration,[5] and scholarly writings. The paper then concludes with recommendations and suggestions.

THE LAND DOMINATES THE SEA: AN ESTABLISHED RULE OF CUSTOMARY INTERNATIONAL LAW

As stated earlier, the principle that the land dominates the sea can be traced back to the historical development of the twin pillars of the law of the sea, namely: freedom of the high seas and the doctrine of the territorial sea.[6] The doctrine of the territorial sea is the starting point for other maritime entitlements. The doctrine itself has been founded on the precept that the extension of the territorial sovereignty is only to a sea area which is adjacent to and surrounding the coastline of a state.

The main idea of the principle is that the sovereignty over the land territory is the decisive factor in determining the title over the adjacent sea, including its sea-bed and subsoil.[7] That is why possession of land

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3 The United Nations Convention on the Law of the Sea, adopted at Montego Bay on 10 December 1982, entered into force on 16 November 1994; United Nations *Treaty Series*, vol. 1833, p. 3.

4 The states are hereafter referred to as States.

5 *South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, PCA Case No. 2013-19, Award (UNCLOS Annex VII Arb. Trib. July 12, 2016). [Hereinafter referred to as South China Sea Arbitration.]

6 Malcolm N. Shaw, 553-644.

7 Bing Bing Jia, "The Principle of the Domination of the Land over the Sea: A Historical Perspective on the Adaptability of the Law of the Sea to New

territory and a coastline are prerequisites for claims to maritime entitlements.[8]

It is a settled principle that the coastal State's sovereignty originates from the land and the maritime entitlements are a derivative of that origin. The International Court of Justice (ICJ) has consistently affirmed that land is the legal source of the power which a State may exercise over territorial extensions to seaward.[9]

The Principle in the Judicial Pronouncements of the ICJ

The idea that the land dominates the sea first appeared in 1951 in the decision of the International Court of Justice in the Anglo-Norwegian Fisheries case.[10] The ICJ enunciates in its judgment that it is the land which confers upon the coastal State a right to the waters off its coasts.[11]

In the seminal North Sea Continental Shelf cases in 1969, the ICJ for the first time directly referred to the name of the principle that the land dominates the sea and ruled that the land is the legal source of the power which a State may exercise over territorial extensions to seaward.[12]

Moreover, in this case, the ICJ acknowledged the influence of the principle over the doctrine of the continental shelf and in particular the

Challenges," *German Yearbook of International Law*, 57 (2014): 63–93, at 66.

8 Ibid.

9 *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, Judgment of 20 February, 1969 ICJ Reports 1969, 51, para. 96.

10 *Fisheries Case* (United Kingdom v. Norway), Judgment of 18 December 1951, 1951 ICJ Rep 116.

11 Ibid, 133.

12 *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands)* (Merits), Judgment of 20 February 1969, 1969 ICJ Rep 3, para. 96.

idea that the continental shelf is founded on the natural prolongation of the land territory.[13]

The Court reiterated the principle again in 1978 in the Aegean Sea Continental Shelf case:

> "It is solely by virtue of the coastal State's sovereignty over the land that rights of exploration and exploitation in the continental shelf can attach to it, ipso jure, under international law. In short, continental shelf rights are legally both an emanation from and an automatic adjunct of the territorial sovereignty of the coastal State."[14]

In this judgment, the court clearly reaffirmed that a State's rights over the continental shelf are derived from the sovereignty of the State over its land territory. Again in 1982, in Tunisia/Libya case, the ICJ stated that the coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it.[15]

In Greenland and Jan Mayen, the ICJ stated in 1993 that the attribution of maritime areas to the territory of a State is a legal process based solely on the possession by the territory concerned of a coastline.[16] It is, therefore, crystal clear that the land must have a coast. The coastline is the basis for any maritime entitlements and there are no maritime rights without land territory.

In Qatar/Bahrain case, in 2001, the Court acknowledged the broadening of the application of the principle to islands as well by ruling that in accordance with Article 121(2) of the 1982 Convention on the Law of the Sea, islands, regardless of their size, in this respect

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13 Ibid, para. 19.

14 *Aegean Sea Continental Shelf Case* (Greece v. Turkey) (Jurisdiction), Judgment of 19 December 1978, 1978 ICJ Rep 3, para. 86.

15 *Continental Shelf Case* (Tunisia v Libyan Arab Jamahiriya), Judgment of 24 February 1982, 1982 ICJ Rep 61,para 73.

16 *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)* (Merits) 1993 ICJ Rep 38, para 80.

enjoy the same status, and therefore generate the same maritime rights, as other land territory.[17]

Again, in Maritime Delimitation in the Black Sea case, in 2009, the ICJ reaffirmed that the title of a State to the continental Shelf and to the exclusive economic zone is based on the principle that the land dominates the sea.[18]

By virtue of the consistent and authoritative decisions of the ICJ in the successive cases stated above, it is fair to conclude that the principle that the land dominates the sea is an established rule of general international law. Without any doubt, the territorial sovereignty of the coastal state over the land is the origin from which the State's maritime entitlements may derive.

Enshrinement of the Principle in the UNCLOS 1982

The principle that the land dominates the sea was born with the genesis of the law of the sea and since then has been established as a rule of customary international law. With the entry into force of the United Nations Convention on the Law of the Sea (UNCLOS) 1982, the principle has also been reflected in the conventional law in parallel to customary international law.

How can the sovereignty of a State that flourishes on its land territory be extended to the seas? If one looks at the UNCLOS 1982, Article 2 confirms the conviction of the State parties to the convention that sovereignty of a State originates in its land territory and from there it extends to the territorial sea and to its sea-bed and subsoil. It also extends to the airspace above the land territory and the territorial sea.

By nature, the land is concrete, solid, and susceptible to physical occupation or appropriation. The seas are fluid and the airspace is

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17 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), Merits, Judgment of 16 March 2001, 2001 ICJ Rep 40, para. 185.

18 *Maritime Delimitation in the Black Sea* (Romania v. Ukraine), Judgment of 3 February 2009, 2009 ICJ Rep 61, para. 77.

invisible and untouchable. In accord with the natural law, it is axiomatic that the land must always be the basis or the foundation for the appropriation of territorial sovereignty, whereas the extension of this sovereignty to the seas and the air space must be derivative in nature.

The practical application of this extension of territorial sovereignty to the seas can be found in the baseline system. The baseline is normally the low-water line along the coast, the line along the coast at the time of low tide.[19] However, in localities where the coastline is deeply indented, or if there is a cluster of islands along the coast, the method of straight baselines joining appropriate points can be applied.[20]

All maritime zones are to be measured from the same baseline, that is, the line on the coastal front. The territorial sea is measured to a limit not exceeding 12 nautical miles from the baselines established under the convention.[21] Likewise, the contiguous zone, the exclusive economic zone, and the continental shelf are measured from the same baselines from which the breadth of the territorial sea is measured.[22]

This is the reason why only coastal States can claim maritime entitlements and not the land-locked States. Land-locked state means a State which has no sea-coast.[23] Since these States have no seacoast, they have no maritime zones of their own and are to rely on a coastal State for the right of access to and from the sea.[24]

The idea of the natural prolongation of land territory to be the basis of the continental shelf was uniformly supported by the negotiating states in the UNCLOS III. The 1982 convention in Article 76(1) reaffirms that the continental shelf of a coastal State comprises the

[19] Article 5, UNCLOS 1982.
[20] Article 7(1), ibid.
[21] Article 3, ibid
[22] See Articles 33, 57, and 86, ibid.
[23] Article 124(1)(a), ibid.
[24] See Articles 124-132, Part X of the UNCLOS 1982.

seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory.[25]

The principle that the land dominates the sea applies not only to the mainland of a coastal State but also to its islands. Article 121 of the UNCLOS is clear evidence of the extension of the principle to islands. An island is defined as a naturally formed area of land which is above water at high tide. Except as stated in Article 121(3), the coastal State can claim all the four maritime zones from an island just like it can claim from the other land territory.[26]

APPLICATION OF THE PRINCIPLE TO CHINA'S NINE-DASH-LINE CLAIM IN THE SOUTH CHINA SEA

The 'nine-dash line' appeared for the first time on an official Chinese map in 1948. In the original version, the map showed 11 dashes but in 1953 the two dashes in the Gulf of Tonkin were removed.[27] Subsequently, only the nine dashes appear in all official Chinese maps.[28]

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25 Article 76(1), ibid.

26 See Article 121(1)(2) & (3) ibid.

27 In 1953, Bai Long Wei Island in the Gulf of Tonkin was transferred from China to Vietnam. It may be the reason why the two dashes in the Gulf of Tonkin were removed. Zou Keyuan, "China's U-Shaped Line in the South China Sea Revisited," *Ocean Development and International Law*, 43(1) (2012): 18, at 24.

28 See Z. Gao and B.B. Jia, "The Nine-Dash Line in the South China Sea: History, Status, and Implications," *American Journal of International Law*, 107(1) (2013): 2013. See also Ronald O'Rourke, "Maritime Territorial, and Exclusive Economic Zone (EEZ) Disputes Involving China: Issues for Congress," *Congressional Research Service* (Dec. 22, 2015) 21. See also Antonio T. Carpio, "The South China Sea Dispute: Philippine Sovereign Rights and Jurisdiction in the West Philippine Sea," *Philippines Law Journal*, 90 (2017): 459, 555, stating that the root cause of the South China Sea dispute is the map containing the nine-dashed line submitted by China to the United Nations in 2009.

It is the official position of the Chinese government that China has indisputable sovereignty over the South China Sea Islands and the adjacent waters. China also contends that its sovereignty and relevant rights in the South China Sea, formed over the long historical course, are upheld by successive Chinese governments, reaffirmed by China's domestic laws on many occasions, and protected under international law including the United Nations Convention on the Law of the Sea (UNCLOS).[29] There is, however, no detailed description of how international law and UNCLOS protect the nine-dash-line claim of China. The only specific reason given by China is that it is supported by a long historical course. It appears that China's claims on the South China Sea within the nine-dash-line is on the ground of "historic rights."

This section will primarily focus on the validity of the claim of historic rights within the nine-dash line[30] and investigate whether it is in harmony with the principle that the land dominates the sea. However, not only China but also other claimant States are claiming sovereignty over islands and other maritime features in the South China Sea. In a later section, these claims will be assessed on the basis of Article 121 of the UNCLOS 1982, which is an extension of the principle that the land dominates the sea to the regime of islands.

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29 "Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines (30 October 2015)" https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/201510/t20151030_679419.html

30 See the map below that shows China's Nine Dash Line claim and how it clashes with claims made by other States. The source of the map is from AFP that appears in a post published by Jason Thomas, "The Nine-Dash-Line Drawing Trouble in Vietnam, *The ASEAN Post*, 28 October 2019, available in https://theaseanpost.com/article/nine-dash-line-drawing-trouble-vietnam, accessed on 11 November 2022.

China's Claim of Historic Rights in the South China Sea

Malaysia and Vietnam jointly submitted, on 6 May 2009, their claims on the exclusive economic zone beyond 200 nautical miles to the Commission on the Limits of the Continental Shelf (the CLCS). In response to that, China sent Notes *Verbales* to the UN Secretary-

General, attaching a map depicting the 'nine-dash line.' China argued that it had indisputable sovereignty over the islands in the South China Sea and the adjacent waters and enjoyed sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof.[31]

This is the first time China officially responded before an international forum to the claims made by other States in the South China Sea based on the map which depicted the nine-dash-line. China's notes were initially rejected by Malaysia and Vietnam[32] and subsequently by Indonesia[33] and the Philippines.[34]

The Philippines' objection reaffirmed the international law principle of the land dominates the sea and maintained that it exercised sovereignty and jurisdiction over the waters around or adjacent to each relevant geological feature in the Kalayaan Island Group (KIG) in the South China Sea.[35]

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31 *Note Verbale* from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/17/2009 (7 May 2009).

32 *Note Verbale* from the Permanent Mission of the Socialist Republic of Vietnam to the United Nations to the Secretary-General of the United Nations, No. 86/HC-2009 (8 May 2009); *Note Verbale* from the Permanent Mission of Malaysia to the United Nations to the Secretary-General of the United Nations, No. HA 24/09 (20 May 2009).

33 Note Verbale from the Permanent Mission of the Republic of Indonesia to the United Nations to the Secretary-General of the United Nations, No. 480/POL-703/VII/10 (8 July 2010).

34 Note Verbale from the Permanent Mission of the Republic of the Philippines to the United Nations to the Secretary-General of the United Nations, No. 000228 (5 April 2011).

35 Note Verbale from the Permanent Mission of the Republic of the Philippines to the United Nations to the Secretary-General of the United Nations, No. 000228 (5 April 2011).

China responded to the Philippine's objection as totally unacceptable and restated its position by also citing the principle of the land dominates the sea.[36]

It is noteworthy that in the Philippines' objection and China's response, both countries accepted and relied on the principle that the land dominates the sea (*la terre domine la mer*) and their arguments were based on that principle. They just argued that they have sovereignty over the maritime features and that is why they were entitled to the sovereign rights and jurisdiction over the relevant sea areas.

As stated earlier, China's claim of sovereign rights and jurisdiction within the nine-dash-line in the South China Sea is presumably based on historic rights. The term historic right is essentially ambiguous. It is understood that it originates from the narrower category of historic waters. According to the International Law Commission's Study on Historic Waters, the claim needs to fulfil three elements: (i) The authority exercised over the area by the State claiming it as historic waters; (ii) The continuity of such exercise of authority; (iii) The attitude of foreign States.[37] Therefore, a state that exercised jurisdiction over its coastal waters would, after a length of time, be considered to have historic title over the relevant waters, provided that the other interested states had tolerated such an authority.[38]

In the South China Sea Arbitration, the Tribunal affirmed that in most instances, historic rights are 'exceptional' rights formed by a State's assertion of the claims and acquiescence on the part of other affected States.[39] The Tribunal made it clear that to rely on the historic

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36 Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/8/2011 (14 April 2011).

37 *Juridical Regime of Historic Waters, Including Historic Bays*, [1962] 2 Yearbook of the International Law Commission 1, 2, UN Doc. A/CN.4/SER.A/1962/Add.1,

38 Florian Dupuy and Pierre-Marie Dupuy, "A Legal Analysis of China's Historic Rights Claim in the South China Sea," *The American Journal of International Law* 107(1) (2013): 124-141, at 137.

39 South China Sea Arbitration, Award, Merits, para 268.

title, China must show that it had historically sought to prohibit or restrict the exploitation of resources of the South China Sea by nationals of other States and that other States also had acquiesced in China's restrictions. The Tribunal found no evidence to support such a claim by China."[40]

According to Jessup, the legality of such a historic claim is to be measured …by the definitiveness and duration of the assertion and the acquiescence of foreign powers.[41] Sophia Kopela argued that the validity of such claims depended on whether the requirements for historic titles could be satisfied, especially the element of acquiescence of other states, as it was unlikely that states would have acquiesced in expansive claims.[42]

Although China's nine-dash-line claim is alleged to be made in light of a long historical course, it was merely a unilateral claim and the crucial element of 'acquiescence' on the part of other interested States is missing. There have been numerous and consistent objections, counter claims, and contrary State practice on the part of other States that solidly negate the element of 'acquiescence.'

First, let us survey the State practice in respect of the rival claims. Both China and France had competing claims over the South China Sea islands since the Sino-French war in 1884-1885. France wanted these islands to be part of French Indochina and China raised objections. Nonetheless, in 1933, France pronounced the annexation of the Paracels and Spratlys and formally incorporated them into French Indochina. At the beginning of World War II, Japan seized the islands from France.[43]

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40 Ibid, para 270.

41 Philip C. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction* (New York: G.A Jennings Co. Inc., 1927), 382, quoted in Y.Z. Blum, *Historic Titles in International Law* (The Hague: Nijhoff, 1965), 256.

42 Sophia Kopela, "Historic Titles and Historic Rights in the Law of the Sea in the Light of the South China Sea Arbitration," *Ocean Development & International Law*, 48 (2) (2017), 1181-207, at 193.

43 Chas W. Freeman, Jr., "Diplomacy on the Rocks: China and Other

During the negotiations of the peace treaty with Japan at the San Francisco Conference in 1951, both China and Vietnam (the latter taking themselves as successors of France under the principle of *Uti possidetis juris*) asserted their rights to the South China Sea islands. Vietnam officially reaffirmed their sovereignty over Spratly and Paracel Islands at the San Francisco Conference on 7 September 1951. They contended that the two archipelagoes always belonged to them. Later, the Philippines also claimed some islands. The Peace Treaty, therefore, was unable to specify to which country the islands belonged.[44]

More recently, immediately after China's official pronouncement of its claim based on the nine-dash-line in 2009, Malaysia and Vietnam objected and after that Indonesia and the Philippines also raised their objections. It is, therefore, crystal clear that there is no acquiescence on the part of the interested States over China's assertion.

One should also seriously consider the fact that the five claimants are occupying nearly 70 disputed reefs and islets spread across the South China Sea. Vietnam currently occupies 21 features in the Spratly Islands. It is reported that the Philippines occupies either nine or ten features. Itu Aba, the largest natural land feature in the Spratly, is occupied by Taiwan. Malaysia has troops and facilities stationed on five features although some sources say that the other three features are also occupied by Malaysia. Brunei claims Louisa Reef.[45]

Apart from such physical occupation, the claimant States have also adopted laws which extend their maritime entitlements and solidify their maritime claims in the South China Sea. These national laws of

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Claimants in the South China Sea**,"** Remarks at a Seminar of the Watson Institute for International Studies, Brown University, accessed 24 August 2022, https://mepc.org/speeches/diplomacy-rocks-china-and-other-claimants-south-china-sea.

44 King C. Chen, *China's War with Vietnam, 1979: Issues, Decisions, and Implications*, (Stanford University: Hoover Institution Press, 1987) 45.

45 Alexander L. Vuving, "South China Sea: Who Occupies What in the Spratlys? A closer look at a basic yet poorly understood question," *The Diplomat*, May 6, 2016, accessed on September 3, 2022, https://thediplomat.com/2016/05/south-china-sea-who-claims-what-in-the-spratlys/

various countries reflect contrary State practice and seriously affect the validity of China's nine-dash-line claim.[46]

Furthermore, the claimants of the South China Sea have entered into a number of bilateral maritime delimitation treaties, covering maritime areas within the nine-dash-line. Two noteworthy examples are the Malaysia and Indonesia agreement on the delimitation of the continental shelf adopted in 1969,[47] and the Vietnam and Indonesia's agreement concerning the delimitation of the continental shelf in 2003.[48] Brunei and Malaysia agreed and signed exchange of notes on the delimitation of maritime boundaries between the two countries and the establishment of Commercial Agreement Areas (CAA) for oil and gas exploration and exploitation in the South China Sea on 17 March 2009.[49]

The nine-dash-line claim does not rely on any solid and specific legal principle apart from the controversial notion of historic rights. It

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46 Brunei adopted the Territorial Sea and Fishery Limits Act in 1982 and made an official declaration of a 200 nautical miles exclusive economic zone on 21 July 1993. Malaysia adopted the Continental Shelf Act in 1966, a Proclamation of a 200 nautical miles exclusive economic zone on 25 April 1980 and passed the Exclusive Economic Zone Act in 1984. Philippines adopted the Petroleum Act in 1949, Presidential Decree No. 1599 of 11 June 1978 establishing a 200 nautical miles exclusive economic zone, and Presidential Decree No. 1596, 1979, declaring Kalayaan Island Group as part of the territory of Philippines. The National Assembly of Vietnam adopted a law on the territorial Sea, the contiguous zone, the exclusive economic zone, and the continental Shelf of Vietnam 28 December 1982.

47 Agreement Between Malaysia and Indonesia on the Delimitation of the Continental Shelves of the Two Countries, 27 October 1969, available at the Web site of the UN Division on Oceans and the Law of the Sea (DOALOS), http://www.un.org/Depts/los.

48 Agreement Between Vietnam and Indonesia Concerning the Delimitation of the Continental Shelf Boundary, 26 June 2003, *Law of the Sea Bulletin*, no. 67 (2008): 39.

49 "New Era in Brunei- Malaysia Bilateral Ties," *News from Mission*, 17 March 2009, High Commission of Malaysia, Bandar Seri Begawan, accessed August 28, 2022, https://www.kln.gov.my/web/brn_begawan/news-from-mission/-/blogs/new-era-in-brunei-malaysia-bilateral-ties.

is submitted that the claim of historic rights could not be successful as the required element of acquiescence is lacking. The main concern here is how one applies the principle that the land dominates the sea to the nine-dash-line claim without any solid proof of unchallenged sovereignty over the islands. If the claim is made to the maritime areas adjacent to the mainland China, it will definitely be protected by the principle. However, most areas of the South China Sea claimed by China are far from the mainland China or Hainan. In particular, the Spratly islands are approximately about 641 nautical miles away from Hainan. There are vast areas of the high seas, where freedom of the seas flourishes, in between the mainland China and the disputed areas.

For that reason, the first thing China or any other claimant State must do is to prove that it possesses sovereignty over the islands and other maritime features in the South China Sea. Sovereignty is the first issue that needs to be settled. One cannot forget that there are many competing States and some of them have even militarily occupied the respective maritime features. Any State that can prove sovereignty over the maritime features can have sovereign rights or jurisdiction over the adjacent maritime areas. And this is in accord with the principle that the land dominates the sea. Otherwise, just claiming the maritime entitlements without settling the question of sovereignty over the land (maritime features), only the opposite would be true, that is: "the sea dominates the land."

APPLICATION OF THE PRINCIPLE TO MARITIME FEATURES IN THE SOUTH CHINA SEA

It is established that the principle according to which the land dominates the sea is applicable not only to the mainland but also to islands.[50] The ICJ and other international tribunals have consistently applied this principle in cases involving the maritime rights of islands.[51] In the Qatar/Bahrain case, for example, the ICJ affirmed that

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50 *Continental Shelf (Libyan Arab Jamahiriya v Malta*) (Merits) [1985] ICJ Rep 13 para 52.

51 See for example, *Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v Myanmar)* (ITLOS case no 16, Judgment of 14 March 2012) para 185.

islands, regardless of their size, in this respect enjoy the same status, and therefore generate the same maritime rights, as other land territory.[52]

By virtue of this principle, States started realising that land was the key to gain access to significant marine resources. If a State owned an island, how small the size of it, that State could claim maritime zones more than a hundred times larger than the size of the island. Due to this fact, States were reluctant to allow all islands to have the same maritime entitlements as they do to the land territory. This is the rationale behind the inclusion of Article 121(3) in the UNCLOS 1982.

The Regime of Islands: A Manifestation of the Principle that the Land Dominates the Sea

The following is the regime of islands as enshrined in Article 121 of the UNCLOS:

> 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.[53]

First, Article 121, as a general rule, confirms that all naturally formed islands generate four maritime zones. Secondly, as an exception to the general rule, it provides that rocks which cannot

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52 *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* 2001 ICJ Rep 40, para. 185.

53 Article 121, UNCLOS 1982

sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

Interpretation of Article 121(1): elements of the term 'island'

Three elements need to be fulfilled to be regarded as an 'island': (i) it is a naturally formed area of land; (ii) it is surrounded by water; and (iii) it must be above water at high tide.

The word 'naturally,' the keyword of the first element, is of primary importance in the definition of island. The ordinary meaning of the word, if interpreted in good faith,[54] refers only to an area of naturally formed land and it does not matter whether it is a hard granite rock, a soft lime rock, a coral reef, or an atoll. It thus very clearly excludes whatever is 'artificial' or 'man-made.'[55]

In the context of the other provisions of the UNCLOS, this interpretation of the meaning of island is supported and collaborated by Article 60(8), which provides that:

> Artificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.[56]

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[54] According to the general rule of interpretation under Article 31 of the Vienna Convention on the Law of Treaties 1969, "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

[55] *South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, PCA Case No. 2013-19, Award (July 12, 2016). See also Sondra Faccio, "Human Habitation or Economic Life of their Own": The Definition of Features Between History, Technology and the Law," *Liverpool Law Review*, 42 (2021) 15-33, at 18.

[56] Article 60(8), UNCLOS 1982. But see a contrary view in Imogen Saunders, "Artificial Islands and Territory in International Law," *Vanderbilt Journal of Transnational Law*, 52 (2019) 643-684, at 647.

The third element states that an island must be above water at high tide. It means that it must be above sea water at all time or permanently. In other words, an island must be a high tide feature and not a low tide elevation. According to Article 13(1), a low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide.[57] The distinction between an island and a low tide elevation is very important as the former can be the basis for maritime entitlements whereas the latter has no maritime entitlements,[58] apart from a limited exception given in the second part of Article 13(1).

Interpretation of Article 121(2)

The interpretation of the first phrase of Art 121(2) - 'Except as provided for in paragraph 3' – is crucial as the ordinary meaning of the terms clearly indicates that Art 121(2) is the general rule whereas Article 121(3) relating to 'rocks' is an exception to the general rule. Art 121(2) leaves no doubt at all that like land territory, an island that fulfils the three elements under Art 121(1) is entitled to all four maritime zones: territorial sea, contiguous zone, exclusive economic zone, and continental shelf.

Interpretation of Article 121(3)

The very first question that can be raised is whether 'rocks' stated in Art 121(3) can be regarded as islands?[59] The answer would be in the affirmative. Rocks stated in Art 121(3) are islands, if one interprets Article 121 in good faith in accordance with the ordinary meaning of the terms in their context. The following are the reasons: (i) Rocks that fulfil the three elements of an island under Art 121(1) are by all means islands: (ii) The title, 'Regime of islands,' denotes that all the features

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57 Article 13(1), ibid.

58 Yuta Arai, *The Interpretation of the Regime of Islands: Application to Okinotorishima*, (World Maritime University Dissertations, Malmo: Sweden, 2019) 19-21.

59 See Joanna Mossop, "The Regime of Islands in the Aftermath of the South China Sea Arbitration," *Proceedings of the ASIL Annual Meeting*, 112 (2018) 12-14.

stated in Article 121 are islands, including rocks in paragraph 3; Rocks are a particular category of 'island;' (iii) Since Art 121(2) pronounces that an island is entitled to all four maritime zones (except as precluded by Art 121(3), the subsection on rocks), the drafters would not include an exception in Article 121(3) if rocks were not islands.[60]

Charney strongly supports this conclusion,[61] stating that this view is implicit in the Eritrea/Yemen arbitral award of 1998 in regard to the Mohabbakahs - four rocky islets.[62] Brown is of the same view and affirms that even small, barren rocks were regarded as falling within the definition of an island.[63]

The Meaning of 'Rock'

What is probably the most problematic in Article 121(3) is the meaning of the term 'rocks.' It is not defined in the UNCLOS 1982 and the drafting history is also not helpful. Dictionaries define 'rock' as the dry solid part of the earth's surface that sticks up out of the ground or the sea,[64] or a concreted mass of stony material.[65] In geology, rock is any naturally occurring solid mass or aggregate of minerals or

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60 David H Anderson, "Islands and Rocks in the Modern Law of the Sea" in Myron H. Nordquist (ed), The Law of the Sea Convention: US Accession and Globalization (Martinus Nijhoff: The Hague, 2012) 307, 310, arguing that Article 121 contains provisions about islands, including those rocks which are accorded treatment similar to that of islands, and those other rocks which are accorded only part of that treatment". See also Jonathan I Charney, "Rocks That Cannot Sustain Human Habitation" (1999) 93 *American Journal of International Law*, 863 at 866, writing: "Rocks that do not fail this test are entitled to all four maritime zones."

61 Jonathan I. Charney, "Rocks That Cannot Sustain Human Habitation," *American Journal of International Law*, 93 (1999), 863, at 864.

62 See *Award of the Arbitral Tribunal in the first stage of the proceedings between Eritrea and Yemen (Territorial Sovereignty and Scope of the Dispute)*, (Decision of Oct. 9, 1998) 22 *RIAA*, 209-332, para 467.

63 See E. D. Brown, *The International Law of the Sea*, in two volumes, (Dartmouth, 1994), 150.

64 *Cambridge English Dictionary*, https://dictionary.cambridge.org/dictionary/english/rock.

65 *Merriam Webster*, https://www.merriam-webster.com/dictionary/rock.

mineraloid matter.[66] To geologists, a rock is a natural substance composed of solid crystals of different minerals that have been fused together into a solid lump.[67] In these definitions, the main idea of a rock is not much different for a layman as well as for a geologist and this is the ordinary meaning of the term rock.

In respect of the meaning of 'rocks', the South China Sea Tribunal has departed from the ordinary meaning of the term and introduced a much wider definition. The Tribunal raised the question of whether Article 121(3) intended to apply only to features that are composed of solid rock. The answer given was in the negative. The Tribunal believed that imposing a geological criteria on Article 121(3) would lead to an absurd result. It opined that any high-tide features formed by sand, mud, gravel, or coral, which are less stable than rocks would always generate extended maritime entitlements, even if they were incapable of sustaining human habitation or economic life of their own.[68]

The Tribunal concluded that the result of this interpretation is that 'rocks' for the purposes of Article 121(3) will not necessarily be composed of rock.[69] Such an unprecedented interpretation is criticised by some commentators on the ground that it is not in accord with the drafting history of the UNCLOS 1982.[70] Gau argues that the Tribunal's view seems unreasonable and its worries seem unwarranted.[71]

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66 *Britannica*, https://www.britannica.com/science/rock-geology.

67 "Rocks Information and Facts," *National Geographic*, https://www.nationalgeographic.com/science/article/rocks#:~:text=What%20Is%20a%20Rock%3F,formed%20at%20the%20same%20time.

68 *The South China Sea Arbitration, Republic of the Philippines and People's Republic of China*, Award of 12 July 2016, Merits, para 481.

69 Ibid, para 482.

70 Gilbert Guillaume, "Rocks in the Law of the Sea: Some Comments on the South China Sea Arbitration Award," *Global Times*, March 15, 2021, accessed 23 August 2022, https://www.globaltimes.cn/page/202103/1218473.shtml

71 Michael Sheng-ti Gau , "The Interpretation of Article 121(3) of UNCLOS by the Tribunal for the South China Sea Arbitration: A Critique" *Ocean Development & International Law*, 50 (1) (2019), 49-69, at. 64.

It is submitted, however, that the worries of the Tribunal appear to be understandable. There are indeed maritime features like coral reefs that are too small and uninhabitable but are above water at high tide and thus make them to be qualified as islands within the meaning of Article 121(1). Since they would not fall under the exception of rocks in Article 121(3), they would be entitled to all the four maritime entitlements although they are uninhabitable and have no economic life of their own. It is not clear from the drafting history why the drafters purposely chose the term 'rocks' rather than 'islands' in Article 121(3). If the drafters of the UNCLOS 1982 used the term 'islands' instead of 'rocks' in Article 121(3), the dilemma could have been avoided. There is, therefore, still a lacuna in law due to the lack of a settled and authoritative definition of 'rock.'

The Issue of Man-Made Additions and Modifications

In the definition of both a low-tide elevation and an island, the required qualification is that it must be 'naturally formed.' It is crystal clear that the status of a feature is to be determined on the basis of its natural condition. That is why, the South China Sea Arbitration Tribunal rightly concludes that as a matter of law, human modification cannot change the seabed into a low-tide elevation or a low-tide elevation into an island. A low-tide elevation, therefore, will remain a low-tide elevation under the Convention, regardless of the artificial extension of it by land reclamation or installation built atop it.[72]

There are a number of commentators who support the thesis that the status of a maritime feature must be determined by virtue of its natural condition without taking into consideration any artificial or man-made additions or modifications.[73]

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72 *South China Sea Arbitration*, Award, para. 305.

73 See, for example, F. Shannon Sweeney, Rocks v. Islands: Natural Tensions over Artificial Features in the South China Sea," *Temple International and Comparative Law Journal*, 31 (2017) 599, at 617-18. See also Barry Hart Dubner, "The Spratly 'Rocks' Dispute – A Rockapelago Defies Norms of International Law," *Temp. Int'l & Comp. L.J.* 9 (1995), 291, at 305.

The Status of Maritime Features in the South China Sea

The South China Sea Tribunal reiterated to the requirement of the convention to ascertain the status of a feature on the basis of its natural condition prior to the significant human modification. So far as maritime features in the South China Sea are concerned, the Tribunal stressed that most of the coral reefs have been entirely buried by millions of tons of landfill and concrete and airstrips and buildings are constructed on top of them. Consequently, it reached its decision on the basis of evidence of the previous status of what is now heavily modified coral reefs.[74]

The Tribunal specifically found that the features known as Hughes Reef, Gaven Reef (South), Subi Reef, Mischief Reef, and Second Thomas Shoal are not islands but only low-tide elevations. Under Article 13(2) of the Convention, a low-tide elevation situated at a distance exceeding the breadth of the 12-nautical-mile territorial sea from the mainland or from an island can have no territorial sea of its own; ipso facto, it is not entitled to an EEZ or continental shelf.[75]

By using somewhat high thresholds of requirements for 'sustainable human habitation' and economic life of their own,' under Article 121(3) of UNCLOS, the Tribunal concluded that none of the high-tide features in the Spratly Islands is capable of sustaining human habitation or economic life of their own and therefore such features shall have no exclusive economic zone or continental shelf.[76]

Although there are commentators who supported the decision of the Tribunal, there are many who opposed it.[77] Talmon, for example, elucidates that the interpretation given by the tribunal in the South

74 *South China Sea Arbitration*, Award, para. 306.

75 Ibid.

76 Award, Merits, paras. 554-557, 560, 563, 569, 570, and 626.

77 Chinese Society of International Law, "The South China Sea Arbitration Awards: A Critical Study" *Chinese Journal of International Law*, 17(2) (2018), 207–748. Stefan Talmon, "The South China Sea Arbitration and the Finality of 'Final' Awards," *Journal of International Dispute Settlement*, 8(2) (2017), 388–401.

China Sea Arbitration to Article 121(3) and, in particular, to the terms 'rocks', 'human habitation' and 'economic life of their own', is not in line with the jurisprudence of other international courts and tribunals or with the decisions of domestic courts.[78]

The South China Sea Arbitration is the first ever of its kind that dealt with an in-depth analysis of many controversial issues relating to maritime features and maritime claims. However, the award did not receive the expected level of endorsement by States. Malaysia simply noted the Award.[79] The 28 members of the European Union (EU) only 'acknowledged' it.[80] It is not surprising that Taiwan which occupies Itu Aba (Taiping), the largest island in the South China Sea, which the tribunal found to be a mere 'rock', immediately rejected the tribunal's award as unacceptable.[81] China, of course, is the State, which from the very beginning rejected the jurisdiction of the Tribunal, and opposed the award in its entirety.

It appears that the decision of the Tribunal is not the end of the story. After the award, what remains clear and unaffected is the unfettered acceptance of the principle that the land dominates the sea. The controversies arise only in respect of the practical application of the principle to the relevant situation and the interpretation of Article 121 of the UNCLOS 1982.

RECOMMENDATIONS AND CONCLUSION

78 Stefan Talmon, "The South China Sea Arbitration and the Finality of 'Final' Awards," *Journal of International Dispute Settlement*, 8(2) (2017), 388–401, at. 394.

79 Press Release made by the Ministry of Foreign Affairs, Malaysia, after the decision of the Arbitral Tribunal on the South China Sea Issue, 13 July 2016, http://www.kln.gov.my.

80 European Union Press Release 442/16, 15 July 2016 http://www.consilium.europa.eu.

81 Ministry of Foreign Affairs, Republic of China (Taiwan), ROC position on the South China Sea Arbitration, 12 July 2016, http://www.mofa.gov.tw.

By virtue of the discussions above, the following are recommended.

Rocks as stated in Article 121(3) are islands so long as they satisfy the elements of an island as defined in Article 121(1). Rocks are a particular category of islands.

There are two different views on the meaning of 'rock': (i) the ordinary meaning that rock is any naturally occurring solid mass or aggregate of minerals or mineraloid matter; and (ii) the wider meaning of rock laid down by the South China Sea Award as any small naturally formed land above water at high tide without any geological qualification. It is submitted that the first view is the better and the more logical one.

The status of a maritime feature must be determined by virtue of its natural condition without taking into consideration any artificial or man-made additions or modifications.

The principle that the land dominates the sea is an established rule of customary international law which can be applied to the mainland and the islands alike.

It is therefore crucial to first determine the sovereignty issue of the disputed maritime features rather than claiming the jurisdiction and rights over the sea areas.

In fact, the South China Sea disputes are 'mixed disputes,' encompassing disputes of sovereignty over the maritime features as well as claims of maritime entitlements. It is quite common that any court or tribunal asked to adjudicate a claim on maritime entitlements, which is also linked with sovereignty dispute over relevant island or maritime feature, is expected to resolve first the sovereignty issue.[82]

[82] See S. Fietta and R. Cleverly, *A Practitioner's Guide to Maritime Boundary Delimitation* (Oxford: Oxford University Press, 2016), at 28, stressing "the need to resolve land boundary, island, or other sovereignty disputes related to land territory as a necessary precursor to any maritime delimitation exercise."

A question that can be raised is whether the United Nations Convention on the Law of the Sea (UNCLOS) alone can be applied to resolve the so-called mixed issues. The answer would be in the negative. The South China Sea Arbitration award on jurisdiction affirmed that UNCLOS is not concerned with sovereignty over land territory, including islands, and assumes for the purposes of maritime claims that the issue of sovereignty is resolved."[83]

The issue of sovereignty is to be determined by applying the general international law on territorial acquisition, in particular, the law of occupation and prescription. If the disputed marine feature is a *terra nullius*, the law of occupation applies and the two elements of effective occupation need to be fulfilled: (i) intention to act as sovereign and (ii) peaceful and continuous exercise of sovereign activities (*effectivit`es*). That is why States are competing with each other in the disputed areas to show their sovereign activities, by installing man-made structures, concrete reinforcements, helicopter pads, military garrisons, etc.

It is natural that a claimant State wants to cement its sovereign activities to prove its effective occupation and control. Nevertheless, the main concern is that man-made constructions and modifications would ultimately change a small uninhabited coral reef or atoll to be a full-fledged island, entitled to the exclusive economic zone and the continental shelf. That would defeat the letter and spirit of the 'regime of islands' as enshrined in the UNCLOS 1982 and thus make the principle that the land dominates the sea meaningless.

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[83] See *South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, Award on Jurisdiction and Admissibility, 29 October 2015, para. 8. See also R. Beckman, 'Disputed Areas in the South China Sea', in Tran Truong Thuy and Le Thuy Trang (eds), *Power, Law, and Maritime Order in the South China Sea* (Lanham: Lexington Books, 2015) 103–117, at 108.