

## Clarifying Article 121(3) of the Law of the Sea Convention: The Limits Set by the Nature of International Legal Processes

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### Introduction

Article 121(3) of the Law of the Sea Convention<sup>1</sup> provides that “[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.” This article has the potential to significantly limit the extent of coastal state maritime zones, especially in the case of isolated insular features. Furthermore, this provision has had an impact on the delimitation of maritime zones between neighbouring states. Article 121(3) appears to have been regularly invoked as an argument to deny an island any weight in establishing a maritime boundary.

An assessment of the impact of article 121(3) of the LOS Convention on the extent of maritime zones is seriously hampered by the fact that it has raised a number of complex issues of interpretation. This concerns among others what size leads to the classification of an island as a rock, and what qualifies as “human habitation”, “economic life” or “of their own.” These questions have attracted significant scholarly attention, providing a thoughtful consideration of the intricacies involved. However, although this makes it possible to limit the range of interpretations of the terms of article 121(3) to some extent, the literature generally acknowledges the impossibility of an authoritative interpretation of it on the basis of existing legal materials. One recent discussion of the rocks provision in fact concludes that it is evident that only state practice and the case law are capable to undertake the task of clarifying article 121(3).<sup>2</sup>

These considerations indicate that another attempt to clarify the provisions of article 121(3) of the LOS Convention cannot lead to more detailed conclusions as have been reached by other authors. On the other hand, the submission that state practice and the case law are capable of providing a clarification of this article has hardly been addressed. This article proposes to undertake this task, looking at the different contexts in which

states and other actors will have to interpret or apply article 121(3). It is believed that the nature of the legal processes involved to a large extent defines the possibilities of clarification of article 121(3). For instance, a court having to deal with the interpretation of this article can be expected to approach this matter differently than a state which has to consider its relevance for the definition of its maritime zones.<sup>3</sup>

Although this paper does not venture another attempt at interpreting the provisions of article 121(3) of the LOS Convention, it starts with an overview of the questions raised by the different elements of the article. This provides a background for understanding the issues involved in defining article 121(3) and makes it possible to assess the significance of various legal processes for its clarification. After this overview the paper assesses the role of national legislation, decisions of national courts, decisions of international courts, the Commission on the Limits of the Continental Shelf (CLCS), and the community interest in the Area and the high seas in the clarification of article 121(3). The conclusion evaluates the contribution of these different processes and discusses the need and possibilities for additional efforts to clarify article 121(3).

### The Uncertainties of Article 121(3)

The discussions on what was to become article 121(3) at the third United Nations Conference on the Law of the Sea (UNCLOS III) indicate that one relevant consideration in establishing what is a rock was the size of the island concerned.<sup>4</sup> Although widely varying figures have been suggested in this respect,<sup>5</sup> it has to be assumed that islands above a certain size never qualify as rocks, even if they meet the other criteria mentioned in article 121(3).<sup>6</sup> It seems doubtful that there can be established one specific size under which each island becomes a rock, as this also depends on an application of the other elements of article 121(3) to each specific case.

To qualify as a rock, it is not necessary that an island is a rock in a geological sense. Article 121(3) can be equally applicable to, for instance, an island consisting of sand.<sup>7</sup> The terms “cannot sustain”, “human habitation”, “economic life” and “of their own” leave significant scope for different interpretations.<sup>8</sup> The reference to “or” between “human habitation” and “economic life” has been interpreted both as being conjunctive<sup>9</sup> and disjunctive.<sup>10</sup>

The impact of article 121(3) is limited by the existence of the provision on archipelagic and straight baselines of the LOS Convention. These provision do not in any way limit the establishment of baselines to specific categories of islands.<sup>11</sup> Islands which might qualify as a rock under article 121(3) of the Convention can be included in a system of baselines and as such be used to establish the outer limit of the EEZ and continental shelf.<sup>12</sup>

Apart from various questions concerning its interpretation, another issue is whether article 121(3) has become a part of customary international law. Legal doctrine is divided on this issue,<sup>13</sup> but an analysis of state practice suggests that article 121(3) has not acquired customary law status.<sup>14</sup> State practice tends to attribute an EEZ and continental shelf to all insular features. The indeterminate nature of article 121(3) possibly contributes to the fact that only in exceptional circumstances a state has limited itself in extending its EEZ and continental shelf from islands.

### National Legislation

Practice of individual states concerning article 121(3) mostly consists of national legislation establishing the outer limits of maritime zones.<sup>15</sup> Two types of legislation on outer limits can be distinguished:

- i) legislation which only provides that the outer limit of the continental shelf or EEZ is measured from the baselines of the territorial sea; and,
- ii) legislation which defines an outer limit by reference to geographical coordinates.

Legislation which defines the outer limit of the EEZ and continental shelf by reference to the baselines of the territorial sea implicitly seems to attribute these zones to all islands, as rocks in the sense of article 121(3) of the LOS Convention also form part of this

baseline.<sup>16</sup> The fact that in many cases existing baseline legislation is used would seem to limit the possibility that article 121(3) is taken into consideration, as this legislation is not necessarily reviewed in establishing an EEZ or continental shelf.

Although a review of legislation suggests that states generally do not take into consideration article 121(3) in establishing the limit of the EEZ and continental shelf, some caution is required. Some legislation contains generally worded exemption clauses,<sup>17</sup> and for other states article 121(3) may not be relevant. An exceptional example of legislation which qualifies the extent of the EEZ or continental shelf is a *Mexican Federal Act*, which provides that islands have a continental shelf and EEZ, but “rocks which cannot sustain human habitation or economic life of their own” not.<sup>18</sup> A map of the Mexican EEZ published by the Secretary of the Foreign Ministry in June 1976 reportedly took into account all Mexican islands, except for the Alijos.<sup>19</sup> A number of states have explicitly established a continental shelf and/or EEZ off islands which might be considered to be rocks.<sup>20</sup>

The recent redefinition of the United Kingdom’s fishery zone off Rockall shows that article 121(3) can have an impact on national legislation. Rockall, which is almost 200 nautical miles (nm) from the Scottish coast and measures only 624m<sup>2</sup>, has been considered as one of the most notable examples of a rock within the meaning of article 121(3).<sup>21</sup> Denmark, Iceland and Ireland had protested the use of Rockall as a basepoint for the British fishery zone established in 1977.<sup>22</sup> The United Kingdom’s decision on the roll-back of the fishery zone limit, which was taken in connection with its accession to the LOS Convention, indicated that it was considered that “*Rockall is not a valid base point for such limits under article 121(3)*”.<sup>23</sup> One important conclusion which can be drawn from this step upon ratification of the LOS Convention is that the United Kingdom apparently considers that practice of the parties to the Convention cannot be taken to have led to an interpretation of article 121(3) which would exclude Rockall from its scope of application.

It seems possible that national legislation in the future can contribute more to the clarification of article 121(3) than has been the case until now. States becoming a party to the LOS Convention may take a step like the United Kingdom did in respect of Rockall. Secondly, some states are still in the

process of defining their position concerning their baselines, which may result in modifications.

The extent of potential conflict of national legislation with article 121(3) may be further clarified by the obligations of states parties to the LOS Convention to provide information on the limits of their maritime zones.<sup>24</sup> Under articles 75 and 84 of the Convention coastal states shall indicate the outer limit lines of the EEZ and the continental shelf on charts of a scale or scales adequate for ascertaining their position. Where appropriate, lists of geographical coordinates of points, specifying the geodetic datum, may be substituted for such lines.<sup>25</sup> The coastal state shall give due publicity to these charts or lists and shall deposit copies thereof with the Secretary General of the United Nations, and in the case of the continental shelf also with the Secretary-General of the International Sea-Bed Authority (ISA).<sup>26</sup> As an evaluation of the status of insular features depends on their possible use as basepoints for straight or archipelagic baselines, it is also relevant that states parties to the Convention have similar obligations in these cases.<sup>27</sup>

The articles of the Convention on charts and lists do not indicate any time limit within which parties have to make a first deposition of the required information and few states parties have taken action in this respect.<sup>28</sup> The absence of a time limit does, however, not imply that inaction of a coastal state always will remain without consequences. Depending on the further circumstances of a case, non-compliance with the obligation to give due publicity to the limits of maritime zones may make these unopposable against other states if a conflict over their exact location arises.<sup>29</sup>

### Decisions of National Courts

The conformity of baselines and outer limits of maritime zones with the provisions of the LOS Convention can become the subject of litigation before national courts. A 1996 Judgment of the Supreme Court of Norway provides an interesting example of the role national courts may play in the clarification of article 121(3) of the LOS Convention.<sup>30</sup>

One of the arguments of the appellants was that the baseline from which the outer limit of the fishery zone of Svalbard was measured, was not in accordance with international law on three counts. One of these was that Abel Island on which a basepoint was located, was an uninhabitable rock

within the meaning of article 121(3) of the LOS Convention.

The Court held that Abel Island, which measures 13.2 km<sup>2</sup> in area, was too large to be a rock within the meaning of article 121(3) and found support for this in state practice. Moreover, the Court held that Abel Island also did not meet the requirement of article 121(3) that it cannot sustain human habitation or economic life of its own. The island would be able to support a significant polar bear hunt, were such hunting not prohibited for conservation reasons.<sup>31</sup> Two other recent national cases, which concerned a number of questions concerning baselines, also indicate the potential of this form of state practice for the clarification of article 121(3) of the LOS Convention.<sup>32</sup>

### The Delimitation of the EEZ and the Continental Shelf between Neighbouring States

Some bilateral delimitation agreements suggest they give partial weight to potential rocks in the sense of article 121(3) in the delimitation of the continental shelf or the EEZ, implying that the feature concerned is not a rock. Recent examples concern two delimitation agreements of Finland with respectively Estonia and Sweden involving the Finnish islets of Bogskär and the delimitation between Denmark (Greenland) and Iceland involving the latter's Kolbeinsey.<sup>33</sup>

Bogskär consists of two islets measuring approximately 3,700m<sup>2</sup> and 1,110m<sup>2</sup>, which are some 340m apart, and some smaller islets and rocks. The total area of Bogskär is approximately 5,000m<sup>2</sup>. Bogskär lies respectively 62, 16.4 and 22.6nm from the Estonian, Finnish, and Swedish coasts.<sup>34</sup> On one of the islets stands a lighthouse, on which the Finnish Frontier Guard has installed surveillance equipment. Kolbeinsey, which measures a few hundred square meters and has a maximum altitude of 6m, lies approximately 55nm to the north of the coast of Iceland.<sup>35</sup>

In the cases of Bogskär and Kolbeinsey the states involved disagreed whether these islets could be used as basepoints for the establishment of a 200nm zone.<sup>36</sup> On the other hand, they did agree that the boundary line should in principle be an equidistance line. The solution which was eventually adopted in the three delimitation agreements is a division of the area between the equidistance lines giving full weight

to the islets and giving no weight to the islets. This treatment might suggest that it was recognised that the islets were valid basepoints, which were accorded a limited effect in the establishment of the boundary line. However, closer consideration indicates that this is not the case. As far as can be established the boundary lines were the result of a compromise between the states involved, without discussing the legal merits of the arguments concerning the islets.<sup>37</sup>

Another case is formed by delimitation agreements of the Netherlands, France and the United States with Venezuela giving full weight to the Venezuelan islet of Aves.<sup>38</sup> Aves Island, which is situated centrally in the Eastern Caribbean, lies some 435km from the nearest Venezuelan territory and some 200km from the Lesser Antilles. The island measures about 585 meters in length and at its narrowest point 30m in width. The delimitation treaties of Venezuela with France, the Netherlands and the United States seem to accord Aves an EEZ and continental shelf as there are areas on the Venezuelan side of the boundary which are only within 200nm from the coasts of Aves and these other states.

Antigua and Barbuda, St Kitts and Nevis and Saint Vincent and the Grenadines have made objections regarding these three agreements. These protests note that, as recognised in both customary international law and as reflected in the LOS Convention, rocks which cannot sustain human habitation or economic life of their own shall have no EEZ or continental shelf. Moreover, it is indicated that the three agreements appear to grant Aves an EEZ and continental shelf, and that Antigua and Barbuda, St Kitts and Nevis and Saint Vincent and the Grenadines have not acquiesced in them.<sup>39</sup> It seems that France, the Netherlands and the United States thus far have not reacted to the protests.<sup>40</sup>

According no weight to an island in a delimitation, as was for instance the case for Rockall in the continental shelf delimitation between Ireland and the United Kingdom,<sup>41</sup> in itself neither provides conclusive evidence that an island was considered to fall under the definition of article 121(3) of the LOS Convention. Giving no weight to Rockall in the above mentioned delimitation could also be considered to be in full conformity with maritime delimitation law if Rockall were entitled to its own EEZ and continental shelf.

The above cases suggest that most bilateral delimitation agreements cannot contribute to a

clarification of the contents of article 121(3) of the LOS Convention. It is to be expected that in most cases states will refrain from a classification of an island as falling under article 121(3), if a compromise agreement can be reached without doing this. Agreements which seem to recognise that the islands concerned have an EEZ, such as the treaties concerning Aves and Kolbeinsey, might be considered to provide some indication concerning the interpretation of article 121(3). However, in this case there also are a number of considerations which caution against such an approach. The agreements refrain from explicitly recognising the entitlement of Aves. Furthermore, the delimitations effected indicate that the states involved reached agreement taking into account considerations not directly related to the material rules of maritime delimitation law.<sup>42</sup> Similar considerations apply in the case involving Kolbeinsey.<sup>43</sup>

### The Case Law

Taking into consideration the eminent role of the International Court of Justice (ICJ) and arbitral tribunals in the definition of the law applicable to the delimitation of maritime boundaries, a similar contribution to the clarification of article 121(3) of the LOS Convention might be considered a possibility. However, there are a number of circumstances which may cause the ICJ or a tribunal to not always address the issue of article 121(3), even if it is raised by one of the parties to the proceedings.

The cases concerning maritime delimitation which have been decided until now have not assessed article 121(3) of the LOS Convention in any detail. The status of article 121 of the LOS Convention was addressed in the *Jan Mayen* conciliation.<sup>44</sup> Interestingly, the Conciliation Commission found that article 121 of the then Draft Convention reflected "*the present status of international law on this subject.*"<sup>45</sup> The Commission did not indicate how it reached this conclusion.<sup>46</sup> On the basis of a brief description of Jan Mayen, the Commission concluded that it had to be considered an island entitled to an economic zone and a continental shelf.<sup>47</sup> Taking into account the size of Jan Mayen, which is some 373km<sup>2</sup>, this conclusion does not seem particularly relevant in most cases in which interpretation of article 121(3) of the LOS Convention is required.

The Icelandic islet of Kolbeinsey, which was already discussed in some detail before, figured in the *Jan*

*Mayen* conciliation and the *Jan Mayen* case. Its treatment in both instances provides examples of how certain issues can be circumvented in an adjudication. In the *Jan Mayen* conciliation the Commission recommended a continental shelf boundary following the Icelandic 200nm outer limit which in part was measured from Kolbeinsey. The Commission did not define this line in an unequivocal manner, but only noted the agreement between Iceland and Norway to give the former a full 200nm economic zone in relation to Jan Mayen.<sup>48</sup>

In the *Jan Mayen* case the ICJ, in establishing the relevant area for the delimitation, adopted as the southern limit the farthest extent of the 200nm zone claimed by Iceland, which in part was influenced by the presence of Kolbeinsey. Denmark had requested the Court to limit its decision in this way, a position which was accepted by Norway.<sup>49</sup>

It seems that a court has ample opportunity to avoid the discussion of the significance of article 121(3) of the LOS Convention in cases involving the delimitation or outer limits of the EEZ and continental shelf.<sup>50</sup> Whether it is possible to leave certain questions unanswered to a certain extent depends on the formulation of the questions submitted to a court.<sup>51</sup>

A first possibility is to refrain from discussing the status of the island involved, and to proceed directly to a delimitation. Such an approach is possible in all cases in which the island is part of a larger delimitation, and is not the only basepoint from which parts of the overlapping claims result.

If an island, which might fall under the definition of article 121(3) of the LOS Convention, is the only basepoint of one state which results in a part of the overlap with the EEZ or continental shelf of another state, there still exists a possibility to avoid discussion of its status. In the *Jan Mayen* conciliation this was accomplished by referring to the boundary as coinciding with the outer limit of the Icelandic 200nm zone. If a boundary is established by a straight line the definition of the terminal point of the boundary can be avoided by referring to the boundary as continuing along a specific bearing until the outer limit of the maritime zones of the states involved is reached.<sup>52</sup>

If a boundary has to be established between a mainland coast and an island or between two islands, one of which might be considered as a rock in the

sense of article 121(3) of the LOS Convention, avoiding the issue of its classification becomes difficult. However, even in this case such an approach in certain instances remains possible. For example, if there is a limited extent of overlap between the EEZ and continental shelf of the parties a court could rule that, taking into account the disparity in coastal lengths, an equitable delimitation results in attributing the larger coast a maritime area which coincides with its 200nm outer limit.

One final possibility to avoid discussion of the status of an island in the context of article 121(3) is what has been referred to as contextualisation. This strategy implies that a judge looks at the issues of a case from the perspective of opposability of the parties' claims *vis-à-vis* each other, instead of looking at it in terms of general rules.<sup>53</sup> An example of this approach in the case law on maritime boundary delimitation is the treatment of Eddystone Rocks in the *Anglo-French Continental Shelf* arbitration. France and the United Kingdom disagreed whether Eddystone Rock was an island or a low-tide elevation. In deciding on this issue the Court of Arbitration did not express itself on this particular point, but limited itself to noting that France had accepted Eddystone Rocks as a relevant basepoint during earlier negotiations.<sup>54</sup>

Although these considerations indicate that there is ample opportunity for refraining from an interpretation of article 121(3) it might in certain instances be difficult to circumvent. This concerns cases in which a ruling on whether an island falls under the definition of article 121(3) provides the only possibility of resolving a dispute. This first of all would seem to concern disputes over the outer limits of the EEZ and continental shelf which generally have *erga omnes* validity.

However, even if such cases arise, clarification of article 121(3) most likely is to take place only gradually. Article 121(3) contains a number of elements which raise considerable interpretative uncertainties, and a case does not necessarily have to address all of these issues at the same time. Moreover, a judge may only appraise whether the requirements of the article are met in general terms, without elaborating on each of them or indicating what the minimum threshold is for each element.<sup>55</sup>

### **The Commission on the Limits of the Continental Shelf (CLCS)**

The CLCS, which has been set up in accordance with article 76(8) and Annex II of the LOS Convention, is to make recommendations to states on matters related to the outer limit of their continental shelf where it extends beyond 200 nautical miles from their coasts.<sup>56</sup> In this procedure the CLCS may be confronted with submissions which use an island, which other states may consider to be a rock in the sense of article 121(3) of the Convention, as a baseline. As article 76(8) of the Convention provides that the limits of the continental shelf established by a coastal state on the basis of the recommendations of the CLCS shall be final and binding, it would seem to be pertinent that some evaluation of the baselines as submitted by the coastal state takes place.

The work of the CLCS on its rules of procedure seems to indicate that it has been realised that disputes over the validity of baselines may be one of the factors complicating its work. The approach which is proposed will not lead to the CLCS assuming a role in the clarification of article 121(3).<sup>57</sup> What it does indicate is that in certain instances states will have to address this issue in connection with the extension of their continental shelf beyond 200nm. This may induce states to take up certain issues which otherwise would not have been addressed for the time being.

### **The Community Interest in the Area and the High Seas**

The classification of an island as a rock in the sense of article 121(3) can have significant consequences for the extent of the high seas and the Area. In this case there is no other coastal state which is adversely affected, but the community of states as a whole. The protection of this community interests will depend mostly on actions by the interested states. Attributing such a role to the International Seabed Authority (ISA) in respect of the Area could have been an option. All rights in the resources of the Area are vested in mankind, on whose behalf the ISA shall act.<sup>58</sup> However, the LOS Convention defines the Area negatively as the sea-bed and ocean floor and its subsoil beyond the limits of national jurisdiction. The definition of these limits is the responsibility of the coastal state.<sup>59</sup>

A first step by interested states against a coastal state claim infringing on the high seas or Area is

likely to consist of informal consultations or a diplomatic protest. Such steps may contribute to some clarification of article 121(3) of the LOS Convention, as states may indicate the grounds for protesting a claim and the coastal state for upholding it. However, if no further steps are taken, these arguments are not subject to a legal evaluation. States can submit a dispute over the applicability of article 121(3) to third party settlement, if such procedures are applicable between them, or if this is not their case, they can reach a compromise to do so.<sup>60</sup> In the case of third party settlement the considerations set out above apply.

### **Conclusions**

The interpretation of article 121(3) in first instance has to be addressed by individual states establishing the other limits of their continental shelf and EEZ. The above analysis indicates that this practice does little to clarify the meaning of article 121(3). One significant exception seems to be British practice with respect to Rockall.

At a next stage, the interpretation of article 121(3) can become an issue either in disputes over the outer limit of the EEZ and the continental shelf, or the delimitation of these zones between neighbouring states. Although entitlement to and delimitation of maritime zones are closely related, in the case of article 121(3) both issues seem to have different implications. This concerns the actors involved and the questions requiring a solution.

A review of state practice and the case law indicates that in the delimitation of maritime boundaries between states, in most cases it is either not necessary to resolve or possible to circumvent the question whether a particular island is a rock in the sense of article 121(3) of the LOS Convention. As the delimitation involving Kolbeinsey indicates, states may even choose not to address this issue if the island concerned is the only feature resulting in an overlap of EEZs and the continental shelf. This suggests that for most delimitations of maritime boundaries the clarification of article 121(3) is not a matter of great urgency. This is mostly explained by the contents of the rules of international law applicable to the delimitation of maritime boundaries which allow for sufficient flexibility to achieve an equitable result without ruling on the applicability of article 121(3).<sup>61</sup>

The establishment of outer limits from a potential rock, which do not result in an overlap with maritime

zones of neighbouring states, generally does seem to require a ruling on the applicability of article 121(3) in case of conflict. However, in this case the actors involved seem to impede a resolution of the dispute involving an authoritative interpretation of article 121(3). An outer limit of the EEZ or the continental shelf encroaching upon the extent of the high seas or the Area places the coastal state interest against the much more diffuse interest of the community of states.<sup>62</sup> This community interest can only be expressed through the actions of individual states. The interest of these other states is of another nature than that of the coastal state. By using a potential rock to establish the outer limits of its EEZ and continental shelf the coastal state *inter alia* secures the exclusive access to the resources of the area involved. States protesting such a claim do not stand to gain similar benefits, as a rollback of a claim would open the area to all states. This suggests that states may not always be willing to litigate such a dispute (if this is an option), due to the resources this requires, and may limit themselves for instance to diplomatic protests.<sup>63</sup>

Whether the judiciary can address the interpretation of article 121(3) first of all depends on the questions being submitted by the parties to a conflict. In any case it seems safe to assume that interpretation by the judiciary will be an incremental process, as courts will limit themselves to the issues needed to resolve the case before them. To some extent it may also be difficult to transpose the results of the application of article 121(3) to a specific island to other islands.

The CLCS is not set to play any role in the clarification of article 121(3), although the process related to the definition of the continental shelf beyond 200nm may contribute to bringing certain disputes over the status of islands under article 121(3) into the open.

These considerations indicate that it is likely that state practice will provide most incidents of relevance to article 121(3). Taking into consideration the nature of most of this practice it does not seem likely that it will contribute much to the clarification of this article. Protests do not seem to go beyond rephrasing the contents of article 121(3). More results might be expected of cases before national courts on for instance the enforcement of fisheries legislation in areas only within 200nm from a potential rock. Whether a court can actually evaluate the legality of national legislation establishing the outer limits of maritime zones against the

requirements of international law depends on the legal system of the state concerned.

One final question to be addressed is whether there is a need to clarify article 121(3) by other means than the ones outlined above and whether this would be acceptable to the interested states. One option would be the clarification of article 121(3) at a diplomatic conference through the elaboration of a more detailed text.<sup>64</sup> However, the experience with article 121(3) at UNCLOS III suggests the futility of such an approach.

Another option is the adoption of alternative procedures for the assessment of claims concerning the application of article 121(3). The present analysis suggests this does not seem to be required for cases involving the delimitation of maritime boundaries between states. However, it might be an option in cases involving a coastal state claim infringing on the high seas and the Area. It has been suggested that the ISA, as a representative of the international community in respect of the Area, should have a role in its definition.<sup>65</sup> Although this might seem an attractive suggestion, it is not likely to be acceptable to all states concerned. During UNCLOS III especially broad margin states persistently rejected a large measure of international control over the definition of the limits of their continental shelf. As a compromise the procedure under article 76 involving the CLCS was devised. It seems highly unlikely that this compromise enshrined in the LOS Convention would be overhauled. Opponents of giving a more significant role to the ISA can argue that the community interest is already protected by the procedure involving the CLCS.<sup>66</sup>

A less ambitious but more realistic approach might be the convening of a meeting of experts under the aegis of the Division of Ocean Affairs and the Law of the Sea (DOALOS) of the United Nations Secretariat. Such a meeting could result in the adoption of a report containing some guidelines on the interpretation of article 121(3).<sup>67</sup>

In conclusion, it appears that state practice, and possibly the judiciary, will continue to be the main source for establishing the more precise meaning of article 121(3). In all likelihood this implies that some uncertainties are to persist, although it can be expected that state practice will address this issue in more detail and more often than in the past.

## Notes

- <sup>1</sup> United Nations Convention on the Law of the Sea of 10 December 1982 (LOS Convention; 21 (1982) *International Legal Materials* (ILM), p.1261).
- <sup>2</sup> R. Kolb, 'L'Interprétation de l'Article 121, Paragraphe 3, de la Convention de Montego Bay sur le Droit de la Mer: Les "Rochers qui ne Prêtent pas à l'Habitation Humaine ou à une Vie Economique Propre..."', 40 (1994) *Annuaire Français de Droit International*, pp.876-909, at p.908; see also M. Kusuma-Atmadja, T.A. Mensah, B.H. Oxman (eds), *Sustainable Development and Preservation of the Oceans: The Challenges of UNCLOS and Agenda 21* (The Law of the Sea Institute, Honolulu, 1997), p 665; B. Kwiatkowska and A.H.A. Soons 'Entitlement to Maritime Areas of Rocks which Cannot Sustain Human Habitation or Economic Life of Their Own', 21 (1990) *Netherlands Yearbook of International Law*, pp.139-181, at p.176; J.M. Van Dyke, J.R. Morgan and J. Gurish, 'The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?', 25 (1988) *San Diego Law Review*, pp.425-494, at p.439. The observation of Kolb is applicable to any rule of international law. However, in most other instances the uncertainty surrounding a rule does not concern to the same extent its constitutive elements.
- <sup>3</sup> The actual impact of specific instances of state practice or judicial decisions can vary greatly. For instance, national legislation which is not enforced has little probative value. A discussion of this issue is beyond the scope of this paper.
- <sup>4</sup> See S.N. Nandan and S. Rosenne, *United Nations Convention on the Law of the Sea 1982; A Commentary, Vol. III* (Martinus Nijhoff Publishers, The Hague, 1995), pp.321-339. The discussion on article 121 at UNCLOS III suggests that proposals to limit the extent of maritime zones served two distinct purposes. One was to deny small islands any entitlement to an EEZ and continental shelf, the other to deny islands such zones in the delimitation with neighbouring states.
- <sup>5</sup> Brown points to two definitions of rocks, one of Hodgson, defining a rock as having an area of less than 0.001 square miles. Another definition of rocks is given by the International Hydrographic Bureau, which defines rocks as less than 1 square kilometer in size (E.D. Brown, *Sea-Bed Energy and Minerals: The International Legal Regime; Volume 1 The Continental Shelf*, (Martinus Nijhoff Publishers, Dordrecht, 1992), p.38).
- <sup>6</sup> See also Kolb, *op. cit.*, p. 904; some doubt in this respect is expressed by Kwiatkowska and Soons, *op. cit.*, p. 167.
- <sup>7</sup> See Kolb, *op. cit.*, pp.904-905; Kwiatkowska and Soons, *op. cit.*, pp.151-153; Van Dyke, *op. cit.*, p.435. *Contra* V. Prescott, 'The Uncertainties of Middleton and Elizabeth Reefs', 6(1) (1998) *Boundary and Security Bulletin*, pp.72-77, at p.74.
- <sup>8</sup> See *e.g.* the discussion in Brown, *op. cit.*, pp.38-39; Kolb, *op. cit.*, p.899-908; Kwiatkowska and Soons, *op. cit.*, pp. 153-173; L. Lucchini and M. V'ickel, *Droit de la Mer; Tome 1* (Pedone, Paris, 1990), pp. 337-339; Van Dyke, *op. cit.*, pp.433-439.
- <sup>9</sup> See *e.g.* Kolb, *op. cit.*, p.906.
- <sup>10</sup> See *e.g.* Kwiatkowska and Soons, pp.163-165.
- <sup>11</sup> See articles 7 and 47 of the LOS Convention.
- <sup>12</sup> See also Kolb, *op. cit.*, p. 899; Kwiatkowska and Soons, *op. cit.*, pp.147-148; Nandan and Rosenne, *op. cit.*, p.338.
- <sup>13</sup> See *e.g.* the overview given by Kwiatkowska and Soons, *op. cit.*, pp. 174-175.
- <sup>14</sup> Increased ratification of the LOS Convention is bound to diminish the relevance of this question. States with a particular interest in article 121(3) which have not yet become a party to the Convention include Colombia, Nicaragua, the United States and Venezuela. The United States seems to take the position that any insular feature which can generate a territorial sea can also generate an EEZ (see Van Dyke, *op. cit.*, pp. 30-432).
- <sup>15</sup> National legislation establishing straight or archipelagic baselines is not relevant in this connection. If basepoints of such lines are located on rocks in the sense of article 121(3) of the LOS Convention, the resulting lines still can be used to establish the outer limit of the continental shelf and the EEZ (see further *supra*).
- <sup>16</sup> For an overview of national legislation on this issue see *e.g.* *The Law of the Sea; National Claims to Maritime Jurisdiction* (New York, United Nations, 1992).
- <sup>17</sup> For instance, legislation of Japan establishes that provisions of treaties apply when they provide otherwise than the legislation concerned (Law on the Exclusive Economic Zone and the Continental Shelf (Law No. 74 of 1996) (*Law of the Sea Bulletin*, No. 35, pp.94-96), article 4). Under the Danish Act No. 411 of 22 May 1996 on Exclusive Economic Zones, the Minister for Foreign Affairs may determine that the Act does not apply to waters covered by special circumstances (*ibid.*, No. 33, p.32, article 1(2)). Admittedly, this latter provision reportedly was included in connection with the dispute with Poland over the weight to be accorded to the Danish island of Bornholm in a maritime delimitation. Bornholm is in any case not a rock in the sense of article 121(3).
- <sup>18</sup> Federal Act relating to the Sea of 8 January 1986, article 51 (*The Law of the Sea; National Legislation on the Exclusive Economic Zone, the Economic Zone and the Exclusive Fishery Zone* (New York, United Nations, 1986), p.193, at p.194) and 63 (*ibid.*; *National Legislation on the Continental Shelf* (New York, United Nations, 1989), p.172, at p.174).
- <sup>19</sup> See C.R. Symmons, *The Maritime Zones of Islands in International Law* (Martinus Nijhoff Publishers,

- The Hague, 1979), pp.125-126. It seems that the Mexican baselines are under review at the present time. Information on the outer limits of Mexico's EEZ may be submitted to the United Nations some time next year.
- <sup>20</sup> See e.g. the examples mentioned in Kwiatkowska and Soons, *op. cit.*, p.177; and Van Dyke, *op. cit.*, pp.444-463 and 487-488.
- <sup>21</sup> See e.g. D.A. Anderson, 'British Accession to the UN Convention on the Law of the Sea', 46 (1997) *International and Comparative Law Quarterly*, pp. 761-786, at p.778; R.R. Churchill, 'United Kingdom's Decision to Defer Accession to the UN Convention on the Law of the Sea: A Convincing Move?', 12 (1997) *International Journal of Marine and Coastal Law*, pp.110-121, at p.114.
- <sup>22</sup> See Churchill, 'United Kingdom's Decision', *loc. cit.*, p.114.
- <sup>23</sup> Statement by the Foreign and Commonwealth Secretary, cited in Anderson, *op. cit.*, p. 778. The limit of the fishery zone was redefined accordingly through the Fishery Limits Order 1997 (Statutory Instrument 1997 No. 1750 of 22 July 1997).
- <sup>24</sup> See also R.R. Churchill and A.V. Lowe, *The Law of the Sea* (Manchester, 1988), pp.44-45.
- <sup>25</sup> LOS Convention, articles 75(1) and 84(1); see also article 76(9).
- <sup>26</sup> *Ibid.*, articles 75(2) and 84(2).
- <sup>27</sup> See *ibid.*, articles 16 and 47 (see further *supra*).
- <sup>28</sup> As of 30 September 1997 only Argentina, China, Costa Rica, Cyprus, Finland, Germany, Italy, Jamaica, Japan, Myanmar, Norway and Romania complied with the obligation to deposit charts and/or lists of geographical coordinates relating to their maritime zones (UN Doc A/52/487 of 20 October 1997, para. 83).
- <sup>29</sup> Cf. Fisheries Case (United Kingdom v. Norway), Judgment of 18 December 1951 (Reports of Judgments, Advisory Opinions and Orders; The International Court of Justice (ICJ Reports) 1951, p.116, at p.139).
- <sup>30</sup> Judgment of 7 May 1996, *Public Prosecutor v Haraldsson et al.* The account given here is based on the more extensive discussion of this case in R.R. Churchill, 'Norway; Supreme Court Judgment on Law of the Sea Issues', 11 (1996) *International Journal of Marine and Coastal Law*, pp. 576-580.
- <sup>31</sup> *Ibid.*, p.579. The Court did not examine whether article 121(3) was actually applicable. The Convention itself was not applicable and it has been doubted whether article 121(3) actually represents customary international law (*ibid.*).
- <sup>32</sup> *United States of America, Plaintiff v. State of Alaska*, US Supreme Court, Decision of 19 June 1997); *Public Prosecutor v. Van Beers et. al.*, Court of Appeal (The Hague, The Netherlands), Decision of 15 November 1996 (not published). For further references to decisions of national courts concerning baselines not directly related to article 121(3) see e.g.
- I. Brownlie, *Principles of International Law; Fourth Edition*, Clarendon Press, London, 1993, p.190, n.56, p.192, nn.68-69.
- <sup>33</sup> Agreement between the Government of Finland and the Government of the Kingdom of Sweden concerning the Delimitation in the Åland Sea and the Northern Part of the Baltic Sea of the Finnish Continental Shelf and Fishing Zone and the Swedish Economic Zone of 2 June 1994 (J.I. Charney and L.M. Alexander (eds), *International Maritime Boundaries; Vol. III* (Martinus Nijhoff Publishers, The Hague, 1998, p.2,553); Agreement between the Republic of Finland and the Republic of Estonia on the Boundary of the Maritime Zones in the Gulf of Finland and the Northern Baltic Sea of 18 October 1996 (12 (1997) *International Journal of Marine and Coastal Law*, p.375); Agreement between the Government of the Kingdom of Denmark along with the Local Government of Greenland on one the hand and the Government of the Republic of Iceland on the other hand on the Delimitation of the Continental Shelf and the Fishery Zone in the Area between Greenland and Iceland of 11 November 1997 (13 (1998) *International Journal of Marine and Coastal Law*, forthcoming). In none of these cases both states involved where a party to the LOS Convention at the time the bilateral agreements were concluded.
- <sup>34</sup> Finland seems to have argued that Bogskär might be included in its system of straight baselines (for the implications of such inclusion see further *supra*). For the legal aspects of the delimitation involving Bogskär see further A. Oude Elferink, 'The Law and Politics of the Maritime Boundary Delimitations of the Russian Federation: Part 1', 1996 (11) *International Journal of Marine and Coastal Law*, pp.533-569, at pp.546-548.
- <sup>35</sup> Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark/Norway) (hereinafter *Jan Mayen* case); Memorial Submitted by the Government of the Kingdom of Denmark, Vol. I, p.8, para.15.
- <sup>36</sup> For the Danish rejection of the use as Kolbeinsey by Iceland to extend its 200 mile fishery zone see *ibid.*, p.11, n.2. The position of Estonia in this respect is not known. The Soviet Union, which had conducted negotiations with Finland over this delimitation had rejected any weight for Bogskär, referring to article 121(3) of the LOS Convention.
- <sup>37</sup> The explanatory memorandum of the Danish Foreign Ministry in respect of the delimitation agreement between Denmark and Iceland notes that in the establishment of the boundary line particular attention was given to good neighbourly relations (Beslutningsforslag nr. B 2, Folketinget 1997-98 (2. samling) of 26 March 1998, p. 7).
- <sup>38</sup> Maritime Boundary Treaty between the United States of America and of 28 March 1978 (*The Law of the Sea; Maritime Boundary Agreements (1970-1984)*, p.126); Boundary Delimitation Treaty between the

Republic of Venezuela and the Kingdom of the Netherlands of 31 March 1978 (*ibid.*, p.139); Delimitation Treaty between the Government of the French Republic and the Government of the Republic of Venezuela of 17 July 1980 (*ibid.*, p.132).

- <sup>39</sup> These protests have been reproduced in LOS/SP/1, LOS/SP/2 and LOS/SP/3.
- <sup>40</sup> A full discussion of all aspects of this issue is beyond the scope of this paper. Formally the agreements do not bind the protesting states. Moreover, the agreements do not explicitly recognise that Aves generates a full EEZ and continental shelf. On the other hand, the agreements appear to give considerable political support to Venezuela's aspirations over Aves. The three delimitation agreements seem to give too much weight to Aves if viewed solely from the perspective of the material rules of maritime delimitation law, especially because of the great disparity in coastal lengths.
- <sup>41</sup> Agreement between the Republic of Ireland and the United Kingdom of Great Britain and Northern Ireland concerning the Delimitation of Areas of the Continental Shelf between the Two Countries of 7 November 1988 (*The Law of the Sea; Maritime Boundary Agreements (1985-1991)*); United Nations, New York, 1992, p.6). The fact that no weight was accorded to Rockall is mentioned in Charney and Alexander, *op. cit.*, Vol. II (Martinus Nijhoff Publishers, Dordrecht 1993), p.1,770.
- <sup>42</sup> See *supra* note 40.
- <sup>43</sup> See further A. Oude Elferink, 'Denmark/Iceland/Norway; Bilateral Agreements on the Delimitation of the Continental Shelf and Fishery Zones', 13 (1998) *International Journal of Marine and Coastal Law*, forthcoming.
- <sup>44</sup> Continental Shelf Area between Jan Mayen and Iceland (Jan Mayen Continental Shelf), Report and Recommendations to the Governments of Iceland and Norway of the Conciliation Commission of 19-20 May 1981 (62, *International Law Reports* (ILR), p.108; 20 (1981) *ILM*, p.797).
- <sup>45</sup> 62, *ILR*, p.114. Legal doctrine has given various evaluations of this finding of the Commission (for an overview see Kwiatkowska and Soons, *op. cit.*, pp.174-175).
- <sup>46</sup> Describing its task the Commission had pointed out that it had thoroughly examined state practice and court decisions in order to ascertain possible guidelines for the practicable and equitable solution of the questions concerned (62 *ILR*, p.125).
- <sup>47</sup> 62, *ILR*, p.114. In the *Jan Mayen* case the ICJ did not address this issue. Denmark had not objected to these entitlements of Jan Mayen, concurring with the view of the Commission in the *Jan Mayen* conciliation (see *Jan Mayen* case, Reply submitted by the Government of the Kingdom of Denmark, Vol.I, p.121, para. 328).
- <sup>48</sup> See 62, *ILR*, p.126. In its Rejoinder in the *Jan Mayen* case Norway stated that:

[t]here is no express agreement or specific understanding between Norway and Iceland providing for recognition by Norway of Kolbeinsey as an Icelandic basepoint. Nor has there been any formal unilateral determination by Norway on the issue. The relevant Agreements between Norway and Iceland imply that, in the absence of any further specification, and of any particular statement of reservation on the part of Norway, the delimitations as between the economic zones and between the appurtenant parts of the continental shelf of the Parties must be determined on the basis of such basepoints and baselines as may from time to time be applied by Iceland in conformity with international law (*Jan Mayen* case, Rejoinder Submitted by the Government of the Kingdom of Norway, p.10, para.25).

- <sup>49</sup> ICJ Reports 1993, p 47 para.18.
- <sup>50</sup> Such an approach can be explained by the fact that a court is required to resolve a specific dispute and not to clarify the law in the abstract. Leaving certain controversial issues, which are not essential to resolving a dispute, unaddressed may facilitate agreement within the court.
- <sup>51</sup> However, a Court has a certain liberty in this respect (see *e.g.* Case concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment of 3 June 1985 (ICJ Reports 1985, p.13, at pp.22-28, paras 18-23).
- <sup>52</sup> Cf. Guinea/Guinea-Bissau Maritime Delimitation *Maritime Delimitation* arbitration, Decision of 14 February 1985 (*International Boundary Cases, The Continental Shelf* Vol. II (Cambridge, 1992), p.1,301 at p.1,356, para.130); D.A. Colson, "The Legal Regime of Maritime Boundary Agreements", in Charney and Alexander, *op. cit.*, Vol. I (Martinus Nijhoff Publishers, Dordrecht, 1993), pp.41-73, at p.61.
- <sup>53</sup> See further M. Koskenniemi, 'Theory: Implications for the Practitioner', in: *Theory and International Law: An Introduction* (The British Institute of International and Comparative Law, London, 1991), pp.1-45, at pp.32-34.
- <sup>54</sup> Arbitration between the United Kingdom and France on the Delimitation of the Continental Shelf, Decision of 30 June 1977 (United Nations Reports of International Arbitral Awards (UNRIAA) Vol. XVIII, p.3), paras 139-143. In this context it is worth noting that the Court emphasized that:
- it is not concerned in these proceedings to decide the general question of the legal status of Eddystone Rocks as an island or of its entitlement to a territorial sea of its own. [...] [T]he Court is here concerned with the Eddystone Rocks only in the particular context of the delimitation of the continental shelf by a median line in the Channel as between the Parties now before the Court (ibid., para. 139).*
- <sup>55</sup> Cf. *Jan Mayen* conciliation referred to *supra*.

<sup>56</sup> On the CLCS see further S. Karagiannis, 'Observations sur la Commission des Limites du Plateau Continental', 8 (1994) *Espaces et Ressources Maritimes*, pp.163-194; S.N. Nandan and S. Rosenne (eds), *United Nations Convention on the Law of the Sea 1982; A Commentary; Volume II* (Martinus Nijhoff Publishers, Dordrecht, 1993), pp.882 and 1,003-1,018.

<sup>57</sup> See e.g. CLCS/3/Rev.1 of 14 May 1998, which contains the Rules of Procedure of the CLCS. Submissions in case of maritime disputes are addressed in Rule 44 and Annex I to the Rules. The Commission has adopted its Rules of Procedure and reached consensus on the Annex, but it was decided that the Annex would be adopted by the Commission only after it had been considered by the Meeting of Parties of the LOS Convention (see SPLOS/28 of 15 May 1998, paras 1-2).

<sup>58</sup> LOS Convention, article 137(2).

<sup>59</sup> See *ibid.*, articles 1(1)(1) and 134. This absence of a role for the ISA is confirmed by the fact that the Convention does not give it rights to the Area as such, but charges it to organise and control activities in the Area, particularly in respect of its resources (see *ibid.*, articles 137 and 157). The ISA might play a limited role in the activities of the CLCS with respect to the continental shelf beyond 200 nautical miles. However, this only concerns the exchange of scientific and technical information (LOS Convention, Annex II, article 3(2)), excluding baseline considerations. A study prepared by the Division for Ocean Affairs and the Law of the Sea of the United Nations Office of Legal Affairs, undertaken with a representative group of experts, notes that the LOS Convention "assigns to the Commission no responsibility relating to the determination of baselines by the coastal State" (SPLOS/CLCS/INF/1 of 10 June 1996, para.42).

<sup>60</sup> Under the LOS Convention disputes over the location of the baselines and outer limits of maritime zones are subject to the dispute settlement mechanisms of its Part XV.

<sup>61</sup> See also Kwiatkowska and Soons, *op. cit.*, p.181.

<sup>62</sup> See also Kolb, *op. cit.*, p.897.

<sup>63</sup> The *Fisheries Jurisdiction* cases of 1974 between the United Kingdom and Iceland and the Federal Republic and Iceland (*Fisheries Jurisdiction Case (United Kingdom v. Iceland; Federal Republic of Germany v. Iceland)*), Judgment of 25 July 1974 (ICJ Reports 1974, p.3) indicate that there may be instances in which states with an interest in the high seas may go to great lengths to protect these interests. However, it should be realised that in this case the United Kingdom and the Federal Republic had a vested interest in the area concerned, which would be gravely damaged if the Icelandic claim would be recognised.

<sup>64</sup> See articles 312 and 313 of the LOS Convention for the rules applicable to its amendment.

<sup>65</sup> W.M. Reisman and G.S. Westerman, *Straight Baselines in International Maritime Boundary Delimitation* (St. Martin's Press, New York, 1992), pp. 209-211; see also S. Karagiannis, *op. cit.*, p.192.

<sup>66</sup> Cf. Case concerning the Delimitation of the Maritime Areas between Canada and France, Decision of 10 June 1992 (31 (1992) ILM, p.1,149, at p.1,172, para.79).

<sup>67</sup> The feasibility of this approach is illustrated by a similar project on the probably equally controversial issue of baselines (see *The Law of the Sea; Baselines: an Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea* (New York, United Nations, 1989).

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