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THE *ROMANIA V. UKRAINE* DECISION AND ITS EFFECT ON EAST ASIAN MARITIME DELIMITATIONS

*Jon M. Van Dyke**

I. INTRODUCTION

The 2009 case *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*¹ presented the International Court of Justice (ICJ) with an opportunity to define and give meaning to the ambiguous and disputed phrase in Article 121(3): “[r]ocks which cannot sustain human habitation or economic life of their own.”² The Court declined to provide a definitive definition for these words in its opinion, but by determining that Ukraine’s tiny Serpents’ Island should have no impact whatsoever on the maritime boundary, the Court reconfirmed that small uninhabited

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1. *Maritime Delimitation in the Black Sea (Rom. v. Ukr.)*, 2009 I.C.J. 1 (Feb. 3), available at <http://www.icj-cij.org/docket/files/132/14987.pdf>.

2. The text of Article 121 of the United Nations Convention on the Law of the Sea is as follows:

1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of 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.

United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter *Law of the Sea Convention*].

islands will generally have limited or no impacts on delimitations and that such features should not generate extended maritime zones.³

Serpents' Island (also called Snake Island and Ostrov Zmeinyy) is virtually the only island in the Black Sea, except for a few that hug the coasts. It has 0.17 square kilometers of land area (forty-two acres or seventeen hectares) and is thirty-five kilometers (about twenty nautical miles) east of the Danube Delta (also called Dragon's Beard),⁴ which forms the border between Ukraine and Romania. It lacks freshwater resources and has never been inhabited historically, although it has had a lighthouse on it since the 1800s and recently Ukraine has built structures and a pier on it, apparently to strengthen its claim to the ocean space around it. Its name is said to have come from the snakes that lived in a temple built on the islet in ancient times. The ocean space around it has become a focus of great interest because recent explorations have indicated that high-quality oil and substantial amounts of natural gas may be found around this islet.

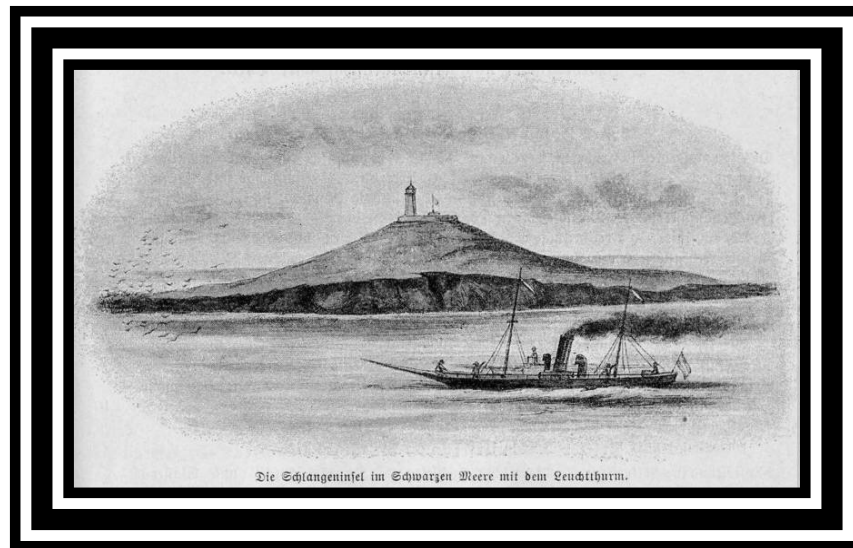


Figure 1: Serpents' Island in 1896.⁵

3. See *Maritime Delimitation in the Black Sea*, 2009 I.C.J. at 1.

4. See *Id.* at para. 16.

5. *Die Donau als Völkerweg, Schiffahrtsstasse und Reiseroute*, Wien, Pest, Leizig, 1896.



Figure 2: Serpents' Island today.

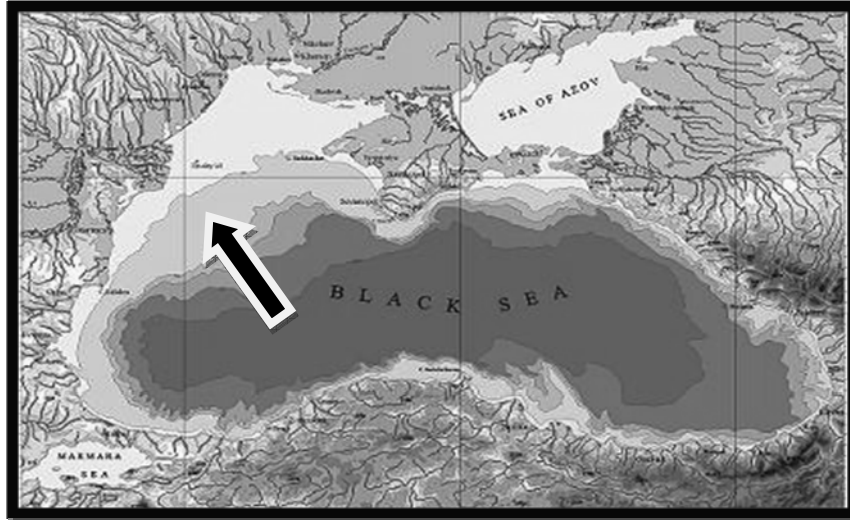


Figure 3: The arrow indicates the location of Serpents' Island, and this map also shows that the Black Sea is relatively shallow at this location.



Figure 4: This map shows the location of Serpents' Island in a relatively shallow part of the Black Sea, with the arrows indicating the competing boundary claims of Ukraine and Romania.

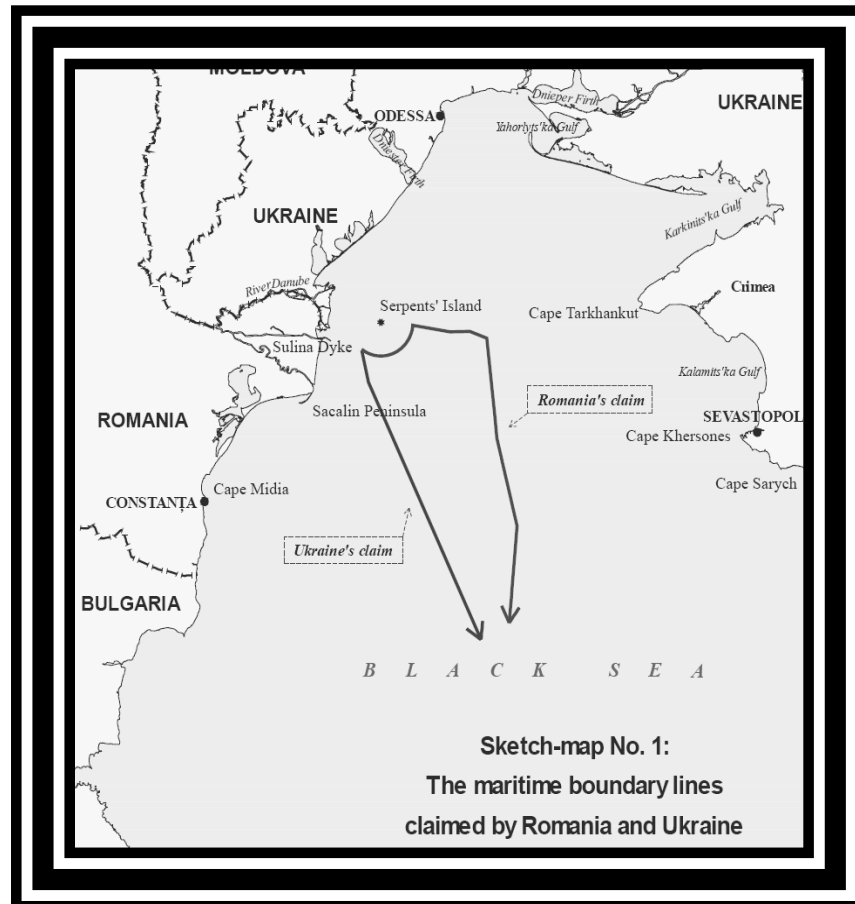


Figure 5: The maritime boundary claims of Romania and Ukraine.⁶

Although sovereignty over Serpents' Island was contested for many years, in 1997 Romania accepted that this feature belonged to Ukraine.⁷ Romania argued before the Court that Ukraine had agreed in the 1997 treaty that Serpents' Island was a "rock" under Article 121(3) and therefore that it could not affect the maritime delimitation between the

6. A similar map is referenced in the Court's opinion. *Maritime Delimitation in the Black Sea*, 2009 I.C.J. at 9 n.1.

7. *Id.* at para. 35. See generally Treaty on the Relations of Good-Neighbourliness and Co-operation between Romania and Ukraine, June 2, 1997, 2159 U.N.T.S. 335; Application Instituting Proceedings, *Maritime Delimitation in the Black Sea (Rom. v. Ukr.)* (Sept. 16, 2004), available at <http://www.icj-cij.org/docket/files/132/1697.pdf>.

two countries, but Ukraine rejected that contention, stating that the reference to Article 121(3) was in a Romanian “declaration,” which Ukraine had not accepted, and that the Romanian assertion was “groundless.”⁸

The Court’s opinion, issued February 3, 2009, avoided giving a comprehensive definition of the words in Article 121(3), but it did address the role that Serpents’ Island should play in the delimitation and determined that this islet should have a twelve-nautical-mile territorial sea, but otherwise had no effect on the delimitation. Ukraine argued first that Serpents’ Island should be considered as part of Ukraine’s coast, because it “forms part of the geographical context and its coast constitutes part of Ukraine’s relevant coasts.”⁹ Romania responded by arguing that Serpents’ Island “constitutes merely a small maritime feature situated at a considerable distance out to sea from the coasts of the Parties.”¹⁰

The Court accepted Romania’s perspective on this matter, saying that “[t]he coast of Serpents’ Island is so short that it makes no real difference to the overall length of the relevant coasts of the parties.”¹¹ The Court went on to say that Serpents’ Island cannot be viewed as part of Ukraine’s coast because it is “lying alone and some 20 nautical miles away from the mainland” and thus “is not one of a cluster of fringe islands constituting ‘the coast’ of Ukraine.”¹²

According to the Court, “[t]o count Serpents’ Island as a relevant part of the coast would amount to grafting an extraneous element onto Ukraine’s coastline: the consequence would be a judicial refashioning of geography, which neither the law nor practice of maritime delimitation authorizes.”¹³

After determining that “the coasts” of the two countries basically followed their mainland coasts (without regard to Serpents’ Island), the Court began the delimitation process “by drawing a provisional equidistance line” between the adjacent and opposite coasts of Romania and Ukraine,¹⁴ and then examining “whether there are factors calling for the adjustment . . . of the provisional equidistance line in order to achieve

8. *Maritime Delimitation in the Black Sea*, 2009 I.C.J. at para. 39.

9. *Id.* at para. 96.

10. *Id.* at para. 92.

11. *Id.* at para. 102.

12. *Id.* at para. 149.

13. *Id.* (analogizing Serpents’ Island to Malta’s tiny and unpopulated isle called Filfla (a bird sanctuary), which was completely ignored in *Continental Shelf (Libya v. Malta)*, 1985 I.C.J. 13 (June 3)).

14. *Id.* at para. 119.

an equitable result,”¹⁵ and whether there was “an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State” requiring an adjustment.¹⁶ Romania argued that Serpents’ Island should be ignored because it is “a rock incapable of sustaining human habitation or economic life of its own” under Article 121(3), and because “using this island as a base point would result in an inordinate distortion of the coastline.”¹⁷

Ukraine responded that Serpents’ Island should be viewed as a “coastal island” because it is within twenty nautical miles of Ukraine’s coast and thus its territorial sea “partly overlaps with the area of territorial sea bordering the Ukrainian mainland.”¹⁸ Ukraine also argued that Serpents’ Island is “indisputably an ‘island’ under Article 121[(2)] . . . rather than a ‘rock’” because it “can readily sustain human habitation and that it is well established that it can sustain economic life of its own.”¹⁹ In particular, the island has vegetation and a sufficient supply of fresh water” and has “appropriate buildings and accommodation for an active population.”²⁰ Finally, Ukraine argued that Article 121(3) “is not relevant to this delimitation because that paragraph is not concerned with questions of delimitation but is, rather, an entitlement provision that has no practical application” to a maritime area within 200 nautical miles of a mainland coast.²¹

The Court did not directly respond to these contentions, but instead simply ruled that Serpents’ Island was entitled to a twelve-nautical-mile territorial sea around it but had no other impact on or relevance to the maritime delimitation between the two countries. “As the jurisprudence has indicated, the Court may on occasion decide not to take account of very small islands or decide not to give them their full potential entitlement to maritime zones, should such an approach have a disproportionate effect on the delimitation line under consideration.”²²

15. *Id.* at para. 120.

16. *Id.* at para. 122.

17. *Id.* at para. 124.

18. *Id.* at para. 126.

19. *Id.* at para. 184.

20. *Id.*

21. *Id.*

22. *Id.* at para. 185 (citing *Continental Shelf (Libya v. Malta)*, 1985 I.C.J. 13 (June 3); *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahr.)*, 2001 I.C.J. 40 (Mar. 16); and *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.)* (Oct. 8, 2007), available at <http://www.icj-cij.org/docket/files/120/14075.pdf>.

That statement is understandable, focusing on the “disproportionate effect” that tiny Serpents’ Island would have on the delimitation. The Court’s statements in the paragraphs that follow are somewhat more obscure,²³ but, taken together, there can be no doubt but that the Court felt that Serpents’ Island should have no effect on the maritime delimitation. In the resulting delimitation, the maritime boundary goes south of the twelve-nautical-mile territorial sea around Serpents’ Island, but otherwise Romania received most of the ocean space it was seeking.

23. In paragraph 187 the Court said that because of Serpents’ Island’s location and because “any continental shelf and exclusive economic zone entitlements possibly generated by Serpents’ Island could not project further than the entitlements generated by Ukraine’s mainland coast [T]he Court concludes that the presence of Serpents’ Island does not call for an adjustment of the provisional equidistance line” and that “the Court does not need to consider whether Serpents’ Island falls under paragraphs 2 or 3 of Article 121 of UNCLOS nor their relevance to this case.” *Id.* at para. 187. Then, in paragraph 188, the Court said:

The Court further recalls that a 12-nautical-mile territorial sea was attributed to Serpents’ Island pursuant to agreements between the Parties. It concludes that, in the context of the present case, Serpents’ Island should have no effect on the delimitation in this case, other than that stemming from the role of the 12-nautical mile arc of its territorial sea.

Id. at para. 188.

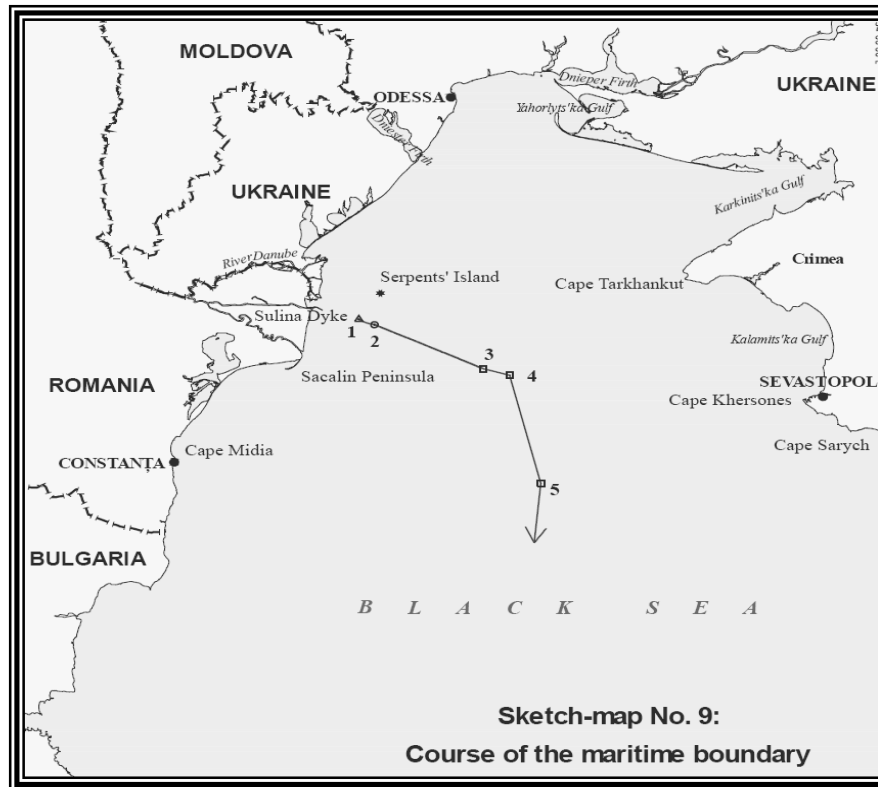


Figure 6: Sketch of the equidistance line established by the Court.²⁴

During the oral arguments in this case, in September 2008, Professor Bernard Oxman, serving as the *ad hoc* judge on the panel appointed by Ukraine, asked the agents for the two countries to discuss whether Article 121(3) applies to islands within 200 nautical miles of coasts or only to open ocean islands:

Does paragraph 3 of Article 121 of the United Nations Convention on the Law of the Sea apply to marine areas that are in any event within the limits of the EEZ [exclusive economic zone] and continental shelf of the same State, such as marine areas within 200 nautical miles of the mainland of that State?²⁵

24. A similar map is provided in the Court's opinion. *Maritime Delimitation in the Black Sea*, 2009 I.C.J. at 66.

25. Verbatim Record of Public Sitting, *Maritime Delimitation in the Black Sea (Rom. v. Ukr.)* (Sept. 12, 2008), at 51, available at <http://www.icj-cij.org/docket/files/123/14729.pdf> [hereinafter Sept. 12 Public Sitting].

Oxford Professor Vaughan Lowe, who was serving as agent for Romania, answered “yes,”²⁶ explaining that Article 121 governed islands and rocks wherever they were, and hence that Serpents’ Island could not be used as a base point for an exclusive economic zone or continental shelf.²⁷ He explained further that Serpents’ Island was a “rock” that “cannot sustain human habitation or economic life of [its] own,” because it “is *totally* dependent for food, water and every other human need” and hence “is indistinguishable from a steel platform.”²⁸ In a mocking response to the Ukrainian agent’s claim that Serpents’ Island does have water, he said that “[s]he did not say how many bottles of water the island has, or how soon they will run out”²⁹ and explained that it rains only 366 millimeters (fourteen inches) per year on Serpents’ Island (or one millimeter a day), an amount that is grossly inadequate to sustain human needs.³⁰ In his earlier presentation to the Court, Professor Lowe had said that to meet the requirement of being able to “sustain human habitation” in Article 121(3), the human habitation must be “stable” and “sustained,”³¹ explaining that the criterion of human habitation is not met if people are “ordered” to go to the islet by their employers.³²

The agent for Ukraine, Rodman R. Bundy, gave the opposite answer, saying that Article 121 does not apply to features within 200 nautical miles of a coast, because it is an “entitlement” provision, and “is not concerned with questions of delimitation.”³³ Another agent of Ukraine, Loretta Malintoppi, argued earlier that Article 121(3) applied only to “a handful of exceptionally small features” such as the United Kingdom’s

26. Verbatim Record of Public Sitting, Maritime Delimitation in the Black Sea (Rom. v. Ukr.) (Sept. 16, 2008), at para. 6, at 11, *available at* <http://www.icj-cij.org/docket/files/132/14745.pdf> [hereinafter Sept. 16 Public Sitting].

27. *Id.* at para. 10, at 11-12.

28. *Id.* at para. 21, at 14 (emphasis in original).

29. *Id.* at para. 20, at 14.

30. *Id.* at para. 22, at 14.

31. Verbatim Record of Public Sitting Maritime Delimitation in the Black Sea (Romania v. Ukraine) (Sept. 4, 2008), at para. 30, at 45, *available at* <http://www.icj-cij.org/docket/files/132/14707.pdf> (last visited June 10, 2010), [hereinafter Sept. 4 Public Sitting].

32. *Id.* at para. 32, at 45.

33. Verbatim Record of Public Sitting Maritime Delimitation in the Black Sea (Rom. v. Ukr.) (Sept. 19, 2008), at para. 26, at 22, *available at* <http://www.icj-cij.org/docket/files/132/14753.pdf> [hereinafter Sept. 19 Public Sitting].

Rockall, northwest of Scotland,³⁴ which, as the United Kingdom has acknowledged, does not generate extended maritime zones.³⁵

II. CONSISTENT WITH EARLIER DECISIONS GIVING LIMITED OR NO EFFECT TO SMALL ISLANDS

Although the ICJ in its *Romania v. Ukraine* decision does not completely resolve the question of how Article 121(3) should be interpreted, the Court's ruling strongly favoring the Romanian position certainly confirms earlier decisions holding similarly that small features will be ignored or will be given greatly reduced effect in maritime delimitations, that islands do not have an equal capacity with land masses to create maritime zones, and that islands do not command equal strength with an opposing continental area or land mass.³⁶ These propositions

34. Sept. 16 Public Sitting, *supra* note 26, at para. 52, at 17.

35. Rockall is a towering granite feature measuring about sixty-one meters (200 feet) in circumference, and is about twenty-one meters (seventy feet) high. It is located about 300 kilometers (190 miles) from the British territory of St. Kilda off the Outer Hebrides of Scotland, about 380 kilometers (240 miles) from the Irish coastal county of Donegal, about 320 miles from the Faroes, and about 400 miles from Iceland. For the U.K. decision recognizing that Rockall did not have the capacity to generate extended maritime zones, see The Fishery Limits Order 1997, 1997 S.I. 1750, available at <http://www.uk-legislation.hmso.gov.uk/si/si1997/19971750.htm>. See generally D.H. Anderson, *British Accession to the UN Convention on the Law of the Sea*, 46 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 761, 778 (1997) (citing 298 House of Commons Hansard 397 (Written Answers) (1997)).

36. Islands can generate maritime zones, see *supra* text accompanying note 2, but they do not generate full zones when they are opposite or adjacent to continental land areas or substantially larger islands. This conclusion has been reached consistently by the International Court of Justice and arbitral tribunals. See, e.g., North Sea Continental Shelf Case (F.R.G. v. Den. & Neth.), 1969 I.C.J. 3 (Feb. 20), at para. 101(d); Arbitration Between the United Kingdom of Great Britain and Northern Ireland and the French Republic on the Delimitation of the Continental Shelf, Mar. 14, 1978, 18 I.L.M. 397; Continental Shelf (Tunis. v. Libya) (Feb. 24), 1982 I.C.J. 18; Continental Shelf (Libya v. Malta), 1985 I.C.J. 13 (June 3); Delimitation of the Maritime Boundary in the Gulf of Maine Area (U.S. v. Can.), 1984 I.C.J. 246 (Oct. 12); Delimitation of the Maritime Boundary Between Guinea and Guinea-Bissau, Feb. 14, 1985, 25 I.L.M. 252; Delimitation of the Maritime Delimitation in the Area Between Greenland and Jan Mayan (Den. v. Nor.), 1993 I.C.J. 38 (June 3); Delimitation of the Maritime Area Between Canada and France (St. Pierre and Miquelon), June 10, 1992, 31 I.L.M. 1145; Maritime Delimitation (Eri. v. Yemen) (Perm. Ct. Arb. 1996), available at <http://www.pca-cpa.org/upload/files/EY%20Phase%20II.pdf>; Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahr.), 2001 I.C.J. 40 (Mar. 16); Maritime Delimitation in the Black Sea (Rom. v. Ukr.), 2009 I.C.J. 1 (Feb. 3).

were introduced in the 1969 *North Sea Continental Shelf Case*,³⁷ and implemented in the *Anglo-French Arbitration* with significant impact.³⁸

Recent cases have shown no deviation from this approach. In the 1999 *Eritrea v. Yemen Arbitration*, the tribunal gave no effect whatsoever to the uninhabited Yemeni island of Jabal al-Tayr and to the uninhabited Yemeni islands in the Zubayr group (which are on the “wrong side” of the equidistance line between the two countries in the Red Sea), stating simply that their “barren and inhospitable nature and their position well out to sea . . . mean that they should not be taken into consideration in computing the boundary line”³⁹ Jabal al-Tayr is a volcanic island with a lighthouse on it; it erupted dramatically on September 30, 2007, after 124 years of dormancy. The islets in the Zubayr group also have lighthouses on them and are visited because of their clear waters and pristine beaches. Similarly, in the 2001 *Qatar v. Bahrain* decision, the ICJ completely ignored the small, uninhabited, and barren Bahraini islet of Qit’at Jaradah, situated midway between the two countries, explaining that it would be inappropriate to allow such an insignificant maritime feature to have a disproportionate effect on a maritime delimitation line.⁴⁰ The Court also completely ignored the “sizeable maritime feature” of Fasht al Jarim, of which “at most a minute part is above water at high tide.”⁴¹

Also of significance is the 2007 case *Nicaragua v. Honduras*, where the two countries asked the ICJ to determine who had sovereignty over four small cays (Bobel Cay, Savanna Cay, Port Royal Cay, and South Cay) located just north of the fifteenth parallel, about thirty miles offshore in the Caribbean Sea.⁴² These “small, low islands composed largely of sand . . . remain above water at high tide.”⁴³ They contain wooden buildings, and, as of 1999, were inhabited by Jamaican fishers.

37. *North Sea Continental Shelf Case*, 1969 I.C.J. para. 101(d), at 53.

38. *Arbitration Between the United Kingdom of Great Britain and Northern Ireland and the French Republic on the Delimitation of the Continental Shelf*, Mar. 14, 1978, 18 I.L.M. 397 (the United Kingdom’s islands of Jersey and Guernsey, which are on the “wrong side” of the equidistance line between Britain proper and the French coast, were given twelve-nautical-mile territorial-sea enclaves, but otherwise did not affect the maritime delimitation; Britain’s Scilly Isles were given “half effect”).

39. *Maritime Delimitation* (Eri. v. Yemen) (Perm. Ct. Arb.) at para. 147, at 45.

40. *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain* (Qatar v. Bahr.), 2001 I.C.J. 40, (Mar. 16).

41. *Id.* at 115. Photos found on the internet show small pavilions on Fasht al Jarim to provide shelter from the sun for visitors.

42. *See Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea* (Nicar. v. Hond.), 2007 I.C.J. 1, (Oct. 8).

43. *Id.* at para. 28, at 15, para. 137, at 40.

Despite the periodic inhabitation of these islets, both Nicaragua and Honduras informed the International Court of Justice that they had agreed not to make any claim that the cays could generate “any maritime areas beyond the territorial sea.”⁴⁴ The Court then determined that Honduras had the better claim to sovereignty over the cays, and proceeded to draw territorial sea enclaves around them, but otherwise ignored them in determining the maritime boundary between the two countries.⁴⁵ The resolution of this dispute thus serves as another example of state practice where countries have concluded that small islets are not entitled to generate exclusive economic zones and should be ignored in delimiting a maritime boundary.⁴⁶

These consistent decisions limiting the ability of uninhabited insular features to generate extended maritime zones are linked to the underlying rationales for the creation of these extended zones. Judge Budislav Vukas of the International Tribunal for the Law of the Sea explained in his opinion written in the *Russia v. Australia* case in 2002 that the purpose for giving exclusive rights over offshore resources to coastal states through the establishment of the exclusive economic zone was to protect the economic interests of the coastal communities that depended on the resources of the sea and thus to promote their development and

44. *Id.*

45. *See id.*

46. Another recent dispute involves Pedra Branca, the tiny islet (also known as Horsburgh Light) awarded to Singapore by the ICJ in May 2008. Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay. v. Sing.), 2008 I.C.J. 130, (May 23), available at <http://www.icj-cij.org/docket/files/130/14492.pdf>. It has a lighthouse on it but has never been inhabited. In July 2008, Singapore claimed that it could draw an EEZ from Pedra Branca, and because of its location, if it were able to generate an EEZ, such a claim would affect the EEZ of Malaysia. Malaysia has strongly protested Singapore’s claim, arguing that Pedra Branca must be considered a “rock” under Article 121(3). Datuk Cheah Kong Wai, the director-general of the Maritime Institute of Malaysia, explained in July 2008 that to generate an EEZ a feature must have “a habitable environment that allows humans to live independently based on resources available naturally. Humans should have access to basic necessities such as fresh water without having to rely on sources from outside and also be able to carry out economic activities such as farming, fishing, or livestock rearing.” *Pedra Branca EEZ: Singapore’s Claim on Shaky Ground*, VOICE OF MALAYSIAN, July 24, 2008, available at <http://voiceofmalaysian.com/tag/pedra-branca-eez-singapore%E2%80%99s-claim-on-shaky-ground/> (interview of Datuk Cheah Kong Wai, the director-general of the Maritime Institute of Malaysia). He added that operating a lighthouse does not qualify as an “economic activity” because “it is an act of facilitating navigation, a requirement [imposed by the Law of the Sea Convention] on states bordering a strait.” *Id.*

enable them to feed themselves.⁴⁷ This rationale does not apply to uninhabited islands because they have no coastal fishing communities that require such assistance. Similarly, the late Professor Jonathan Charney explained in a 1999 article that “the primary purpose of Article 121(3) was to ensure that insignificant features, particularly those far from other states, could not generate broad zones of national jurisdiction in the middle of the ocean.”⁴⁸ Professor Charney went on to say that:

The common spaces are diminished by using such rocks as a basis for placing a maritime area under a coastal state’s jurisdiction when it would otherwise be beyond national jurisdiction. This practice would directly conflict with the objective of Article 121(3): to protect the commons from nationalization based on minor features with little significance other than being above water at high tide.⁴⁹

Professor Charney has also explained that “[o]utside state support for a non-economically viable occupation would be inconsistent with this requirement [of being able to sustain ‘economic life of their own’].”⁵⁰

III. UNRESOLVED MARITIME DELIMITATIONS IN EAST ASIA: THE EAST SEA

How does the *Romania v. Ukraine* decision apply to the maritime delimitation in the East Sea/Sea of Japan? This boundary remains unresolved, in large part because Japan still disputes Korea’s sovereignty over Dokdo, a set of tiny islets located between the two countries.⁵¹ The *Romania v. Ukraine* decision provides strong support for the conclusion that Dokdo should have a twelve-nautical-mile territorial sea, but should not otherwise affect this delimitation. Dokdo is virtually the same size as Serpents’ Island, having 0.18 square kilometers of land area, as compared to Serpents’ Island’s 0.17 square kilometers.

47. The “Volga” Case (Russ. v. Austl.), 2002 ITLOS Reports 11, available at www.itlos.org/start2_en.html (declaration of Vice-President Vukas).

48. Jonathan I. Charney, *Rocks that Cannot Sustain Human Habitation*, 93 AM. J. INT’L L. 863, 866 (1999).

49. *Id.* at 876.

50. *Id.* at 870 n.34.

51. See Jon M. Van Dyke, *Legal Issues Related to Sovereignty over Dokdo and Its Maritime Boundary*, 38 OCEAN DEV. & INTN’L L. 157 (2007) (explaining that Korea’s claim to sovereignty over Dokdo is substantially stronger than that of Japan).

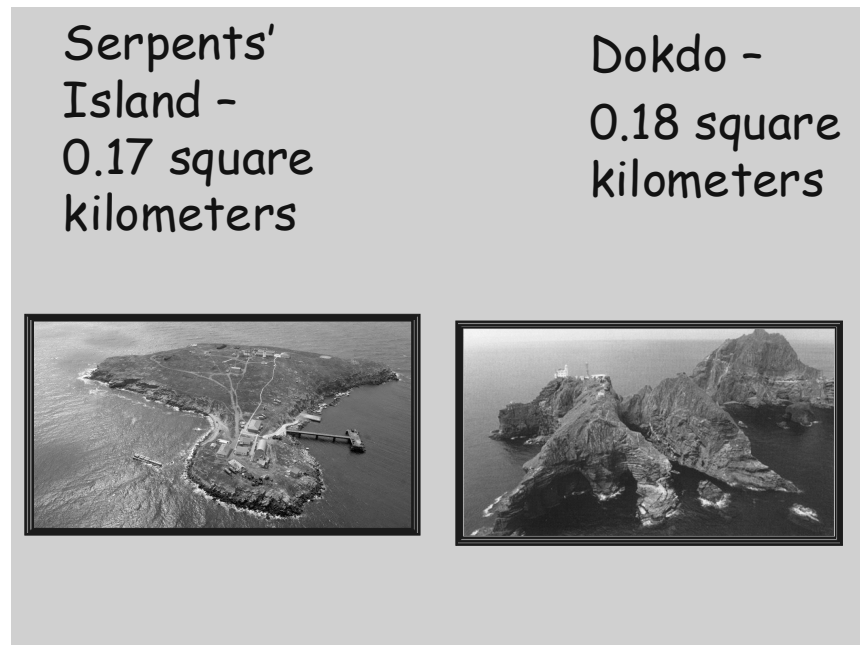


Figure 7: Images comparing Serpents' Island and Dokdo.

Dokdo has stark physical beauty, military personnel have been stationed on it for the past several decades, and fishing families occasionally take up temporary residence on it. But its two main islets and smaller outcroppings remain essentially barren, rocky, and uninhabitable. The distinguished Korean scholar Choung Il Chee wrote in his 1999 book that Dokdo “is a rocky island and unsuitable for human inhabitation.”⁵² Similarly, Han Key Lee has written that “this barren group of islets [is] unfit for sustained human habitation.”⁵³ Professor (now Judge) Jin-Hyun Paik of Seoul National University wrote in 1998 that “the natural conditions of the Dokdo Islands would suggest that

52. CHOUNG IL CHEE, *KOREAN PERSPECTIVES ON OCEAN LAW ISSUES FOR THE 21ST CENTURY* 15 (The Hague: Kluwer, 1999).

53. Han Key Lee, *Korea's Territorial Rights to Tokdo in History and International Law*, 29 *KOREA OBSERVER* 1, 5 (1998) (translated and reprinted from Lee Han-key, *Tokdo, in HAN'GUK UI YONGT'O* [KOREA'S TERRITORY] (Seoul: Seoul National University Press, 1969).

these islands might not generate their own EEZs or continental shelves.”⁵⁴

It would appear, therefore, that Dokdo should be considered to be a “rock” that “cannot sustain human habitation or economic life of [its] own” under Article 121(3). Some have argued otherwise by quoting from Professor Charney’s 1999 article where he speculated that economic activity in the waters surrounding an islet could arguably constitute an “economic life of their own” to allow the islet to generate an exclusive economic zone (EEZ).⁵⁵ This bootstrapping approach has not been accepted, however, and when it has been asserted—by, for instance, Japan with regard to Okinotorishima—it has met with strong resistance by neighboring countries.⁵⁶

Even if Dokdo were somehow to be considered to be an “island” rather than a “rock” under Article 121, it would not be given much importance by a tribunal asked to delimit the maritime boundary between Korea and Japan because of its tiny size and relative insignificance because, as explained above,⁵⁷ tribunals have repeatedly ignored or slighted islands in maritime delimitations, even ones that have substantial populations residing on them. The boundary in the East Sea should therefore be drawn without regard to Dokdo and should follow the equidistance line between Korea’s Ullungdo and Japan’s Oki Islands,⁵⁸ as shown in the map below.

54. Van Dyke, *supra* note 51, at 197 (citing Jin-Hyun Paik, *Evolution of Maritime Boundary Delimitation Law and Its Implications on Northeast Asia Law* (paper delivered at the 1st Annual Korean-US Marine Policy Forum, Seoul, Oct. 22-23, 1998)).

55. Charney, *supra* note 42, at 863.

56. *See infra* text at notes 65-70.

57. *See supra* text at notes 36-50.

58. *See* Jon M. Van Dyke, *Disputes Over Islands and Maritime Boundaries in East Asia*, in *MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA* 39, 46-52 (Seoung-Yong Hong & Jon M. Van Dyke eds., 2009).

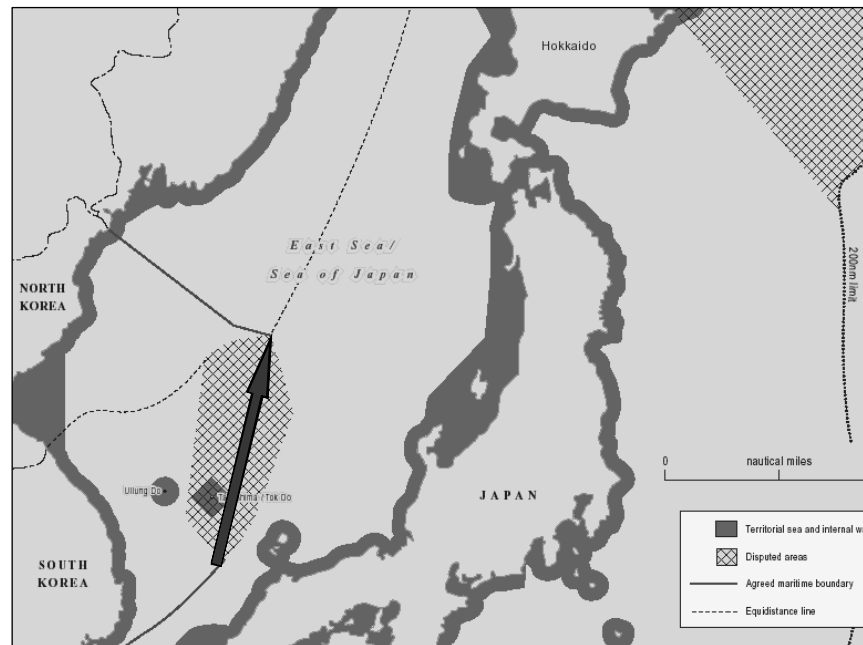


Figure 8: The disputed area in the East Sea/Sea of Japan, with an arrow indicating the author’s view of the appropriate maritime boundary.

IV. THE SENKAKU/DIAOYUDAO ISLANDS

The *Romania v. Ukraine* decision also should help dispel the notion that the Senkaku/Diaoyudao Islands should have any impact on the maritime delimitation of the East China Sea. These eight uninhabited island features in the East China Sea, 170 kilometers northeast of Taiwan, are now controlled by Japan but are also claimed by Taiwan and by the People’s Republic of China. Altogether, they have a land area of seven square kilometers; the largest (Diaoyudao/Uotsurishima) has an area of 4.3 square kilometers, with two peaks rising to about 1100 feet, but has no anchorages for any but the smallest ships to use for landings. Historically, these outcroppings have been used only as navigational aids.

In 1970, after its claim to the Senkakus/Diaoyudao based on an extension of its continental shelf had been protested by Japan, Taiwan issued a reservation when ratifying the 1958 Convention on the Continental Shelf, stating that in “determining the boundary of the

continental shelf of the Republic of China, exposed rocks and islets shall not be taken into account.”⁵⁹ The prominent scholar from the People’s Republic of China Ji Guoxing has reported that the current position of the People’s Republic of China is similar: “China holds that the Diaoyudao Islands are small, uninhabited, and cannot sustain economic life of their own, and that they are not entitled to have a continental shelf.”⁶⁰ This view has been reinforced by the decision of the ICJ to ignore completely Serpents’ Island in delimiting the boundary between Romania and Ukraine, and now it should be clear that the Senkaku/Diaoyudao Islands should receive a twelve-nautical-mile territorial sea but should otherwise be ignored in determining the maritime delimitation of the East China Sea.

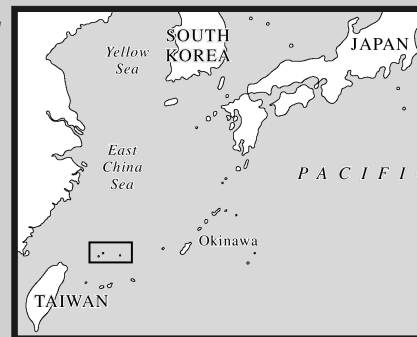
Senkaku/Diaoyu Dao

5 small volcanic islands & 3 rocky outcroppings.

Total land area = 7 sq km.

Largest is Uotsuri/Diaoyu = 8 hectares.

None is inhabited.



59. CLIVE R. SYMMONS, *THE MARITIME ZONES OF ISLANDS IN INTERNATIONAL LAW* 136 (The Hague ed., Martinus Nijhoff & Kluwer Boston, Inc. 1979) (citing Allen & Mitchell, *The Legal Status of the Continental Shelf of the East China Sea*, 51 *OR. L. REV.* 789, 808 (1972)).

60. Ji Guoxing, *The Diaoyudao (Senkaku) Disputes and Prospects for Settlement*, 6 *KOREAN J. OF DEF. ANALYSIS* 285, 306 (1994).

V. THE SOUTH CHINA SEA

China, Vietnam, the Philippines, Malaysia, Brunei, and Taiwan have all made claims to some or all of the twenty-five to thirty-five Spratly Islands in the South China Sea and to ocean space in that semi-enclosed sea.⁶¹ The largest islet (Itu Aba) is 0.43 square kilometers in area, Spratly Island is 0.15 square kilometers (about the same size as Serpents' Island and Dokdo), and only five others are larger than 0.1 square kilometer.⁶² Although visited historically by wandering fishers and now guarded by military police, none of these islets has ever been inhabited by a stable or sustained population. The *Romania v. Ukraine* decision makes it clear that they should be given twelve-nautical-mile territorial seas but ignored in the delimitation of the boundaries in the South China Sea, because any reliance upon them would "have a disproportionate effect on the delimitation line under consideration."⁶³

61. See generally MARK J. VALENCIA, JON M. VAN DYKE & NOEL A. LUDWIG, *SHARING THE RESOURCES OF THE SOUTH CHINA SEA* (1997). The insular features above water at high tide are also described in *id.* at 227-35.

62. See SYMMONS, *supra* note 59, at 68.

63. See Law of the Sea Convention, *supra* note 2, at para. 185.

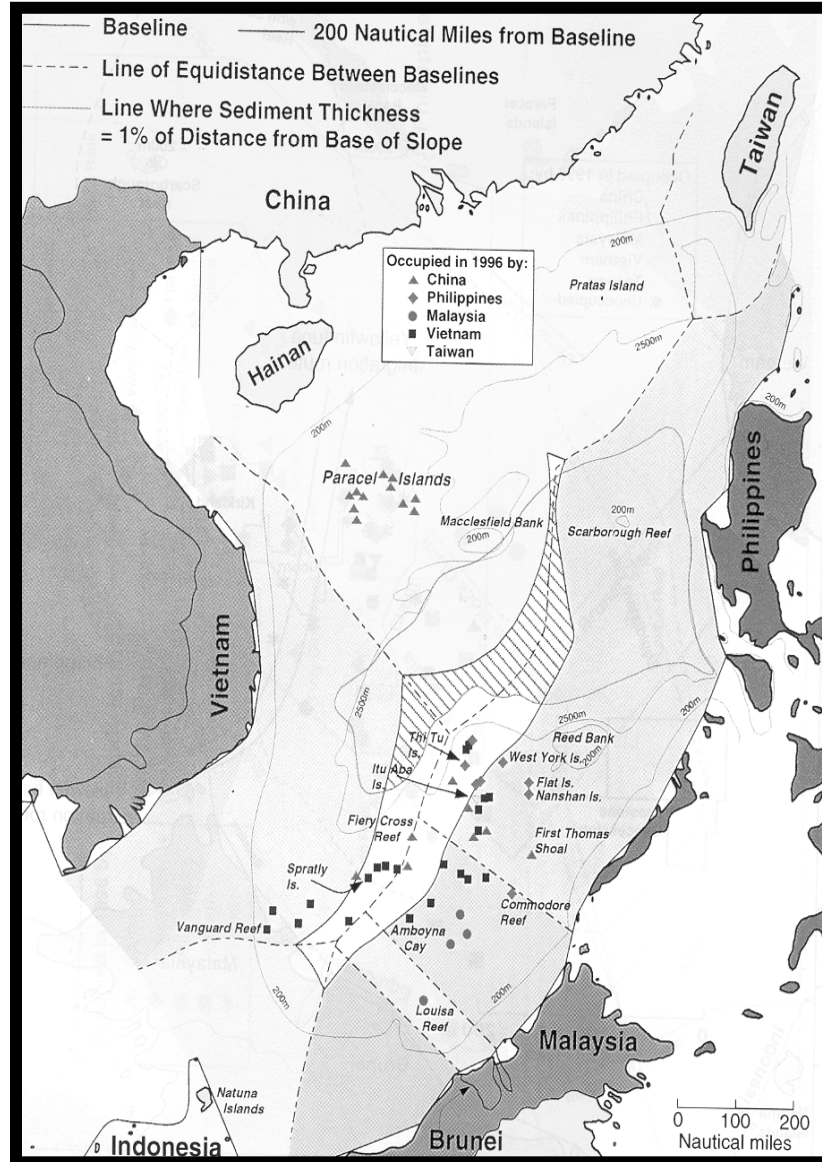


Figure 10: The South China Sea, showing the claimed Spratly Island features, and the maritime delimitation that would be appropriate if defensible coastal baselines were used and all the Spratly features were entirely ignored, but the Paracel Islands given full effect.⁶⁴

64. MARK J. VALENCIA, JON M. VAN DYKE, & NOEL A. LUDWIG, SHARING THE RESOURCES OF THE SOUTH CHINA SEA 265 (1997).

VI. OKINOTORISHIMA

Another matter that may have been clarified by the *Romania v. Ukraine* decision is whether the tiny reef system called Okinotorishima, sometimes referred to as Douglas Reef, which was claimed by Japan in 1931, is entitled to generate an EEZ and continental shelf. This reef system is 1740 kilometers south of Tokyo, and is thus the southernmost Japanese possession. At high tide, only two natural structures remain some seventy centimeters above water; these features in their natural form were about the size of two king-size beds (or four and a half tatami mats). But since 1987, Japan has been trying to protect these tiny pieces of real estate from being washed away by erosion and from sinking into the sea by spending billions of yen to bring vast amounts of wave-dissipating concrete blocks and cement to the location. China has acknowledged Japan's possession of this islet but has strongly protested against the claim that it can generate an EEZ, contending that it is a "rock" and not an "island" under Article 121(3) of the Law of the Sea Convention.⁶⁵

Some have argued that the ability of tiny insular structures to generate extended maritime zones if they are in the open ocean should be governed by different rules than those that apply to the treatment of tiny islets in boundary delimitations. Ukraine's agent, Rodman R. Bundy, argued, for instance, that Article 121(3) of the Law of the Sea Convention has "no relevance" to small insular features "within the 200-nautical-mile limits of the EEZ and continental shelf of a mainland coast" and only applies to features outside coastal EEZs such as Rockall.⁶⁶ The better view, and the one apparently adopted by the Court in the *Romania v. Ukraine* dispute, is the one offered by Romania's

65. On Feb. 6, 2009, China protested Japan's claim to a continental shelf generated from Okinotorishima, saying: "It is to be noted that the so-called Oki-no-Tori Shima Island is in fact a rock as referred to in Article 121(3) of the Convention Available scientific data fully reveals that the rock of Oki-no-Tori, on its natural conditions, obviously cannot sustain human habitation or economic life of its own, and therefore shall have no exclusive economic zone or continental shelf." Three weeks later, on Feb. 27, 2009, the Republic of Korea issued a similar protest, saying "the Republic of Korea has consistently held the view that Oki-no-Tori Shima, considered as a rock under Article 121(paragraph 3) of the Convention, is not entitled to any continental shelf extending to or beyond 200 nautical miles" See generally Yann-huei Song, *Okinotorishima: A "Rock" or an "Island"?* *Recent Maritime Boundary Controversy between Japan and Taiwan/China*, in *MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA* 39, 46-52 (Seoung-Yong Hong & Jon M. Van Dyke eds., 2009).

66. Sept. 19 Public Sitting, *supra* note 33, at para. 27, at 22.

agent, Professor Vaughan Lowe, who explained that Article 121 applies to all islands and rocks:

There is nothing in the Article which says that it applies only to islands on the high seas, or beyond the EEZ or continental shelf, or at a certain distance from the coast. Nothing in the Convention even hints at that possibility. Nor is there anything in the *travaux préparatoires* which indicates that any such limitation should be read into the words of the Article.⁶⁷

As explained above,⁶⁸ Professor Lowe emphasized that Serpents' Island was incapable of sustaining human habitation because it was "totally dependent for food, water, and every other human need" and thus was "indistinguishable from a steel platform."⁶⁹ It therefore falls within Article 121(3) and "cannot be used as a base point" for the generation "of either an EEZ or a continental shelf."⁷⁰



67. Sept. 16 Public Sitting, *supra* note 26, at para. 7, at 11.

68. *See supra* text at pp 12, 16.

69. Sept. 16 Public Sitting, *supra* note 26, at para. 21, at 14 (emphasis in original).

70. *Id.* at para 25, at 15.

VII. CONCLUSION

Although the *Romania v. Ukraine* decision does not contain a comprehensive discussion of Article 121(3) or a definition of the terms used in that provision, the Court's conclusion—that Ukraine's tiny and uninhabited Serpents' Island should have a twelve-nautical-mile territorial sea but no other impact on the maritime delimitation between the two countries—should make it easier to resolve the unresolved maritime boundaries of East Asia. Now that it is clear that such small features should be ignored because any reliance upon them would “have a disproportionate effect on the delimitation line under consideration,”⁷¹ it should be less difficult to reach agreement on where the maritime boundaries should be drawn.

71. Maritime Delimitation in the Black Sea (Rom. v. Ukr.), 2009 I.C.J. 1, para. 185 (Feb. 3) (internal citations omitted).