
Volume 122


Issue 3 *Dickinson Law Review Symposium Issue:*
Access to Justice: Innovations and Challenges in
Providing Assistance to Pro Se Litigants

Spring 2018

China's Artificial Island Building Campaign in the South China Sea: Implications for the Reform of the United Nations Convention on the Law of the Sea

Adam W. Kohl

Follow this and additional works at: <https://ideas.dickinsonlaw.psu.edu/dlr>

 Part of the [International Law Commons](#), [International Trade Law Commons](#), [Land Use Law Commons](#), and the [Law of the Sea Commons](#)

Recommended Citation

Adam W. Kohl, *China's Artificial Island Building Campaign in the South China Sea: Implications for the Reform of the United Nations Convention on the Law of the Sea*, 122 DICK. L. REV. 917 (2018).

Available at: <https://ideas.dickinsonlaw.psu.edu/dlr/vol122/iss3/8>

This Comment is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact lja10@psu.edu.

China's Artificial Island Building Campaign in the South China Sea: Implications for the Reform of the United Nations Convention on the Law of the Sea

Adam W. Kohl*

ABSTRACT

This Comment discusses the United Nations Convention on the Law of the Sea (UNCLOS) with reference to artificial island building in the South China Sea. China recently began an artificial island building campaign in the Spratly Island chain, which is located in the South China Sea. These artificial islands have been the subject of, and have created implications regarding, territorial disputes in the area.

UNCLOS governs international law in the context of disputes among states on the high seas. UNCLOS does have provisions that address artificial island construction and maintenance, but it mistakenly assumes that states will only construct artificial islands within their own exclusive economic zone (EEZ). An international arbitral tribunal established by UNCLOS determined that a state may not build an artificial island within the exclusive economic zone of another state. In this way, the tribunal interpreted UNCLOS to have a prohibitory rather than permissive effect when it comes to artificial island construction.

The tribunal's determination in that case may have legally resolved that territorial dispute, but it does not provide clear guidance for determining the legitimacy of a state constructing an artificial island in international waters not within its own EEZ or an EEZ belonging to another state. This open question is important because several of China's artificial islands in the South China Sea fall into that category.

This Comment recommends that UNCLOS be amended by the state parties to clarify the law of the sea with reference to

* J.D. Candidate, the Dickinson School of Law of the Pennsylvania State University, 2018.

artificial islands. Specifically, states should only be allowed to build artificial islands at a location that is within its own EEZ and is not located within another state's EEZ.

TABLE OF CONTENTS

I.	INTRODUCTION	918
II.	BACKGROUND	919
	A. <i>Purpose and Scope of the UNCLOS</i>	919
	B. <i>The South China Sea Territorial Dispute</i>	921
	C. <i>Kensho Sone v. Harvest Natural Resources, Inc.</i> .	922
	D. <i>China's Claims in the South China Sea</i>	922
	E. <i>Military Implications of China's Artificial Islands</i> .	923
	F. <i>UNCLOS, Naturally-Formed Oceanic Features, and Artificial Islands</i>	924
	1. <i>Islands</i>	925
	2. <i>Rocks</i>	926
	3. <i>Low-Tide Elevations</i>	926
	4. <i>Artificial Islands</i>	926
III.	ANALYSIS	927
	A. <i>Implications of Terrestrial Features Underlying Chinese Artificial Islands</i>	928
	1. <i>Underlying Features Approach</i>	928
	2. <i>Article 60 Approach</i>	929
	B. <i>Taiping Island and EEZ Implications</i>	930
	1. <i>Is Taiping an "Island" Under UNCLOS?</i>	930
	2. <i>China's Potential EEZ in the Spratly Islands</i> ..	931
	C. <i>UNCLOS Permanent Court of Arbitration 2016 Decision</i>	932
	1. <i>Issues Resolved by the PCA</i>	932
	2. <i>Open Question Remains After the PCA's Decision</i>	934
IV.	CONCLUSION	937

I. INTRODUCTION

Over the past several years, tensions have risen in the South China Sea over maritime disputes among regional states.¹ These tensions have been exacerbated by China's construction of several artificial islands in the region, especially in the Spratly Island chain.² China's neighbors in the region, as well as non-regional

1. *China's Maritime Disputes*, COUNCIL ON FOREIGN RELATIONS (Jan. 2017), http://www.cfr.org/asia-and-pacific/chinas-maritime-disputes/p31345#/?cid=otr-marketing_use-china_sea_InfoGuide.

2. *Id.*

countries like the United States, are concerned about China's artificial islands because Chinese control of the islands creates worrisome implications for natural resource allocation, international commerce, and military control in the region.³

Fortunately, there is a body of international law that addresses maritime disputes, including the construction and maintenance of artificial islands: the United Nations Convention on the Law of the Sea (UNCLOS or "the Convention").⁴ UNCLOS is an international treaty designed to codify international maritime law and peacefully resolve disputes among states parties.⁵ This Comment discusses the law under UNCLOS as well as how UNCLOS interacts with the current maritime disputes in the South China Sea.

Part II will examine the development and substance of UNCLOS.⁶ Part II will then discuss the competing maritime claims of the several states that border the South China Sea, the brief history of China's artificial island building campaign, and the implications of China's artificial islands for states in the region as well as the international community.⁷ Part III will analyze the legitimacy of China's claim to its artificial islands and the maritime entitlements that those artificial islands might possess.⁸ Part III will also critique aspects of UNCLOS as it applies to the South China Sea disputes and recommend that UNCLOS be amended to more effectively deal with ambiguities in the law as it relates to artificial islands.⁹

II. BACKGROUND

A. *Purpose and Scope of UNCLOS*

The United Nations Convention on the Law of the Sea was developed after two United Nations Conferences on the Law of the Sea were held in Geneva, Switzerland in 1958 and 1960.¹⁰ UNCLOS was designed by member-states of the United Nations to "contribute to the strengthening of peace, security, cooperation and friendly relations among all nations" as it relates to the conduct of nations on the high seas.¹¹ The implementation of a uniform rule of law to govern dispute resolution between nations was also a key

3. *Id.*

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

5. *Id.* Preamble, at 25.

6. *See infra* Part II.A.

7. *See infra* Part II.B.

8. *See infra* Part III.B.

9. *See infra* Part III.C.2.

10. UNCLOS, *supra* note 4, Preamble, at 25.

11. *Id.*

motivation behind the creation of UNCLOS.¹² Another critical feature of UNCLOS is its deliberate unbounded geographic scope of application.¹³ The Preamble consistently affirms that the Convention's global reach is necessary to promote a "just and equitable international economic order," protect the ocean seabed "irrespective of the geographical location of States," and secure "economic and social advancement of all peoples of the world."¹⁴

The authority of the United Nations under UNCLOS to set policy and resolve disputes is effective over all "States Parties."¹⁵ States Parties are defined as states, "which have consented to be bound by this Convention and for which this Convention is in force."¹⁶ Like most forms of public international law, UNCLOS derives binding authority over a given state because that state affirmatively consents to be so bound.¹⁷ Consent in this context is present when the authorized representative of the state signs and ratifies the treaty comprising the public international law.¹⁸

As of June 16, 2016, 168 states have ratified UNCLOS, including China, the Philippines, Vietnam, and Malaysia.¹⁹ Under the United Nations, Taiwan is not considered its own state, but is referred to, instead, as "Taiwan, Province of China."²⁰ Because it is considered to be a political sub-unit of China, Taiwan is neither considered to be a member of the United Nations nor a signatory of UNCLOS.²¹

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* art. 1, at 26.

16. *Id.*

17. *Id.*

18. Vienna Convention on the Law of Treaties, Art. 11, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

19. *Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements*, U. N. DIV. FOR OCEAN AFFAIRS & THE LAW OF THE SEA (Sept. 23, 2016), http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm [hereinafter *Chronological Lists*].

20. Y. Frank Chiang, Note, *One-China Policy and Taiwan*, 28 FORDHAM INT'L L.J. 1, 2 (2004); see also *Taiwan, Province of China Trade Data*, U.N. INT'L TRADE STATISTICS KNOWLEDGEBASE (2010), <http://unstats.un.org/unsd/tradekb/Knowledgebase/50104/Taiwan-Province-of-China-Trade-data>. (referring to Taiwan as "Taiwan, Province of China").

21. Greg Torode & J.R. Wu, *Taiwan Enters South China Sea Legal Fray, as Group Seeks to Sway International Court*, REUTERS (May 9, 2016), <http://www.reuters.com/article/us-southchinasea-taiwan-idUSKCN0Y02LD>.

B. *The South China Sea Territorial Dispute*

The South China Sea is an expansive body of water bounded by China and Vietnam to the west, Malaysia to the south, Taiwan to the north, and the Philippines to the east.²² Each of these four states and Taiwan assert a territorial claim to some part of the South China Sea.²³ Many of those claims overlap, which has instigated international tension in the area in recent decades.²⁴ China, the Philippines, Vietnam, Malaysia, and Taiwan all have territorial claims to a grouping of terrestrial features called the Spratly Islands.²⁵ China, Taiwan, and Vietnam have territorial claims to the Paracel Islands.²⁶ The Scarborough Shoal is claimed by the Philippines, China, and Taiwan.²⁷ The Pratas Islands are also claimed by both China and Taiwan.²⁸

Prior to 1969, states in Southeast Asia had little reason to assertively pursue their territorial claims in the South China Sea; the land formations in the region were largely uninhabitable and had little to offer to the states that claimed these formations.²⁹ In 1969, however, the Committee for Coordination of Joint Prospecting for Mineral Resources in Asian Offshore (COOP) published a report that adverted to the possibility of large petroleum deposits near terrestrial features in the sea.³⁰ This report prompted the four states and Taiwan to firmly establish their claims to various terrestrial features in the South China Sea in order to secure exclusive drilling rights in immediate offshore areas.³¹ Serious contention over these terrestrial features continues in the context of offshore drilling

22. Eugene C. LaFond, *South China Sea*, ENCYCLOPÆDIA BRITANNICA (Oct. 3, 2007), <https://www.britannica.com/place/South-China-Sea>.

23. Bill Hayton, *Shadow on the South China Sea*, 66 HIST. TODAY 3, 3–4 (2016).

24. *Id.*

25. Robert Beckman, *AGORA: The South China Sea: The UN Convention on the Law of the Sea and The Maritime Disputes in the South China Sea*, 107 A.J.I.L. 142, 144 (2013).

26. *Id.*

27. *Id.* at 145.

28. *Id.*

29. Yann-huei Song, *East Asian Seas—Conflicts, Strategies for Peaceful Resolutions and Accomplishments (Panel I): Conflicting Outer Continental Shelf Claims in the East and South China Seas: Proposals for Cooperation and Peaceful Resolution*, 35 HAW. L. REV. 485, 491–92 (2013).

30. *Id.*

31. *Id.*

rights.³² In fact, a dispute on offshore drilling in the South China Sea was recently adjudicated in the United States.³³

C. *Kensho Sone v. Harvest Natural Resources, Inc.*

In 2014, several Taiwanese citizens sued a Texas-based American oil and gas company called Harvest Natural Resources, Inc. (“Harvest”) claiming that the company had infringed upon Taiwan’s sovereign rights.³⁴ China awarded Harvest a concession to explore an area, known as WAB-21, for oil and gas reserves.³⁵ Taiwanese citizens brought a claim against Harvest for trespassing within the 200-nautical-mile area off of Taiwan’s coast, which is known as the exclusive economic zone (EEZ).³⁶ The case was ultimately resolved in favor of Harvest because Taiwan lacked standing for its claim.³⁷

While, on paper, the case was a dispute between an American oil company and several Taiwanese citizens, the case was essentially a proxy for a territorial dispute between Taiwan and China over the area of the South China Sea in and around WAB-21.³⁸ Specifically, in its opinion, the U.S. District Court for the Southern District of Texas stated: “Although the claims are nominally addressed to Harvest, [the Taiwanese] are really complaining about China’s aggressive assertion of territorial claims at sea.”³⁹ This dispute is representative of one aspect of territorial contentions generally within the South China Sea.

D. *China’s Claims in the South China Sea*

China has claimed sovereign control over all islands and waters within the South China Sea on the basis of its 2,000-year history of having “continuously, peacefully and effectively exercised sover-

32. See, e.g., Stephanie Burnett, *China Says Vietnamese Vessels Rammed Its Boats ‘1,416 Times’*, TIME (June 10, 2014), <http://time.com/2847104/china-says-vietnamese-vessels-rammed-its-boats-1416-times/>.

33. See generally *Kensho Sone v. Harvest Nat. Res., Inc.*, No. H-13-2161, 2014 U.S. Dist. LEXIS 110138 (S.D. Tex. Aug. 8, 2014) (reviewing Taiwanese plaintiffs’ challenge to a Chinese South China Sea concession granted to a Texas-based oil company).

34. *Id.* at *4.

35. *Id.* at *3.

36. *Id.* at *4.

37. *Id.* at *6–7.

38. See *id.* at *7.

39. *Id.*

eighty and jurisdiction over them.”⁴⁰ This claim is represented by the distinctive “nine-dash line” drawn by Chinese officials on a map depicting the greater South China Sea area.⁴¹ China has not only claimed existing terrestrial features, however, but has begun constructing artificial islands.⁴² China has created these islands by dredging sediment from the seafloor and spraying it atop submerged reefs located within a localized area of the South China Sea called the Spratly Island chain.⁴³ China treats these artificial islands as though they were naturally occurring islands and asserts that the islands carry with them traditional sovereign territorial rights.⁴⁴ China does not appear to use its artificial islands primarily to secure claims to natural resources, but rather as a means of enhancing its strategic military interests in the South China Sea.⁴⁵

E. Military Implications of China’s Artificial Islands

Various high resolution photos taken by the Asia Maritime Transparency Initiative, beginning in 2013, show the efforts of Chinese vessels creating or reclaiming land atop submerged reefs in several areas of the Spratly Island chain, including the Fiery Cross Reef, the Johnson South Reef, the Gaven Reef, the Subi Reef, the Hughes Reef, and the Mischief Reef.⁴⁶ Construction on top of these artificial islands is military in nature due to the installation of radar facilities, airstrips for fighter jets, and ports for Chinese Navy vessels.⁴⁷

China’s island building campaign has caught the attention of the United States and led to military confrontations over the artificial islands.⁴⁸ The South China Sea contains several sea lanes that are heavily trafficked by civilian vessels engaged in international

40. *China Issues White Paper on Settling Disputes with the Philippines*, 65 CHINA TODAY 19, 19 (2016), <http://www.xinhuanet.com/english/nhbps2016/en/images/book-en.pdf>.

41. Derek Watkins, *What China Has Been Building in the South China Sea*, N.Y. TIMES (Feb. 9, 2016), http://www.nytimes.com/interactive/2015/07/30/world/asia/what-china-has-been-building-in-the-south-china-sea-2016.html?_r=0. (“China has long marked its claim with a “nine-dash line” that skirts the coasts of other countries.”).

42. *Id.*

43. *Id.*

44. Xinjun Zhang, *The Latest Developments of the US Freedom of Navigation Programs in the South China Sea: Deregulation or Re-balance?*, 9 J. OF EAST ASIA & INT’L L. 167, 173–74 (2016).

45. Watkins, *supra* note 41.

46. *Id.*

47. *Id.*

48. See Zhang, *supra* note 44, at 173.

trade.⁴⁹ Annually, trading vessels carry ship-borne goods totaling five trillion dollars through the South China Sea.⁵⁰ In order to protect freedom of movement in international waters in the South China Sea, the U.S. Navy has challenged the extension of China's military control in the area via its artificial islands.⁵¹ In 2015, President Barack Obama ordered the Lassen, a guided missile destroyer, to sail within 12 nautical miles⁵² of the Subi Reef, which is the location of one of China's artificial islands in the Spratly Island chain.⁵³ This U.S. Navy action was a part of a protocol called the "Freedom of Navigation Program," which was designed to challenge China's attempt to restrict international traffic in the South China Sea.⁵⁴

Beyond seeking to restrict international travel over water in the South China Sea, China has asserted that its artificial islands grant China sovereign airspace above those locations it controls in the area.⁵⁵ Again, as a challenge to these claims, the United States flew B-52 bombers over Chinese artificial islands in December 2015.⁵⁶ The Chinese Defense Ministry condemned the U.S. action as a violation of China's sovereign rights as derived from UNCLOS.⁵⁷ Differing interpretations of maritime law have precipitated these Chinese-American military flashpoints.

F. UNCLOS, Naturally-Formed Oceanic Features, and Artificial Islands

UNCLOS defines terrestrial features in open water by grouping them into one of three categories: islands, rocks, or low-tide elevations.⁵⁸ Under UNCLOS, "islands" are defined as "a natu-

49. *U.S. Warns Against 'Egregious' Restrictions in Contested South China Seas*, REUTERS (Oct. 6, 2015, 1:56AM), <http://www.reuters.com/article/us-southchinasea-usa-china-idUSKCN0S00DE20151006>.

50. *Id.*

51. Helene Cooper, *Challenging Chinese Claims, U.S. Sends Warship Near Artificial Island Chain*, N.Y. TIMES (Oct. 26, 2015), <http://www.nytimes.com/2015/10/27/world/asia/challenging-chinese-claims-us-sends-warship-near-artificial-island-chain.html>.

52. A nautical mile ("nm") is defined as "[a] marine mile; a linear measure of distance on the sea, equivalent to approximately 6,080 feet, the name being taken from the knots in a ship's log line." *Nautical mile*, BALLENTINE'S LAW DICTIONARY (3d ed. 2010).

53. Cooper, *supra* note 51.

54. Zhang, *supra* note 44, at 168.

55. Jeremy Page, *U.S. Bomber Flies Over Waters Claimed by China*, WALL ST. J. (Dec. 18, 2015), <http://www.wsj.com/articles/u-s-jet-flies-over-waters-claimed-by-china-1450466358>.

56. *Id.*

57. *Id.*

58. UNCLOS, *supra* note 4, art. 121, at 66.

rally formed area of land, surrounded by water, which is above water at high tide.”⁵⁹ By contrast, “rocks” are features that meet the definition of an island but “cannot sustain human habitation or economic life of their own.”⁶⁰ Reefs, which are below water at all times, do not possess the qualities of either an island or a rock and, therefore, are defined as “low-tide elevations.”⁶¹ Low-tide elevations (LTEs) carry extremely limited legal entitlements to states claiming them as sovereign possessions.⁶² Artificial islands also have a unique classification under UNCLOS.⁶³

1. Islands

UNCLOS treats islands as if they were mainland territory: “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.”⁶⁴ One of the largest advantages of claiming a terrestrial feature to be an “island” is the attachment of a “territorial sea.”⁶⁵ “Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.”⁶⁶ This 12-nautical-mile demarcation allows the possessing state to claim absolute sovereignty within that perimeter.⁶⁷

Another key advantage to possessing an island is the possessing state’s ability to enforce an EEZ.⁶⁸ The extent of a state’s EEZ is defined in UNCLOS as follows: “The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.”⁶⁹ The EEZ allows a state the sovereign right to explore and exploit the adjacent 200-nautical-mile area around an island to the exclusion of international vessels.⁷⁰ A state’s claim of control of an EEZ has important implications for artificial islands within its limits as well, as will be explained in Part III.

59. *Id.*

60. *Id.*

61. *Id.* art. 13, at 29.

62. *Id.*

63. *Id.* art. 60, at 45.

64. *Id.* art. 121, at 66.

65. *Id.*

66. *Id.* art. 3, at 27.

67. *Id.* art. 2, at 27.

68. UNCLOS, *supra* note 4, art. 121, at 66.

69. *Id.* art. 57, at 44.

70. *Id.* art. 56, at 43.

2. *Rocks*

As previously mentioned, “rocks” are features which cannot sustain human habitation or economic life of their own.⁷¹ They are entitled no EEZ or continental shelf.⁷² They are, however, entitled to a territorial sea,⁷³ just as full-fledged islands are.⁷⁴ Most terrestrial features that are consistently above sea level in the South China Sea are likely considered rocks under this definition, with the possible exception of the Chinese-claimed “island” of Taiping.⁷⁵

3. *Low-Tide Elevations*

LTEs are fully submerged below water at high tide.⁷⁶ They arise in the context of UNCLOS because LTEs meet neither the definition of an “island” nor a “rock,” both of which are defined as being at least partially above water at high tide.⁷⁷ LTEs have no territorial sea of their own, unless they lie within the territorial sea of the mainland or an island belonging to the same state.⁷⁸ However, states continue to assert territorial claims over LTEs, especially in the Spratly Islands.⁷⁹ Despite these claims, if the LTE in question is not within 12 nautical miles of an island or the mainland, the claiming state is afforded no associated sovereign rights under international law.⁸⁰

4. *Artificial Islands*

UNCLOS contemplates states constructing artificial islands only within a legitimate EEZ belonging to that state.⁸¹ UNCLOS states: “In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of: (a) artificial islands”⁸² Ar-

71. *Id.* art. 121, at 66.

72. *Id.*

73. *Id.* art. 2, at 27 (“The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.”).

74. Yann-huei Song, *Taiping Island: An Island or a Rock under UNCLOS*, ASIA MARITIME TRANSPARENCY INITIATIVE (May 7, 2015), <https://amti.csis.org/taiping-island-an-island-or-a-rock-under-unclos/>.

75. *Id.*

76. UNCLOS, *supra* note 4, art. 13, at 29.

77. *Id.* art. 121, at 66.

78. *Id.* art. 13, at 29.

79. Beckman, *supra* note 25, at 143–44.

80. UNCLOS, *supra* note 4, art. 13, at 29.

81. *Id.* art. 60(1), at 45.

82. *Id.*

tificial islands emphatically do not possess a territorial sea.⁸³ They do, however, possess what is called a “safety zone.”⁸⁴ Safety zones allow a controlling state to establish a 500-meter radius in which a state can exert exclusive sovereign control.⁸⁵ Moreover, the plain language of UNCLOS indicates that states do not have the right to construct artificial islands in areas outside of its EEZ.⁸⁶

One other legal implication of artificial island construction is the notice requirement.⁸⁷ UNCLOS states: “Due notice must be given of the construction of such artificial islands, installations or structures, and permanent means for giving warning of their presence must be maintained.”⁸⁸ This provision is designed to protect unsuspecting foreign vessels from running aground when sailing within the EEZ of another state.⁸⁹

Because each type of feature receives different legal treatment, determining the UNCLOS classification of a particular feature is critical when seeking to determine a country’s UNCLOS rights and obligations, given its maritime claims.

III. ANALYSIS

UNCLOS reserves separate treaty sections to address the legal implication of claiming an island, rock, LTE, or artificial island.⁹⁰ However, the Convention does not indisputably determine whether an artificial island constructed atop a rock or LTE retains the legal entitlements of the underlying feature or exclusively adopts the legal entitlements defined for an artificial island.⁹¹ To address this question in the context of the South China Sea dispute, this Comment will briefly evaluate the entitlements of China’s artificial islands in the Spratly Island chain.⁹²

A separate section of this Comment will address the implications of artificial island construction within and outside a state’s

83. *Id.* art. 60(8), at 45.

84. *Id.* art. 60(4-5), at 45.

85. *Id.*

86. *Id.* art. 60(1), at 45.

87. *Id.* art. 60(3), at 45.

88. *Id.*

89. *Id.*

90. UNCLOS, *supra* note 4, art. 121, at 66.

91. See Clive Schofield, *The Trouble with Islands: The Definition and Role of Islands and Rocks in Maritime Boundary Delimitation*, in 65 MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA 19, 24 (Martinus Nijhoff ed., 2009) (“Island-building activities on the part of states, in an effort to enhance their claims to maritime space by creating new islands, is therefore contrary to the Convention.”).

92. See *infra* Part III.A.1.

EEZ.⁹³ Artificial islands are referred to under UNCLOS only in the context of construction within a state's EEZ.⁹⁴ One Chinese-claimed terrestrial feature in the Spratly Island chain could arguably be classified as an island under UNCLOS.⁹⁵ This Comment will evaluate the likely classification of this terrestrial feature and what impact that determination would have on the legitimacy of China's artificial islands in the surrounding area.⁹⁶

Through this analysis, this Comment will elucidate the shortcomings of UNCLOS as it has been applied to China's artificial islands in the South China Sea.

A. *Implications of Terrestrial Features Underlying Chinese Artificial Islands*

1. *Underlying Features Approach*

The artificial islands that China has constructed in the South China Sea are likely built atop either rocks or LTEs.⁹⁷ Artificial islands under UNCLOS do not have territorial seas or EEZs of their own.⁹⁸ However, some scholars have posited that China may continue to assert the legal entitlements attached to those underlying features even though the features are now entirely covered under the surface of the artificial islands.⁹⁹ Following this "underlying feature" approach, a case-by-case analysis is needed to determine the status of each artificial island in question.

The major artificial islands in question are the Fiery Cross Reef, the Johnson South Reef, the Gaven Reef, the Subi Reef, the Hughes Reef, and the Mischief Reef.¹⁰⁰ The Fiery Cross Reef, the Johnson South Reef, and the Gaven Reef are all built atop a terrestrial feature that, at least in part, is considered a rock for the purposes of UNCLOS.¹⁰¹ On the other hand, the Subi Reef, the Hughes Reef, and the Mischief Reef are all built atop LTEs.¹⁰² This dichotomy leads to the odd result that a subset of China's arti-

93. See *infra* Part III.A.2.

94. UNCLOS, *supra* note 4, art. 60(1), at 45.

95. Song, *supra* note 74.

96. See *infra* Part III.B.1.

97. See Gregory Poling, *The Legal Challenge of China's Island Building*, ASIA MARITIME TRANSPARENCY INITIATIVE (Feb. 18, 2015), <http://amti.csis.org/the-legal-challenge-of-chinas-island-building/>.

98. UNCLOS, *supra* note 4, art. 60(8), at 45.

99. Poling, *supra* note 97.

100. Watkins, *supra* note 41.

101. Daniel Andreeff, Note, *Legal Implications of China's Land Reclamation Projects in the Spratly Islands*, 47 N.Y.U. J. INT'L L. & POL. 855, 897 (2015).

102. *Id.*

ficial islands in the Spratly Island chain will be nearly identical in attribute and purpose, but will garner differing entitlements under UNCLOS.¹⁰³ Specifically, the first set of artificial islands built atop rocks will each have a 12-nautical-mile territorial sea.¹⁰⁴ The second set, however, will have no protection under UNCLOS unless it is within the territorial sea of another Chinese-claimed rock.¹⁰⁵

For those artificial islands that are built upon rocks, another issue may arise in applying the territorial sea via the underlying feature approach. If the territorial sea of the rock-based artificial islands is truly derived from, and measured by, the existence and discrete location of underlying rocks, it stands to reason that the territorial sea will remain fixed despite the construction or expansion of an artificial island.¹⁰⁶ In fact, UNCLOS states that the presence of an artificial island “does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.”¹⁰⁷

Given this information, a portion of an artificial island’s coast lying 11 nautical miles from the rock upon which the artificial island was originally constructed would be surrounded by only a one-nautical-mile territorial sea. At the same time, a portion of the artificial island’s coast directly adjacent to the underlying rock would be surrounded by the full 12-nautical-mile territorial sea. This absurd result emerges when applying the legal entitlements of underlying features in the context of artificial islands. This result tends to indicate that this approach is an improper application of UNCLOS.

2. *Article 60 Approach*

A more reasoned approach sees Article 60 as the sole authority on legal entitlements due to artificial islands under UNCLOS.¹⁰⁸ While the term “artificial island” is not itself defined in UNCLOS, each of the Chinese artificial islands has the defining feature of being built atop some other existing terrestrial feature.¹⁰⁹ In Article 60, the framers of UNCLOS seem to have contemplated artificial islands of this sort because they felt compelled to disclaim that “[a]rtificial islands . . . do not possess the status of islands.”¹¹⁰ This disclaimer implies that both regular islands and artificial islands are

103. *See id.*

104. *Id.*

105. *See id.* at 897, 900.

106. *See* Poling, *supra* note 97.

107. UNCLOS, *supra* note 4, art. 60(8), at 45.

108. *Id.* art. 60, at 45.

109. Andreeff, *supra* note 101, at 898.

110. UNCLOS, *supra* note 4, art. 60(8), at 45.

thought to be “area[s] of land, surrounded by water, which [are] above water at high tide,” with the distinguishing feature being that regular islands must be “naturally formed.”¹¹¹

If the framers did indeed contemplate that artificial islands were to be made of some kind of land material, it follows that the framers understood that artificial islands must be built upon something. In this case, it would make little sense for the framers to create a rule for legal entitlements belonging to artificial islands, but nevertheless maintain a belief that entitlements of artificial islands would be defined by the rules attached to each separate island’s underlying feature. Moreover, because Article 60 deals comprehensively with the application of rules governing artificial islands in several contexts, the framers of UNCLOS likely did not intend the legal entitlements affecting artificial islands to be governed by some unrelated section of the Convention.

B. Taiping Island and EEZ Implications

Taiping Island is the largest of the naturally occurring features in the Spratly Island chain.¹¹² The Taiwanese Navy first sailed to Taiping Island in 1946, and Taiwan has administrated the island since 1956.¹¹³ China, however, asserts a claim to Taiping Island and does not recognize Taiwan’s claim to the island.¹¹⁴ Again, because Taiwan is not a member of the United Nations or a signatory to UNCLOS, only China’s claim to the island has been tested by the dispute resolution mechanism of UNCLOS.¹¹⁵

1. Is Taiping an “Island” Under UNCLOS?

Under Article 121, UNCLOS distinguishes between “rocks” and “islands” on the basis of whether features in question can “sustain human habitation or economic life of their own.”¹¹⁶ Scholars have suggested that in order to meet this requirement, a state must demonstrate that the feature can permanently support human habitation for at least 50 people.¹¹⁷ At this point, no doubt exists that Taiping Island can permanently support human habitation of more than 150 people.¹¹⁸ Physically, Taiping as an “island has a

111. See Poling, *supra* note 97.

112. Song, *supra* note 74.

113. *Id.*

114. *Id.*

115. Torode & Wu, *supra* note 21.

116. UNCLOS, *supra* note 4, art. 121, at 66.

117. Song, *supra* note 74.

118. *Id.*

long and narrow shape that is low and flat, approximately 1,290 [meters long] and 366 [meters wide.]”¹¹⁹ Moreover, Taiping currently has a population of 200 people comprised solely of military personnel from the Taiwanese Coast Guard, Navy, and Air Force.¹²⁰ Under this interpretation, then, Taiping appears to meet the UNCLOS definition of a regular island.

A separate approach, however, calls into question the legitimacy of Taiping’s island status because Taiwan’s use of the island does not seem to accord with the spirit of the Convention.¹²¹ Article 31 of the Vienna Convention on the Law of Treaties states: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹²² Applying this language in the context of UNCLOS, the element of the treaty requiring permanent human habitation should be interpreted to mean that stable communities of people actually live on the island.¹²³ Consequently, giving island status to a feature when a state stations military personnel thereon for the purpose of establishing coastal EEZs would be an improper application of UNCLOS.¹²⁴

A determination of the correct status of Taiping Island under UNCLOS is a question of Convention interpretation that must be resolved by binding arbitration or the International Tribunal for the Law of the Sea.¹²⁵ The tribunal’s decision has important implications for the protections afforded to China’s artificial islands in the Spratly Island chain.

2. *China’s Potential EEZ in the Spratly Islands*

Taiping Island’s classification as a naturally formed island would have immense legal consequences with reference to the dispute over China’s artificial islands in the Spratly Island chain. Naturally formed islands fitting the language of Article 121 of UNCLOS are given identical maritime rights as mainland territory.¹²⁶ Therefore, if Taiping Island were deemed a naturally formed island it would have, among other things, a 12-nautical-mile

119. *Id.*

120. *Id.*

121. *Id.*

122. Vienna Convention, *supra* note 18, art. 31, at 340.

123. Song, *supra* note 74.

124. *Id.*

125. United Nations Convention on the Law of the Sea Annex VI art. 1, Dec. 10, 1982, 1833 U.N.T.S. 397, at 166.

126. UNCLOS, *supra* note 4, art. 121, at 66.

territorial sea and a 200nm EEZ, as provided by UNCLOS.¹²⁷ The 12nm territorial sea would no doubt be of benefit to the Taiwanese who administrate the island, but the 200nm EEZ would be particularly beneficial to China because this EEZ would strengthen the legitimacy of China's several artificially constructed islands in the neighboring area.

Specifically, UNCLOS provides that a state has the exclusive right to construct and regulate artificial islands within its 200nm EEZs.¹²⁸ If Taiping Island were found to have an EEZ, each of China's current six artificial islands in the Spratly Island chain would fall within that area.¹²⁹ It would appear, then, that China has constructed and maintained its artificial islands lawfully according to UNCLOS. As will be discussed in the next section, however, an UNCLOS tribunal has ruled against China's claim that its artificial islands fall within a Chinese EEZ created by virtue of their ownership of Taiping Island.

C. *UNCLOS Permanent Court of Arbitration 2016 Decision*

On January 22, 2013, the Philippines submitted its South China Sea dispute with the People's Republic of China to UNCLOS's binding arbitration mechanism for resolution.¹³⁰ UNCLOS provides for, under Articles 286 and 287 of the Convention, the authority of one state to submit a claim for dispute resolution with UNCLOS's Permanent Court of Arbitration ("PCA").¹³¹ China, however, refused to participate in the arbitration and similarly refused to recognize the jurisdiction of the PCA, but the PCA determined that it did have jurisdiction over the dispute and entered an award in the matter on July 12, 2016.¹³²

1. *Issues Resolved by the PCA*

The PCA issued a comprehensive 479-page decision that resolved several controversies arising from competing interpretations

127. *Id.* art. 3, at 27; *id.* art. 58, at 44.

128. *Id.* art. 60(1), at 45.

129. See *Distance Calculator*, DAFTLOGIC, <https://www.daftlogic.com/projects-google-maps-distance-calculator.htm> (depicting the approximate displacement between Taiping Island each of China's six artificial islands as follows: Mischief Reef 77nm; Gaven Reef 13nm; Fiery Cross Reef 96nm; Subi Reef 37nm; Johnson Reef 40nm; and; Hughes Reef 29nm).

130. In the Matter of the South China Sea Arbitration (Phl./Chn.), PCA Case N° 2013-19, Award, UNCLOS Permanent Court of Arbitration, ¶ 28 (July 12, 2016), <https://pca-cpa.org/wp-/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf> [hereinafter *South China Sea Arbitration*].

131. *Id.*

132. *Id.* ¶ 60.

of UNCLOS.¹³³ The decision only addressed issues between the Philippines and China, however, and did not seek to resolve extraneous ambiguities arising under the Convention.¹³⁴

The first major issue that the PCA resolved was the question of Taiping Island's legal status and corresponding maritime entitlements under UNCLOS.¹³⁵ To the chagrin of Taiwan and China, the PCA decided that Taiping Island is in fact a rock under the UNCLOS classification regime.¹³⁶ The PCA arrived at this conclusion largely because Taiping Island is reliant upon Taiwan for personnel, basic living essentials, and food.¹³⁷ In other words, because Taiping Island was incapable of self-sufficiently providing for a stable community of inhabitants, it fell under UNCLOS as a rock rather than a naturally occurring island.

This result, of course, means that Taiping Island is entitled to a 12nm territorial sea, but not to a 200nm EEZ.¹³⁸ As a result, the PCA found that China had no claim to any maritime features that would provide China with an EEZ in the area of the Spratly Island chain.¹³⁹ In turn, China's current six artificially constructed islands in the area do not exist within a Chinese EEZ, leaving China without authority pursuant to Article 60 of UNCLOS to maintain and regulate those artificial islands.¹⁴⁰

The second major issue resolved by the PCA flows from the PCA's determination of Taiping Island to be a rock. The PCA decided that China had violated the rights of the Philippines under UNCLOS by constructing and maintaining its artificial island at Mischief Reef.¹⁴¹

Mischief Reef is the closest of China's artificial islands to the Philippines's Palawan Island, clearly within the 200nm coastal EEZ of the Philippines.¹⁴² While China's artificial islands at Johnson Reef and Hughes Reef also appear to be within the Philippines's 200nm coastal EEZ, the PCA did not address those locations.¹⁴³

Interestingly, the PCA treated Article 60 of UNCLOS as having a prohibitive rather than permissive effect; instead of deciding

133. *See generally id.*

134. *See generally id.*

135. *Id.* ¶ 625.

136. *Id.* ¶ 632; *see also* Torode & Wu, *supra* note 21.

137. *South China Sea Arbitration*, PCA Case N° 2013-19, ¶ 622.

138. Song, *supra* note 74.

139. *South China Sea Arbitration*, PCA Case N° 2013-19, ¶ 626.

140. UNCLOS, *supra* note 4, art. 60(1), at 45.

141. *South China Sea Arbitration*, PCA Case N° 2013-19, ¶ 1203.

142. DAFTLOGIC, *supra* note 129.

143. *Id.*

that the construction and regulation of artificial islands is only permissible within the acting state's EEZ, the PCA decided the converse.¹⁴⁴ Rather, the PCA decided that it was prohibited, according to Article 60, to construct and maintain an artificial island within an area that falls solely within the EEZ of a separate state.¹⁴⁵ The PCA arrived at this decision because it found that China operating its artificial island at Mischief Reef within the Philippines's coastal EEZ infringed upon the Philippines's ability "to authorize and regulate the construction, operation and use of" artificial islands.¹⁴⁶

The PCA's determination as to Taiping Island's UNCLOS classification bears on the artificial island dispute because, if Taiping Island were found to be a naturally formed island pursuant to Article 121, China would have an EEZ extending over the area surrounding Mischief Reef, overlapping the Philippines's coastal EEZ.¹⁴⁷ When two or more coastal states have opposite or adjacent overlapping maritime entitlements, they must go through a process called "delimitation" to establish a border between each state's entitlement.¹⁴⁸ Delimitation, however, has special procedures, including a provision that allows a state to make a declaration taking resolution of disputes over delimitation out of the PCA's subject matter jurisdiction.¹⁴⁹ China had successfully made such a declaration in 2006.¹⁵⁰

If the PCA had decided that China was entitled to an EEZ within the Spratly Island chain pursuant to its claim over Taiping Island as a naturally formed island, then the PCA would no longer have had the jurisdiction to resolve the dispute over China's operation of its artificial island at Mischief Reef.¹⁵¹

2. *Open Question Remains After the PCA's Decision*

As mentioned, PCA review of competing interpretations of UNCLOS unrelated to the dispute between China and the Philippines was outside the scope of the PCA's 2016 decision and, therefore, was not addressed in the PCA's July 12, 2016 decision.¹⁵² One important open question remaining after the PCA's decision is

144. *South China Sea Arbitration*, PCA Case N° 2013-19, ¶ 1203.

145. *Id.*

146. *Id.*

147. UNCLOS, *supra* note 4, art. 121, at 66.

148. *South China Sea Arbitration*, PCA Case N° 2013-19, ¶ 6.

149. *Id.*

150. *Id.*

151. *Id.*

152. *See generally id.*

what the correct treatment of China's other five artificial islands should be.¹⁵³

The PCA's decision gives some guidance, but it fails to directly address the issue.¹⁵⁴ In fact, sections of the PCA's decision seem to provide conflicting interpretations of artificial islands generally under UNCLOS.¹⁵⁵ Specifically, the PCA seemed to resolve the controversy regarding the "underlying features" approach and the "Article 60" approach to the treatment of artificial islands under UNCLOS.¹⁵⁶ At one point, the PCA reasoned that, "[a]s with the other high-tide features that have been the subject of construction and reclamation work, the status of a feature for the purpose of Article 121(3) is to be assessed on the basis of its natural condition, prior to human modification."¹⁵⁷ This reasoning suggests that a state is entitled to maritime entitlements with reference to an artificial island only on the basis of the underlying feature upon which the artificial island was built.

The PCA's decision with respect to Mischief Reef, however, adds complexity to the issue. The PCA first determined that Mischief Reef was an LTE and, as a result, possessed the maritime entitlements of an LTE.¹⁵⁸ Yet, later, the PCA determined that China was in violation of its UNCLOS obligations specifically because China was operating Mischief Reef as an artificial island within the Philippines's coastal EEZ.¹⁵⁹ This determination was based not on Article 121, but rather on Article 60, the provision of UNCLOS that deals comprehensively with artificial islands.¹⁶⁰

In order to reconcile these seemingly incompatible determinations, it appears that artificial islands must take differing treatment under UNCLOS based on their geographic context. In this way, Mischief Reef seems to be treated as an artificial island because it lies within the Philippines's coastal EEZ. The corollary, of course, would be that Mischief Reef would not be treated as an artificial island, but instead as an LTE, if it were situated outside any state's coastal EEZ.

Carrying this application through to China's other artificial islands presents a logical quagmire. Gaven Reef, Fiery Cross Reef, Subi Reef, Johnson Reef, and Hughes Reef may fall outside of any

153. *See generally id.*

154. *See generally id.*

155. *See id.* ¶¶ 568, 1203.

156. *Id.* ¶ 568.

157. *Id.*

158. *South China Sea Arbitration*, PCA Case N° 2013-19, ¶ 1040.

159. *Id.* ¶¶ 568, 1203.

160. *Id.* ¶ 1203.

state's coastal EEZ; exact EEZ delimitations have not been resolved in the South China Sea.¹⁶¹ Given the PCA's determination that artificial islands be treated in accordance with their underlying feature,¹⁶² China is saddled with the proposition that those artificial islands built atop rocks are entitled to a 12nm territorial sea, while those that are built atop LTEs have no maritime entitlements whatsoever.¹⁶³ For example, China's artificial island at Subi Reef is built atop an LTE, providing it no maritime entitlements.¹⁶⁴ Moreover, if artificial islands lying outside a coastal EEZ do not receive Article 60 treatment, China's Subi Reef artificial island would also not enjoy the 500-meter safety zone that attaches to artificial islands.¹⁶⁵ This result would lead to the bizarre scenario where a U.S. guided missile destroyer could lawfully sail up to the beach of China's artificial island at Subi Reef, but would be required by UNCLOS to remain 12nm back from Gaven Reef's underlying feature, which is a rock.

Without doubt, this approach is an illogical way to resolve UNCLOS's ambiguities with respect to artificial islands in the South China Sea. Moreover, China's refusal to accept the PCA's determination with reference to China's dispute with the Philippines leaves real questions over whether UNCLOS has the teeth to effectively resolve complex and heated disputes over artificial island construction in the South China Sea.¹⁶⁶

The conclusions reached by the PCA demonstrate the weaknesses within UNCLOS, especially as they relate to ambiguities over artificial island construction outside of an EEZ. A prudent solution to this problem would be to amend UNCLOS to outlaw state parties from building or maintaining artificial islands anywhere apart from maritime locations indisputably within a state's own EEZ. As discussed, China seems unwilling to accept the judgment of the PCA, so a reform of UNCLOS will be unlikely to ameliorate maritime disputes involving China in the South China

161. See Kevin Baumert & Brian Melchior, *Maritime Claims in the South China Sea*, U.S. DEP'T OF STATE 18 (2014), <https://www.state.gov/documents/organization/234936.pdf>.

162. *South China Sea Arbitration*, PCA Case N° 2013-19, ¶ 568.

163. UNCLOS, *supra* note 4, art. 121, at 66.

164. Andreeff, *supra* note 101, at 898.

165. UNCLOS, *supra* note 4, art. 60(4–5), at 44.

166. Jane Perlez, *Philippines v. China: Q. and A. on South China Sea Case*, N.Y. TIMES (July 10, 2016), <https://www.nytimes.com/2016/07/11/world/asia/south-china-sea-philippines-hague.html> (“While the decision is binding, the tribunal has no power to enforce it, and no one expects that China will volunteer to dismantle its artificial islands and return the sand to the ocean floor.”).

Sea.¹⁶⁷ Clarifying the law, however, will undoubtedly benefit the international community when similar disputes over artificial islands arise in the future.

IV. CONCLUSION

China's artificial island building campaign has exacerbated international tensions in the South China Sea over the past several years.¹⁶⁸ This campaign has enflamed maritime disputes among states that border the South China Sea and tested UNCLOS's ability to effectively resolve those disputes.¹⁶⁹ Despite UNCLOS having contemplated states constructing artificial islands, the Convention leaves much to be desired in terms of how the law determines the legitimacy and entitlements of artificial islands.¹⁷⁰ UNCLOS operates ineffectively when a state constructs an artificial island outside its own EEZ or that of another state.¹⁷¹ China's construction of several artificial islands in the Spratly Island chain has highlighted that exact shortcoming.¹⁷² In order to effectively resolve this dilemma in the context of future disputes over artificial island construction involving states willing to abide by UNCLOS, the state parties should amend UNCLOS to prohibit a state from constructing or maintaining an artificial island outside of its own uncontested EEZ.¹⁷³

167. *Id.*

168. *See supra* Part II.B.

169. *See supra* Part II.F.

170. *See supra* Part III.A.2.

171. *See supra* Part III.C.2.

172. *See supra* Part III.C.2.

173. *See supra* Part III.C.2.
