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WORLD MARITIME UNIVERSITY

Malmö, Sweden

THE INTERPRETATION OF THE REGIME OF ISLANDS

APPLICATION TO OKINOTORISHIMA

By

YUTA ARAI
Japan

A dissertation submitted to the World Maritime University in partial fulfilment of the requirement for the award of the degree of

MASTER OF SCIENCE
In
MARITIME AFFAIRS

(OCEAN SUSTAINABILITY, GOVERNANCE AND MANAGEMENT)

2019

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Declaration

I certify that all the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.

(Signature): 荒井優太

(Date): 22 Sep 19

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Abstract

Title of Dissertation: The Interpretation of the Regime of Islands: Application to Okinotorishima

Degree: Master of Science

This dissertation is a study of the legal status of a maritime feature in west Pacific named Okinotorishima, Japan. Article 121(1) to (3) of the 1982 United Nations Convention on the Law of the sea defines the regime of islands. However, these provisions are subject to different interpretations due to its ambiguous language, in particular Article 121(3), which defines the criteria for a rock that cannot generate an exclusive economic zone and continental shelf. Currently, Japan interprets Article 121 in a way to enable itself to claim full maritime entitlements from Okinotorishima.

Trough investigating general principles of treaty interpretation and the negotiation history of the law of sea that established the provisions on islands, this study attempts to identify the implicit meanings of the provisions. After reviewing the geographical and historical facts of Okinotorishima, this study examines the arguments against the Japanese claims made by neighboring states. This study then analyses the Japanese claims and interpretation of Article 121. This study concludes with a critical view of Japanese claims and a legal status of Okinotorishima.

KEYWORDS : Okinotorishima, UNCLOS, Rocks, Artificial islands, Uninhabited islands, EEZ, continental shelf, Human Habitation, Economic Life of Their Own.

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List of Abbreviations

CLCS	Commission on the Limits of the Continental Shelf
ECS	Extended Continental Shelf
EEZ	Exclusive Economic Zone
ICJ	International Court of Justice
ILC	International Law Commission
ROK	Republic of Korea
UK	United Kingdom
UNCLOS	United Nations Convention on the Law of the Sea
US	United States

List of Treaties

Treaties

Convention on the Territorial Sea and the Contiguous Zone (29 April 1958)

Convention on the Continental Shelf (29 April 1958)

Vienna Convention on the Law of Treaties (23 May 1969)

United Nations Convention on the Law of the Sea (10 December 1982)

Chapter 1 Introduction

1.1 Background of research

There is an atoll called Okinotorishima in the west Pacific. This atoll has two rocky "islands" inside its lagoon. Japan effectively occupies Okinotorishima and considers it as an island (Ministry of Land, 2011).[1] Furthermore, an exclusive economic zone (EEZ) and a continental shelf were established by Japan for the marine entitlements based on Okinotorishima. In addition, Japan has continued to strengthen the claim that Okinotorishima is an island.

However, such Japanese assertion does not gain consensus from the international society. In fact, more than one neighboring states expressed their objections to the Japanese claims and practices.[2] They argued that Japan insists on the self-beneficial interpretation of the regime of islands under the Law of the Sea.

The reason for such argument about Okinotorishima originates from ambiguous language of Article 121 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS). The provision includes three paragraphs to give the meanings of definition and qualification as the regime of islands, including a sub-category of islands – rock that has a special legal status or reduced maritime entitlement.

[1] The whole of atoll and the two rocky "islands" is often referred to as Okinotorishima in a lump. Yet, a rocky feature of them should be recognized as Okinotorishima when the island status is argued.
[2] See section 3.3

Nevertheless, there are difficulties in understanding the stipulations with regard to islands due to its ambiguity. In fact, a scholar illustrated Article 121 as a complete recipe for struggle and confusion (Brown, 1978).

Thus, the interpretation of Article 121, the regime of islands, has become a problem in the Law of the Sea. In particular, the definition of marine entitlements of rocks in Article 121(3) has produced various arguments to interpret which rocks have marine entitlements. In fact, Oude Elferink (1998) emphasized that Article 121(3) holds a number of complex issues of interpretation. Accordingly, Okinotorishima is now a symbolic example of interpretation issues of Article 121(1) and (3) with confusion.

Therefore, it is significant to examine the arguments of interpretation of Article 121 to clarify the legal status of Okinotorishima. Furthermore, Japanese practical actions for Okinotorishima could legitimate the Japanese claim.

1.2 Research questions and objectives

This study is based on research questions as follows:

- What kinds of arguments and practice have been presented with regards to the regime of islands so far?
- How has Article 121 been established in the negotiating history?
- Is Okinotorishima an island or rock under the definition of UNCLOS?
- What kind of actions are effective to fortify Japanese claims?

By answering these questions, this study intends to achieve the following objectives as follows:

- To clarify the negotiation process of the regime of islands.

- To analysis the implicit meanings and requirements of Article 121(1) and (3).
- To define the legal status of Okinotorishima.
- To identify the legitimate actions that Japan may undertake towards Okinotorishima.

1.3 Outline of this dissertation

This study includes five chapters.

Chapter 2 surveys the basic principles of treaty interpretation, which are found in the 1969 Vienna Convention on the Law of Treaties. Then, it analyses Article 121 through investigating the negotiation history and examining phrases stipulated in the provision. The purpose of this chapter is to discover why and how Article 121 is vague and also to clarify the criteria for a marine feature to be islands and rocks having different marine entitlements.

Chapter 3 looks over the characteristics of Okinotorishima and the related arguments between Japan and other states. This chapter furnishes fundamental information of Okinotorishima for legal analysis in the following chapter.

Then, Chapter 4 reviews the Japanese interpretation of Article 121(1) and (3). After that, it analyses the possibility to justify Japanese practices for Okinotorishima. Based on those reviews and analyses, Chapter 4 defines the legal status of Okinotorishima by applying the interpretation of Article 121. Moreover, this chapter discusses the current and future risks of legal qualification of Okinotorishima due to climate change and other natural disasters.

Finally, Chapter 5 concludes this study. A clarified legal regime of islands is needed to develop ocean governance. In addition, this study recommends that Japan should

define Okinotorishima as rocks and take legitimate actions according to international law to best protect its national interests.

Chapter 2 interpretation of Article 121(1) and (3)

The purpose of this chapter is to analyse the meanings of Article 121(1) and (3). First of all, the general principles of treaty interpretation are observed. Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties were stipulated after the provisions were developed from the customary law. Next, a review of the establishment process of the regime of islands follows. The background, which was found in the negotiation history of Article 121(1) and (3), is helpful to understand the potential meanings of the provisions and implicit intention of parties participating in the negotiation. Then, the final section in this chapter tries to clarify the interpretation of each term of Article 121(1) and (3). Such is the outline of this chapter. Thus, this study tries to clear the meanings of Article 121 of UNCLOS obtains.

2.1 General principles of interpretation

The wording in treaties should be easy to apply it into the real world. However, states often face problems how to interpret terms selected in provisions. While treaty interpretation had been conducted as an international customary law, the Vienna Convention on the Law of Treaties defined general principles of interpretation as follows:

Article 31. General rule of interpretation

1.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.

2.The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3.There shall be taken into account, together with the context:
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.
4.A special meaning shall be given to a term if it is established that the parties so intended.

Article 32. Supplementary means of interpretation
Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
(a) Leaves the meaning ambiguous or obscure; or
(b) Leads to a result which is manifestly absurd or unreasonable.

Thus, Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties provide general rules for interpretation of treaties. These rules are recognized as primary standard for treaty interpretation.

In the past, Fitzmorris (1951) divided ways of treaty interpretation into three categories from the schools of thought: “the ordinary meaning of the words school, the intentions of the parties school, and the aims and objects school.” He also emphasized the

necessity of a composite attempt to reach and establish appropriate treaty interpretation. In fact, Articles 31 and 32 of the 1969 Vienna Convention reflects all of these approaches.

However, the ordinary meaning of the words should be considered firstly. In fact, the judgement of the Libya v. Chad Territorial Dispute Case by the International Court of Justice (ICJ) (1994) showed that "interpretation must be based above al1 upon the text of the treaty." To seek implicit intention of parties, the ICJ mentioned other elements like the negotiation history of the treaty to understand its background.

2.2 History of the regime of islands

The following sections examine the negotiation history of the regime of islands with refer to studies by Kwiatkowska & Soons (1990), Jacovides (2014) and Park (2009). The UNCLOS was adopted at the final Conference of the UNCLOS in 1982 after 10 years of negotiations, and it entered into force in November, 1994.

First of all, the provisions of Article 121(1) and (3) are as follows:

> *Article 121 Regime of islands*
> *1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.*
> *3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.*

This provisions define the qualifications of islands and marine entitlements of rocks. This study classified the history into four stages.

2.2.1 The 1930 League of Nations Codification Conference at the Hague

2.2.1.1 The first definition of islands in 1930

At the earliest stage, the 1930 League of Nations Codification Conference at the Hague was the first time to define the notion of an island in customary law. In the conference, it was decided that all high-tide elevations can be considered as islands (Jacovides, 2014).

According to a study by Van Dyke and Brooks (1983), during the discussion in this conference, ideas to limit islands were introduced. Firstly, a group of states consisting of the United Kingdom (UK), Australia and South Africa proposed the four phrases to define islands in their primary drafts, which were *"surrounded by water"*, *"permanently above high water"*, *"in normal circumstances"*, and *"capable of occupation and use"*. Secondly, the United States (US) and other states attempted to adopt three other phrases including *"any naturally formed part of the earth's surface"*, *"projecting above the level of the sea at low tide"*, and *"surrounded by water at low tide"*. Thus, some of these ideas became the basis for the current definition of islands.

However, at that time, it was difficult to establish consensus for all of the words. Consequently, the first regime of islands in the Final Act of the 1930 Conference was concluded as:

> *Every island has its own territorial sea. An island is an area of land, which is permanently above high-water mark.*

As a result of that, all high-tide elevations were considered as an island. In other words, there was no categorization between islands and rocks. This was the primary defined norm of islands introduced in 1930.

2.2.1.2 The sixth session of the International Law Commission in 1954

After the conclusion with the first definition of islands, some scholars raised their other definitions concerning islands. According to Van Dyke and Brooks (1983), two arguments were proposed, which led to the current norm of rocks in Article 121(3).

First, Gidel, a French principal authority on the Law of the Sea, pointed out the viewpoint of human habitation on islands. He proposed his own draft with a new requirement to islands, which was *"natural conditions of which permit the stable residence of organized groups of human beings"* (Soons, 1974). Although the scale of such group was undefined, human habitation was firstly mentioned. This is the origin of the criterion for the human habitation, which mentioned not an actual situation but the capability to make people live there. Furthermore, it associated the remarkable word, *"stable"*.

Another argument was about the capability of occupation, control and use for islands. Johnson suggested that the "area of land" should be replace with *"appreciable surface above the sea visible in normal weather conditions"*. Namely, he tried to put *"a mere pin-point rocks"* into a different category from islands. In fact, the sixth session of the International Law Commission (ILC) in 1954 discussed firstly the criteria of capable occupation and use toward the amendment to make a limit of qualification of islands

On the other hand, Francois, a special rapporteur of the ILC, illustrated his contrary opinion against Johnson's proposal. He opposed to add the requirement of occupation, control and use because of the possibility for rocks to be used as radio station or a weather observation facility; therefore, all rocks could meet such requirement to be capable of occupation and control (Kwiatkowska & Soons, 1990).

Against Johnson's proposal of the new idea, his attempt was rejected. In this point, the commentary in the report of the ILC to the General Assembly (United Nations, 1956) described that a different phrase should be added, which was "in normal

circumstances". In fact, it was instead of the "natural condition" proposed by Gidel. That is,

> *Every island has its own territorial sea. An island is an area of land, surrounded by water, which in normal circumstances is permanently above high-water mark.*

Moreover, the commentary indicated to accept Francois' warning, which showed that it was out of qualified islands that elevations submerged at high tide but appeared above water at low tide even if a lighthouse were stationed on them.

2.2.2 The 1958 United Nations Conference on the Law of the Sea at Geneva

In this stage, a definition of islands was formed the same as the present phrases, "a naturally-formed area of land, surrounded by water, which is above water at high tide." This text was stipulated in Article 10(1) of the 1958 Convention on the Territorial Sea and the Contiguous Zone, and furthermore, Article 1 of the 1958 Convention on the Continental Shelf. Thus, these Conventions considered any elevations which are above water at high tide as islands (Jacovides, 2014).

However, another argument of a definition of rocks was still discussed. Van Dyke (1983) mentioned threats to diminish the freedom of high seas when all high-tide elevations gained the continental shelf. In fact, similar claims were raised in these conferences from both of France and the UK delegations.

Firstly, Scelle, a French delegate, disagreed that all islands can have continental shelfs as their marine entitlements. For example, he asserted that "the smallest rock or the merest patch of sand" should not be treated as islands as the basepoint of the continental shelf. Moreover, Kennedy, a UK delegate, pointed out the concern that the provision included no criteria rating high-tide elevations by size, position or political importance. He believed they should be useful to adequately standardize

them (Alexopoulos, 2003). In other words, a necessity of categorization was stressed stronger than before to distinguish islands with marine entitlements or not to.

In supporting these claims, Van Dyke (1983) focused on the distance between a coastal mainland and specific island and mentioned an inequality among states, especially to gain a marine entitlement due to having remote high-tide elevations far away from a mainland.

Thus, although the definition of islands was formatted as same as the current one in 1958, it was still a concern to divide high-tide elevations into categories of marine-entitlements qualified or unqualified islands.

2.2.3 The Sea Bed Committee, 1972-1973

Since 1971, the Subcommittee meeting of the Sea-Bed Committee started to discuss the issues of the Law of the Sea including the territorial sea and the continental shelf. In particular, an attempt to collect information and issues was conducted to lighten the practical problems concerning islands in the world from the viewpoints of size, location, population and islands-related waters.

In the 1973 Sub-committee, the African Unity proposed their new idea. It was an attempt to include a fair principle for the nature of islands-related waters by taking up all of the relevant factors and special situations such as size, population, geological circumstance and the specific interests of each island (Jacovides, 2014). The argument was accelerated regarding how to deal with uninhabited, remote or tiny islands. (Alexopoulos, 2003). Furthermore, the term for rock was introduced for the first time. the African Unity proposed the definition of rock as follows:

> *A rock is a naturally formed rocky elevation of ground, surrounded by and above water, which is above water at low tide*.

From this proposed definition, a rock was considered as a maritime rocky feature under the group of islands. Moreover, Turkey added a comment to a rock's characteristics which was a rock and low-tide elevations cannot be considered to have their own waters.

Thus, as a result of the argument, it was clearly separated into two parties when the committee concluded. One was a group who claimed to take various and special circumstances of each island into account. The other group held a claim that equal treatment for islands was important (Jacovides, 2014).

2.2.4 The third United Nations Law of the Sea Conference, 1974–1982

2.2.4.1 The Caracas session in 1974

According to a study by Jacovides (2014), four main proposals were raised by parties in the negotiation in Caracas, 1974 to discuss the regime of islands. The issue was about arguments regarding equal versus individual treatments on islands.

First, Malta proposed that the figure-based criteria which ruled that islands were more than 1 km^2. Furthermore, Malta had the new idea that an "islets" was high-tide elevations of less than 1 km^2. Romania also proposed a similar idea but with a limitation as "naturally formed" less than 1 km^2 should be considered as an islet, not an island. Besides, an island should be required the size of more than 1 km^2 and have both an economic and social function.

Second, Turkey provided the size-proportion idea. Turkey tried to produce a category of islands whose size were at least one tenth of the whole of the state's land area and also population of one tenth of a total population of the state.

Third, African states attempted to classify an island into three categories, which were an entitled island, an islet and a rock. Their proposals included that an island was a

"vast naturally formed area of land", an islet was a "smaller naturally formed area of land" and a rock was still "a naturally formed rocky elevation of ground". Furthermore, these should all be surrounded by water and above water at high tide.

Finally, several states, for example Cyprus, refused any proposals to make classification of islands. In addition, Greece stated that islands need to be treated equally because each island is independent in importance. Other states like Denmark strongly supported such claim. This was a party trying to reject any limitations to islands.

In 1973, Greece put forward a proposed definition of an island which reflected those arguments but no additional requirement was added. Thus, a draft provision proceeded with no change until 1982. The drafted definition of islands as follows:

> *a naturally formed area of land surrounded by water which is above water at high tide*

Furthermore, the original stipulation of a rock's marine entitlement was formed in 1974 (Kwiatkowska & Soons, 1990). The definition was:

> *Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.*

2.2.4.2 The New York Session in 1982

Like the proposals above, some attempts were conducted in this final session.

During the final conference in New York, 1982, the UK claimed to deny any ideas to make a classification of islands by size, population, position, distance from the mainland or political status. Furthermore, the UK requested to delete the provision in the same way as the current Article 121 (3).

On the other hand, Romania claimed to add a new paragraph. Romania emphasized the establishment of size-based and habitation-based criteria between islands and islets. The proposal defined a standard to distinguish them by its size at more than or less than 1 km^2 and also to eliminate the uninhabited feature from a basis of marine entitlements. Furthermore, Romania stated that "state practice, customary law and international legal theory demonstrated widespread agreement on the need to distinguish clearly between islets and rocks". In other words, The core objective of Romania was a warning of a risk for coastal states self-beneficially to declare to put marine common resources under their control.

However, even though there was the warning, no further changes were eventually agreed for Article 121 from 1979 to 1982. Thus, Article 121 was adopted as a regime of island in 1982 (Alexopoulos, 2003). The islands were defined in article 121(1) and the criteria of entitled rocks was shown in Article 121(3). Thus, the negotiation history showed there were concerns and warnings to limit states' self-beneficial claims before making a definition. Although some attempts to introduce limitation of qualification of islands or to make terms clearer were discussed, the ambiguity of Article 121 has remained as a result from different interests of coastal states (Jacovides, 2014).

2.3 Interpretation of each term

2.3.1 A naturally formed area of land

When approaching the interpretation of "a naturally formed area of land", there are two aspects to consider.

One is about the opposite idea of "natural", which is "artificial".

The word, “natural”, indicates to exclude the artificial island from granting its entitlement. In related to this, Article 60(8)[3] of UNCLOS clearly denies that the artificial island cannot have a qualification of island.

According to Symmons (1979), it has been discussed whether artificial islands or installations should be qualified island status since the early stage in the negotiation history of the regime of islands. For instance, Germany and the Netherlands insisted on the entitlements of islands for artificial installations in the 1930 Hague Codification Conference. However, the argument was rejected.

Furthermore, for example, the South China Sea Arbitration Award (Permanent Court, 2016) indicated this point as follows:

> *the inclusion of the term “naturally formed” in the definition of both a low-tide elevation and an island indicates that the status of a feature is to be evaluated on the basis of its natural condition. As a matter of law, human modification cannot change the seabed into a low-tide elevation or a low-tide elevation into an island. A low-tide elevation will remain a low-tide elevation under the Convention, regardless of the scale of the island or installation built atop it.*

Therefore, artificial structures like lighthouses and platforms are considered as artificial islands. For this reason, they cannot have status of islands.

Another aspect is about the requirements for the material forming or expanding the land, and also about the formation process. The same Award of South China Sea Arbitration showed a viewpoint about the modification to maritime features, in particular materials and scale of modification, as follows: “... Many of the features in the South China Sea have been subjected to substantial human modification...”,

[3] Article 60(8): “Artificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.”

additionally followed by the mention to the material as “in some cases, it would likely no longer be possible to directly observe the original status of the feature, as the contours of the reef platform have been entirely buried by millions of tons of landfill and concrete.”, and finally its conclusion as ” In such circumstances, the Tribunal considers that the Convention requires that the status of a feature be ascertained on the basis of its earlier, natural condition, prior to the onset of significant human modification. The Tribunal will therefore reach its decision on the basis of the best available evidence of the previous status of what are now heavily modified coral reefs.”[4]

With respect to Award of South China Sea Arbitration’s language, the reclamations of maritime features by growing the same material could satisfy “naturally formed”. Indeed, only when achieving the height of the top of land above sea water at high tide, the land could meet the requirement of this term.

In fact, there was a Tonga’s practice in the Pacific, which is called “Minerva Reefs”. In 1971, the coral reefs a low tide elevation were exposed above the sea surface after the government of Tonga had uplifted these natural coral reefs. Then, The area of land was named “Teleki Tokelau and Teleki Tonga ” as reef islands. Eventually, Tonga established the EEZ around the reef islands (Horn, 1973).

On the other hand, it might call for the argument when the original status is modified forcibly. For example, if a measure is taken to pump out all the water inside after incasing a low tide elevation by concrete walls, such process should not satisfy the criteria of “naturally formed” (Kwiatkowska & Soons, 1990).

Additionally, there is an extra recent topic. Small island developing states are facing to submerge their own islands because of the threats of sea level rise globally (Gagain, 2012).

[4] Underlines are added.

Therefore, invasive materials to the original condition and the scale of factitious treatment are the subjects to consider. In addition, there is a crucial need to treat islands having a risk of submergence, which should also be discussed.

2.3.2 Surrounded by water

This term, “surrounded by water”, means a requirement of a geographical position. That is, the inland needs to be independent from the coast of the mainland. Besides, Schofield (2009) mentioned that an area of land offshore which is linked with the mainland by a sandbar, for example, is not considered an island but integral part of the mainland. Furthermore, Symmons (1979) evaluated this meaning of the term “Needless to say”.

However, this basic phrase should be noted because islands must touch sea water at the rim. That is fundamental premise.

2.3.3 Above water at high tide

The criteria of “above water at high tide” requires an appearance of the figure under the condition of the highest sea level.

However, this includes a problem which is not limited to methods to measure the tidal level. Although tidal level flexibly changes even within a day or the season, in addition, there are meteorological or astronomical conditions. there is no universal method adopted to determine the water mark at high tide. This issue leads to the argument of credibility of tidal data for determination of water marks. Therefore, it is most important to conclude the water marks for the highest in regard to islands (Schofield, 2009).

In fact, there are various hydrographical standards to be utilized. No specific treaty or rules are prepared to define the standard. Therefore, coastal states can select their own and reasonable standard. Schofield (2019) pointed out this problem that no universal standards are used. He stated that this is possibly a potential problem of dispute.

For instance, in the 1977 UK/France Delimitation of the Continental Shelf case, the UK asserted the “mean high water spring tide” is applicable for the Eddystone Rock to achieve to gain a status of an island. On the contrary, France opposed such British favorable criteria. France insisted on the standard to apply was “the permanently most highest tide”. After the arbitration, the Eddystone Rock was considered to the low tide elevations (Symmons, 1979). Therefore, French method was approved.

Another case in point is the territorial and maritime dispute between Nicaragua and Colombia in 2012, whereby the Colombian method used the Highest Astronomical Tide for the disputed maritime feature, Quitasueño. Yet, the calculations by the method was judged as insufficient to prove the data of few centimetres of sea level at high tide. Consequently, the International Court of Justice (ICJ) adopted another method which was used by Nicaragua, namely the “‘Admiralty Total Tide Model” (International Court, 2012).

Thus, although the high water mark is required in the Article 121(1), there is still room to discuss and to determine the tidal level. This is fundamental problem that should be solved.

2.3.4 Cannot sustain

This phrase means the capability of rocks to maintain the following criterion. Hence, the required point is evidence of such possibility.

This phrase instead of “do not sustain” indicates the capacity of rocks, not for the factual situation on it. Therefore, the permanent existence of human beings was not expected (Kwiatkowska & Soons, 1990). However, the Award of South China Sea Case Arbitration showed that “historical facts of actual residence and economic activity in the past are evidence of such ability” (Permanent Court, 2016).

In this point, the capability of rocks depends on the size, figure, resources to survive or external threats at the time. In fact, sea level rise due to climate change or cumulative forces from severe rains and waves can impacts a rock’s situation. Furthermore, the development or innovation to support human residence can change over time (Tanaka, 2015). Therefore, it is needed to show clearly the evidence of current and future feasibility to live on the rock.

2.3.5 Human habitation

For the criteria of “human habitation”, it is need to examine four elements. These are time, period, scale and configuration. In related to any factors, two key words should be recognized, which are “capability” to sustain human habitation and its “stability”.

First, the fact of habitation at the present is appropriate for evidence of the capacity. On the other hand, the one in the past should associate with a reason of uninhabited situation then and what changed. Besides, when showing the ability to make people live on a specific rock in the future, persuasive evidence is necessary. In fact, the Clipper island case showed that the fact of habitation at the present brought the EEZ to France, which was with no investigation for another criterion, “economic life of their own”.

Second, ample or permanent period can be allowed to conform the term temporary stay because instability seems to be included in the temporary stay despite the fact that there is possibility to survive. In other words, a period which can demonstrate

the stability is necessary. Therefore, a period which reminds residents about when they unavoidably discontinue their stays on rocks should be evaluated difficult to consider, to enable and to inhabit. Accordingly, ample or, more desirable, permanent period is persuasive to fit this criterion for the sense of stable life compared to survival life.

The third element is scale, which means a problem whether the existence of humans should be one or more. the inhabitation might be achieved by “a few people” (Yamamoto & Esteban, 2010). However, Van Dyke (1988) stated five people is minimum to make a community. In this point, one is the sufficient number because, subject to a proof of residence of human, it does not need to gather people when showing the fact of presence.

Finally, the other factor is how rocks are shaped. If the word “rock” includes the meanings of from tiny to vast size (Oude Elferink, 1998), it should be formed for a resident to be able to sleep, avoid external threats like heavy rains, gales and severe waves, and remain on rocks. Safety is a minimum need for humans to take any actions. In fact, a premise is already defined to live on rocks surrounded by water. Then, through establishing the fact that humans exist for an adequate period, barriers against safety and stability can be listed such as a lack of sleep, the external threats as noted and a drop which does not mean to cause an injury but to lose presence from rocks. Therefore, rocks should not be steep, narrow or slippery in shape. In addition, it is required that rocks should be free from such storms and even tsunami. In fact, the Rockall in the UK seems to have a lack of stability due to its configuration. Although the UK did not make its view public, the claim was actually withdrawn. As a consequence, the fourth criterion of “human habitation” is the formation of a rock to make it possible to organize a place to sleep safely and stably for an adequate period, even alone.

Therefore, through these investigations, the required elements of "human habitation" are composed of:

- showing evidence of capability to live at the present, or feasibility to live in future.
- living for ample or permanent period.
- existing at least one person
- having a formation to organize a place to sleep safely and stably

Consequently, the meaning of "human habitation" are to secure all of the four objectives: continuity, humans, stability and presence.

2.3.6 Or

As reading literally, these two criteria of "human habitation" and "economic life of their own" can be considered as alternatives to grant rocks an EEZ and continental shelf. In other words, rocks should be able to sustain either "human habitation" or "economic life of their own" for fully entitled islands. As Charney (1999) stated "Only one of these qualifications must be met to remove the feature from the restrictions of Article 121(3)".

2.3.7 Economic life of their own

The attempt to clarify the potential meanings of "economic life of their own" follows in this section. First of all, a plain explanation of this phrase showed the main and basic activities of economic life. These are production, consumption and trade through exchanging values (Ayres & Kneese, 1969).

The first point is to define the meaning of economic life. In association to the words "cannot sustain", there is a viewpoint that the capability to create value is a source of economic life because, when economic activities are conducted, people produce value of goods and services, consume them, and also exchange value with others.

Second, the geographical range of economic life should be allowed to include waters and seabed within 12 nautical miles from rocks. Concerning this, fisheries could take a position of the most available ways to produce value based on islands. Fisheries is also fundamental for coastal states concerning UNCLOS because they have different levels of technology or resources. For that reason, it would be easy and effective to use resources of value creation, which are not only on rocks but also around rocks.

Third, the additional but meaningful term “of their own” is concerned with activities in association with external parties. If trades are conducted with parties outside the 12-natutical-mile range of value creation, the term, “of their own” could not be denied. Some arguments stated that the term expects only an internal economic life. However, trade is an economically essential activity to exchange value and. Therefore, foreign trade with external parties could be accepted even under the term.

The final and most arguable factor is development of technology and innovation. This argument concludes that the more external subjects or human technology are involved, the less an independency of a rock is obtained. For instance, marine protected areas, eco-tourism, mineral resources, power resources of wind, tide, solar, sea current or seawater temperature gap are relatively suitable to activities of economic life because they would be adequate as the capacity to create value (Hayashi, 2007).
In fact, there are existing examples of Aves Islands or Northwest Hawaii Islands （Van Dyke, 1988）.

In addition, knowledge and discoveries could be recognized to have the capability to create value for its information to promote social progress. However, the subject of such activities came from outside so that the rocks might be looked at merely passive. In this point, even if external fishermen or researchers conduct economic activities, also the contribution of rocks could be rated low. Furthermore, unmanned

facilities such as observation posts, satellite tracking bases, runways and berths for autonomous boats are more questionable.

Consequently, economic life requires firstly the capability to create value. Then, the subject unexceeding 12 nautical miles from the rock, the actual economic activities should be tested for the requirement of the term, “of their own”. In conclusion, technological development and innovation will increase confusion.

2.4 Short conclusion

A treaty interpretation is encouraged to comply with the general principles. They showed importance to primarily interpret good faith in accordance with the ordinary meaning of written terms and respect its object and purpose.

The negotiation history illustrated that the argument had continued between the parties concerned about maritime entitlements generated by maritime features because of the impacts on state benefits for huge marine resources such as EEZs and continental shelfs. Consequently, the compromised provisions lead the following generations into various potential interpretations. However, the history told intentions at that time. As a scholar stated, “the language of Article 121 was intentionally left ambiguous because it was impossible to agree on specific standards” (Nordquist, 2012).

In fact, the meaning of the terms of article 121(1) and (3) include potential requirements. This study tried to discover them. Indeed, the qualification of entitled rocks has been never defined but there are actually two written criteria to limit rocks. It is important to be aware of the object and purpose in Article 121(3), which is to refrain self-beneficial invasion from marine common resources in the sea by coastal states.

Chapter 3 Facts of Okinotorishima

The purpose of this chapter is to look over the facts about Okinotorishima. They are shown in the formation of geographical characteristics and the history from the discovery of Okinotorishima to the present. Then, existing arguments about its legal status between Japan and other states are observed. This chapter illustrated there is no objection to the Japanese sovereignty of Okinotorishima but its legal status is arguable.

3.1 Geographical fact

According to official information (Ministry of Land, 2011), Okinotorishima is the most southern territorial land of Japan, which is located in the Western Pacific. It is approximately 1 700 km to the south of Tokyo and approximately 700 km away from the most nearest coast. The position of Okinotorishima is 20°25′ North and 136°05′ East, which is officially indicated in the nautical chart.

Okinotorishima is an isolated atoll developed on top of a steep seamount and holds a 5.78 km² lagoon surrounded by fringing coral reefs submerging at high tide. Yet, there are two naturally formed rocks above water at high tide, a helipad on an artificial island and a building with a lighthouse for an observation base and accommodation inside the lagoon (see Fig 4-1). Japan has about 400 000 km² of EEZ extending from this atoll. The EEZ is larger than the entire Japanese land area (about 380 000 km²).

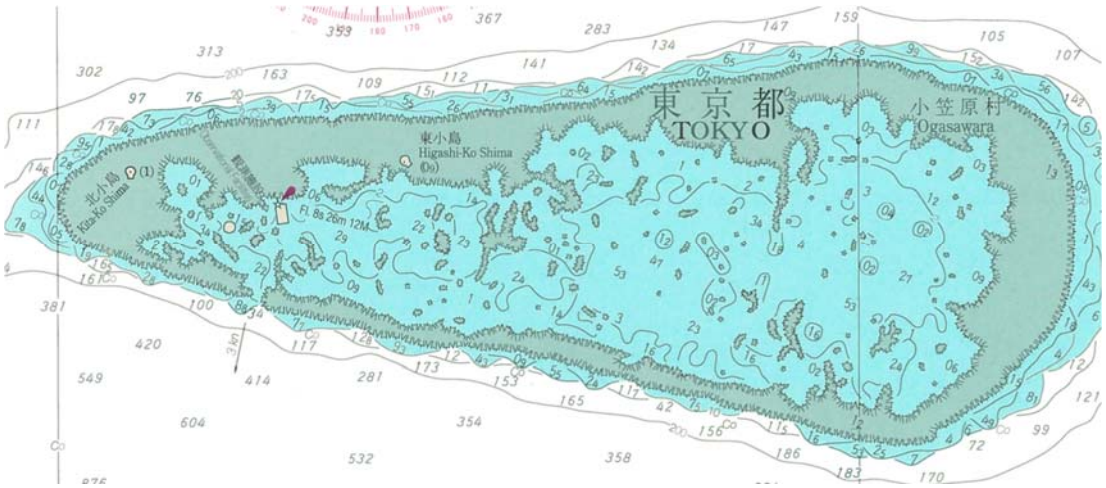

Fig 4-1 Okinotorishima described in the Nautical Chart

Source: Japan Coast Guard (2016)

Fig 4-2 Shape of Okinotorishima

Source: Japan Times (2016) [5]

[5] https://www.japantimes.co.jp/news/2016/07/15/national/politics-diplomacy/japan-steps-rhetoric-okinotorishima-wake-hague-ruling/#.XYjyOi2ANQI

However, according to Song (2010), two rocks are visible about 0.7 meters above sea level at high tide. They are called *Kita Ko Shima* (North Islet) and *Higashi Ko Shima* (East Islet)". The area of *Kita Ko Shima* is 9.44 km² and the area of *Higashi Ko Shima* is 1.58 km². In actuality, these areas are mostly artificial and in particular, the size of the original rocks are described as almost a "king size bed" (Xue, 2011).

It is exposed to severe weather and sea conditions, such as storms and strong waves under the path of a typhoons in the western Pacific. Since these two small islands could be submerged due to erosion, Japan protects them by encasing them with concrete walls and placing iron breakwater blocks. To prevent them from being completely submerged, it has cost over 30 billion yen since 1987. In 1999, the Ministry of Construction began to administrate the maintenance of the Okinotorishima as a state project. Thus, the Okinotorishima is carefully treated by Japan.

3.2 Historical fact

In the reviewing history of Okinotorishima based on studies by Kaji (2011) and Song (2010), the atoll was originally discovered by a Spanish sailor in 1543. He firstly named it *Abre Ojos* (Open Eyes) In the same era, another Spanish sailor seemed to passed near the same atoll and also called it *Parece Vela* (Looks like Candle). The English name, *Douglas Reef*, has been used since after a British sailor, William Douglas, found it in 1789. Japan listed the atoll in its official document, which was the sailing direction issued by the Hydrographic Department of Japan Navy in 1892, as *Parece Vela Reef* or *Douglas Reef*. This is the oldest record that Japan recognizes the existence of the atoll. However, no states claimed the sovereignty over the atoll because the concept of EEZ did not exist at the time. Therefore, the atoll was not worth obtaining.

In relation to the end of the World War I, the southern Pacific islands, which had been governed by Germany, shifted to the Japanese administration in 1920. In fact, the naval hydrographic survey ship *Manshu* surveyed the area in 1922. Furthermore, a nautical chart was published describing the *Parece Vela*.

In 1931, Japan officially started to possess the atoll under the name of Okinotorishima. For this claim of sovereignty, Japan confirmed that no states had claimed the ownership and incorporated it to the Japanese territory.

Studies show there were six rocky features appearing above water inside the lagoon in the past. However, researchers found that one of them had completely collapsed due to the possibly impact of a typhoon in 1937.

After the twenty-two-year occupation of Okinotorishima by the United States since the end of the World War II, Japan resumed its possession in 1968 and it is effective till today. In addition to that, Japan established an original “200-nautical-mile fishery area” in the range of outer waters from Okinotorishima in 1977.

Japan signed the UNCLOS in 1983, and then, it was ratified by Japan and entered into force in 1996. In the meantime, the government had taken full-scale surveys to meet the requirement of UNCLOS for having maritime entitlements including the establishment of a Japanese EEZ and continental shelf. In 1987, because there were only two rocky islands remaining above water at high tide, Japan began constructing concrete walls around each natural rock and locating iron breakwaters outward by 1993.

However, a concrete piece of approximately 200 kg collapsed and found near one islands in 1997. Moreover, this block damaged the naturally formed shape of a rock. To prevent further damage to those rocks from above, Japan decided to cover them with titanium wire mesh.

Since 2003, China has criticized the Japanese practices, such as the establishment of the Japanese EEZ in the view point of the interpretation of UNCLOS. On the other hand, Japan started to operate a lighthouse on the artificial basement inside the lagoon to make a fact against such argument.

Consequently, the Japanese Government stated that “Japan has exercised the effectual administration for Okinotorishima since the declaration of possession in the notification of the Ministry of Interior on July, 1931”. In fact, no state has ever challenged Japanese sovereignty of Okinotorishima. However, arguments were raised by neighboring states. It could be doubtful for Okinotorishima to have the marine entitlements of island due to the categorization under the classification between islands and rocks.

3.3 Arguments against Japanese claim

3.3.1 Chinese objection to Japanese Exclusive Economic Zone

China claims that Okinotorishima should be considered as rocks, not an island for the two reasons. One is that Article 121(3) is a subcategory of Article 121(1). In other words, Okinotorishima should be tested not only in accordance with Article 121(1) but also Article 121(3). Furthermore, China points out that these rocks are too tiny to sustain human habitation. Therefore, China criticizes the Japanese claims based on Okinotorishima (Xue, 2011).

Since 2003, China has expressed its opposition for the establishment of Japanese EEZ around Okinotorishima. China has carried out marine scientific research in the waters near Okinotorishima without a consent of Japan. For marine scientific

research within an EEZ, a consent of coastal states is required by Article 246(2) of UNCLOS (Kaji, 2011).[6]

More clear objection was addressed by China in the bilateral meetings in 2003 and 2004. While accepting Okinotorishima was under Japanese territory, China expressed disagreement with the Japanese EEZ (Jacovides, 2014).

Chinese military activities in the Japanese EEZ have been carried out frequently since 2004. Remarkably, a marine scientific research vessel in association with a total of 11 naval destroyers navigated in the EEZ. China stated that the reason for sailing was for marine scientific research regarding the radioactive impact of a nuclear power plant accident along the Japanese coast, 2011 (Kaji, 2011).

3.3.2 Objections to Japanese Extended Continental Shelf

China and the Republic of Korea (ROK) insisted that the extended continental shelf (ECS) applied by Japan was invalid because Okinotorishima has no legal grounds to generate a continental shelf.

In 2008, Japan applied for the Commission on the Limits of the Continental Shelf (CLCS) to issue a recommendation for a proposed ECS by Japan. At that time, four states submitted Note Verbales to the Secretary-General of the United Nations. The contents of the documents submitted by the US and Palau included no objection to the Japanese application. On the other hand, according to Jacovides (2014), China stated that:

> *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*

[6] Article 246(2): Marine scientific research in the exclusive economic zone and on the continental shelf shall be conducted with the consent of the coastal State.

> *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.*

In addition, ROK stated that:

> *the Republic of Korea has consistently held the view that Oki-no-Tori Shima, considered as a rock under Article 121(3) of the Convention, is not entitled to any continental shelf extending to or beyond 200 nautical miles.*

After that, CLCS expressed "The submerged prolongation of the land mass of Japan in this region extends from the land territories on... the Kyushu-Palau Ridge..." in the recommendation to accept the Japanese application. Regarding this statement of the land on Kyushu-Palau Ridge, there is only one Japanese territorial land, which is the Okinotorishima. Therefore, Japan issued an official comment of appreciation to recognize Okinotorishima as a basepoint for the Japanese extension of the continental shelf.

However, CLCS stated additionally that "in this regard, Japan refers explicitly to the following land territories: ... Oki-no-Tori Shima Island on the Kyushu-Palau Ridge". Thus, CLCS did not clearly declare which specific land was considered as the basepoint for that. In addition, China stated that data in the recommendation could be indicated the ECS was an extension of a Japanese main island, too (Kaji, 2012).

3.3.3 Mention in the South China Sea Arbitration Case

The Philippines quoted such Chinese claim to the Japanese ECS in a statement of the South China Sea Arbitration Case, which was described as "strongly and repeatedly protested Japan's effort to claim a continental shelf" (Republic of the Philippines, 2014). Although the same statement showed that "the Philippines does not express

any view on the nature of Oki-no-Tori", it was apparent that the Philippines eliminated a Japanese word *Shima* which means an island.

Then, while the Philippines showed implicitly its attitude, the Permanent Court of Arbitration mentioned nothing regarding Okinotorishima (Nakajima, 2016).

3.4 Short Conclusion

In this chapter, the geographical characteristics and historical background are introduced. Accordingly, it has been no doubt for Okinotorishima to be effective under Japanese sovereignty and naturally formed rocks at the origin. However, today, the two tiny rocks have already been encased. Moreover, China emphasized that theses rocks have no longer have the capability to meet the requirement of Article 121(3). Thus, there are arguments between Japan and coastal states against Japanese claims. It is needed for Japan to support its claims legally. Otherwise, the dispute in the waters around Okinotorishima will possibly escalate.

Chapter 4 Application to Okinotorishima

The chapter analyses the application 121(1) and (3) to Okinotorishima. Based on reviewing the Japanese interpretation firstly and then investigating Japanese actions to legitimate Okinotorishima's marine entitlements, the legal status of Okinotorishima is concluded. This study has a critical view of that and provides advise to Japan reflecting the current figures of two rocks encased with artificial walls.

4.1 Japanese Interpretation

Japan asserted that Okinotorishima has already established its marine entitlement as an island, therefore it generates an EEZ.

According to a study summarizing records by Kaji (2011), this part describes a Japanese interpretation. Japan interprets that the provision of rocks which cannot have an EEZ and continental shelf in Article 121(3) is completely independent from Article 121(1). In fact, at the 145th House of Representatives Construction Committee in 1999, the Director-General of Economic Affairs and Ministry of the Foreign Affairs stated as follows:

> *As the regime of islands under UNCLOS, the island has, in principle, an EEZ and continental shelf. There is no doubt about the fact that Okinotorishima meets the condition required for an island in accordance with Article 121(1). Therefore Okinotorishima is an island.*

In addition, the Director of the River Bureau of the Ministry of Construction stated that:

> *There is no definition of what a rock is in UNCLOS, and for that reason, it is unclear what a rock is. The Article 121(3) is a criteria applying to rocks. The arguments regarding human habitation or economic life of their own is not related to the maritime feature already having an island status.*

In other words, the official interpretation by the Japanese government is that Article 121(1) is a requirement only for "islands", and Article 121(3) handles a completely different category for "rocks" (Yamamoto & Esteban, 2010). Thus, Japan takes such position that rocks are completely out of the category of islands. Therefore, Okinotorishima already satisfies the requirements of Article 121(1) and is not bound by the criteria in the Article 121(3)".

In addition, Okinotorishima is actually on the sea surface even at high tide. Furthermore, it also meets the requirement of "naturally formed". This is because the work to protect the naturally formed island is to maintain the original shape. The current situation already satisfies the requirements for islands. Japan has never artificially created a new island. Furthermore, the original shape of the island has not been changed.

Thus, Japan exercises its practices to enjoy the marine entitlements, upon its own interpretation of the categorization.

4.2 Japanese Actions

When the Japan began to occupy Okinotorishima in 1932, six rocks were recorded as visible above sea surface in the lagoon. Yet, only two of them have remained since 1987. Japan has taken four main actions to fortify its claim, and also defend its claim in case they also are submerged. However, any of following Japanese actions are doubtful enough to support the Japanese claim legally.

First, Okinotorishima is surrounded by concrete walls and iron breakwater blocks around the border between the artificial walls and sea water. Remarkedly, it cost about 30 billion Japanese yen[7] to construct and about 0.2 billion Japanese yen[8] to maintain them annually. Moreover, the artificial walls has a radius of 25 meters so that people need to access the naturally formed rocks walking on a structure apart from sea water. Therefore, it is arguable for Okinotorishima to be surrounded by water.

Second, Japan has implemented a project to promote growth of natural corals on the fringing reef and inside the lagoon. Although the purpose of the project is to create alternative naturally formed lands, precisely, corals can live only below low tide level. That is, natural and living corals never appear above water at high tide (Kayane, 2007). In this point, Japan essentially aims to mount lumps, shells and gravels of dead corals accumulated on natural foundation for generating an reef island. Kayane (2007) illustrated that the Green Island, an island in the Great Barrier Reef in Australia, is one suitable example for Japan. The island was formed by such materials but it had taken for thousands of years indeed. These measures would be potentially arguable because such naturally fragile sediments lead to calls for an artificial protection similar to the present walls for the two rocks. Even if Japan

[7] Approximately 300 million US dollars
[8] Approximately 2 million US dollars

reclaims the lagoon with the same materials brought from another place, a scale of such artificial methods also become a problem.

Third, Japan tries to prove the "economic life of their own" by operating a lighthouse and conducting scientific research with residents in the research base. This is an attempt to legitimate Japanese claims in case Okinotorishima will be clearly categorized as rock. Nonetheless, meteorologists and marine biologists live and work in a facility built up with piles of a building in the lagoon. Needless to say, the building should be considered as an artificial island. In the viewpoint of the meaning of "their own" noted in Chapter two, the action is not supportive to meet the requirement of Article 121(3).

Finally, Japan practically exercises diplomatic appeals. Every time a foreign vessel conducts marine scientific research in the EEZ, Japan issued an official comment to demand a consent based on the right of coastal state. Furthermore, Japanese coast guard vessels control fisheries of foreign boats in the EEZ. In addition, the Japanese application of ECS to CLCS is also to make a fact the Okinotorishima could be considered as a basepoint of marine entitlements. However, these appeals to fortify the Japanese practices are based on a Japanese interpretation of Article 121, in particular the categorization of islands and rocks. In other words, Japanese practices are lack of legal grounds reflected in Article 121(3).

Thus, these actions are doubtful to justify the Japanese claim at the present and in future. In fact, while such practices are repeated, Japan does not answer any legally essential part for an interpretation of issues of Article 121(3).

4.3 Analysis

4.3.1 Baseline

As defined in Article 6 of UNCLOS,[9] the baseline is low water lines of the reef. For the application of Okinotorishima, the outer rim of the atoll should be used for a baseline. Indeed, the most important issue is that the two rocks are still remaining inside the atoll and are considered as an island. That is to meet Article 6 which is "in case of islands situated on atolls". Therefore, the existence of an island is necessary.

4.4 Legal Status of Okinotorishima

4.4.1 Points to discuss

Firstly, Article 121(1) provides the definition of islands. Okinotorishima has been evaluated to satisfy its criteria, which are "a naturally formed area of land", "surrounded by water" and "above water at high tide". This common understanding is supported by its geographical characteristics, as long as the naturally formed and original rocks are tested for the object.

On the other hand, Article 121(3) defines that the maritime entitlements of rocks, which include the limitations for unqualified rocks to meet the two criteria. That is, rocks which applied this limitation cannot have an EEZ and continental shelf. Its limitation are explained with the phrases, "cannot sustain human habitation or economic life of their own". These two phrases are necessary tests to consider rocks (Kwiatkowska & Soons, 1990).

In contrast, Okinotorishima may have an EEZ and continental shelf if it obtains the ability to sustain both "human habitation" and "economic life of their own".

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[9] Article 6 (Reefs): In the case of islands situated on atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea is the seaward low-water line of the reef, as shown by the appropriate symbol on charts officially recognized by the coastal State.

Accordingly, the following part analyses whether Okinotorishima is equiped with the capability of “human habitation” and also “economic life of their own”. This test is conducted by basis on argument of term’s interpretation in the section 2.3.

4.4.2 Application of “human habitation or economic life of their own”

The term “human habitation” includes the four requirement indicated in section 2.3.5 which are continuity, human, stability and presence. In this point, Okinotorishima has no evidence to show the capability of the evidence to live in the past, present and future. Moreover, there are little or no space for a person to stay stably on the each rock. Additionally, the erosion will continue as its history recoded. Artificial expansion does not contribute to justify the application because the criterion is for the original status.

In another criterion, Okinotorishima possibly passes a criteria expressed as “economic life of their own” in future. Remote devices based on technological innovation might be change the situation. However, there is still doubtful and arguable for resources to be considered as the capability to create value. Therefore, it should be judged Okinotorishima does not clearly justified at this term.

Therefore, the legal examination for Okinotorishima should conclude that the Okinotorishima is not currently entitled to have the EEZ and continental shelf under Article 121(3).

4.4.3 Risks to lose the island’s qualification

The only way for Japan to have the EEZ and continental shelf is to keep holding the status of an island for Okinotorishima. As long as Japan can show the evidence to satisfy the three criteria of Article 121(1) including “a naturally formed area of land”, “surrounded by water” and “above water at high tide”, Japan still has an option to

continue its current exercises, which are the own interpretation of categorization between Article 121(1) for islands and Article 121(3) for rocks and those stated practices based on the invalid EEZ.

Furthermore, the arguable points are a possibility that such premise will be shortly be unprovable. At least, two issues can be raised.

One is that the artificial protection for the original rocks possibly raises a doubt to meet the requirement of "surrounded by water". In fact, the current situation of Okinotorishima is placed completely inside the concrete walls and, therefore, no surface remains touching sea water.

Secondly, this fact makes the height of Okinotorishima above water at high tide vague. Although another standard requires to be "above water at high tide", the evidence cannot be illustrated by water marks on the surface of the rocks.

For the reason that there are threats such as sea level rise due to climate change and cumulative impacts of rains, winds and severe waves, Okinotorishima might lose the legal basis of the Japanese claim that Okinotorishima can already be qualified as an island (Yamamoto & Esteban, 2010).

4.5 Short Conclusion

Japan justifies its claims through actions based on its own interpretation which is Article 121(3) and not the subcategory of Article 121(1). Moreover, the criteria established through the negotiation history are ignored by the self-beneficial interpretation. Some actions illustrate the incoherence of Japanese practices. Now the most important thing is to be aware of the implicit background of Article 121(3). It can be found by intentionally unwritten texts. Therefore, it is required that primarily the terms and contexts as well as preparatory work should be respected.

Chapter 5 Conclusions and Recommendations

5.1 Conclusions

The aims of this study were to analyses the true meaning of Article 121(1) and (3) of UNCLOS, to examine the legal status of Okinotorishima, to discuss future issues of islands and to recommend Japanese claims and actions.

There are general principles of treaty interpretation agreed by states that are essential to interpreting the provisions on islands. States need to be mindful that treaty provisions are subject to interpretation which may generate different meanings. States first must interpret the provisions in good faith in accordance with the ordinary meaning in their context and against their object and purpose. If the interpretation leaves the provisions ambiguous, States are encouraged to refer to preparatory works of a particular provision.

The negotiation history of Article 121(1) and (3) explains the background of the establishment of the regime of islands that gives rights and maritime entitlement to coastal states including Japan. It showed the arguments between a group of states trying to expand their maritime interests and another group of states claiming the importance to protect common resources to all states. As a result of that, islands were defined with a sub-category of rocks that enjoy reduced maritime entitlement. However, the phrases used in Article 121(3) to define rocks are ambiguous.

The attempts to interpret article 121(1) and 121(3) requires the examination of each phrases. In particular, the lack of a universal standard of “high tide” means that coastal states can choose any favorable measurement method to define high tide. Additionally, Article 121(3) requires the evidence of its capability of supporting human habitation or economic life of its own. Moreover, this study showed the minimum four needs of rock configuration.

The fact of Okinotorishima illustrates the past and present situations. The arguments about Okinotorishima were caused by its potential maritime entitlement that would allow Japan to claim ownership of marine resources around it. Japan exercises its practices to hold the maritime entitlements generated by Okinotorishima, including conducting artificial treatment for the two tiny rocks in Okinotorishima. However, Japan’s claims and practice received protests from other coastal states like China. Therefore, there is a possibility to escalate a dispute regarding Okinotorishima.

In reviewing the application of Article 121(1) and (3) by Japan, Japan interpreted the provisions as the self-beneficial categorization of islands and rocks. However, Okinotorishima cannot meet the two criteria, both of which cannot sustain human habitation and economic life of their own. Furthermore, Okinotorishima is facing with losing the island’s qualification of island by the Japanese own artificial treatment and the threat of sea level rise due to climate change and other natural disasters. It becomes clear that Japanese claims and actions are not supported by any legal basis, therefore Japan is faced with withdrawing the claims to obtain marine entitlements of Okinotorishima.

5.2 Recommendations

This study illustrated that Okinotorishima cannot not have an EEZ and continental shelf because it does not meet the two requirements of Article 121(3). Moreover,

Okinotorishima already seems to lose the island status from the reason of Japanese intentional treatment like artificial walls, which comes to be doubtful to satisfy the term “surrounded by water”. Therefore, Japanese claims would face a stronger criticism and be undefendable when this Okinotorishima issue is brought to the court to be judged legally.

This study recommends to Japan preparing for the time only one option left. The option is for Japan to withdraw its claim for marine entitlements based on Okinotorishima. If Japan withdraws the EEZ and continental shelf claims around Okinotorishima, other states can enjoy a freedom of high seas and keep protecting a natural sea bed in the waters. It could be beneficial for to international society to protect marine common resources. That also contributes to avoid escalating dispute between neighboring coastal states. Furthermore, Japan can show a national attitude to respect the law of the sea and marine rule-based order. In fact, the UK judged its legitimacy of the Rockall case. That could be evaluated as a sense of appropriate ocean governance.

It is no doubt that Article 121(3) was intended to prevent such invasions like Japanese claims from global common heritages. Even if there are two phrases which cause interpretation problems of the provision, coastal states should mind the primary object and purpose of Article 121. That was expressed by the Danish delegation’s statement in the final sessions of the 1982 UNCLOS Conference and quoted in the Award of South China Sea Case (Permanent Court, 2016):

> *tiny and barren islands, looked upon in the past as mere obstacles to navigation, would miraculously become the golden keys to vast maritime zones. That would indeed be an unwarranted and unacceptable consequence of the new law of the sea.*

Japanese interpretation and attitude are required to respect the law of the sea.

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