Philippines v China — Rocks or Islands under International Law?

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Abstract

On 22 January 2013, the Philippines initiated arbitral proceedings against the People's Republic of China with regards to a dispute concerning the South China Sea. Proceedings were commenced under Part XV of the United Nations Convention on the Law of the Sea *in accordance with the procedure contained in its Annex VII. This article addresses the findings of the arbitrators, delivered in their unanimous award on 12 July 2016, in relation to the categorisation of certain features in the disputed area. Specifically, it aims to conduct a detailed examination of the nine conclusions reached by the arbitrators with regards to their interpretation of art 121(3) of the* United Nations Convention on the Law of the Sea. *This provision is central to the categorisation of maritime features as either 'rocks' or 'islands', the former receiving a 12 nautical mile maritime entitlement as opposed to the latter's 200 nautical miles. Despite the dramatic influence such a categorisation may have on states' maritime entitlements and arguably geopolitical stability, the operation of art 121(3) has not previously been subject to judicial consideration. Thus, the* Award's *art 121(3) jurisprudence, which this article argues is forward leaning and has developed the law, provides much needed clarity for both academics and practitioners.*

I INTRODUCTION AND METHODOLOGY

On 12 July 2016, five eminent arbitrators sitting in The Hague issued a landmark award.[1] It concerned a dispute between the Philippines and the

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1 *South China Sea Arbitration (Philippines v China) (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) ('*Award*'). Presiding was Judge Thomas A Mensah of Ghana, who was appointed the inaugural President of the International Tribunal on the Law of the Sea ('ITLOS') in 1996. Additionally, in recognition of his significant contributions to the International Maritime Organisation, he was awarded the international maritime prize in 2012. Judge Rüdiger Wolfrum of Germany, was the Vice President of ITLOS under Judge Mensah and himself became president from 2005 to 2008. He continues to be a member of ITLOS and has also participated in several ad hoc

People's Republic of China ('China' or 'PRC') involving the South China Sea ('SCS'). The basis of the arbitration was the *United Nations Convention on the Law of the Sea* ('*UNCLOS*' or '*Convention*').[2] On 22 January 2013, the Philippines, feeling it had exhausted its other options, initiated the arbitration under pt XV of the *Convention* in accordance with the procedure contained in its Annex VII. The dispute settlement provisions contained in pt XV of the *Convention* are a binding and integral part of the *UNCLOS*.[3] This reflects the objectives of the *Convention's* drafters, namely, to create a universal and comprehensive code for the law of the sea, to be ratified as a 'package deal' without reservation.[4] As Alan Boyle put it: 'In this context binding compulsory dispute settlement becomes the cement which should hold the whole structure together and guarantee continued acceptability and endurance for all parties.'[5] Notwithstanding the compulsory and binding nature of the proceedings, China refused to participate from the outset. Indeed, China maintained this attitude throughout the proceedings. Nonetheless, 15 submissions were put to the ad hoc Annex VII Arbitral Tribunal (the 'Tribunal').[6] These submissions fell into four broad categories. The first was the source of maritime entitlements in the SCS, especially with regards to historical claims.[7] The second was the categorisation of certain features in the SCS and the maritime zones that they are capable of generating.[8] The third was the legality of certain Chinese actions in the SCS.[9] The fourth was the aggravation and extension of the dispute by China while the proceedings were on foot.[10]

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arbitrations dealing with matters of public international law. Judge Stanislaw Pawlak of Poland has had extensive experience in diplomacy and civil service. He is currently a member of ITLOS and also presided over the 13th meeting of the state parties to the *UNCLOS*. Judge Jean-Pierre Cot of France began his career in academia before entering politics at a French and European level. He has also been a counsel and advocate in several cases before the ICJ, and is currently a member of ITLOS. Professor Alfred H A Soons of the Netherlands is a prominent law of the sea academic. In addition to scholarly pursuits, Professor Soons has experience in both public and private international arbitration. Note that this summary of the arbitrators' achievements is by no means exhaustive.

2 *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

3 See Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (Hart Publishing, 2nd ed, 2016) 483–7.

4 Alan E Boyle, 'Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction' (1997) 46(1) *International and Comparative Law Quarterly* 37, 38.

5 Ibid.

6 See *South China Sea Arbitration (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) ch III.

7 Reflecting submissions 1 and 2.

8 Reflecting submissions 3–7.

9 Reflecting submissions 8–13.

10 Reflecting submission 14.

This article shall focus exclusively on the second category of submissions. Specifically, it will examine the Tribunal's findings vis-a-vis the categorisation of features as either 'rocks' or 'islands' under art 121 of the *Convention*.[11] Importantly, the *Award* is the first comprehensive finding by an international judicial body in this regard. Hence, the overarching aim of this article is the detailed analysis of this nascent jurisprudence. As well as this analysis, the article will argue that the Tribunal adopted an innovative and broad formulation of the 'rocks' or 'islands' test and, in so doing, it developed the law. The article is divided into five sections. Following this introductory section, Section II will provide a background to the *Award* itself. Section III will turn to the background of the Regime of Islands encapsulated in art 121. Building upon this foundation, Section IV will analyse the *Award's* interpretation of art 121(3). Finally, Section V will provide certain concluding remarks, including a discussion of the significant value of this art 121(3) jurisprudence both for the law of the sea and for international dispute resolution generally.

It ought to be noted from the outset that the overall dispute between the parties encompasses both territorial and maritime claims. However, recall that the Tribunal was constituted under the *UNCLOS* and thus could only consider the latter.[12] For this reason, this article, like the Tribunal, will address only the maritime claims. Thus, all reference to parties' 'claims' should be understood in that context.

II *AWARD*: PARTIES' CLAIMS AND PROCEDURAL BACKGROUND

In total there are seven claimants in the SCS, namely: China, the Philippines, Vietnam, Malaysia, Indonesia, Brunei and the Republic of China.[13] For the purposes of this article, only the Chinese and Philippines' claims shall be examined in detail.[14]

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[11] Reflecting Filipino submissions 3, 5 and 7, as well as the jurisdictional basis for submissions 8 and 9. Note that discussion relating to low-tide elevations, reflecting submission 4 and 6, is outside the scope of this article.

[12] The *UNCLOS* deals exclusively with the subject of the law of the sea. It follows that the Tribunal, established ad hoc under the *UNCLOS*, may only consider disputes of this nature. With this in mind, China informally articulated a view that the true nature of the dispute regarded the sovereignty of SCS features. The Tribunal found that, whilst such a dispute between the parties did exist, none of the Filipino submissions concerned sovereignty. Furthermore, it found that implicit determinations as to sovereignty were not required to consider the maritime claims. Hence, this jurisdictional issue did not obstruct the Tribunal. See *South China Sea Arbitration (Philippines v China) (Award on Jurisdiction and Admissibility)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 29 October 2015) [152]–[155].

[13] This article, like the Philippines and the Tribunal, considers that the Republic of China's legal status and rights are derived from the PRC.

[14] It is worth noting that Indonesia, Malaysia and Vietnam were present at the Tribunal hearings as observers.

A *Chinese Claim*

China's claim, whilst not entirely based on it, is best understood in terms of the 'nine-dash line'. The nine-dash line is comprised of nine dashes, which together form a 'U' shaped line that encompasses much of the SCS. The first dash occurs south of Hainan, from which the line proceeds south via two more dashes to Borneo. At this point the line pivots northeast, and the remaining dashes skirt the coast of Malaysia and the Philippines, before concluding at the southern tip of the island of Taiwan. The rights generated by this concept have never been clearly articulated by China,[15] although the consensus view is that it encompasses all features, waters and resources that fall within it.[16] The nine-dash line's purported basis is China's ancient past and it has appeared on several 20th century government maps.[17] However, until recently it remained an internal concept. This changed in 2009, when China appended a map including the nine-dash line to a diplomatic note and claimed 'indisputable sovereignty' over the vast area it encompasses.[18] In so doing, Beijing appears to have departed from its foreign policy of *toaguang yanghui* or 'keeping a low profile'.[19] Indeed, with regards to the SCS, a progressively assertive PRC rhetoric has become evident. [20] The same can be said of China's domestic audience, who are increasingly framing the SCS as a matter of national pride.[21] Accompanying this atmosphere have been increased Chinese patrols, law enforcement, and responses to incidents at sea in its claimed area.[22]

Beijing's growing interest in the SCS is motivated by several factors. China has long considered an 'ocean-going navy' to be a prerequisite for the 'great power status' that it seeks.[23] However, this requires access to the open seas.[24] This explains Chinese artificial island building and militarisation in the SCS,[25] an attempt to put the West Pacific firmly within

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15 *South China Sea Arbitration (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [180].

16 Leszek Buszynski, 'The Origins and Development of the South China Sea Maritime Dispute' in Leszek Buszynski and Christopher B Roberts (eds), *The South China Sea Maritime Dispute – Political, Legal and Regional Perspectives* (Routledge, 2015) 1, 7.

17 Ibid 2–6. Note that it was originally an 'eleven-dash line', with two dashes removed in 1953 as a concession to Vietnam.

18 Permanent Mission of the People's Republic of China, *Note Verbale to the UN SG*, CML/17/2009 (7 May 2009); Permanent Mission of the People's Republic of China, *Note Verbale to the UN SG*, CML/18/2009 (7 May 2009).

19 Buszynski, above n 16, 10.

20 See Irene Chan and Mingjiang Li, 'Going Assertive? Chinese Foreign Policy under the New Leadership' in Zheng Yongnian and Lance L P Gore (eds), *China Entering the Xi Jinping Era* (Routledge, 2015) 257, 258–63.

21 Ibid 266.

22 Ibid 260–1.

23 Leszek Buszynski, 'The South China Sea: Oil, Maritime Claims, and U.S.-China Strategic Rivalry' (2012) 35(2) *Washington Quarterly* 139, 144–5.

24 Ibid 146.

25 This includes the construction of airstrips at or near completion on Mischief, Fiery Cross and Subi Reefs and Woody Island; and various facilities at Johnson, Hughes, Gaven and

their 'sphere of influence'.[26] Moreover, energy security has also been prioritised as a national security interest.[27] Given the suspected presence of significant hydrocarbon reserves in proximity to the Chinese mainland, the SCS is vital to Beijing's new energy security strategy.[28] Additionally, China's survival and prosperity has relied heavily on seaborne trade.[29] Carrying a quarter of the world's trade,[30] the SCS is a major shipping artery and is thus indispensable to Beijing's wealth. Finally, the SCS is a fishery of global significance accounting for 10 per cent of the world's landed catch.[31] China, which regards the area as a preserve for its own fishing fleet, has imposed and enforced an annual fishing ban leading to a marked increase in clashes with other SCS claimants.[32] Indeed, it was a dispute of this nature that proved to be the catalyst for a rapid deterioration in Chinese-Filipino relations.

B *Filipino Claim*

The Filipino claim is based entirely on the rights conferred by the *Convention*, particularly the entitlements generated by their exclusive economic zone ('EEZ').[33] For this reason, the Philippines opposed the historical basis of China's nine-dash line, submitting that a claim must be uniquely based in the *UNCLOS*.[34] Disabling China's nine-dash line is insufficient given Beijing's sovereignty claims over certain SCS features. As will be discussed in Section III, an 'island' under the *Convention* is entitled to significant maritime zones. This could produce a situation in

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Cuarteron Reefs. Note that, besides its consideration in the context of art 121, artificial islands building and land reclamation falls outside of the scope of this article.

26 Buszynski, 'The South China Sea: Oil, Maritime Claims, and U.S.-China Strategic Rivalry', above n 23, 147.

27 Suisheng Zhao, 'China's Global Search for Energy Security: Cooperation and Competition in Asia–Pacific' (2008) 17(55) *Journal of Contemporary China* 207, 208.

28 Ibid 213.

29 Christopher Len, 'China's 21st Century Maritime Silk Road Initiative, Energy Security and SLOC Access' (2015) 11(1) *Maritime Affairs: Journal of the National Maritime Foundation of India* 1, 2.

30 Richard A Bitzinger, 'China's Military Buildup – Regional Repercussions' in Mingjiang Li and Kalyan M Kemburi (eds), *China's Power and Asian Security* (Routledge, 2015) 42, 45.

31 Clive Schofield, 'A Geopolitical Overview of the South China Sea' in Sam Bateman and Ralf Emmers (eds), *Security and International Politics in the South China Sea – Towards a Cooperative Management Regime* (Routledge, 2009) 7, 17.

32 Buszynski, 'The South China Sea: Oil, Maritime Claims, and U.S.-China Strategic Rivalry', above n 23, 143–4.

33 An EEZ grants sovereign rights to explore, exploit, manage and conserve all living and non-living resources of the water column, seabed and subsoil to a distance of 200 nautical miles, see generally *UNCLOS* pt V. Note also that the Philippines has the inherent right to a continental shelf, see generally *UNCLOS* pt VI. However, despite certain differences, the zones' economic rights are essentially identical, and therefore as shorthand reference will only be made to the EEZ.

34 This reflects the Philippines submissions 1 and 2; see *South China Sea Arbitration (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) ch V D.

which PRC maritime zones, generated by their 'islands',[35] may overlap with the Philippines' EEZ. The ensuing boundary dispute would, even in the best-case scenario, reduce Filipino entitlements. This motivated the Philippines' submissions that the Scarborough Shoal,[36] and Johnson, Cuarteron, and Fiery Cross Reefs, are 'rocks' not 'islands'.[37] Furthermore, by requesting declarations about their own EEZ, Manilla 'effectively [sought] a determination that all of the high-tide features in the Spratlys are "rocks"'.[38] Such determinations ensure that the Filipino EEZ remains undisturbed. Therefore, in this context, the classification of features as either 'rocks' or 'islands' becomes pivotal to Filipino interests.

The Filipino EEZ is rich in both living and non-living resources. Indeed, there likely exist huge reserves of lucrative hydrocarbons that fall within the 200 nautical mile EEZ limit.[39] However, as is exemplified by the so-called 'Scarborough Shoal Standoff', fishing is also considered highly valuable. The standoff was sparked in April 2012, when the Philippines dispatched the *BRP Gregario Del Pillar* to prevent Chinese fishing in the Scarborough Shoal, a feature that falls comfortably within the Filipino EEZ.[40] Upon arrival, PRC maritime surveillance ships declared the Filipino naval vessel to be illegally in Chinese waters, ordering it to vacate immediately.[41] It refused, creating a standoff that lasted until mid-June 2012 and concluded only under the pretext of the onset of monsoon season.[42] This caused public uproar in the Philippines,[43] and led to Chinese economic and diplomatic sanctions.[44] For the Philippines, this was a watershed moment highlighting yet again a 'historical pattern of Chinese protracted, low intensity and incremental moves to gain control of a large

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35 Assuming of course legitimate Chinese sovereignty.

36 Reflecting submission 3.

37 Reflecting submission 7.

38 *South China Sea Arbitration (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [393]. Reflecting submissions 5, 8 and 9. Note that this included features that it itself occupies such as Thitu and West York.

39 See Diane C Drigot, 'Oil Interests and the Law of the Sea: The Case of the Philippines' (1982) 12 *Ocean Development and International Law* 23.

40 See Renato Cruz de Castro, 'The 2012 Scarborough Shoal Stand-Off: From Stalemate to Escalation of the South China Sea Dispute? in Leszek Buszynski and Christopher B Roberts (eds), *The South China Sea Maritime Dispute – Political, Legal and Regional Perspectives* (Routledge, 2015) 111, 118–24.

41 Ibid.

42 Ibid 123. It involved at its height: four coast guard vessels plus ten fishing vessels on the Chinese side; and a Bureaux of Fisheries vessel plus a coast guard vessel on the Filipino side.

43 Damian Grammaticas, 'Protest in Philippines over South China Sea Stand-Off', *British Broadcasting Corporation* (online), 11 May 2012 <http://www.bbc.com/news/world-asia-18030805>.

44 Marga Ortigas, 'Scarborough Shoal Stand Off Sparks Protests', *Al Jazeera* (online), 13 May 2012) <http://www.aljazeera.com/indepth/features/2012/05/2012512191343212584.html>.

portion of the SCS'.[45] Fearing the eventual erosion of their claim, the Philippines sought redress under the *Convention*.

C *Procedural History and China's Non-Appearance*

On 22 January 2013, the Philippines commenced arbitral proceedings by Notification and Statement of Claim pursuant to arts 286 and 287 of the *UNCLOS* and art 1 of Annex VII.[46] The Tribunal was constituted on 21 June 2013,[47] and on 12 July 2013 the Tribunal appointed the Permanent Court of Arbitration as its registry.[48] Consistent with the Tribunal's request,[49] the Philippines submitted its Memorial on 30 March 2014.[50] Subsequent to the Tribunal's request for further written argument,[51] the Philippines delivered its Supplemental Written Submission on 16 March 2015.[52] The Tribunal held a hearing on jurisdiction between 7 and 13 July 2015, handing down its award in this regard on 29 October 2015.[53] The merits hearing took place in two rounds on the 24, 25, 26 and 30 November 2015.[54] On the final day of the hearing, the Philippines submitted, in written form, its Final Submissions.[55] Post-hearing, the Tribunal requested further evidence and clarification from the parties as well as more independent expert evidence on certain matters.[56] It also sought both parties' comments on all new material, which the Philippines consistently provided.[57] Finally, after all new material had been considered and responded to, the *Award* itself was issued on 12 July 2016.

At all times during the proceedings, China refused to cooperate and participate. As the Tribunal put it:[58]

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45 De Castro, above n 40, 119.

46 *South China Sea Arbitration (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [28]. Also note that the Statement of Claim was amended to include the Second Thomas Shoal on 11 March 2014.

47 Ibid [30].

48 See *South China Sea Arbitration (Philippines v China) (Administrative Directive No 1)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2013).

49 *South China Sea Arbitration (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [31].

50 Ibid [34].

51 See *South China Sea Arbitration (Philippines v China) (Procedural Order No 3)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 16 December 2014).

52 *South China Sea Arbitration (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [44]. The Tribunal granted leave to incorporate these as amendments on the 16 December 2015.

53 See *South China Sea Arbitration (Award on Jurisdiction and Admissibility)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 29 October 2015).

54 *South China Sea Arbitration (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [69]. Note that for the purposes of this article the relevant Filipino submissions were delivered during the 25 November hearing.

55 Ibid [77].

56 See ibid [84]–[105].

57 Ibid.

58 Ibid [116].

> China did not participate in the constitution of the Tribunal … did not submit a Counter-Memorial … attend the Hearings on Jurisdiction or on the Merits … reply to the Tribunal's invitations to comment on specific issues of substance or procedure, and has not advanced any of the funds requested by the Tribunal towards the costs of the arbitration. Throughout the proceedings, China has rejected and returned correspondence from the Tribunal … reiterating on each occasion 'that it does not accept the arbitration initiated by the Philippines'.

However, China was not silent. Indeed, on 7 December 2014, it published a Position Paper asserting that it would: 'neither accept nor participate in the arbitration',[59] and that the Tribunal 'manifestly has no jurisdiction'.[60] The arbitrators considered this and other communications to effectively constitute pleas concerning jurisdiction.[61] Upon this basis they convened to determine the jurisdictional issues.[62] The Tribunal held, for various reasons, that it did indeed have jurisdiction with regards to submissions 3, 4, 6, 7, 10, 11 and 13, reserving its decision until the merits phase for the remainder.[63] Importantly for this analysis, it found that the dispute was not a boundary dispute,[64] thereby avoiding a jurisdiction bar arising from a 2006 Chinese declaration under art 298(a) of the *Convention*. This jurisdictional determination was crucial in forcing the Tribunal to address and apply art 121, as in the past international judicial bodies have avoided such a difficult task, preferring instead to proceed under the boundary delimitation regime.[65] Regardless, China disagreed with the determinations on jurisdiction, reiterating its aforementioned position in many other public statements, diplomatic notes and diplomatic letters to the Tribunal.[66]

Nonetheless, despite its non-participation, China is a party to the *Convention* and is therefore bound by the Tribunal's awards.[67] However, the arbitrators did not simply enter a default judgment,[68] as they had a special duty to ensure that the claim was well founded in law and fact.[69] In

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59 People's Republic of China, 'Position Paper on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines' (Position Paper, Ministry of Foreign Affairs, 7 December 2014) [1].

60 Ibid [86].

61 *South China Sea Arbitration (Philippines v China) (Procedural Order No 4)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 21 April 2015).

62 See *South China Sea Arbitration (Award on Jurisdiction and Admissibility)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 29 October 2015). It should be noted that this was not limited to the issues raised in the Position Paper, see ibid.

63 It eventually found that it had jurisdiction vis-a-vis all remaining submissions except 14 (a)–(c).

64 *South China Sea Arbitration (Award on Jurisdiction and Admissibility)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 29 October 2015) [155]–[157].

65 Note that examples of such situations are examined in Section III C.

66 See *South China Sea Arbitration (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) ch II.

67 Ibid [143].

68 Ibid [129].

69 *UNCLOS* Annex VII art 9.

line with this duty, they took various measures to ensure procedural fairness for both parties without compromising efficiency.[70] Furthermore, as well as examining jurisdiction, the Tribunal attempted to ascertain China's position based on official Chinese statements and communications, critically reviewed the Philippines submissions, obtained independent expert evidence on a number of issues, reviewed relevant publicly availably materials and invited additional comments from the parties on those sources.[71]

III THE BACKGROUND TO ARTICLE 121

The Regime of Islands is encompassed in its totality in art 121, which reads 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.

2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.

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

A *Drafting History*

The first effort to create a Regime of Islands arose at the 1930 Conference for the Codification of International Law.[72] Later, in 1956, the International Law Commission ('ILC') adopted the 1930 text, with some modifications,[73] in its draft articles on the law of the sea.[74] The ILC definition, again with slight modifications,[75] was relied upon at the First United Nations Conference on the Law of the Sea, becoming art 10 of the *1958 Convention on the Territorial Seas and Contiguous Zone*.[76] During the 1971 and 1972 sessions of the United Nations General Assembly Sea-

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70 *South China Sea Arbitration (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [144].

71 Ibid [144], [129]–[142].

72 Myron H Nordquist et al, *United Nations Convention on the Law of the Sea 1982: A Commentary* (Martinus Nijhoff Publishers, 1995) vol 3, 327. The text read: 'Every island has its own territorial sea. An island is an area of land, surrounded by water, which is permanently above high-water mark.'

73 The phrase 'in normal circumstances' was added.

74 Nordquist et al, above n 72, 327.

75 The phrase 'naturally formed' was added and the phrases 'in normal circumstances' and 'permanently' were deleted.

76 Opened for signature 29 April 1958, 516 UNTS 206 (entered into force 10 September 1964); Nordquist et al, above n 72, 327.

Bed Committee, the subject of islands again arose and was discussed in conjunction with EEZs.[77] In the 1973 session, a number of general principles emerged regarding the definition of an island, as well as the status of different types and the criteria for delimiting maritime space.[78] This laid the foundation for negotiations in the Third United Nations Conference on the Law of the Sea ('UNCLOS III').[79] At UNCLOS III, a small island states' ability to generate large maritime areas was largely uncontroversial given: 'a universal recognition of a special dependence of islands on the surrounding marine environment'.[80] Instead the debate centred on whether rocks or 'small uninhabited elevations' should have the right to an EEZ and continental shelf ('CS'). Indeed, to many states this proposition seemed to contravene the rules of justice, as well as inviting a substantial limitation of the common heritage of mankind.[81] Thus, many states took the position that small uninhabited islands should not be entitled to substantial maritime areas.[82] Although this view was formulated in various ways at different stages,[83] the final text that became art 121 of the *UNCLOS* was produced by the Second Committee's working group on islands.[84] Unfortunately for future commentators and practitioners, this informal committee kept no record of their work.

B *Publicists' Views*

The first paragraph of art 121 of the *Convention*, by describing an island as a 'naturally formed area of land', excludes artificial islands.[85] Furthermore, the specification that an island is 'above water at high tide' excludes such geographic features as low-tide elevations.[86] The second paragraph confirms that islands generate the same maritime zones as other land territory and that this is to be determined 'according to the Convention and in the same manner applicable to other land territory'. [87] Whilst there has certainly been scholarly disagreement as to the interpretation of the first and second paragraph,[88] it is the third paragraph that sits at the provision's

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77 Nordquist et al, above n 72, 321–2, 327–8.

78 Ibid 322.

79 Ibid.

80 Janusz Symonides, 'The Legal Status of Islands in the New Law of the Sea' in Hugo Caminos (ed), *The Library of Essays in International Law: Law of the Sea* (Ashgate Dartmouth, 2001) 115, 116.

81 Ibid.

82 This includes Columbia, Romania, Malta and a group of 14 African states.

83 For example Malta suggested that a feature requires a surface area greater than one square kilometre to escape categorisation as an 'islet' and Turkey proposed that only an island with a surface area equal to at least a tenth of its governing state should acquire an EEZ and CS.

84 Nordquist et al, above n 72, 335.

85 Ibid 338. Note that artificial islands are dealt with in arts 11, 60, 80 and 147(2) of the *Convention*.

86 Ibid. Note that low-tide elevations are dealt with in art 13 of the *Convention*.

87 Ibid.

88 See generally Clive R Symmons, 'Maritime Zones from Islands and Rocks' in S Jayakumar, Tommy Koh and Robert Beckman (eds), *The South China Sea Disputes and*

core.[89] Article 121(3) explains that 'geographic formations similar to islands do not generate an exclusive economic zone or continental shelf'.[90] However, while the text produced at UNCLOS III demonstrates an overall consensus vis-a-vis distinguishing between rocks and islands, its interpretation was left in doubt. For example, it is unclear whether the geomorphological nature of the feature has to be taken into account.[91] In other words, should rock be read literally in terms of its geomorphology? Additionally, does the exploitation of living resources in the feature's surrounding waters amount to 'economic life', or does it not?[92] It is also unclear whether the requirements of 'economic life' and 'human habitation' should occur separately or concurrently.[93] Moreover, must a feature be constantly inhabited and used for economic purposes or is transient use enough?[94]

C *Relevant Jurisprudence*

Prior to this *Award*, jurisprudence had not alleviated these interpretational issues. Indeed, the International Court of Justice ('ICJ') has only applied art 121 of the *Convention* in the *Territorial and Maritime Dispute (Nicaragua v Colombia) (Judgment)*.[95] On no other occasion has an international court or tribunal attempted an application of art 121. However, even in *Nicaragua v Columbia* the Court only applied art 121(3) to Quitasueño, a 'minuscule' feature boasting a sole protrusion above water at high-tide.[96] As both parties agreed that the feature was at best a 'rock' for the purposes of art 121(3), the ICJ found that the feature had no entitlement to an EEZ or a CS.[97] Therefore it was not necessary for the Court to reconsider the issues of interpretation raised in the previous section. However, the case did shed light on the issue of geomorphology, saying: 'International law defines an island by reference to whether it is "naturally formed" and whether it is above water at high tide, not by reference to its geological composition'.[98]

Whilst not applying art 121 of the *Convention* itself, international courts and tribunals have often considered the relevance of art 121(3) type features and their impact on maritime boundary delimitation. When considering these 'special circumstances', the judicial intention appears to be to minimise 'the effects of an incidental special feature from which an

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Law of the Sea (Edward Elgar Publishing, 2014) 55, 66–93 for a review of publicists' opinions on the subject.

89 Nordquist et al, above n 72, 335.

90 Ibid 326.

91 Symonides, above n 80, 119.

92 Ibid.

93 Ibid.

94 Ibid 119.

95 [2012] ICJ Rep 624 ('*Nicaragua v Colombia*').

96 Ibid 644. Note that the protrusion was named QS 32 in the case.

97 Ibid 693 [183].

98 Ibid 645 [37].

unjustifiable difference of treatment could result'.[99] Indeed, in *Continental Shelf (Libyan Arab Jamahiriya v Malta) (Judgment)*[100] and *Second Stage of the Proceedings between Eritrea and Yemen (Eritrea v Yemen) (Maritime Delimitation)*,[101] insignificant and uninhabited features were ignored for the purposes of delimitation due to their barren and inhospitable character.[102] Moreover, maritime boundary delimitation decisions have shed light on the relevance of military garrisons when considering a feature's habitability. For example, in *Maritime Delimitation in the Black Sea (Romania v Ukraine) (Judgment)*,[103] the ICJ enclaved a Ukrainian feature named Serpents Island within a 12 nautical mile territorial sea facing Ukraine's boundary with Romania.[104] In a similar vein, again in *Nicaragua v Colombia* the Court felt that Serrana Cay's 'small size, remoteness and other characteristics meant that, in any event, the achievement of an equitable result requires that the boundary line follow the outer limit of the territorial sea around the island'.[105] Thus, various maritime boundary delimitation decisions have revealed an unwillingness to take into account small, barren features, often inhabited solely for official purposes if at all.

D *State Practice*

State practice towards this provision has been varied. On the one hand, there have been examples of states giving up large maritime claims based on small art 121(3) type features. One such example is the United Kingdom's behaviour vis-a-vis Rockhall, a barren feature in the North Atlantic.[106] Initially, it had proclaimed a 200 nautical mile fishing zone from the feature. However, upon accession to the *Convention*, it reduced that claim to a 12 nautical mile territorial sea. As justification, it conceded that, notwithstanding fishing activities, the feature was incapable of

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99 *North Sea Continental Shelf (Federal Republic of Germany v Denmark) (Judgment)* [1969] ICJ Rep 3, 49–50 [91].

100 [1985] ICJ Rep 13.

101 (1999) 22 RIAA 335.

102 Filfla, a Maltese feature, was taken to be an 'uninhabited rock' and thus ignored in the delimitation. Furthermore, Jabal al-Tayr and the Zubayr Islands, Yemeni features, were not taken into account by the Arbitral Tribunal given their position out to sea as well as barren and inhospitable nature. By contrast, Eritrean features with the capacity to support economic life and human habitation were given full effect.

103 [2009] ICJ Rep 61.

104 Ibid 123 [188]. The feature is almost barren and the inhabitants are government personnel performing official functions. They rely on regular supplies, especially water, to survive.

105 [2012] ICJ Rep 624, 715 [238]. Serrana Cay boasts: some vegetation; a water supply; a Colombian Navy heliport and lighthouse; and a base for Colombian marines to launch counter-drug trafficking and illegal fishing patrols. The Court applied the same reasoning to Albuquerque, Roncador and the South-East Cays, which had similar natural conditions, installations and official personnel.

106 Rockhall has a circumference of 61 meters, a total area of 626 square metres, and rises up to 21 metres above sea level.

sustaining economic life.[107] On the other hand, it has been pointed out that: 'In practice, however, states have maintained, largely without protest, EEZ claims around remote and uninhabited islands and asserted the full range of sovereign and jurisdictional rights under the [*UNCLOS*].'[108] For example, both Australia and France have carried out enforcement action against 'foreign' fishing fleets in the sub-Antarctic territories of Heard and McDonald Island and Macquarie Island, and Kerguelen respectively.[109] This led to proceedings in the ITLOS where no serious doubt was cast on the legitimacy of the EEZs.[110] Obviously, these examples of state practice are by no means exhaustive. However, they demonstrate an inconsistency that is unhelpful when interpreting a multilateral treaty provision.

IV *AWARD*: ARTICLE 121(3) JURISPRUDENCE

This section will analyse the *Award's* art 121(3) jurisprudence. Part A will begin by describing the methodology and terminology that the arbitrators relied upon. Using this methodology, they drew nine interpretative conclusions with regards to art 121(3). Part B will analyse in detail, in the same order as the Tribunal, these nine conclusions. Additionally, where appropriate, Part B will compare and contrast the *Award's* interpretation with the Philippines' submissions as well as the view of eminent publicists. Finally, Part C attempts to contextualise this jurisprudence in a practical setting by examining the Tribunal's categorisation under the Regime of Islands of Itu Aba, the largest feature in the SCS Spratly group.

A *Tribunal's Terminology and Methodology*

The Tribunal held that 'the "Regime of Islands" in Article 121 presents a definition, general rule, and an exception to that general rule.'[111] However,

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[107] See Robin Churchill, 'United Kingdom Accession to the *UNCLOS*' (1998) 13(2) *International Journal of Marine and Coastal Law* 271.

[108] Rothwell and Stephens, above n 3, 89.

[109] Ibid. These features vary in size and elevation but, given their sub-Antarctic locations, are all extremely isolated. Their populations, if any, exist solely for the purpose of research and conservation. Virtually barren, these features are perhaps best encapsulated by the alternative French name for Kerguelen: '*Îles de la Désolation*' or 'Desolation Islands'.

[110] See *Monte Confurco (Seychelles v France) (Judgment)* (2000) 125 ILR 220; see also *Volga (Russian Federation v Australia) (Judgment)* (2003) 126 ILR 433. Note that only Judge Vukas dissented on this issue, finding that the features were properly categorised as *UNCLOS* art 121(3) 'rocks'. He gives a detailed explanation of his position in the later declaration.

[111] *South China Sea Arbitration (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [387]. The definition being found in paragraph 1, the general rule in paragraph 2, and the exception in paragraph 3. It is also worth noting that the Tribunal determined that this Regime should be considered, in light of the *Convention's* object and purpose, 'in the context of a system of classifying features' including low-tide elevations and submerged features' at [507].

whilst briefly addressing art 121's other elements,[112] as discussed above the *Award's* principal focus was on art 121(3), the 'critical element' of the Article,[113] whose scope and application 'is not clearly established'.[114] Accordingly, this analysis will focus exclusively on the Tribunal's formulation of the requirements of art 121(3) vis-a-vis categorisation under the Regime of Islands. As a brief aside, the Tribunal developed its own terminology vis-a-vis the Regime of Islands. It referred to the generic category of features satisfying art 121(1) as 'high-tide features'.[115] They comprise two sub-sets: 'rocks'; and 'fully-entitled islands'.[116] The former 'cannot sustain human habitation or economic life of their own' and thus do not generate an EEZ or a CS.[117] The latter are not 'rocks', and thus enjoy the same entitlements as other land territory under the *Convention*.[118]

The *Award's* interpretive methodology was multi-pronged. The arbitrators considered that '[i]n order to interpret this provision, the Tribunal must apply the provisions of the *Vienna Convention on the Law of Treaties*.'[119] The articles of the *Vienna Convention* upon which the Tribunal relied were arts 31(1) and 32. Article 31(1) reads: '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.'[120] Thus, in examining art 121(3), the arbitrators initially drew on the plain and ordinary meaning of the text,[121] as well as the object and purpose of the *Convention* itself and the provision's context within it.[122] However, the Tribunal also considered that further examination of the circumstances that led to the adoption of art 121 is warranted for the light it sheds on the purpose of the provision itself.[123] Hence, the *Award* considered in detail the drafting history of art 121(3). [124] This analysis was justified by art 32 of the *Vienna Convention*, which reads:

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[112] See, eg, ibid [311] where the Tribunal held that no specific high water-datum was necessary for paragraph 1. As discussed in Section V, it also expanded upon the notion of the 'indivisibility' of the Regime of Islands.

[113] Ibid [474].

[114] Ibid [475].

[115] Ibid [280].

[116] Ibid.

[117] Ibid.

[118] Ibid.

[119] Ibid [476] citing *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (*'Vienna Convention'*). It should be noted that the *Vienna Convention* and its provisions, despite the fact that not all states have become parties, is generally accepted to have become customary international law.

[120] *Vienna Convention* art 31(1).

[121] See *South China Sea Arbitration (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [478]–[506]. In doing so it made frequent reference to the Oxford Dictionary, as well as the other authoritative texts.

[122] Ibid [507]–[520].

[123] Ibid [521].

[124] Ibid [521]–[538].

> 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.[125]

Importantly, despite a 'number of general conclusions' that can be drawn, in light of the level of compromise and informality surrounding the final text it is an 'imperfect guide'.[126] Finally, the Tribunal also acknowledged state practice as a means of interpretation.[127] However, after reviewing ICJ and Word Trade Organisation jurisprudence, it determined that the threshold for state practice based interpretation was 'quite high' and that the available evidence, 'as far as the case before it is concerned', did not meet this standard.[128] As an aside, this was generally in line with the methodology relied upon by the Philippines' in its submissions.[129]

B *Tribunal's Interpretation of Article 121(3)*

Relying on the methodological approach discussed above, which will be referred back to during this analysis, the Tribunal drew nine conclusions of which eight were interpretative and one was applicative. This section will now analyse these conclusions in the same order in which the Tribunal outlined them. However, given the increased complexity and contested nature of certain elements of art 121(3), equal attention will not be given to each conclusion.

1 *Relevance of Geology and Geomorphology*

The Tribunal held that geology and geomorphology are irrelevant to categorisation under the Regime of Islands.[130] In doing so, it relied heavily

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[125] *Vienna Convention* art 32. Note however that Mortenson contends that the *travaux* are always a relevant interpretative tool as a matter of logic. He argues that four cumulative doctrinal pathways, namely: ambiguity, absurdity, special meaning and confirmation, permit reliance on the *travaux* every time a treaty is interpreted. Therefore, he contends that drafting history should always be relied upon to shed light on the meaning of the text and in some cases may be used to override what had initially seemed like its clear import. See Julian Davis Mortenson, 'The Travaux of Travaux: Is the *Vienna Convention* Hostile to Drafting History?' (2013) 107 *American Journal of International Law* 780.

[126] *South China Sea Arbitration (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [534].

[127] See ibid [552]–[553].

[128] Ibid.

[129] See especially 'Day 2 Hearing on Merits and Remaining Issues of Jurisdiction and Admissibility', *South China Sea Arbitration (Award) (Philippines v China)*, UNCLOS Arbitral Tribunal, Case No 2013-19, 25 November 2015, 58–90. However, the Philippines' submissions seem to place more emphasis on the *travaux*, frequently citing the positions of states at UNCLOS III such as Malta, China, Denmark, Colombia, Romania, Japan, United Kingdom, Trinidad and Tobago, as well as a group of 14 African states.

[130] *South China Sea Arbitration (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [540].

on the plain and ordinary meaning of 'rock', observing that even dictionary definitions do not restrict the meaning to 'solid rock'.[131] For additional support, the *Award* also cited with approval findings to this effect in *Nicaragua v Colombia*.[132] Finally, the arbitrators pointed out that a geologically strict interpretation would lead to 'manifestly absurd results'.[133] As 'rocks' are sub-categories of 'islands' within the Regime, to follow this logic would accord greater entitlements to 'less stable and less permanent' features; 'this cannot have been the intent of the Article.'[134] This reflects the position of the Philippines, who relied on the above case and the plain text,[135] but also contended that such consideration did not bear on object and purpose.[136] On the other hand, it has been argued that such an expansive approach is not supported by the *travaux préparatoires*.[137] However, as discussed above, the Tribunal was cautious of the interpretative worth of the *travaux*, reducing this view's potency. Finally, as an aside, the Tribunal also made clear that the name of a feature has no bearing whatsoever on its categorisation.[138]

2 *Natural Capacity*

The Tribunal found that 'the status of a feature is to be determined on the basis of its natural capacity, without external additions or modifications intended to increase its capacity to sustain human life or an economic life of its own'.[139] In so finding, it looked to context, saying that: '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'.[140] The arbitrators also relied on object and purpose, finding that a contrary interpretation would 'frustrate' art 121(3)'s purpose as a 'provision of limitation' with the objective of limiting potentially immense maritime claims.[141] Finally, it found this reading to be consistent with the text, given the qualification of 'island' with the phrase

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131 Ibid [480].

132 Ibid quoting *Nicaragua v Colombia* [2012] ICJ Rep 624, 645 [37].

133 *South China Sea Arbitration (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [481].

134 Ibid.

135 'Day 2 Hearing on Merits and Remaining Issues of Jurisdiction and Admissibility', *South China Sea Arbitration (Award) (Philippines v China),* UNCLOS Arbitral Tribunal, Case No 2013-19, 25 November 2015, 67–8.

136 'Memorial of the Philippines Volume I', *South China Sea Arbitration (Award on Jurisdiction and Admissibility) (Philippines v China),* UNCLOS Arbitral Tribunal, Case No 2013-19, 30 March 2014, 122.

137 Victor Prescott and Clive Schofield, *The Political Maritime Boundaries of the World* (Martinus Nijhoff Publishers, 2nd ed, 2005) 62–75.

138 *South China Sea Arbitration (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [482].

139 Ibid [541].

140 Ibid [305], [508]. Note that, as aforementioned, the Tribunal found it appropriate to consider art 121 alongside art 13, and other articles, as the *travaux préparatoires* demonstrate that definitions were not considered in isolation, see ibid at [563] and [507].

141 Ibid [509].

'naturally formed' and 'economic life' with the phrase 'of its own'.[142] This formulation and methodology is virtually identical to that of the Philippines.[143] However, alternative formulations have been proposed. For example, suggestions that the phrase 'of their own' qualifies both 'human habitation' and 'economic life', thus enlivening the requirement of natural capacity.[144] Whilst the conclusions are the same, this alternative formulation may weaken perceptions of a holistic and indivisible Regime of Islands.

3 *'Human Habitation'*

With respect to the phrase 'human habitation', the Tribunal held that:

> the critical factor is the non-transient character of the inhabitation, such that the inhabitants can fairly be said to constitute the natural population of the feature, for whose benefit the resources of the [EEZ] were seen to merit protection.[145]

The connection drawn between EEZs and the local inhabitants, seen in the latter part of the above statement, was inspired by a consideration of the provision in the context of the *Convention* as a whole as well as its object and purpose.[146] As for the notions of non-transience and residence, the Tribunal began with a plain reading of 'sustain'. 'Sustain' was found to contain three components: (i) a 'concept' of support and provisions of essentials; (ii) a temporal 'concept' mandating that the first 'concept' occur over a period of time rather than as a one-off or short lived; and (iii) a qualitative 'concept' mandating a 'minimal proper standard'.[147] When read together with 'human habitation', this was interpreted to mean 'to provide that which is necessary to keep humans alive and healthy over a continuous period of time, according to proper conditions'.[148] As for a plain reading of 'human habitation' itself, the arbitrators found that it included notions of settlement and residence, and thus transience or the mere presence of a small number of persons does not satisfy the condition.[149] The term should be understood to involve inhabitation by a stable community for whom the feature is considered home.[150] The community need not be large, and

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142 Ibid [510].

143 'Day 2 Hearing on Merits and Remaining Issues of Jurisdiction and Admissibility', *South China Sea Arbitration (Award) (Philippines v China),* UNCLOS Arbitral Tribunal, Case No 2013-19, 25 November 2015, 72, 78; 'Memorial of the Philippines Volume I', *South China Sea Arbitration (Award on Jurisdiction and Admissibility) (Philippines v China),* UNCLOS Arbitral Tribunal, Case No 2013-19, 30 March 2014, 127.

144 See, eg, Symmons, above n 88, 104.

145 *South China Sea Arbitration (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [542].

146 Ibid [512]–[520].

147 Ibid [487].

148 Ibid.

149 Ibid [488]–[489].

150 Ibid [542].

periodic or habitual residence by nomadic people may be enough.[151] In applying such a test, an indigenous population would 'obviously suffice'.[152] However, when considering a non-indigenous population the Tribunal seems to propose a subjective test that looks to the intention of the population and if they truly wish to reside and make their lives on the feature in question.[153] These conceptualisations were broadly in line with the Philippines' readings of the terms. For example, they contended that it is insufficient 'to keep a single soul alive, or provide episodic shelter for a group of people'.[154] Furthermore, 'sustain' was argued to necessarily contain 'an obvious time element' requiring that the condition be met: 'across a significant period of years, if not permanently', such that they can validly be called residents of the feature.[155]

Importantly, the Tribunal's findings went even further than the Philippines' submissions. Namely, the *Award* held that merely surviving on the feature is not enough.[156] Rather, there must be 'conditions sufficiently conducive to human life and livelihood for people to inhabit'.[157] Such an interpretation is in stark contrast with Karagiannis, who suggested that the presence of a single soul on the feature could meet the threshold.[158] Whilst the Tribunal would certainly reject such a view, it does not itself attempt to 'draw the line' claiming that the text does not reveal: 'the threshold that would separate settled human habitation from the mere presence of humans.'[159] However, it does clarify that at a minimum a feature must 'be able to support, maintain, and provide food, drink and shelter' over an extended period of time, and for more than a sole individual.[160] This minimum standard concurs with the *Award's* reading of 'sustain' but also with the Filipino position that the phrase 'human habitation' infers that a feature must be capable 'of providing the fresh water, the food, the shelter and the living space that are necessary to keep human beings alive'.[161]

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151 Ibid. The latter point will be discussed in more detail in point 8.

152 Ibid.

153 Ibid.

154 'Day 2 Hearing on Merits and Remaining Issues of Jurisdiction and Admissibility', *South China Sea Arbitration (Award) (Philippines v China),* UNCLOS Arbitral Tribunal, Case No 2013-19, 25 November 2015, 74–5.

155 Ibid 73–5.

156 *South China Sea Arbitration (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [489].

157 Ibid.

158 Syméon Karagiannis, 'Les Rochers qui ne se Prêtent pas à l'Habitation Humaine ou à une Vie Économique Propre et le Droit de la Mer' [1996] *Revue Belge de Droit International* 559, 573–4.

159 *South China Sea Arbitration (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [492].

160 Ibid [490]–[491].

161 'Day 2 Hearing on Merits and Remaining Issues of Jurisdiction and Admissibility', *South China Sea Arbitration (Award) (Philippines v China),* UNCLOS Arbitral Tribunal, Case No 2013-19, 25 November 2015, 72; 'Memorial of the Philippines Volume I', *South China Sea Arbitration (Award on Jurisdiction and Admissibility)*

Alternatively, Charney takes issue with such minimum requirements, pointing out that they were not mentioned in the *travaux* and that in fact contrary views were expressed, saying: 'its status may depend upon its actual economic worth rather than classic agrarian concepts of viability … this seems to be the better interpretation of art 121(3) and the negotiators' intentions.'[162]

4 *'Economic Life of Their Own'*

With respect to the phrase 'economic life of their own' the Tribunal made several observations. First, the term 'economic life' does not equate to economic value.[163] This corresponds with the Philippines' position. Indeed, counsel contended that had the drafters intended the phrase to mean 'value' they would have used that word specifically.[164] According to the Tribunal, the proper construction of the term is ordinarily the 'life and livelihoods of the human population inhabiting and making its home on the feature or a group of features'.[165] Indeed, the word 'life' reveals a requirement of more than the mere presence of a resource.[166] This was once more similar to the Filipino contention that, given the use of the word 'life', the economic activity must be 'an expression of human life'.[167] However, their preferred formulation was that of Judge Jesus who wrote extra-judicially that to meet the condition, a feature must: 'develop its own sources of production, distribution and exchange in a way that would constitute the material basis that would justify the existence and development of a stable human population or community.'[168] In contrast, certain publicists have adopted a far more restrictive view. For example, Kwiatkowska and Soons suggest that 'economic life' could be met via the mere presence of a lighthouse or other navigational aid given their value to 'shipping, ocean sports and so

(Philippines v China), UNCLOS Arbitral Tribunal, Case No 2013-19, 30 March 2014, 126–7.

162 Jonathan I Charney, 'Rocks that Cannot Sustain Human Habitation' (1999) 93(4) *American Journal of International Law* 863, 870.

163 *South China Sea Arbitration (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [543].

164 'Day 2 Hearing on Merits and Remaining Issues of Jurisdiction and Admissibility', *South China Sea Arbitration (Award) (Philippines v China),* UNCLOS Arbitral Tribunal, Case No 2013-19, 25 November 2015, 79–80.

165 *South China Sea Arbitration (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [543]. Thus it is linked to 'human habitation' considered above in the previous point.

166 Ibid [499].

167 'Day 2 Hearing on Merits and Remaining Issues of Jurisdiction and Admissibility', *South China Sea Arbitration (Award) (Philippines v China),* UNCLOS Arbitral Tribunal, Case No 2013-19, 25 November 2015, 80.

168 'Memorial of the Philippines Volume I', *South China Sea Arbitration (Award on Jurisdiction and Admissibility) (Philippines v China),* UNCLOS Arbitral Tribunal, Case No 2013-19, 30 March 2014, 129 quoting Jose Luis Jesus, 'Rocks, New-Born Islands, Sea Level Rise, and Maritime Space' in Jochen A Frowein et al (eds), *Negotiating for Peace* (Springer, 2003) 579, 590.

forth', thus equating 'life' with 'value'.[169] Oude Elferink similarly argued, both in respect to this condition and that of 'habitation', that 'the threshold that has to be met in this respect is quite low and almost certainly is lower than the most far-reaching requirement, a stable community.'[170]

Second, the phrase 'of their own' makes clear that the above-mentioned requirements 'must pertain to the feature' and thus 'must be oriented around the feature itself and not focused solely on the waters or seabed of the surrounding territorial sea.'[171] This went further than the Filipino position, which felt that activity in the territorial sea could be considered because it is as much a part of the sovereign territory of the coastal state as the land itself.[172] Hafetz expressed an interesting view in this regard, arguing that economically viable maritime conservation areas would meet the condition given the economic benefits.[173] In so doing he too seems to equate 'life' with 'value', as well as condoning the appropriateness of such value coming from at least the territorial sea.

Furthermore, 'of their own' also makes clear that economic activity that is 'entirely dependent on external resources' or extractive in nature 'without the involvement of a local population' will not suffice to meet this condition.[174] According to the *Award*, this becomes evident when keeping in mind the aforementioned three components of the words 'sustain'. [175] Read together with the phrase 'economic life', this produces a requirement that the economic activity be sustained over a period of time on an ongoing

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169 Barbara Kwiatkowska and Alfred H A Soons, 'Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own' (1990) 21 *Netherlands Yearbook of International Law* 139, 167–8; see also E D Brown, *The International Law of the Sea* (Darthmouth, 1994) vol 1, 38. Note that Soons was a member of the Tribunal and that the Award was unanimous. Therefore, it must be assumed that his view on this point either evolved or was conceded to his fellow arbitrators in order to preserve unanimity.

170 Alex G Oude Elferink, 'The Islands in the South China Sea: How Does Their Presence Limit the Extent of the High Seas and the Area and the Maritime Zones of the Mainland Coast?' (2001) 32 *Ocean Development and International Law* 169, 174.

171 *South China Sea Arbitration (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [543], [502]–[503]. Note also that the Tribunal, in line with the submissions of the Philippines, ruled out inclusion of EEZ and CS economic activity in the categorisation of a high-tide feature as 'circular and absurd' at [502].

172 'Day 2 Hearing on Merits and Remaining Issues of Jurisdiction and Admissibility', *South China Sea Arbitration (Award) (Philippines v China),* UNCLOS Arbitral Tribunal, Case No 2013-19, 25 November 2015, 82.

173 Jonathan L Hafetz, 'Fostering Protection of the Marine Environment and Economic Development: Article 121(3) of the Third Law of the Sea Convention' (2000) 15 *American University International Law Review* 584, 623–7. Such benefits include the increase in tourism and fishing stock as well as the decrease of pollution and the exploitation of coral-based products.

174 *South China Sea Arbitration (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [543].

175 See ibid [487].

and viable basis.[176] Charney strongly disagreed with this interpretation.[177] He contended that the condition is satisfied so long as a resource is exploited over 'some period of time' and generates sufficient revenues to support all equipment and personnel.[178] Indeed, he even suggested that an offshore casino in the territorial sea would be sufficient.[179] Interestingly, whilst referring to the *travaux*, his analysis also relies on his interpretation of the plain language of the authoritative texts,[180] demonstrating that genuine differences of opinion in this regard are indeed possible. Additionally to their plain reading,[181] the arbitrators again relied, as they did in the case of 'human habitation', on the context and object and purpose. [182] This was particularly important in emphasising the link between the economic activity and inhabitants.

5 *Cumulativeness of Conditions?*

The Tribunal found that the two conditions discussed at points 3 and 4 above were disjunctive.[183] In other words, it is only strictly necessary for a feature to be able to sustain one or the other to avoid categorisation as a 'rock'. In so finding, it relied upon a plain reading of the word 'or' which, as a matter of logic and in light of the grammatical structure, necessitates a disjunctive interpretation.[184] Interestingly, the Philippines also relied on such a methodology and came to the opposite conclusion.[185] Addressing this issue, the arbitrators approved of the logical underpinnings of the Filipino argument but found that the conclusions were *non sequitur*.[186]

The Tribunal's characterisation of the disjunctive requirement was critical. They expressed the general rule as being that 'a maritime feature will ordinarily only possess an economic life of its own if it is also inhabited by a stable human community.'[187] This is due to the fact that the two concepts are 'linked in practical terms' as 'humans will rarely inhabit areas where no economic activity or livelihood is possible.'[188] This point concurred with the Philippines' contention that requirements are 'inextricably

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176 Ibid.
177 See Charney, above n 162.
178 Ibid 870–1.
179 Ibid. Charney also suggested that hydrocarbons, optical telescopes and satellite tracking stations were possible examples of 'economic life'.
180 Ibid 871.
181 See *South China Sea Arbitration (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [500].
182 See ibid [512]–[520].
183 Ibid [544].
184 Ibid [494]–[496].
185 'Day 2 Hearing on Merits and Remaining Issues of Jurisdiction and Admissibility', *South China Sea Arbitration (Award) (Philippines v China)*, UNCLOS Arbitral Tribunal, Case No 2013-19, 25 November 2015, 83–5.
186 See *South China Sea Arbitration (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [494]–[496].
187 Ibid [544].
188 Ibid [497].

intertwined'.[189] Hence generally, in practical terms the conditions will in fact be conjunctive. Nonetheless, the *Award* also details a possible exception in the case of 'populations sustaining themselves through a network of related maritime features.'[190] In so doing, it made reference to the Micronesian delegate to UNCLOS III, who described situations where 'multiple features are used in concert to sustain a traditional way of life'.[191] This interpretative innovation appears to be quite a narrow exception and the number of possible situations that it may cover is yet to be seen.

6 *Capacity: Potential or Actual?*

The Tribunal held that: 'Article 121(3) is concerned with the *capacity* of a maritime feature … not with whether the feature is presently, or has been, inhabited or home to economic life'.[192] Furthermore, the assessment of potential capacity is an objective endeavour. [193] These conclusions were reached via a plain reading of 'cannot',[194] and corresponds to the position of the Philippines who considered the interpretation uncontroversial.[195] As an aside, the Tribunal reiterated its findings at the jurisdictional phase that the question of capacity had no relation to the question of sovereignty.[196]

7 *Capacity: a Case-by-Case Assessment*

Whilst objectively considering potential capacity, the arbitrators found that it was not possible or desirable to formulate an abstract test but that the assessment must proceed on a case-by-case basis.[197] In support of this analysis they looked to the *travaux*, noting: 'the drafters accepted that there are diverse high-tide features … [therefore] the negotiating history clearly demonstrates the difficulty in setting, in the abstract, bright-line rules for all cases.'[198] It should be noted that this approach rejects the attempts of some commentators to quantify the conditions necessary to satisfy capacity. For example, Van Dyke and Bennett suggest that the 'human habitation' condition can only be satisfied if a feature can permanently

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189 'Memorial of the Philippines Volume I', *South China Sea Arbitration (Award on Jurisdiction and Admissibility) (Philippines v China)*, UNCLOS Arbitral Tribunal, Case No 2013-19, 30 March 2014, 145. Note however that the Philippines considered this to be the case in all possible instances.

190 *South China Sea Arbitration (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [544].

191 Ibid [497].

192 Ibid [545] (emphasis in original).

193 Ibid.

194 Ibid [483].

195 'Day 2 Hearing on Merits and Remaining Issues of Jurisdiction and Admissibility', *South China Sea Arbitration (Award) (Philippines v China)*, UNCLOS Arbitral Tribunal, Case No 2013-19, 25 November 2015, 69.

196 *South China Sea Arbitration (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [545], [447] citing *South China Sea Arbitration (Award on Jurisdiction and Admissibility)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 29 October 2015) [400]–[404], [153].

197 *South China Sea Arbitration (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [545].

198 Ibid [537].

sustain at least 50 people.[199] Categorisation via exclusively size-based criteria, discussed in point 9, is another example. Despite its insistence on flexibility, the Tribunal does concede that there are certain 'principal factors' such as 'the presence of water, food, and shelter in sufficient quantities to enable a group of persons to live on the feature for an indeterminate period of time' which reflect a minimum standard.[200] Yet again this is consistent with the Philippines' stance that 'apart from the food, water and shelter requirements, there are, and there can be, no bright-line rules'.[201] Additionally, and going beyond what was submitted by the Philippines,[202] the Tribunal outlined certain extra considerations 'that would bear on the conditions for inhabiting and developing an economic life on a feature', including: the prevailing climate; the proximity of the feature to other inhabited areas and populations; and the potential livelihoods on and around the feature.[203] These factors may all be relevant but their importance will vary from case to case.[204]

8 *Capacity: Constellations of Features*

In its assessment of capacity, the arbitrators concluded that 'a feature should be assessed with due regard to the potential for a group of small island features to collectively sustain human habitation and economic life'.[205] As discussed in points 3 and 4, the Tribunal emphasised this potential scenario's relevance to the assessment of the 'human habitation' and 'economic life of its own' conditions in the context of traditional ways of life. The *Award* deemed this to be an exception to the general prohibition, detailed at point 2, on a dependence on external supply given that 'remote island populations often make use of a number of islands, sometimes spread over significant distances, for sustenance and livelihoods'.[206] The basis for this finding seems to be that practically speaking, features should not be 'atomised',[207] as this is not in keeping with 'the realities of life on remote islands',[208] nor with the sensitivities to this

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199 Jon M Van Dyke and Dale Bennett, 'Islands and the Delimitation of Ocean Space in the South China Sea' (1993) 10 *Ocean Yearbook* 54, 79; see also Jon M Van Dyke, Joseph R Morgan and Jonathan Gurish, 'The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When do Uninhabited Islands Generate an EEZ?' (1988) 25 *San Diego Law Review* 425, 438.

200 *South China Sea Arbitration (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [546].

201 'Day 2 Hearing on Merits and Remaining Issues of Jurisdiction and Admissibility', *South China Sea Arbitration (Award) (Philippines v China)*, UNCLOS Arbitral Tribunal, Case No 2013-19, 25 November 2015, 88.

202 Note Counsel did mention the potential relevance of abandonment in response to the Tribunal's query on the matter, see ibid 80.

203 *South China Sea Arbitration (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [546].

204 Ibid.

205 Ibid [547].

206 Ibid.

207 Ibid [544].

208 Ibid [547].

issue that were evident at UNCLOS III.[209] Certain publicists have alluded to similar conclusions by, for example, suggesting that permanence is not necessarily required so long as fishing from 'neighbouring islands' takes place on a regular basis.[210] However, the Tribunal's finding takes a more expansive view by suggesting that traditional ocean-going cultures could travel 'significant distances' and still satisfy the requisite conditions for capacity.

9 *Application of These Interpretations*

Finally, having drawn eight conclusions as to the provision's interpretation, the Tribunal outlined how this should be applied to the assessment of a feature's capacity.[211] It found, in light of the remarks discussed at point 7, that 'evidence of the objective, physical conditions on a particular feature can only take the Tribunal so far in its task.'[212] Nonetheless, as a starting point, if a feature 'clearly' falls into one high-tide feature category or another, then an assessment of the physical characteristic is enough.[213] For example, a feature that is 'entirely barren of vegetation and lacks drinkable water and the foodstuffs necessary even for basic survival' would clearly not meet that requirement of 'human habitation'.[214] The opposite scenario also holds true.[215] Interestingly, Gjentes notes a similarly summary approach taken in the ICJ when Jan Mayen was categorised as an island due to its large size alone without consideration of the capacity to 'sustain' 'habitation' or 'economic life'.[216] However, the *Award's* threshold does seem higher even in these 'clear' cases. Indeed, it noted that: 'the *travaux* make it clear that – although size may correlate to the availability of water, food, living space, and resources for economic life – size cannot be dispositive of a feature's status as a fully entitled island or rock and is not, on its own, a relevant factor.'[217] Relying also on the ICJ's similar comments in *Nicaragua v Colombia*,[218] this demonstrates that size can never form a summary basis for categorisation and at the very least must be considered in tandem with these minimum standards. This corresponds with the Filipino position on the subject.[219] However, Counsel did contend,

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209 Ibid [547], [497].
210 Van Dyke, Morgan and Gurish, above n 199, 437.
211 *South China Sea Arbitration (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [548]–[551].
212 Ibid [548].
213 Ibid.
214 Ibid.
215 Ibid.
216 Marius Gjetnes, 'The Spratlys: Are They Rocks or Islands?' (2001) 32 *Ocean Yearbook* 191, 199, 193–4 citing *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway) (Judgment)* [1993] ICJ Rep 38, 65 [61].
217 *South China Sea Arbitration (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [538].
218 Ibid quoting *Nicaragua v Colombia* [2012] ICJ Rep 624, 645 [37].
219 'Memorial of the Philippines Volume I', *South China Sea Arbitration (Award on Jurisdiction and Admissibility) (Philippines v China)*, UNCLOS Arbitral Tribunal, Case No 2013-19, 30 March 2014, 122.

based on the *travaux*, that 'an insular feature whose area above high-tide is less than one km^2 could be regarded as sufficiently small to create a presumption that it is not genuinely able to sustain human habitation and economic life'.[220] This position was neither addressed nor endorsed by the Tribunal. However, this thinking is in a similar vein to 'logical' intuitions that, despite the lack of explicit reference to size, 'any person of sound mind would think that a rock is smaller than an island';[221] *a fortiori*, size's relevance in the *travaux*.[222] Hence, the *Award's* findings fully extinguish these attempts, especially by earlier publicists, to categorise features by relying on a size based quantification of the word 'rock'.[223]

The same test does not apply for features that 'fall close to the line'.[224] Instead, in these situations recourse should first be had to 'the historical use to which [a feature] has been put' using the best available historical evidence.[225] Logic was apparently the basis of this finding, the arbitrators noting that: 'humans have shown no shortage of ingenuity in establishing communities in the far reaches of the world, often in extremely difficult conditions.'[226] The *Award* considered that the most reasonable conclusion, in situations where there is no historical evidence of habitation, is that 'the natural conditions are simply too difficult for such a community to form and that the feature is not capable of sustaining such habitation'.[227] This is in line with the Philippines' contention on the subject,[228] and formed a critical aspect of their submissions on features generally given the artificial augmentation by China of many of the SCS's features capacities in order to satisfy the conditions. Yet again in disagreement with the arbitrators, Charney argues that historical evidence is essentially irrelevant given 'changes in economic demand, technological innovations or new human activities' and their impact on the feature's capacity.[229]

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220 Ibid.

221 Barry Hart Dubner, 'The Spratly "Rocks" Dispute – a "Rockapelago" Defies Norms of International Law' (1995) 9 *Temple International and Comparative Law Journal* 291, 303.

222 Oude Elferink, above n 170, 173. Although he does later point out that it is not in itself decisive.

223 See Brown, above n 169, 148–52; William T Burke, *International Law of the Sea* (Lupus Publications, 1992) 5–33 citing Robert D Hodgson, 'Islands: Normal and Special Circumstances' in J K Gamble and G Pontecorvo (eds), *Law of the Sea: Emerging Regime of the Oceans, Proceedings of the Law of the Sea Institute* (Ballinger Publishing, 1974). However, it must be noted that a precise size-based definition could not be agreed upon.

224 *South China Sea Arbitration (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [548]–[549].

225 Ibid [549].

226 Ibid.

227 Ibid.

228 'Day 2 Hearing on Merits and Remaining Issues of Jurisdiction and Admissibility', *South China Sea Arbitration (Award) (Philippines v China),* UNCLOS Arbitral Tribunal, Case No 2013-19, 25 November 2015, 69–70.

229 Charney, above n 162, 867.

The *Award* goes on to outline an exception, namely, instances wherein factors that are 'separate from the intrinsic capacity of the feature' have prevented the requirements of capacity being met.[230] For example, war, pollution and environmental harm could force the depopulation of a feature that in its natural state could have met the requisite condition for escaping categorisation as a 'rock'.[231] Overall, in such 'unclear' situations, there appears to be a presumption that historical evidence is determinative of a feature's capacity. This evidence is particularly persuasive if it demonstrates capacity that predates the proclamation of an EEZ.[232] This increased salience is derived in light of the object and purpose of limiting excessive and unfair claims by absentee states unconcerned with the feature's coastal population and seeking only vast maritime claims.[233] Nonetheless, the presumption produced can be rebutted by the presence of circumstances extraneous to the feature, such as those discussed above, which rendered it incapable of meeting the necessary conditions.

Finally, in situations in which a feature has been inhabited or is currently inhabited one must determine that there is no external support enabling the feature's capacity to meet the conditions.[234] In this context, the Tribunal assessed the relevance of an official or military presence to categorisation under the provision. It determined, in light of the previously discussed object and purpose, that 'a purely official or military population, serviced from the outside, does not constitute evidence that a feature is capable of sustaining human habitation'.[235] The Tribunal reached the same conclusion for the same reasons with regards to the requirement of 'economic life'.[236] This is one final vindication of the Filipino position that, whilst approaching the issue in their reading of 'sustain human habitation', said: 'plainly not included in the phrase … is the maintenance of an official or military presence.'[237] In support of this position it quoted Anderson, as well as Van Dyke and Brooks.[238] The latter also made reference to object and

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230 *South China Sea Arbitration (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [549].

231 Ibid.

232 Ibid [550].

233 Ibid.

234 Ibid.

235 Ibid.

236 Ibid.

237 'Day 2 Hearing on Merits and Remaining Issues of Jurisdiction and Admissibility', *South China Sea Arbitration (Award) (Philippines v China),* UNCLOS Arbitral Tribunal, Case No 2013-19, 25 November 2015, 76–7.

238 'Memorial of the Philippines Volume I', *South China Sea Arbitration (Award on Jurisdiction and Admissibility) (Philippines v China),* UNCLOS Arbitral Tribunal, Case No 2013-19, 30 March 2014, 125–6 quoting David Anderson, 'Islands and Rocks in the Modern Law of the Sea' in Myron H Nordquist (ed), *The Law of the Sea: US Accession and Globalisation* (Martinus Nijhoff Publishers, 2012) 307, 313; ibid 77 quoting Jon M Van Dyke and Robert A Brooks, 'Uninhabited Islands: Their Impact on the Ownership of the Oceans' Resources' (1983) 12(3–4) *Ocean Development and International Law* 265, 286.

purpose, saying: 'Islands should not generate ocean space if they are claimed by some distant absentee landlord … [they] should generate ocean space if stable communities of people live on the island and use the surrounding ocean areas.'[239]

C *Practical Application: Itu Aba*

In order to illustrate in a practical setting the art 121(3) conclusions discussed above in Part B, this section will examine the *Award's* categorisation of the largest feature in the Spratlys: Itu Aba. First, it reemphasised the pre-eminence of historical evidence of a feature's physical characteristics, as well as 'human habitation and economic life' on its natural conditions.[240] This was particularly true of historical accounts predating the advent of EEZs and human modification, given the competition by claimants and significant artificial modification of features in the SCS.[241] Second, using the best available historical evidence, the *Award* examined the presence of the objective minimum requirements, namely: potable fresh water,[242] vegetation and biology,[243] and soil and agriculture.[244] It found that fresh water, vegetation and soil have been able to support small numbers of people on Itu Aba in the past and therefore it has the capacity to do so on its natural conditions.[245] Third, the arbitrators examined the historical record of fisherman and commercial operations on and around Itu Aba.[246]

Fourth, having considered the above, it determined that Itu Aba falls 'close to the line' and thus summary categorisation based upon physical characteristics alone was inappropriate. [247] Hence, it determined that the temporary presence of fishermen (their genuine residency being at Hainan) did not equate to 'human habitation' on Itu Aba.[248] Furthermore, given their non-indigenous status, they were required to show an intention to reside and make their home permanently on Itu Aba, which was not the case given the temporary shelters and facilities.[249] This historical commercial activity was extractive and thus 'inherently transient in nature' and this did not meet the threshold.[250] Nor did any of the above fall into the exception of traditional use of constellations of features. Moreover, the current official and military presence, as well as its recent small civilian

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239 Van Dyke and Brooks, above n 238, 286.
240 *South China Sea Arbitration (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [578].
241 Ibid.
242 Ibid [580]–[584].
243 Ibid [585]–[593].
244 Ibid [594]–[596].
245 See ibid [584], [593], [596].
246 Ibid [597]–[601], [602]–[614].
247 Ibid [616].
248 Ibid [618].
249 Ibid.
250 Ibid [619].

population, was not genuine settlement and 'heavily dependent on outside supply'.[251] In sum, nothing 'fairly resembling a stable human community' is or has ever been present on Itu Aba.[252] This was not due to intervening forces, thus the presumption of the veracity of historical evidence was not rebutted, and therefore the condition of 'human habitation' was not met.[253] The *Award* determined that all economic activity on Itu Aba had been purely extractive in nature for the benefit of populations that were not the residents of the feature.[254] Moreover, the absence of a stable local community also meant that on the ordinary understanding of 'economic life', notwithstanding the exception of the traditional use of features in concert, that condition was not met.[255] Further, having considered all of the above, the arbitrators determined that Itu Aba is a rock for the purposes of art 121(3) and is not entitled to an EEZ or a CS under the Regime of Islands.[256]

V CONCLUSION

On a grand scale, the *Award* is merely a small skirmish in the vast SCS geostrategic arena. As discussed in Section II, the situation is tense, complex, and evolving. After the *Award's* release, China reiterated that it was 'null and void and has no binding force'.[257] Despite this, China has not sat idle. Indeed, China and Russia have already engaged in a joint naval exercise in the SCS.[258] Concluding on 19 September 2016 and dubbed 'Joint Sea-2016', the operation focused, inter alia, upon 'island seizing'.[259] In response the US, China's principal rival in the region, has expanded its ability to effectively operate in the SCS.[260] Additionally, it has continued Operation Valiant Shield, a huge military exercise in the Western Pacific. Taking place between 12 and 23 September 2016 off the coast of Guam and around the Marianas Islands, the operation involved over a dozen surface warships, 180 aircraft and 18 000 personnel and tested the interoperability of US forces ensuring, for example, the smooth

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251 Ibid [620].
252 Ibid [621].
253 Ibid [622].
254 Ibid [623].
255 Ibid [623], [625].
256 Ibid [626].
257 People's Republic of China, 'Statement on the Award of the 12 July 2016 Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines' (Statement, Ministry of Foreign Affairs, 12 July 2016).
258 Ben Blanchard, 'China, Russia Naval Drill in South China Sea to Begin Monday' *Reuters* (online), 11 September 2016 <http://www.reuters.com/article/us-southchinasea-china-russia-idUSKCN11H051>.
259 Ibid.
260 Steven Stashwick, 'US Navy Expanding Ability to Sustain Operations in South China Sea' *The Diplomat* (online), 19 October 2016 <http://thediplomat.com/2016/10/us-navy-expanding-ability-to-sustain-operations-in-south-china-sea/>.

coordination of an amphibious landing.[261] Importantly, the exercise also involved naval assets stationed in Japan. Such postures were unsurprising from these superpowers, with one attempting to enforce the status quo and the other to disrupt it. However, the unexpected election of President Donald Trump has made US behaviour far harder to predict. Days after his January 2017 inauguration, President Trump withdrew from the Trans-Pacific Partnership.[262] This seismic policy shift reversed President Obama's strategy to consolidate US influence in Asia in favour of an 'America First' trade policy.[263] On the other hand, the US has continued to exercise its rights to freedom of navigation in the SCS. This has included a 'passing exercise' with Japan designed to enhance the interoperability of their naval assets.[264] Occurring 18 May 2017, the exercise notably involved Japan's largest warship the *JS Izumo*.[265] Furthermore, on 8 June 2017 the US conducted a training mission using two supersonic bombers over the disputed waters.[266] Most recently, on 3 July 2017 US destroyer *USS Stethem* symbolically came within 12 nautical miles of a SCS feature claimed by China.[267] Given these and many other contradictory statements and actions, it appears too early to forecast the Trump administration's SCS policy. President Trump does not however, hold a monopoly on unpredictability in the region. The post-*Award* actions of the Philippines have also been counterintuitive. Rodrigo Duterte, a populist hardliner elected as the Philippines' President only two weeks prior to the *Award*, has seemingly turned the Filipino SCS position on its head. He has rebuked the US-Philippine alliance vowing sooner or later to 'break up with America'.[268] Beyond simple rhetoric, the Filipino Defence Secretary announced on 8 October 2016 a suspension of planned joint naval patrols

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261 Franz-Stefan Gady, 'US Navy to Hold Massive Naval Drill in Western Pacific' *The Diplomat* (online), 8 September 2016 <http://thediplomat.com/2016/09/us-navy-to-hold-massive-naval-drill-in-western-pacific/>.

262 Peter Baker, 'Trump Abandons Trans-Pacific Partnership, Obama's Signature Trade Deal', *The New York Times* (online), 23 January 2017 <https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html?mcubz=1>.

263 Ibid.

264 United States Navy, 'U.S., JMSDF Complete PASSEX in South China Sea' (Press Release, NNS170519-10, 19 May 2017) <http://www.navy.mil/submit/display.asp?story_id=100554>.

265 Ibid.

266 United States Pacific Command, 'Air Force, Navy Train in South China Sea' (Press Release, 8 June 2017) <http://www.pacom.mil/Media/News/News-Article-View/Article/1208657/air-force-navy-train-in-south-china-sea/http://www.pacom.mil/Media/News/News-Article-View/Article/1208657/air-force-navy-train-in-south-china-sea/>.

267 'Warship USS Stethem Challenges Territorial Claims in South China Sea Ahead of Trump Talks', *Australian Broadcasting Corporation News* (online), 3 July 2017 <http://www.abc.net.au/news/2017-07-03/us-warship-challenges-territorial-claims-in-south-china-sea/8672166>.

268 Greg Rushford, 'What Rodrigo Duterte Is Giving Up' *Foreign Policy* (online), 17 October 2016 <http://foreignpolicy.com/2016/10/17/what-rodrigo-duterte-is-giving-up-philippines-china-hague-south-china-sea/>.

and exercises, including an amphibious landing exercise, as well as 28 other regular exercises held by the two States.[269] However, more recently relations appear to have warmed under President Trump, who in May 2017 shared a warm phone call with Duterte and praised his controversial 'war on drugs'.[270] Indeed, the Philippines accepted US technical military assistance in fighting an insurgency in the southern Island Mindanao.[271] Nonetheless, soon after the *Award*, Duterte, accompanied by a sizable business delegation, travelled to Beijing in an attempt to strengthen both economic and military ties.[272] Moreover, he has shown a willingness to ignore the favourable findings of the Tribunal in favour of a newly negotiated arrangement, saying: 'There is no sense in fighting over a body of water … it is better to talk than war.'[273] Certainly, at the 2017 ASEAN meeting he refused to push for a multilateral resolution to address the SCS issue.[274]

Such developments add an extra layer of complexity to the SCS geopolitical situation and put in doubt the value of the *Award* from a dispute resolution standpoint. Nonetheless, geopolitical considerations aside, the *Award* remains of immense jurisprudential value. Indeed, notwithstanding the multitude of law of the sea issues addressed by the Tribunal, this paper contends that the art 121 jurisprudence is particularly valuable. For, as Mr Martin for the Philippines pointed out at the outset of his submissions on the matter:

> the proper interpretation of Article 121(3) is a question on which authoritative guidance is sorely needed … there is no getting around the question here. The interpretation of Article 121(3) lies at the very heart of this case. This tribunal's decision will therefore inject much-needed legal clarity, not only in the South China Sea but around the globe.[275]

The arbitrators did not shy away from this endeavour. Rather, they embarked upon a detailed analysis of art 121(3) finding, likely much to counsel's delight, a broader formulation than even the Philippines had submitted. In so doing the Tribunal took an innovative approach that

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269 'South China Sea: Philippines' Defence Chief Tells US Military to Hold Joint Patrols, Naval Exercises' *Australian Broadcasting Corporation* (online), 8 October 2016 <http://www.abc.net.au/news/2016-10-08/philippines-tells-us-no-joint-patrols-in-south-china-sea/7914852>.

270 Ronald D Holmes and Mark R Thompson, 'Duterte's Year of Sound and Fury', *The Diplomat* (online) 30 June 2017 <http://thediplomat.com/2017/06/dutertes-year-of-sound-and-fury/>.

271 Ibid.

272 Tom Phillips, 'Rodrigo Duterte Arrives in China with "Make Friends, Not War" Message' *The Guardian* (online), 18 October 2016 <https://www.theguardian.com/world/2016/oct/18/rodrigo-duterte-philippines-president-china-make-friends-not-war>.

273 Ibid.

274 Holmes and Thompson, above n 270.

275 'Day 2 Hearing on Merits and Remaining Issues of Jurisdiction and Admissibility', *South China Sea Arbitration (Award) (Philippines v China)*, UNCLOS Arbitral Tribunal, Case No 2013-19, 25 November 2015, 58.

developed the law. One such innovation was the interpretation of the 'human habitation' condition as requiring more than mere survival. This set a high bar for the condition although it should be noted that the threshold itself still requires further clarification. Another example was the *Award's* conclusion that features could, in certain situations involving traditional coastal cultures, be considered in tandem as constellations of features. It should be pointed out that the Philippines did not raise this point directly. This appears to indicate a willingness by the Tribunal to address art 121(3) in its totality, seemingly focusing as much on developing the law as resolving the live issues in the dispute itself.

However, the arbitrators did not consider art 121(3) in isolation. Indeed at several junctures the *Award* built upon the notion that the art 121 Regime of Islands is indivisible. This reading is consistent with the ICJ's findings in *Nicaragua v Colombia*.[276] In that case, the Court found that the maritime entitlements conferred by art 121(2) were 'expressly limited' by reference to art 121(3).[277] In this way the third paragraph of the Regime: 'provides an essential link between the long-established principle that "islands, regardless of their size, ... enjoy the same status, and therefore generate the same maritime rights, as other land territory" and the more extensive maritime entitlements recognized in *UNCLOS*'.[278] Thus the provisions of art 121 must necessarily be read together, making the Regime 'indivisible'.[279] The Tribunal concurred with this reasoning, and this can be seen throughout the *Award*. Indeed, as discussed in Section IV A, from the outset the Tribunal considered that the Regime of Islands contained a definition (paragraph 1), general rule (paragraph 2) and an exception (paragraph 3).[280] Therefore, all features satisfying the definition in paragraph 1 were 'high-tide features', with 'rocks' and 'fully entitled islands' being subsets thereof.[281] A practical implication of this conceptualisation can be found in the *Award's* conclusions vis-a-vis natural capacity.[282] When addressing this issue the arbitrators found that the words 'naturally formed', in the paragraph 1 definition, qualified 'human habitation', necessitating that this requirement be met on the feature's natural conditions. This was based on the logic that, as a 'rock' is the subset of an 'island', the art 121(1) requirement carried to the art 121(3) condition.

This approach to the Regime of Islands is in line with the broader paradigm that the *Convention* is the constitution of the oceans and, given its origins in *Nicaragua v Colombia*, it will likely be followed by the ICJ. On the other hand, when it comes to the *Award's* broad interpretation of art 121(3)

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276 [2012] ICJ Rep 624, 674 [139].
277 Ibid.
278 Ibid.
279 Ibid.
280 *South China Sea Arbitration (Award)* (UNCLOS Arbitral Tribunal, Case No 2013-19, 12 July 2016) [387]–[390].
281 Ibid [280].
282 Discussed in Section IV B 2.

specifically, there remains ample room for disagreement. For, whilst the Tribunal's conclusions are well founded, its reasoning is underpinned by a methodological approach that is vulnerable to potential criticism. For example, it may be put that the Tribunal relied too heavily on the plain and ordinary meaning of the text itself and that more conclusions ought to have been drawn from the *travaux*. Furthermore, it could well be argued that the arbitrators' remarks with regards to the relevance of state practice, dealt with in only two paragraphs, were overly dismissive. Upon this basis, a future ICJ case may well decide to take a more restrictive formulation of art 121(3). This eventuality could emerge in any number of scenarios involving contested maritime features. The ICJ is the perfect forum for such disputes for, unlike the third-party resolution bodies unique to the *UNCLOS*, it can deal with both territorial and maritime claims. The ICJ is therefore jurisdictionally advantaged given that questions of a feature's sovereignty and the maritime zones that it is capable of generating are frequently intertwined.[283] Again Asia, given its geographical, geopolitical, and economic realities, is the likely forum in which such a scenario may materialise. In the East China Sea, China may decide that its territorial and maritime dispute with Japan over the Senkaku (Diaoyu) Islands ought to be ventilated in the ICJ. Ironically, assuming Beijing does not succeed in its claim to sovereignty, the Tribunal's broad formulation of the art 121(3) exception would be to its advantage in curtailing Japan's asserted maritime rights. In the Sea of Japan, for its part, the Japanese government has attempted the same approach, to no avail, with its disputes over the Dokdo (Takeshima) Islands with South Korea.

Were such a case to eventuate, the ICJ's formulation, given its imprimatur, would likely prevail. However, it is contended that this situation is unlikely for several reasons. First, the arbitrators are pre-eminent scholars and practitioners in the field, rendering their views highly persuasive. Second, the Tribunal's conclusions are in many ways analogous to the ICJ's findings vis-a-vis similar features in the maritime boundary delamination cases discussed in Section III. Third, an opposing interpretation by the ICJ would undermine the jurisprudential value of the *UNCLOS's* dispute resolution bodies. Such a scenario would add to perceptions of international law as a disjointed patchwork, undermining its legitimacy and potentially encouraging 'forum shopping'. This is not a desirable outcome for the juridical branch of the UN, especially given the *Convention's* status as a UN treaty. Therefore, whilst a contrary interpretation by the ICJ may be legally possible, it does not appear to be desirable either for the law of the sea, or the objectives of international dispute resolution generally. In either case, for the first time international legal practitioners and scholars have a detailed formulation of the process required for categorisation of

[283] See Robert W Smith and Bradford Thomas, 'Islands Disputes and the Law of the Sea: An Examination of Sovereignty and Delimitation Disputes' in Myron H Nordquist and John Norton Moore (eds), *Security Flashpoints – Oils, Islands, Sea Access and Military Confrontation* (Martinus Nijhoff Publishers, 1998) 55, 64–7.

features under the Regime of Islands. Thus, regardless of China's compliance in this specific case, with maritime features increasingly becoming global flashpoints, a clear interpretation of art 121(3) may be pivotal to ensuring the resolution of disputes 'by peaceful means, and in conformity with the principles of justice and international law'.[284]

[284] *Charter of the United Nations* art 1(1).