

## The South China Sea Arbitration's contribution to the concept of juridical islands

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### 1. Introduction

The Permanent Court of Arbitration case launched by the Philippines against China in 2013 presented the Arbitral Tribunal with the opportunity to answer a number of fundamental legal questions to clarify legal rights in the South China Sea and to contribute significantly to the progressive development of the law of the sea. The fundamental areas concerned China's claimed historic rights within its 'nine-dash line', the lawfulness of some of its development activities in the South China Sea, and the status of insular features. This last area concerns determinations of features as to whether they are low-tide elevations (LTEs), rocks above water at high tide, or islands capable of generating the full suite of maritime zones. Classifying particular features differently from claimant States – of which there are six in the South China Sea<sup>1</sup> – would significantly alter perceived maritime entitlements and potentially lead to revised and inconsistent assertions of maritime jurisdictional rights from features over which multiple sovereignty claims exist. Determination of

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<sup>1</sup> Brunei, China (PRC and ROC), Malaysia, Philippines, Vietnam.



the insular status of the numerous disputed features would also enable much-needed clarification of the troublesome Article 121(3) in the LOSC. This article examines the Tribunal's interpretation of this provision – especially its extensive analysis of the imprecise expressions 'sustain human habitation' and 'economic life' – whereby it set a high threshold for insular features to have juridical island status. The logic of the ruling is assessed, including the Tribunal's application of the clarified standard to the largest naturally-formed feature in the South China Sea: Taiping Dao/Itu Aba. The ruling of the Tribunal that this feature is not an island for the purposes of Article 121(3) is a great disappointment to the Republic of China (Taiwan) which has exercised continuous control over it since the 1950s, as well as the People's Republic of China, which also claims sovereignty over most features in the South China Sea. This article concludes with an opinion as to whether the Tribunal made a well-reasoned and justified interpretation of Article 121(3), and considers the jurisprudential impact of the ruling and its implications for other States which possess remote and uninhabited insular features.

## 2. *The role of islands in enabling coastal State maritime jurisdiction*

The definition of 'islands' and their utilisation in determinations of the outer limits of maritime claims and in the delimitation of maritime boundaries is complex and crucially important for coastal States. The Regime of Islands under the LOSC defines an island at Article 121(1) as a 'naturally formed area of land, surrounded by water, which is above water at high tide.' The following paragraph, Article 121(2), provides that maritime claims from islands are determined as for 'other land territory'. While Article 121(1) is identical to a provision in the 1958 Convention on the Territorial Sea and Contiguous Zone and Article 121(2) repeated a rule from this convention that islands can be used for measuring the territorial sea,<sup>2</sup> Article 121(3) provided a new but imprecise third paragraph. It provides that 'Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.'

<sup>2</sup> Convention on the Territorial Sea and the Contiguous Zone (adopted 19 April 1958, entered into force 10 September 1964) art 10.



Defining an insular feature as a 'full' island capable of generating exclusive economic zone (EEZ) and continental shelf rights, as opposed to a mere 'rock' which cannot, has great benefit in terms of the area of maritime jurisdiction it can support. If a 'full' island has no maritime neighbours within 400 nautical miles (nm), it can generate 125,664 nm<sup>2</sup> [431,014 square kilometres (km)] of territorial sea, EEZ and continental shelf rights whereas a 'rock' can only generate a claim to a territorial sea of 452 nm<sup>2</sup> (1,550 km<sup>2</sup>). Almost without exception, States have interpreted this provision broadly so that they can claim the maximum possible maritime jurisdiction. They have asserted the full suite of maritime claims from islands that are extremely small, uninhabited, remote and desolate.<sup>3</sup> Once claims from such features are asserted, nationalistic sentiments tend to ensure that States are extremely reluctant for them to be modified. Indeed, there is only one example globally of a State voluntarily reclassifying an insular feature and downgrading it from full land status to a mere rock and thus reducing the area of its claimed maritime zones. Cognizant of the new constraint provided in Article 121(3), the United Kingdom determined upon its accession to the LOSC in 1997 that Rockall, a tiny 624 m<sup>2</sup> isolated rocky pinnacle approximately 163 nm northwest of Scotland, was 'not a valid base point' for generating 200 nm limits.<sup>4</sup>

### 3. *The Tribunal's interpretation of Article 121(3)*

Article 121(3) of the LOSC had not been the subject of detailed authoritative judicial examination and pronouncement prior to the 2016 Award determination. The only examples of judicial consideration are declarations appended to two judgments of the International Tribunal

<sup>3</sup> AO Elferink, 'Is it Either Necessary or Possible to Clarify the Provision on Rocks of Article 121(3) of the Law of the Sea Convention?' in M Pratt, J Brown (eds), *Borderlands Under Stress* (Kluwer 2000) 389, 393; C Schofield, 'The Trouble with Islands: The Definition and Role of Islands and Rocks in Maritime Boundary Delimitation' in Seoung-Yong Hong and JM Van Dyke (eds), *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* (Brill 2009) 19-37.

<sup>4</sup> DH Anderson, 'British Accession to the UN Convention on the Law of the Sea' (1997) 46 *Intl Comparative L Quarterly* 761, 778. Previously, no qualifications existed (such as size and habitability) for islands with respect to their ability to generate continental shelf rights. See, eg, ED Brown, 'Rockall and the Limits of National Jurisdiction of the UK' (1978) 2 *Marine Policy* 181, 204.

for the Law of the Sea (ITLOS) by former Croatian Judge Budislav Vukas. Following his determination that it was invalid for France to proclaim an EEZ adjacent to the ‘uninhabitable and uninhabited’ 7,215 km<sup>2</sup> Kerguelen Islands in the southern Indian Ocean in the 2000 *Monte Confurco* case,<sup>5</sup> Vice-President Vukas issued a similar but more detailed declaration in the 2002 *Volga* case concerning Australia’s nearby 368 km<sup>2</sup> Heard Island.<sup>6</sup> In his view, an interpretation of Article 121(3) that would allow States to claim EEZs from rocks or other small uninhabited islands would not be in accordance with the rationale for the creation of the special *sui generis* EEZ regime and would be inconsistent with the ‘letter and spirit’ of the EEZ provisions in the LOSC. He quoted a 1971 statement from Ambassador Arvid Pardo – one of the main architects of the LOSC – who warned of the danger of not limiting maritime claims to more substantial insular features:

‘If a 200 mile limit of jurisdiction could be founded on the possession of uninhabited, remote or very small islands, the effectiveness of international administration of ocean space beyond national jurisdiction would be gravely impaired.’<sup>7</sup>

The conclusion reached by Vice-President Vukas that neither the Kerguelen Islands nor Heard Island could generate EEZs was inconsistent with all the other judges in the cases in the sense that they proceeded on the basis that France and Australia had such maritime jurisdiction. Consequently, Vukas’s declarations did not alter the State practice of France or Australia and they largely have been viewed as oddities in ITLOS rulings.

Article 121(3) has been subject to varied implementation by States. The preponderance of State practice arguably is of coastal States with small insular features asserting full island status rather than sustained and consistent practice of other States disputing such characterisations. The

<sup>5</sup> *The ‘Monte Confurco’ case (Seychelles v France)* (Judgment) 2000 ITLOS Case No 6, Declaration of Judge Vukas, 122.

<sup>6</sup> *The ‘Volga’ case (Russian Federation v Australia)* (Judgment) 2002 ITLOS Case No 11, Declaration of Vice-President Vukas, 42, 44.

<sup>7</sup> Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction, ‘Summary Record of the Fifty-Seventh Meeting’ UN Doc A/AC.138/SR.57, 163, 167 (23 March 1971).



most famous, or indeed infamous, example of a State claiming full island status from the smallest and most inhospitable of features is Japan's claims from Okinotorishima, a tiny atoll in the Philippine Sea far from any land typically described as being the size of a bed.

The absence of judicial cases in which Article 121(3) is interpreted is due to only a handful of cases concerning islands being litigated since the entry into force of the LOSC in 1994 and the reluctance of State parties to raise the specific issue of alleged improper application of the provision by another State. The cases have largely concerned the question of sovereignty over islands or the weight that should be given to insular features when delimiting a maritime boundary. Nevertheless, Article 121(3) has been a rich source for scholarly analysis. This is because its vague and subjective wording is a 'perfect recipe for confusion and conflict'<sup>8</sup> and its implications are significant in terms of the area of ocean space that are subject to national jurisdiction. The LOSC greatly expanded the areas that can be claimed, particularly the extension of the territorial sea to 12 nm breadth, and the creation of the EEZ and the concept of the extended continental shelf. The attention given to Article 121(3) by scholars has illuminated the origins and purpose of the provision and articulated different views of its scope. The debate has been useful but ultimately inconclusive because the vagueness of the article's terms and expressions meant that a clear and authoritative interpretation would be illusory until such time as an international court or Tribunal was required to rule on the matter.

Article 121(3) raises complex issues for interpretation.<sup>9</sup> Phrases that are 'intolerably imprecise'<sup>10</sup> need to be interpreted, especially 'cannot sustain human habitation', 'economic life', and 'of their own'. Although neither these nor similar phrases were included in the 1958 Convention, it is not the case that the ideas inherent in them were new during the negotiating period for the LOSC. The earliest attempts to draft multilateral law of the sea treaties grappled with such concepts, including during the 1930 Hague Codification Conference and Great Britain's attempt in

<sup>8</sup> Brown (n 4) 206.

<sup>9</sup> AO Elferink, 'Clarifying Article 121(3) of the Law of the Sea Convention: The Limits Set by the Nature of International Legal Processes' (1998) IBRU Boundary and Security Bulletin Summer 58.

<sup>10</sup> Brown (n 4) 206.

1923 to develop a common policy on the limits of territorial waters.<sup>11</sup> Suggestions emerged for a 'fully entitled island' to be of a minimum size and, or alternatively, being of a certain standard of habitability, but agreement could not be reached. Drafters of the 1982 LOSC settled on wording that is characteristically opaque and open to interpretation. Crafting treaty provisions that deal with contested issues in vague language enables States to reach agreement on principle and thereby proceed to the conclusion of a treaty while leaving to a later date more difficult interpretation questions about the substance of obligations. While this is inelegant as a matter of legal development, it is a feature of international law that reveals it as much a political and diplomatic process as it is a legal process.<sup>12</sup>

The decision in the *Philippines v China* case was highly anticipated in large part because the Philippines had directly raised the issue of the correct interpretation of Article 121(3) and its application to small and remote insular features. Although the Award decision could only be binding on the parties to the dispute (the Philippines and China), its significance would be global because any clarification of Article 121(3) rendered by the Tribunal would have a direct bearing on the practice of many other States which claim full maritime zones from insular features. A strict or narrow interpretation of Article 121(3) would call into question the validity of countless island claims by numerous States. Conversely, a broad definition could embolden States to claim maritime zones from features that they had previously assumed to be mere rocks. Further, any attempt by the Tribunal to determine a clear 'bright line' test for full island status would be contentious because it would need to rely on assumptions about the intention or meaning of ambiguous phrases, each of which would be open to question. For example, would the Tribunal seek to adopt a strict textual approach, or would it ascribe

<sup>11</sup> *ibid* 204-206; B Kwiatkowska, AHA Soons, 'Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own' (1990) 21 *Netherlands YB Intl L* 139, 153-154; T Uykur, 'An Overview of Two Contemporary Issues in the Law of the Sea: Islands within the Context of Delimitation and Combatting Piracy Off the Coasts of Somalia' in MH Nordquist, JN Moore, AHA Soons, Hak-So Kim (eds) *The Law of the Sea Convention: US Accession and Globalization* (Martinus Nijhoff 2012) 551, 552.

<sup>12</sup> W Gullett, 'Legislative Implementation of the Law of the Sea Convention in Australia' (2013) 32 *U Tasmania L Rev* 184, 185.



an interpretation of Article 121(3) that supports the idea of viewing the LOSC as an enduring constitution-like document that is cognizant of the evolving nature of human endeavour and use of the oceans? If this latter approach were to be adopted, words and phrases like 'habitation' and 'economic life' might be understood in light of developments in modern technology, rather than 'frozen in time' in 1982 when the text was finalised.

This section reviews the process by which the Arbitral Tribunal ascertained the meaning of Article 121(3). A key point is that it is axiomatic that Article 121(3) is a provision of limitation. It is designed to provide a sub-category of above-high tide land features that are entitled to the full range of maritime zones. The Tribunal, in explaining the limitation purpose of Article 121(3), stated that Article 121 'therefore contains a distinction between two categories of naturally formed high-tide features, which the Tribunal refers to as "fully entitled islands" and "rocks" respectfully'.<sup>13</sup>

### 3.1. *Treaty interpretation approach*

The Tribunal observed that in order to interpret Article 121(3) it must apply the provisions of the Vienna Convention on the Law of Treaties.<sup>14</sup> Article 31(1) of that treaty provides that 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'. Further, '[A]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' shall be taken into account. Article 32 provides that as a supplementary means of interpretation, recourse may be had to the preparatory work of the treaty to confirm its meaning, or determine the meaning when it is otherwise ambiguous, obscure, or leads to a manifestly absurd or unreasonable result. This set out the uncontested Treaty interpretation approach for the Tribunal. In short, it was to consider the literal meaning of the words used, bearing in mind the purpose for which the provision was created and the words were selected, and informing itself

<sup>13</sup> *South China Sea Arbitration (The Republic of the Philippines v The People's Republic of China)* PCA case no 2013-19 (Award of 12 July 2016) para 390.

<sup>14</sup> *ibid* para 476.

of the negotiating history of the provision in light of its contested meaning. The approach to first ascertain the literal meaning of words was to resort to a dictionary, with the Tribunal choosing to use the Oxford Dictionary. The second step was to examine the context of the text by considering the object and purpose of the LOSC and then review *travaux préparatoires*. Finally, the Tribunal would draw conclusions on the interpretation of Article 121(3) and then apply the provision to the South China Sea features in question. This section sets out the reasoning of the Tribunal, commencing with the interpretation of the following words and phrases in Article 121(3): ‘rocks’, ‘cannot’, ‘sustain’, ‘human habitation’, ‘or’, ‘economic life of their own’.

### 3.2. *Key terms*

#### i) *Rocks*

The Tribunal determined that the word ‘rocks’ is not limited to features that are solid rock or rock-like.<sup>15</sup> This was because of a broader dictionary definition of the word and an International Court of Justice case in which the word was held to apply to a coral formation.<sup>16</sup> Further, the Tribunal noted that to hold otherwise would lead to ‘absurd’ results whereby less robust small features such as those composed of sand, gravel or mud would be able to generate the full suite of maritime zones.<sup>17</sup> It was logical for the Tribunal to determine that ‘rock’ does not literally mean ‘rock’. This is because the article operates to limit some features from having full island status and if the limitation only applied to features that were composed of rock, it would leave countless other features of equivalent size and hospitability as generating the full suite of maritime zones without the ability to impose any limitation. As stated by the Tribunal, ‘The result of this interpretation is that “rocks” for the purposes

<sup>15</sup> *ibid* para 480.

<sup>16</sup> *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Merits) [2012] ICJ Rep 624, 645.

<sup>17</sup> *South China Sea Arbitration* (n 13) para 481. See also M Gjetnes, ‘The Spratlys: Are They Rocks or Islands?’ (2001) 32 *Ocean Development Intl L* 191, 193.



of Article 121(3) will not necessarily be composed of rock.<sup>18</sup> The soundness of this conclusion reveals that it may be proper to interpret other words in the LOSC in a manner that does not accord with their strict dictionary definitions, thus supporting a purposive approach to interpretation where a literal interpretation would lead to absurd results. This approach is consistent with legislative interpretation in common law countries.<sup>19</sup>

ii) *Cannot*

The Tribunal noted that the word ‘cannot’ in Article 121(3), located immediately before the expression ‘sustain human habitation or economic life’, ‘indicates a concept of capacity’.<sup>20</sup> It characterised the provision as essentially asking ‘Does the feature in its natural form have the capability of sustaining human habitation or an economic life?’<sup>21</sup> Thus, it is an objective assessment of whether the feature ‘is apt, able to, or lends itself to’ human habitation or economic life.<sup>22</sup> The feature need not currently be inhabited. Likewise, a feature may not currently have an economic life but it still may be able to sustain an economic life. The Tribunal considered that historical evidence of habitation or absence of habitation or economic activity may be relevant for the assessment.

iii) *Sustain*

When assessing the word ‘sustain’, the Tribunal again commenced its analysis with the Oxford Dictionary definition which means to ‘support, maintain, uphold’, for an extended period without interruption, keeping at a proper level or standard.<sup>23</sup> The word is used in Article 121(3) in conjunction with a feature that must itself provide this capacity. Thus the Tribunal considered that the ‘ordinary meaning’ of the word has three components: support and provision of essentials; a temporal concept of

<sup>18</sup> *South China Sea Arbitration* (n 13) para 482. See also Kwiatkowska, Soons (n 11) 151.

<sup>19</sup> See, eg, Australia’s *Acts Interpretation Act* 1901 (Cth) s 15AA.

<sup>20</sup> *South China Sea Arbitration* (n 13) para 483.

<sup>21</sup> *ibid.*

<sup>22</sup> *ibid.*

<sup>23</sup> *ibid* para 485.

support over a period of time and not as a one-off or short-lived experience; and a qualitative concept of at least a minimal ‘proper standard’.<sup>24</sup> It continued:

‘Thus, in connection with sustaining human habitation, to “sustain” means to provide that which is necessary to keep humans alive and healthy over a continuous period of time, according to a proper standard. In connection with an economic life, to “sustain” means to provide that which is necessary not just to commence, but also to continue, an activity over a period of time in a way that remains viable on an ongoing basis.’

This interpretation of ‘sustain’ is sound because it gives effect to the literal meaning of the word and ensures that the EEZ and continental shelf regime are reserved for features that are inhabited, or inhabitable, indefinitely by a community or population of people. The interpretation is significant because it is likely to operate to restrict State practice which had evolved to the point of States claiming full island status from the smallest and most inhospitable of features on the basis that theoretically humans could survive on them for short periods. Further, the interpretation supports the rationale of Article 121, discussed below, whereby it was envisaged that the full maritime zones – and notably the EEZ – should be claimable only from features where they will support resident populations. This interpretation therefore is logical but it is not without difficulty. In particular, there is now a new qualification that human habitation must be able to be sustained at a ‘proper’ level, that is, something more than enabling humans to survive on a feature. The word ‘proper’, while sound as an element within the concept of ‘sustain’, does not set an indisputably objective standard. Thus it will be susceptible to a range of interpretations when Article 121(3) is applied to particular features.

iv) *Human habitation*

Following review of the dictionary definition of ‘habitation’, the Tribunal considered the term ‘human habitation’ has a qualitative element involving the notions of settlement and residence. It reasoned that the

<sup>24</sup> *ibid* para 487.



term cannot mean a 'small number' of persons because this could not amount to permanent or habitual residence.<sup>25</sup> Thus, the term 'habitation' 'implies a non-transient presence of persons who have chosen to stay and reside on the feature in a settled manner.' This means that human habitation requires 'all of the elements necessary to keep people alive on the feature, but would also require conditions sufficiently conducive to human life and livelihood for people to inhabit, rather than merely survive on, the feature.'<sup>26</sup> The Tribunal continued:

'Forms of human habitation and livelihood vary greatly, and in an international instrument such as the Convention, no particular culture or mode of habitation should be assumed for the purpose of Article 121(3). Certain factors, however, remain constant wherever habitation by humans is concerned. At a minimum, sustained human habitation would require that a feature be able to support, maintain, and provide food, drink, and shelter to some humans to enable them to reside there permanently or habitually over an extended period of time.'<sup>27</sup>

The Tribunal also considered the term implies habitation of a feature by a group or community of persons. The LOSC does not prescribe a minimum number of persons but the Tribunal noted that humans 'need company and community over sustained periods of time'.<sup>28</sup> Thus, the Tribunal considered there is a minimum requirement to provide for daily subsistence and survival of a number of people for an indefinite time.<sup>29</sup> The Tribunal noted that the LOSC does not set a threshold to distinguish 'settled human habitation' from the 'mere presence of humans' or 'elucidate the physical characteristics of a feature that would be necessary to sustain the more settled mode of human habitation, rather than merely ensuring human survival'.<sup>30</sup> However, according to the Tribunal, 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 exclusive economic

<sup>25</sup> *ibid* para 489.

<sup>26</sup> *ibid*.

<sup>27</sup> *ibid* para 490.

<sup>28</sup> *ibid* para 491.

<sup>29</sup> *ibid* para 492.

<sup>30</sup> *ibid*.

zone were seen to merit protection.<sup>31</sup> Thus the term ‘human habitation’ should be understood to involve the inhabitation of a feature:

‘by a stable community of people for whom the feature constitutes a home and on which they can remain. Such a community need not necessarily be large, and in remote atolls a few individuals or family groups could well suffice. Periodic or habitual residence on a feature by a nomadic people could also constitute habitation...An indigenous population would obviously suffice, but also non-indigenous inhabitation could meet this criterion if the intent of the population was truly to reside in and make their lives on the islands in question.’<sup>32</sup>

The Tribunal determined that the requirements of Article 121(3) will not be met for features that are ‘only capable of sustaining habitation through the continued delivery of supplies’.<sup>33</sup> This interpretation leads to the conclusion that to be a fully-entitled island based on habitability, a feature must enable the living on it of more than a small number of people settled in a group or community by providing provide food, drink and shelter for habitual or permanent residence.

v) *Or*

The Tribunal considered that either category of human habitation or economic life will suffice for establishing that a feature has full island status, thus differing from the Philippine’s submission that both elements are required. However, in the Tribunal’s view, the presence of one category would tend to imply the existence of the other: ‘economic activity is carried out by humans and ... humans will rarely inhabit areas where no economic activity or livelihood is possible’.<sup>34</sup> However, in a key development for the interpretation of Article 121(3), the Tribunal opined that multiple islands could be used in concert to sustain a traditional way of life. This raises the question of what type of ‘constellation’<sup>35</sup> of islands

<sup>31</sup> *ibid* para 542.

<sup>32</sup> *ibid*.

<sup>33</sup> *ibid* para 547.

<sup>34</sup> *ibid* para 497.

<sup>35</sup> *ibid* para 544.



could be considered a group, especially where some or all of them individually are insufficient to amount to fully-fledged islands?

vi) *Economic life of their own*

In interpreting the phrase 'economic life of their own', the Tribunal considered that more than mere presence of economic resources is needed because of the word 'life'. It also considered that the required economic activity must have been conducted more than once or for a short period of time because of the word 'sustain' which 'presupposes ongoing economic activity'.<sup>36</sup> 'Sustain', as discussed above in a similar fashion with regard to human habitation, also implies 'a basic level of viability' for the economic activity.

The Tribunal considered that the words 'of their own' mean that the feature must be able to support independent economic life 'without relying predominantly on the infusion of outside resources or serving purely as an object for extractive activities, without the involvement of a local population'.<sup>37</sup> The economic activity must involve local resources and the benefit must be local. It stated:

'Economic activity that can be carried on only through the continued injection of external resources is not within the meaning of "an economic life of their own"... Similarly, purely extractive economic activities, which accrue no benefit for the feature or its population, would not amount to an economic life of the feature as "of its own".'<sup>38</sup>

Regarding sea areas, the Tribunal stated that it would be incorrect to consider any possible economic life in potential EEZs or continental shelf because it would be 'circular and absurd'.<sup>39</sup> This is sound reasoning considering that a feature can only generate an EEZ or continental shelf if it can sustain human habitation or economic life in the first place. However, there can be no constraint in considering utilisation of resources in the territorial sea because all above high tide land features – including 'rocks' within the meaning of Article 121(3) – can generate a territorial

<sup>36</sup> *ibid* para 499.

<sup>37</sup> *ibid* para 500.

<sup>38</sup> *ibid*.

<sup>39</sup> *ibid* para 502.

sea. However, the Tribunal considered that Article 121(3) requires that the economic life is linked to the feature and not simply occurring in adjacent waters. An example of insufficient evidence of a feature sustaining economic life would be where fishers from far afield exploit the territorial sea for the benefit of distant populations without making use of the feature itself.

The Tribunal's interpretation of the meaning of the expression 'of their own' is sound in so far as it focuses on the characteristics of insular features and is a straightforward reading of the words. What is expected is ongoing activity for the benefit of a local population without need for outside support. However, new areas of uncertainty appear because the reasoning extends the analysis from the objective capacity of features to consideration of historical economic activity. It is unclear whether this approach precludes consideration of any economic activity that is new, currently untried or potentially unviable, although it is clear that the Tribunal would ascribe greater weight to activities that were conducted prior to the text of the LOSC being settled in 1982.

### 3.3. *Object and purpose of Article 121(3)*

The next step in the Tribunal's approach was to assess the object and purpose of Article 121(3). It noted the provision was intentionally one of limitation and must be understood 'in light of the purpose behind the introduction of the exclusive economic zone',<sup>40</sup> which was to benefit populations that inhabit or could inhabit insular features.

The Tribunal determined that a feature must be assessed on the basis of its natural condition.<sup>41</sup> This is because the object and purpose of the provision would be 'frustrated' if States 'were allowed to convert any rock incapable of sustaining human habitation or an economic life into a fully entitled island simply by the introduction of technology and extraneous materials'.<sup>42</sup> This is consistent with Article 121(1) which provides that an island is a 'naturally formed area of land'.<sup>43</sup> It is also incontestable as a matter of logic otherwise the most miniscule of land features could

<sup>40</sup> *ibid* para 507.

<sup>41</sup> *ibid* para 508.

<sup>42</sup> *ibid* para 509.

<sup>43</sup> See also LOSC art 13(1) regarding low tide elevations.



be enlarged into non-natural human-made islands. As a result, large reclamation activities conducted by China in the South China Sea, as well as by other States elsewhere, cannot make what is otherwise a 'rock' for the purposes of Article 121(3) into a juridical island. The Tribunal thus concluded that the words 'cannot sustain' in Article 121(3) mean 'cannot, without artificial addition, sustain'.<sup>44</sup> The Tribunal also indicated that collecting and storing rain water is permissible evidence to support a determination that human habitation can be sustained.<sup>45</sup> This raises the new query of at what point is an 'addition' characterised as 'artificial' and thus unable to be relied upon for the purpose of determining the status of a feature? It could be argued that it is reasonable not to preclude full island status of a feature where it has been rendered more hospitable by the provision and use of a minimal level of supplements. For example, in recognition of evolving human condition, it might be inappropriate to limit assessment of the habitability of a feature to considerations of ancient usage based on pre-modern technology. The Tribunal's comment on this point was that outside support might not change the assessment that a feature is habitable provided it is not 'so significant that it constitutes a necessary condition for the inhabitation of the feature.'<sup>46</sup>

i) *Purpose of EEZ*

The Tribunal considered the purpose of the EEZ in its approach to interpret Article 121(3). It noted that the purpose of an EEZ is to preserve the benefits of resources within it for the population of the coastal State<sup>47</sup>, and that this was a key balance set in the LOSC. It stated:

'As a counterpoint to the expanded jurisdiction of the exclusive economic zone, Article 121(3) serves to prevent such expansion from going too far. It serves to disable tiny features from unfairly and inequitably generating enormous entitlements to maritime space that would serve not to benefit the local population, but to award a windfall to the (potentially distant) State to have maintained a claim to such a feature. Given this context, the meaning attributed to the terms of Article 121(3)

<sup>44</sup> *South China Sea Arbitration* (n 13) para 510.

<sup>45</sup> *ibid* para 584.

<sup>46</sup> *ibid* para 550.

<sup>47</sup> *ibid* para 513.

should serve to reinforce, rather than counter, the purposes that the exclusive economic zone and Article 121(3) were respectively intended to serve.<sup>48</sup>

The Tribunal quoted a statement from Ambassador Koh delivered in 1974 during the negotiation period for the LOSC:

‘The rationale for the proposal that coastal States should have the right to establish an economic zone was essentially based upon the interests of the people and the desire to marshal the resources of ocean space for their development. . . . However, it would be unjust, and the common heritage of mankind would be further diminished, if every island, irrespective of its characteristics, was automatically entitled to claim a uniform economic zone. Such an approach would give inequitable benefits to coastal States with small or uninhabited islands scattered over a wide expanse of the ocean.’<sup>49</sup>

Thus the Tribunal concluded that ‘habitation’ needs to be interpreted as meaning habitation by a portion of the population for whose benefit the EEZ was introduced.<sup>50</sup>

ii) *Travaux préparatoires* of Article 121(3)

The Tribunal noted the first attempt to define a juridical island in the international context was in 1923 at the British Imperial Conference which concerned territory permanently above water and ‘capable of use or habitation’.<sup>51</sup> This expression was intended to mean ‘without artificial addition’. As discussed above, the subsequent 1958 Convention on the Territorial Sea and the Contiguous Zone did not contain this qualification. However, the issue was not significant prior to the negotiating period for the LOSC because attention was not focused on the possibility of small features generating large maritime entitlements. This was because in most areas of the world the territorial sea at that time was only of three nm breadth with the area beyond and adjacent being high seas

<sup>48</sup> *ibid* para 516.

<sup>49</sup> *ibid* para 519.

<sup>50</sup> *ibid* para 520.

<sup>51</sup> *ibid* para 522.



rather than an extended coastal State resource zone. Yet it became important as part of the 'package deal' during the LOSC negotiation period as new maritime entitlements were being recognised.

The concern about small, remote and inhospitable island features being used unjustly to generate large maritime claims was succinctly expressed by Denmark in 1982 when it commented on the unsatisfactory result if Article 121(3) was not included in the final text of the LOSC:

'[T]iny and barren islands, looked upon in the past as mere obstacles to navigation, would miraculously become the golden keys to vast maritime zones. That would indeed be an unwarranted and unacceptable consequence of the new law of the sea.'<sup>52</sup>

Similarly, Colombia argued that Article 121 reflected 'a unique and delicate balance and would help to preserve the common heritage in the oceans'.<sup>53</sup> The Tribunal concluded:

'Article 121(3) is a provision of limitation. It imposes two conditions that can disqualify high-tide features from generating vast maritime spaces. These conditions were introduced with the object and purpose of preventing encroachment on the international seabed reserved for the common heritage of mankind and of avoiding the inequitable distribution of maritime spaces under national jurisdiction.'<sup>54</sup>

There was considerable debate during the negotiation period for the LOSC about how the distinction between fully-entitled islands and rocks should be drawn. For example, should there be a minimum size requirement, or different considerations for remote features, and is it necessary for a feature to be populated, perhaps with a minimum level of population density? However, the diversity of island situations in the world and divergent views of participating States precluded the setting of 'bright-

<sup>52</sup> *ibid* para 533.

<sup>53</sup> *ibid*. China has essentially made the same point in protesting Japan's 2008 claim for extended continental shelf from Okinoritishima: Note Verbale from the People's Republic of China to the Secretary-General of the United Nations, No CML/2/2009 (6 February 2009); Note Verbale from the People's Republic of China to the Secretary-General of the United Nations, No CML/12/2009 (13 April 2009).

<sup>54</sup> *ibid* para 535. See also Kwiatkowska, Soons (n 11) 144.

line rules for all cases' and led the drafters of the LOSC to favour the 'language of the comprise reflected in Article 121(3)'.<sup>55</sup>

#### 3.4. *Summary: Clarified understanding of Article 121(3)*

The Arbitral Tribunal provided clarified understanding of Article 121(3). It eschewed the formulation of an abstract test of the objective requirements to sustain human habitation or economic life. This was because of the great variance in islands around the world and the need for individual assessment of them, particularly when considering in many cases it will be necessary to consider historical usage of features and not simply rely on an objective assessment of their resources.<sup>56</sup> Nevertheless, an updated explanation of the meaning of Article 121(3) can now be offered based on the Tribunal's interpretation of the words and expressions contained in the provision, determined in part due to appreciation of its background context and purpose. It can now be concluded that Article 121(3) should be read along the following lines:

*Insular features shall have no exclusive economic zone or continental shelf unless they are naturally formed land above high-tide and have the capacity in their natural state to support a population of people to live continuously in a community settlement on them (or in group of features where they are used together to sustain a traditional way of life) at a proper healthy standard of life, or to support ongoing economic activity for the benefit of those people, without the necessity of the provision of significant external resources.*

*The capacity of a feature includes its surrounding territorial waters provided that the ocean resources that are or could be used are linked to the land feature and would be for the benefit of its residents.*

#### 4. *Application of Article 121(3)*

Once the Tribunal clarified the meaning of Article 121(3), its next step was to apply it to the numerous features in the Spratly Islands area of the South China Sea to determine which, if any, are entitled to EEZs

<sup>55</sup> *ibid* para 537.

<sup>56</sup> *ibid* para 546.



and continental shelves. This would necessarily involve assessment of the physical characteristics of each insular feature to determine its natural capacity 'to enable a group of persons to live on the feature for an indefinite period of time'.<sup>57</sup> The focus would be on identifying sufficient quantities of water, food and shelter.<sup>58</sup>

#### 4.1. *Methodology*

The Tribunal established a clear methodology for determining the status of island features. Following an assessment of the objective, physical conditions of a feature, a conclusion could be reached that it either clearly can sustain human habitation or economic life, or it cannot. The matter will be resolved if a simple 'yes' or 'no' determination can easily be reached. For example, 'If a feature is entirely barren of vegetation and lacks drinkable water and the foodstuffs necessary even for basic survival, it will be apparent that it also lacks the capacity to sustain human habitation.'<sup>59</sup> Yet the opposite conclusion would be reached 'where the physical characteristics of a large feature make it definitively habitable.'<sup>60</sup>

Further analysis will be needed for features which cannot be categorised so easily. This will be in cases where 'evidence of physical conditions is insufficient for features that fall close to the line'.<sup>61</sup> Thresholds may differ from one island to the next in consideration of a variety of factors including size, remoteness, type of resources, adjacency to other features, climate and characteristics of local populations.

The Tribunal considered that the most reliable evidence of the capacity of a feature 'will usually be the historical use to which it has been put'.<sup>62</sup> It concluded that 'the most reasonable conclusion' in the case of a feature that had never been inhabited 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.'<sup>63</sup> There could be cases where human habitation on an otherwise inhabitable island 'has been prevented

<sup>57</sup> *ibid* para 546.

<sup>58</sup> *ibid*.

<sup>59</sup> *ibid* para 548.

<sup>60</sup> *ibid*.

<sup>61</sup> *ibid*.

<sup>62</sup> *ibid* para 549.

<sup>63</sup> *ibid*.

by forces that are separate from the intrinsic capacity of the feature' such as through war, pollution or environmental harm. In the absence of 'such intervening forces', it can be concluded that 'a feature that has never historically sustained a human community lacks the capacity to sustain human habitation.' The Tribunal also noted the converse situation: a feature could not be considered as having the capacity to sustain human habitation where its inhabitation was only possible through significant outside support. It noted cases where officials or military populations were stationed on features to bolster claims of habitability. Thus little weight would be given to situations where populations had been 'installed' on features after the creation of the EEZ. It stated:

[E]vidence of human habitation that predates the creation of exclusive economic zones may be more significant than contemporary evidence, if the latter is clouded by an apparent attempt to assert a maritime claim.<sup>64</sup>

#### 4.2. *Application of Article 121(3) to South China Sea insular features*

The Tribunal proceeded to apply its interpretation of Article 121(3) to six small features in the South China Sea. It determined they were all 'rocks' within the meaning of the provision largely because of their 'minuscule' size and the absence on them of fresh water. The Tribunal concluded they 'obviously' cannot sustain human habitation or economic life. This included four features – Johnson Reef, Cuarteron Reef, Fiery Cross Reef, Gavin Reef – on which China had constructed installations. However, the constructions could not 'elevate' the status of the features from rocks to fully entitled islands.<sup>65</sup>

The Tribunal then considered larger high-tide features in the Spratly Islands group. In assessing the capacity of these features to sustain human habitation or economic life, it reviewed considerable geographical and historical evidence. It focused on whether and to what extent features possessed potable fresh water, were vegetated, had soil qualities suitable for agriculture, and the existence of evidence of their historical use for

<sup>64</sup> *ibid* para 550. See also para 578.

<sup>65</sup> *ibid* paras 557-565.



fishing or other commercial activities. The larger features were considered 'close to the line' cases because they were neither obviously inhabitable nor habitable. This brought to the fore the critical value of historical evidence of habitation.<sup>66</sup> What was needed for a feature to be a fully-entitled island was evidence of 'non-transient inhabitation ... by a stable community of people for whom the feature constitutes a home and on which they can remain'.<sup>67</sup> The Tribunal pointed out that evidence would be insufficient if it merely established the historical practice of extended habitation of one or more Spratly Islands by fishermen from other areas, such as where they would reside on a seasonal basis while remitting produce offshore.

The most anticipated ruling of the Tribunal was its determination of the status of the largest natural feature in the Spratly Island group. Taiping Dao/Itu Aba is approximately 1.4 kilometres long and about 400 metres wide. It is under the physical control of the Republic of China (Taiwan) whose government presently stations approximately 200 officers and civilians on the feature. The Tribunal considered the physical characteristics of Taiping Dao and its history. It noted the existence of records dating to 1868 which confirm the existence of potable water sourced from wells, which was assumed to have been collected and stored, and which 'supported small numbers of people in the past'.<sup>68</sup> There was also evidence of the farming of chickens and pigs and the existence of a variety of vegetation including introduced banana, papaya and coconut trees and agricultural crops.<sup>69</sup> The Tribunal concluded that the evidence showed that the larger features such as Taiping Dao 'are capable of enabling the survival of small groups of people'<sup>70</sup> because of the existence of fresh water that can be collected and stored, vegetation for shelter and limited agriculture to supplement food from adjacent waters. Yet it determined that such resources were insufficient to support a 'sizeable' population.<sup>71</sup>

<sup>66</sup> *ibid* para 616.

<sup>67</sup> *ibid* para 618.

<sup>68</sup> *ibid* paras 580-584.

<sup>69</sup> *ibid* para 589.

<sup>70</sup> *ibid* para 615.

<sup>71</sup> *ibid* para 596.

The evidence of early historical habitation on Taiping Dao in the 1800s was largely Hainan fishermen using it and other features as a seasonal (or perhaps longer) base. The Tribunal's assessment of their quality of inhabitation was that it was merely survival on the features and doing so with the assistance of periodical replenishment from Hainan of food such as rice. The fishers were not identified as being fishermen 'of' the South China Sea islands nor was there any evidence that they were accompanied by their families and intended long term habitation.<sup>72</sup> In the period 1920-1940 under Japanese control there was evidence of commercial operations to mine guano for phosphate ore and capture turtles by labourers from Formosa (Taiwan). It was estimated that about 200 people lived on Taiping Dao in the 1920s with a population peak of about 600 in 1927.<sup>73</sup> Nevertheless, this habitation over 'a few short years' was characterised by the Tribunal as 'inherently transient in nature'.<sup>74</sup> This was because the objective of the labourers was to 'extract the economic resources of the Spratlys for the benefit of the populations of Formosa and Japan to which they would return. It was not to make a new life for themselves on the islands.'<sup>75</sup>

The Tribunal ignored the more recent and indeed current evidence of more than 200 Taiwanese officials and citizens residing on Taiping Dao. This was because they are 'heavily dependent on outside supply' and the deployment of military and other government personnel was seen as self-serving as an effort to support Taiwan's sovereignty claim.<sup>76</sup>

The Tribunal concluded its analysis by noting that the historical material did not evidence prior residence by a stable community.<sup>77</sup> It reiterated the need to interpret Article 121(3) in a manner that supported the rationale for the establishment of the EEZ regime, which was intended to benefit such people:

'The introduction of the exclusive economic zone was not intended to grant extensive maritime entitlements to small features whose historical

<sup>72</sup> *ibid* para 618.

<sup>73</sup> *ibid* para 606.

<sup>74</sup> *ibid* para 619.

<sup>75</sup> *ibid*.

<sup>76</sup> *ibid* para 620.

<sup>77</sup> *ibid* para 621.

contribution to human settlement is as slight as that. Nor was the exclusive economic zone intended to encourage States to establish artificial populations in the hope of making expansive claims, precisely what has now occurred in the South China Sea. On the contrary, Article 121(3) was intended to prevent such developments and to forestall a provocative and counterproductive effort to manufacture entitlements.<sup>78</sup>

## 5. Conclusion

The Award of the Arbitral Tribunal in the South China Sea case is a landmark ruling for the Regime of Islands which will resound far beyond the South China Sea. It is the first detailed judicial consideration of Article 121(3) and provided much-needed clarification of the troublesome expressions contained in the provision. The Tribunal set a high threshold for an insular feature to be a fully-entitled island. As a result, it would be prudent for States to reappraise their small and remote insular features from which they claim full maritime zone entitlements.

There are three key aspects of the Tribunal's interpretation and application of Article 121(3). The first is whether its interpretation of the provision is correct or justifiable; including the standard it set for an insular feature to be a fully-entitled island. The second is whether it devised a sound methodology to apply the standard when determining the insular status of individual features. The third is the application of the standard to such features, especially the largest feature of Taiping Dao. The jurisprudential legacy of the decision can also be considered. Will it be influential in altering State practice with respect to maritime claims from remote and uninhabited features? Further, in the absence of a doctrine of precedent in international law litigation, will the decision influence future international judicial decisions?

### 5.1. *Standard set for fully-entitled islands*

It is difficult to find fault with the reasoning of the Tribunal on any aspect of its interpretation of elements of Article 121(3). Its interpretation of the provision and the standard it set should be welcomed by those who seek clarity in international law, especially due to the apparent abuse

<sup>78</sup> *ibid.*

of the provision by many States. The Tribunal went to considerable lengths to ascertain the meaning of the words and phrases used in Article 121(3) and the intention of the provision as a whole. Its approach to treaty interpretation was sound and consistent with the Vienna Convention on the Law of Treaties. The meaning it ascribed to the phrases ‘human habitation’ and ‘economic life of their own’ is consistent with a literal reading of the words and with the intention with which they were used. For example, it was logical for the Tribunal to preclude reliance on habitation that has as a necessary condition the provision of ‘significant’ outside support. This ensures that assessment is based on the objective capacity of the resources of features to sustain human habitation or economic life. Further, the Tribunal’s reasoning that the word ‘or’ is disjunctive, thus meaning that an island is entitled to an EEZ and a continental shelf if it is able to sustain *either* human habitation *or* an economic life of its own<sup>79</sup>, is consistent with logical grammatical construction and how the provision has been treated by the majority of scholars. However, the Tribunal also made the insightful observation that ‘economic activity is carried out by humans and ... humans will rarely inhabit areas where no economic activity or livelihood is possible. The two concepts are thus linked in practical terms, regardless of the grammatical construction of Article 121(3).’<sup>80</sup> While Article 121(3) enables a feature to be fully-entitled where it ‘may be able to sustain human habitation but offer no resources to support an economic life’, or in the converse situation where it ‘may sustain an economic life while lacking the conditions necessary to sustain habitation directly on the feature itself’<sup>81</sup>, States now need to be aware that it is preferable to base claims to EEZ and continental shelf on economic activity that links to a feature itself and does so in support of its inhabitants.

Article 121(3) is now better understood but it is not the case that the Tribunal has rendered its meaning crystal clear. The Tribunal’s interpretation of the provision introduced new phrases and concepts that do not easily lead to uncontested interpretation. For example:

- the ‘linked’ nature of human habitation and economic life;
- the quality of a ‘proper’ standard of living on an island;

<sup>79</sup> *ibid* para 496.

<sup>80</sup> *ibid* para 497.

<sup>81</sup> *ibid* para 496.



- the minimum number of people living on a feature to qualify as ‘a stable community of people for whom the feature constitutes a home’<sup>82</sup>;
- the assessment of a group or ‘constellation’ of offshore islands;
- the extent to which outside support will operate to negate evidence of habitation; and
- how to assess post-1982 habitation and economic activity as having been ‘clouded’ by an intention to support LOSC claims.

Consideration will need to be given to these phrases and concepts to determine their scope and application to other features in the world where questionable maritime claims have been made.

## 5.2. *Application of Article 121(3) to large features in the Spratly Islands*

### i) *Methodology*

The Tribunal set out a clear methodology for applying Article 121(3) to insular features. They are described here as a sequential process of inquiry. There are two principal steps:

*Step 1:* Assess the physical characteristics of a feature to determine its natural capacity ‘to enable a group of persons to live on the feature for an indeterminate period of time’.<sup>83</sup> Focus is to be placed on identifying sufficient quantities of water, food and shelter.<sup>84</sup> This step is to be completed by answering one of two applicable questions:

- For larger features with some obvious natural food and fresh water resources: *Can the feature obviously sustain human habitation or economic life?*
- For smaller, more barren features: *Can the feature obviously not sustain human habitation or economic life?*

If the answer to the applicable question is ‘Yes’, the result is a clear determination of the status of the feature for the purpose of Article 121(3). A ‘Yes’ answer to the first question will mean the feature is an

<sup>82</sup> *ibid* para 497.

<sup>83</sup> *ibid* para 546.

<sup>84</sup> *ibid*.

island. A ‘Yes’ answer to the second question will mean the feature is a rock.

If the answer to the applicable question is ‘No’, then the analysis will proceed to the second step on the basis that the feature falls ‘close to the line’.

*Step 2:* The second step is to analyse historical evidence to ascertain whether the feature has ever been inhabited in the past. It is likely that only evidence of habitation prior to the establishment of the EEZ regime will be considered. This step is to be completed by answering the following question:

- *Has the feature ever been inhabited in the past by a community of people without reliance on significant outside support?*

If the answer is ‘Yes’, then a conclusion can be reached that the feature is an island for the purposes of Article 121(3). If the answer is ‘No’, then the feature cannot be a fully-fledged island unless the following subsidiary question is answered in the affirmative:

- *Has such habitation only been prevented by intervening forces, such as war, environmental harm or pollution?*

This methodology relies on the Tribunal’s assumption that the ‘the most reasonable conclusion’ to reach in the case of a feature that has never been inhabited is that it is incapable of sustaining habitation because ‘the natural conditions are simply too difficult for ... a community to form’.<sup>85</sup> This is based on its view that ‘Humans have shown no shortage of ingenuity in establishing communities in the far reaches of the world, often in extremely difficult conditions.’ Thus, ‘the Tribunal can reasonably conclude that a feature that has never historically sustained a human community lacks the capacity to sustain human habitation.’

While the reasoning for Step 2 is logical, the dispositive consequence of the existence or non-existence of evidence of historical habitation places critical weight on Step 1. The Tribunal did not articulate what standard is to be used when assessing whether a feature is ‘obviously’ habitable or inhabitable. This creates a risk in borderline cases: Where a feature is classified as a ‘close to the line’ case because knowledge of the quality and abundance of its natural resources falls just short of reaching

<sup>85</sup> *ibid* para 549.



a dispositive conclusion that it is 'obviously' habitable, then the only way for the feature to be accorded full island status is if there is sufficient evidence of prior habitation. Thus if a conclusion is reached too readily that a feature is a 'close to the line' case, it is unlikely that there will be sufficient evidence of prior habitation due to the restrictive nature of the Step 2 test. It is submitted that Step 1 should be treated as the principal test to determine a feature's insular status. All efforts should be made to examine comprehensively a feature's resources, with consideration of what would be a sustainable size population on that type of feature in that location. If the conclusion is reached perfunctorily that a feature is not 'obviously' habitable, then it is likely that a number of 'almost' obviously habitable features cannot be classified as fully-entitled islands because of the difficulty of proving the existence of sufficient past habitation. A potential example here is France's Kerguelen Islands, which were not treated as fully-entitled islands by Judge Vukas in his separate ITLOS declaration in 2000 (above) in part because of the absence of an indigenous population. It is likely that the Kerguelen Islands would not satisfy the Step 2 test notwithstanding their vast size and the permanent stationing of 50-100 scientists and other researchers since the 1950s. This means that a conclusion about whether the islands are 'obviously' habitable would be determinative. Thus it is submitted that a conclusion on this question should only be reached after thorough examination of the resources of the insular feature.

ii) *Application to Taiping Dao*

The Tribunal's determination that Taiping Dao is not a fully-entitled island was made in accordance with its interpretation of Article 121(3) and its articulated methodology for applying the standard set. In the absence of China's participation in the proceedings, the Tribunal is to be commended for its efforts to ascertain China's position and to avail itself of historical material concerning the South China Sea, including materials made public by Taiwan.<sup>86</sup> The Tribunal considered that Taiping Dao

<sup>86</sup> Taiwan released materials concerning the status of Taiping Dao, including a 'Position Paper on ROC South China Sea Policy' (available at <[www.mofa.gov.tw/Upload/RelFile/1112/156185/12467dfc-3b8c-4392-9096-57f84ff31f1c.pdf](http://www.mofa.gov.tw/Upload/RelFile/1112/156185/12467dfc-3b8c-4392-9096-57f84ff31f1c.pdf)>) and the Chinese (Taiwan) Society of International Law made an *amicus curiae* submission (available at <[csil.org.tw/home/wpcontent/uploads/2016/03/SCSTF-Amicus-Curiae-](http://csil.org.tw/home/wpcontent/uploads/2016/03/SCSTF-Amicus-Curiae-)

was a ‘close to the line’ case, meaning that it was neither ‘obviously’ habitable nor inhabitable. It reached this conclusion after noting the presence of drinking water and the historic cultivation of fruit and vegetables utilising the feature’s natural soil, and being aware of marine life suitable for harvesting in surrounding waters.<sup>87</sup> Nevertheless, it considered these resources were insufficient to support a stable community of people. Its conclusion is largely consistent with argument presented in the course of the proceedings by the Philippines’s counsel based in part on a geographical report on the South China Sea features produced and presented on behalf of the Philippines by an expert witness it retained who concluded that Taiping Dao is a rock for the purposes of Article 121(3).<sup>88</sup> However, this evidence was not rebutted by China (PRC) because it did not participate in the proceedings or likewise by Taiwan (ROC) despite it having maintained continuous physical control and management of Taiping Dao for more than 60 years. Nevertheless, the Tribunal had access to different types of material to ascertain the PRC’s official position on Taiping Dao, which was that it was considered to be a fully entitled island.<sup>89</sup>

The Tribunal’s determination that Taiping Dao was not ‘obviously habitable’<sup>90</sup> was made without detailed analysis of the capacity of the feature’s natural resources to sustain human habitation.<sup>91</sup> Despite determining that the main elements for human habitation were present – potable water that could be combined with rainwater collection and storage, vegetation capable of providing shelter, and proven agricultural capacity to

Brief-final.pdf>). See Yen-Chiang Chang, ‘How Does the Amicus Curiae Submission Affect a Tribunal Decision?’ (2017) 30 *Leiden J Intl L* 647.

<sup>87</sup> *South China Sea Arbitration* (n 13) paras 596, 616.

<sup>88</sup> *South China Sea Arbitration (The Republic of the Philippines v The People’s Republic of China)* (Permanent Court of Arbitration 2016) Merits Proceedings, Day 4, 16.

<sup>89</sup> *South China Sea Arbitration* (n 13) paras 100, 466-468.

<sup>90</sup> *ibid* para 616.

<sup>91</sup> One interesting issue that arose was the open invitation from former President of Taiwan Dr Ma Ying-jeou extended to all members of the Tribunal to visit Taiping Dao. The Tribunal stated that it did not ‘take advantage of the Taiwan Authority of China’s public offer to arrange a site visit’ because it did not seek further information of contemporary conditions relating to habitation (as opposed to the more persuasive historical evidence of habitation), and it noted China’s strong objection to it visiting Taiping Dao and the Philippine’s assessment that a site visit ‘would present certain challenges’: *ibid* para 142.



supplement food resources of surrounding waters<sup>92</sup> – the Tribunal concluded these resources were ‘limited’<sup>93</sup> and that agriculture on Taiping Dao ‘would not suffice, on its own, to support a sizable population’.<sup>94</sup> Yet this conclusion was reached without attempting to ascertain the nutritional requirements of a minimum-size resident population or to quantify the natural production capacity of the feature to produce food. Such an enquiry would be consistent with the logic of the Tribunal’s interpretation of Article 121(3). It is submitted that not engaging in this enquiry is unsatisfactory in light of the high burden and dispositive nature of the Step 2 enquiry. All the elementary requirements for human habitation were found to be present on Taiping Dao. Yet a conclusion was reached that they are insufficient to sustain human habitation in the absence of a determination of the minimum number of residents that would be required for a feature such as Taiping Dao or of the quantity of food resources that can be produced on the feature on an ongoing basis. It is submitted that the Tribunal reached its conclusion on Step 1 perfunctorily. This is unsatisfactory in light of the consequence that the analysis then moves to Step 2 which arguably presents an impossibly high evidentiary burden. As discussed above, a determination that an insular feature is either a rock or island is significant for a State’s maritime jurisdiction and potentially also that of its neighbours.

The Tribunal’s determination of the meaning of Article 121(3) leaves a perplexing issue for examination in future cases: How to evaluate the natural capacity of a feature to sustain human habitation in circumstances where existing habitation has been aided by the use of modern technology? One troublesome example is the use of desalination facilities. The conclusion reached by the Philippine’s counsel is that the presence of modern desalination facilities on Taiping Dao is evidence of the inadequate supply of drinkable water to sustain human habitation.<sup>95</sup> The Tribunal did not make this conclusion, but it did state the following:

<sup>92</sup> *ibid* para 615.

<sup>93</sup> *ibid* para 596.

<sup>94</sup> *ibid*. Indeed, the Tribunal commented on the larger features of the Spratly Islands that ‘their capacity even to enable human survival appears to be distinctly limited’: para 616.

<sup>95</sup> Counsel for the Philippines submitted that the Taiwanese stationed troops on Taiping Dao could not survive if they relied on water from wells: ‘That is why Taiwan built two modern desalination facilities in 1993. And that constitutes further proof that

‘[M]any of the high-tide features in the Spratly Islands have been subjected to substantial human modification as large installations and airstrips have been constructed on them. Desalination facilities have been installed and tillable soil introduced. In some cases, it is now difficult to observe directly the original status of the feature in its natural state. In such circumstances, the Tribunal considers that the Convention requires that the status of a feature be ascertained on the basis of its earlier, natural condition, prior to the onset of significant human modification, taking into account the best available evidence of the previous status of the high-tide features, before intensive modification.’<sup>96</sup>

It is questionable whether it is appropriate to consider desalination facilities as evidence that a feature has inadequate natural drinkable water to support a minimum size population. Desalination facilities can be considered modern technology, but their operation is different from the provision of outside resources. They modify resources naturally found adjacent to a feature in order to supplement otherwise available drinkable water. It is submitted that the presence of a desalination facility should be considered as supporting the argument that a feature can produce sufficient quantities of drinkable water where the feature also has a supply of natural drinkable groundwater and where rainwater can also be collected and stored. A desalination facility should not be considered a significant modification to an island but rather as a modern way to maximise the use of its natural resources. This analysis is consistent with the Tribunal’s assumed acceptance of use of new technology or outside resources by populations in previous historical periods which facilitated their inhabitation of remote islands. Similarly, if analysis extends to the need for a feature to generate power, it is submitted that it would be consistent with the Tribunal’s logic to allow use of solar, wind or wave generating electricity facilities. While these rely on modern technology, they do so to harness local energy sources.<sup>97</sup>

there is no naturally occurring water on the feature that is suitable for drinking, much less sustaining human habitation’: *South China Sea Arbitration* Merits Proceedings (n 88) 28.

<sup>96</sup> *South China Sea Arbitration* (n 13) para 511.

<sup>97</sup> Note that in 1990, Professor Alfred Soons, one of the Arbitrators in the *South China Sea case*, wrote together with Barbara Kwiatkoska that ‘One could ... argue that if the capacity of an island not sustaining’ human habitation or economic life ‘at present can be admitted on the basis of past’ human habitation or economic life, ‘logic would also require admission on the basis of future capacity’: Kwiatkowska, Soons (n 11) 162.



Part of the difficulty the Tribunal faced in determining the capacity of Taiping Dao to sustain human habitation is that the evidence that was presented to it was only from the Philippine side due to China's non-participation in the proceedings. Counsel for the Philippines presented arguments based on extant literature and recently commissioned scientific studies, including a report prepared by expert witnesses hired by the Philippines. The Schofield Report concluded that all 49 features in question in the South China Sea were rocks for the purposes of Article 121(3). The conclusion relied in part on the historical absence of indigenous population. The Tribunal later declared that prior inhabitation of a feature was not a requirement for it to be capable of sustaining human habitation. The Tribunal appointed independent experts – as it is empowered to do under Article 24(1) of its Rules of Procedures – to advise it on technical matters. It appointed experts in navigational safety and coral reefs to produce written reports on unrelated legal questions concerning whether China had impeded navigational rights in the South China Sea or contravened environmental obligations with respect to its dredging, artificial island-building and construction activities on insular features. The Tribunal also appointed a hydrographic expert to assist it in 'reviewing and analysing geographic and hydrographic information, photographs, satellite imagery and other technical data in order to enable the Arbitral Tribunal to assess the status (as a submerged feature, low-tide elevation, or island)' of insular features and to provide a 'critical assessment of relevant expert advice and opinions submitted by the Philippines'.<sup>98</sup> However, the independent expert hydrographer was not tasked with producing a report in the same manner as the independent navigational safety and coral reef experts and the Tribunal did not refer to any independent assessment by the appointed hydrographer in its Award. As such, the submissions made by the Philippines regarding the 'rock' status of the insular features do not appear to have been verified or critiqued as rigorously as its claims against China with respect to navigational safety and environmental obligations.

It was appropriate for the Tribunal to determine the status of Taiping Dao notwithstanding China's non-participation because the legitimacy of the compulsory dispute resolution proceedings would be undermined if they could be thwarted by one party's non-participation. Yet it is clear that more material about the capacity of Taiping Dao could have come to light.

<sup>98</sup> *South China Sea Arbitration* (n 13) para 133.



Further, had China participated, counter arguments could have been canvassed. Nevertheless, it was appropriate for the Tribunal to determine the status of Taiping Dao despite the peculiarities of the proceedings in which one State party did not participate and the most significant feature has for decades been under the physical control and administration of a non-LOSC State Party entity.<sup>99</sup> However, it is submitted that it would have been preferable for the Tribunal to have assessed more thoroughly the capacity of Taiping Dao to produce food and to match the assessment against the approximate nutritional requirements for a specified minimum number of residents to meet the standard set for human habitation. This is really the heart of the matter about whether a feature can sustain human habitation. It is not necessarily a straightforward investigation and assessment, yet some attempt to quantify the production capacity of the feature – perhaps aided by modest use of new technology – is preferable to the absence of an assessment.

The decision reached by the Arbitral Tribunal that all of the larger insular features in question in the South China Sea were rocks for the purposes of Article 121(3) was elegant in the sense that it meant the Tribunal did not need to draw a line between the most substantial feature – Taiping Dao – and other features. In the event that the Tribunal had determined that Taiping Dao was a fully-entitled island, it would then have needed to determine whether the next most substantial feature also met the requirement for human habitation for the same reasons. In any event, it would have needed to draw the ‘bright line’ between rock and island between two similar features with subtle difference in scale and resource capacity.

### 5.3. *Jurisprudential legacy of the South China Sea Arbitration*

The ruling of the Arbitral Tribunal in the South China Sea case – like other international litigation – is only binding on the State parties to the

<sup>99</sup> ROC Taiwan has a unique international status. While it is not recognised as a State with membership of the United Nations, some States do recognise its sovereign State status and a number of multilateral treaties afford it qualified international personality. The Arbitral Tribunal referred to Taiwan in the strange way of ‘the Taiwan Authority of China’. This is a new way to describe Taiwan and creates the misleading impression that its submissions might be recognised or even approved by the PRC Government. It is also noted that some of the other South China Sea insular features are physically controlled by other States not party to the proceedings, such as Vietnam and Malaysia.



proceedings. However, the decision is likely to have a significant jurisprudential legacy. This is because it was a properly constituted arbitral body empowered under a multilateral treaty with close to universal ratification or accessions by States and it gave a unanimous ruling on a number of aspects of the law of the sea. The Award is long (around 500 pages) and on the whole is comprehensive and well-reasoned. It was the first international ruling on the specific question of the scope and application of Article 121(3). It is not known when the next international judicial or arbitral proceedings concerning Article 121(3) will be litigated. It might be imminent or might not occur for decades. Yet it can be expected that the South China Sea Arbitral Award will at minimum be referenced by the next court or tribunal to examine Article 121(3) and it can be anticipated to be influential. A future court or tribunal when examining Article 121(3) will not be bound by the Arbitral Award decision because there is no doctrine of precedence in international law. It is likely that the Award Decision will be influential in future determinations of the scope and application of Article 121(3) unless the future courts or tribunals wish to distinguish the decision before them on factual grounds and adopt a broader interpretation of the provision in light of the characteristics of the different insular features under examination. For example, the characteristics of the small tropical islands in the South China Sea differ remarkably from many remote high latitude insular features. It is the author's opinion that it is likely that a future court or tribunal would adhere to the interpretation of Article 121(3) articulated in the South China Sea case in light of its inherent and well-reasoned logic. However, a future court or tribunal might take a different approach to apply the standard. It might revise the methodology and take a different approach to the assessment of the human habitation capacity of insular features in different areas of the world.

The decision of the Arbitral Tribunal in the South China Sea case will continue to stand as the most authoritative articulation of the meaning of Article 121(3) until such time as a future court or tribunal grapples with the same legal questions. As such, State parties to the LOSC should be mindful of the Award when determining how they characterise and utilise insular features under their sovereignty. Yet the influence of the Award on State practice to date has been minimal or non-existent. Many States have publicly declared their support for the decision and hope that China and the Philippines abide by it, yet to date – more than one year

after the decision – no State is known to have altered its practice concerning any small, remote insular feature by downgrading it from the status of fully-entitled island to a rock for the purposes of Article 121(3). This includes Japan and its claims from Okinotorishima and numerous other States with full maritime claims from questionable insular features. The hitherto lack of alteration of State practice may be significant in future litigation. For example, if years pass and State practice has not altered since the Award, then a future international court or tribunal might be emboldened to interpret the provision differently from the 2016 Award and in a manner more consistent with State practice. In the meantime, the Award is welcomed as part of the steady, slow, incremental progressive development of the Law of the Sea. Irrespective of where any State's national interests lie concerning the status of insular features over which they have sovereignty, there is now greater clarity of a long perplexing and troublesome provision in the LOSC that gives effect to a critical balance drawn by its drafters between the rights of coastal States to adjacent waters and the preservation of high seas freedoms for all States.

