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To cite this article: Michael Sheng-ti Gau (2019): The Interpretation of Article 121(3) of UNCLOS by the Tribunal for the South China Sea Arbitration: A Critique, Ocean Development & International Law, DOI: [10.1080/00908320.2018.1511083](https://doi.org/10.1080/00908320.2018.1511083)

To link to this article: <https://doi.org/10.1080/00908320.2018.1511083>



Published online: 19 Jan 2019.



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# The Interpretation of Article 121(3) of UNCLOS by the Tribunal for the South China Sea Arbitration: A Critique

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## ABSTRACT

The interpretation of Article 121(3) of the 1982 U.N. Convention on the Law of the Sea (UNCLOS) was a key part of the Sino-Philippine Arbitration on the South China Sea Award issued in July 2016. This article uses the principles of treaty interpretation codified in Article 31 of the 1969 Vienna Convention on the Law of Treaties to evaluate the interpretation process. The Tribunal paid little attention to the text such as “rocks” in the plural form and overlooked the context of Article 121(3). The travaux préparatoires identified by the Tribunal was based on materials of doubtful weight.

## ARTICLE HISTORY

Received 4 April 2018

Accepted 29 April 2018

## KEYWORDS

UNCLOS; South China Sea Arbitration; Article 121 of UNCLOS; treaty interpretation; rocks; regime of islands

## Introduction

On 12 July 2016 the *Merits Award* of the Sino-Philippine Arbitration in the South China Sea (SCS) Disputes was released.<sup>1</sup> One of the most influential but controversial rulings is the Tribunal’s interpretation of Article 121(3) of the United Nations Convention on the Law of the Sea (UNCLOS).<sup>2</sup> Previous international judicial decisions concerning maritime delimitation refrained from interpreting this provision,<sup>3</sup> which is the exception to the general rules established by Article 121(1)-(2).<sup>4</sup> The *Merits Award* and the earlier *Award on Jurisdiction and Admissibility* were reached without formal written and oral arguments from China. China has denied the legitimacy of both *Awards*.<sup>5</sup>

The Tribunal commented that “the application of Article 121(3) of the Convention relates to the extent of the International Seabed Area as the common heritage of mankind, relates to the overall interests of the international community, and is an important issue of general nature.”<sup>6</sup> Thus, the interpretation of this provision by the Tribunal deserves close review as it engages the interests of the international community.

This article focuses on the interpretation of Article 121(3) as set out in Chapter VI of the *Merits Award*,<sup>7</sup> and does not address directly its application to the four maritime features identified in the Philippines’ Submissions 3 and 7, or the six largest features in the Spratly Islands Group (Nansha Islands) referenced in the Philippines’ Submissions

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Supported by the Major Project of China’s National Social Science Foundation (Grant No. 16ZDA073), this paper is dedicated to Professor Richard K Gardiner and late Sir Ian Sinclair who taught the author in London. The opinions contained in this article however do not represent them, any government agency and other people.

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5, 8-9.<sup>8</sup> This article will also not discuss the Tribunal's interpretation and application of Article 13 of UNCLOS relating to low-tide elevations (LTE).<sup>9</sup>

## Article 121(3) as Interpreted

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.

The Tribunal provided the following interpretation of Article 121(3) as the point of departure.

In the terminology of the Convention, a feature that is exposed at low tide but covered with water at high tide is referred to as a "low-tide elevation." Features that are above water at high tide are referred to generically as "islands." However, the entitlements that an island can generate to maritime zones will depend upon the application of Article 121(3) of the Convention and whether *the island* has the capacity to "sustain human habitation or economic life of [its] own." Throughout this Chapter, the Tribunal will refer to the generic category of features that meet the definition of an island in Article 121(1) as "high-tide features." The Tribunal will use the term "rocks" for high-tide features that "cannot sustain human habitation or economic life of their own" and which therefore, pursuant to Article 121(3), are disqualified from generating an exclusive economic zone or continental shelf. For high-tide features which are not rocks, and which pursuant to Article 121(2) enjoy the same entitlements as other land territory under the Convention, the Tribunal will use the term "fully entitled islands." "Rocks" and "fully entitled islands" are thus both sub-sets of the broader category of "high-tide features." Finally, the Tribunal will refer to features that are fully submerged, even at low tide, as "submerged features."<sup>10</sup>

Three important points can be noted. First, the Tribunal used the generic term high-tide feature (HTF) to describe a feature meeting the definition of an island under Article 121(1),<sup>11</sup> thus making HTF interchangeable with island. Every HTF has to undergo the disqualifying test provided by Article 121(3) before knowing whether the feature has entitlements to an exclusive economic zone (EEZ) and continental shelf.<sup>12</sup> This divides the category of HTF into two categories, "rocks" and "fully entitled islands."<sup>13</sup> Second, "rocks" stand for those HTFs (or islands) that "cannot sustain human habitation or economic life of their own" under Article 121(3), and, hence, are incapable of generating an EEZ and continental shelf. Paragraph 483 of the *Merits Award* is straightforward: "Does the feature in its natural form have the capability of sustaining human habitation or an economic life? If not, it is a rock."<sup>14</sup> Third, "fully entitled island" is HTF which is not a "rock" and therefore has an EEZ and continental shelf. For an HTF to be a "fully entitled island," it must not meet either of the disqualifying conditions in Article 121(3).

## The Tribunal's Summary of the Philippines' Arguments

Before turning to the interpretation of Article 121(3), the Tribunal reviewed the Philippines' arguments.<sup>15</sup> Ten points are summarized below.

First, to determine the object and purpose<sup>16</sup> of Article 121(3), the Philippines invoked the "origins" of the provision and the "negotiating history," in particular, the "records of the Third United Nations Conference [UNCLOS III]," which, according to the Philippines, reflected an "overwhelming opposition" to the prospect of granting very small, remote, and uninhabited islands or tiny and insignificant features extensive maritime zones. Otherwise, the maritime space of other States and the area of international seabed would be unfairly and inequitably impinged upon.<sup>17</sup>

Second, the Philippines argued that the meaning of "rock" in Article 121(3) must not be limited in terms of geological or geomorphological characteristics. Thus, protrusions above water that are composed of coral, mud, sand, or soil may constitute rocks under Article 121(3).<sup>18</sup> The Philippines in its 2014 Memorial treated "rocks," "islands," "insular features," and "features" as interchangeable and identical.<sup>19</sup> This position was based on the proposals raised during the UNCLOS III by Ambassador Arvid Pardo,<sup>20</sup> Colombia,<sup>21</sup> Libya,<sup>22</sup> Romania,<sup>23</sup> Malta,<sup>24</sup> Turkey,<sup>25</sup> and a group of fourteen African States.<sup>26</sup>

Third, the Philippines acknowledged that size alone is not determinative of the status of a feature as a rock under Article 121(3). However, the Philippines invoked the negotiating history and certain State practices to argue that an HTF of less than one square kilometer could be presumed to be unable to sustain human habitation and economic life of its own.<sup>27</sup>

Fourth, the Philippines noted that the term "cannot" in Article 121(3) refers to the capacity or potential of the feature to sustain human habitation or economic life. Whether the feature is currently inhabited or was inhabited before is not to be asked. However, the fact that a feature has historically been uninhabited and has never sustained economic life constitutes powerful evidence of its lack of capacity to do so.<sup>28</sup>

Fifth, the Philippines argued that the term "sustain human habitation" means that a feature can "support a stable group of human beings across a significant period of years" by providing fresh water, food and living space and materials for human shelter. This interpretation is supported by the requirement that an island must be "naturally formed" under Article 121(1).<sup>29</sup>

Sixth, the term "of their own" connected with features sustaining an economic life, according to the Philippines, means "that the feature itself has the ability to support an independent economic life without infusion from the outside."<sup>30</sup>

Seventh, the term "economic life," according to the Philippines, requires the feature, in its naturally formed state, to have the capacity to be a source of production, distribution, and exchange sufficient to support the presence of a stable human population.<sup>31</sup>

Eighth, the Philippines invoked various commentaries to argue that a military presence on a feature, serviced from outside, does not establish that a feature is capable of sustaining human habitation or has an economic life of its own.<sup>32</sup>

Ninth, while recognizing that the *Case* was not one of maritime delimitation, the Philippines suggested that the Tribunal seek guidance from the approach of international courts and tribunals in the delimitation context. In the delimitation decisions features of comparable nature, small size, and remoteness to those in the Spratly Islands

have all been enclaved and given no more than 12 nautical mile territorial sea. Such enclaving was done to achieve an equitable result in drawing a boundary line. According to the Philippines, in any future maritime boundary delimitation in the South China Sea, all of the HTFs would be enclaved.<sup>33</sup>

Tenth, ultimately, the Philippines submitted that the test of whether a feature constitutes a “rock” for the purposes of Article 121(3) involves a “question of appreciation” in light of the natural characteristics of the feature and that it should be an objective test in the sense that it should not be determined by a State’s subjective assertions.<sup>34</sup>

## **The Tribunal’s Summary of China’s Arguments**

### ***China’s Focus on Nansha Islands as a Whole***

The Tribunal devoted nine pages to China’s position on the interpretation of Article 121.<sup>35</sup> Extracting China’s views from the “Position Paper” released on 7 December 2014<sup>36</sup> and a statement from the Foreign Ministry on 19 May 2016,<sup>37</sup> the Tribunal explained that China rejected the Philippines’ position of examining the compatibility of China’s maritime claims with UNCLOS before settling the territorial sovereignty disputes. As stated by China, without knowing who the coastal State is, “the legal status and entitlements of maritime features do not constitute actual disputes in themselves.”<sup>38</sup>

China rejected the Philippines’ submissions that the Tribunal examine the legal status of nine China-occupied features as being unhelpful in determining China’s maritime entitlements. China indicated that all the maritime features comprising the Nansha Islands must be considered and that “[b]ased on the Nansha Islands as a whole,” China has territorial sea, EEZ, and continental shelf.<sup>39</sup> No position on the interpretation or application of Article 121(3) respecting any of the features identified in the Philippines’ Submissions was taken by China.<sup>40</sup>

### ***China’s Statements on Article 121(3) Regarding Oki-no-Tori Shima***

In November 2008, Japan submitted information respecting its outer continental shelf to the Commission on the Limits of the Continental Shelf (CLCS) using Oki-no-Tori Shima as an island to generate an EEZ, continental shelf, and outer continental shelf beyond 200 nautical miles.<sup>41</sup> The Tribunal quoted China’s *Note Verbale* of 6 February 2009 delivered to the CLCS related to Japan’s Submission which revealed China’s views on Article 121(3):

It is to be noted that the so-called Oki-no-Tori Shima Island is in fact a rock as referred to in Article 121(3) of the Convention. Therefore, the Chinese Government wishes to draw ... attention ... to the inconformity with the Convention with regard to the inclusion of the rock of Oki-no-Tori in Japan’s Submission.

Article 121(3) of the Convention stipulates that, “Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.” Available scientific data fully reveal that the rock of Oki-no-Tori, on its natural conditions, obviously cannot sustain human habitation or economic life of its own, and therefore shall have no exclusive economic zone or continental shelf. Even less shall it have the right to the extended continental shelf beyond 200 nautical miles.<sup>42</sup>

The Tribunal also quoted China's position concerning Oki-no-Tori Shima stated in its *Note Verbale* to the United Nations dated 3 August 2011, where China reiterated the above position.<sup>43</sup>

However, China did not state that an HTF or island incapable of sustaining human habitation or economic life of its own was a rock and without EEZ and continental shelf.<sup>44</sup> Nor did China use the term island or HTF to characterize Oki-no-Tori Shima. What China stated is first, that Oki-no-Tori Shima is a rock. Second, based on the available scientific data concerning its natural conditions, that Oki-no-Tori cannot sustain human habitation or economic life of its own. Therefore, Oki-no-Tori does not have an EEZ or continental shelf.

The Tribunal also quoted China's position on the application of Article 121 to Oki-no-Tori Shima put forward at the 19<sup>th</sup> Meeting of States Parties to the UNCLOS in May 2009.<sup>45</sup> On this occasion, China recalled the general obligation of good faith in UNCLOS Article 300<sup>46</sup> and observed that:

there is also some case in which the Convention is not abided by, for example, claims on the continental shelf within and beyond 200 nautical miles with *an isolated rock* in the ocean as base point. Recognition of such claim will set a precedent which may lead to encroachment upon the high seas and the Area on a larger scale. Therefore, the international community should express serious concerns on this issue.<sup>47</sup>  
[italics added]

...

How to implement [Article 121(3)] relates to the interpretation and application of important principles of the Convention, and the overall interests of the international community, and is a key issue for the proper consideration of relevant submission concerning the outer limits of the continental shelf, and the safeguarding of the common heritage of mankind.<sup>48</sup>

The Tribunal concluded that:

Through the statements recounted above, China has demonstrated a robust stance on the importance of Article 121(3). It has repeatedly alluded to the risks to "the common heritage of mankind" and "overall interests of the international community" if Article 121(3) is not properly applied to small features that on their "natural conditions" obviously cannot sustain human habitation or economic life of their own.<sup>49</sup>

However, China did not use the ambiguous term "small features" to describe Oki-no-Tori Shima. China utilized the term in Article 121(3) to argue that Oki-no-Tori Shima is a rock. Moreover, the focus of China's May 2009 Statement was on an "isolated rock" in the ocean as a base point.<sup>50</sup> This can be distinguished from China's position in claiming maritime entitlements in the South China Sea based on groups of islands and other features (e.g. Zhongsha Islands, Nansha Islands) as a whole.<sup>51</sup> The Tribunal's conclusion respecting China's position on Article 121(3) based on the Oki-no-Tori Shima statements misconstrues China's position.

### ***China's Position on the Status of Scarborough Shoal***

The Tribunal devoted seven paragraphs to China's position on the status of Scarborough Shoal in the context of seeking China's position concerning how Article

121(3) should be interpreted.<sup>52</sup> As indicated by paragraphs 459-460 in the *Merits Award*, the Tribunal noted that China claims territorial sovereignty over Scarborough Shoal as being part of the Zhongsha Islands claimed by China.<sup>53</sup> It is from the Zhongsha Islands, not from Scarborough Shoal, that China has declared a twelve mile territorial sea in accordance with the 1958 Declaration of the Government of the People's Republic of China on China's Territorial Sea, and the 1992 Law on the Territorial Sea and the Contiguous Zone.<sup>54</sup>

The Tribunal commented that "China has not, however, published 'the baselines from which the breadth of the territorial sea' for Scarborough Shoal is measured. ... it has made no such claim [EEZ and continental shelf] specifically with respect to Scarborough Shoal."<sup>55</sup>

The Tribunal quoted a press briefing entitled "Chinese Foreign Ministry Statement regarding Huangyandao [Scarborough Shoal]:"

Huangyan Dao has always been Chinese territory and its legal position has been long determined. According to Article 121 of the UNCLOS, Huangyandao is surrounded by water on all sides and is a natural dry land area that is higher than the water level during high tide; it is not a shoal or submerged reef that does not rise above the water all year round.

...

The Philippines has never challenged the position that Huangyandao is China's territory. Recently, the Philippine side suddenly claims that it has maritime jurisdiction over Huangyandao because the island is in the 200 nm EEZ of the Philippines. This position violates the principles of international law and the UNCLOS... . The issue of Huangyandao is an issue of territorial sovereignty; the development and exploitation of the EEZ is a question of maritime jurisdiction, the nature of the two issues are different ... . According to international law, under a situation where there is an overlapping of EEZ's among concerned countries, the act of a country to unilaterally proclaim its 200 nm EEZ is null and void. The scope of the EEZ's of the Philippines and China should be resolved through negotiations based on the principles and regulations of international laws.<sup>56</sup>

Based on the press briefing, the Tribunal concluded that China considers Scarborough Shoal as an island which may generate an EEZ.<sup>57</sup> However, this conclusion seems inconsistent with the Tribunal's knowledge that China declared its twelve mile territorial sea not from Scarborough Shoal, but from the Zhongsha Islands,<sup>58</sup> and that China has not made a claim of an EEZ and continental shelf specifically with respect to Scarborough Shoal as stated in paragraph 461 of *Merits Award*.<sup>59</sup>

The Tribunal noted that:

in 2012 China banned some fishing in the South China Sea north of 12° north latitude. China has also objected to the Philippines' grant of petroleum concessions in the West Calamian Block (SC-58) adjacent to the coast of Palawan, much of which lies beyond 200 nautical miles from any high-tide feature claimed by China, except for Scarborough Shoal.<sup>60</sup>

However, the Tribunal stated that: "China did not elaborate the basis for these actions, which may have been based either on a theory of historic rights or on a claim to an exclusive economic zone from Scarborough Shoal."<sup>61</sup> Hence, it is doubtful whether the materials cited by the Tribunal concerning China's position on Scarborough Shoal actually sheds any light on China's position on the interpretation of Article 121 of UNCLOS.

### ***China's Position on the Status of Itu Aba***

The Tribunal's understanding of China's position on the status of Itu Aba (Taiping Island or Taiping Dao) was that "Itu Aba is a fully entitled island, entitled to an EEZ and continental shelf."<sup>62</sup> The Tribunal quoted a statement of China's Foreign Affairs Ministry Spokesperson of 3 June 2016 as evidence:

Over the history, Chinese fishermen have resided on Taiping Dao for years, working and living there, carrying out fishing activities, digging wells for fresh water, cultivating land and farming, building huts and temples, and raising livestock. The above activities are all manifestly recorded in Geng Lu Bu (Manual of Sea Routes) which was passed down from generation to generation among Chinese fishermen, as well as in many western navigation logs before the 1930s.

The working and living practice of Chinese people on Taiping Dao fully proves that Taiping Dao is an "island" which is completely capable of sustaining human habitation or economic life of its own. The Philippines' attempt to characterize Taiping Dao as a "rock" exposed that its purpose of initiating the arbitration is to deny China's sovereignty over the Nansha Islands and relevant maritime rights and interests.<sup>63</sup>

Arguably, it is one thing for China to assert that Taiping Island can sustain human habitation or economic life of its own, which China did as indicated above. It is another for China to claim an EEZ and continental shelf from Taiping Island, which China did not indicate in the statement. It cannot be said with certainty that China has applied Article 121 to Taiping Island.

Additionally, the Tribunal quoted comments of China made on 24 March 2016 respecting the statement of the Taiwan Authority of China:

The Nansha Islands including Taiping Dao have been China's territory since ancient times. Chinese people have long been living and working there continuously. China takes the Nansha Islands as a whole when claiming maritime rights and interests, and Chinese people across the Strait all have the responsibility to safeguard the property handed down from our ancestors. China is firmly against attempts of the Philippines to unilaterally deny China's territorial sovereignty and maritime rights and interests in the South China Sea through arbitration.<sup>64</sup>

Clearly, China is using the Nansha Islands as a whole, instead of using individual maritime features like Taiping Island, to claim maritime entitlements. China's statements concerning Taiping Island thus cannot be taken as being consistent with the Tribunal's interpretation of Article 121 or the application of this article to the individual maritime features.<sup>65</sup>

### ***China's Position on the Status of other Features in the Spratly Islands Group***

The Tribunal devoted four paragraphs to exploring China's position concerning the interpretation or application of Article 121(3) respecting the status of other features in the Spratly Islands Group.<sup>66</sup> As noted by the Tribunal, "[w]hile China has not made statements on the Article 121 status of other specific features in the Spratly Islands, it has made general statements that the Spratly Island group as a whole generate full maritime entitlements."<sup>67</sup> This is based on China's *Note Verbale* of 14 April 2011 and the "Position Paper" of 7 December 2014.<sup>68</sup> The Tribunal concluded by saying that "no



further insights on China's position on the application of Article 121 to specific features in the Spratly Islands can be gleaned"<sup>69</sup> and that

as far as the Tribunal is aware, China has not made specific statements about the status of Johnson Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), or McKennan Reef for purposes of Article 121(3) of the Convention. ... Nor has China made any comparable statements regarding the other, more significant high-tide features in the Spratlys, with the exception of Itu Aba.<sup>70</sup>

## The Interpretation of Article 121(3)

Article 31 of the 1969 Vienna Convention on the Law of Treaties (VCLT) provides the rules governing treaty interpretation and constitutes the criteria for scrutinizing the approach of the Tribunal.<sup>71</sup> In interpreting Article 121(3), the Tribunal examined: (i) the text; (ii) the context and the object and purpose of the Convention; (iii) the *travaux préparatoires* of this provision; and (iv) the relevance of State practice in the implementation of the provision.<sup>72</sup>

### Context and Object-and-Purpose

In the section of the context of Article 121(3) and the object and purpose of the Convention,<sup>73</sup> the first seven words of Article 121(2) were ignored by the Tribunal. Article 121(3) serves as an exception to the general rule under Article 121(2), based on the first seven words of Article 121(2), "except as provided for in paragraph 3." These words should have been addressed when interpreting Article 121(3).<sup>74</sup>

The object and purpose of a provision is an important factor for "confirming" the meaning of terms interpreted in their context.<sup>75</sup> Nine paragraphs were devoted by the Tribunal to identifying the object and purpose of the EEZ in the process of interpreting Article 121(3). It was the terms of "human habitation"<sup>76</sup> and "an economic life of its own"<sup>77</sup> in paragraph 3 that were seen as being connected to the "materials" collected which establishes the object and purpose of the EEZ.

Several questions arise. On the one hand, apart from "human habitation" and "an economic life of its own," there are other equally, if not more, important terms in Article 121(3) whose interpretation needed to be confirmed by the object and purpose of the Convention. For example, "rocks" in plural form appears to be different from the subject of paragraphs 1-2, i.e., "island" in singular form, but was taken as having the same scope and meaning by the Tribunal. The Tribunal did not identify any materials to support that the object and purpose confirms that the term "rocks" should be interpreted in this way.

On the other hand, five kinds of "materials" were used to define object and purpose of the EEZ regime. First, the Tribunal utilized the history of the Convention.<sup>78</sup> Second, the Tribunal invoked various regional declarations made prior to the UNCLOS III by the principal proponents of expanded coastal State jurisdiction.<sup>79</sup> Third, the Tribunal cited the positions taken by developing coastal States throughout the negotiations of the Seabed Committee and the UNCLOS III, as well as positions of certain developed States with a particular dependence on fisheries.<sup>80</sup> Fourth, the Tribunal invoked the Preamble

to the UNCLOS.<sup>81</sup> Fifth, the Tribunal cited the positions of individual States taken during the negotiation of the Convention.<sup>82</sup>

In terms of the “materials” to be used to define the object and purpose pursuant to Article 31(1) of the VCLT, leading authorities on treaty interpretation have paid little attention to the above kinds of materials, except for the preamble to a treaty.<sup>83</sup> Identifying the object-and-purpose of the EEZ regime is useful in understanding Article 121(3). What is missing from the Tribunal’s object and purpose analysis of the EEZ is any examination of the actual text of the EEZ regime in the Convention.

The above-mentioned materials were also used to define and interpret the term “human habitation” in Article 121(3). As stated by the Tribunal:

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) should serve to reinforce, rather than counter, the purposes that the exclusive economic zone and Article 121(3) were respectively intended to serve.<sup>84</sup>

In the Tribunal’s view, this is best accomplished by recognising the connection between the criteria of “human habitation” and the population of the coastal State for the benefit of whom the resources of the exclusive economic zone were to be preserved. ... Rather, it is that without human habitation (or an economic life), the link between a maritime feature and the people of the coastal State becomes increasingly slight.<sup>85</sup>

There is no question that the term “human habitation” needed to be considered in the light of its object and purpose. In this process, the immediate context of “human habitation” cannot be overlooked, which is “cannot sustain.” The focus of this provision is on the lack of capability to sustain human habitation and *not* whether the feature is inhabited or uninhabited. The Tribunal, however, gave attention to the latter by noting the remarks of representatives of Peru,<sup>86</sup> Singapore, and Colombia.<sup>87</sup> Arguably, the Tribunal was deviating from actual terms of the Convention.<sup>88</sup>

### **Travaux Préparatoires**

The Tribunal devoted ten pages to the *travaux préparatoires* to shed light on the purpose of Article 121(3).<sup>89</sup> The Tribunal reviewed (i) the records of the 1923 Imperial Conference for harmonizing marine policy across the British Empire; (ii) the 1930 proposal by the United Kingdom made at the League of Nations Hague Codification Conference, as well as a proposal by another group of States during the same Conference; (iii) wording adopted by the International Law Commission (ILC) in 1956 concerning the Law of the Sea and a British proposal made in 1954 at the ILC meeting; (iv) a modified version of the ILC text which became Article 10 of the 1958 Convention on the Territorial Sea and the Contiguous Zone; (v) the remarks of Ambassador Arvid Pardo of Malta made in the 1971 Seabed Committee, prior to the commencement of UNCLOS III; (vi) the positions of several States taken in the 1972-1973 Seabed Committee meetings; (vii) the position of Romania made in the 1974 session of UNCLOS III; (viii) the position of Singapore stated in the 1974 session; (ix) the

positions of the United Kingdom and Mexico made in the Second Committee meetings of UNCLOS III in 1974; (x) the 1975 Informal Single Negotiating Text (ISNT); (xi) the efforts by Japan, Greece, and the United Kingdom to remove the rock exception from the ISNT as well as the opposition by some other States to this effort; and (xii) the unsuccessful proposals by, *inter alia*, Denmark and Colombia to delete the paragraph 3 exception made during the final sessions of UNCLOS III.

There are serious doubts as to whether any *travaux préparatoires* exists respecting Article 121(3) of UNCLOS, as noted by Anthony Aust<sup>90</sup> and the Tribunal itself.<sup>91</sup> Concerning *travaux préparatoires* in the VCLT, Aust has commented that:

the ILC did not seek to define what is included in *travaux*, but it is generally understood to include written material, such as successive drafts of the treaty, conference records, explanatory statements by an expert consultant at a codification conference, uncontested interpretative statements by the chairman of a drafting committee and ILC Commentaries. ... The summary record of a conference prepared by an independent and skilled secretariat, such as that of the United Nations, will carry more weight than an unagreed record produced by a host State or a participating state.<sup>92</sup>

There is also the warning given by Gardiner regarding *travaux préparatoires*.

What is clear ... is that the invariable practice was (and still is) to look at the preparatory work when there is a question of treaty interpretation; but actually basing a finding on such material [preparatory work] needs to take place in more controlled conditions if the agreement of the parties is not to be replaced by the content of unconsummated exchanges of proposals and arguments that preceded finalization of the treaty.<sup>93</sup>

Earlier caution was raised by the Special Rapporteur for the International Law Commission drafting of the VCLT, quoted by Gardiner.

Today, it is generally recognized that some caution is needed in the use of *travaux préparatoires* as the means of interpretation. They are not, except in the case mentioned [reference to agreements, instruments, and documents annexed to a treaty or drawn up in connection with its conclusion], an authentic means of interpretation. They are simply evidence to be weighed against any other relevant evidence of the intentions of the parties, and their cogency depends on the extent to which they furnish proof of the common understanding of the parties as to the meaning attached to the terms of the treaty. Statements of individual parties during the negotiations are therefore of small value in the absence of evidence that they were assented to by the other parties.<sup>94</sup>

Based on the above, it can be argued that none of the materials referenced by the Tribunal as being *travaux préparatoires* appear to fit the term *travaux préparatoires* in the VCLT.

If it is correct for the Tribunal to say that “the *travaux préparatoires* of Article 121 are an imperfect guide in interpreting the meaning of paragraph (3) of that Article,”<sup>95</sup> it is questionable for the Tribunal to conclude<sup>96</sup> that the above negotiating history demonstrates that

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. This understanding of the object and purpose of Article 121(3) is consistent with the views of both the Philippines and China as summarized above at paragraphs 409 to 422 and 451 to 458.<sup>97</sup>

As pointed out above, it is not clear that China shares these views.<sup>98</sup> Besides, identifying the object and purpose by questionable *travaux préparatoires* is problematic in a treaty interpretation exercise.

It is, however, important to read the Tribunal's further remarks. First, going through various proposals made by individual or groups of States participating in UNCLOS III, the Tribunal stated that the words in Article 121(3) were not discussed in isolation, but were frequently discussed in the context of other aspects of the Convention.<sup>99</sup> Second, the drafters accepted that there are diverse high-tide features and that proposals to introduce specific criteria were considered but consistently rejected. Against such attempts at precision, the drafters clearly favored the language of the compromise reflected in Article 121(3).<sup>100</sup> Third, attempts during the Conference to define or categorize islands or rocks by reference to size were all rejected. Thus, the *travaux* makes clear that size is not dispositive of a feature's status as a fully entitled island or rock and is not, on its own, a relevant factor.<sup>101</sup>

### **The Text of Article 121(3)**

After examining the object and purpose, the Tribunal turned to the text. Article 31(1) of the VCLT directs that a treaty is to 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. In other words, every word of a provision counts in treaty interpretation.

The whole text to be interpreted reads: "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." Omitting the second word "which",<sup>102</sup> the Tribunal interpreted (i) rocks,<sup>103</sup> (ii) cannot,<sup>104</sup> (iii) sustain,<sup>105</sup> (iv) human habitation,<sup>106</sup> (v) or,<sup>107</sup> (vi) economic life of their own.<sup>108</sup>

"Rocks". The Tribunal first asked whether the term "rocks" in Article 121(3) needed to meet any geological or geomorphological criteria.<sup>109</sup> The answer given was no, as, according to the Tribunal, the ordinary meaning of "rock" from dictionaries does not confine the term so strictly.<sup>110</sup> The Tribunal then followed the Philippines' argument stating that:

any contrary interpretation imposing a geological criteria on Article 121(3) would lead to an absurd result. Within Article 121, rocks are a category of island. An island is defined as a "naturally formed area of land," without any geological or geomorphological qualification. Introducing a geological qualification in paragraph (3) would mean that any high-tide features formed by sand, mud, gravel, or coral – irrespective of their other characteristics – would always generate extended maritime entitlements, even if they were incapable of sustaining human habitation or an economic life of their own.<sup>111</sup>

With due respect to the Tribunal, whether "rocks" under Article 121(3) need to meet any geological or geomorphological criteria does not seem to be the correct question. The right question should be: what is the ordinary meaning of "rocks" in the context of the Article?

According to the *Oxford Advanced Learner's Dictionary of Current English*, "rock" is defined as "solid stony part of the earth's crust" or "mass of rock standing out from the earth's surface or from the sea."<sup>112</sup> Thus, the term "rocks" in Article 121(3) in plural

form is a group of solid mass stony parts of the earth's crust standing out from the sea at high-tide.<sup>113</sup> Taking the first seven words of Article 121(2) as context, "rocks" should be understood as only a kind of islands with solid stony nature standing out from the sea, surrounded by water, and above water at high tide. The term "rocks" in Article 121(3), when properly interpreted according to Article 31 of the VCLT would be a subcategory of "island," with a smaller scope than that of "island." Importantly, the Tribunal recognized that a State owning a group of rocks capable of collectively sustaining human habitation among themselves or economic life of their own may have an EEZ and continental shelf surrounding those rocks.<sup>114</sup>

"*Cannot*". The Tribunal indicated that the word "cannot" in Article 121(3) indicates capacity. The Tribunal continued: "Does the feature in its natural form have the capability of sustaining human habitation or an economic life? If not, it is a rock."<sup>115</sup> In a different section, the Tribunal pointed out 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 habitation or economic life of its own.<sup>116</sup>

This seems questionable. First, these conditions are not in the text of Article 121(3). Second, the idea was raised in the Imperial Conference of 1923, without being adopted as treaty text in any of the subsequent law-making conferences. The Tribunal stated:

Nevertheless, historical evidence of human habitation and economic life in the past may be relevant for establishing a feature's capacity. If a known feature proximate to a populated land mass was never inhabited and never sustained an economic life, this may be consistent with an explanation that it is uninhabitable.<sup>117</sup>

Clearly, the Tribunal accepted the Philippines' arguments on this point. Arguably, the more convincing way to determine whether a given feature has such a capacity is to undertake a site visit. Historic evidence cannot be exhaustive and may not be comprehensively presented. A sovereign State has the right to prohibit its civilians from dwelling on a maritime feature. Thus, the lack of historic evidence of human habitation does not necessarily prove the lack of the capacity that a group of rocks have to sustain human habitation or economic life.

"*Sustain*". The Tribunal considered that the ordinary meaning of "sustain" has three components: (i) the concept of support and provision of essentials; (ii) a temporal concept – the support and provision of essentials must be over a period of time and not one-off or short-lived; and (iii) a qualitative concept, entailing at least a minimal "proper standard." Thus, to "sustain" means, according to the Tribunal, 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.<sup>118</sup>

The third component may run against the wording in the Preamble of the Convention, – the "due regard for the sovereignty of all States," which may be taken as part of the object and purpose of the Convention. The object of "sustain" is human habitation. There are numerous humans that accommodate themselves to hugely different living environments. In the colonial period, the British Empire sent its civilians from England to settle in India. Lots of women and children died there due to

unsuitable living conditions.<sup>119</sup> However, the conditions in India sustained the local population. With such an example in mind, the third component may be difficult to apply.

“*Human Habitation*”. According to the *Merits Award*, the ordinary meaning of “human habitation” is the “action of dwelling in or inhabiting as a place of residence; occupancy by inhabitants” or “a settlement.”<sup>120</sup> “Inhabit” is defined as meaning “to dwell in, occupy as an abode, to live permanently or habitually in (a region, element, etc.); to reside in (a country, town, dwelling, etc.).”<sup>121</sup> The Tribunal was clear that the mere presence of a small number of people on a feature does not constitute permanent or habitual residence and does not equate to habitation. Rather, according to the Tribunal, the term habitation implies *a non-transient presence* of people who have chosen to stay and reside on the feature in a settled manner.<sup>122</sup> Also according to the Tribunal, the term “habitation” generally implies the habitation of the feature by a group or community of persons<sup>123</sup> or a stable community of people,<sup>124</sup> though no precise number of persons is specified in the Article 121(3).

Arguably, the above interpretation loses sight of both the law and reality. First, the maritime entitlements do not exist just because there is a maritime feature meeting the conditions under Article 121(1). It is the sovereignty of a State claiming the feature which generates the maritime entitlements surrounding the feature.<sup>125</sup> A sovereign State may decide to send civilians to a maritime feature they claim or may ban them from residing there. The free will<sup>126</sup> of the people is not relevant. Second, what is required in Article 121(3) is the capability for “rocks,” in plural form, to sustain human habitation. As long as the “rocks” have the natural capability to sustain human habitation, the “rocks” will have an EEZ and continental shelf. The reason why those people live on the “rocks” is not relevant according to the text of the provision. Third, no answer is provided by Article 121(3) as to how many people suffice to meet “human habitation.” The Tribunal’s creation of the threshold - a group or community of persons - is arbitrary and ambiguous.

“*or*”. The Tribunal opined that the logical interpretation of the use of the term “or” in Article 121(3) indicates that a feature that is able to sustain either human habitation or an economic life of its own will be entitled to an EEZ and continental shelf.<sup>127</sup> Again, the Tribunal ignored the plural form used in the word “rocks” and the legal implications.<sup>128</sup>

“*Economic Life of their Own*”. The Tribunal considered that the ordinary meaning of “economic” is “relating to the development and regulation of the material resources of a community” and may relate to a process or system by which goods and services are produced, sold and bought, or exchanged.<sup>129</sup> The term “life” suggests that the mere presence of resources will be insufficient and that some level of local human activity to exploit, develop, and distribute those resources would be required. “Economic life” must be read with component of “sustain.” A one-off transaction or short-lived venture would not constitute a sustained economic life.<sup>130</sup> The “of their own” component means, according to the Tribunal, that a feature itself (or group of related features) must have the ability to support an 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. The Tribunal pointed out that

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>131</sup>

That the infusion of outside resources and that purely extractive economic activities accruing no benefit for the feature or its population prevent a feature from having an EEZ and continental shelf are missing from the text of Article 121(3) and are impossible to apply. Economic life involves exchanging and trading goods/resources/services. People tend to offer what they can find in their environment in exchange of what they cannot find there. Guano can be extracted in exchange of capital which can be used to purchase highly sophisticated machines and to hire technicians/experts. Then the machines can be used by the experts to identify resources (e.g. oil or natural gas, energy from wind, waves, and sunshine) not easily found or obtained by the local inhabitants in the features.

### **State Practice**

The Tribunal devoted two paragraphs to the practice of States interpreting and applying Article 121(3).<sup>132</sup> Mentioning no practice by States Parties to the UNCLOS, the Tribunal concluded that “as far as the case before it is concerned, there is no evidence for an agreement based upon State practice on the interpretation of Article 121(3) which differs from the interpretation of the Tribunal as outlined in the previous Section.”<sup>133</sup>

It is unnecessary here to dwell on this as Yann-Huei Song has studied the application of Article 121(3) and relevant practice by UNCLOS Contracting Parties, namely, Australia, France, Japan, New Zealand, Brazil, Chile, Fiji, Iceland, Mexico, Portugal, and Venezuela.<sup>134</sup> Small and uninhabited maritime features meeting disqualifying conditions under Article 121(3) as interpreted by the Tribunal have been used individually or *collectively* to claim an EEZ and continental shelf. Some of the claims have met with protests, which also count as State practice in terms of exploring how Article 121(3) has been understood by Contracting Parties.<sup>135</sup> Song concludes that a comprehensive analysis of such seemingly diversified practice could have made the Tribunal’s conclusion on State practice more convincing.<sup>136</sup>

### **Concluding Remarks**

One of the controversial positions taken by the Tribunal concerning the structure of Article 121 was the way it answered its own question: “Does the feature in its natural form have the capability of sustaining human habitation or an economic life? If not, it is a rock.”<sup>137</sup> Thus, no rock can sustain human habitation or an economic life of its own and no rock can have an EEZ and continental shelf. However, according to Article 121(3), “rocks” which “can” sustain human habitation or economic life of their own “shall have” an EEZ and continental shelf. In other words, certain kinds of rocks may have EEZ and continental shelf.

How did the Tribunal arrive at this structural conclusion seemingly irreconcilable with the text of paragraph 3? First, the second word of paragraph 3, “which,” was overlooked in the interpretation process of the Tribunal. The role played by “which” is vital. It attaches the two disqualifying conditions to the subject of this paragraph, “rocks.” It

prevents those “rocks” meeting either disqualifying condition from having EEZ and continental shelf. As a necessary implication, other kinds of “rocks” not fulfilling the disqualifying conditions may have such maritime entitlements. By disregarding the word “which” one of the obstacles was removed for the Tribunal to reach its conclusion.

The second omission by the Tribunal concerns the first seven words of paragraph 2 “Except as provided for in paragraph 3.” These words are equally significant. They position the rules under paragraph 3 as exceptions to the general rule under paragraph 2, namely, the maritime entitlements of an island are determined according to the rules of UNCLOS applicable to other land territory. With these seven words, the “rocks” meeting the disqualifying conditions under paragraph 3 are a sub-category of “islands” under paragraphs 1-2. Put differently, rocks constitute a sub-category of island. Ignoring the first seven words of paragraph 2, the two disqualifying conditions under paragraph 3 were transformed from the conditions for the exception into the limitations to the general rule. Blurring the line between the rule and the exception thus facilitated a process that subjected an island under paragraphs 1-2 to the disqualifying conditions under paragraph 3 before deciding if that island has an EEZ and continental shelf.

The Tribunal’s conclusion cannot be reached without the omission of the textual difference between “rocks” in plural form under paragraph 3 and “an island” in singular form under paragraphs 1-2. The Tribunal noted that rocks are a “category” of island. However, the Tribunal introduced the term HTF to stand for “island” and for “rock.” As HTF replaced both “rocks” in paragraph 3 and “an island” in paragraphs 1-2, the difference between rocks and an island was rendered invisible. Thus, it became justifiable for the Tribunal to find that even an island must stand the test of paragraph 3, i.e., the two disqualifying conditions, in order to determine if it has EEZ or continental shelf.

If the above three omissions can be justified by the principles of treaty interpretation, the Tribunal’s conclusion may be also justified. However, the above three omissions can be criticized as not conforming with the principles of treaty interpretation codified in Article 31(1) of VCLT. The Tribunal’s first omission concerning the second word of paragraph 3, “which”, disregarded the rule that “a treaty shall be interpreted ... in accordance with the ordinary meaning to be given to the terms of the treaty ...” The Tribunal’s second omission of the first seven words of paragraph 2 together with its third omission of the difference between “an island” in singular form under paragraphs 1-2 and “rocks” in plural form under paragraph 3 constituted a disregard of the immediate and vital “context” which includes the “text” of the treaty, thus is inconsistent with Article 31(1)-(2) of VCLT.<sup>138</sup> Moreover, as the Tribunal noted that Article 121(3) was adopted after intensive and lengthy negotiations, each word of the paragraph should have counted and mattered.

Can the Tribunal’s structural conclusion be justified by the object and purpose of the provision and the UNCLOS as well as by the *travaux préparatoires*? As discussed above, this is untenable for five reasons. First, the object and purpose identified by the Tribunal for the interpretation of Article 121(3) was problematic. Second, the object and purpose of the provision cannot prevail over the text. As pointed out above, the



object and purpose identified by the Tribunal deviated from actual text of paragraph 3. Third, the object and purpose as identified was based on negotiation history which only revealed unsuccessful proposals voiced at UNCLOS III. Fourth, the twelve kinds of materials used by the Tribunal as *travaux préparatoires* do not seem to fall within the scope of that term and, as noted above, there is serious doubt as to whether any *travaux préparatoires* exists for Article 121(3) of UNCLOS.<sup>139</sup> This was noted by the Tribunal.<sup>140</sup>

The Tribunal's interpretation of the text of paragraph 3 seems to have departed from the actual wording of the provision and is disconnected from reality. First, the Tribunal considered the fact of human habitation or non-habitation as being vital evidence to prove capacity. Second, the Tribunal overlooked the fact that a sovereign State may prohibit its civilians from residing on any maritime feature it claims. Third, one of the components for the term "sustain" was "a qualitative concept, entailing at least a minimal proper standard" as interpreted by the Tribunal.<sup>141</sup> Such a condition seems arbitrary, ambiguous, hard to apply, and open for more controversies. Fourth, the term "human habitation" was interpreted by the Tribunal as implying "a non-transient presence of persons who have chosen to stay and reside on the feature in a settled manner."<sup>142</sup> However, it is the sovereignty of the State claimed over a given maritime feature that provides maritime entitlements surrounding the feature. Whether the people residing on the feature were willing to stay there or not seems irrelevant for generating maritime entitlement according to the text of paragraph 3. Fifth, the term "economic life of their own," as interpreted by the Tribunal, seems to be alienated from economic reality, namely, the exchanging and trading of goods/resources/services. There is no reason, for example, why guano cannot be extracted in exchange for capital which could be used to purchase machines and to hire technicians/experts. There is no reason why these experts could not help to identify sustainable resources (e.g. oil or natural gas, energy from wind, waves, and sunshine) not easily found or obtained by the local inhabitants on the features

Last but not the least, the word "rocks" in plural form heading Article 121(3) indicates that a State owning a group of rocks capable of collectively sustaining, among themselves, human habitation or economic life of their own may have "an" EEZ and continental shelf surrounding those rocks. Such a possibility was noted by the Tribunal.<sup>143</sup> China's maritime claims in the South China Sea using, *inter alia*, Nansha Islands as a whole may be justified accordingly. Taken together, the above noted controversies, anomalies and uncertainties, amongst other things, explain why the *Merits Award* is unlikely to be of significant precedent value for States that have small features that may or may not be captured by Article 121(3).<sup>144</sup>

## Notes

1. The *South China Sea Arbitration* (The Republic of Philippines v. The People's Republic of China), Case no. 2013–19. The *Merits Award* and the *Jurisdictional Award* of this Arbitration as well as all related materials (e.g. the Philippines' Memorial) and information, is available on the website of Permanent Court of Arbitration (PCA), which acted as the Registry of this Arbitration, at <[www.pca-cpa.org](http://www.pca-cpa.org)>.
2. United Nations Convention on the Law of the Sea, 10 December 1982, 1983 *United Nations Treaty Series* 3.
3. *Merits Award*, supra note 1, para. 474.

4. *Ibid.*, paras. 387-389.
5. See “Statement of the Ministry of Foreign Affairs of the People’s Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines (2016/07/12)” available online <[www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1379492.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1379492.shtml)>.
6. *Merits Award*, supra note 1, para. 457.
7. *Ibid.*, pp. 119, 181-186, and 195-232.
8. *Ibid.*, paras. 397-407, 554-648.
9. *Ibid.*, Section B of Chapter VI, paras. 281-384.
10. *Ibid.*, para. 280.
11. *Ibid.* “Throughout this Chapter, the Tribunal will refer to the generic category of features that meet the definition of an island in Article 121(1) as ‘high-tide features’.”
12. *Ibid.* “The Tribunal will use the term ‘rocks’ for high-tide features that “cannot sustain human habitation or economic life of their own” and which therefore, pursuant to Article 121(3), are disqualified from generating an exclusive economic zone or continental shelf. For high-tide features which are not rocks, and which pursuant to Article 121(2) enjoy the same entitlements as other land territory under the Convention, the Tribunal will use the term ‘fully entitled islands’.”
13. *Ibid.* “‘Rocks’ and ‘fully entitled islands’ are thus both sub-sets of the broader category of ‘high-tide features’.”
14. *Ibid.*, para. 483.
15. *Ibid.*, paras. 409-422.
16. This is required by Article 31(1) of the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, entered into force on 27 January 1980, 1155 *U.N.T.S.* 331. “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.”
17. *Merits Award*, supra note 1, para. 409.
18. *Ibid.*, para. 411.
19. The Philippines’ Memorial, submitted on 30 March 2014, supra note 1, see paras. 5.26, 5.28, 5.29, 5.36, 5.37, 5.39, 5.44, 5.46, 5.48, 5.50-5.52, and 5.56.
20. *Ibid.*, para. 5.16.
21. *Ibid.*, para. 5.17.
22. *Ibid.*, footnote 427.
23. *Ibid.*, para. 5.18.
24. *Ibid.*, para. 5.19.
25. *Ibid.*
26. *Ibid.*, para. 5.20.
27. *Merits Award*, supra note 1, para. 412.
28. *Ibid.*, para. 413.
29. *Ibid.*, para. 414.
30. *Ibid.*, para. 415.
31. *Ibid.*, para. 416.
32. *Ibid.*, para. 418.
33. *Ibid.*, para. 420.
34. *Ibid.*, para. 422.
35. *Ibid.*, pp. 195-204.
36. “Position Paper of the Government of the People’s Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines, 7 December 2014,” Foreign Ministry, available online: <[www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1217147.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml)>.
37. Ministry of Foreign Affairs, People’s Republic of China, Briefing on the South China Sea Arbitration Initiated by the Philippines: Xu Hong, Director General of Department of Treaty and Law (19 May 2016), quoted in *Merits Award*, supra note 1, para. 446, footnote 479.

38. *Ibid.*
39. Letter from the Ambassador of the People's Republic of China to the Netherlands to the individual members of the Tribunal (3 June 2016), enclosing Ministry of Foreign Affairs, People's Republic of China, Foreign Ministry Spokesperson Hua Chunying's Remarks on Relevant Issue about Taiping Dao (3 June 2016), available at <[www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/t1369189.shtml](http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1369189.shtml)>. See also Note Verbale from the People's Republic of China to the Secretary-General of the United Nations, No. CML/8/2011 (14 April 2011) quoted in the *Merits Award*, *ibid.*, para. 449, footnote 484.
40. *Ibid.*, para. 449.
41. Japan's Submission to the Commission on the Limits of the Continental Shelf (CLCS) as well as objections raised by China and Korea are available on the CLCS website at <[www.un.org/depts/los/clcs](http://www.un.org/depts/los/clcs)>.
42. *Merits Award*, supra note 1, para. 452.
43. *Ibid.*, para. 457.
44. *Ibid.*, para. 280.
45. *Ibid.*, paras. 453-455.
46. *Ibid.*, para. 453.
47. *Ibid.*, para. 454.
48. *Ibid.*, para. 455.
49. *Ibid.*, para. 458.
50. Note Verbale from the People's Republic of China to the Secretary-General of the United Nations (21 May 2009), reproduced in United Nations Convention on the Law of the Sea, Meeting of States Parties, Proposal for the Inclusion of a Supplementary Item in the Agenda of the Nineteenth Meeting of States Parties, UN Doc. SPLOS/196, p. 2, para. 3 (22 May 2009), quoted in the *Merits Award*, *ibid.*, para. 454, footnote 494.
51. See supra note 39.
52. *Merits Award*, supra note 1, paras. 459-465.
53. *Ibid.*, para. 459.
54. *Ibid.*, paras. 459-460.
55. *Ibid.*, para. 461.
56. *Ibid.*, para. 462.
57. *Ibid.*, para. 463.
58. *Ibid.*, paras. 459-460.
59. *Ibid.*, para. 461.
60. *Ibid.*, para. 465.
61. *Ibid.*, para. 465.
62. *Ibid.*, para. 466.
63. *Ibid.*, para. 466.
64. *Ibid.*, para. 467.
65. Please compare with the Tribunal's conclusion. See *ibid.*, para. 468. "In this statement, China did not contradict the characterisation by the Taiwan Authority of Itu Aba as a fully entitled island, but rather asserted that its people have lived and worked on Itu Aba continuously, which mirrors the elements of 'human habitation' and 'economic life' in Article 121(3) of the Convention."
66. *Ibid.*, paras. 469-472.
67. *Ibid.*, para. 469.
68. *Ibid.*, paras. 469-470.
69. *Ibid.*, para. 471.
70. *Ibid.*, para. 472.
71. Vienna Convention on the Law of Treaties, supra note 16.
72. *Merits Award*, supra note 1, paras. 478-552.
73. *Ibid.*, paras. 507-520.
74. Gerhard Hafner, "Some Remarks on the South China Sea Award: Itu Aba versus Clipperton," (2016) 34 *Chinese (Taiwan) Yearbook of International Law and Affairs*, pp. 1-

- 19, lists the articles of UNCLOS using the term “island” and points out the consequences of the omission of these articles in the Tribunal’s interpretation exercise.
75. See Anthony Aust, *Modern Treaty Law and Practice*, (1<sup>st</sup> ed. 2000), p. 188: The determination of the ordinary meaning cannot be done in the abstract, only in the *context* of the treaty and in the light of its *object and purpose*. The latter concept ... can be elusive. Fortunately, the role it plays in interpreting treaties is less than the search for the ordinary meaning of the words in their context, and, in practice, having regard to the object and purpose is more for the purpose of confirming an interpretation ...” See Ian Sinclair, *The Vienna Convention on the Law of Treaties*, (2<sup>nd</sup> ed. 1984), p. 130: It is also worth stressing that reference to the object and purpose of the treaty is, as it were, a secondary or ancillary process in the application of the general rule on interpretation. The initial search is for the ‘ordinary meaning’ to be given to the terms of the treaty in their ‘context’; it is in the light of the object and purpose of the treaty that the initial and preliminary conclusion must be tested and either confirmed or modified.
  76. *Merits Award*, supra note 1, paras. 512, 517, 520.
  77. *Ibid.*, para. 512.
  78. *Ibid.*, para. 513.
  79. *Ibid.*, para. 514. They are: the 1952 Santiago Declaration; the 1970 Montevideo and Lima declarations; the 1972 conclusions adopted at the African States Regional Seminar on the Law of the Sea; and the 1973 Addis Ababa declaration adopted by the Organization of African Unity.
  80. *Ibid.*, para. 515 and footnote 543.
  81. *Ibid.*, para. 515.
  82. *Ibid.*, paras. 518-519: the 1973 remarks of the representative of Peru; the 1974 remarks of the representative of Singapore; and the 1982 remarks of the representative of Colombia.
  83. Richard Gardiner, *Treaty Interpretation* (2nd ed., 2017), p. 218: “while ... the preamble may be used as the source of a convenient summary of the object and purpose of a treaty, both the Vienna Convention (article 31(2)) and practice make it clear that an interpreter needs to read the whole treaty. Thus, the substantive provisions will provide the fuller indication of the object and purpose.” See also Sinclair, supra note 75, pp. 118, 134.
  84. *Merits Award*, supra note 1, para. 516.
  85. *Ibid.*, para. 517.
  86. *Ibid.*, para. 518.
  87. *Ibid.*, para. 519.
  88. Gardiner, supra note 83, pp. 219-220, concluded that the object and purpose cannot be used to counter clear substantive treaty provisions.
  89. *Merits Award*, supra note 1, pp. 218-227.
  90. Aust, supra note 75, p. 198: The most important part of a negotiation, and of drafting, often take place informally with no agreed record being kept. The negotiations at the Third United Nations Law of the Sea Conference which met, intermittently, from December 1973 until the adoption of the UN Convention on the Law of the Sea in 1982 are a good example.
  91. *Merits Award*, supra note 1, para. 531: “Eventually, at the Third Session of the Third UN Conference in Geneva in 1975, the matter was referred to an informal consultative group which, without leaving records, prepared the “Informal Single Negotiating Text” that presented the exception for “rocks which cannot sustain human habitation or economic life of their own,” within a provision identical to what became Article 121(3) of the Convention.”
  92. Aust, supra note 75, pp. 197-198.
  93. Gardiner, supra note 83, p. 353.
  94. “Third Report on the Law of Treaties,” [1964] *Yearbook of the International Law Commission*, vol. II, p. 58, para 21, as quoted by Gardiner, supra note 83, p. 353. Also see Sinclair, supra note 75, p. 142 and McNair, *The Law of Treaties*, (1961), 423.
  95. *Merits Award*, supra note 1, para. 534.
  96. *Ibid.*, p. 223.

97. *Ibid.*, para. 535.
98. See above Section “The Tribunal’s Summary of China’s Arguments”.
99. *Merits Award*, supra note 1, para. 536, footnotes 571-577.
100. *Ibid.*, para. 537.
101. *Ibid.*, para. 538.
102. The term “which” introduces the disqualifying conditions to the subject of the sentence, i.e. rocks. The rocks meeting the conditions are prevented from having EEZ and continental shelf. *A contrario*, the other kind of rocks not meeting the disqualifying conditions may have EEZ and continental shelf.
103. *Merits Award*, supra note 1, paras. 479-482.
104. *Ibid.*, paras. 483-484.
105. *Ibid.*, paras. 485-487.
106. *Ibid.*, paras. 488-492.
107. *Ibid.*, paras. 493-497.
108. *Ibid.*, paras. 498-503.
109. *Ibid.*, para. 479.
110. *Ibid.*, para. 480, 540.
111. *Ibid.*, para. 481. Arguably, the examples raised by the Tribunal (i.e. sand, mud, gravel) and by the Philippines (i.e. mud, sand, soil) seem unreasonable while the Tribunal’s worries seem unwarranted.  
Not being able to survive the ocean waves, these examples can hardly be “above water at high tide” as required by Article 121(1). Not being “islands”, they cannot have maritime entitlements under Article 121(2). It was useless to discuss these examples when assessing the scope of “rocks” which are only a category of island.
112. *Oxford Advanced Learner’s Dictionary of Current English*, A.S. Hornby (as General Editor), third edition published in 1980. This definition is similar to that provided by the Tribunal, see *Merits Award*, supra note 1, para. 480.
113. Under this definition, naturally-formed hard areas of coral above water at high tide may be considered as a “non-rock island.” Compare this with *Merits Award*, supra note 1, paras. 411 and 481.
114. When concluding its interpretation of Article 121(3), the Tribunal recognized the possibility for human populations to sustain themselves “through a network of related maritime features.” “A population that is able to inhabit an area only by making use of multiple maritime features does not fail to inhabit the feature on the grounds that its habitation is not sustained by a single feature individually.” Besides, “the Tribunal considers that the capacity of 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.” Moreover, “remote island populations often make use of a number of islands, sometimes spread over significant distances, for sustenance and livelihoods. An interpretation of Article 121(3) that sought to evaluate each feature individually would be in keeping neither with the realities of life on remote islands nor with the sensitivity to the lifestyles of small island peoples that was apparent at the Third UN Conference.” *Ibid.*, paras. 544 and 547. Also, State practice in using a group of rocks like those of Brazil (i.e. Saint Peter and Paul rocks and twelve small volcanic rocks in the southern Atlantic Ocean) may confirm this reading of Article 121(3). See Yann-Huei Song, “Article 121(3) of the Law of the Sea Convention and the Disputed Offshore Islands in East Asia: A Tribute to Judge Choon-Ho Park” in Jon M. Dyke, Sherry P. Broder, Seokwoo Lee and Jin-Hyun Paik (eds.), *Governing Ocean Resources New Challenges and Emerging Regimes: A Tribute to Judge Choon-Ho Park*, (2013), 61-98.
115. *Merits Award*, supra note 1, para. 483.
116. *Ibid.*, para. 541. For a different view see Yoshifumi Tanaka, “Reflections on the Interpretation and Application of Article 121(3) in the South China Sea Arbitration (Merits),” 48 *Ocean Development and International Law*, 368-369 (2017).

117. *Merits Award*, supra note 1, paras. 484, 549.
118. *Ibid.*, para. 487.
119. BBC Empire Episode 2 - Making Ourselves at Home Documentary - Jeremy Paxman, available in <[www.youtube.com/watch?v=Jjg8MX5QStc](http://www.youtube.com/watch?v=Jjg8MX5QStc)> watch the program at 19:20 – 21:30.
120. *Merits Award*, supra note 1, para. 488.
121. *Ibid.*, para. 488.
122. *Ibid.*, para. 489.
123. *Ibid.*, para. 491.
124. *Ibid.*, paras. 542, 544.
125. This is the Roman notion of *dominium maris* and the international law principle of “*la terre domine la mer*” which states that the land dominates the sea. *Ibid.*, para. 184.
126. *Ibid.*, para. 542.
127. *Ibid.*, para. 494.
128. *Ibid.*, paras. 493-497 and 504(d). For views different from the Tribunal’s interpretation concerning the meaning of “or”, see Tanaka, supra note 116, p. 367.
129. *Merits Award*, supra note 1, para. 499.
130. *Ibid.*
131. *Ibid.*, para. 500.
132. *Ibid.*, paras. 552-553.
133. *Ibid.*, para. 553.
134. Yann-huei Song, “The July 2016 Arbitration Award, Interpretation of Article 121(3) of the UNCLOS, and Selecting Examples of Inconsistent State Practices” 49 *Ocean Development and International Law*, 247-261 (2018).
135. Gardiner, supra note 83, p. 270: “It is sufficient if there is practice of one or more parties and good evidence that the other parties have endorsed the practice.” In other words, protest results in lack of agreement of the parties in the context of applying Article 31(3)(b) of VCLT.
136. See Alex G. Oude Elferink, “The South China Sea Arbitration’s Interpretation of Article 121(3) of the LOSC: A Disquieting First,” in the JCLOS Blog, (September 7, 2016), <[site.uit.no/jclos/files/2016/09/The-South-China-Sea-Arbitrations-Interpretation-of-Article-1213-of-the-LOSC-A-Disquieting-First.pdf](http://site.uit.no/jclos/files/2016/09/The-South-China-Sea-Arbitrations-Interpretation-of-Article-1213-of-the-LOSC-A-Disquieting-First.pdf)>. Also see Gerhard Hafner, supra note 74, p. 10. Also see Tanaka, supra note 116, pp. 373-376.
137. *Merits Award*, supra note 1, para. 483.
138. VLCT, supra note 16, Article 31(2) provides that “The context for the purpose of the interpretation of a treaty shall comprise, in addition to *the text*, including its preamble and annexes: ...”
139. Aust, supra note 90.
140. *Merits Award*, supra note 1, para. 531.
141. *Ibid.*, para. 487.
142. *Ibid.*, para. 489.
143. *Ibid.*, paras. 544 and 547. Also see supra note 114.
144. See Tanaka, supra note 116, p. 378.