

8. UNCLOS Article 121 and Itu Aba in the South China Sea Final Award: a correct interpretation?

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I. INTRODUCTION

This chapter provides a textual interpretation of Article 121 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and its relevant application to Itu Aba Island (Itu Aba) in the context of the July 2016 Final Award in the *South China Sea Arbitration (The Republic of Philippines v The People's Republic of China)* dispute regarding the Spratly Islands.

The Third United Nations Conference on the Law of the Sea (UNCLOS III) was formally held from 1973 to 1982. Many observers have noted that the negotiations for this conference were not only lengthy but also highly complex, involving many unique negotiating processes, which were largely designed to save time and to achieve consensus as required by the Conference Rules of Procedure. The ambitious goal of UNCLOS was to reach agreement on a comprehensive legal regime governing over 70 per cent of the earth's surface. The resulting UNCLOS contains 320 articles plus 9 annexes of treaty text. Its original provisions on the deep seabed mining regime proved to be unacceptable to the international community, especially to industrialised states, and the objectionable text was modified through an innovative procedural process in 1994 just prior to UNCLOS's entry into force. By September 2016, there were 168 parties to UNCLOS, including the European Union. With such near universal acceptance, almost all of the provisions in UNCLOS are generally regarded by international law experts either as customary international law or as persuasive evidence of customary international law. The importance of this point is that conventional law is legally binding on a state only with its

¹ William G Phalen provided vital research, drafting and editorial support for this chapter.

express consent, while customary international law is binding and enforceable against all states, whether or not they are parties to the particular convention.

UNCLOS has 17 parts, many of which contain extensive text, but, in sharp contrast, Part VIII consists of only a single article under the heading 'Regime of Islands'. Part VIII does not deal with artificial islands or installations (for this, see UNCLOS Articles 60, 80 and 147), groups of islands (see Part IV concerning the archipelagic regime), or territories under foreign occupation or colonial dependence (see Final Act, Annex I, Resolution III). Moreover, Part VIII, or indeed UNCLOS as a whole, does not deal with disputes over territorial sovereignty or delve into specific maritime delimitation disputes. UNCLOS does provide that to qualify as an 'island' under Article 121, the island territory must be naturally formed and be surrounded by water at high tide. With these qualifications, islands are entitled under UNCLOS to the same maritime zones as other land territory. UNCLOS principles pertaining to islands proper embodied in UNCLOS are widely accepted in customary international law and in state practice. Article 121(3) of UNCLOS, however, contains a novel exception not rooted in customary international law. The third paragraph of Article 121 reads: 'Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf'. The interpretation and application of the Article 121(3) text with respect to *Itu Aba* are given in Parts IV and V of this chapter.

The first noteworthy source of international law dealing with the regime of islands topic was in a draft text prepared for the 1930 Conference for the Codification of International Law. The 1930 draft text read: 'Every island has its own territorial sea. An island is an area of land, surrounded by water, which is permanently above high-water mark.' In this draft text the term 'island' did not exclude artificial islands, provided that they were true portions of the territory and not merely floating works or the like.

Another noteworthy source is the draft articles by International Law Commission (ILC) on the law of the sea. Issued in 1956, the draft articles included text on islands that read as follows: 'Every island has its own territorial sea. An island is an area of land, surrounded by water, which in normal circumstances is permanently above high-water mark.' The ILC did not consider low-tide elevations and technical installations built on the seabed to be islands.

The First Conference on the Law of the Sea held in 1958 produced a modified version of the 1956 ILC draft text. Article 10 of the 1958 Convention on the Territorial Sea and the Contiguous Zone read: 'An island is a naturally-formed area of land, surrounded by water, which is

above water at high-tide. The territorial sea of an island is measured in accordance with the provisions of these articles.’

The 1958 Convention on the Continental Shelf also contains the term ‘island’ in its definitional article. Article 1(b) plainly provides that the legal continental shelf extends ‘to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands’. While not defined in the Convention on the Continental Shelf, the term ‘island’ is properly read as used in the contemporaneously negotiated Convention on the Territorial Sea and Contiguous Zone.

An accurate understanding of the meaning of the Article 121 text requires an appreciation of the unique negotiating context in which the article was drafted at UNCLOS III. Almost all negotiations of the article were conducted in informal working groups with limited delegate participants present where no official UN records were kept. The author of this chapter, Myron Nordquist, was present for many such negotiations at UNCLOS III.² Personal recollections based on an individual’s experiences at UNCLOS III, however, are naturally selective. Thus, the views expressed in this chapter are ‘informed conjecture’ and are not offered as undeniable facts.

This chapter draws significantly different conclusions from those in the 2016 Final Award with respect to the meaning of Article 121(3) particularly as applied to Itu Aba. This chapter argues that Itu Aba is a legal ‘island’ within the meaning of Article 121(3), while the Arbitral Tribunal in the Final Award concluded that the feature was a ‘rock’. This chapter is divided into three sections. The first section outlines in detail the legislative

² Myron H Nordquist was the Secretary of the US Delegation to the Conference at the time the text of Article 121 was drafted in 1974 and 1975. Moreover, he was specifically assigned as an official US delegate to follow, on a daily basis, the negotiations in the Second Committee at the Conference. In this capacity, Nordquist attended the few informal meetings when the regime of islands issues was discussed. To gain a sense of the atmosphere in the negotiations at this stage, one must note that there were numerous other negotiations underway competing for attention, and the status of islands was not the most pressing or even the most controversial issue being followed by US delegation members, including Nordquist. Still, the US delegation was the only one large enough (about 150 total accredited members to the second session in 1974) to send representatives to every meeting to which it was invited. One of the duties of delegate Nordquist during the 1974, 1975 and 1976 periods most relevant to this chapter was to help prepare reports to authorities in Washington, DC, on the events that had just transpired during the negotiations. As Secretary of the US Delegation, he thus played a role in preparing the daily delegation reports sent to Washington, DC, as well as in helping to write the official Delegation Report submitted to US government leaders at the end of each session.

history in which the Article 121 text was drafted at UNCLOS III. The second section interprets the ordinary meaning of the text of Article 121 as applied to the specific facts of *Itu Aba*. The third section reviews supplementary treaty interpretation sources potentially helpful in confirming the legal status and maritime entitlement implications for *Itu Aba* from the text found in paragraph 3 of Article 121 of UNCLOS.

II. NEGOTIATING HISTORY OF ARTICLE 121

A. First and Second UN Conferences on the Law of the Sea

The First UN Conference on the Law of the Sea met in Geneva from 24 February to 27 April 1958, with 86 states being represented. The conference decided to establish five main committees to deal with its agenda: First Committee (territorial sea and contiguous zone); Second Committee (high seas: general regime); Third Committee (high seas: fishing and conservation of living resources); Fourth Committee (continental shelf); and Fifth Committee (question of free access to the sea of land-locked countries). The General Assembly had referred the International Law Commission's final report on the law of the sea, which contained 73 draft articles that had resulted from the commission's seven years of preparatory work, to the First Conference. Based on this final report, the First Conference³ negotiated and produced four conventions: the Convention on the Territorial Sea and the Contiguous Zone;⁴ the Convention on the High Seas;⁵ the Convention on Fishing and Conservation of the Living Resources of the High Seas;⁶ and the Convention on the Continental Shelf.⁷

³ The First Conference also adopted an Optional Protocol of Signature concerning the Compulsory Settlement of Disputes. At the conference, the most challenging issues were the outer limit of coastal state jurisdiction over the territorial sea, fisheries and continental shelf, and the delimitation of boundaries between adjacent and opposite states.

⁴ Convention on the Territorial Sea and Contiguous Zone (adopted 29 April 1958, entered into force 10 September 1964) 516 UNTS 205.

⁵ Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 11.

⁶ Convention on Fishing and Conservation of the Living Resources of the High Seas (adopted 29 April 1958, entered into force 20 March 1966) 599 UNTS 285.

⁷ Convention on the Continental Shelf (adopted 29 April 1958, entered into force 10 June 1964) 499 UNTS 311.

The four conventions from the First Conference in 1958 were landmarks in the progressive codification of international law, despite the failure of the Second Conference in 1960 to agree on the limits of the territorial sea or the extent of fisheries jurisdiction. This result of the First Conference was facilitated by the fact that many of the provisions were expressions of existing customary international law, particularly those in the Convention on the High Seas. Important new rules, however, were embodied in the Convention on the Continental Shelf, while the Convention on the Territorial Sea and the Contiguous Zone was a mixture of well-established and emerging rules. The Convention on Fishing and Conservation of the Living Resources of the High Seas was easily the least well received of the four conventions.

B. Third UN Conference on the Law of the Sea (UNCLOS III)

1. UNCLOS III preparation

In November 1967, Ambassador Arvid Pardo of Malta spoke at length in the UN General Assembly on the importance of the oceans to the future of mankind and on the need for modernisation of the legal regime for ocean space. He also introduced a draft resolution to exclude the seabed beyond national jurisdiction from national appropriation on the basis that it was ‘the common heritage of mankind’ and to establish an international agency to control all seabed activities therein. The financial benefits derived from the exploitation of the deep seabed resources were to be used primarily to aid the poorer countries of the world. Pardo’s ideas won immediate appeal with most developing nations.

Consequently, the General Assembly established an ad hoc Committee of 35 members to study UN activities in the seabed area beyond national jurisdiction and to recommend means to promote cooperation in the use of its resources.⁸ In 1968, the ad hoc Committee informed the General Assembly that further study was needed.⁹ A harbinger of the future

⁸ Examination of the Question of the Reservation Exclusively for Peaceful Purposes of the Sea-bed and the Ocean Floor, and the Subsoil Thereof, Underlying the High Seas Beyond The Limits of Present National Jurisdiction, and the Use of Their Resources in the Interests of Mankind, UNGA Res 2340 (XXII) (18 December 1967) UN Doc A/RES/22/2340.

⁹ See United Nations Ad Hoc Committee to Study the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction, ‘Report of the Ad Hoc Committee to Study the Peaceful Uses of the Sea-bed and the Ocean Floor beyond the Limits of National Jurisdiction’ (UN Doc A/7230) United Nations 1968.

processes for UNCLOS III arose here, in that the ad hoc Committee conducted its work on the basis of consensus among its members, although no formal decision was taken to that effect.

In December 1968, the General Assembly adopted a resolution to create a standing 42-member Committee on the Peaceful Uses of the Sea-Bed and Ocean Floor beyond the Limits of National Jurisdiction (Seabed Committee).¹⁰ The elected chairman of the ad hoc Committee, Hamilton Shirley Amerasinghe, was later elected as the first president of UNCLOS III.

Resolution 2574B, adopted at the 24th session of the General Assembly in 1969, tasked the ad hoc Committee to expedite the preparation of draft principles governing deep seabed mining and to submit a draft declaration in 1970.¹¹ Resolution 2750C, adopted at the 25th session of the General Assembly in 1970, noted that the states' responses given to the Secretary-General in a survey indicated widespread support for holding a comprehensive conference on the law of the sea.¹²

Three Sub-Committees were established in 1971. The Sub-Committees did most of the work accomplished in 1973. Accordingly, the regime of islands issue was dealt with almost exclusively in Sub-Committee II, which focussed on law of the sea. However Sub-Committee II made little progress in drawing up draft articles. To help focus on specific texts, a Working Group was formed to prepare a comparative table and consolidated text of the proposals submitted, and to present 'variants' that might form the basis for draft articles. One result of the variant exercise was to stimulate the submission of a plethora of proposals in 1973. Many delegations wanted to ensure that their nation's position was included in at least one of the variants, which were organised under the most appropriate heading of the list of subjects and issues.

¹⁰ Examination of the Question of the Reservation Exclusively for Peaceful Purposes of the Sea-bed and the Ocean Floor, and the Subsoil Thereof, Underlying the High Seas Beyond the Limits of Present National Jurisdiction, and the Use of Their Resources in the Interests of Mankind, UNGA Res 2467A (XXIII) (21 December 1968) UN Doc A/RES/2467(XXIII)A.

¹¹ Question of the reservation exclusively for peaceful purposes of the sea-bed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction, and the use of their resources in the interests of mankind, UNGA Res 2574B (XXIV) (15 December 1969) UN Doc A/RES/2574(XXIV)B.

¹² Reservation exclusively for peaceful purposes of the sea-bed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction and use of their resources in the interests of mankind, and convening of a conference on the law of the sea, UNGA Res 2750C (XXV) (17 December 1970) UN Doc A/RES/2750(XXV)C.

2. UNCLOS III

The first official act of UNCLOS III was to elect HS Amerasinghe of Sri Lanka as its president.¹³ Amerasinghe had served ably as the chairman of the Seabed Committee and was widely respected by all regional groups. Thirty-one vice-presidents were also elected, and Kenneth Rattray of Jamaica was selected as Rapporteur General. Andres Aguilar from Venezuela was elected chairman of the Second Committee, while Satya N Nandan of Fiji was made its rapporteur. Both Aguilar and Nandan were to play major leadership roles at UNCLOS III, including key roles on the regime of islands issues that were almost entirely within the mandate of the Second Committee.

The second session of UNCLOS III opened with great fanfare on 20 June 1974 in Caracas, Venezuela, with 138 states sending representatives. At its First Meeting held on 3 July 1974, Chairman Aguilar described the organisation of work in the Second Committee as follows:

... the items assigned to the Committee should be considered one by one in the order in which they appeared in the list. The idea was to consider each of the items, to identify the principle [sic] trends and reduce them to generally acceptable formulae, and then to 'put them on ice' so to speak, without any decision.¹⁴

The third session of the conference met in Geneva from 17 March to 9 May 1975. This session of the conference was the most historically important for ascertaining an accurate meaning of the text of Article 121, especially paragraph 3. For the Second Committee as a whole, the 1975 Geneva session was also easily the most productive in terms of generating the actual text of UNCLOS, because each chairman of the three committees was empowered to draft a single negotiating text on the subjects and issues within his committee's mandate. Creating text from committee debate had proved impossible, as delegates with opposing positions could not agree publicly. A single intelligence (represented by the respective chairmen)

¹³ Third United Nations Conference on the Law of the Sea, 'Summary Records of Plenary Meetings: 1st Plenary Meeting' (3 December 1973) UN Doc A/CONF.62/SR.1 in *Official Records of the Third United Nations Conference on the Law of the Sea* (Vol 1, United Nations 1973–74). Second Session, 4, para 13 <http://legal.un.org/docs/?path=../diplomaticconferences/1973_los/docs/english/vol_1/a_conf62_sr1.pdf&lang=E> accessed 5 December 2017. Paragraph 13 states that HS Amerasinghe of Sri Lanka was elected as president. The documents in 'Second Session: Meetings of the General Committee' start on page 219.

¹⁴ Third United Nations Conference on the Law of the Sea, 'Summary Records of Meetings of the Second Committee: 1st Meeting' (3 July 1974) UN Doc A/CONF.62/C.2/SR.1 in *Official Records of the Third United Nations Conference on the Law of the Sea* (Vol 2, United Nations 1973–74) 95.

was the only way to come up with a single text. Issued after the end of the third session in Geneva, the Single Negotiating Text as drafted in 1975 was decisive. The 'provisional become permanent', largely because of the unique drafting procedures, consensus requirement and expedited review procedures adopted and subsequently implemented at UNCLOS III.

Two informal working groups on islands and delimitation considered what were summarily described as 'relevant substantive issues'.¹⁵ It is indeed unfortunate for those seeking to interpret the text of Article 121 that no official records exist from any of the discussions during the informal consultations, which played such a vital role in the formulation of the exact language that was drafted for the regime of islands text in the Single Negotiating Text.

At this stage of the negotiations, selection of the Article 121 text in the Single Negotiating Text was the formal responsibility of the chairman of the Second Committee.¹⁶ However, the original text of Article 121(3) was drafted by the rapporteur of the Second Committee with closely held advice from a few UN Secretariat employees assigned to assist the Second Committee. After listening to the debate and looking at all the proposals before the Second Committee, this small group made a considered collective judgement of what it believed would not be objectionable to the majority of interested delegates. An effort was made to formulate compromise text giving at least a nod of concession to competing points of view. The typical approach throughout the drafting of the Single Negotiating Text was to include language from the 1958 Convention on the Continental Shelf. This was done for the first two paragraphs of Article 121, since there was general (but not universal) support for the principles in the 1958 rules that defined islands and gave islands equal status to land territory for maritime entitlement.

A procedural technique often used in the negotiating process at UNCLOS III at this stage was to sidetrack highly emotional issues, such as foreign or colonial domination and control over islands. In addition, delegates agreed to sever the link under the regime of islands item from the unsolvable delimitation issues. These procedural moves in 1975 left a sparse (but manageable) text under the regime of islands item. No effort to resolve island sovereignty disputes was ever deemed feasible by any experienced delegate at the conference.

¹⁵ Third United Nations Conference on the Law of the Sea, 'Statement on the Work of the Second Committee' (15 July 1975) UN Doc A/CONF.62/C.2/L.89/Rev.1 in *Official Records of the Third United Nations Conference on the Law of the Sea* (Vol 4, United Nations 1976) para 17.

¹⁶ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS) art 121.

The Second Committee Bureau players in this behind-the-scene drafting process in 1975 took careful account of the political atmosphere, particularly the mounting campaign from the landlocked and geographically disadvantaged group. Primarily under political pressure from this group, the bureau members selected bits and pieces of proposal language to draft paragraph 3 as a limitation on exclusive economic zones (EEZs) and outer continental shelf limits for islands.

The Single Negotiating Text as a whole was the focus of intensive informal negotiations during the intersession period from May 1975 to the beginning of the fourth session, which started on 15 March 1976.¹⁷ At the first meeting of the fourth session in New York, the president of the conference indicated that the next phase of work was the preparation by the chairman of the three committees of a revised Single Negotiating Text. A 'rule of silence' procedure was adopted: delegates not speaking implied consent to the Single Negotiating Text. Because of these 'tacit consent' procedures in the Second Committee, the Single Negotiating Text dealing with the regime of islands, as drafted by the bureau and presented after the third session in 1975, was deemed at this stage 'not objectionable'.

At the First Conference the United States had proposed insertion of the word 'natural' in the 1958 text, which was eventually incorporated into Article 121(1). The US intent as stated at the time was to ensure that nations would not be authorised to claim entitlement to offshore resources simply by erecting artificial offshore installations or establishing floating platforms.

Thus by 1975, the text of Article 121(3) was agreed upon, and this would be the version ultimately incorporated into UNCLOS in 1982. The regime of islands is a separate part out of only 17 separate parts in UNCLOS. The entire text of the single article in Part VIII consists of only three sentences, which read as follows in their entirety:

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.

¹⁷ Third United Nations Conference on the Law of the Sea, UNGA Res 3483 (12 December 1975) UN Doc A/RES/3483(XXX).

III. INTERPRETATION OF ARTICLE 121

A. Vienna Convention on the Law of Treaties

The general rule of treaty interpretation in the Vienna Convention is found in Article 31. Article 31 provides that ‘the *ordinary meaning* is to be given to the terms of the treaty in their context and in light of its object and purpose’.¹⁸ In addition to the words in the text, for the purpose of ordinary interpretation, the context includes the preamble, annexes and any agreement or instrument relating to the treaty accepted between all the parties.¹⁹ As we shall see, the preamble, annexes or agreement between the parties are not particularly enlightening matters for the application of Article 121(3) to Itu Aba. Together with the context, subsequent agreements by the parties or subsequent practices in the application of the treaty that establishes the agreement of the parties regarding its interpretation are to be taken into account, as are any relevant rules of international law applicable in the relations between the parties.²⁰ It is noteworthy that the One China Policy followed by the Philippines would properly be included in relevant rules of international law and subsequent practices with respect to Itu Aba.

Article 32 of the Vienna Convention provides guidance on supplementary means of interpretation. It states that²¹

[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) Leaves the meaning ambiguous or obscure; or
- (b) Leads to a result which is manifestly absurd or unreasonable.

In interpreting Article 121(3), the Arbitral Tribunal applied the Vienna Convention and reviewed the ‘text, its context, the object and purpose of the Convention, and the *travaux préparatoires*’,²² before coming to its conclusion that none of the high-tide features in the Spratly Islands,

¹⁸ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31(1) (emphasis added).

¹⁹ *ibid* art 31(2).

²⁰ *ibid* art 31(3).

²¹ *ibid* art 32.

²² *The South China Sea Arbitration (The Republic of Philippines v The People’s Republic of China)* Award (12 July 2016) PCA 2013-19 (Final Award) para 477.

including Itu Aba, is capable of sustaining human habitation or an economic life of their own, and consequently, these features are not entitled to an EEZ or continental shelf of their own.²³ Contrary to the conclusion of the Arbitral Tribunal, this chapter will show that Itu Aba objectively meets all reasonably conceivable requirements for the definition of an 'island' both with respect to interpretation and application of Article 121(3) of UNCLOS.

B. The Arbitral Tribunal's Interpretation of Article 121

1. Ordinary meaning of Article 121

First, what is the ordinary meaning of the text in Article 121? Paragraph 1 provides a widely accepted codified definition of an island that is followed in state practice. By and large the international community has found this definition of an island to be useable, and it is nearly universally applied in state practice. Several points in the first paragraph text, however, merit note. The island must be 'naturally' formed; that is, not man made or artificially formed. Note that the word 'naturally' only modifies 'formed' in Article 121(1) and does not appear in Article 121(3).

In paragraph 504 of the *South China Sea Arbitration* Final Award, the Arbitral Tribunal provided the conclusions that it drew from interpreting the text of Article 121(3). Specifically the Arbitral Tribunal examined the terms 'rocks', 'cannot', 'sustain', 'human habitation', 'or' and 'economic life of their own'. With respect to 'rocks', the interpretation in the Final Award correctly recognises that the term encompasses more than just geological composition, but this is not an issue of importance in the case at hand. In dealing with the term 'cannot', the Arbitral Tribunal first acknowledged in paragraph 483 that 'Article 121(3) indicates a concept of capacity'. The Arbitral Tribunal then erred by injecting the qualifier of 'natural form', a qualifier not found in UNCLOS. The Arbitral Tribunal might have been influenced by the Philippines' arguments that tie the word 'cannot' in Article 121(3) to the feature itself, as if anyone could know and assess the entire geological history of any rock on Earth. In interpreting the word 'sustain' in paragraphs 485–87, the Arbitral Tribunal slipped further down the slope of error, by finding components of its own making not provided in UNCLOS. The Arbitral Tribunal, without citing any evidence, asserted that the term 'sustain' has three components: first the 'concept of the support and provision of essentials', second a concept of time and third a minimum 'proper standard' for a

²³ *ibid* para 625.

feature to remain viable. The Arbitral Tribunal apparently left to itself to select *when* these ‘components’ must exist for all the myriad of features around the world.

The term ‘sustain’ requires a validly constituted tribunal to assess the feature in question at the time of the filing of the judicial action bringing such judicial decision making into the dispute. In the case at hand, therefore the facts of the specific feature of Itu Aba were to be judged accurately at the initiation of the arbitration on 22 January 2013. Any other date to assess the feature and its capacity under UNCLOS would, in the author’s opinion, be totally arbitrary. The reason is that the most relevant status of a feature arises at the time when a decision is legally authorised and required. Thereafter the feature must be objectively evaluated based on presented evidence within the factual knowledge of the decision maker. The Arbitral Tribunal in the Final Award overreached its legitimate mandate and state of factual knowledge, by trying to set up universal criteria for ‘human habitation’ for all features in the world for all time. In paragraph 491, for instance, the Arbitral Tribunal stated that the term habitation ‘generally implies the habitation of the feature by a group or community of persons’ and then proceeded to inject its own creative notions such as the ‘need for company’. Where is that notion in UNCLOS? The disjunction ‘or’ in Article 121(3) is plainly not the conjunctive ‘and’. There is no reason to discuss this plain text further. Sustaining either the condition of human habitation or economic life of its own would qualify a feature for island status. Importantly, however, as noted above, either of these conditions is to be assessed at the time the issues for decision are properly presented to an agreed judicial decision maker. To illustrate the point, it would be foolish indeed to go back to the ‘big bang’ when the earth was formed to determine what was naturally formed.

Turning to the meaning of the term ‘economic life of their own’ in paragraph 498 of the Final Award, the Arbitral Tribunal disqualified features as ‘islands’ based on its self-created standard that the feature ‘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’.²⁴ Again the Arbitral Tribunal cited the Philippine brief to support this remarkable qualifier that the economic activity must be ‘local’ and not imported from support from the outside. In fact, this inserted qualifier belies state practice by disqualifying the very islands Article 121 was intended to cover by the UNCLOS language negotiated at

²⁴ *ibid* para 500.

UNCLOS III.²⁵ In any event, what island anywhere on Earth fits this doctrinal model in today's global economy? Further, the Arbitral Tribunal's assertion—that 'economic activity derived from a possible economic zone or continental shelf must necessarily be excluded'—cannot be found in the UNCLOS text or its legislative history. In reality, unprotested state practice as exemplified in instances such as Christmas Island, Johnston Island and Atoll, Clipperton Island, Trindade Island, Heard and McDonald Islands, and Norway's Bouvet and Peter I Islands as well as many others, refutes, indeed completely contradicts, the Arbitral Tribunal's assertion.²⁶ Again, the Tribunal overreached its legitimate mandate and denied well-founded and accepted facts before it, by injecting doctrines not rooted in UNCLOS or state practice.

In paragraph 505, the Arbitral Tribunal concluded that the phrase 'of their own' excludes 'certain forms of activity that are entirely dependent on external sources, devoted to using a feature as an object for extractive activities without the involvement of a local population, or which make use solely of the waters adjacent to a feature'.²⁷ The Arbitral Tribunal is again open to the criticism that it attempted to override the compromise in the text and the compromise agreement in the UNCLOS III negotiations. The Arbitral Tribunal was not authorised to rewrite UNCLOS's deliberate compromise language, and it erred in expanding its legitimate procedural latitude to exclude islands such as Itu Aba.

2. Context and purpose of treaty

Turning to the context of Article 121(3), the Arbitral Tribunal adopted an approach that allows those favouring the 'contextual' approach to recoup the loss of judicial discretion imposed by the discipline of following the actual text as required by the Vienna Convention on the Law of Treaties. The Arbitral Tribunal predictably found the text of Article 121 to be sufficiently ambiguous to look to the 'context of the treaty in light of its object and purpose'. The Arbitral Tribunal erroneously asserted, for instance, that 'Article 121(3) must ... be interpreted in conjunction

²⁵ See Myron H Nordquist and William G Phalen, 'Interpretation of UNCLOS Article 121 and Itu Aba (Taiping) in the South China Sea Arbitration Award' in Myron H Nordquist, John Norton Moore and Ronán Long (eds), *International Marine Economy: Law and Policy* (Brill 2017).

²⁶ *ibid.*

²⁷ Article 121 was negotiated and drafted to accommodate, in part, the interests of mid-ocean Pacific island states and especially to confer benefits from the tuna resources in their EEZs. The draftsman of the text of Article 121, Satya Nandan, was from Fiji.

with ... Article 13 concerning low-tide elevations', because of a perceived 'system of classifying features'.²⁸ As a careful review of the legislative history below illustrates, Article 121(3) was not drafted, negotiated or amended in conjunction with low-tide elevations under Article 13, but instead was drafted as an exception to the first two paragraphs of Article 121. The Arbitral Tribunal disconcertingly conflated low-tide elevations and islands or rocks without referencing any credible source in support of its approach. In fact, there was little or no debate at UNCLOS III surrounding the distinction between low-tide elevations (Article 13) and islands (Article 121). Divorcing paragraph 3 from Article 121 and aligning it with 'low-tide elevations' from Article 13 appear to be an attempt by the Arbitral Tribunal to establish 'rocks' as a broader independent maritime feature classification, rather than as a limited exception from the presumption of an island, as evidenced by the text and legislative history of UNCLOS III negotiations.

3. Any relevant rules of international law applicable in the relations between parties

The Vienna Convention allows parties to take into account other relevant rules and principles of international law, including canons or guidelines for construction, in interpreting treaty text. One widely accepted canon of construction in treaty interpretation is that exceptions to general rules are strictly construed. In other words, the *general rule or principle carries more weight than its exceptions*. How does this canon apply to Article 123(3)? As noted above, the general rule for island territory, embodied in the UNCLOS text as well as in the 1958 Convention on the Continental Shelf, is that islands receive the same maritime zones and entitlements as land territory. Paragraph 3 of Article 121 provides an exception to this general rule in that it specifies that 'rocks' are not islands, which warrant the same treatment as other land territory for purposes of EEZ and continental shelf entitlement. The application of widely accepted guidelines for interpreting treaty text requires scrutiny of the exception, and unless clearly not merited, the exception should be read restrictively so as not to unnecessarily reduce the entitlement principle in the general rule.²⁹ Not reading the 'rock' exception broadly in this case essentially creates a presumption that what is not clearly a 'rock' is an island entitled to the same treatment as land for purposes of maritime entitlement under UNCLOS. The legal

²⁸ Final Award (n 22) para 507.

²⁹ Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (Oxford University Press 2008) 425–26.

rationale for this interpretation is that the conditions disqualifying ‘rocks’ are construed narrowly, since paragraph 3 is an exception to the general rule of full entitlement for islands. This interpretation is reinforced in the exact text of paragraph 2 of Article 121 itself, which begins with the phrase ‘*Except as provided for in paragraph 3 ...*’.³⁰ The undeniable point is that the actual text of Article 121 identifies paragraph 3 as an ‘exception’ to the maritime zonal entitlements otherwise provided in UNCLOS for islands, rating equal maritime jurisdiction status with other land territory. In other words, ‘islands’ should not be presumed to be ‘rocks’ with a lesser maritime entitlement than proper islands. On the contrary, in cases of doubt, ‘rocks’ should be presumed to be ‘islands’ granted full maritime entitlement as land territory.

C. Supplementary Sources to Interpret Article 121(3)

The most complex textual interpretation problem in Article 121 is that the meanings of the two criteria or conditions that distinguish a ‘rock’ from an ‘island’ in paragraph 3 are genuinely ‘ambiguous or obscure’ in the sense of the Vienna Convention. That is, the ordinary meaning of the words read in their context and in light of the other guidance in Article 31 of the Vienna Convention (object, purpose, preamble, annexes, subsequent agreements, subsequent practice and the like) still leaves the meaning of the precise treaty text unclear. The two conditions in Article 121(3) are at least ‘ambiguous’ in the ordinary usage of the English language in which Article 121 was drafted. Thus, the international law rules in Article 32 of the Vienna Convention are to be applied to further ascertain the meaning of the text in the two qualifying conditions in Article 121(3). Article 32 provides that supplementary means of interpretation include ‘the preparatory work of the treaty and the circumstances of its conclusion’.³¹

Several preliminary notes may be helpful to the interpretation process. First, the word ‘natural’ in Article 121(1) modifies only the word ‘formation’, and that was the intended use of the word. The text as well as legislative history of the first paragraph text tells us that the words were intended to describe physical geography relating to formation. That is to distinguish maritime features that were ‘formed’ by nature from those built or created by humans. The timeframe for this natural process is not specified in UNCLOS, in part because, as noted above, the complete geologic history of any maritime feature is simply unknowable. Thus, any time period

³⁰ UNCLOS (n 16) art 121(2) (emphasis added).

³¹ Vienna Convention on the Law of Treaties (n 18) art 32.

selected for deciding formation is arbitrary unless the question is presented in a legal proceeding. In the case at hand, the Philippines initiated the arbitration proceedings on 22 January 2013. The only non-arbitrary legal basis for selecting a date for deciding the legal status of Itu Aba is at the start of the legal proceedings by the Philippines that called for a decision by this Tribunal. This was the date that arose when the Philippines' legal actions brought the Arbitral Tribunal's formal adjudication process into legal existence. This date is also critical for interpreting Article 121(3) as discussed below. The time period for determining the meaning of the term 'sustain' in the case at hand was not to foster speculation about the past or future, but to ascertain accurately the present status of the feature based on available evidence for the Arbitral Tribunal.

The two most authoritative supplementary sources to research the context of Article 121 are *A Legislative History of Part VIII (Article 121) of the United Nations Convention on the Law of the Sea* published in 1988 by the UN Office for Ocean Affairs and the Law of the Sea³² and *United Nations Convention on the Law of the Sea 1982, A Commentary*, the relevant volume of which was published seven years after the UN Study in 1995.³³

In the publication by the UN Office for Ocean Affairs and the Law of the Sea, Iran recorded an interesting interpretation as its 'understanding':

Islets situated in enclosed and semi-enclosed seas which *potentially* can sustain human habitation or economic life of their own but, due to climatic conditions, resource restriction or other limitations, have not *yet* been put to development, fall within the provisions of paragraph 2 of Article 121 concerning 'Regime of Islands', and have, therefore, full effect in boundary delimitations of various maritime zones of the interested coastal States.³⁴

Thus, the broad parameters of the future debate concerning status, maritime entitlement and the legal consequences from islands were already framed by the end of the 1973 session of the Seabed Committee. On one side were the delegations that favoured specific, objective criteria to define islands. On another side were those states that supported subjective criteria or no definition at all. Both sides' views largely reflected perceptions

³² United Nations Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea. Régime of Islands: Legislative History of Part VIII (Article 121) of the United Nations Convention on the Law of the Sea* (United Nations 1988).

³³ Satya N Nandan and Shabtai Rosenne (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary* (Vol 3, Martinus Nijhoff 1995) 321–39.

³⁴ United Nations Office for Ocean Affairs and the Law of the Sea (n 32) 113 (emphasis added).

about the physical geography of their national territories. All delegations acknowledged that the island definition articles in the 1958 Convention on the Continental Shelf were vague, but no consensus was found on how to formulate general rules that all delegations could accept as a substitute for the 1975 text, given the widely diverse factual situations regarding islands around the world. Article 121 was an attempt to accommodate essentially irreconcilable positions. The most influential advocates for the objective definition were members of the Organization of African Unity (OAU). The OAU delegates advocated the need to define islands and thereby fix maritime entitlement using objective factors. This group of states recommended that such determinations be based on equitable principles (contrary to the more mechanical median line advocates) considering all relevant factors and special circumstances including (i) the size of islands, (ii) their population or the absence thereof, (iii) their contiguity to the principal territory, (iv) their geological configuration and (v) the special interests of island states and archipelagic states.³⁵

The OAU delegates' approach was also at odds with that of states that preferred the existing law with its imprecise definitions in Article 10 of the 1958 Convention on the Territorial Sea and the Contiguous Zone or even with no definition at all, as was the case in the text of Article 1 of the Convention on the Continental Shelf.

The conclusion remains that the most credible source in the record is that the 'sustaining human habitation or an economic life of its own' language in the Single Negotiating Text was more or less drawn from

³⁵ Council of Ministers of the Organization of African Unity, 'Declaration of the Organization of African Unity on the Issues of the Law of the Sea' (19 July 1974) UN Doc A/CONF.62/33 in *Official Records of the Third United Nations Conference on the Law of the Sea* (Vol 3, United Nations 1973–74). The declaration was an attempt to propose objective and equitable rules in opposition to the 'exaggerated claims of countries possessing islands' as contained in the 1958 Convention on the Continental Shelf. Third United Nations Conference on the Law of the Sea, 'Summary records of meetings of the Second Committee 40th meeting' (14 August 1974) A/CONF.62/C.2/SR.40 in *Official Records of the Third United Nations Conference on the Law of the Sea* (Vol 2, United Nations 1973–74) paras 23–24 (Tunisia). On 27 August 1974, 14 African states introduced draft articles on the regime of islands, distinguishing between islands, islets, rocks and low-tide elevations largely based on size. See Algeria, Dahomey, Guinea, Ivory Coast, Liberia, Madagascar, Mali, Mauritania, Morocco, Sierra Leone, Sudan, Tunisia, Upper Volta and Zambia, 'Draft articles on the regime of islands' (27 August 1974) UN Doc A/CONF.62/C.2/L.62/Rev.1 in *Official Records of the Third United Nations Conference on the Law of the Sea* (Vol 3, United Nations 1973–74). Nandan and Rosenne (eds) (n 33) 232–33. Even though this proposal was rejected, the Final Award seems to endorse this general approach.

or patterned after the Romanian proposals. Particularly relevant is Romania's compromise proposal on 12 August 1974, which included the words 'uninhabited permanently' and 'own economic life'. The Second Committee Bureau thus had a pretext for the proposition that a 'source' for a main trend was before the Second Committee. The text in Article 121(3), however, goes far beyond what Romania intended or expressed in the text of its proposal. The text selected inserts a time element, by injecting the words 'can sustain', taken from an Arab proposal that had been rejected by the UNCLOS III delegates. This 'sustain' qualification encompasses future potential and depending upon circumstances not limited to just past or present conditions. Presumably credible evidence of a 'rock's' sustainability for human habitation is demonstrated by the presence of existing inhabitants who are able to survive over a period of time. No better evidence can be given. Likewise, 'sustainability' can be demonstrated for an 'economic life of its own' by a variety of existing activities during the time periods selected. Historically, uses could, of course, include using the 'rock' for a long time as a base for drying fishing nets or even as a site for a satellite transmission or as a relay tower.

The possible economic uses that might qualify for satisfying the economic condition are really only limited by the imagination and technological or financial resources of those attempting to establish that the 'rock' sustains an economic life of its own. The sovereign owner holding 'title' to the feature will normally support this demonstration. But this need not be the case. The criteria are tied to the human use of the maritime feature itself, and the actual owner at the selected date of evaluation may actually be irrelevant, especially when there is a dispute about sovereign ownership of the feature. The point is that the characteristic of sustainability is applicable to the maritime feature regardless of ownership or possession. But at the same time ownership is not immaterial to the status of a feature as a 'rock' or an 'island'. The sovereign whose island or 'rock territory' is involved can and often does have an important impact on 'sustainability'.

In addition, a review of the legislative history of the negotiations at UNCLOS III reveals that objective criteria such as physical size, number of inhabitants, geographical location and other characteristics were proposed, deliberated upon and *rejected* for inclusion in the text of Article 121(3). No meaningful discussion was held about water, naturally drinkable or not, and no reference is made to water on islands in the text of UNCLOS. The Arbitral Tribunal in the Final Award, however, decided to put great emphasis on water.

The text selected and approved in Article 121 is admittedly flawed in the sense that deliberately ambiguous wording was included. Nevertheless, this deliberately ambiguous compromise text itself is what governs under

international law, because this was the text language finally agreed upon and adopted by the sovereign states now party to UNCLOS. Regardless of what the Philippines argued at the arbitral hearings, the Arbitral Tribunal also had an independent judicial duty to ensure for itself that the Philippines' claim was 'well founded in fact and law',³⁶ bearing in mind that entitlement status was to be judged at the time of filing the case in 2013.

IV. APPLICATION OF ARTICLE 121(3) TO ITU ABA

A. Pertinent Characteristics of Itu Aba in 2013

The most current and authoritative facts available to the Arbitral Tribunal with respect to Itu Aba were given on 28 January 2016 after the Head of the Taiwan authority Ma Ying-jeou visited Itu Aba.³⁷ His remarks were addressed to 180–200 people engaged on the 'island' in military, police, fire department, coast guard, medical services and various environmental protection positions located permanently on the island. He reviewed some of the history of Chinese occupation and exercises of authority over the island, including the maps published in 1935 and 1947 reaffirming sovereignty over the islands and surrounding waters. While affirming that the island was an 'inherent part' of the Taiwan authority territory and waters, his government was said to enjoy such rights 'in accordance with international law'.³⁸ Ma outlined a roadmap for his South China Sea Peace Initiative including a 'provisional arrangement of a practical nature', which is a direct quote from UNCLOS Articles 7(3) and 83(3) dealing with EEZ delimitations.³⁹ Itu Aba is no longer solely dependent for electricity on generators run by imported diesel fuel and is projected to raise its electrical supply to run 40 per cent on an expanded solar power

³⁶ UNCLOS (n 16) annex VII art 9.

³⁷ Office of the President, Republic of China, 'Remarks by President Ma on Taiping Island' (28 January 2016) <www.mofa.gov.tw/en/News_Content.aspx?n=8157691CA2AA32F8&sms=4F8ED5441E33EA7B&s=9B04614B26F7FD33> accessed 20 September 2017. A few of the factors reported by Ma in early 2016 might have been slightly altered since the case was filed in 2013.

³⁸ *ibid.*

³⁹ *ibid.* See a detailed blueprint on provisional arrangement for the South China Sea suggested in Robert Beckman and Clive Schofield, 'Defining EEZ Claims from Islands: A Potential South China Sea Change' (2014) 29(2) *International Journal of Marine and Coastal Law* 193.

system.⁴⁰ In December 2015, renovation of the island's wharf and the construction of a lighthouse were completed, substantially aiding supply replenishment and safety aspects.

In November 2015, renovation of the island's airstrip was completed, allowing C-130s (and therefore C-47s also) transport planes to land and take off from the island. Data continued to be obtained from marine and meteorological observation stations on Itu Aba to monitor and warn of natural disasters.⁴¹ Facilities for improved emergency rescues were being enhanced. Ma pointed out that the Taiwan authority has now occupied the island for nearly 60 unbroken years.⁴² He noted that the Philippines had argued in the *South China Sea Arbitration* that Itu Aba had no fresh water or arable soil and was incapable of 'human habitation'; Ma declared such fabrications were 'totally wrong'.⁴³ The hospital on Itu Aba was staffed with two physicians, a dentist and three nurses with videoconferencing connections to hospitals in Kaohsiung. There was also a post office and a *guanyin* temple on the island.⁴⁴ Moreover, mobile telecommunications, postal services, satellite television, air services and ship services (including wharf, lighthouse, navigation facilities and related administrative services) have been established on Itu Aba.⁴⁵

B. Interpretation and/or Application of Article 121(3) to Itu Aba

As noted above, the Arbitral Tribunal found that there was no historical evidence of potable water and naturally occurring vegetation capable of providing shelter on Itu Aba as well as limited agriculture to supplement the food resources of the surrounding waters.⁴⁶ Further, small numbers of fishermen mainly from Hainan had historically been present on Itu Aba.⁴⁷ However, the physical characteristics of the features did not definitively indicate the capacity of the features⁴⁸ to sustain human habitation and economic life of their own. Accordingly, because the Arbitral Tribunal considered that Article 121(3) required that the status of a feature was to be determined on 'the basis of its natural capacity, without external

⁴⁰ Office of the President, Republic of China (n 37).

⁴¹ *ibid.*

⁴² *ibid.*

⁴³ *ibid.*

⁴⁴ *ibid.*

⁴⁵ *ibid.*

⁴⁶ Final Award (n 22) paras 580–614.

⁴⁷ *ibid* para 599.

⁴⁸ *ibid* para 616.

additions or modifications',⁴⁹ the Tribunal had to consider the historical evidence of human habitation and economic life of Itu Aba. It found no indication of 'anything fairly resembling a stable human community' on any of the Spratly Island features including Itu Aba.⁵⁰ In addition, although there was historical evidence of extractive economic activity on Itu Aba supporting the populations of other cities and states, it did not constitute an economic life of its own without the presence of a stable local community.⁵¹ On this basis, Itu Aba was not capable of sustaining human habitation or an economic life of its own.

As elaborated in Section III herein, the Arbitral Tribunal's interpretation of Article 121(3) is deficient. To reiterate, the language in Article 121(3) is not limited just to past habitation or economic capacity as applied to Itu Aba, but includes its future potential or capability in the words of the text to 'sustain human habitation or economic life of its own'. This text as discussed in its legislative history does not read that all future developments are to rely solely upon nature, but to take into account ordinary improvements to facilitate sustainability by humans. This means that even if Itu Aba had not in the past or does not even presently 'sustain' humans or generate its own economic life, the Taiwan authority (or even another state) is not prohibited by UNCLOS to take measures to meet either of the conditions in Article 121(3). As explained above, the legal evaluation of the term 'sustain' begins at the time of the case filing, as a legal decision based on any other time selection in a properly constituted legal case would be completely arbitrary. The Arbitral Tribunal in the Final Award argued for an interpretation that would have future tribunals assess a time before 'intense modification' by humans, without identifying the source in UNCLOS for this requirement. The Arbitral Tribunal also failed to define 'intense modification', possibly because differentiating degrees of modification with a coherent, universally applicable rule would be impossible. Humans have historically modified their habitat intensively at least as far back as the invention of agriculture 23,000 years ago.⁵² Many places now flourishing in the world would indeed be inhospitable without some level of human modification, innovation and adaptation.⁵³

Consequently, as detailed in Section III, the sustained human habitation on Itu Aba as well as the many instances of sustained economic life on

⁴⁹ *ibid* para 541.

⁵⁰ *ibid* para 621.

⁵¹ *ibid* para 623.

⁵² Ainit Snir et al, 'The Origin of Cultivation and Proto-Weeds, Long Before Neolithic Farming' (2015) 10(7) PLOS ONE 1.

⁵³ *ibid*.

the island, substantiated by Ma's visit, establishes beyond any doubt that Itu Aba is not merely a 'rock'.⁵⁴ While some of the improvements reported have occurred since the Philippines' case was initiated, the developments can only be seen as further proving the 'sustainability' of the two criteria in Article 121(3). The failure of the Arbitral Tribunal to take note of the actual developments on the island is baffling. Itu Aba objectively meets all reasonably conceivable requirements for the definition of an 'island' both with respect to interpretation and application of UNCLOS Article 121(3). The Final Award is factually and legally flawed in its holding that the island of Itu Aba is merely a 'rock'.

Another serious legal error with respect to the decision on Itu Aba in the Final Award is the Arbitral Tribunal's seemingly accepting the Philippines' arguments before the Tribunal. For instance, the Philippines argued that it was not asking the Arbitral Tribunal to decide sovereignty over any feature.⁵⁵ The Philippines of course had to argue this position, because otherwise the Arbitral Tribunal would not have jurisdiction in the case under Article 298 of UNCLOS. The Philippines also repeatedly asserted in the arbitration hearings that it was 'only' asking the Arbitral Tribunal to rule on those features occupied or controlled by China, including Itu Aba.⁵⁶

The Arbitral Tribunal asserted that because the Final Award does not deal with issues of sovereignty, the ruling does not implicate Article 298, which provides for exclusion on overlapping EEZ claims or maritime delimitation. The Final Award reads as follows:

nothing in the Convention prevents a Tribunal from recognising the existence of an exclusive economic zone or continental shelf, or from addressing the legal consequence of such zones, in an area where the entitlements of the State claiming an exclusive economic zone or continental shelf are not overlapped by the entitlements of any other State.⁵⁷

⁵⁴ *ibid.*

⁵⁵ See *The South China Sea Arbitration (The Republic of Philippines v The People's Republic of China)* Hearing on Jurisdiction and Admissibility (Day 1, 7 July 2015) PCA 2013-19, 88, where specific reference is made to Itu Aba. Professor Philippe Sands QC, lead counsel for the Philippines, stated that 'The Philippines has not invited the Tribunal directly or indirectly, to adjudicate on China's claims of sovereignty over any island or rock, or the claims of any other state'. The argument is not accurate, because the Arbitral Tribunal was asked directly to recognise a Philippine EEZ, which overlaps with an EEZ formally claimed by China based on Chinese sovereignty.

⁵⁶ See the Philippines' Submission No 5 in Final Award (n 22) para 112B.

⁵⁷ Final Award (n 22) para 629.

However, had the Arbitral Tribunal found Itu Aba to be an island, the entitlements of China would have gone well beyond any 12 NM territorial sea overlapping claims, not just of the Philippines, but also those of Vietnam and Malaysia (see Map 8.1).

Article 298 provides an optional exception of compulsory jurisdiction exercised by China that exempts the certain ‘categories’ of disputes including

(i) disputes *concerning* the interpretation or application of articles 15, 74 and 83 *relating* to sea boundary delimitation, those *involving* ... historic titles ... and provided further that any dispute that necessarily *involves* the concurrent consideration of any unsettled dispute concerning sovereignty or *other rights* over continental or insular land territory shall be excluded from such submission.⁵⁸

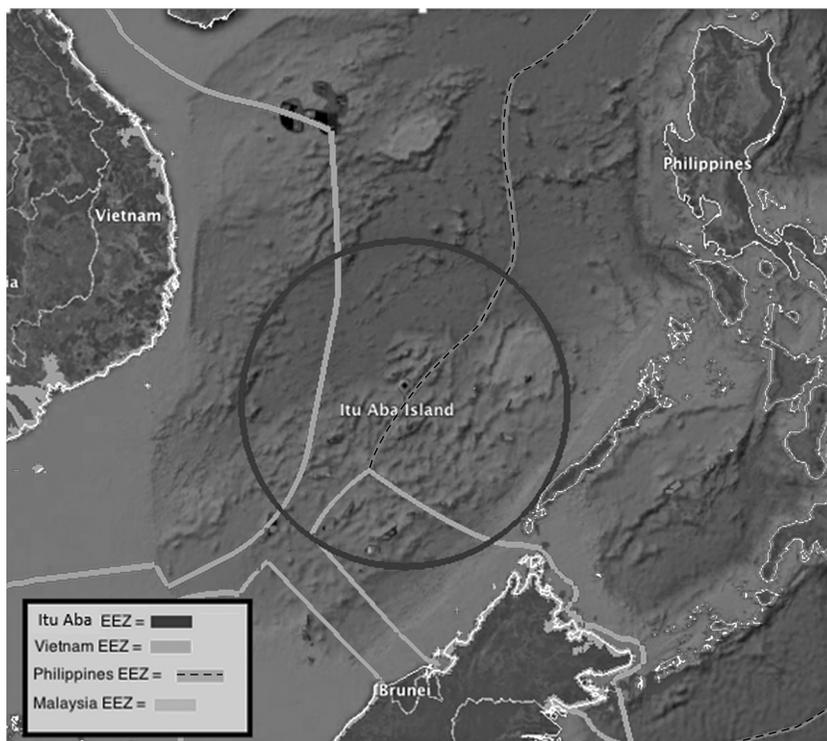
The above text plainly is broadly written using words such as ‘categories’, ‘concerning’, ‘relating’, ‘involving’ and ‘other rights’. The Arbitral Tribunal, however, consistently throughout the Final Award adopted a restrictive approach ruling, inter alia, against any step in the direction of losing jurisdiction in the case.

As can be seen factually from the following graphic illustrations, the dispute before the Arbitral Tribunal clearly ‘concerned’ and ‘related to’ sea boundaries and ‘involved’ other rights to insular land territory. Moreover, the One China policy inherently ‘involves historic titles’ between China and the Taiwan authority at least with respect to Itu Aba. Equally certain is the fact that the dispute ‘concerned other rights’ besides sovereignty.

The Arbitral Tribunal, in paragraph 629 of the Final Award, again cited the Philippines’ submission to justify its jurisdiction. The legal status of the features is important because of the maritime zones to which they are entitled. The Arbitral Tribunal skirted the exemptions in Article 298, by taking the Philippines at its word rather than assessing the real impetus for the proceedings and the state-practice implications of the Final Award. The carefully parsed words used by lawyers for the Philippines were not legally sufficient reasons for finding the Arbitral Tribunal had jurisdiction to proceed with the suit against China.

The jurisdictional analysis in the Final Award focusses on the finding that Mischief Reef and Second Thomas Shoal are low-tide elevations without entitlements to territorial seas. The Arbitral Tribunal was especially keen on determining Mischief Reef and Second Thomas Shoal as low-tide

⁵⁸ UNCLOS (n 16) art 298(1)(a)(i) (emphasis added).



Note: Itu Aba is one of the features within the Spratly group claimed by China, Taiwan authority and Vietnam.⁵⁹

Source: Background Map: Google Earth Pro; EEZ coordinates: marine regions available at <<http://marineregions.org/>>

Map 8.1 Map depicting the officially declared EEZs of Vietnam, the Philippines and Malaysia overlain with the 200 NM EEZ that Itu Aba would generate if properly classified as an ‘island’ under Article 121

elevations, likely because they then unquestionably would lie within the Philippines’ declared 200 NM EEZ. The Final Award’s justification for jurisdiction is buried in less than two pages of the 500-page decision:

⁵⁹ Deposit of lists of geographical coordinates as contained in the ‘Declaration of the People’s Republic of China on the Baselines of the Territorial Sea, 15 May 1996’ <www.un.org/depts/los/legislationandtreaties/pdf/chn_1996_Declaration>.

The Tribunal has also now held (see paragraph 626 above) that neither Itu Aba, nor any other high-tide feature in the Spratly Islands, is a fully entitled island for the purposes of Article 121 of the Convention. As such, pursuant to the operation of Article 121(3) of the Convention, these features are legally considered to be ‘rocks’ and to generate no *exclusive economic zone or continental shelf*. The Tribunal also notes that there is no maritime feature that is above water at high tide in its natural condition and that is located within 12 nautical miles of either Mischief Reef or Second Thomas Shoal.

From these conclusions, it follows that there exists no legal basis for any entitlement by China to maritime zones in the area of Mischief Reef or Second Thomas Shoal. Accordingly, there is no situation of overlapping entitlements that would call for the application of Articles 15, 74, or 83 to delimit the overlap. Because no delimitation is required—or, indeed, even possible—there is no possible basis for the application of the exception to jurisdiction in Article 298(1)(a)(i).⁶⁰

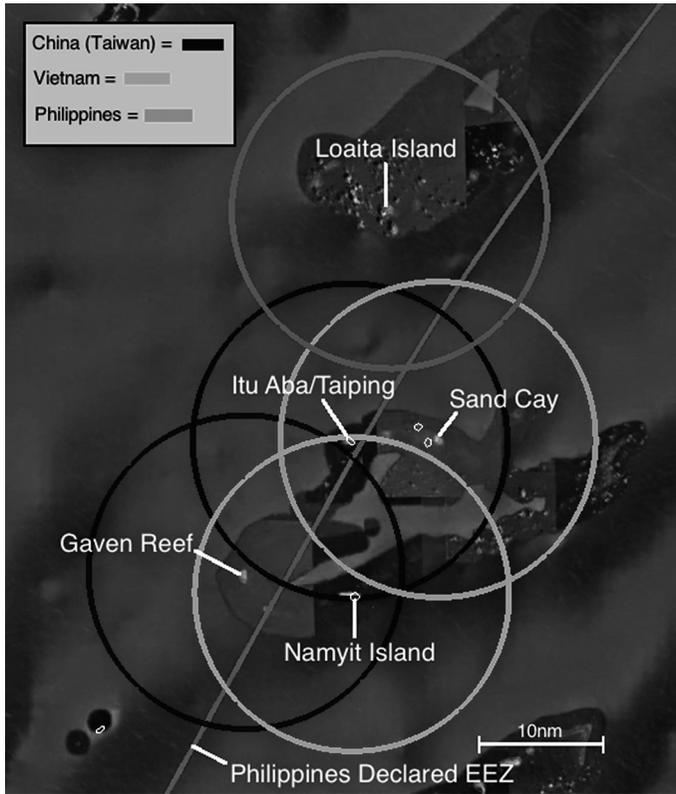
The Arbitral Tribunal failed to recognise, without explanation, that delimitation is required not only for continental shelf and EEZ entitlements, but also for territorial seas and contiguous zones.⁶¹ Had the Arbitral Tribunal considered all overlapping maritime zones under UNCLOS, it could not have accepted jurisdiction over the case as the territorial sea of the high-tide features Loaita Island (occupied by the Philippines) and Itu Aba (occupied by Taiwan authority) overlap significantly (see Map 8.2). Furthermore, even though Itu Aba is seaward of the Philippines’ 200 NM EEZ claim, the territorial sea that Itu Aba is entitled to even as a ‘rock’ overlaps with that claim. Accordingly, even applying the Arbitral Tribunal’s classification of Itu Aba as a ‘rock’ causes the maritime zones of the two parties to the dispute (as well as Vietnam) to overlap considerably. As a result, this dispute is undoubtedly not subject to compulsory dispute settlement pursuant to Article 298, as it ‘concern[s] the interpretation or application of Articles 15 [territorial sea delimitation], 74 [EEZ delimitation] ...’ (see Map 8.2).⁶²

pdf> accessed 7 October 2017. See also ‘M.Z.N. 7. 1996. LOS (Maritime Zone Notification) 5 July 1996’ <www.un.org/depts/los/legislationandtreaties/statefiles/chn.htm> accessed 7 October 2017.

⁶⁰ Final Award (n 22) paras 632–33 (emphasis added).

⁶¹ Contiguous Zone delimitation is also involved, which is especially important in the context of underwater cultural heritage (ie shipwrecks), as Article 303 extends coastal state jurisdiction in the case of objects of ‘an archeological and historic nature’ out to 24 NM. UNCLOS (n 16) art 303. The overlapping island areas in question have been fraught with navigational hazards for centuries, and there is a real possibility of shipwreck ownership disputes pursuant to UNCLOS, because of overlapping contiguous zones.

⁶² UNCLOS (n 16) art 298(1)(a)(i).



Source: Background Map: Google Earth Pro.

Map 8.2 Territorial Seas generated by the claimed high-tide features in the Spratly Group as well as the EEZ declared by the Philippines

The Arbitral Tribunal's admission that the ruling on the merits directly affects whether the Tribunal had jurisdiction is simultaneously an admission that the dispute 'concerned maritime delimitation' and thus should have been exempted from compulsory jurisdiction under Article 298. Indisputable facts clearly demonstrate that the case 'concerns' multiple disputed maritime areas. By not carefully adhering to the text in UNCLOS, the Final Award undermines the very convention it sought to strengthen. The Arbitral Tribunal's narrow interpretation of compulsory arbitration exemptions under Article 298, if followed by future arbitral tribunals,

would discourage compliance among member states and seriously impair the possibility of the United States acceding to UNCLOS.⁶³

V. CONCLUSION

The Final Award in the *South China Sea Arbitration* falters when it diverts from adherence to the text of UNCLOS. The result was a Pyrrhic victory for the Philippines. The regime of islands text was carefully scrutinised and reviewed at UNCLOS III. The text that survived intact, as first drafted in 1975, was an imperfect compromise with deliberate ambiguity; nevertheless that was the text ultimately adopted by UNCLOS III. Another political compromise was served by Article 121(3), which papered over the differences between the geographically disadvantaged or landlocked states and developing mid-ocean island states. Article 298 was also primarily a political compromise between those states that tended to favour compulsory dispute settlement as a residual rule for virtually all issues and states that would not agree to empower third parties to judge sea boundary disputes and military activities or to second-guess coastal state enforcement actions in the EEZ. The Arbitral Tribunal in the Final Award redefined conference-negotiated political determinations, when it ought to have confined itself to the imperfect compromise text as adopted and written in UNCLOS. The Arbitral Tribunal, in the best of faith, might have been unconsciously trying to recover political ground lost during UNCLOS III negotiations for the geographically disadvantaged or landlocked states group, which includes Germany, the Netherlands and Poland (the nationalities of three of the five arbitrators).⁶⁴

Following years of intense and unsuccessful negotiations, imperfect wording with deliberate ambiguities was the result included in the final text of UNCLOS, and that is what Article 121 contains. The working premise at the end for largely exhausted delegates at UNCLOS III was

⁶³ The US Constitution requires approval by a two-thirds vote of the US Senate for the United States to accede to UNCLOS. The Final Award likely delivers a fatal blow to the prospects of approval for US accession to UNCLOS, as the United States risks losing 200 NM jurisdiction from many of its mid-oceanic island territories in the Pacific (over 1 million NM²). The legal and political fallout from the Final Award will likely be much greater than the Arbitral Tribunal anticipated, especially on environmental issues.

⁶⁴ See Tommy Koh and S Jayakumar, 'The Negotiating Process of the Third United Nations Conference on the Law of the Sea' in Myron Nordquist (ed), *United Nations Convention on the Law of the Sea 1982 Commentary* (Vol 1, Martinus Nijhoff 1985) 72–73.

that imperfect solutions were better than no solutions at all. The reality all were trying to serve was the necessity to reach the goal of a consensus agreement. The task was almost impossible, for there really was no perfect middle ground between those states that wanted a median line solution for all islands involved in delimitation disputes and those that wanted 'special circumstances' to achieve their perceived equitable result. The resolution by the Arbitral Tribunal in the Final Award is, unfortunately, not an improvement or a clarification on the actual UNCLOS text adopted by the delegates to UNCLOS III. In addition, by not adequately assessing state practice with respect to Article 121(3), the Arbitral Tribunal misjudged the positive impact the Final Award might otherwise engender. Confusion, not clarity, was the overall result of the Final Award for Article 121(3). Most seriously, the Final Award does not comport with the compromise text found in Article 298, which manifestly exempts a few categories of highly political disputes from compulsory third-party adjudication in exchange for a comprehensive listing of residual resort to compulsory dispute settlement for less sensitive matters. That was the compromise deal from UNCLOS III and the conclusion in this article that the Arbitral Tribunal improperly accepted jurisdiction in this case.

One important point to remember, however, is that the UNCLOS text as written still governs, while the Arbitral Tribunal's decision is directly circumscribed by Article 296(2), which reads: 'Any such decision shall have no binding force except between the parties and in respect of that particular dispute'. The Arbitral Tribunal treated China as a 'party' despite its vigorous disclaimers, which made it abundantly clear that China would not accept the Arbitral Tribunal's decision. This was a critical mistake in the arbitral proceedings. It remains to be seen whether even the new Philippine elected President will accept the decision as such. Press reports indicate that a different Philippine government would not spend the money to initiate the case today with the benefit of hindsight. Despite the arbitral proceedings initiated by the Philippines, it is now certain (and was certain from the outset of the case) that there will be no enforced compliance of the Final Award's interpretation with respect to the regime of islands. When all is said and done, it is unfortunate that the legal effect of the 500-page Final Award with respect to islands is likely to be more honoured in the breach than in international acceptance. It is simply unrealistic to expect affected states to accept widespread repudiation of decades of unprotested state practice regarding the maritime entitlement of their islands throughout the world's oceans.⁶⁵ The rule of law is not advanced from this perspective.

⁶⁵ See Nordquist and Phalen (n 25).

In the future one would hope the UNCLOS text will be interpreted and applied in state practice as intended. Perhaps future dispute settlement efforts will treat the interpretation of Article 121 in the Final Award as a misguided precedent and that the dispute settlement provisions in UNCLOS will hereafter be followed as originally agreed. Like it or not, sovereign states do not follow rules with which they fundamentally disagree. Under the UN Charter, international enforcement of the rule of law is in the end solely entrusted to the Security Council, whose veto is intact.