

THE SOUTH CHINA SEA ARBITRATION
AWARD OF JULY 12, 2016:
THE UNBEARABLE LIGHTNESS OF BEING A ROCK

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SUMMARY: 1. Introduction. – 2. The state of the art in relation to the application and interpretation of Article 121 (3) of UNCLOS. – 3. The arguments of the parties in relation to the nature of features in the South China Sea. – 4. The decision of the Tribunal: focus on the capacity of the features to sustain “human habitation or economic life of their own”. – 5. Conclusion.

1. From the seventies of the twentieth century, the nature of geographical features became increasingly important as States began to exploit natural resources located in the sea bed, at relatively reduced costs, thanks to the development of higher technological means. From that point in time, islands started to be seen as a means to expand States’ sovereign rights.

Together with such a tendency, it emerged the need to limit the territorial expansionism of coastal States so as to avoid that «tiny and barren islands, looked upon in the past as mere obstacles to navigation, would miraculously become the golden keys to vast maritime zones»¹, thus determining an inequitable distribution of the maritime space between States with the consequent erosion of the so-called common heritage of human kind.

A compromise solution was endorsed by Article 121 (3) of the United Nations Convention on the Law of the Sea (UNCLOS) of 1982. Article 121 (3) of UNCLOS establishes the regime of geographical features. It distinguishes islands from rocks, by defining the former as naturally formed areas of land, surrounded by water, which are above water at high tide; the latter as features «which cannot sustain human habitation or economic life of their own»². The nature of the feature impacts on the sovereign rights

¹ *The South China Sea Arbitration*, Award of 12 July 2016, para. 533.

² BOWETT, *The Legal Regime of Islands in International Law*, New York, 1979; FITZMAURICE, TANZI, *Multilateral Environmental Treaties*, Cheltenham, 2017, 145 ss.; PROELSS, *United Nations Convention on the Law of the Sea*, Baden-Baden, 2017. According to CHARNEY, *Rocks that Cannot Sustain Human Habitation*, in *AJIL*, 1999, 864 «[a] rock referred to in Article 121 (3) is an island as defined in paragraph 1 of this Article; the title, “Régime of islands”, denotes that all the features addressed in the Article are islands, including rocks in paragraph 3 ... the exception regarding the entitlement of rocks to certain zones would have been unnecessary if such rocks were not islands». See also YANNHUEI SONG, *The Application of Article 121 of the Law of the Sea Convention to the Selected Geographical Features Situated in the Pacific Ocean*, in *Chinese JIL*, 2010, 680; GJETNES, *The Spartlys: Are They Rocks or Islands?*, in *ODIL*, 2001, 194.

recognized to the coastal States. Indeed, according to Article 121 (2) and (3) of UNCLOS islands entitle the coastal State to 200 miles of exclusive economic zone (EEZ) and continental shelf³ with undisputed right of exclusive exploitation of all natural resources located within the area; by contrast, the recognition as a rock does not give rise to such entitlement and limits the sovereign rights of the State to its territorial sea⁴.

Article 121 (3) of UNCLOS has never been subject to substantive interpretation before the award in *The South China Sea Arbitration* case was rendered last July 2016⁵. The latter refers to the dispute arisen between the Republic of the Philippines and the Popular Republic of China, regarding – among the others – the entitlement by the Chinese features Scarborough Shoal, Johnson Reef, Cuarteron Reef and Fiery Cross Reef, Gaven Reef (North), MeckKennan Reef and Spratly islands of an EEZ⁶.

These features, which range from relatively large features, such as Itu Aba⁷, to very small islets, rocks, low-tide elevations and reefs, often

³ The continental shelf may extend beyond 200 nautical miles if the requirements established by Article 76, para. 5 ff., of UNCLOS are met.

⁴ According to SCHOFIELD, *What's at Stake in the South China Sea? Geographical and Geopolitical Considerations*, in BECKMAN ET AL. (eds.), *Beyond Territorial Disputes in the South China Sea: Legal Frameworks for the Joint Development of Hydrocarbon Resources*, Cheltenham, 2013, 30, «[g]oing to to theoretical extremes, if an island had no maritime neighbours within 400 nm, it could generate 125,6642 nm (431,014 km²) of territorial sea, exclusive economic zone (EEZ) and continental shelf rights as compared to the capacity of a "rock" to generate a territorial sea claim of 4522 nm (1,550 km²)».

⁵ See, e.g., International Court of Justice, *Territorial and Maritime Dispute* (Nicaragua v. Colombia), judgment of 19 November 2012, in *ICJ Rep.*, 2012, 624. As observed by SCHOFIELD, cited *supra* note 4, at 29, the provisions of Article 121 have excited, nonetheless, considerable doctrinal debate over the years. See, *ex multis*, BROWN, *Rockall and the Limits of National Jurisdiction of the UK: Part 1*, in *Mar. Pol.*, 1978, 206-207; BOWETT, cited *supra* note 2; VAN DYKE, BROOKS, *Uninhabited Islands: their Impact on the Ownership of the Ownership of the Oceans' Resources*, in *ODIL*, 1983, 265-84; VAN DYKE, MORGAN, GURISH, *The Exclusive Economic Zone of the North-Western Hawaiian Islands: When do Uninhabited Islands Generate an EEZ?*, in *San Diego LR*, 1988, 425-494; KWAITKOWSKA, SOONS, *Entitlement to Maritime Areas of Rocks which Cannot Sustain Human Habitation or Economic Life of Their Own*, in *NYIL*, 1990, 139-81; KOLB, *L'interprétation de l'article 121, paragraphe 3, de la convention de Montego Bay sur le droit de la mer: les «rochers qui ne se prêtent pas à l'habitation humaine ou à une vie économique propre*, in *AFDI*, 1994, 876-909; ELFERINK, *Clarifying Article 121 (3) of the Law of the Sea Convention: the Limits set by the Nature of International Legal Processes*, in *Boundary & Security Bulletin*, 1998, 58-68; CHARNEY, cited *supra* note 4, 863-878; ANDERSON, *Islands and Rocks in the Modern Law of the Sea*, in NORDQUIST ET AL. (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Dordrecht, 2002, 307-321; JESUS, *Rocks, New-born Islands, Sea Level Rise, and Maritime Space*, in FROWEIN ET AL. (eds.), *Negotiating for Peace*, Berlin, 2003, 579.

⁶ These islands are currently occupied by China and represent only a few of the islands located in the South China Sea: Nansha island is excluded from the submission to the Tribunal, as well as other features that the Philippines occupies.

⁷ The Philippines's claim focused on a few features in the Spratly Islands, nonetheless, the Tribunal decided to consider other significant features, including Itu Aba, to counter China's

identified with multiple names in a variety of languages, have traditionally been ignored and regarded as little more than hazards to navigation⁸. Nonetheless, in recent times they have become a significant matter of controversy between China and the Philippines, as well as other neighbouring countries, as an instrument to extend their respective maritime entitlements in the area⁹. The situation in the South China Sea is so tense that some authors have defined the area as «a multilateral battlefield of conflicting claims to sovereignty over island features and vast areas of maritime jurisdiction»¹⁰.

The present essay will address the contents of the decision in *The South China Sea Arbitration*, highlighting the most significant parts and possible future implications in relation to the interpretation and application of Article 121 (3) of UNCLOS. Firstly, the essay will present the state of the art on the legal definition of features, as it was before the decision in *The South China Sea Arbitration*; then it will briefly describe the positions of both parties in the case before the Arbitral Tribunal – taking into account the circumstance that the proceedings have developed in absentia of China and that the latter views had to be inferred from the State’s practice; thirdly, it will address the contents of the Arbitral Tribunal’s decision, giving special emphasis on the interpretation of the requisites of “human habitation or economic life” and discussing possible impacts and implications in future cases involving maritime features located in areas subject to conflicting coastal State claims.

2. Until the decision in *The South China Sea Arbitration* was rendered, case law discussing the legal status of geographical features was quite a rarity. Most often, international tribunals and domestic jurisdiction, faced with questions concerning the nature of features or, after the conclusion of the UNCLOS, with the interpretation of Article 121 (3), carefully circumvented the issues, although raised by one of the parties in the proceedings¹¹.

An example of this approach is the decision rendered in the Case concerning the *delimitation of continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (30 June 1977-14 March 1978), where the parties disagreed on whether Eddystone

claim that Philippines on purpose selected only a few features to be submitted to arbitration. See, *The South China Sea Arbitration*, cited *supra* note 1, at paras. 571; 577-625; China’s Position Paper of 7 December 2014, para. 19.

⁸ SCHOFIELD, cited *supra* note 4, at 27-28; SCHOFIELD, *Dangerous Ground - A Geopolitical Overview of the South China Sea*, in BATEMAN, EMMERS (eds.), *The South China Sea: Towards a Cooperative Management Regime*, London, 2009, 7-25.

⁹ Sovereignty over Sparsely Islands is also claimed by Vietnam, Malaysia and Taiwan.

¹⁰ GJETNES, cited *supra* note 2, at 191-204.

¹¹ ELFERINK, cited *supra* note 5, at 58-68.

Rock was an island (UK) or a low tide elevation (France)¹². The Court avoided to express itself on the issue by emphasizing «that it is not concerned in these proceedings to decide the general question of the legal status of the Eddystone Rocks as an island or of its entitlement to a territorial sea of its own»¹³.

Another example is represented by the decision rendered by the Conciliation Commission on the *Continental Shelf area between Iceland and Jan Mayen: Report and recommendations to the governments of Iceland and Norway* on June 1981. In this case, the Conciliation Commission formed according to the Agreement between Iceland and Norway concerning fishery and continental shelf questions, in order to make recommendations with regard to the delimitation line for the continental shelf area, approached the issue of defining the status of Jan Mayen feature, stating that it «must be considered as an island ... entitled to a territorial sea, an economic zone and a continental shelf»¹⁴. However, except for a brief description of the natural characteristics of the feature and its size (373km²), the Conciliation Commission did not indicate what were the elements taken into consideration to conclude that the feature had to be considered as an island and not a rock; nor the Commission provided any guidance as to the legal criteria that shall be followed to ascertain the nature of features, except for the reference to the fact that Article 121 of the draft (UNCLOS) Convention reflects the state of international law on the subject.

More recently, in the *Territorial and Maritime Dispute* (Nicaragua v. Colombia) Judgment, the ICJ observed that the entitlement to maritime rights accorded to an island by the provisions of Article 121 (2) of UNCLOS is expressly limited by reference to the provisions of para. 3 of the same Article, which the Court found to have become part of customary international law. According to the ICJ, by denying an EEZ and a continental shelf to rocks which cannot sustain human habitation or economic life of their own, para. 3, on the one hand, confirms the long-established principle that «islands, regardless of their size, ... enjoy the same status, and therefore generate the same maritime rights, as other land territory» and, on the other hand, the legitimacy of the extensive maritime areas recognized (exclusively) to islands by UNCLOS¹⁵. The Court, however, did not approach the interpretation of Article 121 (3) of UNCLOS in details, nor it proceeded to apply it to specific features¹⁶, as the task of the

¹² *Rep. Int. Arb. Awards*, Vol. XVIII, 3-413, para. 125.

¹³ *Ibidem*, at para. 139.

¹⁴ *Rep. Int. Arb. Awards*, Vol. E XXVII, 10.

¹⁵ Cited *supra* note 5, at para. 139; International Court of Justice, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), merits judgment of 16 March 2001, in *ICJ Rep.*, 2001, 97, para. 185.

¹⁶ As to specific features, the Court observed that «[i]t has not been suggested by either Party that QS 32 is anything other than a rock which is incapable of sustaining human

Court was to effect a delimitation between the maritime entitlements of Colombia and the continental shelf and EEZ of Nicaragua within 200 nautical miles of the Nicaraguan coast¹⁷.

Scholars and decision makers have acknowledged that Article 121 (3) of UNCLOS contains a number of elements, which raise considerable interpretative uncertainties, which could hardly be dispelled on the basis of existing legal material¹⁸. For example, the concept of «sustaining human habitation or economic life of their own» had attracted opposite views: some authors argued that the standard necessarily concerns a stable community of permanent residents living on the feature and using the surrounding maritime area¹⁹; others suggested that an abstract capacity of the feature is sufficient to comply with the criterion²⁰.

With specific reference to the Spratly Islands, the majority of scholars discussing the application of Article 121 (3) of UNCLOS to the South China Sea features and the Spratly Islands before the award in *The South China Sea Arbitration* was rendered, argued that most of the features in the Spratly Islands were not “islands” capable of generating claims to maritime jurisdiction, but shall be classified as “rocks” within the meaning of Article 121 (3) of UNCLOS²¹. According to Schofield, for instance, only a few large features, such as Itu Aba, «may conceivably be considered “full” islands from which EEZ and continental shelf rights could be advanced» in accordance with the requirements established by Article 121 (3) of UNCLOS. In this regard, Schofield observed that none of the disputed islands boasted an indigenous population or longstanding history of habitation, with no clear-cut evidence of “human habitation”²².

3. In relation to the status of the features in the South China Sea, the Philippines’ (claimant) position can be summarized as follows: the Scarborough Shoal island and all of the high-tide features in the Spratly Islands shall be characterized as “rocks” according to Article 121 (3) of

habitation or economic life of its own under Article 121, paragraph 3, of UNCLOS, so this feature generates no entitlement to a continental shelf or exclusive economic zone», see *Territorial and Maritime Dispute* (Nicaragua v. Colombia), cited *supra* note 5, at para. 183.

¹⁷ *Ibidem*, at para. 136.

¹⁸ *Volga Case* (Russian Federation v. Australia), judgment of 23 December 2002, in *ITLOS Reports*, 2002, 10, 44, para. 6; ELFERINK, cited *supra* note 5, at 58-68; FRANCKX, *The Enigma of Article 121, Paragraph 3: The Way Forward?*, in www.maritimeissues.com; FRANCKX, *The Regime of Islands and Rocks*, in ATTARD, FITZMAURICE, MARTINEZ GUTIÉRREZ (eds.), *The IMLI Manual on International Maritime Law, Vol. I, The Law of the Sea*, Oxford, 2014, 99-124.

¹⁹ FRANCKX, *The Enigma*, cited *supra* note 18, at 20; VAN DYKE, MORGAN, GURISH, cited *supra* note 5, at 487.

²⁰ FRANCKX, *The Enigma*, cited *supra* note 18, at 21.

²¹ GJETNES, cited *supra* note 2, at 201.

²² SCHOFIELD, cited *supra* note 4, at 32.

UNCLOS as they cannot sustain human habitation and economic life on their own²³. The theory of the Philippines relies, *in primis*, on the meaning of the words contained in Article 121 (3) of UNCLOS and, secondly, on the object and purpose of the Convention itself. With regard to the latter, the Philippines have expressly recalled the negotiation which led to the drafting of the UNCLOS and the fact that representatives expressed «overwhelming opposition to the prospect of granting very small, remote and uninhabited islands extensive maritime zones that would unfairly and inequitably impinge on other State's maritime space and on the area of international seabed»²⁴.

As to the interpretation of Article 121 (3), the Philippines have argued that the term “rock” cannot be interpreted taking into account the geological or geomorphological characteristics of the features exclusively: there is no need that the feature is made of rock material to be defined as a rock. Moreover, the size of the feature per se should not be a critical element to establish its status as it cannot be excluded that territories of very negligible physical dimension are, despite of that, able to sustain human habitation or economic life on their own.

The term “cannot” refers to the capacity or potential of the feature to sustain human habitation or economic life. This capacity, according to the Philippines, can be inferred from the historical excursus of the territory: the circumstance that the feature has historically never been inhabited and has sustained no economic life constitutes evidence of its lack of capacity to do so²⁵.

As to “economic life”, it presupposes the capacity of the feature to autonomously develop «sources of production, distribution and exchange» sufficient to support the population herein established. It is excluded that a feature could be defined as an island if it is not able «to support an independent economic life without infusion from the outside»²⁶.

Finally, the Philippines have argued that Article 121 (3) of UNCLOS should be interpreted in the sense that features must be capable of both sustaining human habitation and economic life of its own, as the first concept (human habitation) is strictly related to the second (economic life), and it would be «difficult to conceive of one without the other»²⁷.

The Philippines have denied that military installation on a rock, serviced from the outside, establishes the existence of an “island” according

²³ *The South China Sea Arbitration*, cited *supra* note 1, at paras. 408, 423, 426.

²⁴ *Ibidem*, at para. 409.

²⁵ *Ibidem*, at para. 413.

²⁶ *Ibidem*, at para. 416. According to the Philippines, the opposite view – notably, admitting that «resources in waters beyond the territorial sea could be relied upon» by a feature to be defined as an island – would have a «circular and illogical» result and it would entail that «the sea dominates the land».

²⁷ *Ibidem*, at para. 417.

to Article 121 (3) of UNCLOS. According to the claimant, State practice, although inconsistent, shows that States «generally accept that small, uninhabited, barren outcrops should not generate full maritime zones»²⁸.

As mentioned, China (respondent) has not taken part in the proceedings before the Arbitral Tribunal, which took place in its *absentia*, and it has not explicitly set out its position on the interpretation and application of Article 121 (3) of UNCLOS, nor it has expressly stated its views as to the application of Article 121 (3) of UNCLOS to each of the maritime features identified in the Philippines' submissions²⁹. The Arbitral Tribunal, therefore, had to take a number of measures to safeguard the procedural rights of China and it had to infer its position on each issue by referring to public statements and informal communications³⁰.

The Arbitral Tribunal has proceeded according to Article 31, para. 3, of the Vienna Convention of the Law of Treaties, which expressly establishes «[t]here shall be taken into account, together with the context ... (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation»³¹. Therefore, the Tribunal has referred to a series of diplomatic exchanges and public statements made by China in order to detect the latter's view in relation to the operation of Article 121 (3) of UNCLOS.

First, China's statements on the Oki-no-Tori-shima's issue have been taken into account: China expressed concerns, as to Japan's claim for an extended continental shelf originating from Oki-no-Tori-shima, that «the obligation to ensure respect for the extent of the International Seabed Area ... which is the common heritage of mankind, [and] ... the overall interests of the international community as a whole» would not be affected³².

Respect for the interests of the international community and of the Seabed Area was also highlighted in China's explanatory note of May 2009 entitled «International Seabed Area as the common heritage of mankind and Article 121 of the United Nations Convention on the Law of the Sea»³³. In

²⁸ *Ibidem*, at paras. 411-419. As examples of States' practice, the Philippines mentions the case of the United Kingdom, who renounced to its 200-nautical-mile fishery zone around Rockall, upon accession to the UNCLOS, and protests by Chinese government against Japan's submission for an extended continental shelf relating to Oki-no-Tori-shima.

²⁹ *The South China Sea Arbitration*, Award on Jurisdiction and Admissibility of 29 October 2015, para. 112.

³⁰ *Ibidem*, para. 122.

³¹ Vienna Convention on the law of treaties (with annex), 23 May 1969, treaties.un.org.

³² *The South China Sea Arbitration*, cited *supra* note 1, at para. 452; Note Verbale from the People's Republic of China to the Secretary-General of the United Nations, No. CML/2/2009, 6 February 2009.

³³ *The South China Sea Arbitration*, cited *supra* note 1, at para. 453; Note Verbale from the People's Republic of China to the Secretary-General of the United Nations, reproduced in *United Nations Convention on the Law of the Sea, Meeting of States Parties, Proposal for the*

its explanatory note, China quoted Article 121 (3) of UNCLOS stating that «[h]ow to implement this provision 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»³⁴.

The importance of protecting the interest of the international community as a whole and the common heritage of mankind, in relation to the interpretation and application of Article 121 (3) of UNCLOS, was also reiterated by China's representatives in the context of the 15th Session of the International Seabed Authority in June 2009 and in a Note Verbale to the UN Secretary General on August 3, 2011³⁵.

According to the Tribunal, «[t]hrough the statements recounted above, China ... has repeatedly alluded to the risk to “the common heritage of mankind” and “overall interest 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»³⁶.

4. The paragraphs of the award in *The South China Sea Arbitration* discussing the interpretation and application of Article 121 (3) of UNCLOS are divided in two parts: the first one discusses the interpretation of Article 121 (3) of UNCLOS in light of the criteria set out in Article 31 (the ordinary meaning of the terms in their context and the object and purpose of the treaty) and Article 32 (supplementary means of interpretation, including the preparatory work of the treaty) of the Vienna Convention of the Law of Treaties³⁷. The second part applies Article 121 (3) of UNCLOS to the features object of the controversy. At the heart of the Tribunal's decision are

Inclusion of a Supplementary Item in the Agenda of the Nineteenth Meeting of States Parties, UN Doc. SPLOS/196, 22 May 2009.

³⁴ *The South China Sea Arbitration*, cited *supra* note 1, at para. 455.

³⁵ *Ibidem*, at paras. 456-457. Delegation of the People's Republic of China, Statement at the 15th Session of the International Sea-bed Authority (June 2009), summarised in International Sea-bed Authority, Press Release, UN Doc. SB/15/14, 4 June 2009, 3, at www.isa.org.jm; Note Verbale from the People's Republic of China to the Secretary-General of the United Nations, No. CML/59/2011, 3 August 2011.

³⁶ *The South China Sea Arbitration*, cited *supra* note 1, at paras. 458-465; 466-468; 469-472. The Tribunal recognizes that 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 UNCLOS; but, it made general statements to the effect that it considers Scarborough Shoal to be a high-tide feature within the definition of “island” under Article 121 (1) of UNCLOS and Itu Aba a fully entitled island, entitled to an EEZ and continental shelf. Finally, China made general statements that the Spratly Island group, as a whole, generate full maritime entitlements.

³⁷ Vienna Convention on the law of treaties (with annex), cited *supra* note 31, Article 32.

the definition of the capacity of the feature, as expressed in the term “cannot” and the interpretation of the wording «human habitation or economic life of their own».

The main questions in relation to the assessment of the capacity of a feature concerns the value to be attributed to its historical background in order to detect its capability to provide human habitation or economic life, on the one hand, and the value to be attributed to any artificial addition which might lead to human habitation and economic life, on the other hand.

According to the Arbitral Tribunal, the term “cannot” refers to the feature’s capability to sustain human habitation or economic life in theory: historical evidence of absence of any human habitation or economic life in the past may be relevant for establishing the feature’s lack of capacity, but it is not in itself sufficient evidence of the feature’s incapacity, as the Tribunal shall ascertain case-by-case whether human habitation has been prevented or ended by forces beyond the physical characteristics of the feature alone³⁸. Moreover, the Tribunal has argued that the phrase “cannot sustain” shall be intended as “cannot, without artificial addition, sustain” and that the status of a feature must be assessed on the basis of its natural conditions, prior to the onset of human modification³⁹. According to the Tribunal, this interpretation is consistent with the object and purpose of Article 121 (3) as «[i]f States were allowed to convert any rock incapable of sustaining human habitation or an economic life into a fully entitled island simply by the introduction of technology and extraneous materials, then the purpose of Article 121 (3) as a provision of limitation would be frustrated»⁴⁰. But, what happens if the capacity of the feature to sustain human habitation or economic life materializes in the future because of changes in economic demand, technological innovations or new human activities?

The capacity of a feature to sustain human habitation or economic life, in fact, is inextricably linked to human and technological developments that may vary over time. Stating that the status of a feature must be assessed on the basis of its natural conditions, prior to the onset of human modification and technology advance, means disregarding this natural link. In this regard, some authors have observed that what should matter is the situation of the feature at the moment of the claim⁴¹. As a consequence, features defined as

³⁸ *The South China Sea Arbitration*, cited *supra* note 1, at paras. 483-484; 508-511; 549.

³⁹ *Ibidem*, at paras. 508-511.

⁴⁰ *Ibidem*, at para. 509. Some authors have expressed criticism as to the purpose of Article 121(3) exception, that the Tribunal identifies as a «counterpoint to the expanded jurisdiction of the exclusive economic zone», stating that in reality Article 121 (3) was inserted by contingent of coastal states seeking to limit the strength of islands in maritime delimitation negotiations, see NORDQUIST, PHALEN, *Interpretation of UNCLOS Article 121 and Itu Aba (Taiping) in the South China Sea Arbitration Award*, in *International Marine Economy: Law and Policy*, 2017, 30-78.

⁴¹ CHARNEY, cited *supra* note 2, at 867.

islands sometime in the past, may in the future lose their qualification if there is no evidence of any capability to sustain human habitation or economic life at the time of the claim and, by contrast, rocks that were not capable of sustaining human habitation or did not have any economic life in the past, may subsequently develop those capabilities and be fully entitled to EEZ and continental shelf. Technological developments and new discoveries over time have allowed mankind to overcome hurdles and have created new opportunities to exploit natural resources in places that were completely out of reach in the past, creating economic and demographic growth.

It seems reasonable, therefore, that the capacity of the feature should be measured taking into account the technological development and human advance existing and applied at a specific point in time. It is evident, however, that the application of technologies shall have some limits: firstly, the application of technologies shall only contribute to the exploitation of the feature and/or its resources, but it shall not determine the existence of the island itself, in other words the island shall not be man-made or artificially formed, but it shall be “naturally formed”⁴²; secondly, the resources obtained from the employment of technologies shall be reinvested, at least to a certain extent, to create and/or sustain human habitation or economic life in the feature. In case the link with the local population is not established, Article 121 (3) should apply and the feature shall not have any right to an EEZ and continental shelf.

As to the meaning of the formula “human habitation or economic life of their own”, before *The South China Sea Arbitration* award was rendered, scholars were quite divided on whether it shall be anchored to the resources of the feature itself or whether resources coming from the outside shall count, at least partially, to recognize an EEZ and continental shelf to a specific feature⁴³. For instance, according to Gjetnes, «some sort of outside support should be allowed in realizing an island’s economic opportunities, since in most cases this is necessary in order to realize an economic potential» although «activity, such as government-paid military occupation or scientific work navigational aid and activities that in no way use local resources, cannot be accepted as proof of economic viability»⁴⁴. Charney suggested that «a feature would not be subject to Article 121 (3) disabilities if it were found to have valuable hydrocarbons (or other characteristics of value, e.g., newly harvestable fisheries in its territorial sea, or perhaps even a location for a profitable gambling casino) whose exploitation could sustain an economy sufficient to support that activity through the purchase of

⁴² NORDQUIST, PHALEN, cited *supra* note 40, at 30-78.

⁴³ The inconsistency of scholarly debate has been described by YANNHUEI SONG, cited *supra* note 2, at 679-688.

⁴⁴ GJETNES, cited *supra* note 2, at 199.

necessities from external sources»⁴⁵. Clagett, by contrast, stated that «[i]t would be an abuse of the Convention for a state to attempt to upgrade the status of an Article 121 (3) “rock” by artificially introducing a population, supplied from outside, for the sole purpose of enhancing the state’s argument that the rock was entitled to command broad areas of maritime space»⁴⁶.

According to the Tribunal in *The South China Sea Arbitration*, the expression “human habitation” includes a qualitative standard, which derives from the notions of settlement and residence, and a quantitative standard, in relation to the extension of time. Therefore, sustaining human habitation should mean that the feature is able to support, maintain and provide food, drink and shelter to some humans to enable them to reside there permanently or habitually over an extended period of time⁴⁷.

As to the term “or”, the Tribunal has admitted that the concepts of human habitation and economic life are linked in practical terms; but, the text remains, nonetheless, open to the possibility that a feature may be able to sustain human habitation, but offer no resources to support an economic life and vice versa⁴⁸. That is particularly true in the case of multiple islands, where the features are used in concert to sustain a traditional way of life and for which the cumulative requirement (human habitation and economic life) might be neither practical, nor equitable⁴⁹. Therefore, «an island that is able to sustain either human habitation or an economic life of its own is entitled to both an EEZ and a continental shelf»⁵⁰.

The concept of «economic life of their own» implies not only the presence of resources in the feature, but also some level of human activity to exploit, develop and distribute them. Human activity shall develop over a certain period of time in order to cope with the need of creating and sustaining economic life. Activities in the territorial sea could form part of the economic life of a feature, provided that it is somehow linked to the feature itself, through local population or otherwise. Purely extractive economic activities, in the feature or in its territorial sea, which accrue no benefit for the feature or its population, would not amount to an economic life of the feature as “of its own”⁵¹. The Tribunal has established that “of their own” means that «the resources around which the economic activity revolves must be local, not imported» with exclusion of any economic

⁴⁵ CHARNEY, cited *supra* note 2, at 870.

⁴⁶ CLAGETT, *Competing Claims of Vietnam and China in the Vanguard Bank and Blue Dragon Areas of the South China Sea: Part I*, in *Oil and Gas Law and Taxation Review*, 1995, 386.

⁴⁷ *The South China Sea Arbitration*, cited *supra* note 1, at paras. 488-492.

⁴⁸ From the *travaux préparatoires* of UNCLOS it emerges that the phrase read «human habitation and economic life» in the early stages of the UNCLOS negotiations and that the choice of “or” appears to have been deliberate. See GJETNES, cited *supra* note 2, at 194.

⁴⁹ *The South China Sea Arbitration*, cited *supra* note 1, at para. 497.

⁵⁰ *Ibidem*, at paras. 493-496.

⁵¹ *Ibidem*, at paras. 498-503.

activity derived from a possible EEZ or continental shelf⁵². As stated by the Tribunal, in fact, «economic activity in the surrounding water must have some tangible link to the high-tide feature itself before it could begin to constitute the economic life of the feature»⁵³. The interpretation given by the Tribunal to the formula «human habitation or economic life of their own», therefore, seems to admit cases in which a feature generates significant economic revenues because of hydrocarbons exploitation, if such revenues are reinvested in the feature itself, for instance if they are used to purchase resources needed for human habitation in the feature from external resources or to build up infrastructures. But, it excludes cases in which the exploitation of the feature's resources does not benefit the feature itself and its population.

5. Coming to the outcome of *The South China Sea Arbitration*, the Tribunal has established that Scarborough Shoal, Johnson Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North) and MecKennan Reef are all rocks for the purpose of Article 121 (3) of UNCLOS as they cannot sustain human habitation, nor economic life in their naturally formed state. The decision of the Tribunal relies on the fact that there is no evidence of any human activity on these features prior to the beginning of China's occupation in 1988 and current human presence in some of these features depends exclusively on outside supplies, with no exploitation of any natural resource located within the features or their territorial sea⁵⁴.

For instance, in relation to Johnson Reef, the Tribunal has observed that «[w]hile China has constructed an installation and maintains an official presence on Johnson Reef, this is only possible through construction on the portion of the reef platform that submerges at high tide. China's presence is necessarily dependent on outside supplies and there is no evidence of any human activity on Johnson Reef prior to the beginning of China's presence in 1988»⁵⁵. The same reasoning applies to the status of Cuarteron Reef, Fiery Cross Reef and Gaven Reef (North).

⁵² *Ibidem*, at para. 500.

⁵³ *Ibidem*, at para. 556.

⁵⁴ *Ibidem*, at paras. 554-571; 577-625. The Tribunal also considered other significant features in the Spratly Islands, notably Itu Aba, Thitu, West York, Spartly Island, South-Ewst Cay and North-East Cay, in order to ascertain whether these features could meet the requirements established by Article 121 (3) of UNCLOS and thus be entitled to an EEZ and continental shelf. The conclusion of the Tribunal in relation to these other features is the same: although some of them are capable of enabling the survival of small groups of people and there is historical evidence of temporary operations for fishermen and mining, they are not obviously habitable and they cannot enable human habitation, nor economic activity on their own, within the meaning of Article 121 (3) of UNCLOS. See, also China's Position Paper of 7 December 2014, para. 19.

⁵⁵ *The South China Sea Arbitration*, cited *supra* note 1, at para. 559.

As to Scarborough Shoal, the Tribunal has recognized that the feature has traditionally been used as a fishing ground by fishermen from different States, however: «[t]here is no evidence that the fishermen working on the reef make use of, or have any connection to, the high-tide rocks at Scarborough Shoal. Nor is there any evidence of economic activity beyond fishing»⁵⁶. The economic activity (fishing) in the surrounding waters does not show to have any tangible link to the feature and it has not, up to now, contributed to create and/or sustain human habitation on the same. This is probably because of the natural characteristics of the feature itself, as Scarborough Shoal is made up of a number of minuscule rocks, with no fresh water, vegetation, or living space and remote from any feature possessing such characteristics. These elements, taken together, have been conducive to the conclusion that Scarborough Shoal could not sustain human habitation nor economic life and shall be defined as a rock according to Article 121 (3) of UNCLOS.

The decision in *The South China Sea Arbitration* has attracted significant attention both from State⁵⁷ and international law scholars⁵⁸. The award is also expected to impact on future cases concerning the nature of features, although, based on UNCLOS, the arbitral award is only legally binding on the parties to the case (the Philippines and China). It is likely that, in future cases, domestic and international judges and arbitrators will refer to *The South China Sea Arbitration* award for guidance in the interpretation of the standards established by Article 121 (3), in particular to define the capacity of the feature and for the interpretation of the wording «human habitation or economic life of their own».

For instance, in the interpretation and application of Article 121 (3), the Tribunal in *The South China Sea Arbitration* has endorsed a case-by-case approach and the specific characteristics of each feature have been taken into consideration in the assessment of its capacity and, consequently, its nature.

⁵⁶ *Ibidem*, at para. 556.

⁵⁷ For example, the European Union only “acknowledged” the Award, while India and Malaysia “noted” the Award. The United States are «studying the decision and have no comment on the merits of the case». The authorities of Taiwan, who administer Itu Aba, rejected the decision as “unacceptable” and continued to claim that Itu Aba meets the criteria of an island as defined in Article 121 of UNCLOS. The reason of such reactions is that many States have their own maritime disputes and are worried about setting a precedent by coming out too in favor of the award. See, TALMON, *The South China Sea Arbitration and the Finality of ‘Final’ Awards*, in *Jou. Int. Disp. Settl.*, 2017, 388-401.

⁵⁸ Among the others, see NORDQUIST, PHALEN, cited *supra* note 40, at 30-78; TALMON, cited *supra* note 57, at 388-401; REED, WONG, *Marine Entitlements in the South China Sea: The Arbitration between the Philippines and China*, in *AJIL*, 2016, 746-760; ORAL, “Rocks” or “Islands”? *Sailing Towards Legal Clarity in the Turbulent South China Sea*, in *AJIL Unbound*, 2016, 279-284; LANDO, *Judicial Uncertainties Concerning Territorial Sea Delimitation under Article 15 of the United Nations Convention on the Law of the Sea*, in *ICLQ*, 2017, 589-623.

It is expected that in future cases, tribunals will endorse the same approach, as the analysis of the capacity and the nature of features cannot overlook their specific characteristics.

It is also expected that future tribunals will not consider size and composition of the feature as material elements in determining the latter's nature, nor they will consider as material the historical background of the feature itself, although these elements would definitely provide some guidance on the definition of the feature's nature.

As to the interpretation of «human habitation or economic life», it shall be expected that future tribunals will consider that a feature is a rock if it relies exclusively on the infusion from the outside, including from a possible EEZ or continental shelf, without exploitation of any of the resources existing in the feature itself. In this regard, it will be interesting to see how the application of new technologies will be considered by decision makers in the determination of whether a feature has the capacity to sustain «human habitation or economic life of its own». Critical will be the link with the feature and its population; if this link is not established, any technological advance applied to develop or exploit the resource of the feature will not impact on the definition of its nature and the feature shall sustain the unbearable lightness of being a rock.

ABSTRACT

The South China Sea Arbitration

Award of July 12, 2016: The Unbearable Lightness of Being a Rock

This essay addresses the contents of the decision in *The South China Sea Arbitration* (Republic of the Philippines v. the Popular Republic of China), highlighting the most significant parts and possible future implications in relation to the interpretation and application of Article 121 (3) of UNCLOS, in cases involving maritime features located in areas subject to conflicting coastal State claims. The essay gives special emphasis on the definition of the capacity of a feature and on the interpretation of the formula «human habitation or economic life», set out in Article 121 (3) of UNCLOS.