Declaration Act repealed existing maritime zone legislation and declared anew all its maritime zones. Detailed regulations ran to more than 450 pages and include long lists of coordinates, plus supporting maps. Ostensibly designed to clarify the state's maritime zones it actually appears to anticipate that, once established, these zones will not change in the future.[12]

It is now clear that anthropogenic impacts on the climate have and will incrementally increase the risks of sea level changes over the next decades and longer; indeed, these impacts have prompted geologists to assess whether we have already entered a new geological epoch—the Anthropocene. In this new epoch, when some of the established principles of the law of the sea may need to be reexamined, the status of islands, rocks, and other vulnerable marine features that may or may not generate maritime claims, assumes even greater significance. This Award offers an interpretation of the provisions of Article 121 of UNCLOS that is clearly not free of controversy but to my mind it provides a legitimate, farsighted, and logically coherent approach to the problems that seem likely to arrive more often in the future in many corners of the world.

Remarks by Douglas Guilfoyle*

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In my remarks I would like to draw attention to the role of history in the Tribunal's reasoning concerning the regime of islands, both as regards its approach to historical uses of maritime features and in particular its approach to determining what it was the drafters of the UN Convention on the Law of the Sea (UNCLOS) intended.[1] My contention in these remarks is that the Tribunal took an unashamedly developing-state oriented view in its conception of the object and purpose of the regime of islands, thus foregrounding perspectives that were present at the time of the negotiation of UNCLOS but which are not necessarily given much attention in the contemporary English-language literature. Before turning to this perspective, one must closely scrutinize the Tribunal's reading of UNCLOS Article 121.

Article 121(1) notes that an island is "a naturally formed area of land, surrounded by water, which is above water at high tide." (Naturally formed is obviously important: if islands could be created or legally enlarged through land reclamation, perverse incentives would be created.) For the Tribunal, the "critical" element is paragraph (3) which provides:[2] "[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."

Herein lies the legal significance of categorizing a "naturally formed area of land … above water at high tide": if it is a rock, it generates a modest territorial sea and contiguous zone; if it is an island, it enjoys a potentially vast resource jurisdiction in the form of the exclusive economic zone (EEZ) and continental shelf regime. The Tribunal finely parsed the meaning to be given to: (1) "rocks," (2) "cannot," (3) "sustain," (4) "human habitation," (5) "or," and (6) "economic life of their own."

My focus shall be less on "rocks" than the other elements. The Tribunal indicated the use of *cannot* connotes the maritime feature's capacity to sustain human habitation or economic life in its natural state. Here history has its role:

[12] *See* David Freestone & Clive Schofield, *Republic of the Marshall Islands: 2016 Maritime Zones Declaration Act: Drawing "Lines in the Sea,"* 31 Int'l J. Marine & Coastal L. 720 (2016).

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[1] These comments draw on a paper published in 8 Asian J. Int'l L. 51 (2018).

[2] South China Sea Arbitration (Phil. v. China), Award, para. 475 (Perm. Ct. Arb. July 12, 2017) [hereinafter Award].

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> The fact that a feature is currently not inhabited does not prove that it is uninhabitable. The fact that it has no economic life does not prove that it cannot sustain [one] … . [H]istorical evidence of human habitation and economic life … may be relevant for establishing a feature's capacity … .[3]

The Tribunal held *sustain* had three elements: the provision of essentials, and the ability to do so both over time and to a minimal "proper standard."[4] Thus, in context, an island must be able to sustain either a human population over time or non-extractive economic activity.

The Tribunal scrutinized the logic and grammar of the use of "or" before coming to the intuitive conclusion that an island may generate both an exclusive economic zone (EEZ) and a continental shelf so long as it is capable of sustaining either human habitation or an economic life of its own. However, it swiftly added that the "two concepts are … linked" as "economic activity is carried out by humans" who rarely live "where no economic activity or *livelihood* is possible." Nonetheless, the drafting covers "islands" which may sustain habitation but not economic activity or vice versa; which "may particularly be the case where multiple islands are used in concert to sustain a *traditional way of life.*" The Tribunal thus flagged early the idea of a population engaged in a traditional lifestyle or livelihood sustained by groups of islands. It thus cautioned against overly strict readings of Article 121 which could "deprive … populations … of the resources on which they have traditionally depended."[5]

As regards the final element, "an economic life of their own," the Tribunal emphasized:

> The "of their own" component … makes clear that a feature itself … must have the ability to support an independent economic life, without relying predominantly on … outside resources or serving purely as an object for extractive activities, *without the involvement of a local population*.[6]

The next step in the Tribunal's logic is dense. What makes for such sustainable economic activity? It would be circular to ask if a (hypothetical) EEZ could sustain an independent economic life; such a zone follows from but cannot precede the legal classification of a feature as an island. However, it is not absurd to ask this question of a territorial sea (which may inhere to a mere "rock") though one must note Article 121(3) "requires a link between the economic life and the feature itself, rather than merely [occurring in] adjacent waters." Thus

> economic activity in the territorial sea could form part of the economic life of a feature, … [if] linked to the feature itself, whether through a local population or otherwise. Distant fisherman exploiting the territorial sea surrounding a small rock …, however, would not suffice … .[7]

Again, the examples given here, a local population contrasted with distant-water fishermen, are telling.

Beyond such conclusions, the Tribunal found it necessary to turn to the object and purpose of the regime of islands, and their relation to the EEZ, in order to interpret Article 121. The sources it draws upon are significant. In relation to Latin American practice, it refers to the 1952 Santiago Declaration and the 1970 Montevideo and Lima declarations; and in African practice, it notes the 1972 African States Regional Seminar on the Law of the Sea and the 1973 Addis Ababa declaration of the Organization of African Unity. These sources evince a common concern with the ability of littoral populations to benefit from the maritime resources in adjacent waters, and later from the

[3] *Id.*, paras. 483–84.

[4] *Id.*, para. 487.

[5] All references in this paragraph are to: Award, *supra* note 2, para. 497 (emphases added).

[6] *Id.*, para. 500 (emphasis added).

[7] *Id.*, para. 503.

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new EEZ. The Tribunal noted that such "objectives are also apparent in the positions taken by coastal developing States throughout the UNCLOS negotiations" and were shared by "certain [fisheries-dependent] developed States." The Tribunal also relied upon the plainly New International Economic Order-inspired language in the Convention's preamble stating that UNCLOS aims to

> contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries … .[8]

The historical conclusion presented here is straightforward: the *purpose* of the EEZ was primarily to benefit developing states, by giving their populations greater control over the marine resources in adjacent waters. Importantly the Tribunal characterizes the qualifications built into Article 121(3) as preventing the newly created EEZ regime "from going too far"; Article 121

> serves to disable tiny features from unfairly and inequitably generating enormous entitlements to maritime space that would serve *not to benefit the local population*, but *to award a windfall to the (potentially distant) State* to have maintained a claim to such a feature.[9]

A distinction is set up here by the Tribunal between deserving local populations (of developing states) which should benefit from an EEZ and undeserving distant seafaring states (great powers and former colonizers) who should not be allocated "windfalls." Thus, the Tribunal could quote Ambassador Koh on the risks of applying a uniform EEZ entitlement to all maritime features: "such an approach would give inequitable benefits to coastal States with small or uninhabited islands scattered over a wide expanse of the ocean."[10] Similar remarks made by Latin American delegations during the negotiations are also cited. The conclusion follows that:

> the human habitation with which the drafters of Article 121(3) were concerned was the habitation by a portion of the population for whose benefit the exclusive economic zone was being introduced. … [Habitation refers to a] settled group or community for whom the feature is a *home*.[11]

Again, the choice of the emotional term "home" is highly significant.

Though the Tribunal never seeks to turn the critical "or" into an "and" (thus vacating the "economic life" test), it does seemingly narrow its possible interpretations. It does this in several steps. First, through holding that "an economic life of its own" excludes activity which is merely extractive and lacking the involvement of a local population. Second, it notes that the easiest evidence of economic life will usually be stable human habitation. Third, it notes the possibilities of a community that is sustained by a *collection* of maritime features even if not all are continually inhabited. This ties back to the Tribunal's earlier discussion of traditional livelihoods.

The general words of Article 121 thus become quite particular. The provision is construed as being intended to benefit certain populations, largely in developing countries though with some concession to fisheries-dependent developed states. If EEZs around islands are to generate "windfalls," they go to the deserving: paradigmatically, stable preexisting communities and especially those practicing traditional lifestyles. Implicitly and explicitly excluded are distant coastal states maintaining claims to (colonial) uninhabited maritime possessions. The reading is unapologetically one which rehabilitates the positions taken by developing states in UNCLOS negotiations

[8] All references in this paragraph are to: Award, *supra* note 2, paras. 514–15.

[9] *Id.*, para. 515 (emphasis added).

[10] *Id.*, para. 519.

[11] *Id.*, para. 520. See further *id.* para. 542, also repeating the word "home."

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and which sees those positions as central to understanding any collective intention embodied in the Convention.

Remarks by Oliver Lewis*

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When the Tribunal issued its July 2016 Award in the Philippines-China arbitration, the United States announced that the decision is an important contribution to the shared goal of a peaceful resolution to disputes in the South China Sea. The United States strongly supports the rule of law and efforts to resolve disputes in the South China Sea peacefully, including through arbitration. As provided in Article 296 of the UN Convention on the Law of the Sea (UNCLOS), the decision is "final and shall be complied with" by both parties to the dispute.

Article 296 also provides that the decision "shall have no binding force except between the parties and in respect of the particular dispute." The focus of this panel is accordingly on potential future implications of the Tribunal's approach to Article 121(3) of the Convention.

As an initial matter, I note that the Tribunal made clear with respect to Article 121(3) that "the negotiating history clearly demonstrates the difficulty in setting, in the abstract, bright line rules for all cases."[1] The Tribunal emphasized its view that this is a case-by-case inquiry, and acknowledged as a general matter that "the relevant threshold may differ from one feature to another."[2] Accordingly, a certain degree of caution is warranted before extrapolating too far beyond the circumstances of the case before the Tribunal.

The Tribunal was also undertaking these fact-specific inquiries in an unusually challenging evidentiary context. In this regard, the Award may not be representative of how a similar inquiry would be handled in other contexts. This is especially so given that the features at issue in this case have a long history of being charted primarily as navigational hazards rather than as destinations in their own right, and that the party which could be expected to have the most evidence about them did not participate in the case or otherwise communicate its views on the merits of the issues involved. Under Article 9 of Annex VII of the Convention, the party's non-participation triggered a duty of the Tribunal to "satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law." Moreover, the Tribunal found that during the pendency of the proceedings, that party had "permanently destroyed" evidence of the features' natural condition.[3] Such evidentiary challenges may help explain why the July 2016 Award in some ways seems to presume the features are merely "rocks" unless otherwise demonstrated. Ordinarily, paragraph 3 of Article 121 being an exception to the general rule of paragraph 2 (which provides that islands have the same maritime entitlements as other land territory "except as provided for in paragraph 3"), one might assume that the burden of proof would be on a party trying to show that an island is, exceptionally, merely a "rock," rather than on a party trying to show that the island generates the usual maritime zones. The evidentiary circumstances the Tribunal faced may also help explain why, for these particular features, it considered historical use to be the most reliable evidence.

In my conversations about the Award with a range of experts, including in foreign governments, and as others on this panel have noted, there is general surprise at how little attention the Tribunal paid to state practice with respect to Article 121(3). As far as its analysis of this issue is concerned,

* U.S. Department of State.

[1] South China Sea Arbitration (Phil. v. China), Award, para. 537 (Perm. Ct. Arb. July 12, 2016).

[2] *Id.*, para. 616.

[3] *Id.*, para. 1203(B)(16).

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