The panel was moderated by Coalter Lathrop, Sovereign Geographic, and the panelists included: David Freestone, George Washington University School of Law; Douglas Guilfoyle, Monash University Faculty of Law; Oliver Lewis, U.S. Department of State; and Joanna Mossop, Victoria University of Wellington Faculty of Law.

David Freestone found that the Award interpreted Article 121 "in a comprehensive, carefully considered and intellectually satisfying way," noting, in particular, the exception made for "a population whose livelihood and economic life extends across a constellation of maritime features" which would not be "disabled from recognizing that such features possess an economic life of their own merely because not all of the features are directly inhabited."[2] Freestone focused the remainder of his remarks on the relationship between the regime of islands and the consequences of sea level rise, in particular on small island states in the Pacific region.

Douglas Guilfoyle contended "that the Tribunal took an unashamedly developing-state oriented view in its conception of the object and purpose of the regime of islands." Guilfoyle scrutinized several aspects of the Tribunal's interpretation of Article 121 but he focused on the interpretation of the phrase "an economic life of their own." Guilfoyle found the Tribunal's interpretation of that key phrase reflected the conclusion that: "the *purpose* of the EEZ was primarily to benefit developing states, by giving their populations greater control over the marine resources in adjacent waters."

Oliver Lewis reflected on some of the ways in which, with respect to Article 121(3), "a certain degree of caution is warranted before extrapolating too far beyond the circumstances of the case before the Tribunal." Lewis noted that in light of the "unusually challenging evidentiary context," the Award may not be representative of how an Article 121(3) question would be handled in other circumstances. He also highlighted ways in which state practice, flexibility in the Tribunal's analysis, and additional legal and factual considerations that may be relevant in other circumstances make it difficult to know how influential the Tribunal's approach to Article 121(3) will prove.

Joanna Mossop disagreed with the Tribunal's approach to interpreting Article 121, in particular the treatment of state practice. Mossop did not contest the Tribunal's conclusion that there was not sufficient subsequent state practice in the application of Article 121 to evidence an agreement of the parties of UNCLOS regarding its interpretation. Nonetheless, a survey of state practice would have revealed many claims to exclusive economic zone and continental shelf from features that would be disqualified under the Award but which have received no protest from other states over periods of several decades. While this may not apply to the specific features in question in the South China Sea Arbitration, Mossop concludes with respect to uncontested claims "there is a good argument to say that those states have acquiesced in the coastal state's interpretation of Article 121(3) as applied to that feature."

## Remarks by David Freestone*

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As a teacher of international law for more years than I care to admit, I have to declare at the start of my comments that I admire the South China Sea Arbitration Award greatly. It presents an interpretation of the provisions of the 1982 UN Convention on the Law of the Sea (UNCLOS) on islands and rocks in a comprehensive, carefully considered and intellectually satisfying way. As my colleagues will doubtless point out, it does present problems relating to current existing state practice,

[2] *Id.*, para. 544.

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but it does to my mind capture what the UNCLOS III drafters had in mind when the 1982 Convention text was put together.

In particular, I like the interpretation of the Permanent Court of Arbitration Tribunal of the provisions of Article 121(3), which provides that: "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." There has been considerable academic discussion as to whether both these two requirements, linked by the word "or," need to be satisfied for an insular formation to qualify as an island with full maritime zones. Indeed, the Philippines had argued for a conjunctive interpretation. However, the Tribunal insisted that either of these legs can be satisfied—a disjunctive interpretation—but did observe that "economic activity is carried out by humans and that humans will rarely inhabit areas where no economic activity or livelihood is possible."[1] Furthermore, the Tribunal ruled that the economic activity must not be purely exploitative; the feature must sustain an activity "of its own."[2]

While this interpretation obviously disadvantages states that currently claim the marine resources of huge maritime zones from uninhabitable features, it does have the result that where a local community is only able to sustain itself by utilizing a range of maritime features, it would not "fail to inhabit a feature on the grounds that its habitation is not sustained by a single feature." Nor conversely would that group be "disabled from recognizing that such features possess an economic life of their own merely because not all the features are directly inhabited."[3] Professor Guilfoyle, below, considers the UNCLOS III *travaux préparatoires*, but the Tribunal did highlight the purpose that Article 121(3) serves, namely to "disable tiny features from unfairly and inequitably generating enormous entitlement to maritime space that would serve not to benefit local populations, but to award a windfall to the (potentially distant) state to have maintained a claim to such a feature." So, the interpretation of Article 121(3) should "serve to reinforce, rather than counter" that purpose.[4]

This far-seeing interpretation of the entitlements of island communities will be welcomed by many communities particularly in low-lying islands in the Pacific, and elsewhere, threatened by sea level changes. The Intergovernmental Panel on Climate Change (IPCC) in its 2013/14 Fifth Assessment Report (AR5) now predicts up to approximately one meter sea-level rise by 2100, with "a strong regional pattern, with some places experiencing significant deviations of local and regional sea level change from the global mean change."[5] IPCC estimates are generally regarded to be conservative, and there is a wide range of differences in the results for the upper bounds of projected sea-level rise, identified in assessments using process-based modelling, on the one hand, and those based on semi-empirical models, on the other—with the latter resulting in upper bounds of up to 2.4 m of global mean sea level rise by 2100.

In its Report to the 77th International Law Association (ILA) Conference in Johannesburg in 2016,[6] the ILA Committee on International Law and Sea Level Rise points out that sea level rise increasingly has the potential to inundate, or render uninhabitable, small islands—particularly the smaller outer islands of islands groups—and other geographical features that may have generated their own maritime zones under Article 121, or been used by the coastal state as base points for drawing straight baselines. It may also have major impacts on the capacity of a feature to generate

[1] South China Sea Arbitration (Phil. v. China), Award, para. 497 (Perm. Ct. Arb. July 12, 2016) [hereinafter Award].

[2] *Id.*, para. 543.

[3] *Id.*, para. 544.

[4] *Id.*, para. 516.

[5] *Climate Change 2013: The Physical Science Basis*, at 1140, 1180, 1186, *available at* http://www.climatechange2013.org/images/report/WG1AR5_ALL_FINAL.pdf.

[6] Text at http://www.ila-hq.org/index.php/committees.

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maritime jurisdictional claims. Some low-lying island states, already under pressure, may find their land areas rendered uninhabitable well before they are overrun by the sea. In extreme cases this may even raise questions as to the ability of some island states to maintain their statehood without a habitable land area, and to maintain sovereignty over the territorial sea, and sovereign rights over the resources of the maritime zones appurtenant to those land areas.

There may be some small comfort in the finding of the Tribunal that the status of a feature is to be determined by its "natural capacity."[7] Hence, enhancing an existing island to maintain its habitability is quite legitimate—although probably prohibitively expensive. Such an enhancement would of course need to be carried out in an environmentally acceptable way respecting the obligations to "protect and preserve the marine environment" in Article 192[8] and "rare and fragile ecosystems" as well as the "habitats of depleted, threatened or endangered species," including giant clams and as well as species of turtles, corals, and fish, in UNCLOS Article 194(5). This can really only be done, said the Tribunal in a nod to the jurisprudence of the International Court of Justice, after an appropriate Environmental Impact Assessment as required by Article 206 of the 1982 Convention.[9]

What is not possible, the Tribunal ruled, is to transform rocks into islands by the enhancement of those natural features—as the Chinese have been doing in the South China Sea.[10] Or to destroy valuable coral reefs and other fragile ecosystems in the process—as China was also found to have done.[11]

Conscious of the potential risk of losing islands and possibly maritime space through sea level rise, the Pacific Island states have been involved with extensive legal efforts to clarify and perhaps fix maritime boundaries and limits in the Pacific region in advance of the impacts of sea level rise.

In particular the Pacific Boundaries Project, a partnership involving the South Pacific Community (SPC) and Australia, with the support of other organizations, has made substantial progress in assisting the Pacific Island states in clarifying the extent of their maritime jurisdictions. The project was initially concerned with assisting the Pacific Island states in the preparation of their extended continental shelf submissions for the Commission on the Limits of the Continental Shelf, something which necessarily involved the definition of their baselines. Its scope has however been expanded to include the updating of their maritime zones legislation and the delineation of the outer limits of their maritime zones. Additionally, the project has played a significant role in terms of assisting these states in preparing and offering a forum for negotiations regarding the delimitation of maritime boundaries between them, which has led to a doubling in maritime boundary agreements in the region in recent years, so that by 2015 nearly two-thirds of the possible boundaries have been settled.

This work has clearly sensitized Pacific leaders to the risks which sea level rise poses. On July 16, 2015, seven leaders of Polynesian states and territories signed the Taputapuātea Declaration on Climate Change. The signatories … "acknowledge, under the United Nations Convention on the Law of the Sea (UNCLOS), the importance of the Exclusive Economic Zones of the Polynesian Island states and Territories, whose area is calculated according to emerged lands and permanently establish the baselines in accordance with the UNCLOS, without taking into account sea level rise [*sic*]."

An example of the way this work may begin to advance state practice in the region can be found in the 2016 legislation of the Republic of the Marshall Islands. Its 2016 Maritime Zones

[7] Award, *supra* note 1, para. 541.
[8] *Id.*, para. 944.
[9] *Id.*, paras. 988, 991.
[10] *Id.*, para. 541.
[11] *Id.*, para. 966.

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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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