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THE REGIME OF ISLANDS IN THE AFTERMATH OF THE SOUTH CHINA SEA ARBITRATION

This panel was convened at 9:00 a.m., Friday, April 14, 2017, by its moderator Coalter Lathrop of Sovereign Geographic, who introduced the panelists: David Freestone of George Washington University School of Law; Douglas Guilfoyle of Monash University Faculty of Law; Oliver Lewis of the U.S. Department of State; and Joanna Mossop of Victoria University of Wellington Faculty of Law.

Introductory Remarks*

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In July 2016, an Arbitral Tribunal constituted pursuant to Annex VII of the Law of the Sea Convention issued an award on the merits in the South China Sea Arbitration between the Philippines and China. Among other issues to be decided was the status of several insular features under the law of the sea regime of islands codified in Article 121 of the UN Law of the Sea Convention (UNCLOS). Article 121, paragraph 1, defines an island as "a naturally formed area of land, surrounded by water, which is above water at high tide." Like all coastal land territory, islands, with one important exception, generate a full suite of maritime zones: territorial sea, contiguous zone, exclusive economic zone, and continental shelf (Article 121(2)). The important exception is found in the third paragraph of Article 121: "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."

The Tribunal undertook a full interpretation of Article 121 that included a textual analysis followed by a review of the context, the object and purpose of the Convention, and the *travaux préparatoires*. The Tribunal then applied the law as interpreted to the insular features in question, finding that all of them would at most fall into the exception created by Article 121(3), as "rocks" that do not generate either an exclusive economic zone or continental shelf. The Tribunal's well-reasoned interpretation nonetheless stands in stark contrast to state practice in respect of this issue. With rare exception, territorial sovereigns consider that their comparable insular features should generate the full suite of maritime zones. Notwithstanding this widespread practice, the Tribunal found that "there is no evidence for an agreement based upon state practice on the interpretation of Article 121(3) which differs from the interpretation of the Tribunal."[1]

While much of the attention following the award has focused on the immediate context of the South China Sea and the claims of states in the region, the Tribunal's decision on the maritime entitlements of insular features under Article 121 has far broader implications extending beyond the region and beyond the law of the sea to the vital geopolitical interests of large and small states throughout the world. This panel was convened to explore and critique the South China Sea Arbitration Tribunal's interpretation of Article 121(3) and to consider the implications for other states and other areas of international law.

* *Note for the reader: this panel was convened at the 2017 ASIL Annual Meeting but due to a publishing oversight appears in the* Proceedings *of the 2018 Annual Meeting*.

[1] South China Sea Arbitration (Phil. v. China), Award, para. 553 (Perm. Ct. Arb. July 12, 2016) [hereinafter Award].

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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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