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

Remarks by Oliver Lewis*

doi:10.1017/amp.2019.47

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,

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[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).

https://doi.org/10.1017/amp.2019.47 Published online by Cambridge University Press

the Tribunal devoted only two short paragraphs to the issue of state practice, which offered a conclusion but did not specify the state practice it was based on.[4] Indeed, in general the practice of states seems overwhelmingly to involve claims of EEZs from very small islands, and conversely very few cases in which a state refrains from claiming an EEZ because it considers a feature to be an Article 121(3) "rock." Moreover, of the countless islands in the world from which an EEZ or continental shelf is asserted, in the vast majority of cases other states have not objected, even when they have been directly involved in relevant international discussions. This has been true in a range of contexts, including reactions to published maritime limits by coastal states, delimitation of maritime boundaries, submissions to the Commission on the Limits of the Continental Shelf, consideration of coastal state measures in Particularly Sensitive Sea Areas at the International Maritime Organization (which has over 170 member states), and elsewhere. Accordingly, it would seem that fairly uniform state practice counsels in favor of being cautious about drawing too many conclusions from this case about how states view the application of Article 121(3) with respect to other features around the world.

Commentators may also have different views depending on whether they are considering how the Tribunal set out its test, versus how it then applied the test to the particular features at issue. This may be especially true given that in certain regards the Tribunal expressly treated some of the Spratly Island features as ones that "fall close to the line."[5] To take one example, in describing what it means to "sustain" human habitation or economic life, the Award stated that "habitation and economic life must be able to extend over a certain duration and occur to an adequate standard."[6] That is not very specific—what is an "adequate" standard, for example?

In applying Article 121(3), there may be additional, case-specific considerations that could be taken into account beyond what the Tribunal highlighted regarding the particular circumstances at issue in this case. Two examples help illustrate this point. First, as a thought experiment, if Antarctica were not subject to its own, *sui generis* legal regime, it would seem to meet the Tribunal's criteria for falling within the scope of Article 121(3)—but would states negotiating the Convention really have intended such a result? Or is there more to the analysis than what the Tribunal highlighted expressly? The Tribunal, for example, said what the word "[r]ocks" in Article 121(3) does *not* mean, but the term may not be altogether meaningless. Specifically, the Tribunal agreed with the International Court of Justice (in the *Colombia-Nicaragua* case) that the term "[r]ocks" does not limit such features to those made of rock, geologically speaking.[7] But the Tribunal did not consider whether the term "rocks" might retain meaning in some other way—perhaps an implication of size, or perhaps of barrenness, or something else. (Both size and barrenness appear to have played a role in the tribunal's analysis, even if the Tribunal did not acknowledge as much directly. For example, it used the word "barren" to describe four features in the relevant sections concluding they are Article 121(3) "rocks." And the Tribunal noted some of the larger features were "not barren" in deciding that further analysis of them was needed.[8])

Second, in other contexts Article 121(3) may implicate substantially different legal interests and practical consequences. For example, protection of the marine environment and the context of enclosed or semi-enclosed seas might be relevant considerations. In some places, such as in certain enclosed or semi-enclosed seas, the distinction between a "rock" and a fully entitled island might primarily bear on *which* state or states may lawfully claim an EEZ and corresponding environment-

[4] *Id.*, paras. 552–53.
[5] *Id.*, paras. 548, 616.
[6] *Id.*, para. 504.
[7] *Id.*, para. 480.
[8] *Id.*, paras. 558, 561, 564, 568, 616; *see also id.*, para. 548.

https://doi.org/10.1017/amp.2019.47 Published online by Cambridge University Press

related jurisdiction in a given area (in particular, as between a state that has sovereignty over the island and a state that has sovereignty over a littoral mainland within two hundred nautical miles). In enclosed and semi-enclosed seas in particular, certain additional commitments apply under Article 123 of the Convention, including regarding cooperation on marine environment protection and conservation. In remote ocean areas, however (including, *e.g.*, around Pacific Island states), the interpretation and application of Article 121(3) could instead make the difference regarding whether *any* state may exercise coastal jurisdiction there, including with respect to protection of the marine environment. Indeed, the environmental consequences could be significant, especially in an area where a coastal state has enhanced environmental protection, such as by establishing a marine protected area in its EEZ. Effective protection of the marine environment benefits everyone, not just the coastal state, and is widely regarded as more difficult beyond national jurisdiction than within it. In the Convention's careful balance of coastal and maritime rights and obligations, it is worth recalling that not only the concept of the EEZ but also the increased focus on protection of the marine environment were key developments compared to earlier instruments on the law of the sea.

These brief reactions illustrate some of the potential complexity in Article 121(3), but do not purport to offer the last word on it. No doubt, the Award remains important for managing and resolving disputes in the South China Sea. It is too soon to tell, however, how influential the Tribunal's approach in this case will be for states and international courts and tribunals approaching Article 121(3) in other circumstances.

Remarks by Joanna Mossop*

doi:10.1017/amp.2019.48

The Tribunal's conclusion that Itu Aba and other features in the South China Sea are rocks that are incapable of generating exclusive economic zones came as a surprise to some scholars and government officials who have never interpreted Article 121(3) of the UN Convention on the Law of the Sea (UNCLOS) in the strict way adopted in this case. In the absence of any previous judicial interpretation of the article, a range of interpretations of Article 121(3) have been seen in the academic literature, and in state practice. Although much of the decision is extremely well argued, I must disagree with the Tribunal's approach to Article 121(3).

Of course, it must be remembered that, first, the Tribunal did not have the advantage of receiving formal submissions from China due to that country's decision not to appear. The Tribunal was justified in proceeding despite China's failure to appear, but was not in receipt of a fully argued case from China's perspective. Second, the conclusion that none of the disputed features were capable of generating an exclusive economic zone (EEZ) or continental shelf allowed the Tribunal to reach a tidy conclusion that both retained its jurisdiction over the dispute and also, if implemented, would greatly simplify the issues in the South China Sea.

Nevertheless, there are some aspects of the decision that reveal flaws in the reasoning. In particular, the absence of any survey of state practice around Article 121(3) is problematic. The Tribunal considered that there was no consistent state practice in the application of Article 121(3) that would reach the level of an agreement of the parties of UNCLOS regarding its interpretation as set out in Article 31(3) of the Vienna Convention on the Law of Treaties.[1] This is undoubtedly correct given the number of disputes around the world as to the application of Article 121(3).

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[1] South China Sea Arbitration (Phil. v. China), Award, para. 552 (Perm. Ct. Arb. July 12, 2016).

https://doi.org/10.1017/amp.2019.47 Published online by Cambridge University Press