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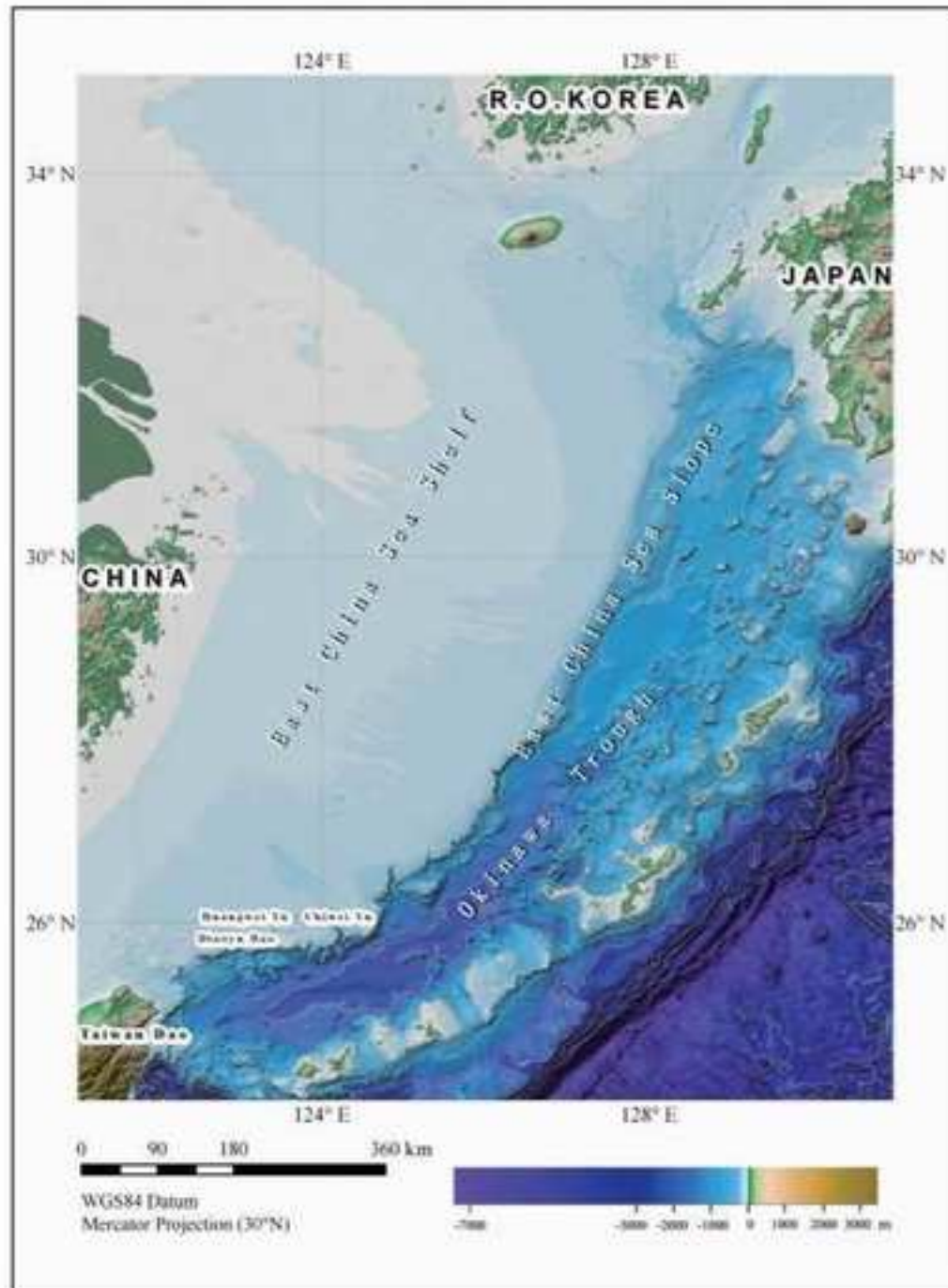
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# The International Journal of Marine and Coastal Law

## Should the Diaoyu/Senkaku Islands be classified as Islands or Rocks? An Examination in Light of the South China Sea Arbitration Award

--Manuscript Draft--

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<b>Abstract:</b>	In July 2016, an Arbitral Tribunal handed down its award in the South China Sea dispute between the Philippines and China. In addition to considering the legal status of the controversial nine-dash line, the Tribunal also provided the first judicial interpretation of Article 121 of UNCLOS, thereby shedding light on what maritime features may be regarded as islands and not rocks within the meaning of that article and therefore entitled to an exclusive economic zone (EEZ) and a continental shelf. This paper considers the decision reached by the Tribunal, and the views expressed in literature, applying them to an analysis that attempts to answer whether the Diaoyu/Senkaku Islands (sovereignty over which is disputed by China and Japan) in the East China Sea would qualify as islands and thus entitled to an EEZ and a continental shelf or as rocks and not so entitled.



Source: Submission by the People's Republic of China Concerning the Outer Limits of the Continental Shelf beyond 200 Nautical Miles in Part of the East China Sea.

## **Should the Diaoyu/Senkaku Islands be classified as Islands or Rocks? An Examination in Light of the South China Sea Arbitration Award**

### **Introduction**

In July 2016, an Arbitral Tribunal constituted under Annex VII of the 1982 United Nations Convention on the Law of the Sea<sup>1</sup> (UNCLOS) handed down its award in the South China Sea dispute between the Philippines and China.<sup>2</sup> In addition to considering the legal status of the controversial nine-dash line, the Tribunal also provided the first judicial interpretation of Article 121 of UNCLOS, thereby shedding light on what maritime features may be regarded as islands and not rocks within the meaning of that article and therefore entitled to an exclusive economic zone (EEZ) and a continental shelf. This paper considers the decision reached by the Tribunal with respect to Article 121 of UNCLOS, and the views expressed in literature, applying them to an analysis that attempts to answer whether the Diaoyu/Senkaku Islands (sovereignty over which is disputed by China and Japan) in the East China Sea would qualify as islands and thus entitled to an EEZ and a continental shelf or as rocks and not so entitled. This paper will begin with a description of the Diaoyu/Senkaku Islands dispute, followed by a consideration of the meaning of Article 121 as expressed in literature and an analysis of the decision of the Tribunal. This analysis is then applied to the Diaoyu/Senkaku Islands dispute. This paper argues that on the basis of the South China Sea dispute award, these maritime features, although referred to as islands, are more likely to be considered as rocks and consequently, not entitled to an EEZ and a continental shelf within the

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<sup>1</sup> United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994) 1833 UNTS 396.

<sup>2</sup> *The South China Sea Arbitration (The Republic of Philippines v The People's Republic of China)* PCA Case No 2013-19 (2016) available at <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf>.

contemplation of Article 121. However, the non-satisfactory interpretation given to Article 121(3) of UNCLOS by the Tribunal may affect the value of the award as a guide for future cases.

### **The Diaoyu/Senkaku Island Dispute**

The dispute over title to the Diaoyu/Senkaku Islands is a major feature of the East China Sea maritime boundary dispute. China and Japan have tried unsuccessfully for decades to agree on where the maritime boundary should lie in the East China Sea, a marginally enclosed sea bounded by the Yellow Sea in the North, the South China Sea in the South, the Japanese Kyushu and Ryukyu Islands in the East and the Chinese mainland in the West. The East China Sea dispute principally concerns how to delimit the continental shelf (and by extension, the EEZ) of the East China Sea when the disputing parties, China and Japan, rely on the different criteria in Article 76(1) of UNCLOS, namely natural prolongation and distance, to assert entitlement to the continental shelf. Entangled in this delimitation problem is the territorial dispute over the Diaoyu/Senkaku Islands which involves not only sovereignty over the Islands but also what maritime zones they are entitled to.<sup>3</sup>

The Island group is made up of 8 tiny insular formations—5 islets and 3 barren rocks. Together, they have a combined land area of less than 7 square kilometres.<sup>4</sup> All of them are uninhabited and there is no evidence of human economic activity on them.<sup>5</sup> While the three

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<sup>3</sup> J Guoxing, 'The Diaoyudao (Senkaku) Disputes and Prospects for Settlement' (1994) 6(2) *Korean Journal of Defense Analysis* 285-311, at p.285; C Park, 'Oil Under Troubled Waters: The Northeast Asia Sea-Bed Controversy' (1973) 14(2) *Harvard International Law Journal* 212-260, at p. 248.

<sup>4</sup> C Manjiao, 'The Unhelpfulness of Treaty Law in Solving the Sino-Japan Sovereign Dispute over the Diaoyu Islands' (2011) 6 *University of Pennsylvania East Asia Law Review* 163-189, at p.164.

<sup>5</sup> S Su, 'The Tiaoyu Islands and Their Possible Effect on the Maritime Boundary Delimitation between China and Japan' (2004) 3(2) *Chinese Journal of International Law* 385-420, at p.387.

largest islets have some vegetation, the others are barren. They possess no intrinsic value and are only desired because of the petroleum that they might deliver to whichever State has title to them.<sup>6</sup> The dispute over ownership of these Islands arose in the late 1960s after a report following a UN study indicated that there was a high probability that a substantial volume of hydrocarbons were located in the seabed around these Islands.<sup>7</sup> Until this time, the seabed had lain undisturbed and it was the report on the presence of hydrocarbons that marked the beginning of the oil war.<sup>8</sup> The report, authored by the Committee for Coordination of Joint Prospecting for Mineral Resources in Asian Offshore Areas (CCOP), founded in 1966 under the auspices of the United Nations Economic Commission for Asia and the Far East (ECAFE), described the continental shelf of the East China Sea as probably ‘one of the most prolific oil reservoirs in the world’.<sup>9</sup> In view of this, the States in the area concerned immediately began to assert claims to sovereign rights over the continental shelf so as to take

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<sup>6</sup> J Donaldson and A Williams, ‘Understanding Maritime Jurisdictional Disputes: The East China Sea and Beyond’ (2005) 59(1) *Journal of International Affairs* 135-156, at pp. 135–36; H Shaw, *The Diaoyutai/Senkaku Islands Dispute: Its History and an Analysis of the Ownership Claims of the P.R.C., R.O.C., and Japan* (University of Maryland School of Law, Baltimore, 1999) 11.

<sup>7</sup> S Su, ‘The Territorial Dispute over the Tiaoyu/Senkaku Islands: An Update’ (2005) 36 *Ocean Development & International Law* 45-61, at p.47.

<sup>8</sup> Park (n 3), at pp. 212–13; Y Ma, ‘The East Asian Seabed Controversy Revisited: Relevance (Or Irrelevance) of the Tiao-Yu-T’al (Senkaku) Islands Territorial Dispute’ (1982) 2 *Chinese (Taiwan) Yearbook of International Law and Affairs* 1-44, at p.2; S Lee, ‘Territorial Disputes among Japan, China, and Taiwan Concerning the Senkaku Islands’ in Shelagh Furness and Clive Schofield (eds), *Boundary and Territory Briefing*, vol 3 (International Boundaries Research Unit, Durham, 2002) 6.

<sup>9</sup> S Kim, ‘Understanding Maritime Disputes in Northeast Asia: Issues and Nature’ (2008) 23(2) *International Journal of Marine and Coastal Law (IJMCL)* 213-248, at p. 238. Ma (n 8), at p.4.

advantage of the hydrocarbon resources of the seabed.<sup>10</sup> As the Diaoyu/Senkaku Islands sat atop the ‘prolific oil reservoir’, title to them would prove to become a very important factor.

At the time of the report, the Diaoyu/Senkaku Islands were still being administered by the Government of the United States pursuant to the UN trusteeship system established under the 1951 Treaty of Peace entered into at San Francisco by Allied Powers with Japan to mark the official end of the Second World War.<sup>11</sup> Although the Treaty does not mention the Diaoyu/Senkaku Islands,<sup>12</sup> they, nevertheless, came under United States’ administration, and there is no evidence of China contesting this until the Islands were returned to Japan as part of Okinawa under the Okinawa Reversion Treaty.<sup>13</sup> However, at this time, the report on the potential hydrocarbon resources of the seabed of the East China Sea had just been released and with the prospect of gaining title to the hydrocarbon resources, the States bordering the East China Sea moved to declare their continental shelf claims. China and Taiwan thus challenged the legitimacy of the transfer of the Diaoyu/Senkaku Islands to Japan along with Okinawa under the Okinawa Reversion Treaty.<sup>14</sup>

Since the United States’ reversion, however, Japan has been in occupation of the Islands while China continues to lay claim to them. The United States has itself maintained a neutral

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<sup>10</sup> Park (n 3), at p.213.

<sup>11</sup> Argentina, Australia, Belgium, Bolivia, Brazil, etc. Treaty of Peace with Japan (with two declarations). 8 September 1951; available at <https://treaties.un.org/doc/Publication/UNTS/Volume%20136/volume-136-I-1832-English.pdf>.

<sup>12</sup> M Manyin, ‘Senkaku (Diaoyu/Diaoyutai) Islands Dispute: U.S. Treaty Obligations’ (Congressional Research Service 2013) R42761 3, available at <http://www.fas.org/sgp/crs/row/R42761.pdf>.

<sup>13</sup> Su (n 7) at p. 47.

<sup>14</sup> S Lee, ‘The 1951 San Francisco Peace Treaty with Japan and the Territorial Disputes in East Asia’ (2002)

11(1) *Pacific Rim Law & Policy Journal* 63-146, at p.91.

stance regarding the territorial dispute, stating that its return of the administrative rights over the islands to Japan does not add any legal rights to those possessed by Japan before the transfer of administration to the United States nor does it diminish the rights of other claimants, making the matter one for resolution between the parties concerned.<sup>15</sup> In spite of this, Japan has refused to acknowledge the existence of a dispute over the Islands and has accordingly refused to enter into negotiations with China on the issue.<sup>16</sup> Furthermore, Japan has used the Islands as base points for the construction of its unilateral median line;<sup>17</sup> this median line represents Japan's position on delimitation of the East China Sea. While China claims that the Islands are not entitled to an EEZ or a continental shelf, Japan holds that they are entitled to an EEZ and a continental shelf and by using them as base points for the construction of its median line,<sup>18</sup> has given them full effect.<sup>19</sup> Thus, this territorial dispute stands in the way of effective resolution of the maritime delimitation dispute.

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<sup>15</sup> Manyin (n 12), at p.5.

<sup>16</sup> J Gao, 'Joint Development in the East China Sea: Not an Easier Challenge than Delimitation' (2008) 23(1) *IJMCL* 39-75, at p. 62.

<sup>17</sup> M Valencia, 'The East China Sea Dispute: Context, Claims, Issues, and Possible Solutions' (2007) 31(1) *Asian Perspective* 127-167, at p. 154; Gao (n 16), at p.62.

<sup>18</sup> Valencia, (n 17), at p. 154.

<sup>19</sup> Although it was held in the *Qatar v. Bahrain* case that 'islands, regardless of their size...enjoy the same status, and therefore generate the same maritime rights, as other land territory' ([2001] ICJ Rep 40, 97, para 185), islands have generally been considered as relevant circumstances to be taken into consideration and weighed along with other relevant circumstances during a delimitation exercise in order to arrive at an equitable solution. In view of this, islands may, in the drawing of the final line, be ignored, given reduced effect or full effect. For a table of cases setting out the effect given to islands, see Yoshifumi Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation*, (Hart Publishing, Portland, 2006) 280. See Chapter 7 for discussions in this regard.



China and Japan had seemingly shelved the territorial dispute in 1972 when diplomatic ties were established between the two States. However, when in April 1978, 100 Chinese fishing vessels entered into the 12-mile territorial sea (then newly declared by Japan) asserting sovereignty over the Islands and defying Japan's demands to leave the area, the once shelved territorial dispute was revived.<sup>20</sup> A number of other incidents have aggravated the dispute.<sup>21</sup> In September 2010, a Chinese fishing boat collided with two Japanese coast guard vessels near the Diaoyu/Senkaku Islands.<sup>22</sup> Japan detained the captain of the Chinese fishing vessel and even though he was subsequently released, bilateral relations between China and Japan deteriorated.<sup>23</sup> Two years after this incident, in September 2012, Japan made the decision to nationalise three of the five main islets belonging to the Diaoyu/Senkaku Island Group.<sup>24</sup> This nationalisation which costs the Japanese Government 2.05 billion yen (\$26.1 million) again

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<sup>20</sup> Y Ma, *Legal Problems of Seabed Boundary Delimitation in the East China Sea* (Occasional Papers/Reprints Series in Contemporary Asian Studies, Baltimore, 1984) at pp.1–2.

<sup>21</sup> For a chronology of important events relating to the Diaoyu/Senkaku Islands, see Lee (n 8), at pp.6–8.

<sup>22</sup> J McCurry, 'Japan-China Row Escalates over Fishing Boat Collision' (*the Guardian*, 9 September 2010) available at <http://www.theguardian.com/world/2010/sep/09/japan-china-fishing-boat-collision>.

<sup>23</sup> P Smith, 'The Senkaku/Diaoyu Island Controversy : A Crisis Postponed' (2013) 66(2) *Naval War College Review* 27-44, at p.28; S Kim, 'China and Japan Maritime Disputes in the East China Sea: A Note on Recent Developments' (2012) 43(3) *Ocean Development & International Law* 296-308, at p.296; T Branigan, 'China Cuts Japan Contacts over Detained Trawler Captain' (*the Guardian*), available at <http://www.theguardian.com/world/2010/sep/19/china-japan-contacts-detained-trawler-captain>; 'Boat Collisions Spark Japan-China Diplomatic Row' (*BBC News*, 8 September 2010), available at <http://www.bbc.co.uk/news/world-asia-pacific-11225522>.

<sup>24</sup> J Perlez, 'China Accuses Japan of Stealing Disputed Islands' (*The New York Times*, 11 September 2012), available at <http://www.nytimes.com/2012/09/12/world/asia/china-accuses-japan-of-stealing-disputed-islands.html>.

intensified the dispute, with protests and demonstrations straining the already strained relationship between the two States.<sup>25</sup>

In addition to this question of title to the Islands, which this paper does not address, there is also the question of whether the Diaoyu/Senkakus are islands within the meaning of Article 121 of UNCLOS and therefore entitled to an EEZ and a continental shelf. It is this question that this paper is concerned with and which is dealt with in subsequent sections, specifically in light of the award in the South China Sea Arbitration where the Tribunal took on the task of interpreting Article 121 of UNCLOS. The answer to this question might impact on the delimitation dispute in the sense that if the Diaoyu/Senkakus are seen to be rocks rather than islands, then what is to be gained from having title to them will be marginal (just 12 nautical miles compared with 200 nautical miles if they were to be classed as islands), and attention may turn to the delimitation dispute involving the main territories of the disputing States, hopefully making its resolution easier. In beginning the analysis, the next section considers the regime of islands in Article 121 of UNCLOS.

### **Islands and the Law of the Sea**

The legal regime governing islands is provided for in Article 121 of UNCLOS. Paragraph 1 of Article 121 defines an island as ‘a naturally formed area of land, surrounded by water, which is above water at high tide.’ Under paragraph 2, an island is entitled to a territorial sea, a contiguous zone, an EEZ and a continental shelf as any other land territory. In the *Qatar v. Bahrain* case, the International Court of Justice (ICJ) held that Article 121(2) of UNCLOS, which reflects customary international law, entitles ‘islands, regardless of their size, in this

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<sup>25</sup> Smith (n 23), at p.27.

respect [to] enjoy the same status, and therefore generate the same maritime rights, as other land territory.’<sup>26</sup>

As an exception to the rule in Article 121(2) that entitles islands to EEZs and continental shelves, Article 121(3) provides that rocks which cannot sustain human habitation or economic life of their own are exempt from possessing EEZs and continental shelves. It is inferred then that rocks may be entitled to a territorial sea and a contiguous zone.<sup>27</sup> At this point, the important question arises as to which maritime features fall into the category of islands generating EEZ and continental shelf entitlements and which ones fall into the category of rocks not entitled to extended maritime spaces. Also, is it accurate to speak of rocks entitled to an EEZ and a continental shelf when they are found to satisfy the conditions in Article 121(3), or is it sufficient (since rocks are not defined anywhere in UNCLOS) for the purposes of deciding whether a particular feature is entitled to an EEZ and a continental shelf, to regard as rocks, a naturally formed area of land, which though surrounded by water and standing above water at high tide cannot sustain human habitation or economic life of its own (that is a kind of island but one not entitled to an EEZ and a continental shelf)?<sup>28</sup> Although these questions have arisen with respect to interpreting Article 121(3), the most

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<sup>26</sup> [2001] ICJ Rep 40, at para 185

<sup>27</sup> J Charney, ‘Rocks That Cannot Sustain Human Habitation’ (1999) 93(4) *American Journal of International Law (AJIL)* 863-878, at p.864.

<sup>28</sup> For a discussion on the possible meaning of ‘rocks’ as used in Article 121(3), see B Kwiatkowska and A Soons, ‘Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own’ (1990) 21 *Netherlands Yearbook of International Law* 139- 181, at pp.151–53; J Van Dyke and D Bennett, ‘Islands and the Delimitation of Ocean Space in the South China Sea’ (1993) 10(1) *Ocean Yearbook Online* 54-89, at pp.77–79; G Xue, ‘How Much Can a Rock Get? A Reflection from the Okinotorishima Rocks’ in M Nordquist and others (eds), *The Law of the Sea Convention: US Accession and Globalization* (Nijhoff 2012) 341-368, at p.355.

important question, for the purposes of this paper, is how the phrases, ‘sustain human habitation’ and ‘economic life of their own’ should be defined. This because it is these phrases that are instructive for coming to a decision as to whether or not a particular maritime feature would be entitled to an EEZ and a continental shelf.

The Diaoyu/Senkaku Islands stand above water at high tide, making it necessary to consider if they fulfil the conditions in Article 121(3). Since the phrases, ‘sustain human habitation’ and ‘economic life of their own’, are not defined in UNCLOS, it is easy to agree with the assertion that paragraph 3 of Article 121 is laconic,<sup>29</sup> and susceptible to a number of different meanings that States may exploit to their advantage.<sup>30</sup> The proper interpretation to be given to Article 121 has thus plagued the minds of scholars for a long time, especially as no judicial pronouncement had been made until the 2016 South China Sea Arbitration Award. It is proposed to consider these opinions before considering the South China Sea Award in determining whether to classify the Diaoyu/Senkaku islands as islands or rocks. This

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<sup>29</sup> R Smith and B Thomas, 'Island Disputes and the Law of the Sea: An Examination of Sovereignty and Delimitation Disputes' in C Schofield and A Harris (eds) *Maritime Briefing* 2(4) (International Boundaries Research Unit, Durham, 1998) 1-27 at p. 2; Su (n 5), at p.393; Charney (n 27), at p.863; C Schofield, 'The Trouble with Islands: The Definition and Role of Islands and Rocks in Maritime Boundary Delimitation' in S Hong and J Van Dyke (eds), *Maritime Boundary Disputes, Settlement Processes, and the Law of the Sea* (Martinus Nijhoff Publishers, Leiden, 2009) 19-38, at pp.25–26; Kwiatkowska and Soons are of the opinion that it difficult to glean the meaning of Article 121 either from the general context of other provisions in UNCLOS or from the *travaux préparatoires*. They also note that in light of the legislative history of Article 121, the value of any consensus reached regarding the maritime spaces of Islands is to be questioned. See Kwiatkowska and Soons (n 28), at pp. 141–142.

<sup>30</sup> A Alexopoulos, 'The Legal Regime of Uninhabited Islets and Rocks in International Law - The Case of the Greek Seas' (2003) 56 *Revue hellénique de droit international* 131-151, at pp.149–50.

consideration will also contribute to understanding whether the Award aligns with the views expressed in literature.

### *Article 121(3) in the Literature*

In considering the interpretation to be given to Article 121(3) of UNCLOS, Van Dyke and Brooks state that in view of the technological advancements of the present day, any rock may be made inhabitable if the State that has title to it so desires.<sup>31</sup> Ma equally notes that any rock may be made economically viable with or without resources from its territorial sea.<sup>32</sup> Indeed, Charney is of the opinion that a casino may be built on a naturally formed area of land surrounded by water, and the revenue generated from the casino could be used to purchase necessities from external sources, and that this would go towards satisfying the condition of ability to sustain economic life of its own, thereby taking the area out of the classification of rocks and entitling it to generate an EEZ and a continental shelf.<sup>33</sup> He also sees the possibility of regarding the resources of the territorial sea surrounding these areas as contributing to the satisfaction of the condition. Charney thus concludes that ‘Article 121(3) ought to be

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<sup>31</sup> J Van Dyke and R Brooks, ‘Uninhabited Islands: Their Impact on the Ownership of the Oceans’ Resources’ (1983) 12(3-4) *Ocean Development & International Law* 265-300, at p.267. See also R Hodgson and R Smith, ‘The Informal Single Negotiating Text (committee ii): A Geographical Perspective’ (1976) 3(3) *Ocean Development & International Law* 225-259, at p.231. Hodgson and Smith opine that ‘[a]ny rock could support human habitation if the state was willing to spend enough money; for example, a rock with a lighthouse built upon it sustains human habitation by external expenditure of funds by the state, which gives the rock an economic life of its own in its value to shipping, ocean sports, and so forth.’

<sup>32</sup> Ma (n 8), at p.30.

<sup>33</sup> Charney (n 27), at p. 871.

interpreted to permit the finding of an economic life as long as the feature can generate revenues sufficient to purchase the missing necessities.<sup>34</sup>

On the other hand, Su opines that the words, ‘economic life *of its own*,’ mean that the economic resources of the island must come from the island itself and not be extraneous to it. He argues that ‘economic activity for that purpose, in the spirit of Article 121(3), must be conducted on the rock or have an intimate link to the resources of the rock.’<sup>35</sup> Ma, agreeing with Su, emphasises the object of Article 121(3), arguing that to take a broad view in interpreting the paragraph (and he specifically uses the casino example) would be to take a view that defeats the object or purpose of the exception to paragraph 2 that paragraph 3 creates. For Ma, under the assumption of the application of a strict interpretation to paragraph 3, a rock’s ‘own economic life should be supported by the resources on the rock proper alone, not including those in its territorial sea or brought from outside.’<sup>36</sup> Therefore, making an island economically viable by using outside resources would amount to creating a ‘semi-artificial island’, and the granting of an EEZ and continental shelf to such an island is doubtful.<sup>37</sup> Ma concludes by stating that, ‘the development of the rock’s indigenous resources must be economically feasible according to local standards at the time the question arises.’<sup>38</sup>

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<sup>34</sup> *Ibid.*

<sup>35</sup> Su (n 5), at p. 401.

<sup>36</sup> Ma (n 8), at p. 30.

<sup>37</sup> *Ibid.* Van Dyke, Morgan and Gurish support this interpretation when they refer to Article 60(8) of UNCLOS which provides that artificial islands shall not be entitled to a territorial sea or affect the delimitation of the territorial sea, the EEZ or the continental shelf. Citing as an obvious reason for Article 60(8), the discouragement of States from building artificial islands for the sole purpose of laying claim to extra ocean space and thus the surrounding resources, they argue that by analogy, Article 121(3) should be interpreted to discourage States from populating certain insular maritime features for the express purpose of laying claim to ocean resources. See J Van Dyke, J Morgan and J Gurish, ‘The Exclusive Economic Zone of the Northwestern

Regarding the sustenance of human habitation, Kwiatkowska and Soons are of the opinion that Article 121(3) should be understood to mean that the rock is incapable of being inhabited (that is, it is uninhabitable) rather than that it is presently uninhabited.<sup>39</sup> Ma agrees that the plain meaning of the terms used in Article 121(3) shows that ‘uninhabitability’ rather than ‘uninhabitedness’ is the intention of the provision.<sup>40</sup> However, he raises salient questions such as: for how long should the island be able to sustain human habitation, weeks, months or years?<sup>41</sup> Symmons is of a similar opinion when he states that the actual fact of habitation has not been required<sup>42</sup> though habitation may provide the evidential basis for considering whether or not a particular rock is inhabitable.<sup>43</sup> These views, it is submitted, are acceptable because Article 121(3) speaks of rocks which ‘cannot’ sustain human habitation, indicating capability, rather than rocks which ‘do not’ sustain human habitation. Regarding the quality of the island which may lead to a conclusion of habitability, Gidel states that the island should have ‘natural conditions’ that permit the ‘stable residence of organized groups of

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Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?’ (1988) 25(3) *San Diego Law Review* 425-494, at p. 438, footnote 71.

<sup>38</sup> Ma (n 8), at p. 30.

<sup>39</sup> Kwiatkowska and Soons (n 28), at p. 160.

<sup>40</sup> Ma (n 20), at p. 90.

<sup>41</sup> *Ibid.*

<sup>42</sup> C Symmons, *The Maritime Zones of Islands in International Law* (Martinus Nijhoff Publishers, Leiden, 1979) 50.

<sup>43</sup> *Ibid.*, at p. 49.

human beings.<sup>44</sup> This definition, according to Gjetnes would require the presence of fresh water, cultivable soil, and possibly other resources.<sup>45</sup>

Whether these two conditions are cumulative or not is another issue that has plagued the minds of scholars.<sup>46</sup> For example, Charney argues that by employing the word, ‘or’, between human habitation and economic life, Article 121(3) presupposes that satisfaction of either of the conditions, rather than both conditions, is what is required.<sup>47</sup> Van Dyke is of the opinion that the two conditions may be regarded a single concept.<sup>48</sup> Similarly, Su analyses paragraph 3 in such a way that he considers whether a rock has sufficient economic resources of its own to sustain human habitation; and Kwiatkowska and Soons ask the very important question of the possibility of considering the notion of economic life in isolation from population.<sup>49</sup> In holding that it is perhaps preferable for the word ‘or’ to be interpreted as meaning ‘and’, Kwiatkowska and Soons refer to the fact that the provision on rocks represents a compromise between States which (at the Third United Nations Convention on the Law of the Sea) supported a distinct categorisation of islands with different legal status attaching thereto and

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<sup>44</sup> B Gidel, *Le droit international public de la mer* (1934), at p. 684 translated into English and quoted in Van Dyke and Brooks (n 31), at p.284.

<sup>45</sup> M Gjetnes, ‘The Spratlys: Are They Rocks or Islands?’ (2001) 32(2) *Ocean Development & International Law* 191-204, at p.195.

<sup>46</sup> A Elferink, ‘Clarifying Article 121(3) of the Law of the Sea Convention: The Limits Set by the Nature of International Legal Processes’ (1998) 6 *IBRU Boundary & Security Bulletin* 58-68, at p.59; Kwiatkowska and Soons (n 28), at pp.163–165.

<sup>47</sup> Charney (n 27), at p. 863.

<sup>48</sup> Van Dyke and Bennett (n 28), at p. 79.

<sup>49</sup> Kwiatkowska and Soons (n 28), at p. 165. Tanaka similarly expresses the view that economic life and human habitation are ‘intimately intertwined’. Y Tanaka, *The International Law of the Sea* (2nd edn, Cambridge University Press, Cambridge, 2015) 66.



States which did not support any such differentiation. Therefore, interpreting the word ‘or’ disjunctively would defeat the aim of excluding certain types of islands from coming under the definition of rocks.<sup>50</sup> Symmons, seemingly agreeing, points out that ‘often, this concept of “utility” or economic viability has been coupled with that of habitation/habitability....’<sup>51</sup> This observation by Symmons is evident in Ma’s analysis where the latter argues that whether a rock is capable of sustaining human habitation would depend on the economic resources of the rock.<sup>52</sup>

The next section analyses the South China Sea Tribunal’s interpretation of Article 121(3), comparing it to the views expressed in literature where appropriate.

### **The South China Sea Arbitration Award**

The claims advanced by the Philippines in the South China Sea Arbitration may be categorised into three. The first claim concerns the interpretation of the ‘nine-dash’ line which China claims represents its historic rights to the South China Sea. The second set of claims relates to whether certain offshore features are low tide elevations, islands or rocks and on the basis of this, whether these offshore features should generate an EEZ and a continental shelf. The third set of claims concerns allegations of violations of UNCLOS relating to interference by China with certain rights of the Philippines in the South China Sea. This paper is concerned with the second category of claims.

Regarding the second category of claims, the Philippines sought a declaration that the following high tide features, namely Scarborough Shoal, Johnson Reef, Cuarteron Reef and

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<sup>50</sup> Kwiatkowska and Soons (n 28) at 163–64.

<sup>51</sup> Symmons (n 42) at p.51.

<sup>52</sup> Ma (n 8), at p.29.

Fiery Cross Reef do not generate any entitlement to an EEZ and a continental shelf.<sup>53</sup> While the Philippines did not expressly ask that the Spratly Islands be declared as rocks, the Tribunal concluded that this was the inevitable prayer resulting from the Philippines' submissions 5, 8 and 9 where it requested the Tribunal to declare that certain activities of China were being carried out illegally in its (the Philippines) EEZ. The Philippines had also advanced the position that 'none of the features in the Spratlys—not even the largest among them—is capable of generating entitlement to an EEZ or a continental shelf.'<sup>54</sup> In this regard, it argued that '[e]ven the largest features in the Spratlys – including Itu Aba, Thitu and West York, the last two of which are occupied by the Philippines – are very small and incapable of sustaining human habitation or economic life.'<sup>55</sup>

Although China did not participate in the proceedings, it published a position paper where it stated that the Spratly Islands, known in China as Nansha Islands, comprise of different maritime features, all of which are under Chinese sovereignty.<sup>56</sup> It further stated that 'China's Nansha Islands is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf.'<sup>57</sup> China did not, in its position paper, provide any evidence to support its claim that the Spratlys are fully entitled to an EEZ and a continental shelf. However, in a letter transmitted to the individual members of the Tribunal by the Chinese Ambassador on 3

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<sup>53</sup> See Submissions 3 and 7. In 4 and 6, the Philippines prayed the Tribunal to declare that certain other maritime features are low tide elevations. This paper is not concerned with low tide elevations.

<sup>54</sup> Memorial of the Philippines, South China Sea Arbitration, vol 1 (20 March 2014) at para. 5.96, available at <https://files.pca-cpa.org/pcadocs/Memorial%20of%20the%20Philippines%20Volume%20I.pdf>.

<sup>55</sup> *Ibid.*, at para 1.47.

<sup>56</sup> People's Republic of China, 'Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines' (7 December 2014), at para 20, available at [http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj\\_1/t1368895.htm](http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1368895.htm).

<sup>57</sup> *Ibid.*, at para 21.

June 2016,<sup>58</sup> China sought to explain, albeit skeletally, why the Nansha Islands (Spratly Islands) should be considered as islands rather than rocks. The letter contained a response by a Chinese Foreign Ministry Spokesperson to a question on the status of Itu Aba Island (called Taiping Dao by the Chinese), the largest of the Spratly Islands which is currently being administered by Taiwan.

The question had noted that experts and journalists who at the time recently visited Itu Aba reported that there was plenty fresh water and lush vegetation, the presence of medical, postal and energy generation facilities as well as a general and vibrant atmosphere on the island. In response, China (through its Foreign Ministry Spokesperson) reiterated China's sovereignty over the Nansha Islands (which includes Itu Aba/Taiping Dao), stating that these islands are entitled to an EEZ and a continental shelf. It then proceeded to provide evidence of the island status of Itu Aba in these words:

Over the history, Chinese fishermen have resided on Taiping Dao for years, working and living there, carrying out fishing activities, digging wells for fresh water, cultivating land and farming, building huts and temples, and raising livestock. The above activities are all manifestly recorded in Geng Lu Bu (Manual of Sea Routes) which was passed down from generation to generation among Chinese fishermen, as well as in many western navigation logs before the 1930s. The working and living practice of Chinese people on Taiping Dao fully proves that Taiping Dao is an "island" which is

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<sup>58</sup> South China Sea Arbitration Award (n 2), at para 100.

completely capable of sustaining human habitation or economic life of its own.<sup>59</sup>

The Philippines responded to this by stating that China had provided no specific evidence, such as citing any specific text or documentation, to support its position that Itu Aba is an island and not a rock within the meaning of Article 121 of UNCLOS, and that the Geng Lu Bu (Manual of Sea Routes) was nothing more than a navigation guide for fishermen.<sup>60</sup> As China did not participate in the proceedings, the Tribunal requested the Philippines to provide anthropological, historical, geographic and hydrographic information on the status of the disputed maritime features. It also consulted an independent technical expert to aid it in its analysis and decision on these maritime features.<sup>61</sup> The Tribunal began by interpreting the different words and phrases that make up the text of Article 121 of UNCLOS in light of its object and purpose. It also considered the *travaux preparatoires* to aid in its interpretation.

It should be stated at this point that some of the opinions expressed by scholars examined above are echoed in the Tribunal's award. However, the award still raises questions about the clear categorisation of a maritime feature as an island or rock. McDorman had noted just before the rendering of the award that notwithstanding the guidance provided by Article 121, the actual categorisation of maritime features is fraught with uncertainty and debate.<sup>62</sup> Unfortunately, this position still holds true after the rendering of the award as will be shown

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<sup>59</sup> Ministry of Foreign Affairs, People's Republic of China, Foreign Ministry Spokesperson Hua Chunying's Remarks on Relevant Issue about Taiping Dao (3 June 2016), available at [http://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/2535\\_665405/t1369189.shtml](http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1369189.shtml).

<sup>60</sup> South China Sea Arbitration Award (n 2), at para 101.

<sup>61</sup> *Ibid.*, at paras 132-33.

<sup>62</sup> T McDorman, 'An International Law Perspective on Insular Features (Islands) and Low-Tide Elevations in the South China Sea' (2017) 32(2) *IJMCL* 298-315, at p. 300.

subsequently. This is not unconnected to the fact Article 121(3) was a ‘product of compromise and deliberate ambiguity.’<sup>63</sup>

In this award, the Tribunal held that the two conditions in Article 121(3) are not cumulative; therefore, the satisfaction of one condition entitles a maritime feature to an EEZ and a continental shelf.<sup>64</sup> This holding is in agreement with Charney’s position stated previously. Nevertheless, the Tribunal acknowledges that these two conditions are linked, often going hand in hand, since economic life should normally refer to the life and livelihoods of human populations that inhabit the offshore feature.<sup>65</sup> Indeed, it is hard to conclude from the reasoning of the Tribunal that these two conditions are not cumulative as the Tribunal seemed to consider them as such in its assessment of the EEZ and continental shelf-generating capacity of the Spratly Islands, specifically, Itu Aba Island.<sup>66</sup> This recognition of the link between human habitation and economic life accords with the positions of Van Dyke, Su, Symmons and Kwiatkowska and Soons stated above.

In interpreting Article 121(3), the Tribunal held that the term, ‘cannot’, in ‘cannot sustain human habitation’ ‘indicates a concept of capacity’. ‘Human habitation’ was taken to mean a ‘stable community of people’ who regard the island not merely as some temporary and transient residence but as their home,<sup>67</sup> because in the opinion of the Tribunal, the requirement to sustain human habitation involves a qualitative element relating not merely to

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<sup>63</sup> *Ibid.*, at p. 312.

<sup>64</sup> South China Sea Arbitration Award (n 2), at para 544.

<sup>65</sup> *Ibid.*, at para 543.

<sup>66</sup> Itu Aba is the largest of the Spratlys. See L Cordner, ‘The Spratly Islands Dispute and the Law of the Sea’ (1994) 25(1) *Ocean Development & International Law* 61-74, at p.61.

<sup>67</sup> South China Sea Arbitration Award (n 2), at para 618.

survival on these features but to a conducive livelihood.<sup>68</sup> The Tribunal further held that Article 121(3) excludes a dependence on outside supply.<sup>69</sup> Thus, a feature that can only sustain human habitation by reliance on continued delivery of resources from outside must be taken as failing to meet the condition in Article 121(3).<sup>70</sup> For the Tribunal, it is the natural ability of the maritime feature that counts. Therefore artificial modifications intended to boost the capability of a feature to sustain human habitation are excluded.<sup>71</sup> This conclusion stands opposed to Charney's casino example but is in agreement with the general views of other scholars presented above. Whomersley, however, questions the Tribunal's reasoning here, arguing that if Article 121(3) indicates the capacity of a maritime feature to sustain human habitation, then how the feature carries out that support function should not be a relevant consideration.<sup>72</sup>

Regarding 'conducive livelihood', the Tribunal did not give the phrase a clear definition. While the Tribunal acknowledged that conduciveness may mean different things in different cultures, it stated that some basic things must be present including food, shelter and water. The problem with these criteria for assessing conduciveness is that they are the same criteria for assessing survivability. Would this then not equate survival on a feature to conducive livelihood? But the Tribunal had held that a feature should support conducive livelihood rather than just survival. Concerning the Tribunal's position that human habitation should not be transient, how is this supposed to be assessed? This is the same question that Ma posed

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<sup>68</sup> *Ibid.*, at para 489.

<sup>69</sup> *Ibid.*, at para 547.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*, at para 541.

<sup>72</sup> C Whomersley, 'The Award on the Merits in the Case Brought by the Philippines against China Relating to the South China Sea: A Critique' (2017) 16(3) *Chinese Journal of International Law*, 387–423 at p. 400.

when he asked how long a feature should be able to sustain human habitation. While the Tribunal said this should not be transient, it is not clear whether ten, twenty or even a hundred years would be viewed as transient. Also, how can one decide with certainty now as to a feature's ability to sustain human habitation in, for example, fifty years' time?

Consistent with the positions of Ma and Su stated above, the Tribunal removed from the scope of Article 121(3), maritime features whose economic activities depend entirely on outside resources or which are used primarily as an object for extracting resources without the involvement of a local population. Therefore, to satisfy the condition of 'economic life of its own', the economic activities in question must be oriented around the specific maritime feature itself, not being focused solely on the surrounding territorial sea.<sup>73</sup> The basis for this conclusion can be seen from the fact of the Tribunal's understanding that the purpose of Article 121(3) is to exclude certain maritime features from possessing an EEZ and a continental shelf 'that would infringe on the entitlements generated by inhabited territory or on the area reserved for the common heritage of mankind' when the only benefit to the State which holds title to such maritime feature is the provision of maritime resources.<sup>74</sup> Furthermore, if Article 121(3) is aimed at determining whether a feature should possess an EEZ and a continental shelf (which are zones over which States exercise sovereign rights for the purpose of exploring and exploiting its natural resources), it would amount to a circular and absurd argument for the resources of the EEZ and continental shelf to be considered a primary determinant in whether a feature should be entitled to an EEZ and continental shelf.<sup>75</sup> This position is understandable although it is not clear why the resources of the territorial sea may not be taken into account for the purpose of proving that a feature can have an economic

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<sup>73</sup> South China Sea Arbitration Award (n 2), at para 623.

<sup>74</sup> *Ibid.*, at para 624.

<sup>75</sup> *Ibid.*, at para 502.

life of its own since the territorial sea may be regarded as part of the territory of a State, being subject to its sovereignty.

In keeping with the Tribunal's analysis, it assessed whether Itu Aba Island (representative of the Spratly Islands, being the largest high tide feature) had the capacity to sustain human habitation by considering the presence of potable water, vegetation and soil quality as well as the historic habitation of the Island. Regarding economic life of its own, the Tribunal considered the evidence of historic commercial activity on the Islands.

Although it was accepted that the presence of potable water, naturally occurring vegetation and agriculture indicated the capacity of Itu Aba to support human habitation, the Tribunal nevertheless concluded that this capacity was 'distinctly limited'<sup>76</sup> 'and that agriculture on Itu Aba would not suffice, on its own, to support a sizable population.'<sup>77</sup> Consequently, Itu Aba was held to be a feature that cannot sustain human habitation.<sup>78</sup>

It is not clear why the Tribunal's conclusion is hinged on the size of the population that can be sustained on Itu Aba, especially as the term 'sizable' can be interpreted ambiguously and because paragraph 3 of Article 121 simply refers to the capacity to sustain human habitation, without more. In fact, the Tribunal expressly acknowledged that, *'[o]n the basis of the evidence in the record, it appears to the Tribunal that the principal high-tide features in the Spratly islands are capable of enabling the survival of small groups of people.'*<sup>79</sup> Can a small group not satisfy the requirement of a stable and settled population who consider the island their home or must a group necessarily be large to satisfy this requirement? Should not the

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<sup>76</sup> *Ibid.*, at para 626.

<sup>77</sup> *Ibid.*, at, para 596.

<sup>78</sup> *Ibid.*, at para 622.

<sup>79</sup> *Ibid.*, at para 615 (emphasis added).



conclusion have been that Itu Aba has the capacity to sustain human habitation? As the Tribunal stated, Itu Aba has

naturally occurring vegetation capable of providing shelter and the possibility of at least limited agriculture to supplement the food resources of the surrounding waters. The record indicates that small numbers of fishermen, mainly from Hainan, have historically been present on Itu Aba and the other more significant features and appear to have survived principally on the basis of the resources at hand.<sup>80</sup>

Also, ‘sizable population’ indicates that the maritime feature should be large and not small. How can a small island support a sizable population? The Tribunal’s reasoning brings one to the realisation that small islands being awarded the status of islands within the meaning of Article 121 and therefore entitled to generate an EEZ and a continental shelf is improbable because the condition of supporting a ‘sizable population’ may be difficult to meet, even though the maritime feature possesses potable water and vegetation which cannot outrightly be dismissed as incapable of supporting human habitation. Incidentally, the Tribunal had stated that size is not dispositive of the status of a maritime feature as an island or rock and had been careful to support this assertion with the fact that during the negotiation of UNCLOS, the negotiators had rejected the prescription of size as determinative of the insular status of a maritime feature.<sup>81</sup> The Tribunal had also referred to the ICJ decision in *Nicaragua v Colombia* where it was held that ‘international law does not prescribe any minimum size which a feature must possess in order to be considered an island.’<sup>82</sup> This leads one to question

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<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*, at, para 538.

<sup>82</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, [2012] ICJ Rep 624, at para. 37

how the Tribunal's decision accords with its position that size is not a relevant factor in itself in the determination of whether a maritime feature is an island or rock.

Nevertheless, the requirement for the population to be sizable is useful for disallowing arguments that a maritime feature is an island because it is capable of sustaining only a small group, for example, 10 persons, as this may be an artificial way of getting around the criterion in Article 121.

One may further question the conclusion arrived at by the Tribunal regarding the capacity of Itu Aba to sustain human habitation. The Tribunal had noted that historic evidence of the use to which a maritime feature had been put was useful in making a determination in this regard. While Paik queries the use of historic evidence on the basis of the fact that it emphasises actual habitation rather than capacity to sustain habitation,<sup>83</sup> it is arguable that the Tribunal was faced with evidence of actual habitation on Itu Aba in the past, which should almost naturally lead to a conclusion of Itu Aba's capacity to sustain human habitation, yet refused to make this finding. The Tribunal's position that Article 121(3) presupposes a settled community who regard the island as home was rather what influenced its holding. But the criterion of a settled community who live permanently on an island is questionable. As Nordquist and Phalen note, the award departs from the text of the Convention as there is nothing in the text of Article 121 to indicate the existence of such a criterion.<sup>84</sup> For them, the fact that human habitation and economic life are being sustained on Itu Aba 'establishes beyond any doubt that Itu Aba/Taiping is not merely a rock ... [but] objectively meets all

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<sup>83</sup> J Paik, 'South China Sea Arbitral Awards: Main Findings and Assessment', (2017) 20(1) *Max Planck Yearbook of United Nations Law Online* 367-407 at p. 404.

<sup>84</sup> M Nordquist and W Phalen, 'Interpretation of UNCLOS Article 121 and Itu Aba (Taiping) in the South China Sea Arbitration Award', in M Nordquist, J Moore and R Long (eds), *International Marine Economy* (Brill, Leiden, 2017) 1-78 at p. 78.

reasonably conceivable requirements for the definition of an “island” both with respect to interpretation and application of Article 121(3) of the Convention.’<sup>85</sup>

Itu Aba was also held to have failed to satisfy the condition of sustaining economic life of its own. This conclusion was reached notwithstanding evidence that the island had been used for commercial purposes in the past, for a considerably long period of time, at least from 1919 to 1945, and involved an established network of trade. As the nature of commercial activities on the island was mainly extractive in nature, depending on the territorial sea and external supplies, and for the benefit of people residing outside the island, it could not be said, according to the Tribunal, that Itu Aba sustained ‘economic life of its own.’<sup>86</sup>

If extractive activities are excluded from constituting ‘economic life of its own’, and if the presence of potable water, vegetation and agriculture only count when they can support a ‘sizable population’, it is hard to understand the conclusion of the Tribunal that the conditions in Article 121(3) are not cumulative. This is because the major economic activity that can take place on such an island that *may* not be classed as extractive would be agriculture, yet this is qualified by the condition, ‘sizable population’. This definitely links the two conditions. Moreover, the Tribunal acknowledges that ‘economic life’ presupposes human presence to carry on this economic life.<sup>87</sup>

Still on ‘economic life of its own’, the award does not convincingly show why certain activities should not count as economic life of a feature’s own. If a maritime feature is surrounded by water, fishing and other uses of the resources in the surrounding water would naturally be the economic activity of the inhabitants of the feature. It is not difficult to find

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<sup>85</sup> *Ibid.*, 66.

<sup>86</sup> *Ibid.*, at para 623-26.

<sup>87</sup> *Ibid.*, at para 499.

coastal communities engaged in fishing and allied activities as first choice, even when they have fertile land that can sustain agriculture. Why then should fishing in the territorial waters not be classed as economic activity of a maritime feature's own? The same argument is applicable to commercial activities such as guano collecting and bird stuffing. If a feature naturally attracts birds and these birds can provide value which can be exploited economically, it should follow that such feature can sustain its own economic life. There is nothing inherently different between engaging in agricultural activities,<sup>88</sup> which is in fact exploiting a natural resource, namely, the soil, and exploiting other natural resources such as fish. A landlocked State might engage in exportation of timber and products manufactured from timber. It would simply be using its resources in the same way that an island State or an island which is owned by a State would use the natural resources of the water. The water is usually the source of livelihood of the people living around it. As absurd as it would be to require a landlocked State to not exploit its timber resources, so it is when islands are not allowed to engage in fishing for the purpose of survival. Economic activities are generally shaped by the environment and the resources available. Indeed, Symmons notes that at the third United Nations Conference on the Law of the Sea, Pacific States, specifically Fiji, pointed out that certain remote islands had no viable land-based economy and 'little prospect of economic development other than by expanding their fishing industry.'<sup>89</sup>

Additionally, disqualifying activities such as guano collecting and bird stuffing which take place on the island itself on the ground that they are extractive does not seem to be based on the text of Article 121 or other provisions of UNCLOS, leading one to question whether the

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<sup>88</sup> It is worthy of note that logging and agri-business are classed as belonging to the extractive industry. See USAID, 'Extractive Industries Management' available at <https://www.usaid.gov/what-we-do/global-health/pandemic-influenza-and-other-emerging-threats/programs/extractive-industry-engagement>.

<sup>89</sup> Symmons (n 42), at 52-53.

Tribunal was actually giving the terms used in UNCLOS their ordinary meaning in their context and in light of the Convention's object and purpose.<sup>90</sup>

Another important question that arises from the Tribunal's reasoning is whether there is a time element involved in deciding that a particular feature is an island or rock. (This is similar to the concept of critical time for the purpose of deciding title to territory.) This question is asked because some maritime features that are above water at high tide could have, in time past, used outside resources to create an economic life or sustain human habitation and therefore at the time of delimitation (whether bilaterally or through adjudication), there would be an established economic life or inhabitation which logically should lead to the conclusion that the maritime feature is an island, and not a rock. Should the criteria then be different because in another case, the island is uninhabited and although it is similar naturally to the first mentioned island, it has not brought in outside resources to establish its economic life or sustain human habitation? The only difference between these features is that in one, humans had used outside resources at an earlier time in history to establish a livelihood whereas in the second one, humans have only recently decided to do the same thing. This would seem to be a case of equity aiding the vigilant and not the indolent.

The above issues raise questions that may make applying the award difficult in subsequent cases. Nevertheless, an attempt would be made to consider how the award may be applicable to the Diaoyu/Senkaku Islands.

*Applying the South China Sea Arbitration Award to the Diaoyu/Senkaku Island  
Dispute*

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<sup>90</sup> Article 31, Vienna Convention on the Law of Treaties (Vienna, 23 May 1969, in force 27 January 1980) 1155 UNTS 331.

In order to apply the decision of the Tribunal in the South China Sea Award to the Diaoyu/Senkaku Island dispute, one must first consider physical evidence that proves or disproves that the Islands can sustain human habitation or economic life of their own. If this proves inconclusive, or to use the Tribunal's words, a feature falls close to line, one may then consider the historic use to which the islands have previously been put.

Regarding the first step, it is submitted that there is insufficient, publicly available physical evidence to categorically conclude that the Diaoyu/Senkaku Islands can support human habitation and/or that it can sustain an economic life of its own at the present.<sup>91</sup> It has, however, been reported that the three of the largest Islands have vegetation, specifically palm trees and tropical bushes.<sup>92</sup> Ma records the presence of the plant, *statice arbuscula*, a medicinal plant used for curing high blood pressure and rheumatism, on them. He notes the presence of potable water capable of sustaining at least 200 persons on the largest island, Diaoyu tai.<sup>93</sup> Not only does this writer not have more detailed information on the agricultural capacity of the Diaoyu/Senkaku Islands or its ability to produce fresh water that can sustain human habitation, this writer acknowledges that the disputing parties—China and Japan—may, if the need arises, present conflicting scientific evidence to support their different positions. In the South China Sea Arbitration, notwithstanding that China did not participate in the proceedings, there were conflicting positions presented on the capacity of Itu Aba to sustain human habitation. The *Amicus Curiae* Submission to the Tribunal by the Chinese (Taiwan) Society on International Law referred to scientific evidence that showed that Itu Aba is capable of sustaining human habitation. According to the submission, there are four groundwater wells operating on Itu Aba, with one of the wells, labelled well No 5, able to

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<sup>91</sup> Su (n 5), at p. 401.

<sup>92</sup> Ma (n 20), at p. 92.

<sup>93</sup> *Ibid.*

provide drinking water for 1000-1500 persons per day.<sup>94</sup> The submission also showed that the soil of Itu Aba is capable of supporting indigenous vegetation and agriculture and listed a number of vegetables and trees that grow on Itu Aba.<sup>95</sup> The Taiwanese government, which administers Itu Aba, has also reiterated that the maritime feature can sustain human habitation.<sup>96</sup>

The Philippines, on the other hand, sought to rely on materials that indicated the contrary position. Nevertheless, in responding to the *Amicus Curiae* Submission, the Philippines noted that there were indeed fruit trees growing on Itu Aba that served as food for persons on the feature in these words: ‘the landing party was given orders that “no one was allowed to pick the flowers, plants and fruits” so these could be “saved as food supplies for the officers stationed on the island”’.<sup>97</sup> In the face of these conflicting positions, the Tribunal took its decision as stated above.<sup>98</sup> The difficulty in predicting the Tribunal’s decision underscores the difficulty of stating firmly that the Diaoyu/Senkakus are indeed islands and not rocks. As the Islands are small, however, there is the possibility, if one were following the award, to

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<sup>94</sup> *South China Sea Arbitration*, ‘*Amicus Curiae* Submission by the Chinese (Taiwan) Society on International Law’ (23 March 2016), at para 30, available at <http://csil.org.tw/home/wp-content/uploads/2016/03/SCSTF-Amicus-Curiae-Brief-final.pdf>.

<sup>95</sup> *Ibid.*, at para 34.

<sup>96</sup> Nordquist and Phalen (n 84), at p. 68.

<sup>97</sup> Responses of the Philippines to the Tribunal’s 1 April 2016 Request for Comments on Additional Materials Regarding the Status of Itu Aba (25<sup>th</sup> April 2016), at para 30, available <https://www.pcacases.com/web/sendAttach/1850>.

<sup>98</sup> Wang argues that the Tribunal did not adequately consider the contrary evidence provided by the *Amicus Curiae*, relying quite heavily on the evidence presented by the Philippines. See J Wang, ‘Legitimacy, Jurisdiction and Merits in the South China Sea Arbitration: Chinese Perspectives and International Law’ (2017) 22(2) *Journal of Chinese Political Science* 185-210 at p. 204.

come to the conclusion that the islands cannot sustain human habitation since any such capacity would be distinctly limited. The Tribunal favoured a maritime feature that can support a sizable population, even though what is sizable is open to conflicting interpretations and there is no requirement for size in Article 121 of UNCLOS.

This section now turns, as the Tribunal did, to consider the past habitation and economic life of the Islands in analysing the status to be awarded them. It is reported that around the beginning of the 20<sup>th</sup> century, a Japanese known as Tatsushiro Koga carried out economic activities on three islets of the group, namely Tiao-yu, Huang-wei, and Nan-hsiao. Koga brought in seasonal workers, food and supplies, and houses, warehouses and sewers were built. The soil was also cultivated, though Koga's main business activities involved collecting guano and albatross feathers, bird stuffing and bonito fishing.<sup>99</sup> The number of people who lived on these islets grew to more than 200 although it was difficult to recruit adults to move to the islets.<sup>100</sup> A research project sponsored by the Japanese government states that the people who moved to the islets moved there not as settlers, but as temporary workers, and this is evidenced by the fact that there were no personal houses but functional buildings, including dormitories, for the workers.<sup>101</sup> After the death of Koga, Koga's son carried on the business but things declined and the inhabitants of the islets emigrated.

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<sup>99</sup> Ma (n 8), 31–32.

<sup>100</sup> Barbara Demick, 'The Specks of Land at the Center of Japan-China Islands Dispute' *Los Angeles Times* (24 September 2012), available at <http://articles.latimes.com/2012/sep/24/world/la-fg-china-japan-islands-20120925>.

<sup>101</sup> Makomo Kuniyoshi, 'The Senkaku Islands in the Context of the History of the Modern Fishing Industry in Okinawa' 14, available at [http://www2.jiia.or.jp/en/pdf/digital\\_library/japan\\_s\\_territories/160414\\_Makomo\\_Kuniyoshi\\_.pdf](http://www2.jiia.or.jp/en/pdf/digital_library/japan_s_territories/160414_Makomo_Kuniyoshi_.pdf).



This description resembles that of Itu Aba Island where temporary workers (numbers of which reportedly rose up to 600 in 1927) lived on the Island, and dormitories, offices, warehouses and a clinic was built. No stable community formed and all workers eventually left the Island.<sup>102</sup> Fishing and guano collecting constituted the major business, which business naturally declined, not being truncated by intervening factors.<sup>103</sup> The similarity between Itu Aba and the Diaoyu/Senkaku Islands indicates that the same conclusion reached in respect of the former may be reached in respect of the latter if the reasoning of the Tribunal is followed.

Thus, while it may be argued that the Diaoyu/Senkaku Islands are inhabitable in view of the fact that they were once inhabited and for a relatively considerable period, it may also be argued that this inhabitation was not sustainable which is evidenced by the emigration of the island inhabitants as well as the continued need, at the time, to replace them with new sets of inhabitants.<sup>104</sup> This is a reminder of the Tribunal's and Gidel's 'stable residence' definition for habitability. The problem with siding with the Tribunal and Gidel is that the absence of a stable residence of inhabitants does not actually indicate that a feature is incapable of sustaining human habitation. Is the fact that only temporary dwellings were constructed useful for holding that a feature is unable to sustain human habitation? Is it not rather the case that the use of the maritime feature whether as a temporary dwelling or as a permanent one was a matter of choice? Why then is this choice determinant of whether a maritime feature is an island or not? The law speaks simply about a feature's capability to sustain human habitation, not its capability to sustain a specific class of human beings, that is, temporary settlers or permanent settlers. In fact, the capability of a feature to sustain temporary inhabitants may be evidence that it can sustain permanent inhabitants.

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<sup>102</sup> South China Sea Arbitration (n 2), at para 606.

<sup>103</sup> *Ibid.*, at para 622.

<sup>104</sup> Ma (n 8), at p.32.

Regarding economic life, while it clear that economic activities did take place on the islets, it may be argued that because Koga had to bring in supplies from outside, the islets cannot be spoken of as having the capacity to sustain an economic life ‘of its own’. Also, as gleaned from the Tribunal’s Award, the kind of economic activities engaged in on the Diaoyu/Senkaku Islands were primarily extractive, depending on the territorial sea and not oriented around the feature itself. Thus, ‘extractive economic activity, without the presence of a stable local community, necessarily falls short of constituting the economic life of the feature.’<sup>105</sup> The failure of Koga’s family business and its non-revival since may also be presented as evidence of the ‘unfeasibility of establishing an indigenous economic life on the islets.’<sup>106</sup> These arguments may be met with equally compelling arguments as noted above such as that the historic use by Koga is not conclusive of the island’s capacity or otherwise to sustain an economic life of its own. This is because (a) the decision to use the resources from the island to benefit outside populations was simply a matter of choice, a choice that could be altered at anytime to benefit a local population, (b) Article 121(3) speaks of capacity to sustain economic life of its own and the historic economic activities constitute evidence of such capacity and, (c) extractive activities such as fishing and guano collecting should be accepted in the assessment of the economic life of a feature’s own.

While it may be difficult to conclude categorically that the Diaoyu/Senkaku Island group be treated as rocks under Article 121(3) rather than as islands capable of generating an EEZ and a continental shelf, it seems more plausible, *on the basis of the Tribunal’s award*, that they are rocks and therefore would not be entitled to an EEZ and a continental shelf. Whether this award will impact on future decisions on Article 121(3) and on State practice is yet to be seen. The areas of dissatisfaction with the award identified in this paper may be such as

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<sup>105</sup> South China Sea Arbitration Award (n 2), at para 623.

<sup>106</sup> Ma (n 8), at p.33.

reduce the probative value of the award and may be highlighted in a future case for the purpose of convincing the adjudicator not to follow the award.<sup>107</sup>

### **Conclusion**

The resolution of the East China Sea maritime boundary dispute between China and Japan necessarily involves the resolution of the question: whether the Diaoyu/Senkaku Islands should be treated as rocks or islands under Article 121(3) of UNCLOS and what role they should play in the delimitation exercise. The award by the Tribunal in the South China Sea dispute accords with some of the views expressed in literature as to the interpretation of Article 121 of UNCLOS. However, the Award's interpretation of Article 121(3) is not satisfactory. The issue of whether the criteria in Article 121(3) are cumulative or not has not been settled. While the Tribunal says they are not cumulative, its interpretation seems to indicate that they are. Other matters such as the role of size in determining the insular status of a feature and determining what constitutes economic life of a feature's own or its capacity to sustain human habitation are still open for question. How the historical use to which a feature has been put impacts on its ability to satisfy Article 121(3) is also not settled as seen from the criticism of the award.

Notwithstanding, it must be noted that the Tribunal's difficulty is a product of the way in which Article 121(3) was drafted. The Tribunal had to give meaning to a provision that was 'poorly drafted'<sup>108</sup> and that 'raises considerable problems of definition and application'.<sup>109</sup> It is similar to Article 83(1) of UNCLOS, the provision on delimitation of the continental shelf

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<sup>107</sup> Nordquist and Phalen (n 84), 78.

<sup>108</sup> R Churchill and A Lowe, *The Law of the Sea*, (Manchester University Press, Manchester, 1988) at p. 41.

<sup>109</sup> I Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press, Oxford, 2008) at p.

that was consciously designed to achieve as little agreement as possible,<sup>110</sup> leaving the task to the ICJ and tribunals to clothe it with substance.<sup>111</sup> Charney had noted in this regard that in international maritime boundaries, the judgments of the ICJ and other tribunals take on great salience.<sup>112</sup> As Article 121(3) had never been interpreted until the South China Sea Arbitration, it will be a reference point in future cases involving the classification of maritime features as either islands or rocks. Still, whether a maritime feature is an island or rock will have to be assessed on a case by case basis.<sup>113</sup>

While the decision may not be easy to apply to cases where it is necessary to decide whether a particular feature is an island or rock, it is possible to apply it to the Diaoyu/Senkaku Island dispute. This is because the history of use of the Island is similar to Itu Aba considered by the Tribunal. *On the basis of the award then*, the Diaoyu/Senkaku islands are more likely to be classed as rocks and consequently, not entitled to generate an EEZ and a continental shelf.

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<sup>110</sup> *Award of the Arbitral Tribunal in the second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation)* (1999) RIAA, 335 at para 116.

<sup>111</sup> *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)* [1985] ICJ Rep 13 at para 28.

<sup>112</sup> J Charney, 'Progress in International Maritime Boundary Delimitation Law' (1994) 88(2) *AJIL* 227-256 at p.227.

<sup>113</sup> D Anderson, 'Some Aspects of the Regime of Islands in the Law of the Sea' (2017) 32(2) *IJMCL* 316- 331 at 327.