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INTERNATIONAL LAW

A CRITIQUE OF THE SOUTH CHINA SEA ARBITRATION

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Introduction

In the recent past, the legal status of islands under international law has been contentious due to the numerous interstate disputes regarding contravention of sovereign rights.¹ By virtue of Article 121(3) of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), only islands which can sustain human habitation or economic life of their own are capable of generating an entitlement to an exclusive economic zone (EEZ) of 200nm and to a continental shelf. While setting out the legal indicators of an island, the above provision underscores the fact that the ‘island’ status displays substantial benefits, namely human habitation and economic life.² A question, however, arises as to whether a rock that meets one of the attributes can be regarded as an island within the description set out under the UNCLOS. This issue was extensively covered in the *South China Sea Arbitration (The Republic of the Philippines v The People’s Republic of China)* case.³ This paper assesses the Permanent Court of Arbitration’s (PCA) award in this case, particularly in respect of competing claims to sovereignty over the Scarborough Shoal in the South China Sea. The paper is structured as follows: summary of the case; the nature of the disputed Shoal; the legal status of an island under Article 121(3) of the UNCLOS, and the interpretation preferred by the PCA; and the validity of China’s claims that the award was null and void, which forms part of the conclusion of this paper.

¹ Carmen Pölsler, ‘The Legal Status of Rocks’ 1, <https://ssc-rechtswissenschaften.univie.ac.at/fileadmin/user_upload/s_rechtswissenschaft/Doktoratsstudium_PhD/Expose1/Voelkerrecht/The_Legal_Status_of_Rocks.pdf> accessed 16 January 2017.

² Yann-huei Song, ‘The Application of Article 121(3) of the Law of the Sea Convention to the Five Selected Disputed Islands in the South China Sea’ (East Sea (South China Sea) Studies, 23 March 2011) <<http://nghiencuubiendong.vn/en/conferences-and-seminars-/505-the-application-of-article-1213-of-the-law-of-the-sea-convention-to-the-five-selected-disputed-islands-in-the-south-china-sea>> accessed 17 January 2017.

³ *The South Sea Arbitration (The Republic of the Philippines v The People’s Republic of China)* PCA Case N° 2013-19 [hereinafter “The South China Sea Arbitration”].

Summary Facts

The case concerned a claim by the Philippines in respect of four issues. In the first issue, the Philippines sought the PCA's clarification on the questions whether the Parties' respective rights and obligations concerning certain maritime features in the South China Sea were governed by the UNCLOS, and whether China's claim of sovereignty over the nine-dash line in the South China Sea was legitimate. The second issue, which is the subject of this paper, was whether Scarborough Shoal and other maritime features claimed by the two countries were islands, rocks, low-tide elevations, or submerged banks. The maritime zones of these features are clearly delineated by the UNCLOS. The third issues concerned the legality of China's activities in the South China Sea. According to the Philippines, China's construction and fishing activities around the disputed area were inimical to the provisions of the UNCLOS regarding environmental protection. Fourthly, the PCA was asked to find that China's actions in the Spratly islands while the arbitration case was pending before the tribunal unlawfully exacerbated the parties' dispute.

On its part, China refused to accept and participate in the proceedings on the ground that the tribunal lacked jurisdiction over the dispute, and that the disputants had agreed to resolve their conflicts through negotiations under bilateral instruments, including the 2002 China-ASEAN Declaration on the Conduct of Parties in the South China Sea.⁴ As such, the Philippines had contravened its international obligations by resorting to international arbitration.⁵ According to China, the dispute before the PCA concerned territorial sovereignty over certain maritime features in the South China Sea and not the interpretation of the UNCLOS. In its finding on the question of jurisdiction, the tribunal properly rejected China's position and held that 2002 Declaration was a political instrument, did not provide for a

⁴ *ibid* [166].

⁵ *ibid*.

binding settlement approach, and did not rule out other means of settling disputes.⁶ Accordingly, the PCA's jurisdiction was not limited as envisaged in Articles 281 and 282 of the UNCLOS.⁷

The author in the present paper agrees *in toto* with the tribunal's finding that China's objection would not prevent the arbitration proceedings. Under Article 9 of Annex VII to the UNCLOS, the refusal of a party to appear before the tribunal or to present its defence does not bar the proceedings. Further, since the two States had exchanged views concerning the settlement of their disputes, as stipulated under Article 283 of the UNCLOS, there was nothing that would stop the Philippines from instituting its arbitration claims.⁸ In light of this, the tribunal decided to proceed with the determination of the issues raised by the Philippines in the dispute.

Tribunal's Ruling

As for the first claim, the tribunal held that the parties' rights and obligations are comprehensively buttressed by the UNCLOS. However, since China's claim was in respect of "historic rights" to the waters of the South China Sea, which had been extinguished when the UNCLOS came into effect, it was invalid.⁹ The author of the present paper considers the tribunal's finding as consistent with principles envisaged in Article 30(3) of the Vienna Convention on the Law of Treaties, to the effect that the provisions of a treaty will take precedence over incompatible rights and obligations which arose before the coming into force

⁶ Permanent Court of Arbitration, *The South China Sea Arbitration (The Republic of the Philippines v The People's Republic of China)* (Press Release, The Hague, 12 July 2016) 7 <<http://www.andrewerickson.com/wp-content/uploads/2016/07/PH-CN-20160712-Press-Release-No-11-English.pdf>> accessed 17 January 2017.

⁷ *ibid.*

⁸ *ibid.*

⁹ *The South China Sea Arbitration* [192].

of that treaty.¹⁰ The UNCLOS does not expressly provide for or allow the maintenance of historic rights to the resources of the EEZ or continental shelf.

Concerning the second claim, the tribunal held that, according to the evidence on record, some of the features fell within the Philippines EEZ. Importantly, none of the disputed features in the South China Sea met Article 121(3) thresholds. In other words, none of them could naturally sustain human or economic life without depending on external support or purely extractive resources.¹¹ The mere presence of personnel on the high-tide features, including the Scarborough Shoal, did not mean that the features were capable of sustaining human life or economic activities on their own. The tribunal seemed to construe phrase “on its own” under Article 121(3) to imply that, for a feature to be regarded as an island, its capacity to sustain human life or economic activities must be natural and not dependent on external supply.¹² In the circumstances of the case, the conditions on the features were purely military or governmental in nature and entailed significant outside resources. This interpretation is, according to the author of this paper, in line with the intention of Article 121(3) drafters. Any other interpretation would undoubtedly distort the intention of the drafters and set a wrong precedent for the PCA.

Having established that most of the features fell squarely within the Philippines’ EEZ, the tribunal found out with regard to the third claim that China’s construction and fishing activities had infringed on the Philippines’ sovereign rights. China also violated Philippines’ fishing rights around the Scarborough Shoal. Similarly, the China’s maritime surveillance vessels unlawfully created a physical barrier against Philippines vessels contrary to Article 56 of the UNCLOS, which protects states sovereign rights of other states in EEZ.¹³

¹⁰ Vienna Convention on the Law of Treaties 22 May 1969, 1155 UNTS 331; see also UNCLOS, Article 293.

¹¹ *The South China Sea Arbitration* [500].

¹² *ibid* [578].

¹³ *ibid* [716].

As regards the Scarborough Shoal, which is the crux of this paper, the tribunal rightly noted that the fishing activities complained of occurred within the 12nm territorial seal generated by the Shoal and the determination of the matter did not substantially depend on whether that Shoal was a rock or island.¹⁴ Based on the evidence on record, it was clear that the disputed Shoal had been a traditional fishing area for many nationalities, such as China, the Philippines, Taiwan and Vietnam.¹⁵ Thus, regardless of which state had sovereignty, both China and Philippine had traditional fishing rights over the Shoal, and China infringed on Philippines' rights by obstructing Filipino fishermen from fishing around the Shoal from May 2012.¹⁶

The fourth issue was also ruled in favour of the Philippines, with the tribunal holding that China's land reclamation and construction projects during the pendency of the dispute greatly impacted the reefs on an unprecedented scale.¹⁷ By doing that, China had breached its duty to refrain from exacerbating the dispute between the two states.¹⁸ The tribunal reiterated the fact that the two countries had taken cognisance of the fact that their conduct was delineated and regulated by the UNCLOS and the basic principles of good faith enshrined in Article 300 thereof,¹⁹ and that their dispute lied in typically distinct understandings of their respective rights and obligations in respect of the South China Sea features.²⁰

The Legal Status of Scarborough Shoal

In the author's view, the tribunal's interpretation of Article 121(3) regarding the Scarborough Shoal, as well as its findings on the fishing activities around that Shoal was objective and properly informed by cogent evidence and the principles of international law. In any case

¹⁴ *ibid* [759].

¹⁵ *ibid* [805].

¹⁶ *ibid* [812].

¹⁷ *ibid* [978].

¹⁸ *ibid* [1169].

¹⁹ *ibid* [1135].

²⁰ *ibid* [1198].

attracting international attention, losers are expected to groan, just like China did. But logic takes precedence over subjective considerations. In 2009, China submitted maps proving that its maritime zones extended to the nine-dash line, but this evidence was widely contested as being inaccurate. China also submitted reservations under Article 298(1) of the UNCLOS, which allows State Parties to submit a written declaration of non-acceptance of the UNCLOS' compulsory dispute settlement procedures with respect to disputes relating to the interpretation or application of Articles 15, 74 and 83 on boundary delimitations, or provisions involving historical bays or titles.²¹ It should be noted that the delineation of rocks and islands in the South China Sea Arbitration case were simply questions of interpretation of the UNCLOS' provisions and not delimitation. As such, the tribunal was properly guided by defining the contested status of the Scarborough Shoal and other reefs in the South China Sea. Though this may not completely resolve the dispute, it may still provide an important framework for future delimitation. For peace and stability to prevail in the often-contested maritime features, it is of great significance that international law clearly defines their distinctive characteristics. Whether that clarity is exhibited in Article 121(3) depends on the interpretation approach preferred by the tribunal.

Before assessing the tribunal's ruling, it is important to highlight the principles underpinning the interpretation of international instruments. Under Article 31 of the Vienna Convention on the Law of Treaties, a treaty should be construed in good faith consistent with its ordinary meaning, taking into account its object and purpose. Additionally, any later practice regarding the application of the treaty should be considered. It is also vital to consider the preparatory work of a treaty.²²

²¹ Pölsler (n 1) 2.

²² Vienna Convention on the Law of Treaties, Article 32.

In defining the legal status of the disputed features, the first task before the tribunal was to determine whether they were high-tide or low-tide elevations within the meaning of the UNCLOS. From the wording of Articles 13 and 121(1) of the UNCLOS, a feature that is surrounded by water at high tide generates a territorial sea of 12nm, while the one that is submerged at high tide generates no such entitlement. From a technical evaluation undertaken by the tribunal, the Shoal contains five to seven rocks protruding at high tide.²³ However, photographic evidence presented before the tribunal showed that those rocks are minuscule.²⁴ This implies that the larger part of Scarborough Shoal is submerged at high tide. According to the tribunal, the protrusions qualify the Shoal as a high-tide feature in its natural condition.

Whether a feature is a rock or an island depends on two important elements. Firstly, one must establish the point at which the feature is capable of sustaining human habitation. Secondly, it must be clear that the feature is capable of sustaining an “economic life of its own.” Once these two elements are understood, the characterisation of rocks and islands will be very easy to distinguish. The element of human habitation raises many concerns, such as the period within a feature should sustain human habitation for it to be regarded as an island, whether residence should be temporal, and whether a feature which has been modified to properly sustain human habitation meets the element. Similarly, the construction of “economic life of its own” raises a number of questions, such as whether economic life should be natural or induced by introducing external resources, and whether this should happen within a specific period of time.

These issues arise because it is uncertain whether the two elements under Article 121(3) of the UNCLOS permit States to alter the status of the features at will through structural means, and whether such alterations constitute circumventions of the Convention. The relevance of

²³ *The South China Sea Arbitration* [333], [334], and [555].

²⁴ *ibid* [556].

this uncertainty becomes real when taking into account the various installations and land reclamation activities undertaken on the contested reefs by China. The presence of military personnel in some of those reefs shows they can provide temporary residence, but whether this should be considered as meeting the element of human habitation is dependent on how Article 121(3) is construed. Accordingly, an interpretation of this provision is necessary to enable States to easily distinguish between a rock and an island for purposes of delimitation of EEZ.

Though Article 121(3) does not elucidate the specific characteristics of a feature that is capable of sustaining human habitation or economic life, a textual interpretation of this provision establishes basic requirements. According to the PCA in the *South China Sea Arbitration*, Article 121(3) of the UNCLOS may be split into six terms: (a) “rocks”, (b) “cannot”, (c) “sustain”, (d) “human habitation”, (e) “or”, and (f) “economic life of their own.”²⁵ Regarding the term “rock”, the tribunal was of the view that the intention of Article 121(3) drafters was not to restrict this provision to features that are made of solid rocks.²⁶ From a literal viewpoint, a rock is an aggregate of minerals, and this often varies in hardness. This may be buttressed by the position of the International Court of Justice (ICJ) in *Territorial and Maritime Dispute (Nicaragua v Colombia)* that a tiny protrusion of coral is an Article 121(3) rock.²⁷ The fact that the protrusion is made of coral is immaterial. In light of this, the author of the present paper agrees with the tribunal’s finding that the term “rock” does not necessarily mean that the feature in question is composed of rock.²⁸ In the same vein, the name of a feature, like reef or shoal, does not qualify it as a rock or island for purposes of paragraphs 1 and 3 of Article 121.

²⁵ *ibid* [478].

²⁶ *ibid* [479].

²⁷ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Merits Judgment, ICJ Reports 2012 [37].

²⁸ *The South China Sea Arbitration* [482].

As for the term “cannot”, the tribunal rightly construed its use in Article 121(3) as indicating the attribute of capacity. In other words, the feature in question must be capable of sustaining human habitation or an economic life in its natural form – that is, without depending on outside resources.²⁹ This attribute can be supported by evidence that the feature historically supported human life or that it was a site of economic activities.³⁰

In the context of Article 121(3), the term “sustain” means to provide the necessary conditions that will keep humans alive and healthy or make it possible to start and continue an economic activity on an ongoing basis.³¹ The term “human habitation” refers to permanent or habitual occupancy of humans.³² It is, however, important to note that Article 121(3) does not specify the test that can be used to distinguish between mere presence of people and settled human habitation. According to the PCA in the *South China Sea Arbitration*, the mere presence of inhabitants does not constitute permanent or habitual residence.³³ Rather, human habitation encompasses a non-transient presence of people who have decided to live on the feature in a settled manner. For this to happen, the feature must have all the conditions (e.g. food, shelter and water) sufficiently necessary for humans to live there permanently or habitually for an indefinite period of time.³⁴ No exact number of inhabitants is contemplated in Article 121(3), but a single individual living on the feature cannot provide sufficient prove of settled human habitation. A group of individuals or community is essential in this case.

As for the disjunctive term “or”, it is important to construe its use in Article 121(3) because it will assist in establishing whether the requirements of “human habitation” and “economic life of their own” are both necessary for a feature to generate entitlements to maritime zones, or

²⁹ *ibid* [483].

³⁰ *ibid* [484].

³¹ *ibid* [488].

³² *ibid* [489].

³³ *ibid* [489].

³⁴ *ibid* [489].

whether one of them will suffice.³⁵ In reality, human beings will seldom live in places that have no capacity to sustain livelihood or economic activities. Thus, in practical sense, the two requirements must be linked together irrespective of the literal meaning of Article 121(3) of the UNCLOS. This notwithstanding, it is indisputable that Article 121(3) presents a possibility where a feature is capable of sustaining human habitation while lacking the resources necessary to sustain an economic life. The PCA in the *South China Arbitration* was privy to this fact, but chose to consider Philippines' position that the term should be interpreted in a way that does not detract from the object and purpose of the EEZ regime, which is to accord rights and duties to the humans inhabiting the feature that generate the zone.³⁶

The last component of Article 121(3) is the phrase "economic life of their own." According to the PCA, this phrase has two parts. The first part is "economic life", which means that the feature in question must be capable of providing the necessary conditions for economic activities to take place over a period of time. The second part, "of their own", is very essential because it makes it clear that the feature in question must be capable of supporting economic activities without relying principally on external resources or serving purely as a landscape for extractive activities. Economic life that utterly relies on external resources without involving the inhabitants certainly falls short of Article 121(3) test. The fact that the natural resources are extracted from the feature to sustain humans who are living elsewhere may provide evidence of economic gain, but cannot reasonably constitute the "economic life of their own" test in Article 121(3). Accordingly, the test of economic life must not be based on the seabed or waters surrounding the feature in question. This assertion is in line with the

³⁵ *ibid* [493].

³⁶ *ibid* [497].

PCA's conclusion that the phrases "human habitation" and "economic life of their own" are inseparable for purposes of assessing the legal status of a maritime feature.³⁷

In the author's view, the PCA's approach of interpretation is in line with the intent of Article 121(3) because it will restrain states from converting a feature which is incapable of sustaining human habitation or an economic life of its own and claim sovereign rights. For instance, some powerful states may reclaim a reef or shoal, or undertake other actions with a view to extending their EEZ to the detriment of other states or the common heritage of mankind.

In view of the foregoing interpretation, the PCA held that Scarborough was a rock mere rock and did not meet the test of Article 121(3) to generate an entitlement. From the evidence adduced by the hydrographer, it was clear that Scarborough Shoal was encumbered by five to seven rocks, which appeared minuscule at high tide.³⁸ There was no evidence that the rocks could sustain human habitation or economic activities in their own natural state. Apart from the surrounding waters, the rocks had no fresh water, vegetation, or living space. Further, the Shoal has often provided ground for fishing by people of different nationalities, meaning that, even if it was capable of sustaining human habitation, there was no historical evidence to prove that. It would be impracticable for human beings to inhabit such a rocky ground, the largest part of it being submerged at high tide. Any steps to reclaim the Shoal to make it habitable or capable of supporting economic activities will undoubtedly defeat the object and purpose of Article 121(3), taking into account the extensive interpretation explored above. In any case, there must be some tangible connection between the Shoal and the alleged economic activities. And, as the phrase "economic life of their own" suggest, artificial additions on the feature do not qualify it as capable of generating entitlement to the EEZ or

³⁷ *ibid* [543].

³⁸ *ibid* [334].

continental shelf for purposes of the UNCLOS provisions. According to the PCA, there was no probative evidence that the fishermen had connection to the Scarborough Shoal. There was also no prove of any other economic activities apart from fishing around the Shoal. As such, it was clear that Scarborough Shoal was incapable of sustaining an economic life on its natural condition.

The PCA's ruling

Validity of PCA's Award

As already noted above, the PCA's ruling in respect of the legal status of Scarborough Shoal was legitimate and within the purview of Article 121(3) of the UNCLOS. Digging deep to history, this provision may be traced to the questions raised prior to the adoption of the UNCLOS that islets or minuscule uninhabited islands situated outside the territorial sea would be considered in the delimitation of maritime zones between adjoining states.³⁹ As a general rule, islands that generate an entitlement to a maritime zone can cover 200nm of maritime jurisdiction, while rocks, which are only capable of receiving a territorial sea can extend maritime jurisdiction up to 12nm.⁴⁰ This distinction needs clarification, and one of the purposes of Article 121(3) is arguably to delineate the type of rocks that can extend maritime jurisdiction and that which cannot.

The preparatory works of the UNCLOS seem to indicate that the term "rocks" in Article 121(3) constitutes small-sized islands, but this was not reflected in the final draft of the UNCLOS. As such, Article 121(3) has remained undefined, particularly on the size or nature of rocks contemplated. The only unequivocal criteria that can be used to differentiate rocks from islands are enshrined in Article 121(3) as discussed above. In the author's view, the lack

³⁹ Jonathan L Hafetz, 'Fostering Protection of the Marine Environment and Economic Development: Article 121(3) of the Third Law of the Sea Convention' (2000) 15 *Am. U. Int'l L. Rev.* 590 <<https://www.wcl.american.edu/journal/ilr/15/hafetz.pdf>> accessed 17 January 2017.

⁴⁰ *ibid.*

of explicit criteria was meant to limit states from making distorted considerations in the delimitation of maritime zones. According to Hafetz, Article 121(3) was left ambiguous in order to be innocuous to all states.⁴¹ Consequently, the PCA's landmark ruling in the *South China Arbitration* came at the right time to bridge the gap that has often been characterised by different interpretations of Article 121(3).

While considered by the affected states as controversial, the ruling resolves the ambiguity by construing the text of Article 121(3) from an objective perspective. Admittedly, some of the affected states have expressed their discontent against the ruling. China's position since the award was made in July 2016 has remained negative, with the Ministry of Foreign Affairs stressing that the award was invalid and without binding effect.⁴² In the author's view, the PCA considered virtually all the aspects, including photographic evidence presented by its own technical experts. The award, therefore, sets an important guideline that may be used to settle future disputes, reflecting on the object and purpose of the UNCLOS.

Conclusion

Maritime disputes have become widespread in the modern-day world. With the rapid technological advancement, developed states have found it easy to undertake projects on maritime space, thereby provoking sovereignty claims from other states. As such, the UNCLOS plays a very pivotal role in ensuring peaceful settlement of disputes as a means of protecting the maritime environment. It should, however, be noted that any deadlock on the interpretation of the Convention's provisions will undoubtedly create confusion in the delimitation process. It is on this basis that the author of this paper considers the PCA's

⁴¹ *ibid.*

⁴² Robert D Williams, 'Tribunal Issues Landmark Ruling in South China Sea Arbitration' (*LAWFARE*, 12 July 2016) <<https://www.lawfareblog.com/tribunal-issues-landmark-ruling-south-china-sea-arbitration>> accessed 16 January 2017; C J Jenner and Tran Truong Thuy, *The South China Sea: A Crucible of Regional Cooperation or Conflict-Making Sovereignty Claims* (New York: Cambridge University Press, 2016) 214.

award as setting a legitimate yardstick against which similar disputes can be resolved in future. In particular, the tribunal's objective interpretation and application of Article 121(3) lays down important elements that should be considered in differentiating between an island and a mere rock for purposes of Articles 13, 121(1) and (3) of the UNCLOS. While controversy has arisen in respect of the legitimacy of the arbitration, the provisions of the UNCLOS provide significant latitude for the tribunal to adjudicate on contentious questions of interpretation regardless of a State's refusal to participate as stated in Article 298. As for the Scarborough Shoal, the tribunal was properly informed by law and facts in finding that the Shoal was incapable of sustaining human habitation and economic activities without relying on artificial modifications or extractive activities. The five to seven protrusions seen at high tide on the Shoal have been characterised as tiny and not capable of meeting the threshold set out in Article 121(1) and (3). Apart from offering a viable ground for fishing activities, the Shoal cannot generate entitlement to maritime zones as alleged by China or Philippines. Evidence clearly points out that the Shoal and other contested features have historically acted as fishing grounds to many states and no state can objectively claim sovereignty without affecting the fishing rights of the others. It is in light of this that the tribunal found China's actions on the disputed reefs inimical to the need to protect maritime environments.

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