

# ROCKS V. ISLANDS: NATURAL TENSIONS OVER ARTIFICIAL FEATURES IN THE SOUTH CHINA SEA

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## ABSTRACT

This Note examines the international arbitration proceeding commenced on January 22, 2013 between the Republic of the Philippines and the People’s Republic of China (hereinafter *Philippines v. China*),<sup>1</sup> wherein China was accused of multiple violations of the United Nations Convention on the Law of the Sea. The analysis will focus on five of the fifteen submissions made by the Philippines during the arbitration proceeding. These submissions include allegations by the Philippines that China used sand dredging and construction efforts to artificially transform rocks and shoals into islands in an effort to claim exclusive use of the waters surrounding these features. This case differed from past controversies because it did not involve questions of sovereignty or maritime boundary delimitation. This Note discusses the procedure used by the Arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the Law of the Sea to apply Article 121(3) of the Convention to assess the features’ capabilities to support human habitation or economic life, and thus the features’ proper classifications. This Note further examines the Tribunal’s final decision regarding the status of each feature, and the maritime entitlement each feature is warranted based on that status. *Philippines v. China* offered a thorough and methodical approach to determine whether an enhanced feature should be classified as a “rock” or an “island”—a crucial outcome that determines China’s entitlements to a 200 nautical mile Exclusive Economic Zone or a 12 nautical mile Territorial Sea. As states continue to claim maritime entitlements based on the sovereignty and categorization of features, the decision and methodology examined herein can be applied to settle these future disputes in a predictable and fair way in accordance with the Convention on the Law of the Sea, and Articles 13 and 121.

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## I. INTRODUCTION

### A. *Maritime Law*

The Earth's seas facilitate the transport of 90% of global trade.<sup>2</sup> The fishing industry is estimated to account for the livelihood of 10–12% of the world's population, and generates over US\$129 billion in global exports.<sup>3</sup> Fair regulation of the seas is essential to promoting the peaceful and equitable use of oceans.<sup>4</sup> Such regulation includes clearly defining what parts of the oceans are under a country's exclusive control, what parts their neighbors control, and what parts are to be shared by all states responsibly.<sup>5</sup>

The United Nations Convention on the Law of the Sea (UNCLOS)<sup>6</sup> is the governing agreement on conduct and entitlements regarding our planet's oceans and seas.<sup>7</sup> UNCLOS standardizes how states determine which waters belong to whom—referred to here as maritime entitlements.<sup>8</sup> UNCLOS also regulates what duties countries have to protect the environmental integrity of oceans<sup>9</sup> and what activities countries can conduct in their own waters,<sup>10</sup> outside of their waters,<sup>11</sup> in emergency situations,<sup>12</sup> and for purposes of maritime scientific research.<sup>13</sup> There are further regulations regarding how countries can fish in their own waters;<sup>14</sup> how they can fish in other countries' waters;<sup>15</sup> each country's right to extract natural gas and oil from the

2. *IMO Profile*, INT'L MAR. ORG., <https://business.un.org/en/entities/13> (last visited Sept. 9, 2017).

3. *Oceans, Fisheries and Coastal Economies*, WORLD BANK (June 5, 2017), <http://www.worldbank.org/en/topic/environment/brief/oceans>.

4. See UNCLOS, *infra* note 6, Preamble (stating that the Convention would strengthen relations among nations and improve economic and social conditions for people around the world).

5. See *id.* (outlining the purpose of the treaty); *Philippines v. China*, ¶231 (describing the rights and obligations of all States within Maritime Zones).

6. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 7, [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf) [hereinafter UNCLOS].

7. See, e.g., UNCLOS, *supra* note 6, art. 3 (stating that coastal states may establish territorial seas up to 12 nm); see also *id.* art. 15 (directing neighboring coastal states how to determine their boundaries).

8. See, e.g., UNCLOS, *supra* note 6, art. 3 (stating that coastal states may establish territorial seas up to 12 nm); see also *id.*, art. 15, Delimitation of the territorial sea between States with opposite or adjacent coasts (directing neighboring coastal states how to determine their boundaries).

9. See UNCLOS, *supra* note 6, art. 145 (emphasizing the shared responsibility of all States to protect the marine environment when conducting any activity in the ocean).

10. See *id.* art. 33 (defining a State's own waters as extending 24 nm from the State's coastal baseline and describing the activities a State can conduct within those boundaries).

11. E.g., *id.* art. 58, ¶ 1 (granting within other countries' EEZ the freedom of navigation and overflight, the laying of cables and pipelines along the ocean floor, and other lawful uses of the sea).

12. See, *id.* art. 18 (permitting ships to sail through another State's territorial waters if they are just passing through or rendering assistance to a vessel in distress).

13. See, e.g., *id.* art. 240 (describing principles for the conduct of scientific research).

14. See *id.* art. 61 (directing Coastal States to manage fishing activities in their waters, and to specifically use conservation efforts to prevent overfishing).

15. *Id.* art. 62.

ocean floor within each country's maritime zones; and each country's responsibility to prevent maritime pollution based on gas and oil exploitation.<sup>16</sup> UNCLOS defines an island as "a naturally formed area of land, surrounded by water, which is above water at high tide."<sup>17</sup> Not all features in the ocean warrant maritime entitlements. In many cases, states value the use and control of the water and resources surrounding a feature rather than use of the feature itself.<sup>18</sup> An island that can support human habitation or economic life may possess a territorial sea, contiguous zone, an exclusive economic zone, and/or a continental shelf.<sup>19</sup> Coastal states have the most significant authority over territorial waters 12 nautical miles (nm)<sup>20</sup> from their coasts, less authority over the Exclusive Economic Zone (EEZ)<sup>21</sup> which extends 200 nm from their coast, and no control over the high seas which extend beyond the 200 nm EEZ.<sup>22</sup>

When countries or multinational companies cannot reach amicable solutions to disputes, international law provides mechanisms for countries to find workable outcomes.<sup>23</sup> Various procedures for settling disputes are established by the services and jurisdiction of the Permanent Court of Arbitration (PCA),<sup>24</sup> or within treaties and agreements between countries.<sup>25</sup> As many other treaties and conventions do, UNCLOS

16. *See id.* art. 193 (highlighting each State's right to exploit natural resources within their maritime zones); *see also id.* art. 133 (defining resources as including all solid, liquid, or gaseous natural resources); *see also id.* art. 194 (emphasizing each State's responsibility to prevent pollution of the maritime environment).

17. UNCLOS, *supra* note 6, art. 121, para. 1.

18. *See, e.g.,* Manuel Mogato, *Ahead of Summit, Philippines Shows Images of Chinese Boats at Disputed Shoal*, REUTERS (Sept. 7, 2016, 6:14 AM), <http://www.reuters.com/article/us-asean-summit-southchinasea-idUSKCN11D08P> ("Although the Scarborough Shoal is merely a few rocks poking above the sea, it is important to the Philippines because the fish stocks in the area.").

19. *See id.* art. 121.

20. *What is the Difference Between a Nautical Mile and a Knot?*, NAT'L OCEAN SERV., [https://oceanservice.noaa.gov/facts/nauticalmile\\_knot.html](https://oceanservice.noaa.gov/facts/nauticalmile_knot.html) (last visited Sept. 29, 2017) ("A nautical mile is based on the circumference of the earth, and is equal to one minute of latitude. It is slightly more than a statute (land measured) mile (1 nautical mile = 1.1508 statute miles). Nautical miles are used for charting and navigating.").

21. *What Is the EEZ?*, NAT'L OCEAN SERV., <https://oceanservice.noaa.gov/facts/eez.html> (last visited Sept. 10, 2017) ("[The] Exclusive Economic Zone (EEZ) extends no more than 200 nautical miles from the territorial sea baseline and is adjacent to the 12 nautical mile territorial sea of the [State].").

22. *See* UNCLOS, *supra* note 6, art. 3 (stating that states have sovereignty over waters within 12 nm of their coastlines); *see also id.* arts. 56–58 (stating the rights and duties of states within the EEZ and the breadth of the EEZ); *see also id.* art. 87 (describing the freedom of the high seas).

23. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 32–36, Nov. 4, 1950, E.T.S. No. 5 (stating the European Court of Human Rights jurisdictions and the procedures for bringing a case to the Court). *See generally* *Dispute Resolution Services*, PERMANENT COURT OF ARBITRATION, <https://pca-cpa.org/en/services/> (last visited Sept. 24, 2017) (listing the dispute resolution services the PCA provides including arbitration and mediation).

24. *See* *Dispute Resolution Services*, PERMANENT COURT OF ARBITRATION, <https://pca-cpa.org/en/services/> (last visited Sept. 29, 2017) (listing services provided by PCA) ("The PCA's functions are not limited to arbitration and also include providing support in other forms of peaceful resolution of international disputes, including mediation, conciliation, and other forms of alternative dispute resolution (ADR).")

25. *See* U.N. Charter, arts. 33–38 (describing procedures for the peaceful settlement of disputes). *See generally* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2,

contains dispute settlement provisions.<sup>26</sup>

UNCLOS parties in dispute are encouraged to dialogue amongst themselves before submitting to a third-party decision maker.<sup>27</sup> If dialogue does not resolve the dispute, the parties may seek help from one or more third-party entities to resolve the issue(s).<sup>28</sup> States may choose to bring their disputes to one or multiple international legal bodies accustomed to hearing disputes between countries, most significantly the following: the International Tribunal for the Law of the Sea (ITLOS); the International Court of Justice (ICJ); and the PCA.<sup>29</sup> For issues involving general interpretation and application of UNCLOS, submission to the PCA in The Hague is the general practice.<sup>30</sup> If the issue is one of sovereignty, it falls outside the scope of UNCLOS and is decided by the ICJ.<sup>31</sup>

Controversies can arise when neighboring countries contend that the other is encroaching on their maritime rights.<sup>32</sup> Just as neighboring landowners can disagree on where one lot ends and another begins, countries can also argue over where their territorial waters end and where a neighbor's waters begin.<sup>33</sup> When maritime entitlements of different countries overlap, or when State A asserts authority over waters and features that States B, C, and D also use, diplomatic tensions likely arise.<sup>34</sup>

1869 U.N.T.S. 401 (promulgating dispute settlement procedures for signatories of the WTO).

26. See UNCLOS, *supra* note 6, arts. 279–81.

27. See *id.* art. 283 (requiring States in dispute to exchange views to try to reach a settlement).

28. See *id.* arts. 286–87 (allowing ratifying States to choose one of multiple dispute resolution bodies for future conflicts concerning Convention interpretation or application).

29. See *id.* art. 287, para. 1 (listing several means for the settlement of disputes); *United Nations Convention on the Law of the Sea*, PERMANENT COURT OF ARBITRATION, <https://pca-cpa.org/en/services/arbitration-services/unclos/> (last visited Sept. 10, 2017) (stating that the PCA has administered the majority of UNCLOS Annex VII arbitrations to date).

30. See *United Nations Convention on the Law of the Sea*, PERMANENT COURT OF ARBITRATION, <https://pca-cpa.org/en/services/arbitration-services/unclos/> (last visited Sept. 29, 2017) (“Since the 1982 Convention came into force in 1994, the PCA has acted as registry in 12 cases that have been arbitrated under Annex VII of UNCLOS.”).

31. *E.g.*, Territorial and Maritime Dispute Between Nicaragua and Honduras in Caribbean Sea (Nicar. v. Hond.), Judgment, 2007 I.C.J. 659 (Oct. 8).

32. See, *e.g.*, Hyung-Jin Kim, *3 Chinese Fishermen Dead After Clash with SKorea Coast Guard*, ASSOCIATED PRESS (Sept. 30, 2016), <http://bigstory.ap.org/article/3d52f99ac8f94998ac42bc82ec1adfad/3-chinese-fishermen-dead-after-clash-skorea-coast-guard> (discussing how South Korean coast guards threw “flashbang” grenades to three Chinese fishermen who were fishing illegally).

33. See Jorge Antonio Quindimil López, *Maritime Delimitation*, OXFORD BIBLIOGRAPHIES, <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0119.xml?rskey=4AaAO3&result=1&q=maritime+delimitation#firstMatch> (last modified Jan. 15, 2015) (“[A]n international maritime boundary is established by agreement between the parties. In the absence of such an agreement, the parties formerly submitted the dispute to international adjudication.”).

34. See, *e.g.*, Dan De Luce, *Beijing Tells Seoul to Stay Calm and Carry On, After Chinese Fishermen Sink a South Korean Coast Guard Boat*, FOREIGN POLICY (Oct. 12, 2016, 4:52 PM), <http://foreignpolicy.com/2016/10/12/beijing-tells-seoul-to-stay-calm-and-carry-on-after-chinese-fishermen-sink-a-south-korean-coast-guard-boat/> (reporting diplomatic exchanges between China and South Korea after persistent illegal Chinese fishing in the Yellow Sea).

### **B. The South China Sea Arbitration**

This is the case in the South China Sea (SCS).<sup>35</sup> The SCS is surrounded by seven states and contains hundreds of islands, rocks, and shoals.<sup>36</sup> In 1948, the government of The People's Republic of China published nautical charts depicting China as owning the majority of the SCS.<sup>37</sup> China publicly made greater claims in diplomatic correspondence to the United Nations (UN) in 2009, when it declared itself the rightful owner of the entire SCS, including land features and the seabed.<sup>38</sup> Despite being a signatory to UNCLOS<sup>39</sup> and thereby accepting limits on maritime entitlements that all parties were bound to respect, China asserted ownership of a 3.5 million square kilometer sea.<sup>40</sup> China's claim reaches hundreds of nautical miles past the internationally recognized 200 nm EEZ of China.<sup>41</sup> China's claim significantly impacts maritime trade, as it covers waters "through which more than US\$5 trillion (S\$6.7 trillion) in shipborne trade passes every year."<sup>42</sup> In addition to existing trade routes, China's maritime claim is estimated to contain eleven billion barrels of oil and 193 trillion cubic feet of natural gas below the seabed.<sup>43</sup>

On January 22, 2013, after attempts to engage China in a discussion based on UNCLOS provisions,<sup>44</sup> the Republic of the Philippines submitted the dispute to the PCA.<sup>45</sup> The PCA provides "administrative support in international arbitrations involving various combinations of states, state entities, international organizations and

35. SCS is also known as the West Philippine Sea. *Philippines v. China*, at xx. Similarly, a certain other body of water is referred to either as the Arabian Gulf or the Persian Gulf, depending on whom one is speaking with. See Karen Zraick, *Persian (or Arabian) Gulf Is Caught in the Middle of Regional Rivalries*, N.Y. TIMES (Jan. 12, 2016), [http://www.nytimes.com/2016/01/13/world/middleeast/persian-gulf-arabian-gulf-iran-saudi-arabia.html?\\_r=0](http://www.nytimes.com/2016/01/13/world/middleeast/persian-gulf-arabian-gulf-iran-saudi-arabia.html?_r=0). This Note will utilize the South China Sea name, which is used in the majority of the sources cited throughout this Note.

36. In the Matter of an Arbitration (Phil. v. China), 2013-19 PCA Case Repository, Award on Jurisdiction and Admissibility, ¶ 3 (Perm. Ct. Arb. 2015) [hereinafter *Award on Jurisdiction*].

37. See *Philippines v. China*, ¶ 181 (mentioning the map published by China's Ministry of Interior). Appendices B-1 through B-3 show the extent of China's claims in the SCS. These excessive claims are referred to by others as the "nine-dash line." *Id.* at 67 n.131. It is also described as the "U-shaped line" or the "cow's tongue" due to its shape. *Id.*

38. See *id.* ¶ 182 (quoting diplomatic exchanges China sent to the U.N. Secretary General in which China claimed "indisputable sovereignty" of the regions land and water).

39. The Philippines ratified the Convention on May 8, 1984 and China on Jun. 7, 1996. *Philippines v. China*, ¶ 4.

40. See *Philippines v. China*, ¶ 187 (displaying China's statement claiming "indisputable sovereignty" over the SCS); see also *Award on Jurisdiction*, ¶ 3 (describing the size of the South China Sea).

41. *Philippines v. China*, ¶ 187 (showing China's formal statement claiming historical rights to all SCS islands).

42. Albert Wai, *Asean, China Introduce Measures to Dial Down Tensions in South China Sea*, TODAY ONLINE (Sept. 7, 2016), <http://www.todayonline.com/china/india/china/asean-and-china-introduce-measures-dial-down-tensions-south-china-sea>.

43. U.S. DEP'T OF DEF., THE ASIA-PACIFIC MARITIME SECURITY STRATEGY 5 (2015).

44. See *Philippines v. China*, ¶ 780 (stating that China rejected the Philippines' attempts to resolve the dispute peacefully).

45. See Press Release, Perm. Ct. Arb., Arbitration Between the Republic of the Philippines and the People's Republic of China (Aug. 27, 2013) (noting that arbitration began when the Philippines served China with a Notification and Statement of Claim).

private parties.”<sup>46</sup> The PCA was established in The Hague in 1899<sup>47</sup> and has provided arbitration services for parties to UNCLOS since it came into effect in 1994.<sup>48</sup> The PCA tasked the Tribunal with settling the matter,<sup>49</sup> which issued a final decision in favor of the Philippines on July 12, 2016.<sup>50</sup>

In all, the Philippines submitted fifteen separate issues (“Submissions”) of dispute that the state wanted the PCA to address.<sup>51</sup> This Note focuses on Submissions 3, 4, 5, 6, and 7,<sup>52</sup> which address the overarching questions of (1) how to decide whether a feature is a low-tide elevation or a high-tide elevation, and (2) whether high-tide elevations are considered “rocks” or “islands” under UNCLOS.<sup>53</sup> The answer to the second question determines whether China’s artificial or enhanced features warrant any maritime entitlements, such as a 12 nm territorial sea or 200 nm EEZ. This Note focuses on these topics because of the unprecedented depth of analysis the Tribunal applied to define a feature’s status—such a thorough analysis had not previously been undertaken by courts or tribunals in prior cases.<sup>54</sup>

Ultimately, the Tribunal held that of five of the eleven features China claimed to be islands under UNCLOS were low-tide elevations warranting no maritime entitlement,<sup>55</sup> despite China’s physical interventions. The Tribunal further held that the remaining six features that were initially assessed as high-tide elevations were rocks and warranted 12 nm territorial sea maritime entitlements,<sup>56</sup> but were not islands that would receive a 200 nm EEZ maritime entitlement.<sup>57</sup> Despite the artificial nature of

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46. *Arbitration Services*, PERMANENT COURT OF ARBITRATION, <https://pca-cpa.org/en/services/arbitration-services> (last visited Sept. 26, 2017).

47. *History*, PERMANENT COURT OF ARBITRATION, <https://pca-cpa.org/en/about/introduction/history/> (last visited Sept. 10, 2017).

48. UNCLOS, *supra* note 6.

49. See Press Release, Perm. Ct. Arb., *supra* note 45 (noting that the Philippines had brought a case to the Tribunal).

50. See Press Release, Perm. Ct. Arb., *The S. China Sea Arbitration* (July 12, 2016) (announcing and summarizing the Tribunal’s decisions on its jurisdiction and the merits of all fifteen Submissions by the Philippines).

51. *Philippines v. China*, ¶ 112.

52. *Id.* ¶¶ 279–648. The rest of the submissions challenged China’s claim to the entire SCS based on historical use, and alleged interference by China within the Philippines’ 200 nm EEZ. *Id.* Chinese interference included government vessels preventing Filipino fishermen from accessing traditional fishing grounds and surveying its own seabed for oil/natural gas, Chinese vessels harming the environment using harmful fishing practices and islands construction projects, dangerous sailing by Chinese Coast Guard vessels that put other vessels at risk of collision, and further exacerbating environmental damage once the Philippines submitted the complaint for arbitration. *Id.*

53. See *infra* Appendices A–B (listing the contested features).

54. See *Philippines v. China*, ¶ 474 (“Article 121 has not previously been the subject of significant consideration by courts or arbitral tribunals and has been accorded a wide range of different interpretations in scholarly literature.”).

55. See *Philippines v. China*, ¶ 474 (listing which features are considered high-tide features and low-tide elevations); *infra* Appendix A (listing the features reviewed by the Tribunal, their geographic positions, and their distances to Philippines and China).

56. *Id.* ¶¶ 643–45. See *infra* Appendix B for a chart listing the Article 13 and 121(3) conclusions of the Tribunal for each disputed feature.

57. See *id.*

the enhanced features—as described *infra* in Part IV—the Tribunal granted many of them maritime entitlements.

### C. Note Structure

This Note claims that in the South China Sea Arbitration Award, the appointed PCA Tribunal adopted a proper and methodical approach to determine the status of maritime features, in order to further determine a state's maritime entitlements. The steps utilized by the Tribunal to determine a maritime feature's ability to sustain human habitation or economic life—the qualities required to be a fully entitled “island” instead of a “rock”—can apply in future disputes over application of UNCLOS Articles 13<sup>58</sup> and 121.<sup>59</sup> As countries continue to claim maritime entitlements based on sovereignty of features, the PCA's method of determination can be applied to settle these disputes in a predictable and fair way in accordance with UNCLOS.

Part II of this Note will briefly review the history of the dispute between the parties and the procedure the PCA followed. Part III will examine Submissions 4 and 6, which address how to determine whether a feature is a low-tide elevation or a high-tide elevation. Classification as a low-tide elevation would produce no maritime entitlement,<sup>60</sup> while a high-tide elevation would allow further assessment to see if it is a fully ledged island.<sup>61</sup> Part IV will cover Submissions 3, 5, and 7, which address the rock versus island determination and the territorial rights associated with each. Part V will analyze the effectiveness of the Tribunal's decision, and offers a hypothetical application of the Tribunal's methodology to two undecided maritime entitlement disputes: (1) whether the Senkaku Islands are islands or rocks, and (2) whether Okinotorishima is an island or a rock. Japan possesses the Senkakus and Okinotorishima, and argues that they are all islands, whereas China and Taiwan argue that they are rocks. Part VI concludes by discussing a key limitation of the Tribunal's decision on the overall SCS issue.

## II. FACTS AND PROCEDURES CENTRAL TO THE ARBITRATION

Five of the seven states that border the SCS—Malaysia, the Philippines, China, Taiwan, and Vietnam—have spent decades laying claim to and utilizing SCS land features.<sup>62</sup> Countries have also used land reclamation processes around some

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58. See UNCLOS, *supra* note 6, art. 13.

59. *Id.* art. 121 (“An island is a naturally formed area of land, surrounded by water, which is above water at high tide.”).

60. *Philippines v. China*, ¶ 308 (holding that a low-tide elevation, not entitled to a 12-nm territorial sea, cannot also be entitled to a 200 nm EEZ).

61. See *id.* ¶ 390 (explaining that paragraph 3 of UNCLOS Article 121 distinguishes between two categories of naturally formed high-tide features, one of which generates an EEZ—“fully entitled islands”—and one that does not—“rocks”).

62. See, e.g., Ralph Jennings, *Civilians Helping Governments Stake Claims in South China Sea*, VOICE OF AM., (Dec. 26, 2016 4:19AM), <http://www.voanews.com/a/civilians-helping-governments-stake-claims-in-south-china-sea/3650842.html> (providing examples of SCS States running civilian tours to claimed features, or stationing civilians and military personnel on remote features to prevent another country from claiming them).



possessed features. For example, Vietnam has increased the size of two features it possesses in the Spratly Islands by 200,000 square meters, and Taiwan added five acres of land onto Itu Aba.<sup>63</sup> The Philippines intentionally ran a ship aground on Second Thomas Shoal in 1999 and permanently stationed Filipino military personnel aboard it, thereby strengthening its claim to that feature and the surrounding waters.<sup>64</sup>

Chinese expansion past its recognized EEZ caused initial feature-claiming and land reclamation activity by SCS countries to develop into interference and aggressive behavior at sea. Since 1995, Chinese ships have prevented Filipino fishermen from fishing near traditional fishing grounds within the Philippines' 200 nm EEZ.<sup>65</sup> In 2011, Chinese ships acted to prevent the Philippines from conducting oil and gas surveys on the seabed of the Philippines' EEZ by harassing survey ships sent by the Philippine government.<sup>66</sup> In 2012, the Chinese government even announced a law temporarily prohibiting all fishing in the SCS north of the 12th degree latitude line, which runs East-West through the Philippines' EEZ.<sup>67</sup> China also uses its Coast Guard to harass other states' maritime activities in the SCS.<sup>68</sup> In 2012, China began occupying the Scarborough Shoal,<sup>69</sup> which is well within the Philippines' EEZ, yet over 400 nm from mainland China.<sup>70</sup> Years of diplomatic exchanges between both countries did nothing to stem Chinese behavior, which ultimately led the Philippines to initiate arbitration proceedings on January 22, 2013.<sup>71</sup> Notably, China then ramped up land reclamation work around some of its SCS features, totaling over 2,000 acres of new landmass between the 2013 filing and the 2016 decision.<sup>72</sup>

After the Philippines filed for arbitration, the PCA and ITLOS formed a five member Tribunal composed of members from Germany, Poland, France, the Netherlands, and Ghana.<sup>73</sup> All UNCLOS arbitrators are selected from a list maintained

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63. BEN DOLVEN ET AL., CONG. RESEARCH SERV., R44072, CHINESE LAND RECLAMATION IN THE SOUTH CHINA SEA: IMPLICATIONS AND POLICY OPTIONS 20 (2015).

64. See Manuel Mogato, *Exclusive: Philippines Reinforcing Rusting Ship on Spratly Reef Outpost - Sources*, REUTERS (July 13, 2015, 9:26 PM), <http://www.reuters.com/article/us-southchinasea-philippines-shoal-exclu-idUSKCN0PN2HN20150714> ("It was eventually transferred to the Philippine navy, which deliberately grounded it on Second Thomas Shoal to mark Manila's claim to the reef in the Spratly archipelago of the South China Sea.").

65. See *Philippines v. China*, ¶ 686 (providing the Philippines' argument that China has prevented fishing at Mischief Reef and Second Thomas Shoal since 1995).

66. See, e.g., *id.* ¶ 656 (describing an encounter where Chinese ships harassed a Singaporean survey ship, even though it had received permits from the Philippine government to conduct survey operations within the Philippine EEZ).

67. See *id.* ¶¶ 671–78 (describing Chinese attempts to regulate fishing activity in parts of the SCS, far outside their EEZ).

68. Greg Torode, *Chinese Coast Guard Involved in Most South China Sea Clashes*, (Sept. 7, 2016, 4:31 AM), <http://www.reuters.com/article/us-southchinasea-china-coastguard-idUSKCN11C2LA> (detailing 45 clashes and standoffs in the South China Sea since 2010, 30 of which included Chinese Coast Guard vessels).

69. *Id.*

70. *Philippines v. China*, ¶ 284.

71. *Id.* ¶ 28.

72. DOLVEN ET AL., *supra* note 63, at 1.

73. See *Award on Jurisdiction*, ¶¶ 28–31 (selecting tribunal members in accordance with UNCLOS Article 3 of Annex VII).

by the U.N. Secretary-General and are “experienced in maritime affairs and [enjoy] . . . the highest reputation for fairness, competence and integrity.”<sup>74</sup> These judges are nominated by their countries of origin and elected by State Parties to UNCLOS by a two-thirds majority for nine-year terms.<sup>75</sup> UNCLOS Arbitration rules allow parties to pick one of the five arbitration panel members. The Philippines selected a German judge.<sup>76</sup> China did not appoint a member, so the President of ITLOS appointed a judge from Poland on behalf of China.<sup>77</sup>

From the outset of the Philippines’ arbitration, China publicly declared that they did not approve of any third-party dispute settlement influence<sup>78</sup> and refused to participate in the proceeding.<sup>79</sup> China did not want to recognize the authority of the Tribunal and used non-participation as a means to undermine the legitimacy of the proceedings and decision.<sup>80</sup> As a result of China’s abstention, in addition to hearing the merits of the dispute and awarding decisions, the Tribunal had to research and put into the record arguments that China would have made had it participated.<sup>81</sup> This made the task of the Tribunal much more difficult, because Article 9 of Annex VII of UNCLOS allows for proceedings to continue when one party refuses to participate, so long as the non-participating party’s rights are not violated.<sup>82</sup> This was not the first international dispute between states where one party refused to participate;<sup>83</sup> however,

74. UNCLOS, *supra* note 6, Annex VII, art. 2; *see also* Jerome A. Cohen, *Like It or Not, UNCLOS Arbitration Is Legally Binding for China*, E. ASIA FORUM (July 11, 2016), <http://www.eastasiaforum.org/2016/07/11/like-it-or-not-unclos-arbitration-is-legally-binding-for-china/> (“UNCLOS tribunal . . . consists of five of the world’s leading law of the sea experts.”).

75. *See* INT’L TRIBUNAL FOR THE LAW OF THE SEA, <https://www.itlos.org/en/general-information/> (last visited Sept. 22, 2017) (describing how UNCLOS arbitration judges are selected).

76. *See* UNCLOS, *supra* note 6, annex VII, art. 3(b); *see also* *Award on Jurisdiction*, ¶ 28.

77. *Award on Jurisdiction*, ¶ 29.

78. MINISTRY OF FOREIGN AFFAIRS 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 ¶ 3 (Dec. 7, 2014), [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1217147.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml) (“China and the Philippines have agreed, through bilateral instruments and the Declaration on the Conduct of Parties in the South China Sea, to settle their relevant disputes through negotiations. By unilaterally initiating the present arbitration, the Philippines has breached its obligation under international law.”).

79. *See Philippines v. China*, at i (listing no agents, counsel, or representatives for China); *see also* Cohen, *supra* note 74 (“But China declined to participate in the tribunal’s proceedings, unilaterally claiming that, since to its own satisfaction its arguments are legally correct, it need not present them for the tribunal’s impartial consideration. Despite this, the tribunal has done its best to evaluate China’s jurisdictional arguments.”).

80. *See Philippines v. China*, ¶ 31 (“Throughout the proceedings, the Chinese Embassy has . . . reiterated that ‘it will neither accept nor participate in the arbitration unilaterally initiated by the Philippines.’”).

81. *See id.* ¶¶ 126–27 (detailing how the Tribunal relied on past official Chinese government statements in lieu of their direct participation at the hearings).

82. *See id.* ¶ 119 (“Second, it protects the rights of the non-participating party by ensuring that a tribunal will not simply accept the evidence and claims of the participating party by default.”).

83. *See, e.g.*, *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14 (June 27) (United States refused to participate in ICJ proceedings); *In the matter of the Arctic Sunrise Arbitration* (Neth. v. Russ.), 2014-02 PCA Case. Repository, *Award on Jurisdiction*, ¶ 2, (Perm. Ct. Arb. Nov. 26) (Russia refused to participate in PCA arbitration for UNCLOS violation).

the Tribunal recognized that its decisions would be carefully examined for bias against China.<sup>84</sup> Accordingly, the Tribunal had to make a good faith effort to ensure Chinese positions were accounted for, and that the decision did not punish China for its lack of participation.<sup>85</sup> On the other hand, the Tribunal noted that it would not be fair to be overly critical of the Philippines' arguments simply because they were the only party to participate in good faith.<sup>86</sup>

#### A. *Pre-Decision Issue of Proper Jurisdiction*

Before considering the merits of the dispute, the Tribunal addressed the question of jurisdiction.<sup>87</sup> Though China did not formally participate, it released numerous statements during arbitration that were used to put China's positions on the record.<sup>88</sup> Despite China's position that it did not recognize the authority of the Tribunal, timely publication of China's position papers, statements, and press releases that exceeded the purposes of consistent and persistent objection suggest otherwise. These actions suggest that China did recognize the Tribunal's power, because a logical actor would not be concerned with monitoring and influencing the outcome of a case before a truly meaningless Tribunal. The Ministry of Foreign Affairs of China released public statements in response to Tribunal decisions<sup>89</sup> and commented on what was discussed at the Tribunal hearings during press conferences.<sup>90</sup> It is because of these indirect attacks on the Tribunal's authority that the judges bifurcated the proceedings to settle jurisdictional issues first.<sup>91</sup> China's main contention that the Tribunal lacked jurisdiction centered on the overall nature of the Philippines' submissions, essentially arguing that the nature of the dispute was one of sovereignty and therefore inappropriate for the PCA.<sup>92</sup> The issue of sovereignty is relevant because it determines which country is the rightful owner and user of a disputed piece of land, an area of ocean, or a maritime feature.

Past disputes over maritime entitlements between states required the court to

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84. See *Philippines v. China*, ¶ 121 (detailing the Tribunal's acts to ensure China's procedural rights were protected).

85. See, e.g., *id.* ¶¶ 298–302 (citing China's position papers, public statements, and diplomatic correspondence to understand the country's position regarding the status of maritime features discussed in Part III below).

86. See *id.* ¶ 122 (stating that a participating party should not be disadvantaged because of the non-appearance of the non-participating party).

87. The Award on Jurisdiction was issued on Oct. 29, 2015. See *Award on Jurisdiction*, at i.

88. *Philippines v. China*, ¶ 127 (“Indeed, the Tribunal has taken note of the regular press briefings of the Chinese Ministry of Foreign Affairs, which frequently touch on issues before the Tribunal, and occasionally contain statements exclusively dedicated to aspects of the arbitration.”).

89. See, e.g., MINISTRY OF FOREIGN AFFAIRS OF CHINA, STATEMENT ON THE AWARD ON JURISDICTION AND ADMISSIBILITY OF THE SOUTH CHINA SEA ARBITRATION BY THE ARBITRAL TRIBUNAL ESTABLISHED AT THE REQUEST OF THE REPUBLIC OF THE PHILIPPINES (2015), [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1310474.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1310474.shtml).

90. See, e.g., Press Conference from Foreign Ministry Spokesperson Hong Lei, Ministry of Foreign Affairs of the People's Republic of China (Dec. 21, 2015), <http://kw.china-embassy.org/eng/fyrth/t1326449.htm>.

91. See *Award on Jurisdiction*, ¶ 68.

92. *Id.* ¶ 133.

determine sovereignty over the feature, and delimit maritime boundaries that form the entitlements.<sup>93</sup> A key difference between *Philippines v. China* and prior maritime entitlement disputes is that the prior cases were between neighboring countries with overlapping entitlements and shared borders.<sup>94</sup> As such, those final decisions required drawing new maritime borders between geographically abutted parties. Determining the rightful owner of the feature influenced the maritime entitlement, which then allowed the judicial body to create the border. On some occasions, the parties to a dispute agreed on what the maritime entitlement should be, thereby leaving only the issue of sovereignty.<sup>95</sup> Unlike prior cases, this case did not involve neighboring parties with overlapping entitlements: China and the Philippines are on opposite ends of the SCS. In fact, of all the disputed features in *Philippines v. China*, the one closest to mainland China was over 400 nm away.<sup>96</sup>

Since the Philippines did not challenge sovereignty, the Tribunal could avoid deciding issues of sovereignty so long as no overlapping entitlements existed.<sup>97</sup> The Tribunal heard argument in The Hague in July 2015<sup>98</sup> and issued its Award on Jurisdiction on October 29, 2015.<sup>99</sup>

### III. DETERMINING WHETHER A FEATURE IS A LOW-TIDE OR A HIGH-TIDE ELEVATION

Of the hundreds of features in the SCS, this arbitration focused on eleven reefs or shoals.<sup>100</sup> The Tribunal made clear throughout the process that a feature would not be

93. For cases that determined sovereignty first before drawing maritime boundaries in accordance with the initial sovereignty determination, see *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahr.), Judgment, 2001 I.C.J. Rep. 97 (Mar. 16); *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (Nicar. v. Hond.), Judgment, 2007 I.C.J. Rep. (Oct. 8).

94. See *Qatar v. Bahr.*, 2001 I.C.J. ¶ 35; *Nicar. v. Hond.*, 2007 I.C.J. ¶¶ 26–7; see also *Maritime Delimitation in the Black Sea* (Rom. v. Ukr.), Judgment, 2009 I.C.J. Rep. (Feb. 3).

95. See, e.g., *Rom. v. Ukr.*, 2009 I.C.J. ¶ 33; *Nicar. v. Hond.*, 2007 I.C.J. ¶ 227.

96. *Philippines v. China*, ¶ 284 (describing Scarborough Shoal).

97. *Id.* ¶ 395 (“The Tribunal would only have jurisdiction to consider the Philippines’ Submissions if it found that only the Philippines were to possess [sic] an entitlement to an exclusive economic zone and/or continental shelf in the areas where China’s allegedly unlawful activities occurred.”) If the Tribunal found that there were overlapping entitlements, the sea boundary would need to be determined, which is beyond the scope of this tribunal. *But see Award on Jurisdiction*, ¶¶ 401, 403; e.g., *Nicar. v. Hond.*, 2007 I.C.J. ¶¶ 259–320 (drawing sea boundaries in past disputes between neighboring countries with overlapping maritime entitlements); *Qatar v. Bahr.*, 2001 I.C.J. ¶ 217 (drawing sea boundaries in past disputes between neighboring countries with overlapping maritime entitlements).

98. *Award on Jurisdiction*, ¶ 86.

99. See *id.* ¶ 413.

100. The eleven features are as follows: Scarborough Shoal, Cuarteron Reef, Fiery Cross Reef, Johnson Reef, McKennan Reef, Hughes Reef, Gaven Reefs North and South, Subi Reef, Mischief Reef, and Second Thomas Shoal. *Philippines v. China*, ¶ 112. Johnson Reef, McKennan Reef, and Hughes Reef form part of a larger reef formation, Union Bank, which is in the center of the Spratly Islands. *Id.* ¶ 287. See Appendix A for a chart based on Award data. More than half of the disputed features claimed by China lie within the Philippines’ EEZ, and all eleven of the features in dispute are many hundreds of nautical miles outside of China’s EEZ. The English names of these geographic features are used in this Note, which mirrors the Tribunal’s labeling in its Award. See *id.* at xix

classified by simple linguistics, i.e., “reef,” “island,” or “shoal.”<sup>101</sup> The Tribunal also emphasized that, in determining the status of the features and their respective entitlements, analysis would be based on their natural status *prior* to any man-made enhancement.<sup>102</sup> This was an important clarification of criteria because China conducted substantial land reclamation activity on many of the disputed reefs and shoals prior to the Philippines initiating arbitration, and even more land reclamation work prior to the Tribunal’s final decision.<sup>103</sup> The Tribunal’s two-step process first determined the proper status of a feature, and then determined the extent of any warranted maritime entitlements.<sup>104</sup>

Through Submissions 4 and 6, the Philippines wanted the Tribunal to limit the maritime area any claimant could win in future sovereignty disputes:

(4)Mischief Reef, Second Thomas Shoal[,] and Subi Reef are low-tide elevations that do not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, and are not features that are capable of appropriation by occupation or otherwise;

...

(6)Gaven Reef and McKennan Reef (including Hughes Reef) are low-tide elevations that do not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, but their low-water line may be used to determine the baseline from which the breadth of the territorial sea of Namyt and Sin Cowe, respectively, is measured[.]<sup>105</sup>

For the first step of status determination, the Tribunal relied on UNCLOS Article 13:

Article 13 – Low-tide elevations

1. A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.

2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own.<sup>106</sup>

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(giving Chinese and Philippine names for SCS geographic features).

101. *Philippines v. China*, ¶ 482 (“A feature may have ‘Island’ or ‘Rock’ in its name and nevertheless be entirely submerged. Conversely a feature with ‘Reef’ or ‘Shoal’ in its name may have protrusions that remain exposed at high tide. In any event, the name of a feature provides no guidance . . .”).

102. *Id.* ¶ 305 (“As a matter of law, human modification cannot change the seabed into a low-tide elevation or a low-tide elevation into an island. A low-tide elevation will remain a low-tide elevation under the Convention, regardless of the scale of the island or installation built atop it.”).

103. *See id.* ¶ 854 (describing scale of China’s island construction project initiated at end of 2013).

104. Part III of this Note covers step one, low-tide vs. high-tide elevation; Part IV covers step two, rock vs. island.

105. *Philippines v. China*, ¶ 281.

106. UNCLOS, *supra* note 6, art. 13; *quoted in Philippines v. China*, ¶ 308 (explaining that a

### A. *Tribunal's Methodology and Application of UNCLOS Article 13*

If a feature is completely submerged at high tide, it is considered a low-tide feature that receives no maritime entitlement.<sup>107</sup> The Tribunal re-emphasized that analysis of features is based on their naturally occurring condition, and not any human-made efforts to turn a submerged feature into a low-tide elevation or, conversely, a low-tide elevation into a high-tide elevation.<sup>108</sup>

To determine the status of the features, the Tribunal reviewed the evidence presented by the Philippines and conducted its own analysis of non-Philippine tidal data and nautical charts made by foreign navies.<sup>109</sup> The Tribunal reviewed old nautical charts and sailing directions<sup>110</sup> but ensured that those various sources were based on different data and observations, taken on different days and at different times.<sup>111</sup> Though a state may issue a map claiming ownership of certain territory, such issuance is not determinative.<sup>112</sup> The Tribunal did not rely on satellite imagery provided by the Philippines due to resolution imprecision applied to much smaller sized features.<sup>113</sup> The Tribunal also considered that different countries define “high-tide” in different ways, and therefore examined multiple measurements incorporating those different definitions.<sup>114</sup>

### B. *Tribunal's Status Determination Regarding Low-Tide or High-Tide Features*

For each of the eleven disputed features,<sup>115</sup> the Tribunal cited the historical sources used to reach their determination.<sup>116</sup> Five features—Hughes Reef, Gaven Reef

low-tide elevation generally does not generate a 12 nm territorial sea of its own).

107. UNCLOS, *supra* note 6, art. 13, para. 1.

108. *Philippines v. China*, ¶ 305 (“As a matter of law, human modification cannot change the seabed into a low-tide elevation or a low-tide elevation into an island. A low-tide elevation will remain a low-tide elevation under the Convention, regardless of the scale of the island or installation built atop it.”).

109. *See id.* ¶ 318. The Tribunal did not conduct its own in-person tide cycle observations or commission its own nautical surveys due to the time and effort required and the plethora of information available, and because some of the features have been already built up by man-made efforts which precluded observation in their naturally-formed state. *See Philippines v. China*, ¶ 306.

110. *See id.* at 142 n.318 (citing data from the United Kingdom from 1865).

111. *See id.* ¶¶ 327–32. Sailing directions are like travel advisories for ships. They tell anyone sailing in that area to be on the lookout for hazards and or aids to navigation. *See* Sailing Directions, LANDFALL, <http://www.landfallnavigation.com/gsailingdir.html> (last visited Sept. 25, 2017). Using sources with different data prevents false reliance on what an observer may think are different sources, but in actuality all have the same set of original information and are practically the same source, different only in name and publishing country.

112. Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), Judgment, 2007 I.C.J. Rep. 08, ¶ 217 (Oct. 8) (quoting Frontier Dispute (Burk. Faso v. Republic of Mali), Judgment, 1986 I.C.J. Rep. 3, (Jan. 10)).

113. *See Philippines v. China*, ¶ 322 (explaining that the size of features in dispute are in many cases smaller than the maximum resolution size of satellite images, and therefore unreliable for these purposes).

114. *Id.* ¶¶ 310–19 (describing how the Tribunal correlated tidal data from Philippine, Chinese, British, and Japanese sources).

115. *See infra* Appendix A, for the position of the eleven disputed features.

116. *Philippines v. China*, ¶¶ 333–34 (determining status of Scarborough Shoal); *id.* ¶¶ 335–39 (determining status of Cuarteron Reef); *id.* ¶¶ 340–43 (determining status of Fiery Cross Reef); *id.* ¶¶

South, Subi Reef, Mischief Reef, and Second Thomas Shoal—were each determined to be low-tide features that generate no maritime entitlement of their own.<sup>117</sup> Of those five low-tide features, three lie within 12 nm of high-tide features,<sup>118</sup> which may ultimately extend territorial sea entitlements of the nearby high-tide features depending on the status determination discussed in Part IV of this Note,<sup>119</sup> if both features belong to the same state.

#### IV. DIFFERENTIATING BETWEEN TYPES OF HIGH-TIDE ELEVATIONS: ROCK VS. ISLAND

Following the Tribunal’s determination that five of the eleven disputed features were low-tide elevations—warranting no maritime entitlement—the Tribunal examined the remaining six high-tide features.<sup>120</sup> In its review of Submissions 3, 5, and 7, the Tribunal further examined the remaining six features that were previously determined to be high-tide elevations, to determine whether they were full-fledged islands, or, simply, rocks.<sup>121</sup> Submissions 3, 5, and 7 focus on maritime entitlements, but the Tribunal first addressed confirming the classification of the high-tide feature:

(3) Scarborough Shoal generates no entitlement to an exclusive economic zone or continental shelf;

...

(5) Mischief Reef and Second Thomas Shoal are part of the exclusive economic zone and continental shelf of the Philippines;

...

(7) Johnson Reef, Cuarteron Reef and Fiery Cross Reef generate no entitlement to an exclusive economic zone or continental shelf[.]<sup>122</sup>

If the feature is determined to be a rock under UNCLOS Article 121(3), it is accorded a 12 nm territorial sea and 12 nm contiguous zone.<sup>123</sup> If it is determined to be an island under that same paragraph, it is entitled to a 200 nm EEZ and a continental

344–51 (determining status of Johnson Reef); *id.* ¶¶ 352–54 (determining status of McKennan Reef); *id.* ¶¶ 355–58 (determining status of Hughes Reef); *id.* ¶¶ 359–66 (determining status of Gaven Reefs North and South); *id.* ¶¶ 367–73 (determining status of Subi Reef); *id.* ¶¶ 374–78 (determining status of Mischief Reef); *id.* ¶¶ 379–81 (determining status of Second Thomas Shoal).

117. *Id.* ¶ 383; *see infra* Appendix B, for a chart summarizing the rock vs. island analysis.

118. *Philippines v. China*, ¶ 384 (showing Hughes Reef, Gaven Reef, and Subi Reef to be the three closest to high-tide features).

119. *See* UNCLOS, *supra* note 6, art. 13 (“Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.”).

120. *Philippines v. China*, ¶ 383.

121. *Id.* ¶ 385.

122. *Id.*

123. *See* UNCLOS, *supra* note 6, art. 33 (defining contiguous zone as an area that extends beyond a coastal State’s territorial waters, allowing that State to exercise control necessary to enforce customs, fiscal, immigration, or sanitary laws). *See also* J. Ashley Roach & Robert W. Smith, *Legal Divisions of the Oceans and Airspace*, 66 INT’L L. STUD. SER. U.S. NAVAL WAR COL. 21, 103 (1994) (“The contiguous zone is comprised of international waters through which ships . . . of all nations enjoy the high seas freedoms of navigation . . .”).

shelf, “the same entitlements under [UNCLOS] as other land territory.”<sup>124</sup> The key language in Article 121 is within paragraph 3, which provides the standard for judging whether a feature is an island or merely a rock: “Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”<sup>125</sup>

The Tribunal focused on Section 3 of Article 121, assessing on a case-by-case basis whether each disputed feature can support human habitation or economic life, in order to then classify each as a rock or an island.<sup>126</sup>

#### ***A. New Approach to Status Determination and Maritime Delimitation under UNCLOS Article 121(3)***

The Tribunal’s focus on Article 121(3), determining what it means to “sustain human habitation or economic life,” is significant because past cases involving maritime delimitation did not address this question with the thoroughness of *Philippines v. China*.<sup>127</sup> Past cases differed because their central issues included sovereignty and concerned features that existed within maritime zones of neighboring countries.<sup>128</sup> Knowing which party is sovereign over disputed features allowed courts to draw new boundaries between neighboring countries,<sup>129</sup> but did not involve the same contested definition of features as *Philippines v. China*.

In *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, the ICJ determined the sovereignty of islands claimed by neighboring Arabian Gulf countries, and then drew a single maritime boundary based on the sovereignty judgments.<sup>130</sup> To determine the status of disputed features, the ICJ

124. *Philippines v. China*, ¶ 389.

125. UNCLOS, *supra* note 6, art. 121. “The continental shelf and the exclusive economic zone (EEZ) are distinct maritime zones. The continental shelf includes only the seabed and subsoil; whereas the EEZ includes the water column. Also, while the maximum extent of the EEZ is 200 nautical miles, the continental shelf may extend beyond 200 nautical miles from the coastline, depending on the depth, shape, and geophysical characteristics of the seabed and sub-sea floor.” *FAQ, U.S. EXTENDED CONT’L SHELF PROJECT*, <https://www.continentalshef.gov/faq/index.htm> (last visited Sept. 13, 2017). Continental shelves are defined and measured under UNCLOS Article 76, and are set to normally extend 200 nm, like the EEZ. If a coastal state claims that its continental shelf extends past 200 nm, it may submit its measurements to the Commission on the Limits of the Continental Shelf. UNCLOS, *supra* note 6, art. 76. *See id.* annex II, arts. 4–9 (detailing procedures for applying for an Extended Continental Shelf).

126. *Philippines v. China*, ¶¶ 508–11.

127. *See id.* ¶ 474 (“Article 121 has not previously been the subject of significant consideration by courts or arbitral tribunals and has been accorded a wide range of different interpretations in scholarly literature.”).

128. *See* Maritime Delimitation in the Black Sea (Rom. v. Ukr.), Judgment, 2009 I.C.J. Rep. 61 (Feb. 3); Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), Judgment, 2007 I.C.J. Rep. 08, 659 (Oct. 8); Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), Judgment, 2001 I.C.J. Rep. 40 (Mar. 16); Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 I.C.J. Rep. 624 (Nov. 19).

129. *See, e.g.*, Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 I.C.J. Rep. 624, 711, 714 (Nov. 19); Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.), Judgment, 2007 I.C.J. Rep. 659, 761–62 (Oct. 8) (displaying maps of newly drawn boundaries).

130. Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v.



distinguished between low-tide elevations and islands, and defined any island in accordance with Article 121(1).<sup>131</sup> The Court did not identify them as high-tide elevations using the Article 121(3) criteria.<sup>132</sup> The ICJ needed to determine sovereignty before drawing a single maritime boundary between the two countries because the disputed features existed in overlapping maritime zones.<sup>133</sup>

In *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, a dispute over Caribbean Sea maritime features that lay off the coasts of neighboring countries,<sup>134</sup> the ICJ first determined sovereignty of the features<sup>135</sup> and then drew a single maritime boundary between the zones of both countries, beginning at the coast and extending seaward.<sup>136</sup> The Court did not reach application of Article 121(3) because neither party argued that any feature should be entitled to anything more than a 12 nm territorial sea.<sup>137</sup>

In *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, a dispute over whether a Black Sea feature possessed by Ukraine was a full-fledged island, Romania argued that Serpents' Island was a rock, while Ukraine argued that it was an island.<sup>138</sup> However, the ICJ did not conduct an Article 121(3) analysis, because both parties agreed that maritime entitlements of the feature was limited to a 12 nm territorial sea, which the ICJ found would remain in effect.<sup>139</sup> There was no reason to examine Serpents' Island's ability to support human habitation or economic life to decide whether it was entitled to a 200 nm EEZ, because any EEZ assignable to Serpents' Island was enveloped by the Ukrainian EEZ from its mainland coast.<sup>140</sup> Prior to the ICJ's ruling, Ukraine argued that Serpents' Island was not a rock because it had

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Bahr.), Judgment, 2001 I.C.J. Rep. 40, ¶ 1, at 44 (Mar. 16) (“relating to ‘sovereignty over the Hawar islands, sovereign rights over the shoals of Dibal and Qit’ at Jaradah, and the delimitation of the maritime areas of the two States”).

131. UNCLOS, *supra* note 6, art. 121 (“An island is a naturally formed area of land, surrounded by water, which is above water at high tide.”).

132. *Qatar v. Bahr.*, 2001 I.C.J. ¶ 195.

133. *Id.* ¶ 1, at 44.

134. *Nicar. v. Hond.*, 2007 I.C.J. ¶ 136 (“There are four relevant cays involved, Bobel Cay, Savanna Cay, Port Royal Cay and South Cay. All of these cays are located outside the territorial sea of the mainland of both Nicaragua and Honduras.”).

135. *See id.* ¶ 208 (“[T]he Court finds that the *effectivités* invoked by Honduras evidenced an ‘intention and will to act as sovereign’ and constitute a modest but real display of authority over the four islands.”).

136. *Nicar. v. Hond.*, 2007 I.C.J. Sketch Map No. 5, at 754; *see also id.* Sketch Maps Nos. 7 & 8, at 761–62.

137. *Id.* ¶ 137 (“The Court notes that the Parties do not dispute the fact that [the features] remain above water at high tide . . . The Court further notes that the Parties do not claim for these islands any maritime areas beyond the territorial sea.”).

138. *Maritime Delimitation in the Black Sea (Rom. v. Ukr.)*, Judgment, 2009 I.C.J. Rep. 61 (Feb. 3).

139. *Id.* ¶¶ 187–88 (“The Court further recalls that a 12-nautical-mile territorial sea was attributed to Serpents' Island pursuant to agreements between the Parties.”).

140. *Id.* ¶ 187 (“[A]ny continental shelf and exclusive economic zone entitlements possibly generated by Serpents' Island could not project further than the entitlements generated by Ukraine's mainland coast . . . [and] are fully subsumed by the entitlements generated by the western and eastern mainland coasts of Ukraine itself.”).

vegetation and fresh water to support human habitation and “sustain an economic life of its own.”<sup>141</sup>

In *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, the ICJ settled issues of status and sovereignty between parties over maritime features in the Caribbean Sea,<sup>142</sup> and then drew maritime boundaries accounting for their judgment and pre-existing maritime boundaries.<sup>143</sup> The court briefly touched on the difference between islands that receive maritime entitlements, and low-tide elevations that do not.<sup>144</sup> However, the court did not delve into issues of human habitation, because the parties in this case agreed that some of the disputed features were islands, but disagreed as to others.<sup>145</sup> Unlike *Philippines v. China*—which only concerned status determination—sovereignty was a central issue along with status determination, both of which needed resolution before the ICJ could create maritime boundaries.<sup>146</sup>

*Philippines v. China* differs from these prior cases because the criteria used to assess a feature’s ability to support human habitation or economic life had not been explored in such detail prior to this decision. Unlike these cases, in *Philippines v. China*, sovereignty was not discussed because there was no instance of overlapping maritime entitlements that required the Tribunal to draw new maritime borders. In *Philippines v. China*, the two-step process to determine low-tide vs. high-tide elevation, followed by rock vs. island determination—two types of high-tide elevations that warrant different entitlements—was put into practice for the first time.

### ***B. Assessing a Feature’s Ability to Support Human Habitation or Economic Life in its Natural Condition***

According to the Tribunal and the provisions of UNCLOS, determining a feature’s ability to support human habitation or economic life must take into account only the feature’s natural attributes, and not any external human modification.<sup>147</sup> To include human modification in a status determination would go against the purpose of Article 121(3), which is to prevent states from taking actions to extend their maritime zones.<sup>148</sup> Article 121(3) prevents “excessive and unfair claims by States,” which might compel their citizens to live on features that would be uninhabitable without outside support for the sole purpose of staking a claim to it and enjoying the newly entitled

141. *Id.* ¶ 184 (“Ukraine further asserts that Serpents’ Island ‘is an island with appropriate buildings and accommodation for an active population.’”).

142. *Territorial and Maritime Dispute (Nicar. v. Colom.)*, Judgment, 2012 I.C.J. Rep. 636, ¶ 17 (Nov. 19).

143. *Id.* ¶ 184

144. *Id.* ¶ 26 (stating that islands are capable of appropriation regardless of size).

145. *Id.* ¶ 27 (“The Parties agree that Albuquerque [sic] Cays, East-Southeast Cays, Roncador, Serrana, Serranilla and Bajo Nuevo remain above water at high tide and thus, as islands, they are capable of appropriation. They disagree, however, as to whether any of the features on Quitasueño qualify as islands.”).

146. *Id.* ¶ 25 (“Before addressing the question of sovereignty, the Court must determine whether these maritime features in dispute are capable of appropriation.”).

147. *Philippines v. China*, ¶ 508 (“The status of a feature must be assessed on the basis of its natural condition.”). See UNCLOS, *supra* note 6, art. 121 (“An island is a *naturally* formed area of land . . .”) (emphasis added).

148. *Philippines v. China*, ¶ 509.

maritime zones generated by changed status.<sup>149</sup>

This single measure of interpretation heavily influenced the final decisions of the Tribunal. By the time the Tribunal assessed each feature, China had performed extensive construction on many of the disputed features, essentially turning them from insignificant specks in the sea into man-made, artificial “islands.”<sup>150</sup> The construction of artificial islands was accomplished using ships and barges that employed two types of sand dredging: either sucking sand from the sea floor and piling it on top of the feature, or using a metal grinder to dig up the sand and coral and pile it on top of the feature.<sup>151</sup> The work undertaken to build artificial islands was so extensive that the Tribunal included photos in the Award decision to demonstrate how the features had completely changed.<sup>152</sup> China ramped up its island-building in September 2013, nine months after the Philippines initiated arbitration.<sup>153</sup> In less than three years, China created more than 12.8 million square meters of new land.<sup>154</sup> Although other states conducted reclamation work in the SCS, China conducted reclamation work on a much greater scale.<sup>155</sup> The sand dredging resulted in enlarged or newly-created features, upon which China built harbors, military radars, structures to house troops, and runways long enough to support military aircraft.<sup>156</sup>

Lastly, the Tribunal also clarified that the presence of the word “rock” within a feature’s proper name does not determine its status,<sup>157</sup> nor does the geological composition of the feature factor into the status determination.<sup>158</sup>

### *C. Criteria Explored to Determine Ability to Support Human Habitation or*

149. *Id.* ¶ 550.

150. *Id.* ¶¶ 853–54 (detailing China’s construction efforts).

151. *Id.* ¶¶ 855–56 (describing sand-dredging methods). *See also id.* at 331 (for illustrations of sand dredging methods); *id.* at 335 (for photos of Chinese dredging operations).

152. *See id.* at 333–405 (showing photos of features before and after Chinese construction efforts: Cuarteron Reef at 341; for Fiery Cross Reef at 333, 343; for Johnson Reef at 347; Hughes Reef at 351; Gaven Reef North at 347; Subi Reef at 333, 353; Mischief Reef at 402, 405).

153. DOLVEN ET AL., *supra* note 63, at 1 (“Since September 2013, China has undertaken extensive land reclamation and construction on several reefs in the Spratly island chain in the southern part of the South China Sea . . .”).

154. *Philippines v. China*, ¶ 854.

155. DOLVEN ET AL., *supra* note 63, at 2 (“Other observers, including U.S. government officials, argue that the scale of China’s current reclamation dwarfs that by any other actor in the South China Sea.”).

156. *See id.* at 1 (describing post-reclamation construction on the island); *see also* David Brunnstrom, *China Installs Weapons Systems on Artificial Islands: U.S. Think Tank*, REUTERS (Dec. 15, 2016, 3:41 AM), <http://www.reuters.com/article/us-southchinasea-china-arms-exclusive-idUSKBN1431OK> (reporting Chinese installation of anti-aircraft and anti-missile systems on disputed features).

157. *See Philippines v. China*, ¶ 540 (“[U]se of the word ‘rock’ does not limit the provision to features composed of solid rock.”).

158. *Id.* ¶¶ 479–82; *see also id.* ¶ 446 (quoting Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 I.C.J. Rep. 624, ¶ 37, (Nov. 19) (“International law defines an island by reference to whether it is ‘naturally formed’ and whether it is above water at high tide, not by reference to its geological composition . . . . The fact that the feature is composed of coral is irrelevant.”)).

### *Economic Life*

To assess a feature's ability to support human habitation or economic life, the Tribunal considered: (1) evidence of prior human habitation sustained over a period of time; (2) potable water, vegetation, and shelter; (3) size of the feature; (4) ongoing human habitation; (5) non-transient human habitation; and (6) whether actions on a feature constituted economic activity or economic life.<sup>159</sup>

#### **1. Historical Records of Past Human Habitation**

The Tribunal emphasized historical records' abilities to show whether anything resembling a human community had ever developed on a feature.<sup>160</sup> In the Tribunal's interpretation of Article 121(3), a lack of historical evidence of habitation is an indication that the feature cannot support human habitation or economic life.<sup>161</sup>

If there was evidence of past human habitation, it had to have been non-transient habitation, where the people living on the feature were part of a natural population and lived off the resources of the feature and its surrounding waters.<sup>162</sup> For these purposes, human habitation consists of a "settled group or community for whom the feature is a home."<sup>163</sup> This analysis included a consideration of whether intervening factors prevented human habitation on a feature that had the physical conditions necessary to sustain it.<sup>164</sup>

#### **2. Potable Water, Vegetation, and Shelter**

For a feature to qualify as an island instead of a rock, it must "provide food, drink, and shelter to some humans to enable them to reside there permanently or habitually over an extended period of time[.]"<sup>165</sup> in a quantity to "enable a group of persons to live on the feature for an indeterminate period of time[.]"<sup>166</sup> and of a quality that allows for more than "mere survival."<sup>167</sup>

In its analysis of whether Itu Aba—a Spratly Island group feature possessed by Taiwan—could support human habitation, the Tribunal reviewed historical observations of freshwater well sizes and quality.<sup>168</sup> Wells that historically might have supported only a very small population were treated as potentially inadequate to

159. *Id.* ¶¶ 539–51.

160. *Id.* ¶ 549 (“[T]he most reliable evidence of the capacity of a feature will usually be the historical use to which it has been put.”).

161. *Id.* (“If the historical record of a feature indicates that nothing resembling a stable community has ever developed there, the most reasonable conclusion would be that the natural conditions are simply too difficult for such a community to form and that the feature is not capable of sustaining such habitation.”).

162. *Id.* ¶ 542.

163. *Philippines v. China*, ¶ 520.

164. *Id.* ¶¶ 548–49 (explaining that determination should consider whether war, pollution, and environmental harm precluded habitation on features that had sufficient food, water, and shelter).

165. *Id.* ¶ 490.

166. *Id.* ¶ 546.

167. *Id.*

168. *See id.* ¶¶ 581–84 (examining whether freshwater sources on Itu Aba provided enough drinkable water for a human population).

support current human habitation,<sup>169</sup> especially considering the ongoing effects of pollution and recent building.<sup>170</sup>

The Tribunal also looked to the historical variety and presence of vegetation to determine whether other Spratly features provided enough resources for food consumption and the provision of shelter.<sup>171</sup> The features must, at a minimum, have naturally present soils adequate to support agricultural development, such that the features could, “support a sizable population” without external intervention.<sup>172</sup>

### 3. Size of the Feature at High-Tide

The Tribunal relied on the meeting notes from UNCLOS III negotiations and the ICJ’s judgment in *Nicaragua v. Colombia* to emphasize that size qualifications alone cannot be enough to determine whether a feature is a rock or an island.<sup>173</sup> However, the Tribunal did explain that “[feature] size may correlate to the availability of water, food, living space, and resources for an economic life.”<sup>174</sup>

While the Tribunal concluded that life “size cannot be dispositive of a feature’s status as a fully entitled island or rock and is not, on its own, a relevant factor[.]”<sup>175</sup> several features in dispute were described as “miniscule” protrusions above the water at high-tide, and thus lacking adequate area to provide the resources necessary in the support of human habitation.<sup>176</sup>

### 4. Current Human Habitation

At the time the arbitration award was pronounced, many of the disputed features had become inhabited, but those inhabitants were government agents and military personnel whose ability to live there depended on deliveries of supplies from the mainland.<sup>177</sup> Habitation that is “only possible through outside support” does not reflect a feature’s ability to support human habitation in its natural condition.<sup>178</sup>

Where outside support is so significant that it constitutes a necessary

169. See *Philippines v. China*, ¶ 582 (quoting Hitoshi Hiratsuka, *The Extended Base for the Expansion of the Fishery Business to Southern Area: New Southern Archipelago—On-site Survey Report*, TAIWAN TIMES (May 1939)) (describing the size of fresh water wells on Itu Aba and the relative size of a potential supported population).

170. See *id.* ¶¶ 583–84 (highlighting that the water may be too salty and not suitable for drinking).

171. See *id.* ¶¶ 585–93, 615–17 (discussing vegetation and biology of the Spratly Islands).

172. See *id.* ¶¶ 594–96, 615–17 (describing limited agricultural potential of the Spratly Islands).

173. See *id.* ¶ 538 (quoting Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 I.C.J. Rep. 624, ¶ 33 (Nov. 19)) (“[I]nternational law does not prescribe any minimum size which a feature must possess in order to be considered an island.”).

174. *Philippines v. China*, ¶ 538.

175. *Id.* ¶ 538.

176. See, e.g., *id.* ¶ 556 (evaluating Scarborough Shoal’s ability to “sustain human habitation”); *id.* ¶ 558 (finding Johnson Reef incapable of “sustaining human habitation”).

177. See *id.* ¶ 550 (“Where outside support is so significant that it constitutes a necessary condition for the inhabitation of a feature . . . it is no longer the feature itself that sustains human habitation.”); see also *id.* ¶ 578 (noting that the current human presence on the Spratly Islands is “predominately military or governmental”).

178. *Id.* ¶ 550.

condition for the inhabitation of a feature, however, it is no longer the feature itself that sustains human habitation. In this respect, the Tribunal notes that a purely official or military population, serviced from the outside, does not constitute evidence that a feature is capable of sustaining human habitation.<sup>179</sup>

### 5. Non-Transient Habitation

When assessing any human habitation under Article 121(3)—past or present—inhabitants of a feature must consist of a “natural population . . . for whose benefit the resources of the exclusive economic zone were seen to merit protection.”<sup>180</sup> The inhabitants should be a “stable community of people for whom the feature constitutes a home and on which they can remain.”<sup>181</sup> Permanent presence is not necessary, as “[p]eriodic or habitual residence on a feature by a nomadic people[.]” or a shared presence among smaller islands within a larger group of islands in close proximity to each other could suffice.<sup>182</sup> The “critical factor” is non-transience established by evidence of past habitation.<sup>183</sup> This would preclude the past presence of peoples supporting a finding of habitability if those people were sent by the coastal state for a finite period to extract resources,<sup>184</sup> or were visitors who fished from the feature.<sup>185</sup>

### 6. Economic Life, Not Economic Activity

Economic life relates “to a process or system by which goods and services are produced, sold . . . or exchanged.”<sup>186</sup> The Tribunal ruled that determining whether a feature can support economic life is a local question, pertaining to the benefit of people living on or nearby the feature.<sup>187</sup> According to the Tribunal, the presence of the word “sustain” in Article 121 means that there is a time component to economic life, and cannot be satisfied by a “one-off transaction or short-lived venture[.]”<sup>188</sup>

The purpose of an EEZ and continental shelf is to allow the coastal state (i.e. the state adjacent) to utilize the resources in its vicinity for its benefit.<sup>189</sup> “Extractive

179. *Philippines v. China*, ¶ 550.

180. *Id.* ¶ 542.

181. *See, e.g., Philippines v. China*, ¶¶ 617–19 (rejecting evidence of on-again/off-again mining operations and commercial activity on high-tide features of the Spratly Islands as adequate proof of historical human habitation).

182. *Id.* ¶¶ 542, 617–19.

183. *Id.* ¶ 542.

184. *See, e.g., id.* ¶ 618 (rejecting evidence of on-again/off-again mining operations and commercial activity on high-tide features of the Spratly Islands, as adequate proof of historical human habitation).

185. *See, e.g., Philippines v. China*, ¶ 556 (holding that Scarborough Shoal cannot sustain human habitation despite serving as traditional fishing grounds).

186. *Id.* ¶ 499.

187. *See id.*, ¶ 543 (“The Tribunal considers that the ‘economic life’ in question will ordinarily be the life and livelihoods of the human population inhabiting and making its home on a maritime feature or group of features.”).

188. *Id.* ¶ 499.

189. *Id.* ¶ 513 (“[T]he purpose of the exclusive economic zone that emerges from the history of the Convention . . . was to extend the jurisdiction of States over the waters adjacent to their coasts and to preserve the resources of those waters for the benefit of the population of the coastal State.”).

economic activity” would not accomplish this purpose because economic life should be linked to human habitation of the same feature.<sup>190</sup> Also, the economic life cannot derive from a proposed 200 nm EEZ,<sup>191</sup> because maritime entitlements are endowed after determining what a feature is, not vice versa.<sup>192</sup> Therefore, for the purposes of establishing economic life, the benefit must not be for the “benefit of a population elsewhere,”<sup>193</sup> and the benefit must derive from the feature itself, or be linked to the feature in a meaningful way if it is derived within its 12 nm territorial sea.<sup>194</sup>

#### ***D. Tribunal’s Application of Article 121(3)’s Criteria to SCS Disputed Features***

To consider Article 121(3), the Tribunal reviewed evidence submitted by the Philippines,<sup>195</sup> and in the absence of China’s participation,<sup>196</sup> conducted its own review of historical maps, and observations by sailors, scientists, and experts.<sup>197</sup>

The Tribunal applied the criteria necessary for a feature’s ability to support human habitation or economic life to classify the six features assessed as high-tide features in Part III of this Note as either rocks or islands. The Tribunal found that these six features—Scarborough Shoal, Cuarteron Reef, Fiery Cross Reef, Johnson Reef, McKennan Reef, and Gaven Reef North—were all merely rocks due to their inability to support human habitation or economic life in their natural states.<sup>198</sup>

The features did not provide adequate potable water, vegetation, or living space to support sustained human habitation or economic life.<sup>199</sup> Either those resources were absent from the features in sufficient quantities to support a sizable community of people, or the features were so minuscule that habitation was impossible.<sup>200</sup> The classification of these features as rocks meant that they do not warrant an EEZ or

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190. *Philippines v. China*, ¶ 543 (explaining that exploitation of resources in and around a feature for the benefit of a far-away population results in economic *gain*, but not economic *life*).

191. *Id.* ¶ 502; *see, e.g., id.* ¶ 556 (explaining why fishing near Scarborough Shoal, while evidence of economic activity, does not constitute economic life).

192. *See id.* ¶ 502 (“It would be circular and absurd if the mere presence of economic activity in the area of the possible exclusive economic zone or continental shelf were sufficient to endow a feature with those very zones.”).

193. *Id.* ¶¶ 503, 543.

194. *See id.* ¶ 503, (“[E]conomic activity in the territorial sea could form part of the economic life of a feature, provided that it is somehow linked to the feature itself, whether through a local population or otherwise.”).

195. *See Philippines v. China*, ¶ 409 (“Based on a review of the origins and negotiating history, the Philippines discerns certain clear conclusions regarding the object and purpose of the provision.”).

196. *See id.* ¶¶ 458, 472.

197. *Id.* ¶¶ 12, 13, 119–42.

198. *See id.* ¶ 1203(B)(6) (“Scarborough Shoal, Gaven Reef (North), McKennan Reef, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef, in their natural condition, are rocks that cannot sustain human habitation or economic life of their own, within the meaning of Article 121(3) of the Convention . . .”).

199. *See id.* ¶¶ 554–70.

200. *See Philippines v. China*.

continental shelf.<sup>201</sup>

The temporary presence of fishermen, or inhabitants who temporarily lived on the feature to extract resources sent to the coastal state, was not strong enough evidence of past human habitation to meet this requirement and to allow the Tribunal to classify them as “islands” for the purposes of Article 121(3).<sup>202</sup>

#### ***E. Tribunal’s Voluntary Additional Analysis of Taiwan-Controlled Itu Aba***

UNCLOS provides that even though low-tide elevations do not generate their own territorial sea, they can extend the maritime entitlement of high-tide elevations—such as rocks and islands—if they lie within the territorial sea of that feature.<sup>203</sup> The Tribunal recognized that though it was not petitioned to consider such matters, other Spratly Island features “may impact” its decision.<sup>204</sup> The Tribunal assessed Itu Aba, as well as other high-tide features, out of recognition that “small island populations will often make use of a group of reefs or atolls to support their livelihood and, where this is the case, it does not consider that Article 121(3) can or should be applied in a strictly atomised fashion.”<sup>205</sup>

While the Philippines did not ask the Tribunal to consider Itu Aba,<sup>206</sup> the Philippines later argued that the Tribunal should not consider it an island.<sup>207</sup> Evidence that the majority of Taiwanese living on the islands are military personnel, and that Taiwan built a desalination plant to provide them with potable water, reflects Itu Aba’s inability to sustain human habitation or economic life.<sup>208</sup> The Philippines also argued that prior human habitation that was not for a military purpose—fishing, for example—was “short-lived” and did not meet the requirement of sustained human habitation.<sup>209</sup>

Ultimately, the Tribunal held that Itu Aba was not an island that warranted a 200 nm EEZ on top of a 12 nm territorial sea.<sup>210</sup> Evidence of past habitation of up to 600 people and the occurrence of economic activities such as farming, guano extraction,

201. *See id.* ¶ 1203(B)(6) (“Scarborough Shoal, Gaven Reef (North), McKennan Reef, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef generate no entitlement to an exclusive economic zone or continental shelf[.]”).

202. *See id.* ¶¶ 554–70.

203. UNCLOS, *supra* note 6, arts. 3–7. In other words, if a high-tide feature that gets 12 nm of territorial sea has low-tide elevations in it, that state’s territorial sea can extend 12 nm past the low-tide elevation—assuming it does not overlap another state’s maritime entitlement. *See id.*

204. *Philippines v. China*, ¶ 400.

205. *Id.* ¶ 572.

206. *See id.* ¶¶ 89, 92.

207. *See id.* ¶¶ 427–30 (detailing examples of inability to sustain human habitation or economic life).

208. *See id.*

209. *See Philippines v. China*, ¶ 429 (“[M]ilitary occupation for the sole purpose of asserting sovereignty does not suffice to prove capacity to sustain human habitation or an economic life.”).

210. *Id.* ¶ 646 (“[N]one of the high-tide features in the Spratly Islands are capable of sustaining human habitation or an economic life of their own[, and] . . . are therefore legally rocks for purposes of Article 121(3) and do not generate entitlements to an exclusive economic zone or continental shelf.”).



and fishing, was not sufficient for the Tribunal.<sup>211</sup> The Tribunal concluded that Itu Aba—and other high-tide features of the Spratly Islands—were “capable of enabling the survival of small groups of people”<sup>212</sup> but were nonetheless “not obviously habitable” based on the historical evidence.<sup>213</sup>

## V. ANALYSIS AND IMPLICATIONS OF TRIBUNAL DECISION

In aggregate, the Tribunal’s thorough application of Article 121(3) was proper. The decision clarified UNCLOS’s benchmarks that must be met for a feature to be classified as an island. According to the decision, a feature must include the ability to sustain human habitation or economic life, examined through the lens of its naturally occurring condition. The decision further explained how to assess the presence of human habitation or economic life. This decision’s analytical framework can be applied to future disputes over other maritime features, independent of the separate questions of who actually owns a feature, and how an appropriate boundary based on type of feature and ownership could be drawn.<sup>214</sup>

The Tribunal explained that “sustain[ing]” human habitation or economic life demands the following: (1) “the support and provision of essentials”; (2) the essentials are provided “over a period of time and not one-off or short-lived”; and (3) the support meets a “minimal ‘proper standard.’”<sup>215</sup>

Prior cases considering maritime entitlements and status determination of features followed a pattern of deciding sovereignty first, then determining the maritime entitlement, and then drawing boundaries where entitlements of parties overlap.<sup>216</sup> Some of the past cases did not fully address the human habitation question because they did not have to; the disputing parties had already mutually agreed on the feature’s status<sup>217</sup> or a maritime entitlement,<sup>218</sup> or the feature already existed within the

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211. See Ryan Scoville, *The South China Sea Arbitration: Implications for the Senkaku Islands*, LAWFARE (July 18, 2016, 1:43 PM), <https://www.lawfareblog.com/south-china-sea-arbitration-implications-senkaku-islands> (“Itu Aba has had fresh-water wells of sufficient quality and volume to support small groups of people; its vegetation has included, at one point or another, coconut, banana, plantain, and papaya trees, along with fields of palm, pineapple, cabbage, radish, and sugarcane.”).

212. *Philippines v. China*, ¶ 615.

213. *Id.* at ¶ 616.

214. See *id.* at ¶ 545 (“For this reason, the determination of the objective capacity of a feature is not dependent on any prior decision on sovereignty, and the Tribunal is not prevented from assessing the status of features by the fact that it has not and will not decide the matter of sovereignty over them.”).

215. *Id.* ¶ 487.

216. See, e.g., *Maritime Delimitation in the Black Sea (Rom. v. Ukr.)*, Judgment, 2009 I.C.J. Rep. 61 (Feb. 3); *Territorial and Maritime Dispute (Nicar. v. Colom.)*, Judgment, 2012 I.C.J. Rep. 624 (Nov. 19); *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahr.)*, Judgment, 2001 I.C.J. Rep. 40 (Mar. 16).

217. See, e.g., *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicar. v. Hond.)*, Judgment, 2007 I.C.J. 659, ¶ 137 (Oct. 8) (“The Court notes that the Parties do not dispute the fact that Bobel Cay, Savanna Cay, Port Royal Cay and South Cay remain above water at high tide. They thus fall within the definition and régime [sic] of islands under Article 121 of UNCLOS . . .”).

218. See, e.g., *id.* (“The Court further notes that the Parties do not claim for these islands any

200 nm EEZ of the same country's coastline.<sup>219</sup> This decision departed from that pattern and demonstrated that a detailed interpretation and application of Article 121(3)—determining the capacity of a feature to sustain human habitation or economic life—can be completed objectively without any regard to sovereignty.<sup>220</sup>

Such methodology will influence future disputes involving low-tide elevations submerged for significant parts of the day, and will ensure that they cannot be awarded the same maritime entitlement of a 200 nm EEZ as full-fledged islands. Furthermore, future disputes similar to *Qatar v. Bahrain* will not be resolved in high-tide elevations being granted the same weight during the boundary delimitating process as features that have human populations or supported them in the past.<sup>221</sup> Proper classification of disputed maritime features will enable parties to know in advance which entitlements could possibly be awarded, thus ensuring more efficient disposals of sovereignty questions and maritime boundary delimitations.<sup>222</sup>

The Tribunal's consistent assessment of features in their *natural condition* was a very important factor in the outcome of this case's inquiries and carries significant ramifications. For seven of the eleven disputed features in question, China transformed barely noticed shoals and rocks into military fortresses complete with runways, harbors, and buildings to support stationed personnel.<sup>223</sup> By many other measures, today these are fully functional islands that host human inhabitants,<sup>224</sup> though they were made using sand and stone pulled from nearby waters.<sup>225</sup> The

maritime areas beyond the territorial sea . . ."); *Rom. v. Ukr.* 2009 I.C.J. ¶ 188 ("The Court further recalls that a 12-nautical-mile territorial sea was attributed to Serpents' Island pursuant to agreements between the Parties.").

219. See, e.g., *Rom. v. Ukr.*, 2009 I.C.J. ¶ 187 ("Further, any possible entitlements generated by Serpents' Island in an eastward direction are fully subsumed by the entitlements generated by the western and eastern mainland coasts of Ukraine itself.").

220. See *Philippines v. China*, ¶ 554 ("The capacity of a feature is necessarily an objective criterion. It has no relation to the question of sovereignty over the feature."); see also Julian Ku & Christopher Mirasola, *Analysis: Chinese South China Sea Operations Ambiguous After Ruling*, USNI NEWS (Oct. 17, 2016, 3:20 PM), <https://news.usni.org/2016/10/17/analysis-chinese-south-china-sea-operations-ambiguous-ruling> (assessing Chinese government behavior within the first three months after the Tribunal's decision); *id.* ("The China-Philippines tribunal was the first to interpret these criteria, and it opted to construe them so as to '[prevent] encroachment on the international seabed' and '[avoid] the inequitable distribution of maritime spaces.'").

221. See *Qatar v. Bahr.*, 2001 I.C.J. ¶ 195 (deciding that Qit'at Jaradah is an island based on UNCLOS Article 121(1) and not a low-tide elevation).

222. See Scoville, *supra* note 211 ("If sovereignty is unlikely to carry with it an exclusive economic zone or rights to the continental shelf, then the parties simply have less incentive to contest title in the first place.").

223. See *Philippines v. China*, at ¶¶ 341, 343, 347, 351, 353, 405 (depicting dramatic before and after photos of Chinese reconstruction efforts); see also DOLVEN ET AL., *supra* note 63, at 3 (describing Chinese construction projects and possible military use of newly-built structures on SCS reefs).

224. See Christopher Mirasola, *What Makes an Island? Land Reclamation and the South China Sea Arbitration*, ASIA MARITIME TRANSPARENCY INITIATIVE (July 15, 2015), <https://amti.csis.org/what-makes-an-island-land-reclamation-and-the-south-china-sea-arbitration> ("For example, in 1995, Subi Reef was completely submerged at high tide. Today, there are 3.9 million square meters of reclaimed land above water at high tide on Subi Reef, and it is home to a pair of wooden barracks, communications array, and helipad.").

225. See *Philippines v. China*, ¶¶ 854–55 (describing how sand dredges cut into the seabed or

Tribunal did not rely on this fact to classify the construction projects as naturally occurring based on their composition of natural materials, but instead focused on the methods that resulted in the land building.<sup>226</sup> These islands only exist due to extensive construction and dredging efforts, so they do not warrant the full 200 nm EEZ that naturally occurring islands may deserve.<sup>227</sup> Instead, they are limited to the 12 nm territorial sea.<sup>228</sup> The Tribunal's decision may deter countries from expanding maritime entitlements through man-made dredging operations in the future. When a country builds its own island in the middle of the ocean—or another country's territorial sea or EEZ—it will not receive the benefit of a globally recognized, legitimate 200 nm EEZ that naturally occurring, full-fledged islands warrant.<sup>229</sup>

#### A. *Twelve Nautical Miles are Still a Windfall*

Although it is reasonable to view the 12 nm limit around man-made islands as miniscule compared to the 200 nm EEZ alternative for natural islands, the allowance is still quite significant. While the surface area generated by a 12 nm distance is much smaller than a 200 nm one, it is still a sizable portion of the sea that a state now has dominion over, and is also important considering the fishing and mineral resources that fall within it.<sup>230</sup> To put this parameter in perspective, 3.0 nm is the approximate distance that a two meter tall person standing on shore can see until the ocean's horizon visually meets the sky.<sup>231</sup> Therefore, a state that transforms a “minuscule” reef into a de facto island—even if all support to sustain human habitation comes from the mainland state, and not from the feature itself—will create a new claim to ocean territory that extends more than four times beyond the horizon that most people can

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reef to break apart and extract materials to be then pumped to the reclamation area).

226. *Id.* ¶ 562 (“[T]he status of a feature for the purpose of Article 121(3) is to be assessed on the basis of its natural condition, prior to human modification. China’s construction . . . however extensive, cannot elevate its status from rock to fully entitled island.”).

227. *Id.* ¶ 516 (“Article 121(3) . . . serves to disable tiny features from unfairly and inequitably generating enormous entitlements to maritime space that would serve not to benefit the local population, but to award a windfall to the (potentially distant) State to have maintained a claim to such a feature.”).

228. *Id.* ¶ 624 (“Such features . . . will generate a 12-nautical-mile territorial sea, provided they remain above water at high tide.”).

229. *Id.* ¶ 509 (“Were a feature’s capacity to sustain [human habitation or economic life] allowed to be established by technological enhancements, then ‘every high-tide feature, no matter . . . its natural conditions, could be converted into an island generating a 200-mile entitlement if the State that claims it is willing to devote and regularly supply the resources necessary to sustain a human settlement.’”).

230. Assuming the 12 nm territorial sea around a feature does not overlap with the maritime entitlement of another feature, the feature’s territorial sea covers an area of over 450 square nautical miles (a circular area defined by a 12 nm radius). *See How Do You Find That Area of a Circle if You Know the Radius?*, VIRTUAL NERD, <http://www.virtualnerd.com/pre-algebra/perimeter-area-volume/circles/circle-sector-area-examples/circle-area-from-radius> (last visited Sept. 26, 2017).

231. *See Distance to the Horizon*, BOATSAFE.COM, <http://boatsafe.com/tools/horizon.htm>. *See also How Far Away is the Horizon?*, LIVE SCIENCE (Sept. 12, 2012, 3:05 PM), <http://www.livescience.com/32111-how-far-away-is-the-horizon.html> (“Geometry tells us that the distance of the horizon – i.e. the farthest point the eye can see before Earth curves out beneath our view – depends simply on the height of the observer.”).

see.

UNCLOS did not intend this windfall benefit,<sup>232</sup> and the Tribunal recognized the consequence of allowing human-made islands to have 200 nm EEZs.<sup>233</sup> Yet, the Tribunal's decision allowed for manufactured maritime territory<sup>234</sup>—albeit a much smaller entitlement than an EEZ. It is difficult to accept the assertion that this decision will completely deter future construction of islands, because a state may still gain vast new areas of territory, including fisheries and stores of resources. Furthermore, once a state commences building efforts, it can build islands of any size that dredging ships and water depth allow.

### ***B. Applying the Tribunal's Article 121(3) Methodology to Other Disputed Features: Senkaku Islands and Okinotorishima***

The Senkaku Islands are a group of eight small, uninhabited features in the East China Sea (ECS),<sup>235</sup> that were not evaluated in this decision. They are 180 nm southeast of mainland China, 225 nm west of Japan's Okinawa Island, and 90 nm northeast of Taiwan.<sup>236</sup> While the features are currently under Japanese control, China and Taiwan separately claim them as sovereign territory.<sup>237</sup> Due to the proximity of the Senkaku Islands to Taiwan and China, overlapping entitlements would ensue if a future arbitration panel were to classify any of the Senkaku Island features as an island in accordance with UNCLOS Article 121(3).<sup>238</sup> This would require a diplomatic solution, or for the ICJ to draw a fixed boundary, similar to the overlapping claims examined in *Romania v. Ukraine* and *Nicaragua v. Honduras*.<sup>239</sup>

Okinotorishima is 1740 kilometers (940 nm) south of Tokyo and is Japan's

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232. *Philippines v. China*, ¶ 535 (explaining how UNCLOS imposed limiting conditions to promote equality in maritime space distribution and to prevent sovereign States from infringing on the common usage of maritime spaces).

233. *Id.* ¶ 509 (expressing concern for the slippery slope that may ensue if any State could claim every high-tide feature as an island, permitting that the State funds and sources the island to support human settlement).

234. *Id.* ¶ 624 (stressing that the Tribunal recognized that small rocks and maritime features are vulnerable to territorial sovereignty claims, entitling a State to 12 nm of maritime space).

235. China calls these islands the Daioyu Islands, but Japan calls them the Senkaku Islands. Most of the sources pertaining to this topic use the Japanese term. *See generally Narrative of an Empty Space*, *ECONOMIST*, Dec. 22, 2012, at 53.

236. *The Senkaku Islands*, MINISTRY OF FOREIGN AFFAIRS OF JAPAN, <http://www.mofa.go.jp/files/000018519.pdf> (last visited Jan. 2, 2017).

237. *See D.Z., Who Really Owns the Senkaku Islands*, *ECONOMIST EXPLAINS* (Dec. 3, 2013, 11:50 PM), <https://www.economist.com/blogs/economist-explains/2013/12/economist-explains-1> (explaining how both China and Taiwan asserted claims to the islands after oil and gas reserves were discovered near the island).

238. *Philippines v. China*, ¶ 395 (noting that the 200 nm EEZ of Taiwan would overlap the 200 nm EEZ of the Senkakus, thereby requiring a re-drawn fixed maritime boundary).

239. *Id.* ¶ 395 (stating that a question of boundary limitations is outside the Tribunal's jurisdictional scope); *see also* Jon M. Van Dyke, *The Romania v. Ukraine Decision and Its Effect on East Asian Maritime Delimitations*, 15 *OCEAN & COASTAL L.J.* 261, 281 (2010) (discussing concurrent territorial claims between Romania and Ukraine as well as Nicaragua and Honduras).

southernmost possession,<sup>240</sup> contained within a 4.5 by 1.7 kilometer area of sea.<sup>241</sup> These features, also known as Douglas Reef, are not very significant in their natural state, and “at high tide, only two natural structures remain[ed] some seventy centimeters above water; these features in their natural form were about the size of two king-size beds[.]”<sup>242</sup> Since the 1980s, Japan has spent considerable resources—including time and JP¥600 million—erecting steel and concrete jetties to protect these two features from erosion.<sup>243</sup> Japan also recently rebuilt a three-story observation tower to monitor maritime traffic, for JP¥13 billion.<sup>244</sup> Japan claims a 200 nm EEZ around Okinotorishima, and because no other state has a maritime claim that overlaps their claim, the result is a 400,000 square kilometer maritime territory for Japan.<sup>245</sup> Taiwan and China vehemently disagree with Japan’s assertion that Okinotorishima is an island that warrants a 200 nm EEZ,<sup>246</sup> and their position is strengthened by the findings of *Philippines v. China*.

As with the disputed features at the center of the *Philippines v. China* arbitration, the waters around both the Senkakus and Okinotorishima are rich fishing grounds and encompass potentially rich oil and gas reserves,<sup>247</sup> making them valuable contestable features.

### 1. Senkaku Islands

The eight Senkaku Island features have been described as “a group of five islands and three rocky outcroppings.”<sup>248</sup> The combined surface area of the eight Senkaku features totals 5.53 square kilometers,<sup>249</sup> but three of the features are all individually

240. See Van Dyke, *supra* note 239, at 281 (describing Okinotorishima as 1,740 kilometers south of Tokyo). 1 kilometer is equal to 0.539957 nautical miles.

241. Justin McCurry, *Japan to Spend Millions on Tiny Islands 1,000 Miles South of Tokyo*, GUARDIAN (Feb. 3, 2016, 6:16 AM), <https://www.theguardian.com/world/2016/feb/03/japan-spend-billions-yen-tiny-okinotori-islands-1000-miles-south-of-tokyo> (noting that the atoll measures “just 4.5km east to west and 1.7km north to south”).

242. Van Dyke, *supra* note 239, at 281.

243. McCurry, *supra* note 241.

244. *Id.*

245. See Joe Hung, *Okinotori Atoll: Rocks or Islands?*, CHINA POST (Oct. 17, 2016, 12:18 AM), <http://www.chinapost.com.tw/commentary/china-post/joe-hung/2016/10/17/481261/Okinotori-Atoll.htm> (“Japan claims an EEZ over 400,000 square km (154,500 square miles) around Okinotorishima, much larger in area than the whole of Japan.”).

246. See Ayako Mie, *Japan Steps up Rhetoric Over Okinotorishima in Wake of Hague Ruling*, JAPAN TIMES (July 15, 2016), <https://www.japantimes.co.jp/news/2016/07/15/national/politics-diplomacy/japan-steps-rhetoric-okinotorishima-wake-hague-ruling/#.WbV8ctOGPOR> (describing Tokyo’s arguments for why Okinotorishima is an island and not mere rocks, as Taiwan and China assert).

247. See *How Uninhabited Islands Soured China-Japan Ties*, BBC NEWS (Nov. 10, 2014), <http://www.bbc.com/news/world-asia-pacific-11341139> (highlighting fishing, oil, and gas resources in the waters adjacent to the Senkaku Islands); see also McCurry, *supra* note 241 (highlighting similar natural resources in the waters adjacent to Okinotorishima).

248. Min Gyo Koo, *Island Disputes and Maritime Regime Building in East Asia: Between a Rock and a Hard Place*, THE POLITICAL ECONOMY OF THE ASIA PACIFIC 103 (Vinod K. Aggarwal ed., 2009).

249. *Information about the Senkaku Islands*, MINISTRY OF FOREIGN AFFAIRS OF JAPAN, (March

smaller than the size of three football fields (American soccer).<sup>250</sup> Though more than 200 Japanese have lived together on the Senkaku Islands at one time,<sup>251</sup> some of the features may not be large enough to provide the resources necessary to support human habitation.

In *Philippines v. China*, the Tribunal used evidence of human habitation to judge whether a feature in its naturally occurring condition could support human habitation.<sup>252</sup> Even though civilians do not reside on the Senkakus today, there is a history of human habitation.<sup>253</sup> Japanese settlers from Okinawa lived on the Senkakus and processed katsuobushi<sup>254</sup> from 1895 until 1940, when they left during World War II.<sup>255</sup> Fishermen from Taiwan and Okinawa made long, dangerous voyages to the Senkakus for the abundant fish resources in the 1950s when the islands remained uninhabited.<sup>256</sup> The fact that the features were uninhabited for so long raises worthy doubts about whether they can support human habitation.

The larger features collectively have various amounts of vegetation, animals, and freshwater. Extant vegetation includes trees, ferns, sugarcane, sweet potatoes, and woody plants.<sup>257</sup> Animal species include goats, black rats, cats, land birds, and sea birds.<sup>258</sup> This flora and fauna are evidence that the features can support some forms of life,<sup>259</sup> but the freshwater sources on the features are not available in large enough quantities to provide a stable supply for human usage.<sup>260</sup> The lack of adequate potable

6, 2015) [http://www.mofa.go.jp/a\\_o/c\\_m1/senkaku/page1we\\_000009.html](http://www.mofa.go.jp/a_o/c_m1/senkaku/page1we_000009.html).

250. Okinokitaiwa Island, Okinominamiwa Island, and Tobise Island. *Id.* One football (American soccer) field is 0.0108 square kilometers. *Convert Football Field [Soccer, 120x90] to Square Kilometer*, GOWEBTOOL, [http://www.gowebtool.com/unit-conversion/area/convert.php?from=football\\_field\\_soccer&to=square\\_kilometer&language=en](http://www.gowebtool.com/unit-conversion/area/convert.php?from=football_field_soccer&to=square_kilometer&language=en).

251. *Information about the Senkaku Islands*, *supra* note 249.

252. *See Philippines v. China*, ¶ 21 (stating that the Tribunal will also consider whether any feature in the Spratly Islands could support either human habitation or economic viability within the definitions of Article 121 (3)).

253. *See Narrative of an Empty Space*, *supra* note 235 (describing Japanese annexation of the uninhabited features in 1895, after which Japan sent at least 200 of its citizens from nearby Okinawa to live and work on the features).

254. Katsuobushi is “[d]ried fish prepared in hard blocks . . . and used in Japanese cooking.” *Definition of Katsuobushi in US English*, ENGLISH OXFORD LIVING DICTIONARIES, <https://en.oxforddictionaries.com/definition/us/katsuobushi> (last visited Nov. 1, 2016).

255. *See Narrative of an Empty Space*, *supra* note 235 (“The last of Koga’s employees left in 1940.”).

256. *See id.* (detailing stories of Okinawans who made lonely, yet profitable, voyages to the Senkakus to fish).

257. *See Surveys Between the End of World War II and 1970, Part 2 (1970, 1971: University of the Ryukyus)*, SASAKAWA PEACE FOUND. (Feb. 17, 2015), [https://www.spf.org/islandstudies/info\\_library/senkaku-islands/04-eco/04\\_eco004.html](https://www.spf.org/islandstudies/info_library/senkaku-islands/04-eco/04_eco004.html) (summarizing reports of the Senkakus’ ecosystems).

258. *See id.*; *see also* William Pesek, *Why Outrage over Islands Full of Goats is Crazy*, BLOOMBERG VIEW (Sept. 18, 2012, 5:00 PM), <https://www.bloomberg.com/view/articles/2012-09-18/why-outrage-over-islands-full-of-goats-is-crazy> (“Goats are all you will find on the cluster of uninhabited rocks over which the Japanese and Chinese seem ready to go to war.”).

259. *See Narrative of an Empty Space*, *supra* note 235 (detailing stories of prior inhabitants’ observations of animals and vegetation on the island).

260. *See Water Quality on the Senkaku Islands, Review of Island Studies*, SASAKAWA PEACE FOUND. (Feb. 17, 2015), [https://www.spf.org/islandstudies/info\\_library/senkaku-islands/06-](https://www.spf.org/islandstudies/info_library/senkaku-islands/06-)

water would require constant resupply from the Japanese mainland or man-made water purification plants to sustain human habitation.

Despite their names, the *Philippines v. China* Tribunal pointed out that even if “Island” is within the proper name of a feature, it does not endow that feature with the entitlements that naturally occurring islands receive under UNCLOS Article 121.<sup>261</sup> Following the Tribunal’s full reasoning, it is unlikely that the Senkakus would earn the full status of an island entitling it to a 200 nm EEZ,<sup>262</sup> mainly due to the limited supply of potable water,<sup>263</sup> and the fact that a sizable community has not lived on any of the Senkaku features since 1940.<sup>264</sup>

## 2. Okinotorishima

Applying the *Philippines v. China* methodology, a future adjudicator could classify the Okinotorishima as high-tide elevations, but not islands. The portion of the features remaining at high-tide is too miniscule to support human habitation or economic life.<sup>265</sup> A feature’s ability to support human habitation or economic life must be judged in its natural condition—and not in light of artificial improvements. Okinotorishima is thus too small to provide the resources needed that were articulated in Part III of this Note—potable water, vegetation, and adequate living space. However, since a miniscule portion of the feature manages to keep dry at high-tide, it is not a low-tide feature, and therefore it is not totally precluded from a maritime entitlement.<sup>266</sup> Therefore, Okinotorishima would warrant at most a 12 nm territorial

env/06\_env001.html (reporting how research of water samples proved that the nature of the land would make water purification difficult).

261. *Philippines v. China*, ¶ 482 (explaining that the mere presence of the word “Island” in a feature’s name does not matter for purposes of Article 121(3)).

262. See Scoville, *supra* note 211 (predicting that since the Tribunal decided that Taiwanese possessed Itu Aba was a rock and not an island, the most island-like feature of the Senkakus, which is similar to Itu Aba, would also ultimately be classified as a rock); but see Jonathan I. Charney, *Central East Asian Maritime Boundaries and the Law of the Sea*, 89 AM. J. INT’L L. 724, 734 (1995) (“I believe that resources such as fisheries and seabed hydrocarbons in the adjacent territorial sea could be included in the calculation if the rock is, or has the resources necessary for use as, an economically viable base for operations.”).

263. See Scoville, *supra* note 211 (asserting that neither the Itu Aba nor the Senkaku Islands seem to have enough natural water sources to support long-term human habitation for an indefinite amount of time).

264. See *Narrative of an Empty Space*, *supra* note 235 (reporting that the last inhabitants, descended from the approximately 200 Okinawans who had arrived in 1895, departed in 1940).

265. See, e.g., *Philippines v. China*, ¶ 564 (assessing Fiery Cross Reef as incapable of sustaining human habitation or economic life of its own because the high-tide portion is tiny and desolate).

266. See Kyodo, *Taiwan Moves to ‘Clarify’ Okinotorishima Stance in Response to Fishing Boat Seizure*, JAPAN TIMES (Apr. 28, 2016), <https://www.japantimes.co.jp/news/2016/04/28/national/politics-diplomacy/taiwan-step-pressure-japan-okinotori-fishing-issue/#.WabpkNOGNHQ> (describing how Japan has artificially built up Okinotorishima land features to create more visibility); but see Jesse Johnson, *After South China Sea Ruling, Could Tiny Okinotorishima be the Next Flash Point?*, JAPAN TIMES (July 13, 2016), <https://www.japantimes.co.jp/news/2016/07/13/national/south-china-sea-ruling-tiny-okinotorishima-next-flash-point/#.Wabp9tOgNHQ> (addressing critics who say Okinotorishima is man-made and could wash away from strong typhoon waves).

sea entitlement and not a 200 nm EEZ.<sup>267</sup>

It is also worthwhile to note that the Tribunal's analysis referenced past Chinese diplomatic statements regarding Okinotorishima, in order to reliably ascertain China's position with respect to applying UNCLOS Article 121(3) to the disputed features in *Philippines v. China*.<sup>268</sup> China has argued that Okinotorishima could not possibly sustain human habitation or economic life, and therefore could not be an island that warrants a 200 nm EEZ.<sup>269</sup>

## VI. LIMITATIONS OF *PHILIPPINES v. CHINA*: SOVEREIGNTY LEFT UNRESOLVED

Sovereignty was at issue in the *Philippines v. China* case,<sup>270</sup> so that question may someday be brought before the ICJ for determination. The ICJ's *Nicaragua v. Honduras* decision articulated that an "effective exercise of powers" by a claimant over a disputed territory is key in determining sovereignty.<sup>271</sup> To decide if Honduras exercised control over the disputed feature as a sovereign would,<sup>272</sup> the ICJ examined various activities that reflected "a relevant display of sovereign authority" over disputed islands, including (1) legislative and administrative control;<sup>273</sup> (2) application and enforcement of criminal and civil law;<sup>274</sup> (3) regulation of immigration;<sup>275</sup> (4) regulation of fisheries activities;<sup>276</sup> (5) naval patrols;<sup>277</sup> (6) oil concessions;<sup>278</sup> and (7) public works.<sup>279</sup> Other factors considered by the ICJ included recognition by third parties of Honduran sovereignty, the formation of bilateral treaties that mentioned Honduran control of the feature,<sup>280</sup> and lack of consistent protest by Nicaragua over

267. See Johnson, *supra* note 266 (comparing the case of Japan's EEZ claims of Okintorishima to China's claims of islands in the South China Sea).

268. *Philippines v. China*, ¶¶ 452–53; see also *id.* ¶¶ 457–58.

269. *Id.* ¶¶ 452–53; see also *id.* ¶¶ 457–58.

270. *Id.* ¶ 28 (stating that Philippines does not seek to address sovereignty issues).

271. Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (*Nicar. v. Hond.*), Judgment, 2007 I.C.J. Rep. 659, ¶ 172 (Oct. 8) ("A sovereign title may be inferred from the effective exercise of powers appertaining to the authority of the State over a given territory.").

272. See *id.* ¶ 208 (finding that Honduras has demonstrated its intention to function as a sovereign).

273. *Id.* ¶ 177.

274. *Id.* ¶ 182.

275. *Id.* ¶ 186 (explaining that Honduras keeps detailed immigration records on foreign nationals living within Honduras, as well as records on foreign nationals living on the disputed islands).

276. *Id.* ¶ 190 (explaining that Honduras claims its regulations through the bitácoras (fishing licenses), given to fishermen of the disputed islands, amount to a display of governmental authority).

277. Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (*Nicar. v. Hond.*), Judgment, 2007 I.C.J. Rep. 659, ¶ 199 (Oct. 8) (explaining Honduras' contention that it has supervised naval patrols since 1976 to carry out security, fishery, and immigration law).

278. *Id.* ¶ 202.

279. *Id.* ¶ 205 (stating that Honduras submitted evidence of antenna construction to prove title to the islands in question, and that no other party protested the existence of the antenna).

280. *Id.* ¶¶ 224–25 (considering the weight of assertions by both parties regarding recognition by third party states and bilateral treaties).



Honduran activity well before it formally challenged Honduras in court.<sup>281</sup>

Decisions on sovereignty can be immensely consequential. In the South China Sea scenario, if the ICJ were to affirm Chinese sovereignty over the disputed features, other states could be motivated to build their own islands on top of high-tide elevations, as China has done. Although those states would not be granted a 200 nm EEZ, international law will grant them a 12 nm territorial sea that did not previously exist.<sup>282</sup>

## VII. CONCLUSION

The Tribunal laid out objective parameters and methods not previously utilized to assess whether maritime features warrant entitlements. This decision was in keeping with the underlying purposes of UNCLOS to promote mutual benefit from the oceans' resources, and to "restrain[] excessive State claims[.]"<sup>283</sup> The Tribunal's methodology in *Philippines v. China* provides a specific list of criteria to apply in future disputes assessing the status of a maritime feature, including a feature's ability to support sustained human habitation or economic life. Having a scintilla of fresh water and vegetation, or past occasional habitation, will not be enough to merit claims in many circumstances.<sup>284</sup> The resources necessary on the feature—and not provided by the mainland of the assertive state<sup>285</sup>—must be of a quantity and quality to allow a sizable population to live and grow unassisted for an indefinite period of time, not to merely survive. Evaluation of features must be performed on a case-by-case basis,<sup>286</sup> and features will be considered in their naturally occurring conditions, free from human intervention.<sup>287</sup>

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281. *Id.* ¶ 208 (finding that Nicaragua has not demonstrated proof of its intention to function as a sovereign).

282. *But see* Scoville, *supra* note 211 (downplaying the significance of recognizing maritime rights after the South China Sea Arbitration because states are granted minimal nautical mile space).

283. *See Philippines v. China*, ¶ 439 ("It also recalls that restraining excessive State claims is one of the purposes of Article 121(3) and international law in general.").

284. *See id.* ¶ 542 (describing the definition of human habitation as involving a stable community of people and a feature on which they can continue to live).

285. *See id.* ¶ 550 (finding that inhabitation is important to consider to determine if habitation on the feature would only be feasible through external assistance).

286. *Id.* ¶ 546 ("[T]he capacity of a feature to sustain human habitation or an economic life of its own must be assessed on a case-by-case basis.").

287. *See id.* ¶ 541 (emphasizing that the status of a feature must be considered on its natural qualities and accommodations without regard to man-made modifications).

**Appendix A: Precise and Relative Location of Each Disputed Feature**

Feature	Position	Distance (nm) from nearest baseline point of:	
		Philippines	China
Scarborough Shoal	15-09-16 N, 117-45-58 E	116.2*	448.2
Cuarteron Reef	08-51-41 N, 112-50-08 E	245.3	585.3
Fiery Cross Reef	09-33-00 N, 112-53-25 E	254.2	547.7
Johnson Reef	09-43-00 N, 114-16-55 E	184.7*	570.8
McKennan Reef	09-54-13 N, 114-27-53 E	181.3*	566.8
Hughes Reef	09-54-48 N, 114-29-48 E	180.3*	567.2
Gaven Reef North	10-12-27 N, 114-13-21 E	203.0	544.1
Gaven Reef South	10-09-42 N, 114-15-09 E	200.5	547.4
Subi Reef	10-55-22 N, 114-05-04 E	231.9	502.2
Mischief Reef	09-54-17 N, 115-31-59 E	125.4*	598.1
Sec. Thomas Shoal	09-54-17 N, 115-51-49 E	104.0*	616.2

\*Denotes that the feature is within the 200 nm Philippine Exclusive Economic Zone (EEZ).

**Appendix B: Tribunal's Article Decisions on Each Feature**

Feature	Status per Article 13, as determined by the Tribunal	Status per Article 121(3), as determined by the Tribunal
Scarborough Shoal	high-tide feature (¶ 334)	rock (¶ 554)
Cuarteron Reef	high-tide feature (¶ 339)	rock (¶ 560)
Fiery Cross Reef	high-tide feature (¶ 343)	rock (¶ 563)
Johnson Reef	high-tide feature (¶ 351)	rock (¶ 557)
McKennan Reef	high-tide feature (¶ 354)	rock (¶ 569)
Hughes Reef	low-tide elevation (¶ 358)	none
Gaven Reef North	high-tide feature (¶ 365)	rock (¶ 566)
Gaven Reef South	low-tide elevation (¶ 366)	none
Subi Reef	low-tide elevation (¶ 368)	none
Mischief Reef	low-tide elevation (¶ 378)	none
Second Thomas Shoal	low-tide elevation (¶ 381)	none

Paragraphs noted in parentheses are the pinpoint source of this information within the South China Sea Arbitration Award. *See Philippines v. China.*