The July 2016 Arbitral Award, Interpretation of Article 121(3) of the UNCLOS, and Selecting Examples of Inconsistent State Practices

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I. Introduction

On July 12, 2016, the Arbitral Tribunal, constituted under Annex VII to the United Nations Convention on the Law of the Sea (hereinafter referred to as "UNCLOS" or "the Convention")[1] to hear *The Republic of the Philippines v. The People's Republic of China* (the South China Sea arbitration case),[2] announced its final Award ("the Award" or "the July 2016 Arbitral Award").[3] The Award consists of 10 parts, is 1,203 paragraphs or almost 500 pages in length. In Part 6 of the Award, the Tribunal considered the status of features in the South China Sea (the Philippines' submissions No. 3-7).[4] The Tribunal concluded that "none of the high-tide features in the Spratly Islands are capable of sustaining human habitation or an economic life of their own within the meaning of those terms in Article 121(3) of the Convention" [5] and that "[a]ll of the high-tide features in the Spratly Islands are therefore legally rocks for purposes of Article 121(3) and do not generate entitlements to an exclusive economic zone or continental shelf."[6]

The Tribunal declared that Scarborough Shoal and the five maritime features of the Spratly Islands, namely, Gaven Reef (North), McKennan Reef, Johnson Reef, Cuarteron Reef and Fiery Cross Reef, that are currently under Chinese control or occupation, in their natural condition are rocks and therefore convey no right to generate a 200 nautical miles ("nm") Exclusive Economic Zone ("EEZ") or continental shelf.[7]

In approaching its interpretation of Article 121(3) of the UNCLOS, the Tribunal reviewed the text, its context, the object and purpose of the Convention, and the *travaux preparatoires*.[8] The Tribunal also addressed the role of State practice in the implementation of Article 121(3) of the Convention. Surprisingly,

however, there can be found only two short paragraphs[9] in the entire Award that addressed the relevance of State practice in the interpretation or application of the third paragraph of Article 121, which reads: "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."[10]

In citing the jurisprudences of the International Court of Justice ("ICJ") and the World Trade Organization ("WTO"), the Tribunal concluded that there is no evidence for an agreement based upon State practice in the interpretation of Article 121(3) which differs from its interpretation of Article 121(3).[11] Interestingly, this conclusion was made after the Tribunal reached its conclusions on the interpretation of Article 121(3).

The Tribunal found no evidence of an agreement based upon State practice in the interpretation of Article 121(3). However, there exist bilateral maritime boundary agreements, signed by the States, such as the one between Australia and France,[12] and another between the United States, a non-party to the UNCLOS, and Kiribati, a party to the Convention,[13] in which the parties to the agreements acquiesced in practice with respect to the interpretation and implementation of Article 121(3). It should be emphasized that these State practices differ from the Tribunal's conclusion on the interpretation of Article 121(3). In addition, the Tribunal overlooked maritime claims made by parties to the UNCLOS, such as Australia, France, Japan and New Zealand, for their respective insular formations, not only to a 200-nm EEZ and continental shelf, but also the outer continental shelf that is allowed under Article 76 of the Convention to extend seaward 350-nm from the baselines used to measure the breadth of these coastal States' territorial sea, provided that the features in question convey the right to generate an EEZ or continental shelf in accordance with Article 121(2). The features concerned, from the five selected coastal States, are problematic with respect to the two requirements contained in Article 121(3), and therefore could possibly be considered "rocks" instead of 'fully entitled islands".

Immediately after the announcement of the July 2016 Award, the governments of Australia,[14] Japan,[15] and the United States[16] issued statements, calling on the two Parties to the SCS arbitration case to abide by the Tribunal's ruling as they consider the Award final and binding. The government of New Zealand also urged all parties to respect the ruling.[17] The government of France, as a member of the European Union, did not issue independent statement on the Tribunal's ruling, but in April 2017, its Foreign Minister joined with other six foreign ministers of the Group of Seven (G-7) to opine that the July 2016 award should be considered "as a useful basis for further efforts to peacefully resolve disputes in the South China Sea."[18]

On June 3, 2017, at the IISS Shangari La Dialogue – the 16th Asia Security Summit, in his address, U.S. Defense Secretary Jim Mattis stressed that the Award "is binding".[19] At the same meeting, Japanese Defense Minister Tomomi Inada and Australian Defense Minister Marise Payne reiterated their position that the

Award is binding on both parties to the SCS arbitration case.[20] In addition, in the Joint Statement issued after the three defense ministers held talks in Singapore on the margins of the IISS Shangri-La Dialogue, it was repeated that "the award of July 2016 could be a useful basis for further efforts to peacefully resolve disputes in the South China Sea."[21] This was followed by another joint statement issued after the annual Australia-United States Ministerial (AUSMIN) consultations held in Sydney on June 5, 2017, in which the Award as a useful basis for settling the South China Sea disputed was mentioned.[22] More recently, in the joint statement issued after Australia-Japan-United States Trilateral Strategic Dialogue being held in Manila on August 7, 2017, the foreign ministers of the three countries again called on China and the Philippines to abide by the July 2016 Award, "as it is final and legally binding on both parties."[23]

A double standard might arise if, on the one hand, the governments of Australia, France, Japan, New Zealand and the United States continue to press the parties, particularly China, to the SCS arbitration case to abide by the Award, while they themselves ignore the Tribunal's ruling, in particular, on the legal status of those high- tide features in the South China Sea, and take no actions to consider changing or abandoning their claims to 200-nm EEZ and continental shelves for remote islands located respectively in the Southern Ocean (Australia's Heard Island and McDonald Island), Eastern Pacific (France's Clipperton Island), Western Pacific (Japan's *Oki-no-Tori-shima*[24]), Southern Pacific (New Zealand's Kermadec Islands), and Central Pacific (the U.S. Baker Island, Howland Island, and Kingman Reef) that could be considered "rocks" instead of "fully entitled islands"[25] in accordance with the Tribunal's ruling.[26]

The purposes of this article are twofold. The first is to identify the problem resulting from the insufficient consideration of the role of State practice in the interpretation and implementation of Article 121(3) by the Tribunal in the SCS arbitration case. The second purpose is to illustrate the inconsistent State practices in the interpretation or implementation of Article 121(3) by examining the maritime claims of the five selected coastal States, namely, Australia, France, Japan, New Zealand and the United States, that give rise to the question concerning the legal status of the features concerned and their rights to generate an EEZ or continental shelf in accordance with Article 121of the UNCLOS.

This article consists of six parts. After this introductory part, Part II provides brief information about the SCS arbitration case and a summary of the Tribunal's ruling on the legal status of features in the South China Sea and their right to generate maritime zones. This is followed in Part III by a summary of the Tribunal's conclusion on the interpretation of Article 121(3) and its consideration of the relevance of State practice in the implementation of the provision in question. Part IV examines the maritime claims and practices of the five selected countries that have repeatedly called upon the two parties to the SCS arbitration to abide by the Award since July 2016 in Part IV. Part V discusses the flaws found in the Tribunal's consideration of the interpretation and application of Article 121(3). The article concludes in Part VI with a number of remarks related to the problem of

insufficient examination of State practices by the Tribunal and the policy challenges for the five selected countries to consider modify their claims to a 200-nm EEZ for their high-tide features that cannot sustain human habitation or an economic life of their own, or continue the practices that give rise to the problem of a double standard in the implementation of their foreign policies.

II. A Brief Summary of the Tribunal's Ruling on the Status of Features in the South China Sea

On January 22, 2013, pursuant to Articles 286 and 287 of the UNCLOS and in accordance with Article 1 of Annex VII to the Convention, the Philippines instituted arbitral proceedings against China to settle their disputes over maritime claims and entitlements in the South China Sea.[27] The Philippines stated in *Notification and Statement of Claim of the Republic of the Philippines* that it seeks an Award, *inter alia*, that determines whether, under Article 121 of the Convention, certain maritime features claimed by both China and the Philippines are islands, low-tide elevations or submerged banks, and whether such features are capable of generating an entitlement to a maritime zone greater than 12-nm.[28]

The Philippines argued in its Memorial[29] that Taiping Island (also known as Itu Aba), Thitu Island, and West York Island, the three largest land features in the Spratly island group, lack natural conditions sufficient to sustain human habitation and economic life, and are therefore properly considered "rocks".[30] As such, these three features cannot generate entitlements to an EEZ or a continental shelf under UNCLOS. The Philippines asked the Tribunal to declare, *inter alia*, that

> Scarborough Shoal, Johnson Reef, Cuarteron Reef and Fiery Cross Reef are submerged features that are below sea level at high tides, except that each has small protrusions that remain above water at high tide, which are "rocks" under Article 121(3) of the Convention and which therefore generate entitlements only to a Territorial Sea no broader than 12 [nautical miles]; and that China has unlawfully claimed maritime entitlements beyond 12 [nautical miles] from these features.[31]

The Philippines challenged the Chinese claim to maritime entitlements beyond 12-nm from Scarborough Shoal, Johnson Reef, Cuarteron Reef, Fiery Cross Reef, and Itu Aba and argued that the actions taken by China in the waters surroundings these features have unlawfully interfered with the enjoyment and exercise of its sovereign rights with respect to the living and non-living resources in the Philippines' EEZ and continental shelf. In order to make decisions with respect to the Philippines' submissions No. 3,[32] 5,[33] and 7,[34] as well as to determine its jurisdiction with respect to the Philippines' Submissions No. 8[35] and 9,[36] the Tribunal interpreted and applied Article 121 of the UNCLOS.

On July 12, 2016, the Tribunal announced its final award, which consists of 10 parts. After the introductory Part I, the Tribunal described the procedural history of the case in Part II.[37] In Part III,[38] it summarized the relief and submissions of the Philippines. In Part IV,[39] the Tribunal addressed the preliminary matters in relation to the legal and practical consequences of China's non-participation in the proceedings and summarized its award on jurisdiction and admissibility that was issued on October 29, 2015, and discussed the status and effect of this award. This is followed by the Tribunal's considerations of the merits of the disputes, and its findings, conclusions as well as decisions in relation to the 15 submissions of the Philippines in Part V (The "Nine-Dash Line" and China's Claim to Historic Rights in the Maritime Areas of the South China Sea),[40] VI (The Status of Features in the South China Sea),[41] VII (Chinese Activities in the South China Sea),[42] VIII (Aggravation or Extension of the Dispute Between the Parties),[43] and IX (The Future Conduct of the Parties).[44] Part X is the *Dispositif* of the Award.[45] In relation to the merits of the Parties' disputes, the Tribunal reached 29 findings and made 16 declarations.[46]

The Tribunal reached two main findings in relation to the status of the features that China occupies or controls in the South China Sea. It found that Scarborough, Gaven Reef (North), MeKennan Reef, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef are "high tide features" within the meaning of Article 121(1) of the UNCLOS.[47] It found that Subi Reef, Gaven Reef (South), Hughes Reef, Mischief Reef, and Second Thomas Shoal are low-tide elevations within the meaning of Article 13 of the Convention.[48] Based on these findings, the Tribunal declared that Mischief Reef and Second Thomas Shoal cannot be appropriated and have no rights to generate maritime zones of territorial sea, EEZ, or continental shelf.[49] It also declared that Subi Reef, Gaven Reef (South), and Hughes Reef do not generate entitlement to a territorial sea, EEZ, or continental shelf and are not features that are capable of appropriation, but may be used as the baseline for measuring the breadth of territorial sea of high-tide features situated at a distance not exceeding the breadth of the territorial sea.[50]

With regard to the features' right to generate maritime zones, the Tribunal found that Scarborough Shoal and all of the high-tide features in the Spratly Islands do not have the capacity to sustain human habitations or economic life of their own within the meaning of Article 121(3) of the UNCLOS.[51] Accordingly, it declared that Scarborough Shoal, Gaven Reef (North), McKennan Reef, Johnson Reef, Cuarteron, and Fiery Cross Reef, all of them are under China's control or occupation, are "rocks" within the meaning of Article 121 (3) and therefore they generate no entitlements to an EEZ or continental shelf. The Tribunal also declared that Mischief Reef and Second Thomas Shoal are within the Philippines' EEZ and continental shelf.[52]

III. The Tribunal's Interpretation of Article 121(3) and Consideration of the Relevance of State Practice

As indicated by the Tribunal that heard the SCS arbitration case, Article 121 of the UNCLOS has not previously been the subject of significant consideration by international judicial institutions, including the ICJ. This provision has been accorded a wide range of different interpretations in scholarly literature. The scope of application of the third paragraph of Article 121 has not been clearly established. Accordingly, the Tribunal considered it necessary to interpret this provision, in particular its third paragraph, before turning to its application to the maritime features in the South China Sea.[53]

In accordance with the provisions of the 1969 Vienna Convention on the Law of Treaties ("VCLT"),[54] in particular Articles 31[55] and 32,[56] the Tribunal thoroughly examined the meaning of Article 121 of the UNLCO by reviewing the text, its context, the object and purpose of the Convention, and the *travaux preparatoires*. The Tribunal concluded that:

First, the use of the term "rock" in the third paragraph of Article 121 does not limit application of this provision to features composed of solid rock;[57]

Second, the status of a feature is to be determined on the basis of its *natural capacity*, which means that external additions or modifications intended to increase the feature's capacity to sustain habitation or an economic life of its own cannot be taken into account [emphasis added];[58]

Third, with respect to "human habitation", the critical factor is the *non-transient character* of the inhabitation and the term "human habitation" should be understood to "involve the inhabitation of the feature by *a stable community of people* for whom the feature constitutes a home and on which they can remain"[emphasis added];[59]

Fourth, the term "economic life of their own" is linked to the requirement of human habitation; economic life must *be oriented around the feature itself* and not focused solely on the waters or seabed of the surrounding territorial sea; economic activity *cannot depend entirely on external resources* and *must involve a local population*; *extractive economic activity* to harvest the nature resources of the feature for the benefit of a population elsewhere cannot be taken into account in support of the requirement of having economic life of its own [emphasis added];[60]

Fifth, a population inhabiting a feature but *making use of a network of related maritime features* to sustain its habitation and a population whose livelihood and economic life *extending across a constellation of maritime features* are considered meeting the requirements under Article 121(3)[emphasis added];[61]

Sixth, the objective capacity of a maritime feature *has no relation to the question of sovereignty over the feature* and therefore the determination of a feature's objective capacity is not dependent on any prior decision on sovereignty [emphasis added];[62]

Seventh, the capacity of a feature to sustain human habitation or an economic life of its own *must be assessed on a case-by-case basis* and an abstract test of the objective requirements can or should be formulated, which makes it necessary to examine the evidence of conditions on, and the capacity of, the features in question [emphasis added];[63]

Eighth, the capacity of a feature should be assessed with due regard to *the potential for a group of small island features to collectively sustain human habitation and economic life* [emphasis added];[64] and

Ninth, evidence of the objective, physical conditions is insufficient for a particular feature to be considered meetings the two requirements contained in Article 121(3), in particular, when the feature in question falls close to the line; and the relevant threshold may differ from one feature to another. The Tribunal considered *the historical use* the most reliable evidence of the capacity of a feature. In the absence of *intervening forces*, a feature that has never historically sustained a human community lacks the capacity to sustain human habitation. Conversely, if a feature is presently inhabited or has historically been inhabited, it is necessary to consider whether there is evidence to indicate that habitation on the feature in question was only possible through outside support. *A purely official or military population, serviced from the outside*, does not constitute evidence in support of the claim that a feature is capable of sustaining human habitation. *Evidence of human habitation that predates the creation of EEZ* may be more significant than contemporary evidence, if the latter is clouded by a clear attempt to assert a maritime claim. The consideration of historical evidence equally applies to the past or current existence of economic life of the feature in question.[65]

After reaching the aforementioned conclusions on the interpretation of Article 121(3), the Tribunal, took into account the relevance of State practices in implementation of Article 121(3). By scrutinizing the ICJ jurisprudence on State practices and treaty interpretation, in particular the Court's *Advisory Opinion Concerning the Legality of the Use by a State of Nuclear Weapons in Armed Conflict*[66] and its judgment made in *Kasikili/Sedudu Island (Botswana/Namibia)*,[67] the Tribunal indicated that the threshold the ICJ establishes for accepting an agreement on the interpretation by State practice is quite high. By citing the jurisprudence of the WTO on the issue, the Tribunal also explained that the threshold for accepting an agreement on the interpretation by State practices is similarly high, because it requires "a 'concordant, common and consistent' sequence of acts or pronouncements" to establish a pattern implying agreements of the parties regarding a treaty's interpretation.[68] Accordingly, the Tribunal concluded that as far as the SCS arbitration case is concerned, "there is no evidence for an agreement based upon State practice on the interpretation of Article 121(3) which differs from its interpretation of the Tribunal as outlined in the previous Sections."[69]

The Tribunal's consideration of State practices in the implementation of Article 121(3) is considered insufficient. It is argued here that if relevant maritime claims and State practices had been thoroughly examined, the Tribunal might have come to a different conclusion on the interpretation and application of the provision

in question. In turn, its consideration of the Philippines' submissions No. 5, 8, and 9, that are related to the interpretation and application of Article 121(3) and the declarations it made in accordance with the Philippines' requests might have come to a different outcome.

For the purpose of demonstrating the problem concerning the Tribunal's insufficient examination of State practices during the arbitral proceedings, five coastal States are selected, namely, Australia, France, Japan, New Zealand and the United States, for the purpose of studying their maritime claims to a 200-nm EEZ and continental shelf for respective remote features that are suited in the Pacific Ocean and the Southern Ocean in accordance with Article 121(3) of the UNCLOS. There are two reasons for making this selection: first, the maritime claims and practices of these countries have given rise to a question of interpretation and application of Article 121(3); second, these five countries have been taking the same position since July 2016 that the Award is final and binding on the two parties to the SCS arbitration case; and they have repeatedly asked the Philippines and China to abide by the Tribunal's ruling.

IV. Maritime Claims and Practices of the Five Selected Countries in Relation to Article 121(3)

The Philippines argued in the SCS arbitration case that State practice on the interpretation of Article 121(3) is inconsistent, but States generally accept that small, uninhabited, barren outcrops should not generate full maritime zones. Although Clive R. Symmons, a distinguished law of the sea scholar, takes the same view that State practice on the interpretation of Article 121(3) is not consistent, he indicates that "in general States have tended to attribute an EEZ or continental shelf of all their insular possessions, even if they clearly fall into the 'Article 121(3) category.'" [70] He also points out that States even allow or claim full value in maritime delimitation of EEZs on occasion where the features involved clearly fall into the Article 121 (3) category.[71] Maritime claims and practices of the five selected countries, namely, Australia, France, Japan, New Zealand, and the United States, the examples to be examined below, are exactly on point in support of Symmons' proposition. Before proceeding to an examination of the five countries' claims and practices, a number of other examples are given first.

Brazil claims an EEZ and outer continental shelf on the basis of its possession of The Saint Peter and Saint Paul rocks.[72] Chile uses two small, uninhabitable volcanic rocks, called Isla Salas y Gomez, to claim an EEZ.[73] Fiji uses Ceva-i-Ra (also called Conway Reef) in the Pacific Ocean to claim an EEZ, without raising a protest from France. Conway Reef is a coral atoll. In the middle of it there is a small sand cay 1.8 meters high and about 320 meters long and 73 meters wide, and a land area of two hectares. Conway Reef clearly cannot sustain human habitation or an economic life of its own.[74] Iceland uses an uninhabitable rock of Kolbeinsey to claim an EEZ. When it was first measured in 1616, the size of Kolbeinsey was 700

metres from north to south and 100 metres east to west. By 1903, it had already diminished to half that size. In August 1985, the size was given as 39 metres across.[75] Mexico uses Clarion (also called Santa Rosa Island) of the Revilla Gigedo island group and the island of Roca Portida to claim EEZs.[76] Portugal claims an EEZ for its Salvage Islands (also called Selvagens Islands) in the North Atlantic.[77] Venezuela uses a tiny sand cay called Aves Island to claim an EEZ which has been recognized by various bilateral boundary agreements, but which has been protested by other States. Aves Island is 375 meters in length and never more than 50 meters in width, and rises 4 meters above the sea on a calm day. This island, in its natural condition, cannot sustain human habitation nor an economic life of its own.[78] However, France, the Netherlands and the United States recognize that Aves Island generates more than a territorial sea in maritime delimitation in the area concerned.[79]

Likely, more examples could be cited if a comprehensive study were conducted. However, a study of the five selected countries' maritime claims and practices below illustrates the existing problem of inconsistency concerning the interpretation and application of Article 121(3) of the UNCLOS, which was overlooked by the Tribunal when it applied Article 31 of the Vienna Convention on Law of Treaties to consider the relevance of State practice in the interpretation and implementation of Article 121(3).

1. Australian Claim and Practice

Australia claims a 200-nm EEZ for Heard Island and McDonald Islands, a volcanic group of islands in the Southern Ocean.[80] There is no permanent human habitation or indigenous economic activity on the islands, but the Australian government allows limited fishing in the surrounding waters. Australia's claim to 200-nm for Mellish Reef in the Coral Sea also gives rise to the question of interpretation and application of Article 121(3) in light of the July 2016 Award.[81]

On November 15, 2004, Australia submitted to CLCS information on its proposed outer limits of the continental shelf beyond 200-nm from the baselines drawn to measure its territorial sea. The claim included the continental shelf beyond 200-nm in the Kerguelen Plateau Region seaward of the baselines of Heard Island and McDonald Islands.[82] In April 2008, CLCS confirmed the outer limit of Australia's continental shelf in nine marine regions and Australia's entitlement to large areas of shelf beyond 200-nm.[83] Eight countries[84] sent communication to the U.N. Secretary-General, asking CLCS not take any action on Australia's submission relating to the continental shelf appurtenant to Antarctica covered by the Antarctic Treaty of 1959. However, no third party notifications have ever been sent by any countries to challenge Australian claim to a 200-nm EEZ and continental shelf. In the Volga Case (Russian Federation v. Australia), Judge Budislav Vukas of the International Tribunal for the Law of the Sea ("ITLOS") did not agree with conclusions based on Australia's claim to 200-nm EEZs around Heard Island and McDonald Islands and wrote that such islands have no right to generate a 200-nm

EEZ under Article 121(3) of the UNCLOS.[85]

In addition to its claim to EEZ and outer continental shelf, Australia also signed agreements with France, a party to the UNCLOS, in which maritime entitlements of Heard Island and the McDonald Islands to 200-nm EEZs and continental shelves were accepted by France. On January 4, 1982, an agreement on marine delimitation was signed between Australia and France, which delimits the boundary between Heard and McDonald Islands (Australia) and Kerguelen Island (France) in the southern Indian Ocean. This boundary is roughly equidistant and consists of 7 straight-line segments defined by 8 individual coordinate points.[86] The treaty came into force on January 10, 1983 after it was ratified by both states. This agreement was followed by a treaty concluded between the two countries on November 24, 2003 on cooperation in the maritime areas adjacent to the French Southern and Antarctic Territories (TAAF), Heard Island and the McDonald Islands.[87] Under Article 1, this Treaty applies to activities conducted in relation to the territorial seas and EEZ of Heard Island and the McDonald Islands and the territorial seas and EEZ of the French territories of Kerguelen Islands, Crozet Islands, Saint-Paul Island and Amsterdam. The areas covered by the Treaty and referred to in the text of the Treaty as the "Area of Cooperation" are the territorial seas and the EEZs surrounding the Australian territory of Heard Island and the McDonald Islands, and those of the French territories of Kerguelen Islands, Crozet Islands, Saint-Paul Island and Amsterdam Island.[88]

2. French Claim and Practice

France claims a 200-nm EEZ for Clipperton Island in the Eastern Pacific. The size of EEZ generated from this island is nearly as large as mainland France. However, Clipperton Island is uninhabited, situated 1,120 km from Mexico and has an area of six square kilometers. The only economic activity is tuna fishing in its adjacent waters. In 1858, France annexed the island. In 1897, Mexico seized and claimed the island. Subsequently the two countries submitted the dispute to an arbitrator who ruled in favor of France in 1931. France took possession of Clipperton Island in 1935.[89]

In February 1978, France proclaimed a 200-nm EEZ for Clipperton Island by decree[90] and then extended after France ratified the UNCLOS in December 1995.[91] Mexico strongly protested the French EEZ claim. In response to the protest from Mexico, France agreed to allow Mexican vessels to fish in the water around Clipperton Island. In 2009, it was pointed out that there is a high, but unknown degree of illegal fishing in the EEZ around Clipperton Island.[92] In June 2009, Michele Alliot-Marie, who was the French interior minister and minister in charge of overseas territories questioned the practice of allowing Mexican vessels to fish in the French-claimed Clipperton EEZ.[93]

On May 8, 2009, France submitted the preliminary information indicative of the outer limits of the continental shelf beyond 200-nm of French Clipperton to the

UN Secretary-General, in which a map shows not only a 200-nm EEZ surrounding Clipperton Island, but also two areas of extended continental shelf. Interestingly, less than two days after the filing, France withdrew this preliminary information without explanation.[94] On November 30, 2010, France deposited with the Secretary-General of the UN a list of geographical coordinates of points defining the outer limits of the EEZ of Clipperton Island. This deposit was accompanied by the text of Decree no.78-147 of February 3, 1978, establishing, pursuant to French Law of July 16, 1976, an EEZ along the coasts of Clipperton Island.[95] Accordingly, it is clear with respect to the French position on the interpretation application of Article 121, that Clipperton Island is not a rock as defined in Article 121(3) of the UNCLOS. And yet, not only does France claim a 200-nm EEZ and continental shelf, but also an outer continental shelf possibly extended from Clipperton Island's baseline up to 350-nm.

The maritime boundary agreements signed between France and foreign countries such as Australia as noted earlier also show that the French claim and practice in relation to the interpretation and application of Article 121(3) are recognized which differ from the conclusion of the Tribunal's consideration of the relevance of State practice in the implementation of the provision in question.

3. Japanese Claim and Practice

Oki-no-tori-shima, "which consists of two eroding protrusions no larger than king-sized beds – certainly meets the description of an uninhabited rock that cannot sustain economic life of its own"[96] and therefore it is not entitled the right to generate a 200-nm EEZ or continental shelf. However, not only does Japan claim an EEZ and continental shelf for the island, but also submitted its application for extended continental shelf in November 2008.

Starting in 2004, China began raising questions concerning the legal status of *Oki-no-tori-shima* and the Japanese claims regarding sovereign rights and jurisdiction in the waters surrounding this feature. China argued that because *Oki-no-tori-shima* does not sustain human habitation nor economic life of its own, it cannot have a 200-nm EEZ or continental shelf. In 2005, Taiwan also raised questions concerning the legal status of *Oki-no-tori-shima*.[97] In October 2005, June 2012, and April 2016, respectively, Taiwan fishing vessels were detained by the Japanese Coast Guard in the Japanese-claimed EEZ surrounding *Oki-no-tori-shima*. After depositing financial securities, the detained Taiwanese fishing vessels were released. However, Taiwan has consistently claimed that the Japanese actions are insupportable in light of the relevant international legal regulations, in particular, Article 121 (3) of the UNCLOS.

In November 2008, Japan submitted to the CLCS, in accordance with Article 76, paragraph 8, of the UNCLOS, information on the limits of its continental shelf beyond 200-nm from the baselines from which the breadth of the territorial sea is measured. Among seven regions claimed by Japan,[98] the Southern Kyushu-Palau

Ridge Region is relevant to the legal status of *Oki-no-tori-shima*. The continental margin in the Southern Kyushu-Palau Ridge Region extends to the south along the Kyushu-Palau Ridge, which forms a natural prolongation of Japan's land mass on the Ridge represented by *Oki-no-tori-shima*.[99] In response, both China and South Korea delivered *note verbales* to the Secretary-General of the UN, questioning the Japanese position to claim a 200-nm EEZ and continental shelf for *Oki-no-tori-shima*.[100] In April 2012, the CLCS adopted Recommendations prepared by the Sub-commission established for the consideration of the Submission made by Japan with amendments, in which the Commission decided not to take action to make recommendations on the Southern Kyushu-Palau Ridge Region until such time as the matters referred to in the *notes verbales* submitted by China and South Korea have been resolved.[101]

In addition to *Oki-no-tori-shima,* Japanese claim to 200-nm EEZ for *Ta-ke-shima* (Dokdo) in the Sea of Japan and Senkaku (Diao-yu-tai) Islands in the East China Sea also give rise to the question of interpretation and application of Article 121(3).[102] *Oki-no-tori-shima* differs from the *Ta-ke-shima* and Diao-yu-tai Islands as it involves no territorial dispute, but Ta-ke-shima (Dokdo) involves sovereignty disputes between Japan and Korea, and ownership of Senkaku (Diao-yu-tai) Islands are disputed between China, Japan, and Taiwan.

4. New Zealand's Claim and Practice

New Zealand also makes extensive claims to small uninhabited insular formations, such as the Kermadec Islands group which is situated to the north of its main islands. The government of New Zealand is taking the position that these islands are entitled to the same maritime spaces as other land territory and the UNCLOS justifies its claims that the small islands, which are uninhabited or have no economic life of their own, qualify as base points for an EEZ. As a result, New Zealand's EEZ is 4 million square kilometres – the fourth largest in the world.[103] Kermadec Islands consist of five insular formations, namely Raoul, Macauley, Cheeseman, Curtis and L'Esperance which lie halfway between the Bay of Plenty and Tonga. These islands are uninhabited, except for Raoul Island where there is a permanently manned meteorological, radio and conservation station.[104] In March 2016, the Kermadec Ocean Sanctuary Bill was proposed to establish a new marine protected area in New Zealand's EEZ around the Kermadec Islands and to preserve it in its natural state.[105]

In April 2006, New Zealand made a submission through the Secretary-General of the UN to the CLCS, which contained the information on the proposed outer limits of the continental shelf of New Zealand beyond 200-nm from the baselines from which the breadth of its territorial sea is measured. New Zealand's submission were divided into four regions, namely Northern, Eastern, Southern and Western. The Northern region covers, *inter alia*, the northern Kermadec Ridge and Kermadec Trench and the Eastern region convers *inter alia*, the south Kermadec Ridge and Kermadec Trench.[106] Along the Kermadec and Colville

Ridges, north from the line 200-nm from the New Zealand territorial sea baseline (derived from base points on Raoul Island) to the intersection with the lines 200-nm from the territorial sea baselines of Fiji and Tonga.[107] In August 2008, the CLCS adopted the recommendations with regards to the submission made by New Zealand,[108] in which the Commission recommended, taking into consideration Article 9 of Annex II, that New Zealand proceeds to establish the outer limits of the continental shelf in the Northern Region on the basis of the outer edge of the continental margin recommended by the Commission and in accordance with Article 76, paragraphs 7 – 10. The Commission also recommended that New Zealand proceed to establish the outer limits of the continental shelf in the Eastern region.[109] Based on the recommendations made by the CLCS, it seems that New Zealand's 200-nm EEZ claim for the Kermadec Islands has been acquiesced to.

5. The U.S. Claim and Practice

Although the United States is not a party to the UNCLOS, its 200-nm EEZ claim for the Aleutians, Northwestern Hawaii and the Pacific remote islands gives rise to a potential problem of interpretation and application of Article 121(3) of the UNCLOS. The decision made by the Tribunal that none of the features in the Spratly Islands in the South China Sea are entitled to claim an EEZ could also be used by nations wishing to challenge U.S. EEZ claims in the Aleutians, Northwestern Hawaii and the Pacific remote islands.[110] Take the seven Pacific remote islands as example, it is indeed questionable whether Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Palmyra Atoll, and Wake Island are capable of sustaining a stable community or economic activity that is not dependent on outside resources or purely extractive in nature. Nevertheless, the U.S. government is taking the position that these insular formations are capable of generating 200-nm EEZs. The U.S. established 50-nm marine protection areas, officially called the Marine National Monument, in the waters surrounding the seven Pacific remote islands, several of which were expanded to 200-nm in the adjacent waters of the islands. In addition, a maritime boundary agreement signed between the United States and Kiribati could be considered an acquiescence of the U.S. claim to 200-nm EEZ for its remote insular features Baker Island, Howland, Jarvis Island, Kingman Reef and Palmyra Atoll.

The United States took a position opposing the establishment of any extended resource zone during the negotiating sessions of the Third United Nations Conference on the Law of the Sea ("UNCLOS III") in the early and mid-1970s. By 1976, due to the claims made by other States to the extended maritime zone, in particular EEZ, and in recognizing U.S. fishing interests and considering much to gain from a similar claim, the U.S. government changed its previous position. As a result, the U.S. Congress enacted the Magnuson Fishery Conservation and Management Act of 1976, which established a 200-nm fishery conservation zone along all U.S. coasts.[111]

In August 1983, President Reagan proclaimed the United States' sovereign

rights and jurisdiction within the EEZ of the United States, which "is a zone contiguous to the territorial sea, including zones contiguous to the territorial sea of the Unite States, in the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands (to the extent consistent with the Covenant and the United Nations Trusteeship Agreement), and United States oversea territories and possessions".[112] The U.S. EEZ "extends to a distance 200-nm from the baseline from which the breadth of the territorial sea is measures".[113] In December 1988, President Reagan proclaimed the extension of "the territorial sea of the United States of America, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Mariana Islands, and any other territory or possession over which the United States exercises sovereignty" from 3-nm to 12-nm from the baselines of the United States determined in accordance with international law.[114]

In August 1995, the U.S. Department of State publicized a notice entitled "Exclusive Economic Zone and Maritime Boundaries; Notice of Limits." For Baker and Howland Islands, the seaward limit of the EEZ is a line of 200-nm from the baseline from which the U.S. territorial sea is measured, except that to the southeast and south of Howland and Baker Islands the limit of the EEZ is determined by straight lines connecting the 15 points. For Jarvis Island, the seaward limit of its EEZ is 200-nm from the U.S. baseline, except that to the north and east of the island the limit of the EEZ should be determined by straight lines connecting the 17 points. For Johnston Atoll, the seaward limit of the EEZ is 200-nm from the U.S. baselines. For Palmyra Atoll-Kingman Reef, the seaward limit of the EEZ is 200-nm from the U.S. baseline, except that to the southeast of Palmyra Atoll and Kingman Reef the limit of the EEZ should be determined by straight lines connecting the 12 points. For Wake Island, the seaward limit of the EEZ is 200-nm from the U.S. baseline, except that to the south of Wake Island the limit of the EEZ shall be determined by straight lines connecting the 6 points.[115]

On January 6, 2009, a few days before leaving office, President George W. Bush established three new marine national monuments in the Pacific Ocean: (1) the Marianas Trench Marine National Monument; (2) the Pacific Remote Islands Marine National Monument; and (3) the Rose Atoll Marine National Monument.[116] The Pacific Remote Islands Marine National Monument ("PRIMNM") is for the Pacific Remote Islands lying south and west of Hawaii, including Baker, Howland, Jarvis and Wake Islands, Kingman Reef, Johnston and Palmyra Atolls. On September 25, 2014, President Barack Obama designated the Pacific Remote Islands Marine National Monument Expansion (PRIMNME), which includes the waters and submerged lands of Jarvis and Wake Islands and Johnston Atoll that lie from the PRIMNM boundary established in Proclamation 8336 of January 6, 2009, to the seaward limit of the U.S. EEZ (as established in Proclamation 5030 of March 10, 1983) of these islands and atoll.[117]

The United States delimits EEZ boundaries between its islands of Palmyra Atoll, Kingman Reef, Jarvis Island, Baker Island, and Wake Island and those islands belonging to the Republic of Kiribati or belonging to the Republic of Marshall Islands in the South Pacific Ocean. The principle of equidistance, meaning that the

lines are equal in distance from the United States and the two island States, is applied to this maritime boundary delimitation. On September 6, 2013, the Treaty between the Government of the United States of America and the Government of the Republic of Kiribati on the Delimitation of Maritime Boundaries was signed at Majuro.[118] On December 9, 2016, President Barack Obama transmitted the Treaty to the Senate for its advice and consent to ratification. The purpose of the Treaty is to establish maritime boundaries between Kiribati and the U.S. islands of Palmyra Atoll, Kingman Reef, Jarvis Island and Baker Island.[119] Under Article III of the Treaty, the three maritime boundaries between the two countries are formed by the geodesic lines[120] connecting six coordinates between Baker Island (U.S.) and Kanton, McKean, Nikumaroro (Kiribati); five coordinates between Palmyra Atoll, Kingman Reef (U.S.) and Teraina, Tabuaeran (Kiribati), and ten coordinates between Jarvis Island (U.S.) and Teraina, Tabuaeran, Kiritimati, Malden, and Starbuck (Kiribati).[121] The parties to this Treaty shall not claim or exercise sovereignty, sovereign rights, or jurisdiction with respect to the waters or seabed or subsoil in the side of other Party's maritime boundary.[122] In this regard, the U.S. 200-nm EEZ claim for its Pacific remote islands of Palmyra Atoll, Kingman Reef, Jarvis Island and Baker Island is recognized by Kiribati. However, it should be noted that this Treaty is still awaiting the advice and consent of the U.S. Senate.

Based on the aforementioned examination of the claims and practices of the five selected countries with respect to their interpretation and application of Article 121(3) of the UNCLOS, it is argued that the Tribunal might have come to an alternative or different outcome in its consideration of the interpretation of Article 121(3) if it had examined more maritime claims and State practice in relation to the implementation of the provision in question.

V. Critique of the Tribunal's Consideration of the Relevance of State Practice in the Implementation of Article 121(3)

The Tribunal considered briefly the relevance of State practice in the implementation of Article 121(3) after, *not before*, it reached its conclusion on the interpretation of the provision in question. This is problematic. In addition, the Tribunal failed to examine any subsequent agreements between the parties and subsequent State practice regarding the application of the UNCLOS's provision, that is, Article 121(3).

Article 31(3)(a)&(b) of the VCLT provides that *any subsequent agreement* between the parties regarding the interpretation of the treaty or the application of its provisions, and that *any subsequent practice* in the application of the treaty which establishes the agreement of the parties regarding its interpretation, shall be taken into account, together with the context of the provision,[123] here referred to Article 121(3) of the UNCLOS. In relation to "subsequent agreement" as referred to in Article 31(3)(a) of the VCLT, the International Law Commission ("ILC"), in its commentary on what was then Article 27 of the Draft VCLT, stated that "an agreement as to the interpretation of a provision reached after the conclusion of the

treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation."[124] As regards the "subsequent practice" referred to in Article 31(3)(b) of the VCLT, the ILC indicated in the same commentary that "[t]he importance of such subsequent practice in the application of the treaty, as an element
of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty."[125]

As cited in Part IV, the agreements signed between Australia and France, or between Kiribati and the United States, indicate that they "must have acquiesced in such practice so that one can speak of an agreement reached concerning the interpretation of the provision in question," which, is referred to Article 121(3). The Tribunal cited the ICJ and WTO jurisprudences on the issue concerning the role of State practice in the implementation of the provision in question. Without further elaboration, however, it suggested that the *threshold* both the ICJ and WTO establish for accepting an agreement on the interpretation by State practice is "quite high", which requires "a 'concordant, common and consistent' sequence of acts or pronouncements" to establish a pattern implying agreement of the parties regarding a treaty interpretation.[126] Without conducting a further examination of the relevance of State practice in the interpretation and application of Article 121(3), the Tribunal concluded by stating that "there is no evidence for an agreement based on State practice on the interpretation of Article 121(3) which differs from the interpretation of the Tribunal" as outlined in 5(a)(i)(ii)(iii)(iv) of Part 6 of the Award.[127] This reasoning is considered not convincing.

As illustrated in Part IV, there can be found maritime claims and practices involving with at least ten parties to the UNCLOS with respect to the interpretation and application of Article 121 (3) that differ from the Tribunal's conclusion on the interpretation of the provision in question. It is believed that if a more comprehensive survey on maritime claims and State practice in relations to the interpretation and application of Article 121(3) were conducted, more examples of "subsequent agreements" or "subsequent practice" could be found. This evidence could be used to challenge the Tribunal's conclusion in its interpretation of Article 121(3). In turn, it would affect the outcome of the Tribunal's consideration of application of Article 121(3) to Scarborough Shoal, Johnson Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), MeKennan Reef, and application of Article 121 to other high-tide features in the Spratly Islands, including Itu Aba West York, Spratly Island, South-West Cay, and North-East Cay. If this would be the case, the Tribunal might have made a different ruling on the Philippines' submissions that are related to the legal status of features in the South China Sea.

Finally, the recommendations adopted by the CLCS for Australia and New Zealand, as well as other State Parties to the UNCLOS, such as Brazil,[128] that confirmed their outer limit of the continental shelves generating from the Article 121(3) category insular formations of Heard Island and McDonald Island (Australia), the Kermadec Islands (New Zealand) and Saint Peter and Paul Rocks (Brazil) in accordance of the ruling of the Tribunal in the SCS arbitration case, could

be interpreted as subsequent State practice regarding the interpretation and application of Article 121(3). No third-party notifications had ever been sent to the Secretary-General of the UN in response to, or in a challenge to, the 200-nm EEZ and continental shelf claims of Australia, Brazil and New Zealand. This means that the Parties to the UNCLOS must have acquiesced in such practices. If this evidence had been used by the Tribunal, it might have come to a different ruling on the legal status of features in the South China Sea.

VI. Conclusion

As pointed out by Professor Choon-ho Park, a former Judge of the International Tribunal for the Law of the Sea, because the geographical circumstances of islands throughout the world are different, ambiguities had to be allowed, in particular, in Article 121(3) of the UNCLOS.[129] As such, State practice is not consistent. The Philippines is also taking the same position during the arbitral proceedings.

As there exists no official authoritative clarification of Article 121(3), the Tribunal that heard the SCS arbitration case interpreted this provision in accordance with general rules of treaty interpretation as reflected in the VCLT, in particular Article 31(3) of the Treaty. The Tribunal reached its conclusion on the interpretation of Article 121(3) before considering the relevance of State practice in accordance with the rule of interpretation under the VCLT. In addition, the Tribunal only explained very briefly, actually in one paragraph out of the entire 1,203 paragraphs of the July 2016 Award. Arguably, the Tribunal did not make efforts to consider the relevant maritime boundary agreements signed by the parties to the UNCLOS. It also downgraded the importance of "any subsequent practice" in the application of the treaty, which constitutes objective evidence of the understanding of the parties as to the meaning of the treaty, in particular concerning their interpretation and application of Article 121(3).

The Tribunal's opinion on the "threshold" established by the ICJ and WTO and its conclusion that there is no evidence for an agreement based upon State practice on the interpretation of Article 121(3) which differs from its interpretation of the role of State practice in the implementation of Article 121(3) are also open to question.

Based on the examination of the maritime claims and State practice of the five selected coastal States, it is concluded that the Tribunal might have come to an alternative outcome if it had examined comprehensively relevant maritime claims and State practices in relation to the interpretation and application of Article 121(3). As far as the five selected coastal States' foreign policies regarding the implementation of the July 2016 Award by China and the Philippines are concerned, it would give rise to a problematic double standard if the countries were to stick with their present claims and practices in relation to their insular formations, which could be considered "rocks" under Article 121(3) given the

interpretation of the Tribunal, and continuously press China and the Philippines to abide by the ruling.

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[1] United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 3, 397; 21 I.L.M. 1261 (1982) (*entered into force* Nov. 16 1995) [hereinafter UNCLOS].
[2] Arbitration Between the Republic of the Philippines and the People's Republic of China, PCA Case No. 2013-19.
[3] Arbitration Between the Republic of the Philippines and the People's Republic of China, PCA Case No. 2013-19, Award (July 12, 2016), http://www.pca-cpa.org [hereinafter Award].
[4] Award, *supra* note 3, para. 279 – 648, p. 119-260.
[5] *Id.* at para. 646, p. 260.
[6] *Id.* at para. 646, p. 260.
[7] *Id.* at para. 1203(B)(6), p. 474.
[8] *Id.* at para. 477, p. 205.
[9] Note these are paragraphs 552 and 553 of the Award, pp. 231-232. However, the Tribunal did not consider it necessary to address in general whether and under which conditions the Convention may be modified by State practice. It stated that "[i]t is sufficient to say that a unilateral act alone is not sufficient." See para. 275, the Award, *supra* note 3, p. 116.
[10] UNCLOS, *supra* note 1, Art. 121, para. 3.
[11] Award, *supra* note 3, para. 553, p. 232.
[12] Treaty between the Government of Australia and the Government of the French Republic on Cooperation in the Maritime Areas Adjacent to the French Southern and Antarctic Territories (TAAF), Heard Island and the McDonald Islands (Canberra, 24 November 2003), *The International Journal of Marine and Coastal Law*, Volume 19, Issue 4, p. 545 – 554 [hereinafter TAAF]
[13] The Treaties with the Republic of Kiribati and the Government of the Federated States of Micronesia on the Delimitation of Maritime Boundaries, Senate Treaty Document, Treaty Doc. 114-13 [hereinafter Kiribati]
[14] Australian Ministry of Foreign Affairs, Press Release, Australia Supports Peaceful Disputes Resolution in the South China Sea (July 12, 2016), http://foreignminister.gov.au/releases/Pages/2016/jb_mr_160712a.aspx.
[15] Ministry of Foreign Affairs of Japan, Press Release, Arbitration between the Republic of the Philippines and the People's Republic of China regarding the South China Sea (July 12, 2016). http://www.mofa.go.jp/press/release/press4e_001204.html.
[16] U.S. Department of State, Bureau of Public Affairs, Press Release. (July 12, 2016). Decision in the Philippines China Arbitration, https://2009-2017.state.gov/r/pa/prs/ps/2016/07/259587.htm.
[17] Viray, P.E., Japan, New Zealand Underscore Arbitral Ruling on South China Sea Angering China, (May 19, 2017), *The Philippine Star*, http://www.philstar.com/headlines/2017/05/19/1701542/japan-new-zealand-underscore-arbitral-ruling-south-china-sea-angering.
[18] Group of Seven (G7), Joint Communique of G7 Foreign Ministers' Meeting Lucca, (April 11, 2017), http://www.g7italy.it/sites/default/files/documents/G7_FMM_Joint_Communique.pdf. The French foreign minister jointed the other 6 foreign ministers in stating that "[w]e consider the July 12, 2016 award rendered by the Arbitral Tribunal under the UNCLOS as a useful basis for further efforts to peacefully resolve disputes in the South China Sea."
[19] U.S. Department of Defense, Remarks by Secretary Mattis at Shangri-La Dialogue, (June 3, 2017), https://www.defense.gov/News/Transcripts/Transcript-View/Article/1201780/remarks-by-secretary-mattis-at-shangri-la-dialogue/.
[20] International Institute for Strategic Studies (IISS), IISS Shangri-La Dialogue 2017 Second

Plenary Session "Upholding the Rules-Based Regional Order: Tomomi Inada", (June 3, 2017) https://www.iiss.org/en/events/shangri-la-dialogue/archive/shangri-la-dialogue-2017-4f77/plenary-2-faad/inada-622b; "Upholding the Rules-Based Regional Order: Marise Payne" (June 3, 2017) http://www.iiss.org/en/events/shangri-la-dialogue/archive/shangri-la-dialogue-2017-4f77/plenary-2-faad/payne-44ff.

[21] U.S. Department of Defense, Joint Statement Australia-US-Japan Defence Ministers' Meeting, (June 3, 2017) https://www.defense.gov/Portals/1/Documents/pubs/Australia-US-Japan-Defense-Ministers-Meeting-June-2017.pdf.

[22] United States Department of State, Joint Statement AUSMIN 2017, (June 5, 2017) https://www.state.gov/r/pa/prs/ps/2017/06/271560.htm.

[23] United States Department of State, Australia-Japan-United States Trilateral Strategic Dialogue Ministerial Joint Statement, (August 6, 2017), https://www.state.gov/r/pa/prs/ps/2017/08/273216.htm.

[24] The Japanese wording "shima" stands for "island".

[25] "Rocks" and "fully entitled islands" are both sub-sets of the broader category of "high-tide features." The term "rocks" stands for high-tide features that "cannot sustain human habitation or economic life of their own" and which therefore, pursuant to Article 121(3), are disqualified from generating an EEZ or continental shelf. The term "fully entitled islands" stands for those high-tide features which are not rocks, and which pursuant to Article 121(2), enjoy the same entitlements as other land territory under the Convention. This means that "fully entitled islands" are entitled the right to generate an EEZ and continental shelf. See Award, *supra* note 3, para. 280, p. 119.

[26] To be examined in Part IV of this article.

[27] Notification and Statement of Claim of the Republic of the Philippines, January 22, 2013, available at https://assets.documentcloud.org/documents/2165477/phl-prc-notification-and-statement-of-claim-on.pdf [hereinafter Notification]

[28] *Id*.

[29] *Id*., pp. 271-272. There were 15 submissions contained in the Philippines' Memorial that was submitted to the Tribunal on March 30, 2014.

[30] Notification, *supra* note 27, p.145.

[31] Award, *supra* note 3, p. 33, para. 99.

[32] Award, *supra* note 3, p. 41, para 112 (b), Submission No. 3: Scarborough Shoal generates no entitlement to an exclusive economic zone or continental shelf.

[33] *Id.* Submission No. 5: Mischief Reef and Second Thomas Shoal are part of the exclusive economic zone and continental shelf of the Philippines.

[34] *Id.* Submission No. 7: Johnson Reef, Cuarteron Reef and Fiery Cross Reef generate no entitlement to an exclusive economic zone or continental shelf.

[35] *Id*. Submission No. 8: China has unlawfully interfered with the enjoyment and exercise of the sovereign rights of the Philippines with respect to the living and non-living resources of its exclusive economic zone and continental shelf.

[36] *Id*. Submission No. 9: China has unlawfully failed to prevent its nationals and vessels from exploiting the living resources in the exclusive economic zone of the Philippines.

[37] Award, *supra* note 3, paras. 26-111, pp. 11- 39.

[38] Award, *supra* note 3, paras. 112-115, pp. 41-43.

[39] Award, *supra* note 3, paras. 116-168, pp. 45-65.

[40] Award, *supra* note 3, paras. 169-278, pp. 67-117. This part deals with the Philippines' Submissions No. 1 and 2, for Submissions No. 1 and 2, see Award, para. 112 (B), p. 41.

[41] Award, *supra* note 3, paras. 279-648, pp. 119-260. This part deals with the Philippines' Submissions No. 3 – 7. For Submissions No. 3-7, see Award, para. 112 (B), p. 41.

[42] Award, *supra* note 3, paras. 649-1109, pp. 261-436. This part deals with the Philippines' Submissions No. 8 – 13. For Submissions No. 8-13, see Award, para. 112(B), pp. 41-42.

[43] Award, *supra* note 3, paras. 1110-1181, pp. 437-464. This part deals with Philippines' Submission No. 14. For Submission No. 14, see Award, para. 112(B), p. 42.

[44] Award, *supra* note 3, paras. 1182-1201, pp. 465-470. This part deals with the Philippines' Submission No. 15. For Submission No. 15, the Award, para. 112(B), p. 42.

[45] Award, *supra* note 3, para. 1203, pp. 471-473.
[46] Award, *supra* note 3, para. 1203, pp. 473-477.
[47] Award, *supra* note 3, para. 1203 (B)(3)(b), p. 473.
[48] Award, *supra* note 3, para. 1203 (B)(3) (c), p. 473.
[49] Award, *supra* note 3, para. 1203 (B)(4), p. 474.
[50] Award, *supra* note 3, para. 1203 (B)(5), p. 474.
[51] Award, *supra* note 3, para. 1203 (B)(7), p. 474.
[52] Award, *supra* note 3, para. 1203 (B)(6) & (7), p. 474.
[53] Award, *supra* note 3, para. 474, p. 204.
[54] Vienna Convention on the Law of Treaties, Articles 39-51, 61-62 *opened for signature* May 23, 1969, 1155 UNTS 331(entered into force Jan. 27, 1980) [hereinafter Vienna Convention].
[55] Vienna Convention, *supra* note 54, Article 31 (General Rule of Interpretation):

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:
(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

[56] Vienna Convention, *supra* note 54, Article 32 (Supplementary Means of Interpretation):

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 :

(a) Leaves the meaning ambiguous or obscure; or
(b) Leads to a result which is manifestly absurd or unreasonable.

[57] Award, *supra* note 3, para. 540, p. 227.
[58] Award, *supra* note 3, para. 541, p. 227.
[59] Award, *supra* note 3, para. 542, pp. 227-228.
[60] Award, *supra* note 3, para. 543, p. 228.
[61] Award, *supra* note 3, para. 544, p. 228.
[62] Award, *supra* note 3, para. 545, p. 228-229.

[63] Award, *supra* note 3, para. 546, p. 229.
[64] Award, *supra* note 3, para. 547, p. 229-230.
[65] Award, *supra* note 3, paras. 548-551, pp. 230-231.
[66] *Advisory Opinion Concerning the Legality of the Use by a State of Nuclear Weapons in Armed Conflict,* ICJ Reports 1996.
[67] *Kasikili/Sedudu Island (Botswana/Namibia),* Judgment, ICJ Reports 1999.
[68] Award, *supra* note 3, para. 552, pp. 231-232.
[69] Award, *supra* note 3, para. 553, p. 232.
[70] Clive Symmons, *Maritime Zones from Islands and Rocks*, *in* THE SOUTH CHINA SEA DISPUTES AND LAW OF THE SEA, 107 (S. Jayakumar, Tommy Koh, & Robert Beckman eds., 2014).
[71] *Id*.
[72] Yann-huei Song, *The Application of Article 121 of the Law of the Sea Convention to the Selected Geographical Features Situated in the Pacific Ocean*, 9 CHIN. J. INT. LAW 663–698, 77 (2010).
[73] See Wikipedia at https://en.wikipedia.org/wiki/Isla_Salas_y_G%C3%B3mez (last visited 2017/8/18).
[74] US Department of State, Bureau of Intelligence and Research, *Limits in the Seas*, No. 101, Fiji Maritime Claims, p. 6 (November 30, 1984) available in: https://www.state.gov/documents/organization/58567.pdf.
[75] Marius Gjetnes, *The Legal Regime of Island in the South China Sea*, Master's Thesis (University of Oslo, Norway, 2000), pp. 65-67.
[76] R. R. CHURCHILL & A.V. LOWE, THE LAW OF THE SEA 164 (1988).
[77] Wikipedia, available at https://en.wikipedia.org/wiki/Savage_Islands (last visited 20176/8/16).
[78] R. R. CHURCHILL & A.V. LOWE, THE LAW OF THE SEA (1988).
[79] David Freestone, *Maritime Boundaries in the Eastern Caribbean*, *in* INTERNATIONAL BOUNDARIES AND BOUNDARY CONFLICT RESOLUTION : PROCEEDINGS OF THE 1989 IBRU CONFERENCE , 199–200 (1990).
[80] Wikipedia, at https://en.wikipedia.org/wiki/Heard_Island_and_McDonald_Islands (last visited 2017/8/19).
[81] Sam Bateman, OBAMA AT MIDWAY: PICKING AND CHOOSING THE LAW OF THE SEA, https://www.lowyinstitute.org/the-interpreter/obama-midway-picking-and-choosing-law-sea (last visited May 23, 2017).
[82] Australian Submissions, through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, pursuant to article 76, paragraph 8, of the United Nations Convention on the Law of the Sea of 10 December 1982, available at http://www.un.org/depts/los/clcs_new/submissions_files/submission_aus.htm.
[83] Recommendations of the Commission on the Limits of the Continental Shelf (CLCS) in regard to the Submission made by Australia on November 15, 2004, adopted by the CLCS on April 9, 2008, available at http://www.un.org/depts/los/clcs_new/submissions_files/aus04/Aus_Recommendations_FINAL.pdf.
[84] They are: France, Germany, India, Japan, the Netherland, Russian Federation, Democratic Republic of Timor-Leste, and the United States.
[85] The 'Volga', Russian Federation v Australia, Prompt Release, ITLOS Case No 11, ICGJ 344 (ITLOS 2002), 23rd December 2002, International Tribunal for the Law of the Sea [ITLOS].
[86] TAAF, *supra* note 12, Article 2 provides that "Seaward of Heard and McDonald Islands on the one hand and of Kerguelen Islands on the other hand, the line of delimitation between the Australian fishing zone and the French Economic Zone and between areas of continental shelf over which each State respectively exercises sovereign rights in accordance with international law lies along the geodesics connecting the . . . points, defined by their co-ordinates . . ."
[87] TAAF, *supra* note 12, p. 545-552.
[88] Id., Article 1.

[89] Central Intelligence Agency, CLIPPERTON ISLAND, https://www.cia.gov/library/publications/the-world-factbook/geos/ip.html (last visited June 23, 2017).
[90] French Overseas Departments and Dependencies, Summary of Claims, DoD 2005, 1-M, available at http://www.dtic.mil/whs/directives/corres/20051m_062305/french_dependencies.doc.See also La Zone Economique Exclusive de Clipperton, at http://www.clipperton.fr/incagen.html?territoire.htm~main (last visited 2017/8/19).
[91] Law No. 95-1311, December 21, 1995.
[92] Daniel Pauly, *The Fisheries Resources of the Clipperton Island EEZ (France)*, *in* FISHERIES CATCH RECONSTRUCTIONS: ISLANDS (Dirk Zeller ed., 2000).
[93] French minister questions Pacific fishing policies, RADIO NEW ZEALAND (2009), http://www.radionz.co.nz/international/pacific-news/184155/french-minister-questions-pacific-fishing-policies (last visited June 23, 2017).
[94] See Extension of the Continental Shelf beyond 200 Nautical miles: an Asset for France. The Delegation for Overseas Territories, October 24, 2013, available at http://www.eesc.europa.eu/ceslink/resources/docs/d141.pdf, p. 25 (last visited Aug. 17, 2017).
[95] Deposit by France of a list of geographical coordinates of points, pursuant to article 75, paragraph 2, of the Convention, M.Z.N. 80.2010.LOS (Maritime Zone Notification), December 6, 2010.
[96] Jon Van Dyke, *Speck in the Ocean Meets Law of the Sea*, THE NEW YORK TIMES, January 21, 1988, http://www.nytimes.com/1988/01/21/opinion/l-speck-in-the-ocean-meets-law-of-the-sea-406488.html (last visited June 23, 2017).
[97] Yann-huei Song, *Okinotorishima: A Rock Or An Island? Recent Maritime Boundary Controversy Between Japan And Taiwan/China*, *in* MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA (Seoung-Yong Hong & Jon Van Dyke eds., 2009).
[98] Japanese Submissions, through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, pursuant to article 76, paragraph 8, of the United Nations Convention on the Law of the Sea of 10 December 1982, available at http://www.un.org/depts/los/clcs_new/submissions_files/jpn08/jpn_execsummary.pdf (last visited Aug. 19, 2017). Note, the seven areas are the Southern Kyushu-Palau Ridge Region, the Minami-Io To Island Region, the Minami-Tori Shima Island Region, the Mogi Seamount Region, the Ogasawara Plateau Region, the Southern Oki-Daito Ridge Region and the Shikoku Basin Region.
[99] *Id*., p. 9.
[100] For China's *note verbale* CML/2/2009, visit http://www.un.org/depts/los/clcs_new/submissions_files/jpn08/chn_6feb09_e.pdf (last visited 2017/8/19). For South Korea's note verbale MUN/046/09, visit http://www.un.org/depts/los/clcs_new/submissions_files/jpn08/kor_27feb09.pdf (last visited 2017/8/19).
[101] Summary of Recommendations of the Commission on the Limits on the Continental Shelf in Regard to the Submission Made by Japan, 12 November 2008. Adopted by the CLCS, with amendments, on April 19, 2012, Part IV (A) (20), p. 4, available at http://www.un.org/depts/los/clcs_new/submissions_files/jpn08/com_sumrec_jpn_fin.pdf (last visited Aug. 18, 2017).
[102] Young-won Kim, IMPLICATIONS OF THE AWARD OF THE SOUTH CHINA SEA ARBITRATION FOR KOREA AND JAPAN, http://www.jpi.or.kr/kor/regular/policy_view.sky?code=archive&id=5564 (last visited Sep 23, 2017).
[103] Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977, Part 2, available in New Zealand Legislation at http://www.legislation.govt.nz/act/public/1977/0028/latest/whole.html (last visited Sep 23, 2017) and Story: Law of the Sea, The benefits for New Zealand, The Encyclopedia of New Zealand, at https://teara.govt.nz/en/law-of-the-sea/page-3 (last visited Sep 23, 2017).

[104] See "New Zealand to Establish Extensive Ocean Sanctuary," *Environment News Service*, October 3, 2015, available at http://ens-newswire.com/2015/10/03/new-zealand-to-establish-extensive-ocean-sanctuary/ (last visited Sep 23, 2017).
[105] Kermadec Ocean Sanctuary Bill, New Zealand Legislation, Bill 120-1, available at http://www.legislation.govt.nz/bill/government/2016/0120/latest/versions.aspx?search=ts_act%40bill%40regulation%40deemedreg_kermadec_resel_25_a (last visited 2017/8/21). Note, the bill is still on the second reading in New Zealand's Parliament.
[106] See New Zealand Submission to the Commission on the Limits of the Continental Shelf pursuant to article 76 (8) of the United Nations Convention on the Law of the Sea, Executive Summary, Part 6, 6.1 (Northern Region), p. 10 and 6.2 (Eastern Region), p. 13, available at http://www.un.org/depts/los/clcs_new/submissions_files/nzl06/nzl_exec_sum.pdf.
[107] *Id*., 6.1 (a).
[108] See the Report of the Twenty-second session of the Commission on the Limits of the Continental Shelf, New York, August 11 – September 12, 2008, Item 4 Consideration of the Submissions made by New Zealand to the Commission pursuant to article 76, paragraph 8, of the 1982 United Nations Convention on the Law of the Sea, p. 3, available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N08/523/33/PDF/N0852333.pdf?OpenElement.
[109] See Summary of the Recommendations of the Commission on the Limits of the Continental Shelf (CLCS) in regard to the Submission made by New Zealand 19 April 2006, adopted by CLCS on August 22, 2008, 5.3 Recommendations, paragraph 148, p. 44 and 5.3 Recommendations, paragraph 167, p. 50, available at http://www.un.org/depts/los/clcs_new/submissions_files/nzl06/nzl_summary_of_recommendations.pdf.
[110] Raul Pedrozo, *South China Sea Lawfare: Post-Arbitration Policy Options and Future Prospects*, May 12, 2017, http://scstt.org/reports/2017/1082 (last visited July 23, 2017).
[111] Magnuson–Stevens Fishery Conservation and Management Act (MSFCMA), 16 U.S.C. ch. 38 § 1801 (1976). The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) is the primary law governing marine fisheries management in U.S. federal waters. This Act fosters long-term biological and economic sustainability of the U.S. marine fisheries out to 200 nautical miles from shore. Key objectives of the Act are to: 1. Prevent overfishing; 2. rebuild overfished stocks; 3. increase long-term economic and social benefits; and 4. ensure a safe and sustainable supply of seafood. Prior to the Magnuson-Stevens Act, waters beyond 12 nautical miles were international waters and fished by fleets from other States. The 1976 law extended U.S. jurisdiction to 200 nautical miles and established eight regional fishery management councils (Councils) with representation from the coastal states and fishery stakeholders. The Councils' primary responsibility is to develop fishery management plans (FMPs). These FMPs must comply with a number of conservation and management requirements, including the ten National Standards – principles that promote sustainable fisheries management.
[112] Exclusive Economic Zone of the United States of America, Proclamation 5030-48 Fed.Reg. 10605 (Mar. 10, 1983).
[113] *Id*.
[114] *Id*.
[115] See Public Notice 2237 (dated August 10, 1995), 50 Fed. Reg. 43825 (Aug. 23, 1995).
[116] See NOAA, Marine National Monument Program: Rose Atoll Marine National Monument, available at http://www.fpir.noaa.gov/MNM/mnm_roseatoll.html (last visited July 21, 2017); NOAA, Marine National Monument Program: Marianas Trench Marine National Monument, available at http://www.fpir.noaa.gov/MNM/mnm_marianas-trench.html.(last visited July 21, 2017); NOAA, Marine National Monument Program: The Pacific Remote Islands Marine National Monument, available at http://www.fpir.noaa.gov/MNM/mnm_prias.html (last July 21, 2017).
[117] Pacific Remote Islands Marine National Monument Expansion, Proclamation No. 9173, 79 Fed. Reg. 58,645 (Sept. 29, 2014).
[118] Kiribati, *supra* note 13.

[119] *Id.*
[120] The "geodesic line" is the shortest line that can be drawn between two points on the ellipsoidal surface of the earth; a curve drawn on any given surface so that the osculating plane of the curve at every point shall contain the normal to the surface; the minimum line that can be drawn on any surface between any two points.
[121] Kiribati, *supra* note 13, Article III of the Treaty
[122] Kiribati, *supra* note 13, Article IV of the Treaty
[123] Vienna Convention, *supra* note 54.
[124] Reports of the International Law Commission, Document A/6309/Rev.l, in *Yearbook of International Law Commission*, 1966, Vol. II, p. 221, para. 14.
[125] *Id*, para. 15.
[126] Award, *supra* note 3 para. 552, p. 231-232.
[127] Award, *supra* note 3, paragraphs 475 – 551, pp. 204 – 231.
[128] For the discussion of Brazil's maritime claim and practice with respect to its Saint Peter and Paul Rocks' right to generate 200-nm EEZ and continental shelf, the interpretation and application of Article 121(3) and its submission of the limit of outer continental shelf, see Yann-huei Song, *supra* note 72 at 684–685.
[129] Choon-ho Park, *The Changeable Legal Status of Islands and "Non-Island*, *in* BRINGING NEW LAW TO OCEAN WATERS, 490 (David D. Caron & Harry Scheiber eds., 2004).