

## NOTE & COMMENT

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# A Chinese Perspective of Treaty Interpretation on the Status of Maritime Features: In Response to the South China Sea Arbitration Award

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*The status of maritime features is one of the core issues in the South China Sea Arbitration. The essence of this issue is territorial sovereignty and maritime delimitation disputes between China and the Philippines. Based on the interception of certain facts and evidence, the Tribunal did not interpret the China's diplomatic position as it wanted, and it had an intensely subjective interpretation of Article 121(3) of the United Nations Convention on the Law of the Sea of 1982. Combined with the Chinese government's positions before and after the publicity surrounding the Award, this paper, which takes the logical approaches of the Award as the main line, focuses on chapter 6 of the Award, raising questions about disputes on the status of maritime features, analyzing the treaty interpretations related to the status of maritime features, and clarifying the defections.*

### Keywords

Arbitral Tribunal, South China Sea, Statue, Maritime Features, Treaty Interpretation, *In Dubio Mitius*

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# 1. Introduction

On January 22, 2013, the Philippines unilaterally initiated an arbitration against China on the South China Sea Disputes (hereinafter South China Sea Arbitration) in accordance with Chapter 15 and Annex VII of the United Nations Convention on the Law of the Sea of 1982 (“UNCLOS”). On July 12, 2016, the Arbitral Tribunal issued its final award (hereinafter the Award),<sup>1</sup> with its Part VI involving the Status of Features in South China Sea.

In the Award, the Tribunal referred to the maritime features that met the definition of an island laid down in Article 121(1) of the UNCLOS as “high-tide features.”<sup>2</sup> The Tribunal used the term ‘rocks’ for high-tide features that “cannot sustain human habitation or economic life of their own” pursuant to Article 121(3), but these high-tide features are fully entitled islands under Article 121(1). According to the Award, *Huangyan Dao* (Scarborough Shoal), *Chigua Jiao* (Johnson Reef), *Huayang Jiao* (Cuarteron Reef), *Ximen Jiao* (Mckennan Reef) and *Yongshu Jiao* (Fiery Cross Reef) are rocks which do not generate an Exclusive Economic Zone (“EEZ”) or continental shelf. Low-tide elevations include *Meiji Jiao* (Mischief Reef), *Renai Jiao* (Second Thomas Shoal), *Zhubi Jiao* (Subi Reef), and *Dongmen Jiao* (Hughes Reef), the *Nanxun Jiao* (Gaven Reef) were separated into two parts: the southern part is a low-tide elevation, and the northern part is a rock. None of the maritime features in *Nansha Qundao* (Spratly Islands or Nansha Islands) generates maritime entitlement including EEZ or continental shelf as a whole.<sup>3</sup>

When the Award was issued, the Chinese government released the “Statement on China’s Territorial Sovereignty and Maritime Rights and Interests in South China Sea” to enumerate its territorial sovereignty and maritime rights and interests based on the practice of the Chinese people and government over the long course of history. The Statement, *inter alia*, provides:

(i) China has sovereignty over Nanhai Zhudao, consisting of *Dongsha Qundao*, *Xisha Qundao*, *Zhongsha Qundao* and *Nansha Qundao*; (ii) China has internal waters,

<sup>1</sup> In the Matter of the South China Sea Arbitration before An Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Convention of the Law of the Sea Between the Republic of the Philippines and the People’s Republic of China Case No. 2013-19, at 472-4, ¶ 1203 (Perm. Ct. Arb. July 12, 2016) (hereinafter South China Sea Arbitration Award), available at <http://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf> (last visited on Mar. 23, 2018).

<sup>2</sup> South China Sea Arbitration Award, at 119, ¶ 280.

<sup>3</sup> *Id.* at 471-4, ¶ 1203.

territorial sea and contiguous zone, based on Nanhai Zhudao; (iii) China has EEZ and continental shelf, based on Nanhai Zhudao; (iv) China has historic rights in the South China Sea.<sup>4</sup>

## 2. Interpretation of Articles 13 and 121 of the UNCLOS in the Award

As part of the Award, the Tribunal reviewed and determined its jurisdiction and admissibility (hereinafter Award on Jurisdiction and Admissibility) with respect to “The Philippines’ Submissions concerning the Status of Features in the South China Sea,”<sup>5</sup> which was affirmed by the Award on Jurisdiction and Admissibility issued on October 29, 2015.<sup>6</sup> Then, the Tribunal distinguished a low-tide elevation (Article 13) from an island (Article 121), as defined in the UNCLOS. By interpreting Article 121(3) of the UNCLOS, the Tribunal set up the condition that islands must be able to “sustain human habitation or economic life of their own” to be recognized as such in the legal sense. According to this standard and other factual evidence, the Tribunal has finally decided the Status of *Huangyan Dao* (Scarborough Shoal), *Chigua Jiao* (Johnson Reef), and other maritime features, as requested by the Philippines.

The essence of arguments in Part VI of the Award is the interpretation of the UNCLOS. Articles 13 and 121(1) have similar expressions without tidal standards in the text, while Article 121(3) essentially distinguishes the fully entitled islands from the rocks which has potential to limit the extent of coastal state maritime zones, especially in the case of rocks. The Tribunal made a distinction between a low-tide elevation (Article 13) and an island (Article 121(1)) by referring to height data and tidal patterns and ranges. Then the Tribunal emphasized interpreting Article 121(3), reviewing each textual element of the Article, including such terms as ‘rocks,’ ‘cannot,’ ‘sustain,’ ‘human habitation,’ ‘or’ and “economic life of their own.” In the Tribunal’s view, ‘rocks’ may not necessarily consist of rock, but they

<sup>4</sup> See Statement of the Government of the People’s Republic of China on China’s Territorial Sovereignty and Maritime Rights and Interests in the South China Sea (July 12, 2016), available at [http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj\\_1/t1379493.htm](http://www.fmprc.gov.cn/nanhai/eng/snhwtlcwj_1/t1379493.htm) (last visited on Apr. 22, 2018).

<sup>5</sup> South China Sea Arbitration (Award on Jurisdiction and Admissibility), Case No. 2013-19 (Perm. Ct. Arb. Oct. 29, 2015), available at <https://pcacases.com/web/sendAttach/1506> (last visited on Apr. 22, 2018).

<sup>6</sup> *Id.* at 149, ¶ 413. See also South China Sea Arbitration Award, at 471, ¶ 1202.

must consist of naturally formed materials.<sup>7</sup>

The use of ‘cannot’ indicates a concept of ‘capacity.’ It means that even if a feature is currently not inhabited, this does not prove that it is ‘uninhabitable.’ However, historical evidence of human habitation and economic life in the past may be relevant for establishing a feature’s capacity. Historical evidence of human habitation and economic life in the past may be relevant for establishing a feature’s capacity. If a known feature proximate to a populated land mass was neither inhabited nor appropriate for sustainable economic life, this may be consistent with an explanation that it is uninhabitable. Conversely, if having positive evidence that humans historically lived on a feature or that the feature was the site of economic activity, it could constitute relevant evidence of a feature’s capacity.<sup>8</sup>

The meaning of ‘sustain’ has three components, which are: (1) the support and provision of essentials; (2) a temporal concept; and (3) a qualitative concept. Thus, to ‘sustain’ means to provide something necessary to keep humans alive and healthy over a continuous period of time, according to a proper standard.<sup>9</sup> The term ‘human habitation’ implies a non-transient presence of persons who have chosen to reside on the feature in a settled manner, which should be able to support, maintain, and provide food, drink, and shelter in order to sustain human habitation. Although no precise number of persons is specified in Article 121(3), the Tribunal considered that the term ‘habitation’ generally implies habitation of the feature by a group or community of persons. Therefore, a sole individual would not be qualified.<sup>10</sup>

Also, the Tribunal pointed out that military and governmental personnel stationed on the features of Nansha Islands does not constitute ‘human habitation,’ as they are heavily dependent on outside supply and are deployed to Nansha Islands in an effort to support the various claims to sovereignty that have been advanced.<sup>11</sup> The Tribunal addressed the fact that economic activity is carried out by humans, who will rarely inhabit areas without economic activity or livelihood. The disjunctive ‘or’ does not mean there are two different standards to define ‘island.’ In other words, ‘human habitation’ and ‘economic life’ are linked in practical terms, regardless of the grammatical construction of Article 121(3).<sup>12</sup> The final

<sup>7</sup> South China Sea Arbitration Award, at 205-6, ¶ 480.

<sup>8</sup> *Id.* at 206-7, ¶¶ 483-484.

<sup>9</sup> *Id.* at 207-8, ¶ 487.

<sup>10</sup> *Id.* at 208, ¶¶ 489-491.

<sup>11</sup> *Id.* at 252, ¶ 618.

<sup>12</sup> *Id.* at 210, ¶¶ 495-496.

element, the phrase “economic life of their own,” implies that the economic activity must revolve around local resources, rather than economic life being ultimately dependent on support from the outside or purely extractive economic activities. Furthermore, economic activities derived from a possible EEZ or continental shelf must be excluded.<sup>13</sup>

To sum up, the Tribunal recalled that the UNCLOS classifies features on the basis of their natural condition. The core principle on interpreting Article 121(3) is “to prevent insignificant features from generating large entitlements to maritime zones that would infringe on the entitlements of inhabited territory or on the high seas and the area of the seabed reserved for the common heritage of mankind.”<sup>14</sup> As a result, the entitlements of a feature depend on its objective capacity - in its natural condition - to sustain either a stable community of people or economic activity that is neither dependent on outside resources nor purely extractive in nature.

### 3. Challenge to a Given Dispute on the Status of Maritime Features

In the South China Sea Arbitration, the Philippines raised the question of territorial sovereignty concerning the status of the maritime features. The Tribunal appeared to be subjective on interpreting ‘dispute’ by referring to international judicial practices. Together with the Philippines, it misinterpreted China’s related diplomatic records. The Tribunal, assuming China’s positions on the status of specific features in the South China Sea, finally concluded that China and the Philippines had disputes on the status of the maritime features referred to in Article 288 of the UNCLOS. Thus, the main point of contention is whether the disputes exactly exist. For this question, the Tribunal should have examined the respective positions of China and the Philippines and determined whether such disputes are excluded by the Declaration of the People’s Republic of China under Article 298 of the UNCLOS dated August 25, 2006 (hereinafter China’s Declaration of 2006),<sup>15</sup> relating to maritime delimitation.

<sup>13</sup> *Id.* at 211-2, ¶¶ 500-503.

<sup>14</sup> The South China Sea Arbitration (Phil. v. P.R.C.), Press Release, July 12, 2016, available at <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Press-Release-No-11-English.pdf> (last visited on Apr. 22, 2018).

<sup>15</sup> On August 25, 2006, the Chinese government filed a statement with the UNCLOS saying that the Government of

### A. Misinterpretation of China's Positions on the Status of the Features

The Tribunal and the Philippines inferred China's positions on the status of the maritime features in the South China Sea, referring to China's statements in related diplomatic records. The Tribunal reviewed several diplomatic statements made by the Chinese government,<sup>16</sup> in the end, the Tribunal agreed with the Philippines that Nansha Islands should not be deemed as archipelagos enclosed within a system of archipelagic or straight baselines as China asserts,<sup>17</sup> and considered China's claim for EEZ based on the assertion above contradicts its position under Article 121(3).<sup>18</sup> The Tribunal, adopting the Philippines' position and misinterpreting to China's position, isolated each maritime feature in the South China Sea and denied their integrity.

China's assertion of rights to the *Nanhai Zhudao* (maritime features in the South China Sea) as a whole preceded the enactment and execution of the UNCLOS. In early 20th century, the government of the Republic of China had claimed entitlement to *Nansha Zhudao*. Since 1949, the Chinese government has asserted entitlement to *Dongsha*, *Xisha*, *Zhongsha* and *Nansha* respectively in all related the Position Paper of 2014<sup>19</sup> and official statements on South China Sea issues, without claiming EEZ or continental shelf to any specific features separately. Even the Philippines and Vietnam treated Nansha Islands as a whole when they claimed

the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraphs 1(a), (b) and (c) of Article 298 of the Convention. See ITLOS, Declarations made by States Parties under article 298, available at <https://www.itlos.org/jurisdiction/declarations-of-states-parties/declarations-made-by-states-parties-under-article-298> (last visited on Apr. 23, 2018).

<sup>16</sup> These diplomatic statements include: Note *Verbale* of 2009 to the Secretary-General of the United Nations to protest Japan's claim for EEZ and continental shelf based on the rock of Okinotori (hereinafter Note *Verbale* of 2009), No. CML/2/2009 (Feb. 6); Proposal for the inclusion of a supplementary item in the agenda of the 19th Meeting of States Parties: Note *Verbale* dated 2009/05/21 from the Permanent Mission of China to the United Nations addressed to the Secretary-General (May 22, 2009), available at <http://repository.un.org/handle/1176/277786?show=full>; Note *Verbale* of 2011 to the Secretary-General of the United Nations on South China Sea Issues (hereinafter Note *Verbale* of 2011), No. CML/8/2011 (Apr. 14, 2011); South China Sea Arbitration (Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility), Case No. 2013-19, at 104, ¶¶ 9-12 (Perm. Ct. Arb. Nov. 25, 2015), available at <https://pcacases.com/web/sendAttach/1548>; Department of Foreign Affairs of Republic of the Philippines, Note *Verbale* of 2015 from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs, No. 15 (PG)-214 (June 28, 2015) (Annex 689), available at <https://www.pcacases.com/web/view/7>; 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 on Dec. 7, 2014 (hereinafter Position Paper of 2014), available at [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1217147.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml) (all last visited on Apr. 22, 2018).

<sup>17</sup> South China Sea Arbitration Award, at 235-6, ¶¶ 571 & 573.

<sup>18</sup> *Id.* at 198-9, ¶¶ 153 & 453-458.

<sup>19</sup> Position Paper of 2014, *supra* note 16, ¶ 16.

sovereignty respectively over the Kalayaan Island Group<sup>20</sup> and the Truong Sa archipelago in history.<sup>21</sup> The Philippines has conceded China's assertion to Nansha Islands as a whole,<sup>22</sup> yet interprets it as claiming territorial sea, EEZ and continental shelf of each feature in the South China Sea without even providing evidence. The UNCLOS strictly distinguishes "for the purposes of this Convention"<sup>23</sup> from "for the purposes of this Part"<sup>24</sup> when defining certain concepts. Article 46(2) of the UNCLOS defines archipelago "for the purposes of this Convention." It indicates that 'archipelago' in Article 46(1) is a general definition to describe a group of islands that is viewed as a geographical unit.

The Chinese statement regarding Nansha Islands as a whole is based on the fact that these Islands have been historically regarded as an archipelago or geographical unit.<sup>25</sup> The definition of 'archipelago' can support China's claim to Nansha Islands as a whole. Nonetheless, the Tribunal denied China's assertion to Nansha Islands because China is not an archipelagic state under the UNCLOS. Such attempt distorted the nature and scope of the disputes in the South China Sea between China and the Philippines,<sup>26</sup> thereby framing the issue in Article 121 of the UNCLOS, in order to justify its interpretation.

Even the Note *Verbales* of 2009 and 2011<sup>27</sup> do not reflect China's positions on Nansha Islands. The Tribunal referred to both Note *Verbales* to explain China's position<sup>28</sup> and considered China's statements in support of its arguments on Article 121(3). However, the rock of Okinotori is not comparable to the maritime features in the South China Sea, and the Note *Verbales* of 2009 and 2011 are not relevant to China's assertion of rights to Nansha Islands. Okinotori is an isolated rock in the Pacific Ocean; two small rocks are exposed above sea level at height of 16cm and 6cm during high tide-both less than 10 square meters,<sup>29</sup> while Nansha Islands are

<sup>20</sup> See the Republic of the Philippines Written Responses of The Philippines to the Tribunal's 13 July 2015 Questions (Vol. 1), at 25, ¶ IV.3, available at <https://www.pcacases.com/web/sendAttach/1847> (last visited on Apr. 23, 2018).

<sup>21</sup> Vietnamese Ministry of Foreign Affairs, Vietnam Opposes Chinese Fishing in Truong Sa Archipelago, (July 13, 2012), available at <http://www.mofa.gov.vn/en/nr040807104143/nr040807105001/ns120716112437> (last visited on Apr. 22, 2018).

<sup>22</sup> *Supra* note 20, at 1-2, ¶¶ I.1-I.3.

<sup>23</sup> UNCLOS arts. 1, 10, 29 & 46.

<sup>24</sup> *Id.* arts. 70(2) & 133.

<sup>25</sup> S. Talmon, *The South China Sea Arbitration: Observations on the Award on Jurisdiction and Admissibility*, 15 CHINESE J. INT'L L. 309-7 (2016).

<sup>26</sup> Position Paper of 2014, *supra* note 16, ¶ 22.

<sup>27</sup> Note *Verbale* of 2009 and Note *Verbale* of 2011, *supra* note 16.

<sup>28</sup> South China Sea Arbitration Award, at 196-9, ¶¶ 449-458.

<sup>29</sup> See *China welcomes UN rejection to Japan's island claim*, CHINA CTR.TV, May 16, 2012, available at <http://english.>

archipelagos consisting of the *Shuangzi Qunjiao* (North Danger Reefs), the *Yinqing Qunjiao* (London Reefs), *Taiping Dao* (Itu Aba), *Zhongye Dao* (Thitu Island) and other features. Compared to natural conditions, economic activities, or entitlement claims between China and Japan, Okinotori and Nansha Islands are very different types of features. Thus, by quoting China's statements in the *Note Verbales*, the Philippines confused the Tribunal. Furthermore, Japan claims entitlement to an isolated rock, while China does Nansha Islands as a whole. Accordingly, since China's statements regarding the Okinotori are not relevant references for this case, the principle of estoppel should not be applied.

### ***B. Nonexistence of Disputes on the Status of Features***

The Tribunal explained: "The concept of a dispute is well-established in international law and the inclusion of the term within Article 288 of the UNCLOS constitutes a threshold requirement for the exercise of the Tribunal's Jurisdiction."<sup>30</sup> According to the Tribunal's view and Article 288, in determining whether there were actual disputes between the parties, it is first necessary to clarify the relation between the concept of dispute in international law and that under Article 288, and then to decide whether disputes exist on the status of the features referred to in Article 288 between China and the Philippines.

No universally accepted concept of dispute is established in international law. The Tribunal cited the definitions and explanations of 'dispute' in such cases as *Mavrommatis Palestine Concessions*, *Interpretation of Peace Treaties with Bulgaria Advisory*, *South West Africa*, and *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, in order to explain how international law defines dispute.<sup>31</sup> However, Gerhard Hafner has described these definitions either too widely or too narrowly at the same time.<sup>32</sup> Also, other international courts and tribunals have given plenty of explanations of 'dispute' in other cases, such as *East Timor*<sup>33</sup> and *Texaco Overseas Petroleum Co. v. Libya*.<sup>34</sup>

cntv.cn/program/asiatoday/20120516/116939.shtml. See also T. Schoenbaum, *Resolving Japan's Territorial and Maritime Disputes with its Neighbors-Problems and Opportunities*, 57 J. SOCIAL SCI. 225 (2006), available at [https://ci.nii.ac.jp/els/contentscinii\\_20180506195829.pdf?id=ART0008710438](https://ci.nii.ac.jp/els/contentscinii_20180506195829.pdf?id=ART0008710438) (all last visited on Apr. 22, 2018).

<sup>30</sup> South China Sea Arbitration Award, at 57, ¶ 148.

<sup>31</sup> *Id.*

<sup>32</sup> G. Hafner, *The Physiognomy of Disputes and the Appropriate Means to Resolve Them*, 559 UN CONGRESS ON PUBLIC INTERNATIONAL LAW PROC. 560 (1995).

<sup>33</sup> East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. 99, ¶¶ 21 & 22 (June 30), available at <http://www.icj-cij.org/en/case/84/judgments> (last visited on Apr. 23, 2018).

<sup>34</sup> Texaco Overseas Petroleum Co. v. Libya, Preliminary Award of 27 November 1975, 53 I.L.R. 389, at 416 (1979).

The Tribunal neither explained the reasons why those specific definitions in the international cases were cited nor elaborated on them in the Award on jurisdiction and admissibility. Therefore, it is natural to question whether there is a universally accepted concept of dispute established in international law, let alone apply the criteria concluded by individual cases to interpret Article 288. Accordingly, the concept of dispute is not well-established in international law.

As for the South China Sea Arbitration, China and the Philippines did not have a specific disagreement on the status of the maritime features in this area. A dispute exists when the parties hold contrary positions or different opinions towards the same matter. Thus, if initiating an international judicial procedure or arbitration, parties should negotiate and their opinions “must refer to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter.”<sup>35</sup> Then, it must be shown that “the claim of one party is positively opposed by the other.”<sup>36</sup> In other words, a mere assertion by one party is not sufficient to prove the existence of a dispute. Therefore, to determine whether China and the Philippines have disputes referring to the latter’s Submissions 3 to 7 concerning the interpretation or application of the UNCLOS, the Philippines and the Tribunal should verify that the Philippines has made such a claim to China and that China has expressed objection, denial or refutation of that fact. Nevertheless, the Tribunal explained China’s position on the status of *Huangyan Dao* (Scarborough Shoal) and *Tai ping Dao* (Itu Aba) all by its speculation. By quoting a statement made by Chinese Foreign Ministry on May 22, 1997, the Tribunal argued:

The above statement expresses China’s view that Scarborough Shoal is an island ... China does, however, allude to a situation of two “overlapping EEZs” rather than a situation of an exclusive economic zone overlapping only with a territorial sea. As Scarborough Shoal lies more than 200 nautical miles from any other high-tide feature claimed by China, the reference to “overlapping EEZs” suggests that China may consider Scarborough Shoal to be entitled to an exclusive economic zone.<sup>37</sup>

<sup>35</sup> Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Judgment, 2011 I.C.J. 84-5, ¶ 30 (Apr. 1), available at <http://www.icj-cij.org/en/case/140> (last visited on Apr. 23, 2018).

<sup>36</sup> South West Africa (Ethiopia v. S. Afr./Liberia v. S. Afr.), Judgment, 1962 I.C.J. Rep. 328 (Dec. 21), available at <http://www.icj-cij.org/files/case-related/46/046-19621221-JUD-01-00-EN.pdf> (last visited on Apr. 23, 2018). See also East Timor, *supra* note 33, at 99-100, ¶ 22.

<sup>37</sup> South China Sea Arbitration Award, at 130 & 195, ¶¶ 298 & 446.

Indeed, China's statement mentioned above does not exclude the possibility to claim EEZ based on the sovereignty over *Huangyan Dao* (Scarborough Shoal). Meanwhile, China has not made specific assertions of such entitlements. The Tribunal evaded China's genuine attempt and takes its speculation on China's position in order to decide the existence of disputes between the parties. Furthermore, the Tribunal affirmed that China has made assertion to Nansha Islands as a whole rather than to each feature, such as *Meiji Jiao* (Mischief Reef) or *Yongshu Jiao* (Fiery Cross Reef).<sup>38</sup> It means that China's statement did not 'positively oppose' the Philippines' claim regarding Submissions 4 to 7.

The Tribunal sought jurisdiction on this subject matter by inappropriately referring to former cases. When considering the relation between territorial sovereignty and the status of the features which may have impact on jurisdiction, the Tribunal, referring to *United States Diplomatic and Consular Staff in Tehran*, argued that there are no grounds to "decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important."<sup>39</sup> However, the International Court of Justice ("ICJ") immediately explained: "Yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them."<sup>40</sup> The ICJ reaffirmed this position and made a distinction between political and legal disputes while considering jurisdiction issues. It can be found in cases such as *Border and Transborder Armed Actions*,<sup>41</sup> *Military and Paramilitary Activities in and Against Nicaragua*,<sup>42</sup> and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.<sup>43</sup>

All these cases are dealing with disputes caused by the specific acts of one of the State parties. In these cases, "one aspect of a dispute" means "legal aspects of a political dispute," which refers to the matters determining a dispute caused

<sup>38</sup> *Id.* at 130, 195, 196 & 202-3, ¶¶ 298, 446, 449 & 472.

<sup>39</sup> *South China Sea Arbitration* (Award on Jurisdiction and Admissibility), at 59, ¶ 152.

<sup>40</sup> *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), Judgment, 1980 I.C.J. 20, ¶ 37 (May 24), available at <http://www.icj-cij.org/files/case-related/64/064-19800524-JUD-01-00-EN.pdf> (last visited on Apr. 23, 2018).

<sup>41</sup> *Border and Transborder Armed Actions* (Nicar. v. Hond.), Judgment, 1988 I.C.J. 93, ¶ 54 (Dec. 20), available at <http://www.icj-cij.org/files/case-related/74/074-19881220-JUD-01-00-EN.pdf> (last visited on Apr. 23, 2018).

<sup>42</sup> *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1984 I.C.J. 439, ¶ 5 (Nov. 26), available at <http://www.icj-cij.org/files/case-related/70/070-19841126-JUD-01-00-EN.pdf> (last visited on Apr. 23, 2018).

<sup>43</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 197, ¶ 150 (July 9), available at <http://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf> (last visited on Apr. 23, 2018).

by an act of a State rather than any aspect of the dispute. The South China Sea Arbitration was motivated by territorial disputes rather than specific acts of China or the Philippines. Taking the ICJ's opinions out of the context of the judgments, the Tribunal replaced political disputes with territorial disputes for its own consideration. It is a serious misinterpretation of the Tribunal on the ICJ's position in above cases.

### *C. Non-Applicability of the Compulsory Arbitration to the Subject Matter*

In the Award on Jurisdiction and Admissibility, the Tribunal considered that China's Declaration of 2006 is an example intended to activate certain exceptions to the compulsory settlement of disputes set out in Article 298 of the UNCLOS. Beyond these specific exceptions, however, Article 309 provides: "No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention."<sup>44</sup>

The State parties to the UNCLOS are accordingly not free to pick and choose the portions of the Convention they wish to accept or reject. Therefore, the Tribunal contended that the compulsory settlement of disputes could not be excluded by China's Declaration of 2006. The UNCLOS allows States to make "reservations and exceptions" in Article 309 and "declarations and statements" in Article 301. From the wording of these articles, reservation and declaration are strictly distinguished in the UNCLOS. Neither reservations nor exceptions may be made to the UNCLOS unless expressly permitted, while declarations or statements, however phrased or named, can be made when signing, ratifying or acceding to the UNCLOS. China's Declaration of 2006 uses the term 'declaration' in accordance with Article 298, which provides that "a State may ... declare in writing that it does not accept any one or more of the procedures provided for in Section 2 with respect to certain categories of disputes."<sup>45</sup> China's Declaration of 2006 is to refuse compulsory settlement of disputes with respect to Article 298(1) (a), (b) and (c). Therefore, even assuming China's Declaration of 2006 is a reservation or an exception according to the Tribunal's logic, such reservation or exception was made according to other provisions of the UNCLOS, which is permitted by Article 309.

In *Status of Eastern Carelia*, the Permanent Court of International Justice ("PCIJ") argued: "It is well established in international law that no State can, without its

<sup>44</sup> South China Sea Arbitration (Award on Jurisdiction and Admissibility), at 37, ¶ 107.

<sup>45</sup> UNCLOS art. 298(1).

consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement.”<sup>46</sup> China’s Declaration of 2006 was made in accordance with the UNCLOS and clearly excludes jurisdiction of a tribunal or court over the disputes with respect to Article 298(1) (a), (b) and (c). Interpretation of China’s Declaration of 2006 is totally different with that of treaty. In *Fisheries Jurisdiction*, the ICJ explained:

A declaration of acceptance of the compulsory jurisdiction of the Court, whether there are specified limits set to that acceptance or not, is a unilateral act of State sovereignty...the interpretation of declarations made under Article 36 of the Statute is not identical with that established for the interpretation of treaties by the Vienna Convention on the Law of Treaties... The Court has in earlier cases elaborated the appropriate rules for the interpretation of declarations and reservations.<sup>47</sup>

Accordingly, “the Court will thus interpret the relevant words of a declaration including a reservation contained therein in a natural and reasonable way, having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court.”<sup>48</sup> The ICJ also pointed out:

The intention of a reserving State may be deduced not only from the text of the relevant clause, but also from the context in which the clause is to be read, and an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served.<sup>49</sup>

In his separate opinion to *Fisheries Jurisdiction*, Judge Koroma addressed: “The question whether the Court is entitled to exercise its jurisdiction must depend on the subject-matter and not on the applicable law, or the rules purported to have been violated.”<sup>50</sup> In *Oil Platforms*, Judge Oda pointed out in his dissenting opinion:

The Court should not have interpreted each provision ... for the jurisdiction of the

<sup>46</sup> Status of Eastern Carelia (U.S.S.R. v. Fin.), Advisory Opinion, 1923 P.C.I.J. (ser. B), No. 5, at 27 (July 23), available at [http://www.icj-cij.org/files/permanent-court-of-international-justice/serie\\_B/B\\_05/Statut\\_de\\_la\\_Carelie\\_orientale\\_Avis\\_consultatif.pdf](http://www.icj-cij.org/files/permanent-court-of-international-justice/serie_B/B_05/Statut_de_la_Carelie_orientale_Avis_consultatif.pdf) (last visited on Apr. 22, 2018).

<sup>47</sup> Fisheries Jurisdiction (Spain v. Can.), Judgment, 1998 I.C.J. 453-4, ¶¶ 46-47 (Dec. 4), available at <http://www.icj-cij.org/files/case-related/96/096-19981204-JUD-01-00-EN.pdf> (last visited on Apr. 23, 2018).

<sup>48</sup> *Id.* at 454, ¶49.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 487, ¶ 4 (dissenting opinion by Koroma, J.), available at <http://www.icj-cij.org/files/case-related/96/096-19981204-JUD-01-03-EN.pdf> (last visited on Apr. 23, 2018).

Court but should rather have determined that a dispute ... falls within the purview of the 1955 Treaty of Amity. Failure to dismiss Iran's Application in the present case invites a situation in which a State could, under the pretext of the violation of any trivial provision of any treaty containing a compromissory clause, unilaterally bring the other State party to the treaty before the Court on the sole ground that one of the parties contends that a dispute within the scope of the treaty exists while the other denies it.<sup>51</sup>

Judge Oda also released his separate opinion in *Transborder Armed Action* that: "One cannot lay too much stress upon the paramount importance of the expression of the acceptance of the Court's jurisdiction, which is invariably required for the Court to entertain a case, as the first and critical task of the Court is always to ascertain the intention of the Parties."<sup>52</sup> In a word, the Tribunal's explanation of China's Declaration of 2006 deviated from previous international judicial practices. When interpreting and evaluating China's Declaration of 2006, the Tribunal applied the way of treaty interpretation in order to expand its jurisdiction, although it was cognizant of China's real intention.

The subject-matter concerning status of the maritime features would constitute an integral part of maritime delimitation between China and the Philippines. The Position Paper of 2014 offered:

Even assuming the subject-matter of the arbitration were concerned with the interpretation or application of the Convention, the subject-matter would still be an integral part of maritime delimitation and, having been excluded by the China's Declaration of 2006, could not be submitted for arbitration.<sup>53</sup>

However, the Tribunal, reviewing China's positions expressed in the Position Paper of 2014, reaffirmed its judgment in the Award of Jurisdiction and Admissibility that the Philippines' Submissions 3 to 7 have nothing to do with maritime delimitation, so that the jurisdiction of the Tribunal was not excluded by Article 298.<sup>54</sup>

The same question - whether jurisdiction of a court or a tribunal can be excluded as the dispute arising out of or concerning another dispute is excluded by a declaration or reservation - was also raised in *Fisheries Jurisdiction*. The ICJ viewed:

<sup>51</sup> Oil Platforms (Iran v. U.S.), Judgment, 1996 I.C.J. 900, ¶¶ 25-26 (Dec.12) (dissenting opinion by Oda, J.).

<sup>52</sup> Border and Transborder Armed Actions, *supra* note 41, at 125, ¶ 16 (separate opinion by Oda, J.), available at <http://www.icj-cij.org/files/case-related/74/074-19881220-JUD-01-02-EN.pdf> (last visited on Apr. 23, 2018).

<sup>53</sup> Position Paper of 2014, *supra* note 16, ¶¶ 58-59.

<sup>54</sup> South China Sea Arbitration (Award on Jurisdiction and Admissibility), at 141-3, ¶¶ 400-404.

The reservation does not reduce the criterion for exclusion to the ‘subject-matter’ of the dispute ... the words of the reservation exclude not only disputes whose immediate ‘subject-matter’ is the measures in question and their enforcement, but also those ‘concerning’ such measures and, more generally, those having their ‘origin’ in those measures (“arising out of”) - that is to say, those disputes which, in the absence of such measures, would not have come into being.<sup>55</sup>

In the South China Sea Arbitration, the status of the features will definitely influence maritime delimitation between the parties because a determination may support or deny claims of maritime entitlements. The Tribunal’s interpretation of Article 298 denied the validity of China’s Declaration of 2006 in this case. However, such interpretation narrows the scope of application and changes the essence of the article, which is inconsistent with the previous judgments of the ICJ.

When the parties claimed sovereignty over the marine features without an agreement on delimitation, the Tribunal’s decisions on the status of the features might have crucial influence on maritime delimitation. Even assuming that the subject-matter of the arbitration was concerned with the interpretation or application of the UNCLOS, this subject matter would constitute an integral part of maritime delimitation between China and the Philippines, thereby falling within the scope of the China’s Declaration of 2006. In accordance with Article 298 of the UNCLOS, the subject-matter excludes, *inter alia*, disputes concerning maritime delimitation from compulsory arbitration and other compulsory dispute settlement procedures.

#### 4. Interpretation of Articles regarding the Status of the Marine Features

The interpretation given by the Tribunal in the South China Sea Arbitration to Article 121(3) of the UNCLOS is not in line with the jurisprudence of other international courts and tribunals,<sup>56</sup> which usually avoided directly interpreting and applying Article 121(3). In the South China Sea Arbitration, however, the Tribunal tried to interpret Article 121(3) according to Articles 31 and 32 of the

<sup>55</sup> Fisheries Jurisdiction, *supra* note 47, at 458-9, ¶¶ 61-62.

<sup>56</sup> S. Talmon, *The South China Sea Arbitration and the Finality of ‘Final’ Awards*, 8 J. INT’L DISP. SETTLEMENT 388-97 (2017).

Vienna Convention on the Law of Treaties (“VCLT”), considering the text of the article, the object and purpose of the Convention, and *travaux préparatoires*. The Tribunal concluded that as far as the case before it was concerned, there is no evidence for an agreement based upon State practice on the interpretation of Article 121(3) which differs from the interpretation of the Tribunal as outlined in the Award.<sup>57</sup>

### *A. Misinterpretation of Article 121(3)*

The Tribunal tried to interpret Article 121(3) strictly while explaining the meaning of the six textual elements in it. In this course, the Tribunal unexpectedly decided legal criteria for an island beyond the discussion of State parties. As a result, these criteria do not reflect the parties’ common intention.

First, the Tribunal explained Article 121(3) ambiguously. When interpreting the term ‘rock,’ the Tribunal maintained that a “naturally formed island” should not be constructed to change its geological or geomorphological condition.<sup>58</sup> Article 121(1) also defines an island as “naturally formed area of land.” In order to sustain ‘human habitation’ and ‘economic life,’ however, transformation of the features is sometimes inevitable. When interpreting the term ‘cannot,’ the Tribunal followed the Philippines’ positions without considering the time continuity and future conditions of the features.<sup>59</sup> This is why Article 121(3) is difficult to apply in practice. The Tribunal’s interpretation of ‘sustain’ was not enforceable, as it did not clarify the proper standard for “a period of time” sufficiently to determine whether the criterion of [sustainable] “human habitation and economic life” is met. When interpreting ‘human habitation,’ the Tribunal narrowed the scope of the subject, excluding the military or other governmental personnel presently stationed on the features of Nansha Islands without any basis on international law.<sup>60</sup>

The Tribunal considered ‘outside supply’ as a factor that proves the unsustainability of features themselves. However, it neglected the link between natural capacity and the number of people of the feature. When interpreting “sustain economic life of their own,” the Tribunal considered that economic activity from possible EEZ, continental shelf, or territorial sea of a feature is insufficient to endow it with economic life.<sup>61</sup>

<sup>57</sup> South China Sea Arbitration Award, at 232, ¶ 553.

<sup>58</sup> *Id.* at 206, ¶ 481.

<sup>59</sup> South China Sea Arbitration (Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility), *supra* note 16, at 70, ¶¶ 7-26.

<sup>60</sup> South China Sea Arbitration Award, at 252, ¶ 618.

<sup>61</sup> *Id.* at 212, ¶ 501.

However, ‘offshore fishery’ is a basic economic activity for inhabitants of the features, based on tradition or living habits rather than considerations under international law. In relation to the interpretation of the term, ‘or’ lying between ‘human habitation’ and “economic life of their own,” there have been discussions since Article 121(3) was drafted.<sup>62</sup> The Tribunal attempted to interpret it with authority, but there is nothing new in its analysis.

Moreover, many international lawyers, including those on the Philippine side, opined that it is almost ‘impossible’ to interpret Article 121(3) accurately just based on its text.<sup>63</sup> Except referring to *Territorial and Maritime Disputes* to interpret the term ‘rock,’ the Tribunal interpreted other textual terms of Article 121(3) that contained individual opinions of arbitrators and disputed academic viewpoints, without legal arguments based on customary international law or other international instruments.

Second, teleological interpretation of Article 121(3) cannot reflect the common intention of all contracting States of the UNCLOS. The Tribunal considered that there was an inextricable link between Article 121(3) and the expansion of coastal State jurisdiction through the EEZ.<sup>64</sup> The Tribunal supposed that the drafters of Article 121(3) were concerned with the habitation for a portion of the population whose benefit would be introduced through EEZ.<sup>65</sup> The purpose of treaty interpretation under Articles 31 and 32 of the VCLT is to ascertain the ‘common intention’ of all the parties, rather than the intention of any particular party.<sup>66</sup> Thus, in order to ascertain the link between the purpose of EEZ and the entitlements to marine features, the Tribunal should have considered the common intention of all State parties. Furthermore, the ICJ stressed in *Maritime Delimitation and Territorial Questions*: “Islands, regardless of their size, in this respect enjoy the same status, and therefore generate the same maritime rights, as other land territory.”<sup>67</sup>

<sup>62</sup> E. Franckx, *The Regime of Islands and Rocks*, in 1 IMLI MANUAL ON INTERNATIONAL MARITIME LAW 322 (M. Fitzmaurice et al. eds., 2014).

<sup>63</sup> C. Schofield, *The Trouble with Islands: The Definition and Role of Islands and Rocks in Maritime Boundary Delimitation*, in MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA 27 (S.-Y. Hong et al. eds., 2009). See also A. Elferink, *Clarifying Article 121(3) of the Law of the Sea Convention: The Limits Set by the Nature of International Legal Processes*, 6 BOUNDARY & SEC. BULL. 58-9 (1998).

<sup>64</sup> South China Sea Arbitration Award, at 215, ¶¶ 512-514.

<sup>65</sup> *Id.* at 218, ¶ 520.

<sup>66</sup> Appellate Body Report, *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc. WT/DS363/AB/R, ¶ 405 (adopted Dec. 21, 2009), available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/c363abr\\_e.pdf](https://www.wto.org/english/tratop_e/dispu_e/c363abr_e.pdf) (last visited on Apr. 22, 2018).

<sup>67</sup> *Maritime Delimitation & Territorial Questions (Qatar v. Bahr.)*, Judgment, 2001 I.C.J. 61, ¶ 185 (Mar. 16), available at <http://www.icj-cij.org/files/case-related/87/087-20010316-JUD-01-00-EN.pdf> (last visited on Apr. 23, 2018).

Therefore, it is quite subjective of the Tribunal to draw a line between human habitation and habitation for the benefit of the population on the feature through the introduction of the EEZ. In order to verify its points, the Tribunal referred to the remarks of the representative of Peru during Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction and the ambassador of Singapore during the Third UN Conference.<sup>68</sup> However, teleological interpretation has its limitations, just as Judge Ajibola points out: “[The] intention approach may be over-subjective and the integration approach will equally deal adequately with the entire content of the treaty which is expressed by Article 31(2) of the Vienna Convention.”<sup>69</sup> Furthermore, the negotiation of a treaty is so complicated that it may be difficult to clarify the common intention of all parties beyond the text of articles.

Third, *travaux préparatoires* make little sense for understanding the essence of Article 121(3). In his separate opinion to *Territorial Dispute*, Judge Ajibola pointed out:

In the interpretation of treaties, preparatory work and the circumstances of their conclusion are considered as secondary or supplementary means ... for confirming the primary meaning ... [T]his is stated in Article 32 of the Vienna Convention. ... I doubt that there is any need at all to resort to the *travaux préparatoires* ... because the voluminous items of correspondence, maps, negotiation documents, reports and parliamentary debates as forming part of the *travaux préparatoires* are themselves frequently subject to conflicting interpretations.<sup>70</sup>

It seems that the Tribunal did not get to any helpful conclusions by reviewing *travaux préparatoires*, either. Rather, it proves different positions existing in the course of drafting Article 121(3). Due to the ambiguous expression, Article 121(3) failed to form the common intention on more specific criteria of an island, such as size and population. In fact, the Tribunal did not have sufficient evidence to prove the common intention in the Award.

<sup>68</sup> South China Sea Arbitration Award, at 216, ¶ 514.

<sup>69</sup> *Territorial Dispute (Libya v. Chad)*, Judgment, 1994 I.C.J. 49, at 64-9, ¶¶ 59-78 (Feb.3) (separate opinion by Ajibola, J.), available at <http://www.icj-cij.org/files/case-related/83/083-19940203-JUD-01-03-EN.pdf> (last visited on Apr. 23, 2018).

<sup>70</sup> *Id.* at 72, ¶ 88.

## B. Imbalance between Deduction and In Dubio Mitius

*In dubio mitius* is a customary principle of interpreting ambiguous treaty provisions<sup>71</sup> “widely recognized in international law.”<sup>72</sup> Oppenheim argued:

The principle *in dubio mitius* must be applied interpreting treaties. If, therefore, the meaning of a stipulation is ambiguous, the meaning is to be preferred which is less onerous for the obliged party, or which interferes less with the parties’ territorial and personal supremacy, or which contains less general restrictions upon the parties.<sup>73</sup>

In 1925, the PCIJ, adopting *in dubio mitius* in the Advisory Opinion of *Treaty of Lausanne*, held that it should strictly interpret the limitations of sovereignty.<sup>74</sup> However, the Tribunal’s interpretation of Article 121(3) is contradictory to principles applied in previous cases.

First, there is no common intention of State parties concerning Article 121(3). The interpretation of the treaty was based on the presumption that the text of the treaty must be the authentic expression of the intentions of the parties, making the ordinary meaning of the terms, the context of the treaty, its object and purpose, and the general rules of international law, together with authentic interpretations by the parties, the primary criteria for interpreting a treaty.<sup>75</sup> Presumed intention means that the parties are determined through the application of the various means of interpretation which are recognized in Articles 31 and 32 of the VCLT.<sup>76</sup> It is based on the premise that a potential ‘common intention’ can be abstracted from the textual meaning of the article for interpretation. As the state parties did not form a common intention during the negotiations of the UNCLOS, presuming a common

<sup>71</sup> I. VAN DAMME, TREATY INTERPRETATION BY THE WTO APPELLATE BODY 63 (2009). See also A. Voigt, *The Role of General Principles in International Law and their Relationship to Treaty Law*, 31 RETFAERD ARGANG 16 (2008), available at [http://retfaerd.org/wp-content/uploads/2014/06/Retfaerd\\_121\\_2008\\_2\\_s3\\_25.pdf](http://retfaerd.org/wp-content/uploads/2014/06/Retfaerd_121_2008_2_s3_25.pdf) (last visited on Apr. 23, 2018).

<sup>72</sup> Appellate Body Report, *E.C. Measures Concerning Meat and Meat Products* (EC Hormones), WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R, ¶ 165 (adopted Jan. 16, 1998), available at [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=33861&CurrentCatalogueIdIndex=0&FullTextHash=](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=33861&CurrentCatalogueIdIndex=0&FullTextHash=) (last visited on Apr. 24, 2018).

<sup>73</sup> L. OPPENHEIM, 1 INTERNATIONAL LAW: A TREATISE 561 (1905). See also F. MARTINES, L’ONERE DELLA PROVA NELL’ ORGANIZZAZIONE MONDIALE DEL COMMERCIO E VALORI DEL SISTEMA 41 (2012).

<sup>74</sup> Interpretation of Article 3(2) of the Treaty of Lausanne, Advisory Opinion, 1925 P.C.I.J. (ser. B) No. 12, at 25 (Nov. 21), available at [http://www.icj-cij.org/files/permanent-court-of-international-justice/serie\\_B/B\\_12/01\\_Article\\_3\\_du\\_traite\\_de\\_Lausanne\\_Avis\\_consultatif.pdf](http://www.icj-cij.org/files/permanent-court-of-international-justice/serie_B/B_12/01_Article_3_du_traite_de_Lausanne_Avis_consultatif.pdf) (last visited on Apr. 22, 2018).

<sup>75</sup> Report of the International Law Commission on the Work of its Eighteenth session, *reprinted in* [1966] 2 Y.B. Int’l L. Comm’n 204-5, U.N. Doc. A/CN.4/SER.A/ 1966/Add.1.

<sup>76</sup> Report of the International Law Commission to the General Assembly, 65 U.N. GAOR Supp. No. 10, at 27, U.N. Doc. A/68/10 (2013), available at <http://legal.un.org/docs/?symbol=A/68/10> (last visited on Apr. 22, 2018).

intention for the necessary interpretation would actually increase or decrease rights and obligations of State parties. However, presumed intention is not a separately and originally identifiable will. Furthermore, *travaux préparatoires* are not the primary grounds for determining the presumed intention of the parties, but only, as Article 32 of the VCLT indicates, a supplementary means of interpretation.<sup>77</sup> In this regard, the *travaux préparatoires* clearly show that State parties did not form a common intention on Article 121(3), not to mention the purpose of the provision. This is the main reason why the criteria of what constitutes ‘island’ still remain unsettled.

Neither judgment nor State practice could be evidence to clarify the true meaning of Article 121(3).<sup>78</sup> Although there are few authentic interpretations from State parties and the common intentions are not easily gleaned from the general meaning of textual elements of Article 121(3), the background of the drafting of the UNCLOS, or general rules of international law,<sup>79</sup> the Tribunal still referred to *travaux préparatoires* of Part V (EEZ) in order to determine the common intention based on Part VIII of the UNCLOS. The Tribunal’s interpretation ignored such facts and unreasonably set legal rights and obligations for State parties.

Meanwhile, the principle of *in dubio mitius* should be applied when the common intention cannot be ascertained. It should be recognized that *in dubio mitius* is a customary principle for interpreting treaties rather than general principle of international law. The hydrologic condition, ecosystem and economic life of each marine feature are distinctive. Also, State parties held different position towards Article 121 of the UNCLOS during the negotiations. Accordingly, the principle of *in dubio mitius* provides flexibility for the Tribunal to interpret Article 121, even under Articles 31 and 32 of VCLT, with discretion. When ruling on the Philippines’ submission, the Tribunal might have had two choices of interpretation (adopting or rejecting) considering that the purposes of interpretation is to clarify the meaning of the articles and to ease disputes. On October 29, 2015, the Tribunal ruled that it holds jurisdiction and admissibility regarding the case.<sup>80</sup> Following the principle of prohibiting the denial of justice,<sup>81</sup> it is unreasonable for the Tribunal not to interpret Article 121(3) while presuming the common intention of States as to set rights

<sup>77</sup> *Id.*

<sup>78</sup> South China Sea Arbitration Award, at 225-6, ¶¶ 534-535.

<sup>79</sup> *Id.* at 215, ¶ 512.

<sup>80</sup> PCA, Arbitration between the Republic of the Philippines and the People’s Republic of China, Press Release, Oct. 29, 2015, available at <https://www.pcacases.com/web/sendAttach/1503> (last visited on Apr. 22, 2018).

<sup>81</sup> M. Sattorova, *Denial of Justice Disguised? Investment Arbitration and the Protection of Foreign Investors from Judicial Misconduct*, 61 INT’L & COMP. L.Q. 223-4 (2012).

and obligations out of the UNCLOS. It is beyond the function of the Tribunal. As a consequence, in relation to the Tribunal should have admitted that there was a lack of common intention between the State parties on the proper interpretation of Article 121(3) and applied the principle of *in dubio mitius*. However, it not only presumed a common intention of State parties which did not actually exist, but also interpreted Article 121(3) rather strictly.

### *C. Failure to Explain the Treaty Terms within Their Evolving Characters*

When using subsequent agreements and practice as means of interpretation, it should be assessed whether the meaning of a ‘term’ is capable of evolving over time.<sup>82</sup> The word ‘term’ is not confined to a specific meaning such as commerce, territorial status or investment, but it may also encompass more interrelated or cross-cutting concepts, such as ‘by law’ or ‘necessary.’<sup>83</sup> When interpreting the treaty terms, international courts or tribunals would invoke the contemporaneous or evolving approach. In the latter case, the evolving meaning should be taken into account by judges case by case to determine whether a treaty term should be given evolution over time.<sup>84</sup>

In this regard, Judge ad hoc Guillaume concluded in his declaration of Navigational and Related Rights that principle of contemporaneous interpretation is preferred when interpreting specific terms in a treaty (such as water-parting, centre of the main channel, mouth, and geographical names), while evolutionary interpretation approach is usually taken to interpret more generic terms (such as the strenuous conditions of the modern world, the well-being and development of the peoples concerned).<sup>85</sup>

As for the terms of Article 121(3), different considerations should be taken. The term of ‘rock’ obviously falls into the category of specific terms. According to Judge ad hoc Guillaume, understanding of ‘cannot,’ ‘sustain,’ ‘human habitation,’ and “economic life of their own” may vary as human society and technology develop because they are generic terms. In the context of the long-standing

<sup>82</sup> *Supra* note 76, at 27. See also M. Fitzmaurice, *Dynamic (Evolutive) Interpretation of Treaties Part I*, 21 HAGUE Y.B. INT'L L. 101-2 (2008).

<sup>83</sup> *Supra* note 76, at 30.

<sup>84</sup> *Id.* at 25.

<sup>85</sup> Dispute regarding Navigational and Related Rights (Costa Rica v. Nicar.), Judgment, 2009 I.C.J. 294-300, ¶¶ 9-18 (July 13) (Declaration by Guillaume, J. ad hoc), available at <http://www.icj-cij.org/files/case-related/133/133-20090713-JUD-01-03-EN.pdf>. See also Report of the International Law Commission to the General Assembly, 60 U.N. GAOR Supp. No. 10, at 36, U.N. Doc. A/60/10 (2005), available at [http://legal.un.org/ilc/documentation/english/reports/a\\_60\\_10.pdf](http://legal.un.org/ilc/documentation/english/reports/a_60_10.pdf) (all last visited on Apr. 24, 2018).

validity, the UNCLOS “is a living instrument which ... must be interpreted in the light of present-day conditions”;<sup>86</sup> the terms mentioned above shall be interpreted in accordance with their evolving characters. In *Navigational and Related Rights*, the ICJ interpreted the term ‘comercio’ in the 1858 Treaty as follows:

There are situations in which the parties’ intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used-or some of them-a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law.<sup>87</sup>

After affirming that *comercio* is a generic term, the ICJ addressed: “The parties necessarily having been aware that the meaning of the terms was likely to evolve over time ... and where the treaty has been entered into for a very long period ... the parties must be presumed to have intended” the term to “have an evolving meaning.”<sup>88</sup> In *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, the WTO Appellate Body also stated that the generic term ‘natural resources’ in Article XX(g) is not ‘static’ in its content or reference, but is rather “by definition, evolutionary.”<sup>89</sup>

It is thus reasonable to believe that the evolutionary interpretation approach is universally applied in interpreting generic terms in treaties. In the South China Sea Arbitration, however, the Tribunal relied heavily on a contemporaneous interpretation approach, referring to individual records in both the 1860s and the 1920s-1930s to determine the current status of marine features in the South China Sea.<sup>90</sup> As the Tribunal’s choice of interpretation approach was contrary to international judicial practices, reasonable and legal conclusions cannot be expected.

<sup>86</sup> *Tyrer v. United Kingdom*, 26 Eur.Ct.H.R. (ser. A), at 31 (1978), available at [https://hudoc.echr.coe.int/eng#{"tabview": "document", "itemid": \["001-57587"\]}](https://hudoc.echr.coe.int/eng#{) (last visited on Apr. 24, 2018).

<sup>87</sup> *Dispute Regarding Navigational and Related Rights*, *supra* note 84, at 242, ¶ 64.

<sup>88</sup> *Id.* at 243, ¶¶ 66-68.

<sup>89</sup> Appellate Body Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R, ¶ 130 (adopted Oct. 12, 1998), available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/58abr.pdf](https://www.wto.org/english/tratop_e/dispu_e/58abr.pdf). See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, Advisory Opinion, 1971 I.C.J. 31, ¶ 53 (June 21), available at <http://www.icj-cij.org/files/case-related/53/053-19710621-ADV-01-00-EN.pdf> (all last visited on Apr. 22, 2018).

<sup>90</sup> *South China Sea Arbitral Award*, at 141, ¶ 329.

## 5. Conclusion

To sum up, although the UNCLOS is the most comprehensive treaty governing legal orders relating to the sea, it is not the entirety of the international law of the sea.<sup>91</sup> The Tribunal misinterpreted not only China's diplomatic documents but also Article 121(3) of the UNCLOS. It is inconsistent with the original purpose of treaty interpretation, which is to clarify the meaning of the provisions and to ease disputes peacefully. In particular, some of Tribunal's decisions are inconsistent with previous ICJ adjudications.

China has the right to resolve disputes on its own under the UNCLOS. The South China Sea Arbitration neither settled the maritime dispute between China and the Philippines, nor gave a convincing interpretation of the UNCLOS. Such blind spots in the South China Sea Award will only frustrate the State parties as well as the international community. As a result, the Tribunal's 'Award' on this provision will be temporary rather than final.

<sup>91</sup> J. Ma & S. Sun, *Restrictions on the Use of Force at Sea: An Environmental Protection Perspective*, 98 INT'L REV. RED CROSS 527 (2016).