The South China Sea Arbitration’s Interpretation of Article 121(3) of the LOSC: A Disquieting First

Posted on 07/09/2016 by csb000

By: Alex G. Oude Elferink

**Decision commented on:** The Matter of the South China Sea Arbitration, Between the Republic of Philippines and The People’s Republic of China, *Award on the Merits* (Award) of 12 July 2016 (Registry, the Permanent Court of Arbitration).

**Introduction**

The central issue in the arbitration instituted by the Philippines against China under the United Nations Convention on the Law of the Sea (*LOS*C) on 22 January 2013 no doubt concerned the question whether the Spratly Islands and Scarborough Reef have a continental shelf and an exclusive economic zone. If this were to be the case, and China’s sovereignty claim over the islands were to be vindicated, their potential continental shelf and exclusive economic zone entitlement would extend to most of the South China Sea. In this case, the continental shelf and the exclusive economic zone of the islands would have to be delimited with that of the other States surrounding the South China Sea and China would have undisputed water-column rights in the central part of the South China in accordance with Part V of the LOSC. This outcome would also have limited the availability of third party settlement under Part XV of the LOSC to resolve the law of the sea dimension of the South China Sea dispute. China has made a declaration excluding maritime boundary delimitation from compulsory dispute settlement mechanisms in accordance with article 298 of the Convention. On the other hand, if the Spratly Islands and Scarborough Reef do not have a continental shelf and exclusive economic zone, the area beyond their territorial sea would be part of the continental shelf and exclusive economic zones of the other States surrounding the South China Sea and the islands would only be entitled to a 12-nautical-mile territorial sea and a 24-nautical-mile contiguous zone.

The regime of islands is contained in article 121 of the LOSC. Paragraph 1 of the article provides a definition of the term “island”: “a naturally formed area of land, surrounded by water, which is above water at high tide.” Paragraph 2 then specifies that islands have the same entitlements to maritime zones as other land territory. However, an exception to this general rule is contained in paragraph 3, which reads “[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.” The terms “rocks”, “human habitation” and “economic life of their own” are not defined in the Convention. As the tribunal itself observed in its award on the merits in this connection:

Article 121 has not previously been the subject of significant consideration by courts or arbitral tribunals and has been accorded a wide range of different interpretations in scholarly literature. As has been apparent in the course of these proceedings, the scope of application of its paragraph (3) is not clearly established (SCSA, para. 474; footnotes suppressed).
The award on the merits in *Philippines v. China* provides the first detailed review of the interpretation and application of article 121 and in particular its paragraph 3 by the international judiciary. The award in many respects provides welcome clarifications of paragraph 3. For instance, the award concludes that the use of the term “rock” is not intended to limit the scope of application to certain islands only (SCSA, paras 479-482), and to exclude, for instance, islands composed of sand. As the tribunal observes, limiting the term “rocks” to features composed of rock would lead to according “features [that] are more ephemeral than a geological rock and may shift location or appear and disappear above high water as a result of conditions over time” greater entitlements than more stable and permanent features. “This cannot have been the intent” of article 121 (SCSA, para. 481).

Another example of a welcome clarification of article 121 concerns the tribunal’s finding that an article 121(3) “rock cannot be transformed into a fully entitled island through land reclamation” (SCSA, para. 508). With current technologies, it would be possible to make any feature fit for human habitation. As is observed by the tribunal, “the purpose of Article 121(3) as a provision of limitation would be frustrated” if such an approach were to be allowed (SCSA, para. 509).

Notwithstanding the evident merits of some of the tribunal’s findings on article 121(3), in the view of this author, the award is flawed in respect of two critical aspects. First, the tribunal concludes that “size cannot be dispositive of a feature’s status as a fully entitled island or rock and is not, on its own, a relevant factor” (SCSA, para. 538). Second, the tribunal interprets the phrase “economic life of their own” in such a way as to render it practically meaningless. The remainder of this post will focus on these two issues. In addition, the post will briefly reflect on the possible implications of tribunal’s approach to the interpretation of these two aspects of article 121(3) beyond the specific context of the arbitration between the Philippines and China.

**Is the size of an island relevant under article 121(3) of the LOSC?**

In reaching the conclusion that size is not dispositive – *i.e.* if size were dispositive certain islands would never be captured by article 121(3) because they are simply too large to be a rock – the tribunal bases itself primarily on the *travaux préparatoires* of the Convention. According to the tribunal “repeated attempts during the [Third United Nations Conference on the Law of the Sea (UNCLOS III)] to define or categorise islands or rocks by reference to size were all rejected” (SCSA, para. 538). Before turning to this matter, it should be noted that the tribunal in ruling on this issue strays from the interpretative approach it claims to be following, that is the approach reflected in articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (SCSA, para. 476). The general rule of interpretation contained in article 31(1) of the Vienna Convention requires that at 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.” The *travaux préparatoires* of a treaty are a supplementary means of interpretation. Such means may be employed “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” (Vienna Convention on the Law of Treaties, article 32).

In its consideration as to whether size may be relevant in determining the status of islands under article 121, the tribunal does not start its analysis with an attempt to establish the ordinary meaning of the term “rock”. This contrasts with the tribunal’s consideration, discussed above, of the question as to whether the composition of an island – solid rock or other material – is a relevant criterion in determining the scope of application of paragraph 3. The tribunal in this connection uses the *Oxford English Dictionary* (SCSA, para. 480). This makes the *Oxford English Dictionary* a logical starting point in trying to establish whether size is relevant to determining the term
“rock”. The Oxford English Dictionary provides a number of meanings of the term rock that indicate that the term is used to refer to an object of limited dimensions. Item 1.1 under “Rock” reads “A mass of rock projecting above the earth’s surface or out of the sea: “there are dangerous rocks around the island”.” Item 2 reads: “A large piece of rock which has become detached from a cliff or mountain; a boulder: “the stream flowed through a jumble of rocks”.” Finally, item 2.1 provides “North American A stone of any size: “the crowd threw a few rocks and dispersed”” (Oxford English Dictionary online, last accessed 23 August 2016). The example sentence under item 1.1 indicates that rocks are distinguished from islands. It may be noted that the distinction between rocks and islands is also present in article 121 itself. Paragraph 1 refers to “islands” and paragraph 3 refers to “rocks”. Had the drafters of the Convention intended that size should not be a relevant factor under paragraph 3 and that the paragraph could be applicable to all islands, it would have been logical to use the same term in both paragraphs. Article 121 does not do so.

Although the above arguments confirm that size is relevant in determining the scope of application of article 121 (3), contrary to what the tribunal holds, they do not provide a very precise indication. In that situation, article 32 of the Vienna Convention indicates that recourse may be had to the preparatory work of article 121. As mentioned above, the tribunal concludes that the travaux préparatoires indicate that size is not a relevant criterion. In that connection, the tribunal refers to the fact that there were attempts:

- to include “size” on a list of “relevant factors”; proposals to categorise islands and islets depending on whether they were “vast” or “smaller”; and proposals that made distinctions based on whether the surface area of a feature measured more or less than a particular figure, such as one square kilometre or ten square kilometres (SCSA, para. 538).

While it is true that UNCLOS III failed to include a reference to size in paragraph 3 of article 121, at the same time the negotiating record makes clear that the term “rock” was used to refer to one specific type of island and was not intended to be a synonym of the term “island”. For instance, a proposal by Algeria, Dahomey, Guinea, Ivory Coast, Liberia, Madagascar, Mali, Mauritania, Morocco, Sierra Leone, Sudan, Tunisia, Upper Volta, Zambia refers to islands, islets, rocks and low-tide elevations (Doc. A/CONF.62/C.2/L.62/Rev.I; reproduced in The Law of the Sea; Regime of Islands (United Nations, 1988) p. 48). It thus was clear to the drafters of the Convention that by introducing the term “rock” in paragraph 3 of article 121, the provision would not be applicable to islands above a certain size. Of course, that does not dispose of the question what specific size provides the limit value in this respect. The tribunal itself observes that at UNCLOS III the figures of 1 and 10 square kilometers were mentioned (SCSA, para. 538). These figures are not directly relevant for determining the maximum size of rocks, as they are used in connection with the definition of respectively islets and islands (see e.g. The Law of the Sea; Regime of Islands (United Nations, 1988) pp. 15, 17 and 40). However, the fact that rocks were distinguished from islets at UNCLOS III suggests that a figure of less than 1 square kilometer might be relevant to define the upper size of a rock under article 121(3).

The tribunal’s conclusion that “size cannot be dispositive of a feature’s status as a fully entitled island or rock and is not, on its own, a relevant factor” is followed immediately by a reference to the judgment of the International Court of Justice in Territorial and Maritime Dispute (Nicaragua v. Colombia), that “international law does not prescribe any minimum size which a feature must possess in order to be considered an island.”(SCSA, para. 538). It is not clear what point the tribunal seeks to make by this reference. The fact that the Court holds that there is no minimum size for a feature to qualify as an island, in no way proves that the use of the term “rock” does not imply a maximum size above which islands cannot be article 121(3) rocks. As will be set out below, the tribunal’s
conclusion that size is neither dispositive of nor a relevant factor in determining the status of islands has, in combination with the tribunal’s findings in relation to the phrase “economic life of their own”, which will be discussed next, significant implications beyond the South China Sea.

The interpretation of the phrase “economic life of their own”

Article 121(3) contains two requirements, which if met, imply that a rock is a fully entitled island, namely if it can sustain human habitation or economic life of its own. A first question in this respect is whether the word “or” between the phrases “cannot sustain human habitation” and “economic life” entails that these requirements are cumulative. In other words, does a rock, to escape the ambit of article 121(3) have to be able to sustain both human habitation and economic life, or is it sufficient to be able to sustain only human habitation and not economic life or vice versa? The tribunal considers that the latter is the case, basing itself on formal logic and the context in which the formulation “cannot sustain human habitation or economic life of their own is placed” (SCSA, paras 494-496). While concluding that the two requirements are distinct, the tribunal immediately makes a critical caveat, observing that:

economic activity is carried out by humans and that humans will rarely inhabit areas where no economic activity or livelihood is possible. The two concepts are thus linked in practical terms, regardless of the grammatical construction of Article 121(3) (SCSA, para. 497).

This view of the tribunal has far-reaching implications for its interpretation of the phrase “economic life of their own”.

The key conclusions of the tribunal on the interpretation of the phrase “economic life of their own” are contained in paragraphs 543 and 547 of its award, which read:

543. Fourth, the phrase “economic life of their own” is linked to the requirement of human habitation, and the two will in most instances go hand in hand. Article 121(3) does not refer to a feature having economic value, but to sustaining “economic life”. The Tribunal considers that the “economic life” in question will ordinarily be the life and livelihoods of the human population inhabiting and making its home on a maritime feature or group of features. Additionally, Article 121(3) makes clear that the economic life in question must pertain to the feature as “of its own”. Economic life, therefore, must be oriented around the feature itself and not focused solely on the waters or seabed of the surrounding territorial sea. Economic activity that is entirely dependent on external resources or devoted to using a feature as an object for extractive activities without the involvement of a local population would also fall inherently short with respect to this necessary link to the feature itself. Extractive economic activity to harvest the natural resources of a feature for the benefit of a population elsewhere certainly constitutes the exploitation of resources for economic gain, but it cannot reasonably be considered to constitute the economic life of an island as its own.

547. [...] A feature that is only capable of sustaining habitation through the continued delivery of supplies from outside does not meet the requirements of Article 121(3). Nor does economic activity that remains entirely dependent on external resources or that is devoted to using a feature as an object for extractive activities, without the involvement of a local population, constitute a feature’s “own” economic life. [...] (SCSA, paras 543 and 547)
Paragraphs 543 and 547 indicate that the tribunal considers that the phrase “economic life of their own” requires the presence of a local population. As the tribunal observes in paragraph 543 “the term “economic life of their own” is linked to the requirement of human habitation, and the two will in most instances go hand in hand”. This outcome of the tribunal’s exegesis of the term “economic life of their own” does not convince. While the tribunal first concludes – correctly in the view of this author – that the word “or” between “human habitation” and “economic life of their own” implies that these requirements do not have to be met at the same time, the interpretation it offers of “economic life of their own” implies that this latter requirement as a general rule will only be met if the requirement of “human habitation” has been met. This makes the requirement of “economic life of their own” ancillary to the requirement of “human habitation”, instead of these being two requirements that stand on an equal footing. In that light, it is warranted to have a look closer at how the tribunal arrives at its interpretation of the term “economic life of their own”.

In assessing the meaning of the term “economic life of their own”, the tribunal breaks down this phrase into two elements: “economic life” and “of their own” (SCSA, para. 498). The tribunal makes the following observations on these elements:

499. The ordinary meaning of “economic” is “relating to the development and regulation of the material resources of a community” and may relate to a process or system by which goods and services are produced, sold and bought, or exchanged. The term “life” suggests that the mere presence of resources will be insufficient and that some level of local human activity to exploit, develop, and distribute those resources would be required. The Tribunal also recalls that “economic life” must be read bearing in mind the time component of “sustain”. A one-off transaction or short-lived venture would not constitute a sustained economic life. The phrase presupposes ongoing economic activity. Although the drafters chose not to import any reference to “value”, the need for the economic activity to be sustained over a period of time does presuppose a basic level of viability for the economic activity.

500. The “of their own” component is essential to the interpretation because it makes clear that a feature itself (or group of related features) must have the ability to support an independent economic life, without relying predominantly on the infusion of outside resources or serving purely as an object for extractive activities, without the involvement of a local population. In the Tribunal’s view, for economic activity to constitute the economic life of a feature, the resources around which the economic activity revolves must be local, not imported, as must be the benefit of such activity. Economic activity that can be carried on only through the continued injection of external resources is not within the meaning of “an economic life of their own.” Such activity would not be the economic life of the feature as “of its own”, but an economic life ultimately dependent on support from the outside. Similarly, purely extractive economic activities, which accrue no benefit for the feature or its population, would not amount to an economic life of the feature as “of its own” (SCSA, paras 499-500 (footnotes suppressed)).

The tribunal’s assessment of the meaning of the phrase “economic life” does not raise particular concerns and does not make the requirement of economic life of their own dependent on human habitation. As the tribunal’s reasoning indicates, the economic life need not even be permanent, but only needs to be carried on over a period of time. The crux of the tribunal’s reasoning is contained in paragraph 500 of the award, which looks at the phrase “of their own”. The tribunal identifies two parameters in this respect: the economic activity has to be carried out without the injection of external resources; and the benefit of the activity has to be for the feature concerned or its population. The tribunal justifies its requirement of the absence of injection of external resources by arguing that
this would constitute “an economic life ultimately dependent on support from the outside” (SCSA, para. 500). It is submitted that this is a mischaracterization of the relationship between external resources and the economic life that an island can sustain of its own. Even if the economic life of the island is dependent on support from the outside, that life may center on resources that are located on the island or on services the island can provide and that are being used in a viable economic activity that can be sustained over a period of time. What should be determinative is not the extent of support from the outside as such, but how it relates to the resources or services the island has of its own. The mere fact that outside support is needed to develop an economic activity on an island does not mean that this activity is not the result of the presence of resources or services of the island and in that sense is the islands economic life of its own.

The tribunal’s position that “of their own” disqualifies “extractive economic activities, which accrue no benefit for the feature or its population” as meeting the requirement of “economic life of their own” is premised on the assumption that “economic life of their own” requires the presence of a local population. However, the fact that article 121(3) distinguishes between the separate requirements of human habitation and economic life, indicates that there is no basis in the text of article 121(3) to justify this assumption, but rather points in the contrary direction. The drafting history of article 121(3) does not give any reason to arrive at a different conclusion in this respect. The requirements of human habitation and economic life were introduced as separate requirements (see The Law of the Sea; Regime of Islands (United Nations, 1988) passim) and there is no support for the tribunal’s position that the drafters intended that the phrase “economic life of their own” should be read as “economic life of their own benefiting a local population”.

**Implications of a different interpretation of article 121(3) for the status of the islands in the South China Sea**

The tribunal in its award carries out a detailed assessment to determine whether the Spratly Islands and Scarborough Reef are covered by article 121(3) of the LOSC (see SCSA, paras 554-626). On the basis of this assessment, the tribunal reaches the conclusion that none of these features can sustain human habitation or economic life of their own, implying that they do not have a continental shelf and exclusive economic zone (SCSA, para. 626). This section briefly considers whether the above findings on the relevance of size and the interpretation of the phrase “economic life of their own” might have led to a different conclusion on this point.

For a number of features, such as the rocks on Scarborough Reef, the answer without doubt is no. These rocks are smaller than any reasonable figure that would identify the maximum size of an island to qualify as a rock under article 121(3). Their size also excludes the possibility of a viable economic activity over a period of time on these rocks.

The situation is different in relation to the largest islands in the Spratly Islands. Itu Aba according to information contained in the award, measures 1,400 meters in length and has a maximum width of 400 meters and is 0.43 square kilometers (SCSA, para. 401). These figures could be said to imply that Itu Aba, rather than being a rock, should be categorized as an islet. As was noted above, during UNCLOS III, these two subcategories of islands were distinguished, and article 121(3) is only applicable to rocks. This fact perhaps also pinpoints a difficulty the tribunal was facing in considering the issue of size. If it only would have had to concern itself with features similar to the rocks on Scarborough Reef, it would have been possible to leave the issue of whether the term “rock” in article 121(3) implies an upper limit as regards size unanswered. For a feature like Itu Abu that would not have been possible. As was noted above, at UNCLOS III proposals were made to deny islets of less than 1 square
kilometer a continental shelf and exclusive economic zone. Those proposals imply that the limit value distinguishing islets from rocks is less than 1 square kilometer. That would put this limit value close to the size of Itu Aba. In view of the fact that the selection of any limit value would have implied a measure of arbitrariness, and would have had huge implications, and any decision on this point consequently would have been open to criticism, this is undoubtedly a task that any arbitrator would prefer to forego.

A different interpretation of the phrase “economic life of their own” would have led to a different outcome as regards the larger islands in the Spratly Islands. The tribunal concludes that the physical features of these islands do not “definitely indicate the capacity of the features” to sustain human habitation or economic life of their own (SCSA, para. 616). To reach a final conclusion on this point the tribunal reviews “the historical evidence of human habitation and economic life on the Spratly Islands and the implications of such evidence for the natural capacity of the features” (SCSA, para. 616). On the basis of that review, the tribunal concludes that historic economic activity has been of an extractive nature not benefiting a local population (SCSA, para. 623). As was argued above, those criteria should not be considered to be determinative of the question as to whether an island can sustain an economic life of its own. At the same time, the tribunal’s description of these activities (SCSA, paras 597-614) could be argued to indicate that these economic activities were not viable over a period of time and thus would, as argued above, also not constitute “economic life” under a less stringent interpretation of the phrase “economic life of their own”.

By way of conclusions: Implications of the tribunal’s findings beyond the South China Sea

States almost invariably have claimed a continental shelf and exclusive economic zone for all the islands under their sovereignty. The one notable exception is the United Kingdom, which, upon becoming a party to the LOSC, rolled back its claim to a 200-nautical-mile zone from Rockall and Shag Rocks. Certain other islands are almost likely to be captured by any reasonable interpretation of article 121(3) of the LOSC. An obvious example is Japan’s Okinotorishima, which is comparable in size to the rocks on Scarborough Reef, which were briefly discussed in the previous section. However, if the findings of the tribunal on size, and sustaining human habitation and economic life of their own were to be applied across the board, many islands that have not been considered to fall under the scope article 121(3) would likely have to be (re)categorized as article 121(3) rocks. The issue of size and the phrase “economic life of their own” were already discussed above. As regards sustaining human habitation, the tribunal’s main points are that “[a]t a minimum, sustained human habitation would require that a feature be able to support, maintain, and provide food, drink, and shelter to some humans to enable them to reside there permanently or habitually over an extended period of time” (SCSA, para. 490) and “[t]he 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” (SCSA, para. 542).

Among the islands that likely would have to be categorized as article 121(3) rocks one can think of isolated islands in the polar regions, like Jan Mayen, the Russian islands of Henrietta and Jeannetta, Heard and MacDonald Islands or Bouvet Island. Examples from other regions would be Clipperton (Pacific), Tromelin (Indian Ocean) or Jabal al-Tair, which played a role in the arbitration concerning sovereignty and maritime delimitation between Eritrea and Yemen (see further below). If size were a criterion to distinguish article 121(3) rocks from other islands, a number of the above islands certainly would not be categorized as article 121(3) rocks. For instance, Jan Mayen has a surface area of 320 square kilometers. However, according to the tribunal size in itself is not relevant. Whether Jan Mayen can sustain human habitation in the sense the term is understood by the tribunal is unlikely. The island currently is home to the personnel of a weather station and scientists reside on the island.
during a period of the year. There currently is no economic activity on the island. In the past, Jan Mayen was used
in connection with whaling operations. However, the tribunal rejects that such extractive activities constitute the
island’s “economic life of its own”. Moreover, the tribunal held that in looking at this issue, activities of distant
fishermen exploiting the territorial sea (or the area beyond) do not constitute an island’s “economic life of its own”
(SCSA, para. 503). This was the situation of the whaling industry on Jan Mayen. Potential future activities on Jan
Mayen most likely would also be extractive in nature.

The question whether Jan Mayen is a fully entitled island or an article 121(3) rock was briefly examined by the
Conciliation Commission on the Continental Shelf area between Iceland and Jan Mayen, which issued its Report
and Recommendations in June 1981. The Commission, consisting of Elliott Richardson, Hans Anderson and Jens
Evensen, three key players at UNCLOS III, concluded that Jan Mayen was a fully entitled island (Report, Section
IV). The commission reached this conclusion on the basis of the description contained in Section III of its report
(Report, Section IV). Nothing in Section III suggests that Jan Mayen meets the tribunal’s criteria for escaping the
application of article 121(3) of the LOSC. The status of Jan Mayen was also briefly considered by the International
Court of Justice in the Jan Mayen case. The Court observed that Denmark had alluded to article 121(3), but did
not find it necessary to assess whether Jan Mayen might fall under the scope of this provision (Maritime
Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993, p. 38 at paras 60
and 80). The Court delimited the continental shelf and 200-nautical-mile fishery zone between Jan Mayen and
Greenland.

Another example of a decision of a third party dispute settlement body that does not seem in sync with the
approach of the tribunal in Philippines v. China is the arbitration between Eritrea and Yemen. In the second
phase of the arbitration, the arbitral tribunal in determining the maritime boundary between the two States held
that a Yemeni island, Jabal al-Tayr, should not be taken into consideration as a basepoint of the median line in
delimiting the continental shelf and the exclusive economic zone. In this connection, the tribunal referred to the
barren and inhospitable nature of the island (In the Matter of an Arbitration pursuant to an Agreement to
Arbitrate dated 3 October 1996 between the Government of the State of Eritrea and the Government of the
Republic of Yemen, Award of 17 December 1999, para. 147). The only traditional importance of Jabal al-Tayr was
that it had a lighthouse on it (In the Matter of an Arbitration pursuant to an Agreement to Arbitrate dated 3
October 1996 between the Government of the State of Eritrea and the Government of the Republic of Yemen,
Award of 9 October 1998, para. 510). This information leaves little doubt that Jabal al-Tayr would be an article 121
(3) rock under the approach of the tribunal in Philippines v. China. The tribunal in the arbitration between Eritrea
and Yemen did not make any reference to article 121(3). One other point to be noted about this arbitration is that
it distinguishes between islands, islets and rocks (see e.g. In the Matter of an Arbitration pursuant to an
Agreement to Arbitrate dated 3 October 1996 between the Government of the State of Eritrea and the Government
of the Republic of Yemen, Award of 9 October 1998, paras 458 and 508). Jabal al-Tayr is consistently identified as
an island. It may be noted that Jabal al-Tayr has an area of some 3.9 square kilometers. If size were to be a
relevant criterion under article 121(3) of the LOSC, in the light of the other characteristics of the island, only that
figure would seem to save Jabal al-Tayr from falling under the scope of article 121(3).

In The “Monte Confurco” Case (Seychelles v. France), and The “Volga” Case (Russian Federation v. Australia),
two cases concerning the prompt release of vessels under article 292 of the LOSC before the International
Tribunal for the Law of the Sea, judge Vukas in a declaration indicated that he considered that respectively the
Kerguelen Islands and Heard and MacDonald Islands should not be entitled to an exclusive economic zone. In his
declaration in Monte Confurco, discussing the Kerguelen Islands, judge Vukas observed that “it is highly
questionable whether the establishment of an exclusive economic zone off the shores of these “uninhabitable and uninhabited” islands […] is in accordance with the reasons which motivated [UNCLOS III] that specific legal régime and with the letter and spirit of the provisions on the exclusive economic zone, contained in the [LOSC]”. In his much more elaborate declaration in *Volga*, discussing Heard and McDonalds Islands, Vukas stated that “the purpose of this brief text is to explain my belief that the establishment of exclusive economic zones around rocks and other small islands serves no useful purpose and that it is contrary to international law” (declaration, para. 10). He also observed that “[i]n the present case, an exclusive economic zone has been proclaimed by Australia off the coasts of two uninhabited islands which are much smaller than the Kerguelen Islands” (declaration, para. 2). The views of judge Vukas on the status of Kerguelen Islands and Heard and MacDonald Islands in neither case is reflected in the Order of the Tribunal or the individual opinions of any of the other judges. It would be possible to defend the view that all of these sub-Antarctic islands “cannot sustain human habitation or economic life of their own”, certainly if the interpretation of the tribunal in *Philippines v. China* were to be followed. The Kerguelen Islands have a surface area of 7,215 square kilometers, Heard Island measures 368 square kilometers and the McDonald Islands have a size of some 2.5 square kilometers. McDonald, the largest island of the latter group measures slightly more than 1 square kilometer.

It remains to be seen how the tribunal’s findings on article 121(3) in *Philippines v. China* will impact on State practice beyond the South China Sea. At the moment, there is an abyss between the tribunal’s approach and the practice of many States. If this situation prevails, China’s unease with the LOSC may not be confined to section 2 of Part XV of the Convention. There is a certain irony to the fact that the compulsory dispute settlement provisions of the Convention, which were intended to guarantee the uniform interpretation and application of the LOSC and thereby its stability, in this case may achieve exactly the opposite result.

---

Like Be the first of your friends to like this.

This entry was posted in Arbitration, China, Continental shelf, Exclusive economic zone, Islands, Philippines, Rocks, South China Sea, Spratly Islands. Bookmark the permalink.

---

**One Response to The South China Sea Arbitration’s Interpretation of Article 121(3) of the LOSC: A Disquieting First**

**Stuart Kaye** says:
10/09/2016 at 03:10

Excellent analysis Alex