

A New Critique of the South China Sea Arbitration Award

Jointly Compiled by

**National Institute for South China Sea Studies
Huayang Center for Maritime Cooperation and Ocean Governance**

Legal Support and Advisory Services from Fietta LLP

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Foreword

Since January 2013, when the Philippine government unilaterally initiated the so-called compulsory arbitration concerning the South China Sea disputes between China and the Philippines, China has pursued a comprehensive response through coordinated political, diplomatic, maritime rights protection, public communication, and legal measures. These efforts have achieved significant results. Nowadays, international perceptions of the South China Sea arbitration and its “Award” have evolved considerably. China’s position of non-acceptance, non-participation, and non-recognition of the “Award” is now more widely understood and acknowledged internationally. Regrettably, however, a small number of countries have yet to fully appreciate the serious damage the “Award” has inflicted on the management of South China Sea disputes by the states directly concerned, the development of regional rules and order in the South China Sea, the credibility and integrity of the dispute settlement mechanism under the United Nations Convention on the Law of the Sea (UNCLOS), and the broader international legal order. Some continue to harbor unrealistic expectations regarding the “Award.”

More than a decade has passed since the arbitration tribunal issued the “South China Sea Arbitration Award.” With the support of the United States and certain other Western countries, the Philippines has promoted misleading narratives, including claims that “the Award is international law” and that “failure to implement the Award constitutes a violation of international law,” and amplified them through a range of high-profile international platforms. The current Philippine administration’s repeated provocations against China in the South China Sea reflects its growing reliance on the “Award” as a means of attempting to alter the status quo, consolidate its unlawful gains, and expand its unilateral claims and activities. The “Award” has seriously undermined mutual trust between China and the Philippines. Moreover, in addition to the Philippines, some other claimant states occasionally invoked or cited the “Award” to support their own claims and unilateral actions. Certain countries outside the region have treated the “Award” as authoritative, and sought to pressure China into complying with it. Looking back over the developments in the South China Sea during the past decade, one conclusion is clear: the “Award” has neither brought nor could ever bring peace and stability to the South China Sea. Instead, it has become a source of instability, a cause of strained relations among the parties concerned, and an obstacle to the full and effective implementation of the Declaration on the Conduct of Parties in the South China Sea (DOC) and to further promote consultations on the Code of Conduct in the South China Sea (COC).

Against this backdrop, the National Institute for South China Sea Studies (NISCSS) and the Huayang Center for Maritime Cooperation and Ocean Governance established a research task force led by Dr. Wu Shicun, Chairman of the Huayang Center and Chairman of the Academic Committee of NISCSS, serves as Chief Expert. The team brought together leading scholars of international law from China and abroad. With legal support and advisory services provided by the London-based law firm Fietta LLP, the team prepared the report *A New Critique of the South China Sea Arbitration Award* and released it both in China and internationally. The report aims to subject the “South China Sea Arbitration Award” to renewed and rigorous academic scrutiny, identify the flaws in its legal reasoning, and assess its broader legal and practical consequences.

The publication of this report seeks to further demonstrate the significant errors and flaws in the South China Sea arbitration “Award,” particularly with respect to its interpretation and application of international law, its findings of fact, and its assessment of evidence. By doing so, the report seeks to enable governments, scholars, and the broader international legal community, both within and beyond the region, to better understand the flawed reasoning and harmful consequences of the “Award.” It also reaffirms to the international community that China's position of rejecting any claims or actions based on the “Award” is firmly grounded in safeguarding its legitimate rights and interests in the South China Sea, safeguarding regional peace and stability, and upholding the international rule of law. At the same time, we emphasize our commitment to advancing scholarly and legal examination of the “Award” through various means until its adverse effects are fully recognized and effectively addressed.

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I. INTRODUCTION

1. A decade has passed since the tribunal in the *South China Sea Arbitration* issued its 2016 Final Award (respectively the “SCS Tribunal” and “2016 Award”). This paper considers the reactions of States, tribunals, and scholars to core aspects of the 2016 Award related to UNCLOS Article 121, small island features and historic rights in the modern law of the sea. It shows that the developments over the past decade have exposed the 2016 Award as highly controversial in these contexts. The article proceeds in three substantive sections.
2. Section II explains that the 2016 Award has had limited, if any, impact on State practice with regard to maritime claims based on small island features and historic rights. It exposes the contradiction between the rejection of the 2016 Award’s interpretation and application of the law of the sea in State practice, and some States’ ongoing formal public support for the 2016 Award (including by a number whose own practice continues to *contradict* the 2016 Award). States have thus refrained from applying the 2016 Award’s finding on Article 121(3) of the United Nations Convention on the Law of the Sea (“UNCLOS”) and historic rights in their maritime claims.
3. Section III then shows that the 2016 Award has not significantly impacted the law of the sea in the context of interpretation and application of UNCLOS Article 121, the treatment of small island features and the role of historic rights in the modern law of the sea. It thus appears that the 2016 Award is *anything but* a “seminal” or “landmark” ruling in these respects. In fact, international courts and tribunals have ignored the SCS Tribunal’s findings concerning Article 121 of UNCLOS and historic rights, including in the context of maritime delimitation and traditional fishing activities. Furthermore, commentators have generally either ignored or critiqued these findings.
4. Finally, Section IV concludes that the 2016 Award in the *South China Sea Arbitration* has produced a limited impact on the development of the law of the sea over the past decade, particularly in the context of UNCLOS Article 121 and its application to small island features, and the role of historic rights in the modern law of the sea.

II. THE AWARD HAS HAD LIMITED, IF ANY, IMPACT ON STATE PRACTICE WITH REGARD TO MARITIME CLAIMS BASED ON (1) SMALL ISLAND FEATURES AND (2) HISTORIC RIGHTS

5. The international community's response to the 2016 Award and its specific findings has been mixed, and often highly politicised, particularly in terms of statements made following the 2016 Award. Meanwhile, State practice, particularly as regards the treatment of small insular features in delimitation and the extension of claims to sovereign rights beyond the territorial sea limit of such features, has largely been *unaffected* by the 2016 Award, including by States (*e.g.*, the US, Canada, France, Japan, Australia, and New Zealand) that have made public statements endorsing the Award.
6. In assessing the international community's response to the 2016 Award, we reviewed the following sources:
 - a) official public statements by States;
 - b) State submissions to the United Nations, including the deposit of charts, Commission on the Limits of the Continental Shelf ("CLCS") submissions, and *notes verbales*;
 - c) maritime delimitation treaties; and
 - d) other public sources from which State practice or policy can be deduced.
7. The review of State practice exposes four trends in relation to States' responses to the 2016 Award: (i) States remain divided as to the validity and legal authority of the 2016 Award, with some States advocating support for the 2016 Award and its binding legal effect, particularly as a matter of policy, while other States have objected to the 2016 Award, whether as a whole or in specific respects; (ii) the 2016 Award's central findings interpreting Article 121(3) of UNCLOS have largely been *ignored* in State practice; (iii) there has been an inconsistency between States' public support for the 2016 Award and their failure to apply the SCS Tribunal's legal interpretation of Article 121(3) of UNCLOS with respect to *their own* maritime claims, thus indicating a significant political element to some public positions taken with respect to the 2016

Award; and (iv) States have maintained claims to historic rights irrespective of the 2016 Award's rejection of such rights post-UNCLOS.

A. States are publicly divided as to the validity and legal authority of the 2016 Award

8. A survey of public statements since the 2016 Award shows that States are divided as to the validity and legal authority of the 2016 Award. While many States have endorsed the 2016 Award, others have strongly opposed its validity and legal reasoning. Several States including Montenegro, Pakistan, Russia, Syria, Belarus, Sudan, and Vanuatu have expressed reservations or outright opposition to the 2016 Award. These States have generally emphasised concerns relating to China's non-participation, the procedure followed by the SCS Tribunal, and broader principles governing international dispute settlement.
9. Many States took issue with the 2016 Award's treatment of China's lack of consent to arbitrate the dispute with the Philippines under UNCLOS. Pakistan has been explicit in its objection to this jurisdictional pre-requisite of the 2016 Award, rejecting the 2016 Award as the "unilateral imposition of [a] decision[]" on China without its consent, while expressing support for China's reliance on the optional exceptions to jurisdiction under Article 298 of UNCLOS. Pakistan's position reflects a broader concern, possibly driven by the increasing preponderance of "lawfare" in international dispute resolution (addressed at Section IV below), to preserve and safeguard the critical requirement for State consent in compulsory dispute settlement mechanisms.¹ Montenegro implicitly criticised the 2016 Award on similar grounds, and underscored that arbitration should be approached solely on the basis of mutual consent and mutual agreement of the parties. For Montenegro, consensual dispute resolution is essential to fostering long-term regional stability.² Similarly, Vanuatu, in a 2024 joint statement with China, endorsed China's position on the South China

¹ Reuters, 'Pakistan supports China's position on S. China Sea', *CBN News* (14 July 2016), <https://www.abs-cbn.com/overseas/07/14/16/pakistan-supports-chinas-position-on-s-china-sea>.

² Montenegro, Government of Montenegro, 'Statement on the publication of the judgment of the Permanent Court of Arbitration in The Hague on the dispute between China and the Philippines' (12 July 2016), <https://web.archive.org/web/20181115223702/http://www.gov.me/naslovna/vijesti-iz-ministarstava/163193/Saopstenje-povodom-objavljivanja-presude-Stalnog-arbitraznog-suda-u-Hagu-o-sporu-izmedu-Kine-i-Filipina.html>.

Sea and emphasised that disputes should be addressed through peaceful negotiations and dialogue between the parties directly concerned.³

10. After the 2016 Award, Syria expressed its support for China's position on sovereignty and maritime entitlements in the South China Sea. Syria further stressed the importance of resolving disputes through direct negotiations and consultations among the States concerned, advocating for solutions that are mutually acceptable and conducive to regional peace and stability. In doing so, it pointed to existing regional frameworks, including the 2002 Declaration on the Conduct of Parties in the South China Sea between ASEAN Member States and China ("**DOC**"), as an appropriate basis for managing tensions in the South China Sea.⁴
11. The Russian Federation went further and questioned the procedural fairness of the *South China Sea Arbitration*.⁵ Russia emphasised that dispute resolution mechanisms should involve the participation and consent of all parties, suggesting that the absence of one party from the proceedings undermines the legitimacy of the outcome.⁶ President Putin affirmed that Russia "support[s] China's position to not recognise the court's ruling".⁷ Similarly, Sudan voiced strong opposition to the 2016 Award in its aftermath, characterising it as politically motivated and lacking a sound legal basis. Sudanese representatives emphasised that the arbitration process was flawed due to China's absence and argued that the outcome undermined established principles of international law. Sudan further supported China's position that disputes in the South China Sea should be resolved through dialogue and negotiation, while cautioning against external interference that could exacerbate tensions and

³ The People's Republic of China, the State Council, 'Joint Statement between the People's Republic of China and the Republic of Vanuatu' (13 July 2024), https://english.www.gov.cn/news/202407/13/content_WS6691b998c6d0868f4e8e9224.html.

⁴ R.Said, 'Syria supports China's sovereignty over its territory in South China Sea', *Syrian Arab News Agency* (20 July 2016), <https://web.archive.org/web/20181115223419/https://sana.sy/en/?p=83065>.

⁵ However, it should be noted that Russia has relied on the 2016 Award as a legal authority in its submissions during international judicial proceedings, e.g. *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation)*, PCA Case No. 2017-06, Preliminary Objections of the Russian Federation, <https://pcacases.com/web/sendAttach/2617>, paras. 57, 138, 150, 170.

⁶ Russia, President of Russia, 'Answers to journalists' questions' (5 September 2016), <http://en.kremlin.ru/events/president/news/52834>.

⁷ Russia, President of Russia, 'Answers to journalists' questions' (5 September 2016), <http://en.kremlin.ru/events/president/news/52834>.

undermine regional stability.⁸

12. The 2016 Award has also been opposed in States' submissions at the International Court of Justice ("ICJ" or "Court"). Its legal reasoning on UNCLOS Article 121 was addressed in detail in submissions in *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)* ("NICOL II"). Colombia strongly objected to the 2016 Award which it described as a "controversial arbitral award" which "deprived the term 'rock' from any particular meaning".⁹ The Court rejected Nicaragua's case on another legal basis (namely, the lack of overlapping entitlements as a matter of law within Colombia's 200 nautical mile ("nm") limit) and thus avoided having to make any ruling on the legal dispute between the parties regarding the interpretation of UNCLOS Article 121(3) and the term "rock".¹⁰
13. Although a number of States explicitly oppose the 2016 Award, a survey of public statements since the 2016 Award shows different levels of support for the 2016 Award by many other States. *First*, no fewer than 17 States have positively acknowledged the 2016 Award,¹¹ without taking a position on the sovereignty aspects of the South China Sea disputes. These States emphasised the need for the parties to resolve the sovereignty dispute through peaceful means.¹² *Second*, other countries

⁸ M. Xinhua, 'Spotlight: Sudan warns against impact of unjust South China Sea award', *Xinhuanet* (13 July 2016), <https://www.xinhuanet.com/english/2016-07/13/c135510704.htm#:~:text=In%20the%20meantime%2C%20Mohamed%20Mustafa,conflicts%20which%20leads%20to%20instability.%22>.

⁹ *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, *Rejoinder of Colombia*, 9 July 2018, para. 4.28.

¹⁰ This is discussed further below at paragraph 100 below.

¹¹ The States that have positively acknowledged the 2016 Award include: Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Estonia, Hungary, Indonesia, Latvia, Lithuania, Luxembourg, Malaysia, Malta, Myanmar, Singapore, Slovenia, Timor-Leste, and Vietnam ('Arbitration Support Tracker', *Asia Maritime Transparency Initiative* (18 July 2023), <https://amti.csis.org/arbitration-support-tracker/>).

¹² Official statement from the European Union and its members affirming that: "The European Union and its Member States, as contracting parties to the United Nations Convention on the Law of the Sea (UNCLOS), acknowledge the Award rendered by the Arbitral Tribunal". The statement further clarifies that, "The EU does not take a position on sovereignty aspects relating to claims. It expresses the need for the parties to the dispute to resolve it through peaceful means, to clarify their claims and pursue them in respect and in accordance with international law, including the work in the framework of UNCLOS". European Council, 'Declaration by the High Representative on behalf of the EU on the Award rendered in the Arbitration between the Republic of

have more explicitly supported the 2016 Award, urging China to abide by it. These States include: Australia, Austria, Belgium, Canada, Czechia, Denmark, Finland, France, Germany, Greece, India, Ireland, Italy, Japan, Netherlands, New Zealand, Norway, Philippines, Poland, Portugal, Romania, Slovakia, South Korea, Spain, Sweden, the United Kingdom, and the United States.¹³ Notably, as further exemplified in the review of State practice below, many States that outwardly support the 2016 Award, including the United States, France, Japan, Australia and New Zealand, have adopted a contradictory approach in respect of their *own* maritime claims, effectively rejecting the 2016 Award’s conclusions in their own practice.

14. In the written statements submitted to the International Tribunal for the Law of the Sea (“ITLOS”) during the *Climate Change* advisory proceedings, at least 23 participating States relied on the 2016 Award, albeit only for the specific reason of advancing the (relatively uncontroversial) duty to protect the marine environment and to take measures to mitigate the effects of climate change.¹⁴ These States did not refer to any of the 2016 Award’s more controversial conclusions, such as those relating to jurisdiction, historic rights, or the meaning and application of the term “rock” under UNCLOS Article 121(3).

the Philippines and the People’s Republic of China’ (15 July 2016), <https://www.consilium.europa.eu/en/press/press-releases/2016/07/15/south-china-sea-arbitration/>.

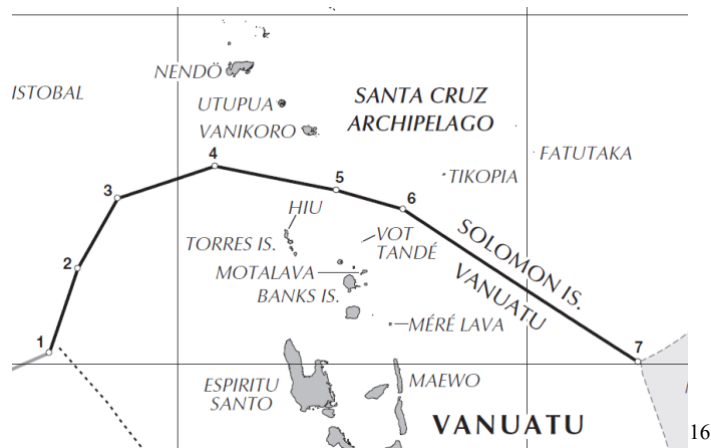
¹³ ‘Arbitration Support Tracker’, *Asia Maritime Transparency Initiative* (18 July 2023), <https://amti.csis.org/arbitration-support-tracker/>.

¹⁴ See, e.g., Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal), Written Statements of the following States: Written Statement of the Kingdom of the Netherlands (16 June 2023), p. 6; Written Statement of Australia (16 June 2023), para. 45; Written Statement of Belize (16 June 2023), paras. 56-59; Written Statement of Canada (16 June 2023), paras. 10, 24-25, 34-36; Written Statement of the Republic of Chile (16 June 2023), para. 43, 45, 90, 102; Written Statement of the Arab Republic of Egypt (16 June 2023), paras. 28, 30, 40, 51, 58, 79, 80; Written Statement of the Republic of Mauritius (16 June 2023), paras. 64, 74; Written Statement of New Zealand (15 June 2023), paras. 13, 61; Written Statement of the Portuguese Republic (16 June 2023), paras. 61, 64; Written Statement of the Republic of Rwanda (17 June 2023), 80-83, 161-165, 175-176; Written Statement of the Republic of Sierra Leone (16 June 2023), paras. 50, 60, 68; Written Statement of the Republic of Singapore (16 June 2023), para. 64; Written Statement of the United Kingdom (16 June 2023), para. 38; Written Statement of the Republic of Mozambique (16 June 2023), para. 3.60; Written Statement of the People’s Republic of Bangladesh (16 June 2023), paras. 41, 50; Written Statement by the Socialist Republic of Viet Nam (16 June 2023), para. 4.4.

B. The 2016 Award’s expansive interpretation and implementation of Article 121(3) of UNCLOS have had no tangible impact on State practice as regards the treatment of small island features in delimitation

15. Maritime delimitation agreements concluded since the 2016 Award was issued provide an additional indication as to whether the 2016 Award has been applied by States. Delimitation treaties are *sui generis* exercises in which the precise distribution or perceived location of overlapping maritime claims may have been affected by various considerations. It is therefore difficult to ascertain whether a delimitation line was definitively shaped due to the findings of the 2016 Award. In any event, most treaties concluded since the 2016 Award did not concern features which arguably fall within the 2016 Award’s interpretation and application of UNCLOS Article 121(3). Yet, a review of post-2016 delimitation practice provides examples of treaties in which States did not implement UNCLOS Article 121(3) as interpreted and applied by the SCS Tribunal.
16. In particular, our review indicates that: (i) States gave effect in Exclusive Economic Zone (“EEZ”) and Continental Shelf (“CS”) delimitations to insular features likely falling within the 2016 Award’s definition of an UNCLOS Article 121(3) “rock”; and (ii) States have not moved to reopen or renegotiate agreed maritime delimitation treaties in light of the 2016 Award, including its restrictive findings on the entitlements of insular features. While practice differing from point (i) above may have existed,¹⁵ the practice reviewed below indicates that, at the very least, the interpretation by the SCS Tribunal of Article 121(3) of UNCLOS has not been uniformly accepted or applied by States.
 - (i) States have given effect in subsequent EEZ and CS delimitations to small island features likely falling within the 2016 Award’s definition of “rocks”
17. On 7 October 2016, shortly after the 2016 Award, the Solomon Islands and Vanuatu concluded a delimitation agreement. The treaty gave effect *beyond the territorial sea* to features arguably falling within the 2016 Award’s definition of an UNCLOS Article 121(3) “rock”.

¹⁵ See, e.g., the 2022 Agreement between the Italian Republic and the Republic of Croatia on the delimitation of their exclusive economic zones (para. 53 below).



18. Vanuatu's Vot Tande feature was used as a basepoint for the equidistance line, and the parties gave it effect in the delimitation of the EEZ and CS between them (even if given potentially reduced weight).¹⁷ Vot Tande, however, is an uninhabited volcanic feature of approximately 0.25 sq. kilometres ("km") (approximately half the size of Itu Aba). Similarly, point 7 of the boundary line appears to be a point 200 nm from the Solomon Islands' Fatutaka feature, from which the Solomon Islands claims a 200 nm EEZ and CS entitlement.¹⁸ Fatutaka is an uninhabited small volcanic feature of roughly 1.81 sq. km.¹⁹ Fatutaka arguably cannot sustain human habitation or economic life of its own and may be a geological rock as well:

¹⁶ M. Pratt, 'Solomon Islands-Vanuatu Report Number 5-45', in C. Lathrop (eds.), *International Maritime Boundaries* (The American Society of International Law 2019).

¹⁷ M. Pratt, 'Solomon Islands-Vanuatu Report Number 5-45', in C. Lathrop (eds.), *International Maritime Boundaries* (The American Society of International Law 2019).

¹⁸ 200 nm from Fatutaka is the point from which Fiji, Solomon Islands and Vanuatu begin their joined Outer Continental Shelf submission to the CLCS. See Joint Submission of Fiji, Solomon Islands, and Vanuatu to the Commission on the Limits of the Continental Shelf concerning the North Fiji Basin, Executive Summary, https://www.un.org/depts/los/clcs_new/submissions_files/nfb96_2025/NFB_ES_DOC_secured.pdf. The submission indicates that Fiji also accepts the Solomon Islands' claim to an EEZ from Fatutaka.

¹⁹ 'Fatutaka', *Wikipedia*, <https://en.wikipedia.org/wiki/Fatutaka>.



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19. In 2022, Fiji and the Solomon Islands concluded a delimitation agreement of their respective claimed EEZ entitlements.²¹ The delimitation follows an equidistance line between Fatutaka and Fiji's Rotuma Island:



22

20. Vot Tande and Fatutaka would both likely fit within the 2016 Award's definition of an UNCLOS Article 121(3) "rock". Yet Fiji, Solomon Islands, and Vanuatu recognised these features' EEZ and CS entitlements. No public objections to these claims have been identified.

²⁰ C. Peter, 'Fatutaka Island (Mitre Island)', *Harbourmaps.com* (4 August 2025), <https://www.harbourmaps.com/en/harbour/fatutaka-island-mitre-island>.

²¹ N. Reid, et al, 'Fiji-Solomon Islands Report Number 5-49', in C. Lathrop (eds.), *International Maritime Boundaries* (The American Society of International Law 2019); Fiji-Solomon Islands', *Sovereign Limits*, <https://sovereignlimits.com/boundaries/fiji-solomon-islands-maritime>.

²² 'Fiji-Solomon Islands', *Sovereign Limits*, <https://sovereignlimits.com/boundaries/fiji-solomon-islands-maritime>.

- (ii) States have not amended pre-existing delimitation treaties in which small island features likely falling within the 2016 Award's definition of "rocks" were given full effect in EEZ and CS delimitation

21. Delimitation treaties divide overlapping maritime jurisdiction between two or more States, and can be amended by consent. Often, a contentious issue in delimitation is the treatment of islands. Small islands are less likely to be given full effect in delimitation if they are considered to be "rocks", within the meaning of UNCLOS Article 121(3). Since the 2016 Award, however, we have identified no situations in which: (i) States have agreed to amend a delimitation treaty to reduce the entitlement or weight previously given to small island features likely constituting "rocks" under the 2016 Award's interpretation; (ii) States have argued that a delimitation treaty should be amended or terminated because a "rock" was mistakenly deemed to generate EEZ or CS rights, or otherwise given too much weight in the delimitation; or (iii) third States have claimed that a delimitation has unlawfully delimited EEZ or CS rights, potentially to the prejudice of third States or even the international community (with respect to areas that would fall beyond national jurisdiction), with reference to small island features that would constitute "rocks" under the 2016 Award's interpretation.²³

22. The absence of such agreements, arguments or claims is notable because multiple treaties predating the 2016 Award gave effect to small island features in EEZ and CS delimitation which would likely be treated as a "rock" according to the interpretation adopted in the 2016 Award. Such treaties would arguably warrant renegotiation or revision in light of the 2016 Award, but they have remained unchanged. For example:

- a) in the 2014 delimitation of the EEZ and CS between Costa Rica and Ecuador,²⁴ Ecuador's Darwin Island was given full effect in the equidistance line with Costa

²³ In other situations, third States regularly object to delimitation agreements which undermine their maritime rights. An example for this is the multiple objections lodged by States to the delimitation agreement between Türkiye and Libya. See, e.g., G. Lindenstrauss and others, 'The Perils of the Turkey-Libya Maritime Delimitation Deal', *Institute of National Security Studies*, (18 December 2019), <https://www.inss.org.il/publication/the-perils-of-the-turkey-libya-maritime-delimitation-deal/>; European Parliament, 'Memorandum of Understanding between Turkey and Libya on Maritime Borders' (9 December 2019), https://www.europarl.europa.eu/doceo/document/P-9-2019-004285_EN.html.

²⁴ A. Brenes-Castro, 'Costa Rica-Ecuador Report Number 3-8 (2)' in C. Lathrop (eds.), *International Maritime Boundaries* (The American Society of International Law 2019).

Rica's Dos Amigos Islands. Darwin Island is an uninhabited insular feature with a landmass of around 2.3 sq. km.²⁵ While only the smaller features in Darwin Island are geological rocks, Darwin Island arguably cannot support human habitation in its natural state, particularly to the high degree mandated by the 2016 Award;²⁶

- b) in the 2014 maritime delimitation treaty between the United States and Micronesia, the parties delimited their respective EEZ entitlements via equidistance, giving full effect to Gaferut island.²⁷ Gaferut is a remote and uninhabited feature with the land mass of about 0.1 sq. km., which significantly impacted the equidistance line with the United States' Guam. Gaferut is significantly smaller than Itu Aba, uninhabited and "without fruit trees or fresh water".²⁸ In 2024, the United States confirmed its recognition of Gaferut's EEZ and CS entitlement in Limits in the Seas No. 152 in reference to the treaty: "FSM's (Micronesia's) maritime boundary agreement with the United States, concluded in 2014, establishes an EEZ and continental shelf boundary on the basis of equidistance that is composed of geodesic lines connecting 16 points. The boundary separates the maritime zones generated by islands in the northwest part of FSM, including Fais, Faraulep, and *Gaferut*, and Guam (U.S)".²⁹
- c) in the 2012 maritime delimitation treaty between Cook Islands and Kiribati, Kiribati's Vostock Island was given full effect in the EEZ delimitation.³⁰

²⁵ 'Darwin Island', *Galapagos Conservancy*, https://www.galapagos.org/about_galapagos/the-islands/darwin-island/.

²⁶ 'Darwin Island', *Cove*, <https://editions.covecollective.org/content/darwin-island>.

²⁷ C. Schofield and A. Arsana, 'Federated States of Micronesia-United States (Guam) Report Number 5-42' in C. Lathrop (eds.), *International Maritime Boundaries* (The American Society of International law 2019); see also The United States, Department of State, Limits in the Seas No. 152.

²⁸ William A. Niering, *Observation on Puluwat and Gaferut, Caroline Islands*, The Pacific Science board, National Academy of Sciences, p. 11, available at <https://repository.si.edu/server/api/core/bitstreams/126f9f0b-0865-49fc-b085-015214245d6c/content> ("it is uninhabited, without fruit trees or fresh water, which only collects in pits after rain, and that the inhabitants of near-by atolls visit it to collect turtles and birds.")

²⁹ The United States, Department of State, Limits in the Seas No. 152, p. 15 [emphasis added]. In contrast to Gaferut, Fais and Faraulep are populated features. It should, however, be noted that Faraulep is smaller than Itu Aba with the landmass of about 0.4 sq. km.

³⁰ J. Brien, 'Cook Islands-Kiribati [Report Number 5-32]', in C. Lathrop (eds.), *International Maritime Boundaries* (The American Society of International law 2019).

Vostock Island is an uninhabited feature with the land mass of 0.25 sq. km. – half the size of Itu Aba – without any permanent fresh water sources;³¹

d) in the 2002 EEZ delimitation between France and Kiribati, Flint Island (Kiribati) and Motu One (France), both uninhabited features, despite limited fresh water and a landmass of around 2.5 sq. km. each, were given full effect in the delimitation.³² Both features arguably cannot support human habitation, particularly to the high degree mandated by the 2016 Award.

23. There are multiple additional examples.³³ These treaties predate the 2016 Award and cannot, of themselves, thus be taken as express rejections of the SCS Tribunal's interpretation of Article 121(3) of UNCLOS. Nevertheless, the fact that, following the 2016 Award, none of the States parties, or otherwise affected States, appears to have made any attempt to amend the delimitations, or adjusted maritime claims that were informed such delimitations, indicates that the States concerned did not change their legal positions on the status of small island features similar to, or even smaller than, those examined in the *South China Sea* Arbitration.

C. Many States have continued to exercise or claim EEZ and CS rights from small island features likely falling within the 2016 Award's interpretation of "rocks" under Article 121(3) of UNCLOS

24. The 2016 Award's controversial interpretation of UNCLOS Article 121(3) appears not to have materially altered State practice with respect to claims to exercise EEZ or CS rights from features arguably falling within the 2016 Award's definition of a

³¹'Vostok Island', *Groklopedia*, https://groklopedia.com/page/Vostok_Island.

³² 'Flint Island', *Britannica*, https://www.britannica.com/place/Flint-Island?utm_source=chatgpt.com.

Also refer to 'Motu One (Society Islands)',

Groklopedia, https://groklopedia.com/page/motu_one_society_islands; M. Pratt, 'France-Kiribati Report Number 5-44' in C. Lathrop (eds.), *International Maritime Boundaries* (The American Society of International law 2019).

³³ C. Park, 'Fiji-France (New Caledonia, Wallis and Futuna) (1983) Report Number 5-6' in C. Lathrop (eds.), *International Maritime Boundaries* (The American Society of International law 2019), pp. 995, 996 (France recognised Fiji's claim from Theva-i-Ra, formerly Conway Reef, an uninhabited small feature of 0.5 sq km.) ('Conway Reef', 2012, https://www.yt1ad.info/3d2c/about_3d2c.html); C. Park, 'Australia-France (New Caledonia) (1982) Report Number 5-1', in C. Lathrop (eds.), *International Maritime Boundaries* (The American Society of International law 2019), (Middleton reef was used as a basepoint by Australia). Rose Atoll was given weight in delimitations between the United States and the Cook Islands (*Ibid.*, Report 5-5) and Niue (*Ibid.*, Report 5-22).

“rock”. A review of State practice following the 2016 Award reveals three trends in this regard: (i) States made new claims to exercise sovereign rights from such features; (ii) States maintained pre-existing claims to exercise EEZ or CS rights from such features; and (iii) except for a few outlier situations, no new objections by States to claims to exercise sovereign rights from features likely falling within the 2016 Award’s definition of a “rock” have been identified.

- (i) States have made new claims since the 2016 Award to exercise EEZ or CS rights from small island features likely falling within the 2016 Award’s definition of “rocks”

- 25. States have, since the 2016 Award, made new claims to EEZ and CS sovereign rights projecting from small insular features. Four examples of such new claims are discussed below.
- 26. *First*, in 2024, Mauritius claimed sovereign rights from the insular feature Tromelin, sovereignty over which is disputed between itself and France. On 1 April 2025, Mauritius deposited a map with the United Nations showing an EEZ extending beyond 12 nm from Tromelin up to what appears to be the equidistance line with Madagascar.³⁴ France objected to this claim on 5 August 2025, noting that France had established an EEZ around Tromelin on 3 February 1978.³⁵ Both States have maintained the position that Tromelin is capable of generating an EEZ of its own, and that the feature therefore does not fall within Article 121(3) of UNCLOS.

³⁴ Republic of Mauritius, ‘EEZ Outer Limit Line’, <https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/MusMzn167IM1EEZ.jpg>.

³⁵ *Note Verbale* from the Permanent Mission of France to the United Nations (5 August 2025), [https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/communicationsreposit/FranceCommEng.pdf](https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/communicationsredeposit/FranceCommEng.pdf).



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27. Tromelin is a small, isolated and uninhabited insular feature with a landmass of roughly 1 sq. km. While slightly larger than Itu Aba (taken in isolation), Tromelin has no arable land nor crops, and has no economic activity.³⁷ Tromelin thus likely falls neatly within the 2016 Award’s definition of “rock”. Yet Mauritius laid claim to an EEZ from the feature in 2024 and France maintained its EEZ claim from the feature as of 2025. Thus, both States effectively rejected the 2016 Award’s interpretation of UNCLOS Article 121(3) as it applied to Tromelin. We have not identified any objections to these EEZ claims from third States based on the proposition that Tromelin should be deemed a “rock”.³⁸
28. *Second*, on 26 February 2019, France deposited with the United Nations a list of geographic coordinates for the outer limits of its claimed EEZ off Clipperton Island alongside an illustrative map.³⁹ Clipperton Island is an uninhabited insular feature with no arable land nor crops.⁴⁰ Although some economic activity has been planned on Clipperton Island, none has apparently yet been established on the feature,⁴¹ and

³⁶ S. Patel, ‘Castaways’, *Archaeology Magazine* (October 2014), <https://archaeology.org/issues/september-october-2014/features/tromelin-island-castaways/>.

³⁷ ‘Tromelin Island’, *The World Factbook* (10 February 2005), <https://user.iiasa.ac.at/~marek/fbook/04/print/te.html>.

³⁸ The dispute between Mauritius and France concerning the EEZ claims from Tromelin relates to sovereignty over the feature.

³⁹ French Republic, ‘Deposit of lists of geographical coordinates of points concerning the outer limit lines of the territorial sea and the exclusive economic zone off the coast of Clipperton Island, as contained in Decree No. 2018-23 of 16 January 2018’, https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/FRA_Deposit_MZN142.htm.

⁴⁰ Clipperton Island (possession of France), <https://user.iiasa.ac.at/~marek/fbook/01/geos/ip.html>.

⁴¹ ‘Clipperton Island’, *Wikivoyage*, https://en.wikivoyage.org/wiki/Clipperton_Island.

the only economic activity locally is reportedly tuna fishing (presumably, regulated by France) in its claimed EEZ.⁴² Although significantly larger in size than Tromelin (around 7 sq. km.), Clipperton Island could arguably still qualify as a “rock” under the 2016 Award as it appears to have no capacity for human habitation nor economic activity on its own, particularly under the elevated level mandated in the 2016 Award.⁴³

29. *Third*, Brazil claims a 200 nm EEZ from Rocas Atoll. This feature is one of the smallest atolls in the world,⁴⁴ with a total area of 0.36 sq. km, thus significantly smaller than Itu Aba.⁴⁵ The feature is largely composed of geological rocks with no fresh water or arable land, and arguably cannot support human habitation or economic life of its own in its natural state, particularly at the elevated level mandated in the 2016 Award.

⁴² Clipperton Island (possession of France), <https://user.iiasa.ac.at/~marek/fbook/01/geos/ip.html>; Y. Song, ‘The Application of Article 121 of the Law of the Sea Convention to the Selected Geographical Features Situated in the Pacific Ocean’, *Chinese Journal of International Law*, vol. 9, issue 4 (2010), <https://academic.oup.com/chinesejil/article-abstract/9/4/663/312701>, p. 691.

⁴³ See P. Milhiet, ‘Clipperton in France’s Indo-Pacific Strategy’, *S. Rajaratnam School of International Studies*, (22 December 2023), <https://rsis.edu.sg/rsis-publication/rsis/clipperton-in-frances-indo-pacific-strategy/> (“A 2016 ruling of the International Tribunal in The Hague provides an extensive definition of a rock. An atoll that does not have the capacity to host an economic activity or human habitation is categorised as a rock, not an island. These two conditions are not fulfilled in the case of Clipperton. An international court could therefore legitimately qualify it as a “rock”. In this case, Clipperton would only be entitled to a 12 nautical-mile territorial sea and subsequently lose its strategic assets.”). *But see* Y. Song, ‘The Application of Article 121 of the Law of the Sea Convention to the Selected Geographical Features Situated in the Pacific Ocean’, *Chinese Journal of International Law*, vol. 9, issue 4 (2010), <https://academic.oup.com/chinesejil/article-abstract/9/4/663/312701>, para. 72. Mexico protested the French claim to an EEZ and in response “France agreed to allow Mexican vessels to fish in the waters around” the feature. *Ibid*, para. 10.

⁴⁴ B. Pinheiro and others, ‘Population dynamics of *Siderastrea stellata* Verrill, 1868 from Rocas Atoll, RN: implications for predicted climate change impacts at the only South Atlantic atoll’, *Anais da Academia Brasileira de Ciencias* (2017), https://www.researchgate.net/publication/317005769_Population_dynamics_of_Siderastrea_stellata_Verrill_1868_from_Rocas_Atoll_RN_implications_for_predicted_climate_change_impacts_at_the_only_South_Atlantic_atoll.

⁴⁵ ‘Rocas Atoll’, *DEIMS-SDR*, <https://deims.org/locations/cde262a4-74bf-43a7-ae89-fcb9b09af542>.



30. In its 2004 and 2017 CLCS submissions, Brazil reiterated its EEZ entitlement from Rocas Atoll.⁴⁸ Recent data shows that Brazil maintains its claim to an EEZ generated from Rocas Atoll.⁴⁹ To date, no State appears to have raised objections to Brazil's claim. The legal position of Brazil and other States as to the maritime entitlement of Rocas Atoll thus remained unaffected by the 2016 Award.

⁴⁶ 'Rocas Atoll', *NASA* (21 November 2019), <https://science.nasa.gov/earth/earth-observatory/rocas-atoll-146378/>.

⁴⁷ 'Rocas Atoll', *Wikipedia*, https://en.wikipedia.org/wiki/Rocas_Atoll.

⁴⁸ Submission by Brazil to the Commission on the Limits of the Continental Shelf (CLCS) 'Continental Shelf and UNCLOS Article 76', Executive Summary (17 May 2004), https://www.un.org/depts/los/clcs_new/submissions_files/bra04/bra_exec_sum.pdf; Submission by Brazil to the Commission on the Limits of the Continental Shelf (CLCS) 'Continental Shelf and UNCLOS Article 76', Executive Summary (8 September 2017), https://www.un.org/depts/los/clcs_new/submissions_files/bra02_rev17/BR-EM-ExecutiveSummary.pdf, also refer to Cembra 'Commission on the Limits of the Continental Shelf (CLCS) Outer limits of the continental shelf beyond 200 nautical miles from the baselines: Submissions to the Commission: Partial revised Submission by Brazil', <https://www.cembra.org.br/pt-br/node/188>.

⁴⁹ 'Catches by Taxon in the waters of Fernando de Noronha (Brazil)', *Seaaroundus*, <https://www.seaaroundus.org/data/#/eez/970?chart=catchchart&dimension=taxon&measure=tonnage&limit=10>.

31. *Fourth*, in its 28 September 2017 Counter Memorial and 11 February 2019 Rejoinder to the International Court of Justice, in the *NICOL II* case, the Republic of Colombia reiterated its claim to an EEZ generated from four small insular features (Serrana, Serranilla, Roncador, and Bajo Nuevo) maintaining the position that all the features are fully-fledged islands and not “rocks”.⁵⁰ Out of the four features, Roncador and Bajo Nuevo generated the most significant claimed EEZ entitlements. According to Colombia, Roncador is a particularly small feature with a land area of 0.18 sq. km. It is visited by fishermen and the Colombian Navy and has some basic houses and shelters.⁵¹ Bajo Nuevo is even smaller, at 0.007 sq. km. and has only a lighthouse on it.

⁵⁰ Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (*Nicaragua v. Colombia*), Rejoinder of Colombia, 9 July 2018, Chapter 4. It should be noted that this case was under customary international law.

⁵¹ *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Counter-Memorial of Colombia, 28 September 2017, paras. 4.150-4.155.

THE LIGHTHOUSE ON
BAJO NUEVO



Figure 4.59

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⁵² *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Counter Memorial of Colombia, 28 September 2017, para. 177.



32. Nicaragua, relying on the 2016 Award, objected to Colombia’s claim, suggesting that these features (as well as others) were “rocks” that cannot generate EEZ or CS entitlements.⁵⁴ While Colombia’s claim from these features originated before the 2016 Award, the submissions in the case show that Colombia actively maintained its legal claim before the ICJ notwithstanding the 2016 Award, which it described to the Court as a “controversial arbitral award” which “deprived the term ‘rock’ from any particular meaning”.⁵⁵ As noted above, because Nicaragua lost the case based on an unrelated legal issue, the Court did not ultimately rule on the dispute between the parties as to the meaning and application of the term “rock”, the status of the four features and the legal effect of the 2016 Award.
33. The claims reviewed in this sub-section were either made or reiterated officially after the 2016 Award. The next sub-section discussed examples of similar claims which, although made before the 2016 Award, have been maintained unaffected by States notwithstanding the 2016 Award.

⁵³ *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Counter Memorial of Colombia, 28 September 2017, para. 156.

⁵⁴ *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Reply of Nicaragua, 9 July 2018, paras. 4.30-4.35.

⁵⁵ *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Rejoinder of Colombia, 9 July 2018, para. 4.28.

- (ii) States have maintained pre-2016 claims to exercise sovereign rights beyond the territorial sea from small island features likely falling within the 2016 Award's definition of "rocks"
34. Many States, including the United States, France, Japan, Fiji, Kiribati, Australia, Marshall Islands, Brazil, and Micronesia, have claimed EEZ entitlements from small uninhabited insular features likely falling within the 2016 Award's expansive definition of "rocks".⁵⁶ Yet none of these States has withdrawn or amended its EEZ claim following the 2016 Award, even though a number of them have actively promoted the 2016 Award as valid and binding. This sub-section will review several key examples for this practice.
35. *First*, Brazil continues to maintain its claim of EEZ and CS entitlements from the insular features Saint Peter and Saint Paul. Both features are very small geological rocks, with a landmass measuring around 0.0159 sq. km., on which the Brazilian Navy reportedly inaugurated the Saint Peter and Saint Paul Archipelago Scientific Station in 1998, which operates with no more than four researchers.⁵⁷ These features, in contrast to Itu Aba and other features in the Spratly (Nansha) Islands, are geological rocks with no fresh water nor arable land, and cannot sustain human habitation or economic life of their own, *a fortiori* pursuant to the restrictive interpretation of UNCLOS Article 121(3) in the 2016 Award.

⁵⁶ An extensive analysis of State practice in this regard can be found in the Counter-Memorial and Rejoinder of the Republic of Colombia in *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*.

⁵⁷ C. Engel de Alvarez and D. Viania, 'The Research Station of St Peter and St Paul Archipelago', in Saint Peter and Saint Paul Archipelago, Brazil in the mid-Atlantic', *Vedas Edições* (2017), <https://www.marinha.mil.br/secirm/sites/www.marinha.mil.br/secirm/files/arquipelagospsp.pdf>, p. 128; J. Sales, 'Studies conducted in the Saint Peter and Saint Paul Archipelago celebrate 20 years and become the theme of a publication', *Federal University of Rio Grande Do Norte* (30 August 2018), <https://ufrn.br/en/press/headlines/19321/pesquisas-realizadas-no-arquipelago-sao-pedro-e-sao-paulo-completam-20-anos-e-viram-tema-de-publicacao>.



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36. In its 17 May 2004 submission to the CLCS, Brazil maintained that Saint Peter and Saint Paul are entitled to an EEZ.⁵⁹ On 25 August 2004, the United States sent a note to the CLCS raising technical concerns regarding Brazil's CLCS submission, but with no objection to Brazil's EEZ claim from the small features.⁶⁰ Subsequently, on 1 April 2015, Brazil deposited with the United Nations a list of coordinates indicating the outer limits of its EEZ,⁶¹ which showed that Brazil maintained its claim to an EEZ around Saint Peter and Saint Paul. No State appears to have filed an objection to Brazil's claim, even after the 2016 Award. Recent data on EEZs shows that Brazil maintains an unchallenged 200nm entitlement from these features.⁶² The 2016 Award evidently did not impact Brazil's or other States' legal position as to the EEZ

⁵⁸ 'Saint Peter and Saint Paul Archipelago', *Wikipedia*, https://en.wikipedia.org/wiki/Saint_Peter_and_Saint_Paul_Archipelago.

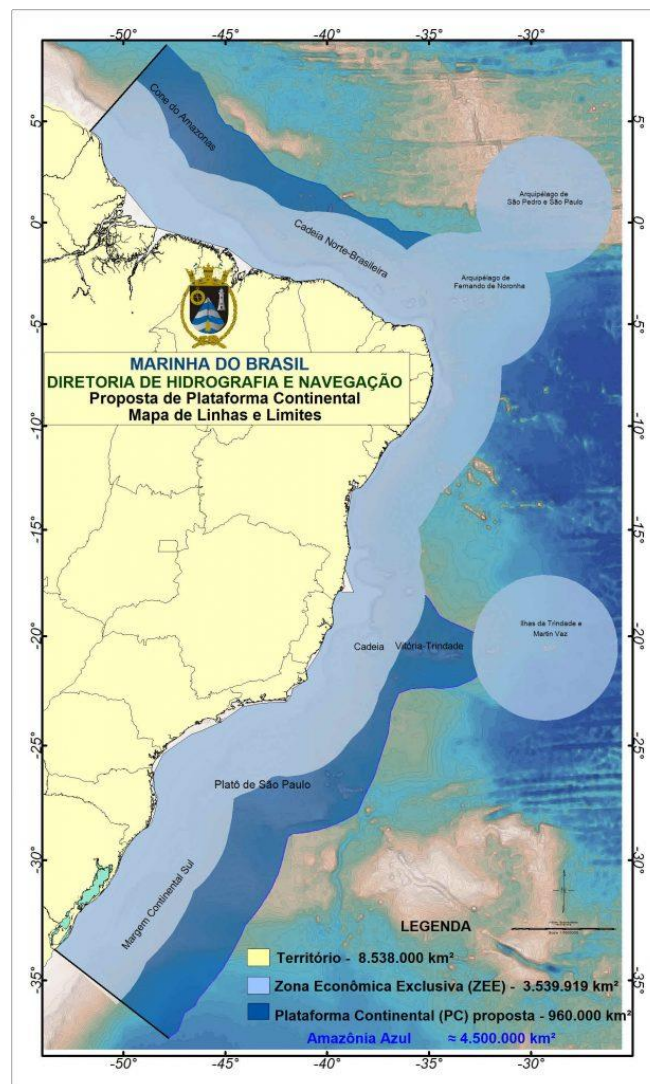
⁵⁹ Submission by Brazil to the Commission on the Limits of the Continental Shelf (CLCS) 'Continental Shelf and UNCLOS Article 76', Executive Summary (17 May 2004), https://www.un.org/depts/los/clcs_new/submissions_files/bra04/bra_exec_sum.pdf.

⁶⁰ Letter from the Permanent Mission of the United States to the Legal Counsel of the United Nations regarding the Brazilian Submission to the CLCS (25 August 2004), https://www.un.org/depts/los/clcs_new/submissions_files/bra04/clcs_02_2004_lo_usatext.pdf.

⁶¹ Deposit by Brazil of the list of geographical coordinates of points, pursuant to article 16, paragraph 2, and article 75, paragraph 2, of the Convention (1 April 2015), https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/BRA_Deposit_MZN114.html.

⁶² 'Catches by Taxon in the waters of St Paul and St. Peter Archipelago (Brazil)', *SeaAroundUs*, <https://www.seaaroundus.org/data/#/eez/970?chart=catch-chart&dimension=taxon&measure=tonnage&limit=10>.

entitlement of Saint Peter and Saint Paul.



37. *Second*, Japan continues to maintain its claim to an EEZ from Oki-no-Tori Shima. On 12 November 2008, Japan submitted information to the CLCS including an EEZ entitlement from Oki-no-Tori Shima.⁶³ China and South Korea challenged Japan's submission arguing that Oki-no-Tori Shima is clearly a rock under Article 121(3) of UNCLOS (regardless of the expansive interpretation of UNCLOS Article 121(3) in the 2016 Award).⁶⁴ Recently, on 28 May 2025, Japan criticised Chinese maritime

⁶³ Japan's Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea, Executive Summary (12 November 2018), https://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/jpn_execsummary.pdf, p. 11.

⁶⁴ *China's Reaction to the Submission made by Japan to the Commission on the Limits of the Continental Shelf*, CML/2/2009 (6 February 2009),

scientific research activity in the waters around Oki-no-Tori Shima invoking once again its claim to an EEZ projected from the feature.⁶⁵



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38. The feature, which is substantially smaller and more inhospitable than Itu Aba and other features in the Spratly (Nansha) Islands, is evidently incapable of sustaining human habitation or an economic life of its own, on any reasonable interpretation of UNCLOS Article 121(3). Nevertheless, Japan continues to assert an EEZ entitlement from Oki-no-Tori Shima. Aside from objections by China and South Korea, no other State has objected to this claim. Japan's position plainly is inconsistent with its public recognition and support for the 2016 Award,⁶⁷ showing that, in spite of its support, the 2016 Award has not affected Japan's legal posture in respect of a feature that is significantly smaller and less significant than those classified as "rocks" in the 2016

https://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/chn_6feb09_e.pdf, and *South Korea's reaction to the Submission made by Japan to the Commission on the Limits of the Continental Shelf*, MUN/046/09 (27 February 2009),

https://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/kor_27feb09.pdf.

See also, *South Korea's letter to the Commission on the Limits of the Continental Shelf*, MUN/230/11 (11 August 2011),

https://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/kor11aug11.pdf.

⁶⁵ "PRC conducted research within EEZ, Japan says" *Taipei Times*, *AFP* (28 May 2025), https://www.taipeitimes.com/News/world/archives/2025/05/28/2003837644?utm_source=chatgpt.com.

⁶⁶ 'Okinotorishima Rockien', *Asia Maritime Transparency Initiative*, <https://amti.csis.org/okinotorishima-rockien/>.

⁶⁷ *Japan's letter to the Commission on the Limits of the Continental Shelf*, SC/21/002 (21 January 2021), https://www.un.org/Depts/los/clcs_new/submissions_files/mys_12_12_2019/20210119JpnNvUn001OLA202000373.pdf.

Award.

39. *Third*, on 3 May 2016 the Marshall Islands deposited with the United Nations a chart identifying the outer limits of its EEZ.⁶⁸ The chart clearly shows that the Marshall Islands lays claim to an EEZ from the insular features called Bikar and Bokak. Bikar is a small uninhabited feature with a landmass of around 0.5 sq. km., lacking any fresh water.⁶⁹ Bokak is a slightly larger uninhabited atoll with a landmass of around 3.1 sq. km. Bokak is an isolated feature located at almost 200nm from the main archipelagos. None of these features appear capable of sustaining human habitation or economic life of their own under the elevated standard set by the 2016 Award. Yet, the Marshall Islands continues to maintain its EEZ claim from the features, and we have identified no objections to such claim by other States, even since the 2016 Award. Evidently, the 2016 Award did not alter the Marshall Islands' and other States' legal position as to the maritime entitlement of these features.
40. *Fourth*, Portugal maintains its claim to an EEZ from the Selvagens Islands. The Selvagens Islands are small uninhabited features with a total landmass of around 2.6 sq. km.⁷⁰ This claim has been disputed by Spain, which has argued since before the 2016 Award that the features constitute "rocks" under UNCLOS Article 121(3).⁷¹ The United States notes the disagreement between Portugal and Spain as to the legal status of the features as part of its January 2025 report on Portugal's maritime claims in Limits in the Seas No. 155.⁷² While the United States criticised Portugal's straight baselines system, it refrained from commenting on the legal status of the Selvagens Islands, nor has it raised any objection to the claim. Portugal's legal position as to

⁶⁸ Republic of the Marshall Islands, 'Chart of geographical coordinates of the outer limits of the Territorial Sea, Contiguous Zone, Exclusive Economic Zone and Continental Shelf', https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MAPS/MHL_MZN120_2016_00ill4.jpg.

⁶⁹ 'Bikar Atoll', *EBSCO*, <https://www.ebsco.com/research-starters/environmental-sciences/bikar-atoll>.

⁷⁰ European Council, 'European Diploma areas', (18 August 1992), <https://www.coe.int/en/web/bern-convention/-/selvagens-islands-nature-reserve>.

⁷¹ European Parliament, 'Dispute over the Ilhas Selvagens exclusive economic zone — 2' (5 September 2013), https://www.europarl.europa.eu/doceo/document/E-7-2013-009909_EN.html?redirect. See also United States, Department of State, 'Limits in the Seas, No. 155, Portugal' (January 2025), <https://www.state.gov/wp-content/uploads/2025/01/LIS155-Portugal-508-FINAL-1-14-2024.pdf>.

⁷² United States, Department of State, 'Limits in the Seas, No. 155, Portugal (January 2025), <https://www.state.gov/wp-content/uploads/2025/01/LIS155-Portugal-508-FINAL-1-14-2024.pdf>.

the status of the features has remained unaffected by the 2016 Award, and other States have raised no further objections to Portugal's claim since the 2016 Award.⁷³ Thus, even though the United States strongly supports the 2016 Award in the public domain and diplomatically, this has not affected the United States' ambiguous legal position as regards Portugal's claims with respect to the Selvagens Islands.

41. *Fifth*, the United States in fact maintains claims to extend an EEZ and CS from insular features likely falling within the 2016 Award's expansive definition of a "rock" (and a number of which would fall within any more reasonable interpretation of UNCLOS Article 121(3)). Key examples include Kingsman Reef, Howland Island and Baker Island.
42. The United States asserts that its EEZ extends from the U.S.-affiliated Pacific islands, among them Kingman Reef.⁷⁴ The U.S. Department of the Interior describes Kingman Reef as "a triangular, atoll-like reef and shoal about 9 ½ miles east and west by 5 miles north and south, of which all but the eastern end is now submerged."⁷⁵ Kingman Reef consists mainly of submerged land,⁷⁶ with a landmass at high tide of no more than 0.03 sq. km.⁷⁷

⁷³ It should be noted that the position of the United States could have been shaped by the fact that the disputed area would nevertheless fall within the EEZ of either Portugal or Spain, rather than revert to form part of the high seas. Thus, it is possible that the reason only Spain objected to the claim rests in the fact that Spain is the only State affected by the claim.

⁷⁴ United States Government, 'Exclusive Economic Zones (EEZs) - U.S.-Affiliated Pacific Islands', <https://catalog.data.gov/dataset/exclusive-economic-zones-eezs-u-s-affiliated-pacific-islands>. The United States maintains a conservation zone extending from 12 to 200 nm from the feature. 'Kingman Reef', *Marine Conservation*, https://marine-conservation.org/archive/mcabi/Kingman_Factsheet.pdf.

⁷⁵ United States of America, Department of the Interior, 'Kingman Reef', <https://www.doi.gov/oia/islands/kingmanreef>.

⁷⁶ United States of America, U.S Fish & Wildlife Service, 'Kingman Reef National Wildlife Refuge', <https://www.fws.gov/refuge/kingman-reef>.

⁷⁷ 'Kingman Reef', *Britannica*, <https://www.britannica.com/place/Kingman-Reef>.



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43. Kingman Reef is therefore similar in many ways to Oki-no-Tori Shima as discussed above, thus constituting a “rock” on any reasonable interpretation of UNCLOS Article 121(3). This feature, which may in fact be below water at high tide (and thus a low-tide elevation), cannot plausibly sustain human habitation or economic life of its own, and is thus clearly incapable of generating any EEZ or CS entitlement.
44. Howland Island and Baker Island provide further examples of the United States’ assertive practice in this regard. Both features are small atolls with a land mass of 1.6 sq. km. and 1.4 sq. km., respectively, consisting of low-lying accumulations of reef debris without a lagoon.⁷⁹ They are administered by the U.S. Fish and Wildlife Service, which visits the islands periodically.⁸⁰ They almost certainly cannot sustain human habitation or economic life of their own in their natural state, particularly at the elevated standard mandated by the 2016 Award. The United States nevertheless claims an EEZ entitlement from the two features.⁸¹ There are no recorded objections by other States to the United States’ claims from these Pacific islands.

⁷⁸ ‘Kingman Reef’, *Marine Conservation*, https://marine-conservation.org/archive/mcabi/Kingman_Factsheet.pdf.

⁷⁹ ‘Howland & Baker Island’, *Pacific Islands Ocean Observing System*, <https://www.pacioos.hawaii.edu/education/region-howlandbaker/>.

⁸⁰ The United States of America, U.S Fish & Wildlife Service, ‘Howland Island National Wildlife Refuge’, <https://www.fws.gov/refuge/howland-island>; The United States of America, U.S Fish & Wildlife Service, ‘Baker Island National Wildlife Refuge’, <https://www.fws.gov/refuge/baker-island>.

⁸¹ United States Government, ‘Exclusive Economic Zones (EEZs) - U.S.-Affiliated Pacific Islands’, <https://catalog.data.gov/dataset/exclusive-economic-zones-eezs-u-s-affiliated-pacific-islands>.



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45. The United States has not revised its position on the maritime entitlements of the islands following the 2016 Award, and others have raised no formal objections to the United States' claims in light of the 2016 Award. The United States' approach to these insular features is plainly at odds with its unequivocal support for the 2016 Award.
46. *Sixth*, Chile maintains its claim to extend an EEZ from "Salas y Gómez Island".⁸³ The feature is a remote uninhabited Pacific island with a landmass of approximately 0.15 sq. km., substantially smaller than Itu Aba, with no apparent ability to sustain human habitation or economic life of its own on any reasonable interpretation of UNCLOS Article 121(3). This feature nevertheless generates a significant EEZ claim by Chile in the Pacific, which joins and extends the EEZ generated by Chile's Easter Island to the east. No State has apparently objected to Chile's claim, even following the 2016 Award.

⁸² N. Sinha, 'This Island Is The Last Place On Earth To Welcome New Year 2026, 17 Hours After India', *Republic* (1 January 2025), <https://www.republicworld.com/viral/this-island-is-the-last-place-on-earth-to-welcome-new-year-2026-17-hours-after-india>.

⁸³ 'Marine Gazetteer Placedetails', *Marineregions.org*, <https://www.marineregions.org/gazetteer.php?gazetteer.php?p=details&id=21787>.



47. *Seventh*, Venezuela asserts EEZ rights from “Aves Island” (otherwise known as “Bird Rock”).⁸⁴ The feature is a low-lying, uninhabited, and sandy insular feature of about 0.1 sq. km, so substantially smaller and less hospitable than Itu Aba.⁸⁵ Venezuela’s claim to an EEZ from this feature was, prior to the 2016 Award, challenged by Antigua and Barbuda, Saint Lucia, Saint Vincent and the Grenadines, St. Kitts and Nevis, and Dominica on the basis that Aves Island is an UNCLOS Article 121(3) rock.⁸⁶ Dominica and Saint Vincent and the Grenadines, however, have reportedly recognised Venezuela’s sovereignty and maritime entitlements over Aves Island.⁸⁷
48. There are multiple additional examples of States maintaining claims to EEZ

⁸⁴ ‘Satellite Map of Isla Aves’, *Latitude*, https://latitude.to/satellite-map/ve/venezuela/29341/isla-aves#google_vignette.

⁸⁵ ‘Aves Island’, *NASA*, <https://science.nasa.gov/earth/earth-observatory/aves-island-6667/>.

⁸⁶ United Nations, Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs, ‘Law of the Sea, Bulletin No. 35’, https://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletinE35.pdf, pp. 97-100; ‘Bird Island talks agreed’, *BBC Caribbean* (27 June 2006), https://www.bbc.co.uk/webarchive/https%3A%2F%2Fwww.bbc.co.uk%2Fcaribbean%2Fnews%2Fstory%2F2006%2F06%2F060627_birdisland.shtml#:~:text=Dominica%20has%20led%20Eastern%20Caribbean,control%20of%20the%20islandin%201950. See also ‘Former UN ambassador makes case for Bird Island’, *Dominica News* (5 August 2015), <https://dominicanewsonline.com/news/homepage/news/regional/former-un-ambassador-makes-case-for-bird-island/>.

⁸⁷ Roseau, ‘Dominica’s sovereignty claim over Bird Island must be revisited’, *TheDominican.net*, <https://thedomincan.net/2016/08/claim-to-bird-island.html>; See also, Sir Ronald Sanders, Former Caribbean Ambassador and business executive, ‘Venezuela in the Caribbean: Expanding its sphere of influence’, <https://sirronaldsanders.com/Docs/Venezuela%20in%20the%20Caribbean%20-%20Expanding%20its%20sphere%20of%20influence.pdf>, p. 9; ‘OECS has accepted Venezuela’s sovereignty over Bird Island -Ralph Gonsalves’, *Stabroek News* (1 April 2007), https://www.stabroeknews.com/2007/04/01/news/guyana/oecs-has-accepted-venezuelas-sovereignty-over-bird-island-ralph-gonsalves/?utm_source=chatgpt.com#google_vignette.

jurisdiction extending from features likely falling within the 2016 Award’s extensive definition of a “rock” or, in fact, within any more reasonable interpretation of UNCLOS Article 121(3). These examples include Australia’s claim to a 200 nm EEZ from Middleton Reef and Elizabeth Reef,⁸⁸ and France’s claims to a 200 nm EEZ surrounding Matthew Island and Hunter Island,⁸⁹ and Bassas da India.⁹⁰ All these features are similarly very small, often barren, uninhabited features with no apparent ability to sustain human habitation or economic life of their own, *a fortiori* on the test established by the 2016 Award. The EEZ claims extending from these features have nevertheless remained unchanged by the 2016 Award.

49. Overall, the 2016 Award’s expansive interpretation of Article 121(3) of UNCLOS has, with few or no exceptions, failed to restrain the EEZ and CS claims made by States elsewhere in the world, many of which are made with reference to insular features that are substantially smaller, “rockier” and more inhospitable than Itu Aba and other insular features in the South China Sea. Equally of note, we have identified no new objections to such claims following the 2016 Award.

(iii) States have refrained from claiming EEZ rights *only* from geological “rocks” falling within a more reasonable interpretation of Article 121(3)

50. The review above shows that irrespective of the 2016 Award, many States have maintained claims to exercise EEZ jurisdiction from features likely falling within the 2016 Award’s expansive interpretation of the term “rock” (and, in a number of instances, from features falling within a more reasonable interpretation of UNCLOS Article 121(3)). Further, the review of State practice shows that when States have refrained from claiming EEZ rights from insular features, these features would be “rocks” or boulders in the geological sense, and within the meaning of UNCLOS

⁸⁸ Recognised by New Zealand in their 2004 delimitation agreement, Australia, Parliament of Australia, ‘Report 66 Treaties tabled on 7 December 2004 (4), 15 March and 11 May 2005’, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Completed_Inquiries/jsct/11may2005/chapter3.

⁸⁹ ‘Matthew & Hunter Exclusive Economic Zone (200 Nautical Miles)’, *Pacific Data Hub* (12 October 2025), [https://pacificdata.org/data/dataset/matthew-hunter-pol-sept25-1764#:~:text=Matthew%20%20Hunter%20Exclusive%20Economic%20Zone,\)%20%2D%20Dataset%20%2D%20Pacific%20Data%20Hub](https://pacificdata.org/data/dataset/matthew-hunter-pol-sept25-1764#:~:text=Matthew%20%20Hunter%20Exclusive%20Economic%20Zone,)%20%2D%20Dataset%20%2D%20Pacific%20Data%20Hub).

⁹⁰ ‘Marine Gazetteer Placedetails’, *Marineregions.org*, <https://marineregions.org/gazetteer.php?p=details&id=8340>.

Article 121(3), and are thus unlike the features analysed in the 2016 Award.

51. *First*, following the United Kingdom's accession to UNCLOS in 1997, the United Kingdom relinquished a claim to exercise powers within 200nm from Rockall, thereby ending disputes with both the Republic of Ireland and Iceland.⁹¹ The United Kingdom Government indicated that under Article 121(3) of UNCLOS, Rockall is not a valid base point for such limits.⁹² Rockall is an isolated and bare lump of rock covering just 780 square metres in area, rising out of the North Atlantic to a height of 17 metres.⁹³ The feature is clearly a "rock", both in the geological sense and within the meaning of UNCLOS Article 121(3).



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52. *Second*, similarly, the United Kingdom has refrained from asserting any maritime rights beyond the territorial sea from the Shag Rocks, which are six isolated, uninhabited rocks covering 0.2 sq. km. in the Southern Ocean. It remains unclear

⁹¹ United Kingdom, Parliament of the United Kingdom, Committee, 'Dr Bill Hayton, Associate Fellow, Asia-Pacific Programme, Chatham House – Written evidence (UNC0012)', <https://committees.parliament.uk/writtenevidence/40814/html/>; also refer to The Fishery Limits Order 1999 (22 June 1991), https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/GBR_1999_Order.pdf. Prior to acceding to UNCLOS the UK claimed to exercise fisheries jurisdiction within 200 nm from Rockall; this claim was relinquished upon joining UNCLOS.

⁹² R. Churchill, 'Accession to the UN Convention on the law of the sea', *The International Journal of Marine & Coastal Law*, 13(2) (13 May 1998), <https://www.ovid.com/journals/ijmcl/abstract/00072668-199813020-00006~united-kindom-accession-to-the-un-convention-on-the-law-of?redirectionsource=fulltextview>.

⁹³ R. Churchill, 'Rocks', *Oxford Public International Law* (February 2019), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1214>.

⁹⁴ 'Rockall', *Wikipedia*, <https://en.wikipedia.org/wiki/Rockall>.

whether this reflects a deliberate application of Article 121(3) of UNCLOS.⁹⁵



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53. *Third*, Mexico has similarly refrained from claiming an EEZ from Rocas Alijos, a cluster of tiny islets with a combined surface area of less than 0.001 sq. km., located approximately 160 nm off Mexico's Pacific mainland coast. Mexico is among the few States to have incorporated the text of UNCLOS Article 121(3) into its domestic legislation.⁹⁷

⁹⁵ R. Churchill, 'Rocks', *Oxford Public International Law*, (February 2019), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1214>, para. 27.

⁹⁶ 'Shag Rocks (South Georgia)', *Wikipedia*, https://en.wikipedia.org/wiki/Shag_Rocks_%28South_Georgia%29.

⁹⁷ R. Churchill, 'Rocks', *Oxford Public International Law*, (February 2019), <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1214>.



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54. *Fourth*, as part of the 2022 EEZ delimitation treaty between Croatia and Italy,⁹⁹ the features Galijula and Palkagruza were only recognised as generating a territorial sea. Both features are clearly geological rocks.¹⁰⁰



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⁹⁸ ‘ACAP Breeding Site No. 61. Rocas Alijos, Mexico support a tiny, recently-established population of Laysan Albatrosses’, *Agreement on the Conservation of Albatrosses and Petrels (ACAP)*, <https://www.acap.aq/latest-news/acap-breeding-site-no-61-rocas-alijos-mexico-support-a-tiny-recently-established-population-of-laysan-albatrosses>.

⁹⁹ I. Papanicopolulu, ‘Croatia-Italy Report Number 8-27’ in C. Lathrop (eds.), *International Maritime Boundaries* (The American Society of International law 2019).

¹⁰⁰ ‘Galijula’, *Wikipedia*, <https://en.wikipedia.org/wiki/Galijula>; ‘Palagruža’, *Wikipedia*, <https://en.wikipedia.org/wiki/Palagru%C5%BEa>.

¹⁰¹ ‘Sailing To Palagruža, the Remotest Croatian Island’, *Sailing Europe*, <https://www.sailingeurope.com/blog/sailing-to-palagruza-the-remotest-croatian-island>.



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D. The 2016 Award’s restrictive interpretation and application of “historic rights” has not materially impacted State practice

55. The 2016 Award concluded that UNCLOS extinguished all claims to historic rights in maritime spaces, except to the extent mandated otherwise by the Convention. The 2016 Award made two relevant determinations in this regard: (i) China’s claim to historic rights within the 9-dash line was extinguished by UNCLOS; and (ii) any previous traditional fishing rights were similarly extinguished within the EEZ by the operation of UNCLOS. So far as we are aware, both conclusions have subsequently had no material impact on State practice.

(i) State claims to historic rights in maritime areas beyond the territorial sea have persisted following the 2016 Award

56. The 2016 Award concluded that all claims to historic rights, except those specifically recognised by UNCLOS, have been extinguished by the treaty.¹⁰³ This interpretation is highly questionable. As discussed elsewhere, historic rights can continue to exist under customary international law irrespective of UNCLOS.¹⁰⁴ In any event, the

¹⁰² ‘Galijula’, *Wikipedia*, <https://en.wikipedia.org/wiki/Galijula>.

¹⁰³ The South China Sea Arbitration, (The Republic of Philippines v. The People’s of Republic of China), Award, 12 July 2016 (hereinafter the “**2016 Award**”), para. 278.

¹⁰⁴ ‘A Legal Critique of the Award of the Arbitral Tribunal in the Matter of the South China Sea Arbitration’, *National Institute for South China Sea Studies (“NISCSS”)* (2018) (hereinafter “**NISCSS AsJIL Legal Critique**”), Asian Yearbook of International Law, Volume 42(2018).

s. 4.4.1 (This is so irrespective of the fact that the tribunal lacked jurisdiction to render a decision on China’s claimed historic rights or to conclude that these were not claim to historic title which are specifically excluded from its jurisdiction.)

review of State practice since the conclusion of the 2016 Award shows that States which claimed historic rights in maritime areas prior to the 2016 Award have since maintained those claims irrespective of the 2016 Award. In fact, no treaty has been amended, or a claim rescinded, due to the 2016 Award's decision in this regard.

57. *First*, Türkiye asserts an extensive maritime claim under its “Blue Homeland” doctrine.¹⁰⁵ The initial purpose of this doctrine was to define the boundaries of Türkiye's territorial waters, continental shelf, and EEZ across the Black Sea, the Aegean Sea and the Mediterranean Sea. In addition to delineating these maritime zones, the doctrine aimed to establish Türkiye's strategic approach to its surrounding seas and develop a military-industrial complex for this strategy.¹⁰⁶ Türkiye's plans, however, have been constrained by Greece's maritime entitlements under UNCLOS, leading Türkiye to maintain its claims with reference to historic rights.
58. Thus, in the Aegean Sea, Türkiye argues that Greece's extension of the territorial sea beyond 6 nm would disregard the special characteristics of the Aegean and the “inherent historical rights that each of the coastal states has on it [...]”.¹⁰⁷ Türkiye's claim to historic rights operates to deny Greece the rights otherwise recognised under UNCLOS. Considering Türkiye's claim, Greece has not extended its territorial sea from 6 to 12 nm, although it has reserved its right to do so.¹⁰⁸ While Türkiye is not a party to UNCLOS, as both the territorial sea and EEZ regimes in UNCLOS reflect customary international law,¹⁰⁹ under the 2016 Award, Türkiye's claim to historic rights within the area lying between 6 and 12 nm from Greece's islands would have been extinguished. Türkiye's position, however, remains steadfast as regards its

¹⁰⁵ ‘Mavi Vatan, the “Blue Homeland”: the Origins, Influences and Limits of an Ambitious Doctrine for Turkey’, *French Institute of International Relations* (April 2021), <https://www.ifri.org/en/studies/mavi-vatan-blue-homeland-origins-influences-and-limits-ambitious-doctrine-turkey>.

¹⁰⁶ J. Namini Mianji, ‘The Blue Homeland Doctrine of Turkey’, *Institute for Political and International Studies*, <https://ipis.ir/en/subjectview/619031/the-blue-homeland-doctrine-of-turkey>.

¹⁰⁷ Republic of Türkiye, Ministry of Foreign Affairs, ‘The Breadth of Territorial Waters’, <https://www.mfa.gov.tr/the-breadth-of-territorial-waters.en.mfa>.

¹⁰⁸ J. Theo Halong, ‘Expansion in the Aegean Sea?’, *International Law & International Legal Thought*, <https://voelkerrechtsblog.org/expansion-in-the-aegean-sea/>.

¹⁰⁹ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2012, para.114; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2022, paras. 56-57.

historic rights in the Aegean, irrespective of the 2016 Award.

59. *Second*, Canada asserts that the Northwest Passage is part of its internal waters based on historic title derived from long-standing usage and control.¹¹⁰ The Northwest Passage is a maritime route through the islands of northern Canada, connecting the Atlantic and Pacific Oceans.¹¹¹ On 6 December 2019, Canada's Minister of Foreign Affairs issued a statement on Canada's Arctic sovereignty claiming that: (i) all waters of Canada's Arctic Archipelago, including Northwest Passage, are internal waters of Canada by virtue of historic title; (ii) as internal waters, there are no rights of transit passage or innocent passage; and (iii) recognising existing boundary disputes with the United States, such disputes will "continue to be well managed and will be resolved in due course in accordance with international law."¹¹² Canada thus claims to exercise *more* rights in those water than would have been accorded to it under UNCLOS, if the claim was based on enclosure via the use of straight baselines. Canada claims that its use of aggressive (and probably illegal) straight baselines in support of its historic claim is for "greater clarity" only.¹¹³
60. Canada's position has been contested by the United States, which claims that the passage is part of an international strait and thus subject to transit passage. In June 2019, a U.S. State Department spokesperson affirmed that "[w]e view Canada's claim that the waters of the Northwest Passage are internal waters of Canada as inconsistent with international law".¹¹⁴
61. In spite of Canada's official support for the 2016 Award, Canada fails to apply the 2016 Award's reasoning to its own historic claim. The 2016 Award's reasoning as to the purported extinguishment of China's historic claim by the EEZ regime arguably

¹¹⁰ B. Lowell and L. Seokwoo, 'Historic Rights in the Law of the Sea: Clarification, Continuity, and Contestation', *Korean Journal of International and Comparative Law*, (2025), para. 4.3, p. 283.

¹¹¹ 'The Northwest passage – The Arctic grail', *Discoveringtheartic.org.uk*, <https://discoveringtheartic.org.uk/governance/arctic-geopolitics/northwest-passage-the-arctic-grail/>.

¹¹² Canada, Government of Canada, 'Question Period Note: Arctic Sovereignty – General', <https://search.open.canada.ca/qpnotes/record/dfatd-maecd%2C00093-2010>.

¹¹³ Canada, Government of Canada, 'Question Period Note: Arctic Sovereignty – General', <https://search.open.canada.ca/qpnotes/record/dfatd-maecd%2C00093-2010>.

¹¹⁴ Z. Schalanger, 'The US is picking a fight with Canada over a thawing Arctic shipping route', *QUARTZ*, <https://qz.com/1653831/the-us-is-picking-a-fight-with-canada-over-an-arctic-shipping-route>.

supports a similar conclusion in respect of Canada's claim to historic rights in the Northwest Passage.¹¹⁵ Namely, as UNCLOS does not provide for historic rights to internal waters exceeding those under the Convention, Canada's claim would have been extinguished by the regime governing internal waters under UNCLOS; *a fortiori* where it comes to Canada's claim to excessive rights in claimed areas of "internal waters" otherwise falling in areas forming territorial sea or EEZ.

(ii) Claims to traditional fishing rights beyond the territorial sea have persisted following the 2016 Award

62. As further elaborated below, the SCS Tribunal's interpretation of the relationship between the EEZ regime and traditional fishing rights is unconvincing and has been objected to by scholars.¹¹⁶ The proposition that a third State has traditional fishing rights in a coastal State's territorial sea – a regime under the full sovereignty of that coastal State – but were somehow extinguished in a coastal State's EEZ, an economic regime balancing the rights of the coastal State with other members of the international community and in which the coastal State does not exercise full sovereignty, is seen as anomalous.
63. A review of State practice shows that States have continued to lay claims to traditional fishing rights within spatial areas falling within the EEZ of other States irrespective of the 2016 Award. Such claims have not been withdrawn by the States concerned following the issuance of the 2016 Award. Two key examples are outlined below.
64. *First*, in its pleadings before the ICJ in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)* ("**NICOL III**"), the Republic of Colombia claimed that the Raizales, an indigenous community residing on Colombia's Caribbean islands, had traditional fishing rights within Nicaragua's EEZ.¹¹⁷ In that case (as further elaborated below), the parties disagreed on whether

¹¹⁵ Following the reasoning of the SCS Tribunal, as the Convention does not provide for historic rights to internal waters exceeding those under UNCLOS, Canada's claim should have been extinguished by the regime governing internal waters under UNCLOS, and particularly its claim to exercise excessive powers in areas of "internal waters" otherwise subject to the regime of the territorial sea or EEZ.

¹¹⁶ See further *infra* Section III.

¹¹⁷ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2022, para. 30.

traditional fishing rights continued to exist in the EEZ. The ICJ, however, did not decide on this question but rather dismissed Colombia's counter-claim relating to traditional fishing rights based on its failure to prove the existence of such rights as a matter of fact, sidestepping this legal issue. In any event, this example shows that Colombia maintained its claim irrespective of the 2016 Award, and even strongly criticised the suggestion that traditional fishing rights have been extinguished in the EEZ (a finding also reached in the 2016 Award).¹¹⁸

65. *Second*, Australia and Papua New Guinea recognise the “traditional way of life and livelihood” in the protected zone established by their 1985 delimitation agreement,¹¹⁹ including the traditional fishing rights of nationals of both parties. The 2016 Award did not affect the States’ legal position, with neither State claiming that the treaty should be amended. After more than three decades of mutually enjoying traditional fishing rights, and irrespective of the 2016 Award, the parties remain committed to the implementation of the agreement.¹²⁰

E. The exception as regards State practice following the 2016 Award among South China Sea littoral States, particularly in the context of CLCS submissions

66. In contrast to the broader State practice identified above, South China Sea littoral States have adopted and shaped their maritime claims based on the 2016 Award.¹²¹ The Philippines, Malaysia, Vietnam and Indonesia appear to have adopted the 2016 Award’s conclusions in order to support their own maritime claims in the region.¹²² This is most clearly evident from submissions to the CLCS and related exchanges of *note verbales*. This practice, however, can be attributed to the States’ own self-

¹¹⁸ See, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, CR 2021/18, Valencia-Ospina, paras. 16-26.

¹¹⁹ ‘Torres Strait Treat, 1978’, *National Archives of Australia*, <https://www.naa.gov.au/help-your-research/fact-sheets/torres-strait-treaty-1978>.

¹²⁰ Australia, Minister for Foreign Affairs, ‘40th anniversary of the Torres Strait Treaty’ (15 February 2025), <https://www.foreignminister.gov.au/minister/penny-wong/media-release/40th-anniversary-torres-strait-treaty>.

¹²¹ C. Schultheiss, ‘Beyond Compliance: The Impact of International Arbitration on the South China Sea Disputes.’ *Contemporary Southeast Asia* [PASIR PANJANG], vol. 47, no. 3 (December 2025), pp. 437–64, <https://doi.org/10.1355/cs47-3d>. pp. 446-447. (footnote references omitted)

¹²² C. Schultheiss, ‘Beyond Compliance: The Impact of International Arbitration on the South China Sea Disputes.’ *Contemporary Southeast Asia* [PASIR PANJANG], vol. 47, no. 3 (December 2025), pp. 437–64, <https://doi.org/10.1355/cs47-3d>. pp. 446-447. (footnote references omitted).

interests, rather than any genuine conviction that the 2016 Award's findings with regard to UNCLOS Article 121 and historic rights are legally definitive, still less universally binding.

67. The Philippines, Malaysia, and Vietnam, made CLCS submissions claiming an Outer Continental Shelf (“OCS”) in the South China Sea. These submissions entail the premise that there exist, in the South China Sea, maritime areas lying beyond 200 nm from the coasts of mainland and insular features that generate EEZ and CS entitlements.¹²³ Therefore, the CLCS submissions and the diplomatic notes exchanged in the process, show that regional States accepted and implemented the 2016 Award in two aspects: (i) the rejection of China's claim to historic rights within the 9-dash line; and (ii) the conclusion that none of the features in the Spratly (Nansha) Islands generate EEZ and CS rights.
68. Malaysia's 12 December 2019 CLCS submission sought to establish the outer limits of Malaysia's purported OCS in the southern part of the South China Sea.¹²⁴ China strongly objected to Malaysia's claim as an infringement on China's sovereignty, sovereign rights and jurisdiction in the South China Sea.¹²⁵ China's *note verbale* triggered a series of diplomatic exchanges among multiple States focused on their legal positions in this regard. While not all communications expressly referred to the 2016 Award, many were nonetheless consistent with the SCS Tribunal's findings regarding maritime entitlements and the interpretation of UNCLOS.
69. Unsurprisingly, the Philippines relied on the 2016 Award to claim that China has no

¹²³ It should be noted that the ICJ only ruled in 2023 that OCS claims may not intrude within another State's 200 nm entitlement. Therefore, it is arguable that claims made before that decision do not necessarily entail a recognition that there are areas beyond 200 nm from any State.

¹²⁴ Letter from the Permanent Mission of Malaysia to the Secretary-General of the United Nations transmitting the Submission, HA 59/19, 12 December 2019, https://www.un.org/depts/los/clcs_new/submissions_files/mys85_2019/2019_12_12_MYS_NV_UN_001.pdf; also refer to Malaysia Partial Submission to the Commission on the Limits of the Continental Shelf pursuant to Article 76, paragraph 8 of the United Nations Convention on the Law of the Sea 1982 in the South China Sea, Part I Executive Summary (November 2017), https://www.un.org/depts/los/clcs_new/submissions_files/mys85_2019/20171128_MYS_ES_DOC_001_secured.pdf.

¹²⁵ Letter from the Permanent Mission of the People's Republic of China to the Commission on the Limits of the Continental Shelf, CML/14/2019, 12 December 2019, https://www.un.org/depts/los/clcs_new/submissions_files/mys85_2019/CML_14_2019_E.pdf.

historic rights in the South China Sea and that none of features in the Spratly (Nansha) Islands generate EEZ or CS entitlements.¹²⁶ Similar positions were expressed by Vietnam¹²⁷ and Indonesia,¹²⁸ as well as by non-littoral States including Australia,¹²⁹ Japan,¹³⁰ New Zealand,¹³¹ France, Germany, the United Kingdom,¹³² and the United States.¹³³ The support for the 2016 Award's findings expressed by Japan, France,

¹²⁶ Communication from the Republic of the Philippines to the Commission on the Limits of the Continental Shelf, 6 March 2020, Communication 2, https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_03_06_PHL_NV_UN_00_1.pdf. In a separate *note verbale* the Philippines rejected Malaysia's claim insofar as it overlaps with the Kalayaan Island Group, over which the Philippines asserts sovereignty. Communication from the Republic of the Philippines to the Commission on the Limits of the Continental Shelf, 6 March 2020, Communication 1, https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_03_06_PHL_NV_UN_00_2.pdf.

¹²⁷ Communication from the Socialist Republic of Viet Nam to the Commission on the Limits of the Continental Shelf, 30 March 2020, Communication 2, https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/VN20200330_ENG.pdf (Viet Nam emphasised that low-tide elevations and submerged features are not capable of appropriation and cannot generate maritime entitlements, and that China's claims to historic rights have no lawful effect.)

¹²⁸ Communication from the Republic of Indonesia to the Commission on the Limits of the Continental Shelf, 26 May 2020, https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_05_26_IDN_NV_UN_00_1_English.pdf.

¹²⁹ Communication from Australia to the Commission on the Limits of the Continental Shelf, 23 July 2020, https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_07_23_AUS_NV_UN_00_1_OLA-2020-00373.pdf, p. 1 (Australia further opposed claims to treat groups of features, including those in the Spratly Islands, as a single unit for the purpose of generating maritime zones, and opposed the use of straight baselines around such dispersed features.)

¹³⁰ Communication from Japan to the Commission on the Limits of the Continental Shelf, 19 January 2021, https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/20210119JpnNvUn001OLA202000373.pdf p. 1 (Referring to Mischief Reef, Japan reaffirmed that low-tide elevations do not generate territorial seas or airspace); *See also* communication from the People's Republic of China to the Commission on the Limits of the Continental Shelf, 18 September 2020, https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_09_18_CHN_NV_UN_00_9_e.pdf, p.2.

¹³¹ Communication from New Zealand to the Commission on the Limits of the Continental Shelf, 3 August 2021, https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/20210803NzNote.pdf, p. 2. (New Zealand also emphasised that maritime entitlements depend on the natural classification of features, noting that rocks cannot generate an EEZ or continental shelf, and that low-tide elevations and submerged features generate no maritime zones and cannot be subject to sovereignty claims.)

¹³² Communication from France, Germany and the United Kingdom to the Commission on the Limits of the Continental Shelf, 16 September 2020, https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_09_16_GBR_NV_UN_00_1.pdf, p. 1.

¹³³ United Nations General Assembly, *Letter dated 1 June 2020 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General*, UN Doc A/74/874-S/2020/483 (2 June 2020), <https://docs.un.org/en/a/74/874>, p. 2. Also refer to the subsequent submission by the United States to the CLSC on 6 December 2024, United Nations General Assembly, *Letter dated 5 December 2024 from the Permanent Representative of the United States of America to the United Nations*

Australia and the United States is facially inconsistent with their own maritime claims from insular features reviewed above.

70. Indonesia and Vietnam's *note verbales* show their self-interest in their support for the 2016 Award. Vietnam stated that China's claim seriously violates Vietnam's sovereignty, sovereign rights, and jurisdiction in the East Sea (i.e., the South China Sea),¹³⁴ while Indonesia asserted that, based on the legal positions confirmed by the 2016 Award: "the Government of the Republic of Indonesia sees no legal reasoning under international law, particularly UNCLOS 1982, to conduct negotiations on maritime boundaries delimitation with the People's Republic of China or on any other matters pertaining to maritime rights or interests' claims made in contravention to international law".¹³⁵
71. In 2024, the Philippines and Vietnam made respective CLCS submissions claiming a purported OCS entitlement in the South China Sea.¹³⁶ These claims similarly operate to reject China's maritime claims in the South China Sea and are based on the findings of the 2016 Award.¹³⁷ They similarly generated an exchange of correspondence between States through *note verbales* sent to the CLCS.
72. In respect of the Philippines' 14 June 2024 partial CLCS submission, both Malaysia

addressed to the Secretary-General, UN Doc A/79/674 (6 December 2024), <https://docs.un.org/en/A/79/674> (the United States further asserted that Second Thomas Shoal and Mischief Reef were low tide elevations).

¹³⁴ Communication from the Socialist Republic of Viet Nam to the Commission on the Limits of the Continental Shelf, 30 March 2020, Communication 2, https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/VN20200330_ENG.pdf

¹³⁵ Communication from the Republic of Indonesia to the Commission on the Limits of the Continental Shelf, 12 June 2020, https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_06_12_IDN_NV_UN_002_ENG.pdf.

¹³⁶ A Partial Submission of Data and Information on the Outer Limits of the Continental Shelf of the Republic of the Philippines in the West Palawan Region Pursuant to Article 76 of the United Nations Convention on the Law of the Sea (14 June 2024), https://www.un.org/depts/los/clcs_new/submissions_files/phl1/2023PhlEsDoc001Secured.pdf; United Nations, Receipt of the partial Submission made by the Socialist Republic of Viet Nam to the Commission on the Limits of the Continental Shelf in respect of the Central Area (VNM-C), UN Doc CLCS.95.2024.LOS (Continental Shelf Notification) (17 July 2024), https://www.un.org/depts/los/clcs_new/submissions_files/vnm95_24/CLCS-95-2024-LOS.Eng.pdf.

¹³⁷ As both submissions were subsequent to the 2023 ICJ decision in *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, it is indisputable that the underlying proposition of these submissions is that there are no EEZ entitlements in the area claimed as OCS.

and Vietnam raised objections due to the purported overlap with their own maritime claims in the South China Sea.¹³⁸ China also rejected the Philippines' claim, asserting sovereignty over Nanhai Zhudao and arguing that the Philippines' OCS claim infringes on its rights in the South China Sea.¹³⁹ The Philippines only responded to China's *note verbale*, reiterating its objections to China's historic rights and the status of high-tide features in the Spratly (Nansha) Islands, based on the 2016 Award.¹⁴⁰ Similar objections to China's claims were again raised by the United States, France, Germany, and the United Kingdom.¹⁴¹

73. On 17 July 2024, Vietnam lodged a partial CLCS submission in respect of the South China Sea. China similarly objected to Vietnam's CLCS submission as an infringement on China's sovereignty, sovereign rights and jurisdiction,¹⁴² subsequently reiterating its entitlements in the South China Sea.¹⁴³ Following the same pattern as with the Philippines' submission, the United States, France, Germany, and the United Kingdom addressed only China's claims and rejected

¹³⁸ Communication from Malaysia to the Commission on the Limits of the Continental Shelf, 27 June 2024, https://www.un.org/depts/los/clcs_new/submissions_files/phl1/20240627MysNvUn001.pdf, p.1; Communication from the Socialist Republic of Viet Nam to the Commission on the Limits of the Continental Shelf, 17 July 2024, https://www.un.org/depts/los/clcs_new/submissions_files/phl1/20240717VnmNvUn001E.pdf.

¹³⁹ Communication from the People's Republic of China to the Commission on the Limits of the Continental Shelf, 18 June 2024, https://www.un.org/depts/los/clcs_new/submissions_files/phl1/20240618ChnNvUnEng.pdf.

¹⁴⁰ Communication from the Philippines to the Commission on the Limits of the Continental Shelf, 19 July 2024, https://www.un.org/depts/los/clcs_new/submissions_files/phl1/20240729PhlNvUnEng.pdf. Communication from the Philippines to the Commission on the Limits of the Continental Shelf, 19 July 2024, https://www.un.org/depts/los/clcs_new/submissions_files/phl1/20240729PhlNvUnEng.pdf.

¹⁴¹ Communication from the United States to the Commission on the Limits of the Continental Shelf, 5 December 2024, https://www.un.org/depts/los/clcs_new/submissions_files/phl1/20241205UsaNvUn001.pdf; also refer to Communication from the United Kingdom to the Commission on the Limits of the Continental Shelf, 10 March 2025, https://www.un.org/depts/los/clcs_new/submissions_files/phl1/UK2025Phl.pdf. The States reiterated claims made in their previous communication to the Commission on the Limits of the Continental Shelf.

¹⁴² Communication from the People's Republic of China to the Commission on the Limits of the Continental Shelf, 29 July 2024, https://www.un.org/depts/los/clcs_new/submissions_files/vnm95_24/20240729ChnNvUn001E.pdf.

¹⁴³ Communication from the People's Republic of China to the Commission on the Limits of the Continental Shelf, 14 October 2024, https://www.un.org/depts/los/clcs_new/submissions_files/vnm95_24/20241014ChnNvUn002E.pdf.

them.¹⁴⁴ Notably, the Philippines and Malaysia did not object to Vietnam's submission.

74. As noted above, the CLCS submissions in the South China Sea by littoral States show that their support for the 2016 Award is based on self-serving reasons.¹⁴⁵ In fact, some of the *note verbales* clearly attest to such reasons. In addition, many of the *note verbales* by other, non-littoral States, express positions which are clearly at odds with their own maritime claims from features likely falling within the SCS Tribunal's interpretation of Article 121(3) of UNCLOS and in some cases, any reasonable interpretation of that provision.¹⁴⁶

75. In conclusion, this section demonstrates that the 2016 Award has had limited, if any, impact on State practice in relation to EEZ and CS claims from insular features and claims to historic rights.
76. *First*, the review of State practice clearly shows that States, irrespective of the 2016 Award, have made and maintained EEZ and CS claims from features likely falling within the 2016 Award's expansive interpretation of Article 121(3) of UNCLOS, and even from insular features without any plausible capacity to sustain human habitation or economic life of their own. In fact, States that have refrained from, or withdrawn, EEZ and CS claims from "rocks", have done so around features that palpably fall within UNCLOS Article 121(3) (predominantly tiny geological rocks), by contrast to

¹⁴⁴ Communication from the United States to the Commission on the Limits of the Continental Shelf, 5 December 2024, https://www.un.org/depts/los/clcs_new/submissions_files/vnm95_24/20241205UsaNvUn001.pdf. Also refer to Communication from the United Kingdom to the Commission on the Limits of the Continental Shelf, 10 March 2025, https://www.un.org/depts/los/clcs_new/submissions_files/vnm95_24/UK2025Vnm.pdf.

¹⁴⁵ Commentators even suggested that the exchanges of *note verbales* was a form of lawfare: "The Philippines' decision to pursue a legal course of action was seen as a calculated use of lawfare, in which it strategically invoked established international legal avenues to counter China's military and maritime encroachment in the South China Sea. This development prompted an exploration of the viability of similar lawfare tactics for other South China Sea littorals in countering China's actions. The so-called "*battle of Note Verbales*" a while back saw China facing more serious pushback from Southeast Asia and extra-regional stakeholders. All the objecting States have referred to UNCLOS and challenged the legality of China's claims". E. Noor and J. Chan, 'The South China Sea – Ten Years After the 2016 Arbitral Award', *RSIS Commentary* (1 April 2026), p.3, <https://rsis.edu.sg/wp-content/uploads/2026/04/CO26067.pdf>.

¹⁴⁶ See *supra* at Section II.

some of the larger, non-rocky features in the South China Sea.

77. This practice is in stark contrast to the public support for the 2016 Award expressed by some States; sometimes in contrast to their own maritime claims. It is thus evident that much of the support for the 2016 Award comes primarily from political considerations rather than any genuine support for its legal interpretation and findings.
78. *Second*, the review of State practice following the 2016 Award shows that its approach to historic rights did not materially impact existing claims by States. States have continued to maintain claims to historic rights which would have arguably been extinguished based on the 2016 Award's approach to historic rights, whether in respect of such claims over spatial areas or traditional fishing rights within another State's EEZ.
79. *Third*, the review of claims by littoral States surrounding the South China Sea shows that while those States seem to have accepted the 2016 Award, such acceptance should reasonably be attributed to their self-interest. This conclusion is supported by the stark difference between the general practice of States in relation to claims from insular features worldwide, and the claims by littoral States which would be negatively impacted should China's maritime rights (wrongfully rejected by the 2016 Award) be sustained.

III. THE LIMITED IMPACT OF THE 2016 AWARD ON INTERNATIONAL JURISPRUDENCE AND COMMENTARY, AND ON THE DEVELOPMENT OF THE LAW OF THE SEA, IN THE CONTEXT OF UNCLOS ARTICLE 121 AND HISTORIC RIGHTS

80. The previous Section II has shown that the 2016 Award had not impacted the development of the law of the sea through State practice. This Section III further considers the 2016 Award's impact on the development of law of the sea by focusing on the 2016 Award's reception in jurisprudence and leading commentary. As it shows, the 2016 Award has produced a limited, if any, impact on the development of the law of the sea with regard to UNCLOS Article 121, the treatment of small islands and historic rights and the modern law of the sea. Many of its findings in this respect have been criticised in scholarship and disregarded in subsequent decisions.
81. To assess the 2016 Award's impact on these aspects of the law of the sea, this section takes each of the relevant findings made by the SCS Tribunal in turn. *First*, the key aspects of each set of findings are briefly summarised. *Second*, the extent to which each set of findings has been discussed (and followed or, alternatively, distinguished or ignored) in subsequent jurisprudence is explained and assessed. *Third*, and finally, the reception of each set of findings in leading commentary is outlined.
82. It will be seen that most findings made by the SCS Tribunal have been ignored or avoided by the international judiciary in the decade since the issuance of the 2016 Award. The myriad of other findings made by the SCS Tribunal, including many of those said by commentators to be the most significant in the 2016 Award, have received no judicial attention, even when opportunities to endorse or build on those findings have arisen.
83. Such treatment is evident across each of the main dispute resolution *fora*, with the ICJ, ITLOS, and Annex VII arbitral tribunals all having ignored findings made in the 2016 Award in recent cases, whether deliberately or not. The ICJ, in particular, has displayed a noticeable tendency to skirt around the 2016 Award, so much so that there has been no reference to the 2016 Award in any judgment of the full Court. Whilst these judicial bodies have not gone so far as to specifically disavow the 2016 Award, their muted treatment of it certainly limits the extent to which it can be said to have

shaped the law of the sea.

84. Turning to commentary, given the scope and political sensitivity of the 2016 Award, a wide range of scholars have analysed the decision from a multitude of angles. Notably, many leading academics, practitioners, and former judges have critiqued the key legal findings reached by the SCS Tribunal. In relation to some findings, the balance of the commentary has been more negative than positive, particularly on jurisdiction, Article 121 of UNCLOS, and historic and traditional fishing rights. That the 2016 Award has been subject to such scrutiny further calls into question the extent to which it has influenced the law of the sea. In fact, it may even explain why courts and tribunals have been hesitant to endorse the 2016 Award.

A. The SCS Tribunal’s expansive interpretation and application of the term “rocks” under UNCLOS Article 121(3) has been largely ignored in jurisprudence and heavily criticised by commentators

85. The 2016 Award extensively engaged with Article 121 of UNCLOS, particularly its subparagraph (3). Each element of Article 121(3) was considered by the SCS Tribunal in turn, after which it concluded that all of the relevant high-tide features in the Spratly (Nansha) Islands constituted “rocks” within the meaning of Article 121(3), rather than “fully-entitled islands”. Thus, the maritime features claimed by China were held not to generate any EEZ or CS, with the result that there were no potential overlapping entitlements in maritime areas in which the Philippines complained about China’s conduct. This was a critical “gateway” finding to other decisions of the SCS Tribunal on both jurisdiction and merits in the case.

(i) The SCS Tribunal’s interpretation and application Article 121 has been largely ignored in jurisprudence since the 2016 Award

86. The 2016 Award was the first full judicial analysis and interpretation of Article 121 of UNCLOS – a provision which has long divided scholars of the law of the sea.¹⁴⁷ Perhaps due to the (deliberate) ambiguity of the provision, courts and tribunals prior to the 2016 Award had been noticeably reticent to examine, interpret, or

¹⁴⁷ For this reason, the SCS Tribunal’s examination of Article 121 of UNCLOS is often said to be the most significant aspect of the 2016 Award, *see, e.g.*, A. Elferink, ‘The South China Sea Arbitration’s Interpretation of Article 121(3) of the LOSC: A Disquieting First’, *The NCLOS Blog* (7 September 2016) (stating it was “no doubt” the “central issue” in the case).

comprehensively engage with Article 121 of UNCLOS.¹⁴⁸

87. Clearly, a strong indicator that the 2016 Award had influenced the law of the sea would have been the emergence of subsequent jurisprudence in which the SCS Tribunal's interpretation of Article 121 of UNCLOS was endorsed and supported, or, at the very least, built on. In this regard, writing shortly after the issuance of the 2016 Award, one leading commentator stated that:

Article 121(3) was a provision of deliberately negotiated vagueness, thus [sic] Tribunal's rock/island criteria can be viewed perhaps as "missionary" work. The rock or island criteria in the Award may result in states [being] able to more readily reach maritime boundary agreements and adjudicative bodies more readily make such determinations. It will be future tribunals, courts, and state practice that will determine whether this "missionary" aspect of the Award finds favour.¹⁴⁹

88. Another commentator forecasted that the 2016 Award would "have a significant jurisprudential legacy" and that "it can be expected that the [2016 Award] will at minimum be referenced by the next court or tribunal to examine Article 121(3) and it can be anticipated to be influential".¹⁵⁰ This has not occurred.
89. The rulings of tribunals and courts in the decade since the 2016 Award show that the SCS Tribunal's interpretation of Article 121 has not encouraged adjudicative bodies to engage more substantively with that provision. Quite contrarily, courts and

¹⁴⁸ For example, Erik Franckx describes courts and tribunals as being "reluctant to interpret this particular provision of UNCLOS" and instead "preferr[ing] to hide behind the screen of maritime delimitation to avoid addressing the interpretation of this enigmatic article". He observes that, prior to the 2016 Award, the ICJ had five opportunities to engage with Article 121(3) of UNCLOS, but managed to avoid doing so in each case, E. Franckx, 'The Arbitral Tribunal's interpretation of paragraph 3 in Article 121: a first but important step forward', in S. Jayakumar et al (eds), *The South China Sea Arbitration: The Legal Dimension* (NUS Centre for International Law Series 2018), pp. 154, 159-162. Likewise, Tanaka has observed that international courts on the whole have been wary of applying Article 121(3) to maritime features, Y. Tanaka, 'Reflections on the interpretation and application of article 121(3) in the South China Sea Arbitration (Merits)', *Ocean Development and International Law*, vol. 48(3-4) (2017) 365, p. 376.

¹⁴⁹ T. McDorman, 'The South China Sea Arbitration', *ASIL Insights* (18 November 2016), <https://asil.org/insights/volume-20-issue-17/>. In a similar vein, Whomersley has remarked that the SCS Tribunal "was clearly very keen to give guidance on the issue [of Article 121], and devotes considerable space to do so", C. Whomersley, 'The South China Sea Arbitration and its Implications' in K. Zhou (ed), *Routledge Handbook of the South China Sea* (Routledge, 2021), p. 441.

¹⁵⁰ W. Gullett, 'The South China Sea Arbitration's contribution to the concept of juridical islands' (2018) 47 *Questions of International Law* 5, p. 37.

tribunals have not engaged with the 2016 Award’s interpretation of UNCLOS Article 121 and arguably sidestepped clear opportunities to build on the SCS Tribunal’s “missionary” work with respect to the provision.

90. As will be shown below, the ICJ has had two clear opportunities to engage with the 2016 Award’s handling of Article 121 of UNCLOS, but has declined both. In fact, it has not even mentioned the 2016 Award in either case.

(a) *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean*

91. In 2018, the ICJ handed down its judgment in the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean* case between Costa Rica and Nicaragua. Issues relating to Article 121 of UNCLOS arose in the determination of the two States’ relevant coasts. Here, Nicaragua contended that a few kms should be added to the overall length of its relevant coast to account for the Corn Islands and the Cayos de Perlas (the former of which is discussed further below).¹⁵¹ Nicaragua described the Cayos de Perlas as “an integral part of Nicaragua’s mainland coast” which “contribute to Nicaragua’s entitlement to a continental shelf and an exclusive economic zone”.¹⁵² In its oral pleadings, Costa Rica highlighted that the Cayos de Perlas were separated from the Corn Islands and thus Nicaragua’s mainland. Costa Rica did not consider Cayos de Perlas a valid basepoint.¹⁵³
92. To settle the “relevant coasts” issue, the ICJ made a determination under Article 121 of UNCLOS in respect of the Cayos de Perlas. Specifically, it found that “no evidence concerning the capacity of the Cayos de Perlas to ‘sustain human habitation or economic life of their own’, as required by Article 121 of UNCLOS, was supplied by Nicaragua to support its assertion that ‘the Cayos de Perlas generate maritime projections’”.¹⁵⁴ Thus, whilst the ICJ essentially held the Cayos de Perlas were

¹⁵¹ *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*, Counter-Memorial of Nicaragua, 8 December 2015, para. 3.65.

¹⁵² *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*, Counter-Memorial of Nicaragua, 8 December 2015, para. 3.65; *Ibid.*, CR 2017/10, Oude Elferink, p. 23, para. 10.

¹⁵³ *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*, CR 2017/9, Lathrop, p. 46, para. 35.

¹⁵⁴ *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2018, p. 184, para. 113.

“rocks” for purposes of UNCLOS Article 121(3), it did so on the basis of a lack of evidence from the Nicaraguan side. No mention was made of the 2016 Award’s interpretation of UNCLOS Article 121.¹⁵⁵

93. Another disagreement between the parties concerned the placement of base points on the Corn Islands.¹⁵⁶ In its Memorial, Costa Rica argued that provisional equidistance lines should be drawn “between the nearest points on the coasts of the two States”.¹⁵⁷ Costa Rica suggested that prior adjudicative bodies have tended to ignore otherwise valid base points on States’ offshore maritime features, pointing to the *Black Sea* case before the ICJ and two maritime delimitations involving Bangladesh.¹⁵⁸ On this basis, Costa Rica argued that the ICJ should exclude the Corn Islands as a base point.¹⁵⁹ Importantly, Costa Rica acknowledged that Corn Islands were given full effect in a previous ICJ case involving Nicaragua and did not go so far as to argue that they should be treated as an UNCLOS Article 121(3) “rock”.¹⁶⁰ Instead, it suggested that the Court should not follow the approach taken in that prior case because, whereas that case was a delimitation between the opposite coasts of opposing islands, *Costa Rica v. Nicaragua* was a delimitation between adjacent mainland coasts.¹⁶¹ At the oral hearing, Costa Rica sought to argue that the Corn Islands were not an integral part of Nicaragua’s coast, and that placing base points on

¹⁵⁵ The 2016 Award was issued after both States had filed their written pleadings. However, it had been publicised ahead of the hearing and ahead of the ICJ’s judgment.

¹⁵⁶ *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2018, p. 191, para. 139. In terms of other arguments, Costa Rica acknowledged that in *NICOL I*, Corn Islands were given full effect in the delimitation with Colombia, but sought to distinguish its case from *NICOL I* on the basis that *NICOL I* involved a delimitation between States with opposite coasts, not adjacent coasts. Nicaragua also posited that the Corn Islands’ vicinity to the mainland meant they were “an integral component of Nicaragua’s coast”, thereby justifying the placement of base points on them.

¹⁵⁷ *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*, Memorial of Costa Rica, 3 February 2015, para. 4.22.

¹⁵⁸ Specifically, Costa Rica stated that the ICJ did not use base points on Serpents’ Islands in the *Black Sea* case, and that two tribunals excluded Bangladesh’s St. Martin’s Islands as a base point in the *Bangladesh/Myanmar* and *Bangladesh v. India* arbitrations. See *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*, Memorial of Costa Rica, 3 February 2015, para. 4.23.

¹⁵⁹ *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*, Memorial of Costa Rica, 3 February 2015, para. 4.24.

¹⁶⁰ *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*, Memorial of Costa Rica, 3 February 2015, fn. 141.

¹⁶¹ *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*, Memorial of Costa Rica, 3 February 2015, fn. 141.

them in the delimitation would distort the equidistance line.¹⁶² At the same time, Costa Rica continued to highlight jurisprudence that, it said, justified not placing base points on the Corn Islands.

94. In its Counter-Memorial, Nicaragua characterised the Corn Islands as “significant features that form an integral part of the physical reality of Nicaragua’s coast”.¹⁶³ Nicaragua disputed Costa Rica’s interpretation of relevant jurisprudence, suggesting that the maritime features at issue in the *Black Sea* (Serpents’ Island) and Bangladesh cases (St. Martin’s Island) were not comparable with the Corn Islands.¹⁶⁴ *First*, Nicaragua noted that the Corn Islands were significantly larger in size and population than Serpents’ Island and that, unlike Serpents’ Island – whose “natural conditions do not support the development of an economic life of its own” – the Corn Islands do “sustain a vibrant economic life” through fishing and tourism industries.¹⁶⁵ *Second*, Nicaragua noted that St. Martin’s Island was not used as a base point in *Bangladesh/Myanmar* because of its “unusual location” (*i.e.*, immediately in front of Myanmar’s mainland territory), whereas the Corn Islands are located approximately 80nm from Costa Rica.¹⁶⁶ Therefore, whilst it did not specifically invoke Article 121 of UNCLOS, Nicaragua’s position was clearly that the Corn Islands are fully entitled islands, because it emphasised key elements of Article 121(3) of UNCLOS in distinguishing the Corn Islands from Serpents’ Island.
95. Ultimately, the ICJ determined that base points should be placed on the Corn Islands.¹⁶⁷ Notably, the ICJ chose to put aside the various other arguments made by Costa Rica and Nicaragua on the Corn Islands and focus on their status under Article

¹⁶² *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*, CR 2017/9, pp. 19-22.

¹⁶³ *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*, Counter-Memorial of Nicaragua, para. 3.101.

¹⁶⁴ *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*, Counter-Memorial of Nicaragua, paras. 3.65, 3.102-3.107.

¹⁶⁵ *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*, Counter-Memorial of Nicaragua, paras. 3.103-3.105. See also *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*, CR 2017/11, Reichler, pp. 31-31, paras. 38-39.

¹⁶⁶ *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*, Counter-Memorial of Nicaragua, paras. 3.106-3.107.

¹⁶⁷ *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2018, p. 191, para. 140.

121 of UNCLOS. It found that the Corn Islands “have a significant number of inhabitants and sustain economic life”, meaning they “amply satisfy the requirements set forth in Article 121 of UNCLOS for an island to be entitled to generate an exclusive economic zone and continental shelf”.¹⁶⁸ Whilst the ICJ applied Article 121 of UNCLOS to the Corn Islands, it did not engage in an interpretation of the provision, and no mention was made of the 2016 Award.

96. It is true that neither Costa Rica nor Nicaragua actively directed the ICJ to the 2016 Award in their pleadings, however, the 2016 Award could have nevertheless been mentioned by the ICJ on its own initiative, given its invocation of Article 121 of UNCLOS in relation to the Corn Islands (and Cayos de Perlas). Thus, the ICJ appeared to sidestep the 2016 Award’s interpretation of Article 121 in the *Costa Rica v. Nicaragua* case.

(b) *Nicaragua/Colombia II (“NICOL II”)*

97. The ICJ again ignored the SCS Tribunal’s interpretation of UNCLOS Article 121 in its 2023 judgment in *NICOL II*.¹⁶⁹ As Colombia is not a party to UNCLOS, the ICJ was required to apply customary international law in settling the dispute, which concerned an attempt by Nicaragua to secure a delimitation between its claimed OCS and Colombia’s continental shelf within 200nm from its mainland and insular features. One area of division between the parties was the status of certain insular features and the entitlements they generated.
98. Unlike the *Costa Rica v. Nicaragua* case, in *NICOL II* both States referred to the 2016 Award in their pleadings (issued just over three months prior to the filing of Nicaragua’s Memorial). Colombia raised the 2016 Award in its Counter-Memorial,¹⁷⁰ overtly criticising the SCS Tribunal’s interpretation of the term “rocks”

¹⁶⁸ *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2018, p. 191, para. 140.

¹⁶⁹ The *NICOL II* proceedings were instituted in 2013, shortly after the Court issued its 2012 Judgment in the *Territorial and Maritime Dispute* case also between Nicaragua and Colombia (“*NICOL I*”). Indeed, the very reason Nicaragua brought the *NICOL II* case was to settle outstanding issues that the Court felt it could not adjudicate in *NICOL I*.

¹⁷⁰ The reasons for which Nicaragua chose not to lead in referencing the 2016 Award are not clear. Presumably, it did not feel it had enough time to fully digest the implications of the 2016 Award for its argument relating

under UNCLOS Article 121(3), stating that it “struggled to demonstrate that the term [...] has no specific geological or geomorphological meaning and, ultimately, no meaning at all”.¹⁷¹ Colombia’s position was that UNCLOS Article 121(3) only applied to features which were geological rocks.

99. In its Reply, Nicaragua expressly defended the 2016 Award, rejecting Colombia’s complaints about the SCS Tribunal’s definition of the term “rocks”.¹⁷² Nicaragua argued that “under Colombia’s approach, a small, uninhabitable sand-spit or mud-patch, devoid of economic life would be entitled to generate expanded maritime rights and jurisdiction even though an otherwise identical feature that happens to be composed of granite would not be”.¹⁷³ Despite the clear resemblance between this argument and a finding made by the SCS Tribunal in the 2016 Award,¹⁷⁴ Nicaragua curiously did not cite the 2016 Award in support of this passage of its Reply. Elsewhere in its Reply, though, Nicaragua did cite with endorsement the 2016 Award’s interpretation of the “human habitation” limb of Article 121(3) of UNCLOS.¹⁷⁵

to Article 121 of UNCLOS, given the 2016 Award was issued just over two months before the deadline for the filing of its Memorial.

¹⁷¹ *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Counter-Memorial of Colombia, 28 September 2017, para. 4.46.

¹⁷² *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Reply of Nicaragua, 9 July 2018, paras. 4.45-4.46 (stating that the SCS Tribunal had no difficulty in demonstrating that the term “rocks” has no specific geological or geomorphological meaning).

¹⁷³ *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Reply of Nicaragua, 9 July 2018, para. 4.53.

¹⁷⁴ 2016 Award, para. 481 (“any contrary interpretation imposing a geological criteria on Article 121(3) would lead to an absurd result. Within Article 121, rocks are a category of island. An island is defined as a ‘naturally formed area of land,’ without any geological or geomorphological qualification. Introducing a new geological qualification in paragraph (3) would mean that any high-tide features formed by sand, mud, gravel, or coral—irrespective of their other characteristics—would always generate extended maritime entitlements, even if they were incapable of sustainable human habitation or an economic life of their own. Such features 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. A geological criterion would thus accord greater entitlements to less stable and less permanent features”).

¹⁷⁵ *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Reply of Nicaragua, 9 July 2018, para. 4.128 (stating “the presence of Navy and Coast Guard personnel does not meet the standard of human

100. At the close of the written phase, the ICJ took the unprecedented step of bifurcating the proceedings on the merits by requesting the parties to address certain questions of law. Neither of the two questions put to the parties by the ICJ related to the regime of islands under customary international law. Having heard their answers, the ICJ issued its final judgment, the central finding of which was that under customary international law a State's entitlement to a continental shelf beyond 200nm of its baselines (i.e., the OCS) may not extend within 200nm of the baselines of another State. Thus, the ICJ disposed of *NICOL II* on the law, without examining the status and entitlements of disputed maritime features. As a result, it did not address either of the parties' extensive legal and factual submissions on Article 121 of UNCLOS.
101. The ICJ's judgment in *NICOL II* has been the subject of criticism. Of particular note, Judge Nolte's Separate Opinion critiqued the majority's decision to dispose of the case on the law. In his view, the ICJ was required to determine the status and entitlements of two disputed maritime features, namely Serranilla and Bajo Nuevo, to settle the States' dispute.¹⁷⁶ Judge Nolte acknowledged that the majority's central finding that one State's OCS claim cannot encroach on another's continental shelf claim within 200nm from the coast meant that the parties had no overlapping entitlement, irrespective the status of Serranilla and Bajo Nuevo.¹⁷⁷ However, he stressed that the Application brought by Nicaragua did not solely seek delimitation of overlapping maritime entitlements, but rather requested the ICJ to "adjudge and declare [...] [t]he precise course of the maritime boundary between Nicaragua and Colombia in the areas of the continental shelf which appertain to each of them".¹⁷⁸ To resolve this dispute, Judge Nolte opined, the ICJ was required to settle the status

habitation as understood in the context of Article 121(3) and its customary law equivalent" and citing para. 520 of the 2016 Award).

¹⁷⁶ Separate Opinion of Judge Nolte, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, I.C.J. Reports 2023, para. 9.

¹⁷⁷ Separate Opinion of Judge Nolte, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, I.C.J. Reports 2023, para. 3.

¹⁷⁸ *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Application of Nicaragua, 16 September 2013, para. 12.

of Serranilla and Bajo Nuevo¹⁷⁹ and, in not doing so, he suggested that the ICJ “le[ft] the Parties in the dark about the ‘precise course’ of the maritime boundary”.¹⁸⁰

102. Thus, the ICJ could have engaged further with Article 121 of UNCLOS, insofar as it reflects customary international law, in the *NICOL II* case. Faced with the opportunity to endorse the handling of Article 121 by the SCS Tribunal, the Court did not mention it. Even Judge Nolte made no mention of the 2016 Award’s interpretation of Article 121 in his Separate Opinion, despite his disavowal of the Court’s decision to circumvent engaging with the disputed status of maritime features. If Judge Nolte had felt that the 2016 Award’s findings were significant or dispositive, he could have mentioned this in opining on how the Court should have determined the status and entitlements of Serranilla and Bajo Nuevo,¹⁸¹ an issue which Judge Nolte also avoided opining on.

103. The fact that the ICJ and its judges have refrained from citing, let alone endorsing, the 2016 Award’s interpretation of UNCLOS Article 121 in two subsequent cases (including one in which the parties had pleaded with extensive reference to the 2016 Award) is telling, and demonstrates the limited extent to which the 2016 Award has impacted the law of the sea over the past decade. Certainly, notwithstanding the 2016 Award, the ICJ seems reluctant to delve into UNCLOS Article 121 questions with regard to specific features.
104. The above survey of jurisprudence also shows that the 2016 Award has not impacted

¹⁷⁹ In fact, Judge Nolte went as far as stating that “[t]he Court should rather have given the Parties the opportunity to present their case and to argue whether Serranilla and Bajo Nuevo generate a maritime zone of 200 nautical miles”, Separate Opinion of Judge Nolte, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, I.C.J. Reports 2023, para. 9.

¹⁸⁰ Separate Opinion of Judge Nolte, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, I.C.J. Reports 2023, para. 4.

¹⁸¹ Indeed, in cases before other *fora*, judges have used their individual opinions to make remarks on the status of maritime features, despite this not being a central issue in proceedings. For example, in the *Volga* case, Judge Vukas issued a Declaration disassociating himself with all statements in the majority judgment assuming that Australian maritime features Heard and McDonald Islands could generate an EEZ and specifically arguing that these features should be deemed Article 121(3) rocks, *The “Volga” Case (Russian Federation v. Australia)*, Prompt Release, Declaration of Judge Vukas (23 December 2002).

the development of the law of the sea as regards islands, rocks, and Article 121 of UNCLOS, when viewed from the perspective of potential litigants. In the aftermath of the 2016 Award, some commentators queried whether the 2016 Award would open the floodgates to Article 121 litigation.¹⁸² However, the two cases touching on UNCLOS Article 121 since the 2016 Award were both instituted before 12 July 2016. Accordingly, it is clear that States have not been emboldened to litigate claims to maritime zones based on features that do not meet the SCS Tribunal’s definition of a “rock”. This is consistent with the fact that, in respect of their own maritime claims, States have repeatedly rejected the SCS Tribunal’s interpretation and application of UNCLOS Article 121(3).

(ii) The SCS Tribunal’s approach to UNCLOS Article 121 has been heavily criticised in leading commentary since the 2016 Award

105. A number of commentators have critiqued the SCS Tribunal’s interpretation of Article 121 of UNCLOS in the past decade on the grounds that it was both legally and logically flawed. Such criticisms cover most if not all of the aspects of the SCS Tribunal’s interpretation of the provision. This may well explain the ICJ’s reluctance to mention the 2016 Award in its recent cases and its hesitation to engage comprehensively with Article 121 in relevant cases.

(a) “Rocks”

106. Commentators have highlighted the lack of attention paid by the SCS Tribunal to the deliberate use of the word “rocks” in Article 121(3). This was an argument referenced and indeed made in the NISCSS’s earlier critique of the 2016 Award.¹⁸³

107. Especially notable in this regard is a piece authored in 2021 by Judge Gilbert Guillaume, the former ICJ President and, more recently, a Judge *ad hoc* in the

¹⁸² For example, Joanna Mossop asked at the American Society of International Law conference in 2018 “[s]hould states with uncontested claims expect a raft of legal challenges?”, Remarks by Joanna Mossop, *ASIL Proceedings 2018*, p. 13.

¹⁸³ NISCSS AsJIL Legal Critique, s. 3.1.1.3.1, p. 188. (although the NISCSS critique suggests that the term “rocks” “does not impose fixed geological or geomorphological limitations so as to require a feature to be composed of solid rock”)

Somalia v. Kenya case.¹⁸⁴ His central thesis is that the term “rock” in Article 121(3) of UNCLOS has a specific meaning – a rugged mass of hard mineral material of a small size – that the SCS Tribunal failed to grasp.¹⁸⁵ This was also the position espoused by Colombia before the ICJ in *NICOL II* and reflects State practice as elaborated above.

108. It will be recalled that the SCS Tribunal posited that the term “rock” involves no specific material, size, or geological features. A key pillar of the SCS Tribunal’s reasoning was its reliance on the Oxford English Dictionary, and particularly the quote that rocks “may consist of aggregates of minerals [...] and occasionally also organic matter [...]. They vary in hardness, and include soft materials such as clays”.¹⁸⁶ However, as Judge Guillaume has stated:

This quotation is accurate but incomplete. While the [Oxford English Dictionary] does give that as its second definition of “rocks”, its first definition is that of a “large rugged mass of hard mineral material”. The first definition is equivalent to “*roche*” in French, the second, to “*rocher*”. But while the English version thus has a degree of ambiguity, the same does not apply to the French version [of Article 121(3)], which refers not to “*roches*”, but to “*rochers*”, meaning, according to the dictionary of the Académie Française, to “craggy masses of hard stone”. The Chinese, Russian and Spanish versions similarly correspond to the terminology in French”.¹⁸⁷

109. In this regard, Judge Guillaume overtly criticises the interpretative approach followed

¹⁸⁴ G. Guillaume, ‘Rocks in the Law of the Sea: Some comment on the South China Sea Arbitration Award’, *EJIL:Talk!* (25 February 2021), [Rocks in the Law of the Sea: Some comments on the South China Sea Arbitration Award – EJIL: Talk!](#).

¹⁸⁵ G. Guillaume, ‘Rocks in the Law of the Sea: Some comment on the South China Sea Arbitration Award’, *EJIL:Talk!* (25 February 2021), [Rocks in the Law of the Sea: Some comments on the South China Sea Arbitration Award – EJIL: Talk!](#).

¹⁸⁶ 2016 Award, para. 480.

¹⁸⁷ G. Guillaume, ‘Rocks in the Law of the Sea: Some comment on the South China Sea Arbitration Award’, *EJIL:Talk!* (25 February 2021), [Rocks in the Law of the Sea: Some comments on the South China Sea Arbitration Award – EJIL: Talk!](#). Guillaume suggests that the Chinese, Russian and Spanish versions all align with the French version of UNCLOS because: (a) the Chinese version uses two characters, meaning “reef” and “rock” (礁 岩), thus referring to rocky reefs; (b) the Russian version uses the word “скалы”, the plural of the word “скала”, meaning “block of stone, a cliff with steep sides and sharp edges”; and (c) the Spanish version uses the word “roca” which, according to the Spanish dictionary of the Real Academia Española, means “rock which stands on land and in the sea” (“*peñasco que se levanta en la tierra y en el mar*”).

by the SCS Tribunal. For him, it is “regrettable” that the SCS Tribunal did not look at the other, non-English versions of the UNCLOS text, because they would have enabled the SCS Tribunal to easily distinguish “between ‘*roches*’ and ‘*rochers*’ and given the word ‘rock’ its ordinary meaning: that of a rugged mass of hard mineral material”.¹⁸⁸ Similar arguments have been made by Gerhard Hafner.¹⁸⁹

110. Judge Guillaume also refers to the negotiating history of UNCLOS to support his position. He states that Article 121(3) of UNCLOS derives from three proposals raised during negotiations, which generally distinguished between “islands” and other features, including rocks,¹⁹⁰ a point also made by Prof Stefan Talmon (a leading academic and practitioner).¹⁹¹ Judge Guillaume notes that, alongside these proposals, several delegations at the UNCLOS negotiations campaigned that Article 121(3) would cover islets and rocks, but that this proposal was rejected.
111. Taking this negotiating history together, Judge Guillaume opines that the preparatory work “support the literal interpretation” of Article 121, whereby a “rock” is simply a rock.¹⁹² Talmon agrees: his summary of the UNCLOS negotiation history leads him to the conclusion that “States considered the term ‘rocks’ not to include islets, let

¹⁸⁸ G. Guillaume, ‘Rocks in the Law of the Sea: Some comment on the South China Sea Arbitration Award’, *EJIL:Talk!* (25 February 2021), [Rocks in the Law of the Sea: Some comments on the South China Sea Arbitration Award – EJIL: Talk!](#).

¹⁸⁹ G. Hafner, ‘Some Remarks on the South China Sea Award: Itu Aba Versus Clipperton’ (2016) 34 *Chinese (Taiwan) Yearbook of International Law and Affairs* 1, pp. 5-6.

¹⁹⁰ The three proposals were (i) a Romanian proposal, whereby Article 121(3) would cover islands and small, uninhabited islands with no economic activity; (ii) a Turkish proposal, which distinguished between islands without economic life and rocks, with only the latter being excluded from the benefits of Article 121; and (iii) a proposal by several African States, which distinguished between islands, islets, rocks, and shoals, and which defined a “rock” as “a natural rocky elevation of land which is surrounded by the sea and exposed at high tide”.

¹⁹¹ See also S. Talmon, ‘Article 121’ in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Beck/Hart, 2017), p. 868 (“During the deliberations of the topic ‘regime of islands’ in the Second Committee of UNCLOS III States clearly distinguished between ‘islands’, ‘islets’, ‘rocks’, and ‘low-tide elevations’. In a draft article on the regime of islands proposed by 15 African States in August 1974, a ‘rock’ was defined as ‘a naturally formed rocky elevation of ground’, while an island or an islet was defined as a vast or smaller ‘naturally formed area of land.’”)

¹⁹² G. Guillaume, ‘Rocks in the Law of the Sea: Some comment on the South China Sea Arbitration Award’, *EJIL:Talk!* (25 February 2021), [Rocks in the Law of the Sea: Some comments on the South China Sea Arbitration Award – EJIL: Talk!](#).

alone proper islands”.¹⁹³

112. Talmon’s critique is notable given it appears in a leading commentary to UNCLOS, in the chapter relating to Article 121. On his view, the SCS Tribunal “gave up the distinction between rocks and islands”, so much so that, on its interpretation, Article 121(3) functionally reads “*islands which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf*”. In this sense, Talmon concludes that the SCS Tribunal “adopted a legislative role rewriting the text of Art. 121 (1)”.¹⁹⁴
113. Other commentators, such as Christopher Whomersley (former UK FCO Deputy Legal Adviser), Prof Sean Murphy (a leading academic, arbitrator and practitioner), and Michael Sheng-ti Gau (a leading Chinese scholar) have also criticised the SCS Tribunal’s failure to account for its almost interchangeable use of “rock” in place of “island”.¹⁹⁵
114. Murphy is particularly emphatic in noting the contradictory nature in which the SCS Tribunal interpreted the word “rock” within Article 121(3), given that the SCS Tribunal “saw considerable significance in the precise wording of Article 121 in various other respects”.¹⁹⁶ Sheng-ti Gau observes that the difference between an “island” and “rocks” under UNCLOS Article 121 “was rendered invisible” by the SCS Tribunal’s repeated usage of the term “high-tide feature”.¹⁹⁷

¹⁹³ S. Talmon, ‘Article 121’ in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Beck/Hart, 2017), pp. 868-872.

¹⁹⁴ S. Talmon, ‘Article 121’ in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Beck/Hart, 2017), p. 863.

¹⁹⁵ C. Whomersley, ‘The South China Sea Arbitration and its Implications’ in Keyuan Zhou (ed), *Routledge Handbook of the South China Sea* (Routledge, 2021), p. 441 (“the Tribunal fails to account for why the world ‘rock’, and not ‘island’, was included in paragraph 3 of Article 121”); S. Murphy, *International Law Relating to Islands* (Brill, 2017), p. 74 (“the Tribunal seems to ascribe no significance whatsoever to the use of the word ‘rock’ rather than ‘island’ in paragraph 3”); M. Gau, ‘The Interpretation of Article 121(3) of UNCLOS by the Tribunal for the South China Sea Arbitration: A Critique’ (2019) 50(1) *Ocean Development & International Law* 49, pp. 59-60 (with reference to the “ordinary meaning” of “rocks” in the Oxford Advanced Learner’s Dictionary of Current English, the author states “‘rocks’ should be understood as only a kind of islands with solid stony nature standing out from the sea, surrounded by water, and above water at high tide”).

¹⁹⁶ S. Murphy, *International Law Relating to Islands* (Brill, 2017), p. 74.

¹⁹⁷ M. Gau, ‘The Interpretation of Article 121(3) of UNCLOS by the Tribunal for the South China Sea Arbitration: A Critique’ (2019) 50(1) *Ocean Development & International Law* 49, p. 15.

115. Relatedly, Prof Alex Oude Elferink (a leading academic who has also represented States in law of the sea proceedings, including Nicaragua in *NICOL II* and *NICOL III*) argues that the SCS Tribunal erred in finding that size is not dispositive of a maritime feature's status and is not, on its own, a relevant factor.¹⁹⁸ He suggests that size may be a relevant factor in determining the scope of application of Article 121(3), as a point of distinction between a "rock" and an "island".¹⁹⁹ He makes three key points in critiquing the 2016 Award: *first*, the SCS Tribunal failed to establish whether the ordinary meaning of "rock" incorporates a size criterion (which, on his view, it does);²⁰⁰ *second*, the UNCLOS negotiating records suggest States viewed "islands", "islets", and "rocks" as differently sized maritime features;²⁰¹ and *third*, the SCS Tribunal's reliance on ICJ jurisprudence to suggest size was not relevant was unavailing.²⁰²

116. Others, such as Christine Pichel²⁰³ (an officer of the European Commission) and

¹⁹⁸ 2016 Award, para. 538.

¹⁹⁹ A. Elferink, 'The South China Sea Arbitration's Interpretation of Article 121(3) of the LOSC: A Disquieting First', *The NCLOS Blog* (7 September 2016).

²⁰⁰ Instead, he says the SCS Tribunal proceeded straight to an analysis of UNCLOS's negotiating history, which is a *supplementary*, not principal, means of interpretation per the interpretive rules outlined in the Vienna Convention on the Law of Treaties ("**VCLT**") (emphasis added). Looking at the ordinary meaning of the term "rock", Oude Elferink observes that the same dictionary used elsewhere in the 2016 Award by the SCS Tribunal indicates there is a distinction between "rock" and "island", as does the text of Article 121 of UNCLOS itself, A. Elferink, 'The South China Sea Arbitration's Interpretation of Article 121(3) of the LOSC: A Disquieting First', *The NCLOS Blog* (7 September 2016).

²⁰¹ He recalls proposals at the negotiating conferences that distinguished between features of 10 square kilometres (islands) and one square kilometres (islets), suggesting that "a figure of less than 1 square kilometer might be relevant to define the upper size of a rock under article 121(3)" A. Elferink, 'The South China Sea Arbitration's Interpretation of Article 121(3) of the LOSC: A Disquieting First', *The NCLOS Blog* (7 September 2016).

²⁰² The 2016 Award justified the conclusion that a maritime feature's size is irrelevant by reference to the *NICOL I* judgment, wherein the ICJ found that "international law does not prescribe any minimum size which a feature must possess in order to be considered an island". The relevance of this ICJ jurisprudence is questioned by Oude Elferink, who states "[t]he 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", A. Elferink, 'The South China Sea Arbitration's Interpretation of Article 121(3) of the LOSC: A Disquieting First', *The NCLOS Blog* (7 September 2016); *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, *I.C.J. Reports 2012*, p. 645, para. 37.

²⁰³ Pichel's analysis of the UNCLOS negotiating records leads her to conclude that States "tried to establish size parameters" but "failed to agree on a specific size". Importantly, she states that this "does not mean that the size of a feature was not important, and that States did not have in mind 'rocks' as small features". Quite the opposite, her view is that size does matter in applying Article 121 to maritime features, not least because a maritime feature's size may be directly relevant to its capacity to sustain human habitation or economic life, see C. Pichel, 'The Unfortunate Wording of Article 121(3) of UNCLOS and Its Interpretation in the 2016

Judge Gillaume (whose views are discussed above),²⁰⁴ make similar points. Oliver Lewis has also highlighted the inconsistency of the SCS Tribunal in stating that size is not dispositive of the status of a maritime feature, whilst simultaneously highlighting the size of maritime features in its analysis. For example, the SCS Tribunal described Johnson Reef as “a *miniscule*, barren feature obviously incapable, in its natural condition, of sustaining human habitation or an economic life of its own” (emphasis added).²⁰⁵ The SCS Tribunal also described Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North) as “miniscule” in applying Article 121(3) of UNCLOS.²⁰⁶ In this regard, Lewis queries whether the SCS Tribunal should have openly acknowledged size as a relevant factor in determining a feature to be a “rock”.

(b) “*Human habitation*”

117. The SCS Tribunal made several findings in relation to the term “human habitation” within Article 121(3), including that: (i) the term implied notions of “settlement and residence”, which would not be satisfied by “[t]he mere presence of a small number of persons on a feature”; (ii) a feature must, at minimum, provide food, drink, and shelter to humans to enable their permanent or habitual residence thereon; and (iii) habitation had to occur by “a group or community of persons”.²⁰⁷
118. Nordquist is highly critical of the SCS Tribunal’s interpretation of “human habitation”. He states that the SCS Tribunal “overreached its legitimate mandate and state of factual knowledge, by trying to set up universal criteria for ‘human habitation’ for all features in the world for all time”.²⁰⁸ He argues that the SCS Tribunal ignored both the text of UNCLOS and its negotiating history in its interpretation of “human

South China Sea Arbitration Award’ (2022) 7 *Asia-Pacific Journal of Ocean Law and Policy* 53, pp. 64-65. See also S. Talmon, ‘Article 121’ in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Beck/Hart, 2017), p. 863 (Talmon agrees that size is relevant to capacity to sustain human habitation or an economic life).

²⁰⁴ G. Guillaume, ‘Îles, rochers et hauts-fonds découvrants en droit de la mer’ (2019) 65 *Annuaire français de droit international* 513, p. 520.

²⁰⁵ 2016 Award, para. 558, cited in Remarks of Oliver Lewis, *ASIL Proceedings 2018*, fn. 8.

²⁰⁶ 2016 Award, paras. 561, 564, 567, cited in Remarks of Oliver Lewis, *ASIL Proceedings 2018*, fn. 8.

²⁰⁷ 2016 Award, paras. 488-492.

²⁰⁸ M. Nordquist, ‘UNCLOS Article 121 and Itu Aba in the South China Sea Final Award: a correct interpretation?’ in S. Jayakumar et al (eds), *The South China Sea Arbitration: The Legal Dimension* (NUS Centre for International Law Series 2018), p. 187.

habitation”. For example, he identifies that there was “[n]o meaningful discussion” about drinking water during the negotiations of Article 121, and yet the SCS Tribunal “decided to put great emphasis on water”.²⁰⁹

119. Judge Paik (the former President of ITLOS) has similarly critiqued the expansiveness of the SCS Tribunal’s interpretation of “human habitation”. He suggests that the SCS Tribunal was wrong to suggest “human habitation” must require “a stable community of people for whom the features constitute a home and on which they can remain”.²¹⁰ For him, the ordinary meaning of “human habitation” cannot support such an extensive interpretation, which instead seems to have resulted from the SCS Tribunal (wrongly) according greater weight to the context, object, and purpose of Article 121 and UNCLOS (including the desire to limit spurious EEZ and continental shelf claims generated from tiny, barren features).²¹¹
120. The SCS Tribunal also held that both the “human habitation” and “economic life of their own” limbs of Article 121(3) “clearly exclude[] a dependence on external supply” (even though the words “of their own” attaches only to “economic life”).²¹² Joanna Mossop has critiqued this finding. She argued that the suggestion that all maritime features are completely self-sufficient neglects “the nature of human economic activity from the time that sea travel became regularised”. Specifically, she argues that communities have historically formed in places where valuable commodities are located, but not the full range of resources need to sustain life. Given the development of modern trade routes, it is possible to exchange one commodity found, grown, or extracted locally for another which is provided externally and still organically sustain human life. Thus, Mossop’s view is that “external supply should

²⁰⁹ M. Nordquist, ‘UNCLOS Article 121 and Itu Aba in the South China Sea Final Award: a correct interpretation?’ in S. Jayakumar et al (eds), *The South China Sea Arbitration: The Legal Dimension* (NUS Centre for International Law Series 2018), p. 193.

²¹⁰ J. Paik, ‘South China Sea Arbitral Awards: Main Findings and Assessment’, *Max Planck Yearbook of United Nations Law*, vol. 20(1) (2017), pp. 403-404.

²¹¹ J. Paik, ‘South China Sea Arbitral Awards: Main Findings and Assessment’, *Max Planck Yearbook of United Nations Law*, vol. 20(1) (2017), pp. 403-404. Natalie Klein appears to make a similar point, insofar as she says that the SCS Tribunal’s examination of the terms “human habitation” was driven by “the policy of not granting extensive maritime zones, and hence exclusive rights to a coastal state, on the basis of a small feature lacking sufficient human life and activity”, N. Klein, ‘Islands and Rocks after the South China Sea Arbitration’ (2016) 34 *Australian Year Book of International Law* 21, p. 24.

²¹² 2016 Award, para. 558.

not disqualify a feature from being capable of human habitation”.²¹³

(c) “*Economic life of their own*”

121. The SCS Tribunal’s interpretation of the terms “economic life of their own” has also been subject to much criticism. According to the SCS Tribunal, for a feature to have an “economic life of their own”, it:

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.²¹⁴

122. Myron Nordquist has described this as a “remarkable qualifier” and a “self-created standard”.²¹⁵ He adds that the SCS Tribunal’s standard “belies state practice by disqualifying the very islands Article 121 was intended to cover by the UNCLOS language negotiated at UNCLOS III”.²¹⁶ In fact, Nordquist goes so far as to query if any island on Earth could meet the threshold established by the SCS Tribunal, given the interconnectedness of today’s global economy.²¹⁷
123. Oude Elferink similarly suggests that external economic support should not disqualify a maritime feature from being a fully-entitled island. For him, the key question is

²¹³ J. Mossop, ‘The *South China Sea* Arbitration and New Zealand’s Maritime Claims’ (2017) 15(2) *New Zealand Journal of Public and International Law* 265, p. 283. See also G. Guillaume, ‘Rocks in the Law of the Sea: Some comment on the South China Sea Arbitration Award’, *EJIL:Talk!* (25 February 2021), [Rocks in the Law of the Sea: Some comments on the South China Sea Arbitration Award – EJIL: Talk!](#).

²¹⁴ 2016 Award, para. 500.

²¹⁵ M. Nordquist, ‘UNCLOS Article 121 and Itu Aba in the South China Sea Final Award: a correct interpretation?’ in S. Jayakumar et al (eds), *The South China Sea Arbitration: The Legal Dimension* (NUS Centre for International Law Series 2018), p. 187.

²¹⁶ M. Nordquist ‘UNCLOS Article 121 and Itu Aba in the South China Sea Final Award: a correct interpretation?’ in S. Jayakumar et al (eds), *The South China Sea Arbitration: The Legal Dimension* (NUS Centre for International Law Series 2018), pp. 187-188.

²¹⁷ M. Nordquist ‘UNCLOS Article 121 and Itu Aba in the South China Sea Final Award: a correct interpretation?’ in S. Jayakumar et al (eds), *The South China Sea Arbitration: The Legal Dimension* (NUS Centre for International Law Series 2018), p. 188. Nordquist also critiques the SCS Tribunal’s finding that economic activity derived from a possible EEZ or continental shelf generated from a maritime feature “must necessarily be excluded”. He suggests this ruling, again, has no basis in the text of UNCLOS or its negotiating history, and runs contrary to “uncontested state practice” around the world, giving the examples of Christmas Island, Johnston Island and Atoll, Clipperton Island, Trindade Island, Heard and McDonald Islands, and Norway’s Bouvet and Peter I Islands (*Ibid*, p. 188).

how external support “relates to the resources or services the island has of its own”.²¹⁸ Further, Oude Elferink says the SCS Tribunal’s interpretation of “economic life of their own” can only be satisfied if a human community exists on a maritime feature.²¹⁹ In turn, this blurs the distinction between the “human habitation” and “economic life” limbs of Article 121 – limbs which the SCS Tribunal specifically said were separate.²²⁰

(d) “Sustain”

124. The manner in which the SCS Tribunal approached the word “sustain” within Article 121(3) of UNCLOS has also been critiqued by scholars.
125. *First*, commentators suggest the SCS Tribunal focused too heavily on historic evidence of a maritime feature’s capacity to “sustain” human habitation or an economic life. Nordquist states that the critical date for assessing a maritime feature’s capacity to “sustain” human habitation or economic life is “the time of the filing of the judicial action bringing such judicial decision making into the dispute”, i.e., 22 January 2013 in the *South China Sea Arbitration* context.²²¹ He further argues the word “sustain” is prospective, in that it clearly encompasses the future potential or capability of a maritime feature to “sustain” human habitation or an economic life.²²² Yet, the SCS Tribunal looked heavily at historic evidence in relation to certain features, like Itu Aba.
126. Paik similarly argues that the SCS Tribunal “equated the capacity to sustain human habitation with actual human habitation”, insofar as it emphasised historic evidence

²¹⁸ A. Elferink, ‘The South China Sea Arbitration’s Interpretation of Article 121(3) of the LOSC: A Disquieting First’, *The NCLOS Blog* (7 September 2016).

²¹⁹ A. Elferink, ‘The South China Sea Arbitration’s Interpretation of Article 121(3) of the LOSC: A Disquieting First’, *The NCLOS Blog* (7 September 2016).

²²⁰ A. Elferink, ‘The South China Sea Arbitration’s Interpretation of Article 121(3) of the LOSC: A Disquieting First’, *The NCLOS Blog* (7 September 2016).

²²¹ M. Nordquist, ‘UNCLOS Article 121 and Itu Aba in the South China Sea Final Award: a correct interpretation?’ in S. Jayakumar et al (eds), *The South China Sea Arbitration: The Legal Dimension* (NUS Centre for International Law Series 2018), p. 187.

²²² M. Nordquist, ‘UNCLOS Article 121 and Itu Aba in the South China Sea Final Award: a correct interpretation?’ in S. Jayakumar et al (eds), *The South China Sea Arbitration: The Legal Dimension* (NUS Centre for International Law Series 2018), p. 196.

of human and economic life on Itu Aba.²²³ As a result, Paik queries whether the SCS Tribunal contradicted its earlier finding that Article 121(3) calls for an inquiry of whether a feature has the capacity to sustain human habitation or an economic life, not an assessment of whether it actually does so.²²⁴

127. *Second*, commentators criticise the SCS Tribunal’s finding that a feature’s capacity to “sustain” is assessed on “the basis of its natural capacity, without external additions or modifications intended to increase its capacity to sustain human habitation or an economic life of its own”.²²⁵ Nordquist states that neither the text nor the negotiating history of Article 121(3) support this finding.²²⁶ He argues that States are not precluded from making ordinary improvements to maritime features to facilitate sustainability and indeed many places around the world that were originally inhospitable have been improved by human modification, innovation, and adaptation.²²⁷ In this regard, Nordquist is highly critical that the SCS Tribunal did not take into account human development on Itu Aba (which, he says, led to the SCS Tribunal’s (incorrect) conclusion that Itu Aba is a “rock”).²²⁸

(e) *State practice*

128. One of strongest lines of criticism against the 2016 Award is the lack of coherence between the SCS Tribunal’s restrictive interpretation of Article 121 on the one hand, and existing State practice (discussed above), on the other.
129. Just two paragraphs from the 2016 Award focus on State practice in the context of

²²³ J. Paik, ‘South China Sea Arbitral Awards: Main Findings and Assessment’, *Max Planck Yearbook of United Nations Law*, vol. 20(1) (2017), p. 404.

²²⁴ J. Paik, ‘South China Sea Arbitral Awards: Main Findings and Assessment’, *Max Planck Yearbook of United Nations Law*, vol. 20(1) (2017), p. 404

²²⁵ 2016 Award, para. 541.

²²⁶ M. Nordquist, ‘UNCLOS Article 121 and Itu Aba in the South China Sea Final Award: a correct interpretation?’ in S. Jayakumar et al (eds), *The South China Sea Arbitration: The Legal Dimension* (NUS Centre for International Law Series 2018), p. 196.

²²⁷ M. Nordquist, ‘UNCLOS Article 121 and Itu Aba in the South China Sea Final Award: a correct interpretation?’ in S. Jayakumar et al (eds), *The South China Sea Arbitration: The Legal Dimension* (NUS Centre for International Law Series 2018), p. 196.

²²⁸ M. Nordquist, ‘UNCLOS Article 121 and Itu Aba in the South China Sea Final Award: a correct interpretation?’ in S. Jayakumar et al (eds), *The South China Sea Arbitration: The Legal Dimension* (NUS Centre for International Law Series 2018), pp. 196-197.

Article 121, one of which discusses the law. In the sole paragraph of the 2016 Award which purports to determine the existence of State practice in relation to Article 121, the SCS Tribunal states, without any further detail, that “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”.²²⁹ Yet, as recently confirmed by the ICJ in its Advisory Opinion on the *Right to Strike under ILO Convention No. 87*, State practice may inform the interpretation of a treaty as a supplementary means of interpretation irrespective of whether or not it is sufficient to establish an agreed interpretation of the treaty.²³⁰

130. By focusing on the absence of *agreed* State practice, the SCS Tribunal sidestepped a more general discussion of how certain States have interpreted and applied Article 121. In so doing, it elided the general practice of States, which, to use the words of one scholar, seems:

[...] overwhelmingly to involve claims of EEZs from very small islands, and conversely very few cases in which a state refrains from claiming an EEZ because it considers a feature to be an Article 121(3) “rock.” Moreover, of the countless islands in the world from which an EEZ or continental shelf is asserted, in the vast majority of cases other states have not objected, even when they have been directly involved in relevant international discussions. This has been true in a range of contexts, including reactions to published maritime limits by coastal states, delimitation of maritime boundaries, submissions to the Commission on the Limits of the Continental Shelf, consideration of coastal state measures in Particularly Sensitive Sea Areas at the International Maritime Organization (which has over 170 member states), and elsewhere.²³¹

131. Even if it were correct that there was no *agreement* among States on the proper meaning of Article 121(3) in the lead up to the 2016 Award (which some

²²⁹ 2016 Award, para. 553.

²³⁰ *Right to Strike under ILO Convention No. 87*, Advisory Opinion, 21 May 2026, paras. 77 & 112-115.

²³¹ Remarks by Oliver Lewis, *ASIL Proceedings 2018*, p. 11.

commentators suggest),²³² this does not vitiate the need to look at how States have interpreted and applied Article 121 of UNCLOS generally. As the position above shows, there is a large body of evidence that States interpret and apply Article 121(3) in a manner that does not reflect the SCS Tribunal's reading of that provision.

132. A remarkable number of scholars have highlighted the limited consideration of State practice in the SCS Tribunal's interpretation of Article 121(3), including Gilbert Guillaume (2019, 2021),²³³ Myron Nordquist (2018),²³⁴ Joanna Mossop (2017, 2018),²³⁵ Christopher Whomersely (2021),²³⁶ Alexandre Pereira da Silva (2020, describing the steps Brazil took to generate its (excessive) claim from the St. Peter and St. Paul Archipelago),²³⁷ Stefan Talmon (2017),²³⁸ Alex Oude Elferink (2016),²³⁹ Oliver Lewis (2018),²⁴⁰ Michael Sheng-ti Gau (2019),²⁴¹ Yann-Huei Song (2018),²⁴²

²³² See, e.g., Remarks by Joanna Mossop, *ASIL Proceedings 2018*, p. 12. Mossop generally opposes the SCS Tribunal's findings on Article 121(3), but agrees with the SCS Tribunal's finding that there is no consistent State practice in applying Article 121(3) that would reach the level of an agreement of UNCLOS parties.

²³³ G. Guillaume, 'Îles, rochers et hauts-fonds découvrants en droit de la mer' (2019) 65 *Annuaire français de droit international* 513, p. 522; G. Guillaume, 'Rocks in the Law of the Sea: Some comment on the South China Sea Arbitration Award', *EJIL:Talk!* (25 February 2021), [Rocks in the Law of the Sea: Some comments on the South China Sea Arbitration Award – EJIL: Talk!](#).

²³⁴ M. Nordquist, 'UNCLOS Article 121 and Itu Aba in the South China Sea Final Award: a correct interpretation?' in S. Jayakumar et al (eds), *The South China Sea Arbitration: The Legal Dimension* (NUS Centre for International Law Series 2018), p. 203.

²³⁵ Remarks by Joanna Mossop, *ASIL Proceedings 2018*; J. Mossop, 'The South China Sea Arbitration and New Zealand's Maritime Claims' (2017) 15(2) *New Zealand Journal of Public and International Law* 265, pp. 282-284.

²³⁶ C. Whomersley, 'The South China Sea Arbitration and its Implications' in Keyuan Zhou (ed), *Routledge Handbook of the South China Sea* (Routledge, 2021), p. 443.

²³⁷ A. Silva, 'From Rocks to an Archipelago: The Brazilian Interpretation and Application of Article 121 of the United Nations Convention on the Law of the Sea With Respect to the St. Peter and St. Paul Insular Features' (2020) 51 *Ocean Development & International Law* 330.

²³⁸ S. Talmon, 'Article 121' in Alexander Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Beck/Hart, 2017), p. 872.

²³⁹ A. Elferink, 'The South China Sea Arbitration's Interpretation of Article 121(3) of the LOSC: A Disquieting First', *The NCLOS Blog* (7 September 2016).

²⁴⁰ Remarks by Oliver Lewis, *ASIL Proceedings 2018*.

²⁴¹ M. Gau, 'The Interpretation of Article 121(3) of UNCLOS by the Tribunal for the South China Sea Arbitration: A Critique' (2019) 50(1) *Ocean Development & International Law* 49, p. 62.

²⁴² Y. Song, 'The July 2016 Arbitral Award, Interpretation of Article 121(3) of the UNCLOS, and Selecting Examples of Inconsistent State Practices' (2018) 49(3) *Ocean Development & International Law* 247.

Natalie Klein (2016),²⁴³ and Kate Parlett (2022, together with Klein),²⁴⁴ meaning there is a significant and sustained body of literature against this aspect of the 2016 Award.

133. Equally remarkable is the number of excessive claims highlighted by many of these scholars, namely those of the United States;²⁴⁵ France;²⁴⁶ Brazil;²⁴⁷ Australia;²⁴⁸ New Zealand;²⁴⁹ Chile;²⁵⁰ Costa Rica;²⁵¹ Japan;²⁵² Kiribati;²⁵³ Mexico;²⁵⁴ Norway;²⁵⁵ Portugal;²⁵⁶ South Africa.²⁵⁷ Some of these examples, and others, have been elaborated on in Section II above.
134. The SCS Tribunal’s neglect of State practice has been boiled down by Nordquist into the claim that “the Tribunal overreached its legitimate mandate and denied well-founded and accepted facts before it, by injecting doctrines not rooted in UNCLOS or state practice”.²⁵⁸ Joanna Mossop is also particularly strong in highlighting how the SCS Tribunal’s interpretation of Article 121 risks “invalidating 40 years of state

²⁴³ N. Klein, ‘Islands and Rocks after the South China Sea Arbitration’ (2016) 34 *Australian Year Book of International Law* 21, pp. 27-29.

²⁴⁴ N. Klein and K. Parlett, *Judging the Law of the Sea* (Oxford University Press, 2022), p. 169.

²⁴⁵ Johnson Atoll, Jarvis Island, Palmyra Atoll, Kingman Reef, Wake Island, Howland and Baker Islands, Maro Reef.

²⁴⁶ Clipperton Island, Matthew Island, Kerguelen Islands, Crozet Islands, Amsterdam Island.

²⁴⁷ St. Peter and St. Paul Archipelago, Trindade and Martim Vaz.

²⁴⁸ Heard Island, McDonald Island, Elizabeth and Middleton Reefs, Macquarie Island.

²⁴⁹ Auckland Island, Campbell Island, Bounty Island, Antipodes Islands, Kermadec Islands.

²⁵⁰ Isla Salas y Gómez, Desventuradas Islands.

²⁵¹ Isla del Coco.

²⁵² Minamitori-shima.

²⁵³ McKean Island.

²⁵⁴ Isla Clarión and Roca Partida.

²⁵⁵ Bouvet, Peter I Islands.

²⁵⁶ Ilhas Selvagens.

²⁵⁷ Prince Edward Islands.

²⁵⁸ M. Nordquist, ‘UNCLOS Article 121 and Itu Aba in the South China Sea Final Award: a correct interpretation’ in S. Jayakumar et al (eds), *The South China Sea Arbitration: The Legal Dimension* (NUS Centre for International Law Series 2018), p. 188.

practice”.²⁵⁹ She suggests that the SCS Tribunal’s failure to discuss examples of State practice is all the more important due to the general lack of clarity in the UNCLOS negotiating records.²⁶⁰

135. By contrast, Prof Clive Schofield does not find this line of criticism persuasive. Whilst acknowledging a “considerable gap” between State practice and the standard established by the SCS Tribunal, Schofield downplays the importance of that gap for two main reasons.²⁶¹ *First*, he suggests that State practice on the issue of islands is not uniform (thus defending the SCS Tribunal’s conclusion that there has not been agreement among States concerning the interpretation of Article 121).²⁶² *Second*, he deems it unsurprising that States would seize upon ambiguously drafted rules to make excessive claims, but suggests this does not disentitle a court or tribunal from rejecting excessive claims. As a point of comparison, Schofield highlights that, notwithstanding there being a tendency among States to make excessive straight baseline claims, in *Qatar v. Bahrain*, the ICJ “showed little compunction” in discounting State practice and restrictively applying the relevant provisions of UNCLOS.²⁶³

136. As the above subsections show, a significant body of commentary – if not the majority of commentary – has flatly rejected the interpretation and application of Article 121 of UNCLOS in the 2016 Award. What is more, even those commentators who argue that the SCS Tribunal’s interpretation of Article 121 carries legal weight have been qualified in their assessments, acknowledging that it is “not free of some

²⁵⁹ J. Mossop, ‘The *South China Sea* Arbitration and New Zealand’s Maritime Claims’ (2017) 15(2) *New Zealand Journal of Public and International Law* 265, p. 283.

²⁶⁰ Remarks by Joanna Mossop, *ASIL Proceedings 2018*, p. 13. Indeed, the SCS Tribunal itself noted that the UNCLOS negotiating records were only an “imperfect guide” when it comes to Article 121(3), particularly because “the key compromise that produced the ultimate formulation [...] was reached through informal consultations in 1975, for which no records were kept”, 2016 Award, para. 534.

²⁶¹ C. Schofield, *The Regime of Islands Reframed: Developments in the Definition of Islands under the International Law of the Sea* (Brill, 2021), pp. 82-83.

²⁶² C. Schofield, *The Regime of Islands Reframed: Developments in the Definition of Islands under the International Law of the Sea* (Brill, 2021), p. 83.

²⁶³ C. Schofield, *The Regime of Islands Reframed: Developments in the Definition of Islands under the International Law of the Sea* (Brill, 2021), p. 83.

controversy”.

137. Thus, Churchill, Lowe, and Sander, in the 2022 edition of what is considered a leading law of the sea text, state as follows:

The award in the South China Sea case, and the tribunal’s interpretation of article 121(3), are formally binding only on the parties to the case (China and the Philippines). However, given its thoroughness and the fact that it is the only detailed judicial consideration of article 121(3) to date, the tribunal’s interpretation, even though not free of some controversy, would seem to have considerable persuasive weight.²⁶⁴

138. This passage is open to criticism for several reasons. For one, the fact that a judicial inquiry is thorough and unique does not necessarily mean it is correct. Noticeably, Churchill, Lowe, and Sander do not opine that the SCS Tribunal’s interpretation of Article 121 is correct. Furthermore, whilst the commentators note that in *Costa Rica v. Nicaragua* (discussed above) “the ICJ did not mention the *South China Sea* case nor suggest how article 121(3) should be interpreted”,²⁶⁵ they do not indicate how this impacts the “persuasive weight” of the 2016 Award. As has been reiterated throughout this section, the fact that the interpretation of Article 121 offered by the SCS Tribunal has not been endorsed or even mentioned in subsequent ICJ cases is an important yardstick by which the 2016 Award’s limited impact on the law of the sea can be measured.

B. The SCS Tribunal’s approach to historic rights and traditional fishing rights

139. In the 2016 Award, the SCS Tribunal started its analysis finding that UNCLOS comprehensively allocates rights to maritime areas, and that protections for pre-existing rights to resources were considered, but (with only limited exceptions) not adopted in the UNCLOS.²⁶⁶ Accordingly, the SCS Tribunal concluded that, to the extent China had historic rights to resources in the waters of the South China Sea that

²⁶⁴ R. Churchill, V. Lowe, and A. Sander, *The law of the sea* (4th edn, Manchester University Press, 2022), p. 97.

²⁶⁵ R. Churchill, V. Lowe, and A. Sander, *The law of the sea* (4th edn, Manchester University Press, 2022), p. 97.

²⁶⁶ 2016 Award, para. 257-262.

had subsequently become part of the EEZ under UNCLOS, such rights were extinguished. The SCS Tribunal also noted that, although Chinese navigators and fishermen, as well as those of other States, had historically made use of the islands in the South China Sea, there was no evidence that China had historically exercised exclusive control over the waters or their resources.

140. As a result, the 2016 Award reached two main findings on the subject of historic maritime claims. *First*, as UNCLOS defined the scope of maritime entitlements in the South China Sea, the SCS Tribunal rejected China's claims to historic rights in the area referred to as the "nine-dash line". *Second*, it adjudged that Scarborough Shoal (a high-tide feature) had been a traditional fishing ground for, *inter alia*, Filipino fishermen, and that China had unlawfully prevented Filipino fishermen from exercising their traditional fishing rights in the surrounding (territorial sea) waters from May 2012 onwards.

(i) The SCS Tribunal's approach to historic and traditional fishing rights has been avoided in jurisprudence since the 2016 Award

141. The passages of the 2016 Award analysing historic rights in the context of UNCLOS have been celebrated by some as representing the first time that an international arbitral tribunal or court has addressed these issues in detail.²⁶⁷ However, whilst the 2016 Award may have engaged with areas of the law not previously elaborated upon by the international judiciary, the conclusions reached by the SCS Tribunal on historic and traditional fishing rights have generally not been relevant in subsequent cases and, where they have, the findings have not gained traction. This fact further limits the overall persuasiveness of the SCS Tribunal's rulings and the extent to which the 2016 Award can be said to have influenced the law of the sea.

142. No case since the *South China Sea Arbitration* has centred on the issue of historic

²⁶⁷ See, e.g., C. Symmons, 'Historic rights in the light of the Award in the *South China Sea Arbitration*: what remains of the doctrine now?', in S. Jayakumar et al (eds), *The South China Sea Arbitration: The Legal Dimension* (NUS Centre for International Law Series 2018), p. 102 ("Consequently, I welcome the findings of the Arbitral Tribunal on the matter of historic maritime claims. This is because the question of historic maritime claims in the contemporary law of the sea, having arisen for adjudication in a very direct fashion, has at last received a detailed consideration from an international adjudicative body *in the context of UNCLOS*, rather than in a non-UNCLOS-based context [...]") (emphasis in original); C. Symmons, *Historic Rights and Historic Waters in the Law of the Sea: A Modern Reappraisal* (2nd ed, Brill 2019), p. 1 (stating that "the meaning of [historically based rights]" was "commendably clarified in the *Philippines v China Award*").

maritime claims and historic rights,²⁶⁸ and the related aspects of the 2016 Award that addressed China's nine-dash line are, of course, unique to the situation in the South China Sea.

143. Traditional fishing rights in the EEZ, however, were a central issue in the *NICOL III* case between Nicaragua and Colombia. Here, Colombia filed counterclaims against Nicaragua, claiming, *inter alia*, that Nicaragua had violated the traditional fishing rights of the Raizales, the indigenous inhabitants of the San Andrés Archipelago, in areas that had been delimited by the ICJ in *NICOL I* as forming part of Nicaragua's EEZ.²⁶⁹ Colombia's claim was premised on the assumption that Colombian fishermen enjoyed traditional fishing rights in the areas concerned, as a matter of customary international law.
144. In its Reply of 15 May 2018, Nicaragua argued that the inhabitants of the San Andrés Archipelago "do not and cannot enjoy artisanal fishing rights in Nicaragua's EEZ" because, even if those rights had existed (which Nicaragua said they did not), they "were extinguished with the creation of the EEZ regime".²⁷⁰
145. It will be recalled that the SCS Tribunal in the 2016 Award found that the drafters of UNCLOS did not intend to preserve traditional fishing rights in the EEZ.²⁷¹ This finding of the SCS Tribunal is thus of clear relevance to Nicaragua's case, even though customary international law, not UNCLOS, applied in the *NICOL III* case (as Colombia is not an UNCLOS party). However, discussion of the 2016 Award was conspicuously absent from the dedicated section in Nicaragua's Reply, particularly the section explaining how jurisprudence supports the claim that the EEZ regime extinguished traditional fishing rights in that maritime zone.
146. Nicaragua cited the 2016 Award just twice in its Reply, endorsing the test outlined

²⁶⁸ Although the arbitration between Croatia and Slovenia did involve issues relating to historic bays.

²⁶⁹ See, e.g., *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Counter-Memorial of Colombia, 17 November 2016, paras. 1.10, 9.4.

²⁷⁰ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Reply of Nicaragua, 15 May 2018, para. 6.5.

²⁷¹ 2016 Award, para. 804(b).

by the SCS Tribunal for the formation of historic rights under international law,²⁷² as well as the SCS Tribunal's finding that the exercise of freedoms permitted under international law cannot give rise to a historic right.²⁷³ In this regard, while Nicaragua did refer to aspects of the SCS Tribunal's reasoning relating to the Chinese nine-dash line (Section V of the 2016 Award), it did not cite to any part of the 2016 Award's discussion of traditional fishing rights in the South China Sea (Section VII.C of the 2016 Award). This is, again, despite the seemingly obvious relation between that part of the 2016 Award and matters at issue in the *NICOL III* case.

147. Colombia subsequently raised the 2016 Award in its Rejoinder. It focused on three paragraphs of the 2016 Award in which the SCS Tribunal established that traditional fishing activities had been occurring in areas of territorial sea around Scarborough Shoal. Using these paragraphs, Colombia: (i) criticised Nicaragua for attempting to heighten the threshold for establishing the existence of traditional fishing rights, stating the 2016 Award formed part of "consistent jurisprudence" on this matter;²⁷⁴ and (ii) suggested (with implicit approval) that the Court should follow the SCS Tribunal's "common sense" approach to matters of proof in establishing the existence of traditional fishing rights in the 2016 Award.²⁷⁵
148. In Nicaragua's Additional Pleading on Colombia's counterclaims, the 2016 Award was mentioned on a handful of occasions, in support of two main arguments. *First*, Nicaragua stated that whilst the 2016 Award indicated that evidencing traditional fishing rights should be handled with sensitivity, the SCS Tribunal did not go so far as to lower the standard of proof.²⁷⁶ *Second*, Nicaragua distinguished between fishing

²⁷² *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Reply of Nicaragua, 15 May 2018, para. 6.59, citing 2016 Award, para. 265 ("The formation of 'historic rights' in international law requires 'the continuous exercise of the claimed right by the State asserting the claim and acquiescence on the part of other affected States'").

²⁷³ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Reply of Nicaragua, 15 May 2018, para. 6.60, citing 2016 Award, para. 268.

²⁷⁴ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Rejoinder of Colombia, 11 February 2019, para. 5.4, citing 2016 Award, paras. 805-807.

²⁷⁵ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Rejoinder of Colombia, 11 February 2019, para. 5.36, citing 2016 Award, para. 805.

²⁷⁶ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Nicaragua's Additional Pleading, para. 2.44, citing 2016 Award, para. 805.

at Cape Bank, which one affiant said had occurred since the 1980s and 1990s, and fishing in the South China Sea context, which had been “carried out for generations”,²⁷⁷ as part of its argument that traditional fishing rights cannot crystallise over a timeframe of five decades or less.

149. During the oral proceedings, Nicaragua emphasised that it would be incongruous for another State (or another State’s nationals) to have traditional fishing rights in a coastal State’s “*exclusive*” economic zone (emphasis added).²⁷⁸ Nicaragua further highlighted a statement from the Court in the *Gulf of Maine* case that, following the birth of the EEZ regime, “[t]hird States and their nationals found themselves deprived of any right of access to the sea areas within those zones”.²⁷⁹ Nicaragua posited that this pronouncement reflected the Court’s agreement that only coastal States can fish in their own EEZs. Finally, Nicaragua argued that the text of UNCLOS, including Article 62(3), and the UNCLOS *travaux* support the proposition that traditional fishing rights do not exist in the EEZ.²⁸⁰ Initially, Nicaragua did not invoke the 2016 Award (which even Colombia highlighted in its oral response).²⁸¹ However, in the second round of its oral pleadings, it did raise the *South China Sea Arbitration*, stating that the 2016 Award “specifically addressed the question of whether traditional rights could exist in the EEZ and decisively concluded that they could not”.²⁸²
150. In response, Colombia highlighted that Nicaragua’s position was inconsistent with the *Eritrea/Yemen* arbitration, in which the tribunal stated “traditional fishing [...] is not limited to [...] territorial waters” and “is not qualified by the maritime zones

²⁷⁷ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Nicaragua’s Additional Pleading, fn. 96, citing 2016 Award, para. 806.

²⁷⁸ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, CR 2021/16, Martin, pp. 18-19, para. 7.

²⁷⁹ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, CR 2021/16, Martin, p. 19, paras. 8-11, citing *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment, I.C.J. Reports 1984, pp. 341-342, para. 235.

²⁸⁰ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, CR 2021/16, Martin, pp. 20-23.

²⁸¹ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, CR 2021/18, Valencia-Ospina, pp. 59-60, para. 26.

²⁸² *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, CR 2021/19, Martin, pp. 14-15, para. 20.

specified under [...] [UNCLOS]”.²⁸³ Additionally, Colombia suggested that Nicaragua read too much into the *Gulf of Maine* case, which “was *not* about traditional fishing rights” (emphasis in original), and disputed Nicaragua’s presentation of the UNCLOS text and *travaux*.²⁸⁴ On this latter point, Colombia highlighted that Article 62(3) of UNCLOS deals with habitual, not traditional fishing.²⁸⁵ Colombia also flagged that the UNCLOS preamble specifically indicates that “matters not regulated” by UNCLOS “continue to be governed by the rules and principles of general international law”,²⁸⁶ arguing that traditional fishing rights is one such unregulated matter.

151. In deciding this case, the Court chose to distil Colombia’s claim regarding traditional fishing rights into “two main contentions”: *first*, that Colombian fishermen have for centuries fished in locations now falling within Nicaragua’s EEZ, giving rise to customary rights of access and exploitation to fisheries; and *second*, that Nicaragua’s President accepted the existence of those rights through statements. The ICJ found that the affidavit and other evidence supplied by Colombia was not sufficient to establish that there was “a constant practice of artisanal fishing spanning many decades or centuries” in areas of the sea that became the Nicaraguan EEZ,²⁸⁷ and that Nicaragua’s President had not accepted the existence of those purported traditional fishing rights. In dealing with this case on the facts, the Court did not directly address the threshold legal issue of whether traditional fishing rights can exist within the EEZ regime under customary international law,²⁸⁸ despite the parties’ clear division on this

²⁸³ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, CR 2021/18, Valencia-Ospina, p. 57, para. 19, citing *Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation)*, Decision of 17 December 1999, RIAA, Vol. XXII, p. 361, para. 109.

²⁸⁴ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, CR 2021/18, Valencia-Ospina, pp. 58-59, paras. 22-25.

²⁸⁵ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, CR 2021/18, Valencia-Ospina, p. 59, para. 25.

²⁸⁶ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, CR 2021/18, Valencia-Ospina, p. 59, para. 26.

²⁸⁷ *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2022, pp. 348-352, paras. 218-224.

²⁸⁸ F. Anggadi, C. Goodman, N. Klein and D. Rothwell, ‘Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea: Implications for the Customary International Law of the Sea’, (2023) 54(3) *Ocean Development & International Law* 277, p. 289.

issue, and the fact that the Court arguably could have done so with reference to 2016 Award.

152. A group of leading Australian commentators have queried whether the ICJ “effectively put the cart before the horse” by assessing whether Colombian fishermen possessed traditional fishing rights before establishing whether under customary international law traditional fishing rights could even exist in the EEZ.²⁸⁹ This illuminates a curious divergence in the ICJ’s handling of the *NICOL II* and *NICOL III* cases. In *NICOL II*, the ICJ bifurcated the proceedings to address matters of law. It decided the case having heard the parties’ arguments on the law, without engaging with issues like the status and entitlement of certain maritime features. In so doing, it obviated the need for it to apply the rules of customary international law reflecting Article 121 of UNCLOS (during which it would have had to engage with the interpretation of this provision in the 2016 Award).²⁹⁰ By contrast, in *NICOL III*, the ICJ chose to decide the dispute by focusing on matters of fact (whether Colombian fishermen possessed traditional fishing rights), without engaging with seemingly threshold legal questions (on which the SCS Tribunal had commented in the 2016 Award). Thus, the Court appears to have found a way to avoid detailed discussion of the 2016 Award.

153. The Declaration of Judge Xue in the *NICOL III* did discuss traditional fishing rights in the EEZ regime (albeit, like the majority, without reference to the 2016 Award), finding that such rights “are recognized and protected under customary international law”.²⁹¹ Judge Xue appeared to directly refute findings reached in the 2016 Award. In the 2016 Award, the SCS Tribunal stated that Article 62(3) of UNCLOS “confirms that the drafters of the Convention did not intend to preserve [traditional fishing] rights”, because that provision requires a coastal State to pay regard to “the need to

²⁸⁹ F. Anggadi, C. Goodman, N. Klein and D. Rothwell, ‘Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea: Implications for the Customary International Law of the Sea’ (2023) 54(3) *Ocean Development & International Law* 277, pp. 292-293.

²⁹⁰ The ICJ has held that all three limbs of Article 121 of UNCLOS reflect customary international law, see *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, *I.C.J. Reports* 2012, pp. 689-690, paras. 176-177.

²⁹¹ Declaration of Judge Xue, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, *I.C.J. Reports* 2022, para. 2.

minimize economic dislocation in States whose nationals have habitually fished in the zone”.²⁹² Whilst Judge Xue acknowledged that the notion of “habitual fishing” may encompass some traditional fishing activities, she posited that it cannot be taken to capture “all situations relating to traditional fishing rights”.²⁹³ In this regard, she appears to have agreed with Colombia’s position.

154. Furthermore, pointing to the ICJ’s prior jurisprudence, Judge Xue remarked that pre-existing rights under customary international law, such as traditional fishing rights, continue to exist and apply under customary international law unless and until they are explicitly negated by treaty law or new customary rules.²⁹⁴ She also highlighted the ICJ’s finding that where a treaty influences a customary rule, but does not regulate all aspects of that rule, “customary international law continues to exist alongside treaty law”.²⁹⁵ These points underpinned Judge Xue’s conclusion that “[t]he advent of the régime of the exclusive economic zone, as set forth in UNCLOS, does not by itself extinguish traditional fishing rights that may be found to exist under customary international law”.²⁹⁶ This directly opposes the overarching conclusion in the 2016 Award that “[i]n the exclusive economic zone, [...] traditional fishing rights are extinguished [...]”.²⁹⁷
155. The fact that the majority of the ICJ sidestepped the question of whether traditional fishing rights can exist in the EEZ under customary international law in *NICOL III* suggests that this area of law is still subject to significant uncertainty. The majority of the ICJ impliedly distanced itself from the SCS Tribunal’s attempts to take a firm

²⁹² 2016 Award, para. 804(b); UNCLOS, art 62(3).

²⁹³ Declaration of Judge Xue, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, I.C.J. Reports 2022, para. 8.

²⁹⁴ Declaration of Judge Xue, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, I.C.J. Reports 2022, para. 9, citing *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 424, para. 73.

²⁹⁵ Declaration of Judge Xue, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, I.C.J. Reports 2022, para. 9, citing *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 94, para. 176.

²⁹⁶ Declaration of Judge Xue, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, I.C.J. Reports 2022, para. 9.

²⁹⁷ 2016 Award, para. 804(b).

position on this issue, whilst Judge Xue directly refuted the findings reached by the SCS Tribunal. This clearly demonstrates that the 2016 Award has not influenced the law on this particular issue. Indeed, if it had, the ICJ would have had no need to sidestep dealing with this legal question.

(ii) The SCS Tribunal's approach to historic and traditional fishing rights has been criticised in commentary since the 2016 Award

156. This sub-section summarises the key themes arising in the commentary on historic rights and traditional fishing rights in the decade since the 2016 Award was issued. It will be seen that a range of commentators have criticised the 2016 Award's findings on these two topics, and on several fronts.

(a) *Historic rights*

157. The commentary on the historic rights aspects of the 2016 Award is generally mixed. On the one hand, commentators are generally supportive of the manner in which the SCS Tribunal defined "historic rights" and other types of historic maritime claim. On the other hand, several scholars have overtly criticised the SCS Tribunal's reasoning in determining that China's nine-dash line is contrary to UNCLOS and without lawful effect, which has generated responsive commentary defending the SCS Tribunal's reasoning.

1. The SCS Tribunal's definition of "historic rights"

158. Several prominent scholars have defended the manner in which the SCS Tribunal defined "historic rights" and other types of historic maritime claims.

159. Clive Symmons, who is considered a leading authority on historic maritime claims, is particularly supportive of the SCS Tribunal's attempts to give meaning to the term "historic rights", which he says was "commendably clarified" in the 2016 Award.²⁹⁸ Specifically, Symmons endorses the SCS Tribunal's attempts to clearly distinguish between the terms "historic waters", "historic rights" and "historic title".²⁹⁹ Taking

²⁹⁸ C. Symmons, *Historic Waters and Historic Rights in the Law of the Sea: A Modern Reappraisal* (2nd ed, Brill, 2019), p. 1.

²⁹⁹ C. Symmons, *Historic Waters and Historic Rights in the Law of the Sea: A Modern Reappraisal* (2nd ed, Brill, 2019), pp. 12-13. *See also Ibid*, p. 71

the SCS Tribunal’s definition of “historic waters” (*i.e.*, “simply a term for historic title over maritime areas”),³⁰⁰ Symmons notes this goes further than previous definitions offered by the ICJ,³⁰¹ and rejects attempts by other commentators to argue that SCS Tribunal erred in tying the definition of “historic waters” to notions of sovereignty.³⁰² By extension, Symmons also appears to support the SCS Tribunal’s interpretation of Article 298 of UNCLOS (which excludes a court of tribunal’s jurisdiction over disputes involving historic bays or historic titles).³⁰³

160. Prof Yoshifumi Tanaka appears similarly supportive of the SCS Tribunal’s work in defining “historic rights”. After excerpting the key definitional paragraph of the 2016 Award in his article, Tanaka goes on to state:

Given the lack of precision of the various “historic” concepts may entail the risk of encouraging States to make historic claims of increasing scope to marine spaces, the clarification of the concept of historic rights and that of historic title by the Tribunal can be thought to be a welcome development.³⁰⁴

161. In contrast to Symmons and Tanaka, some Chinese scholars have critiqued the manner in which the SCS Tribunal defined terms relating to “historic rights”. For instance, Prof Keyuan Zou takes issue with the SCS Tribunal’s definition of “historic

³⁰⁰ 2016 Award, para. 225.

³⁰¹ C. Symmons, *Historic Waters and Historic Rights in the Law of the Sea: A Modern Reappraisal* (2nd ed, Brill, 2019), pp. 6-7.

³⁰² C. Symmons, *Historic Waters and Historic Rights in the Law of the Sea: A Modern Reappraisal* (2nd ed, Brill, 2019), pp. 15-16.

³⁰³ C. Symmons, ‘Historic Waters and Historic Rights’ in *the Law of the Sea: A Modern Reappraisal* (2nd ed, Brill, 2019), pp. 23-24.

³⁰⁴ Y. Tanaka, ‘Reflections on Historic Rights in the *South China Sea* Arbitration (Merits)’ *International Journal of Marine and Coastal Law* vol. 32 (2017) 458, p. 466. At the conclusion of this article, Tanaka states “[i]t can be argued that the Tribunal, in the *South China Sea* arbitration, made a significant contribution to clarify the concept of historic rights and the relationship between historic rights and the Convention” (*Ibid*, p. 482). In a different piece, Tanaka wrote that the SCS Tribunal “made a clear distinction between the concept of historic title that refers to historic sovereignty to land or maritime areas, and that of historic rights that include more limited rights falling well short of a claim of sovereignty”. Tanaka went on to state “it would be fair to say that the Tribunal made a significant contribution to clarifying the two concepts”, Y. Tanaka, *South China Sea Arbitration: Toward an International Legal Order in the Oceans* (Hart Publishing, 2019), pp. 177-178.

title’’.³⁰⁵

2. The SCS Tribunal’s reasoning with regard to China’s nine-dash line has also been criticised by commentators

162. On the other hand, the reasoning employed by the SCS Tribunal in adjudicating China’s nine-dash line has been criticised by several commentators. To contextualise those criticisms, it is necessary to briefly recall the SCS Tribunal’s reasoning.
163. To begin its analysis of whether historic rights can be accommodated within UNCLOS, the SCS Tribunal raised Article 311 of UNCLOS (titled “*Relation to other conventions and international agreements*”). Before the terms of this provision were even set out, the SCS Tribunal held that it “applies equally to the interaction of [UNCLOS] with other norms of international law, such as historic rights, that do not take the form of an agreement”.³⁰⁶ The SCS Tribunal also raised Article 293(1) of UNCLOS (which permits a court or tribunal to apply UNCLOS and other compatible rules of international law) and Article 30 of the VCLT (which specifies that a later treaty generally prevails over a subsequent treaty, without indication to the contrary).
164. The SCS Tribunal then framed the required analysis as follows:
- a) Does UNCLOS expressly permit the claimed historic right (as it does with historic bays and historic titles in Articles 10 and 15).
 - b) If not, is the claimed historic right compatible with UNCLOS, meaning either it does not conflict with any provision of UNCLOS, or UNCLOS can be interpreted so as to preserve the right.
 - c) If the claimed historic right is compatible with UNCLOS, it is preserved (per Article 311(2) of UNCLOS).

³⁰⁵ K. Zou, ‘Historic Rights in the South China Sea Arbitration Case’ (2016) 1 *Asia-Pacific Journal of Ocean Law and Policy* 268, p. 269 (“The term ‘historic title’ ‘is used specifically to refer to historic sovereignty to land or maritime areas’. Here the tribunal uses the term ‘historic sovereignty’ (which is very rare in the literature of international law) for historic title. As the tribunal acknowledged that the United Nations viewed ‘historic title’ as ‘a process of acquiring a historic right’, the question here is: does ‘historic title’ only refer to ‘historic sovereignty’? The tribunal’s award adds confusion”).

³⁰⁶ 2016 Award, para. 235.

d) If the claimed historic right is not compatible with UNCLOS, it is not preserved (per the principles set out in Article 30(3) of the VCLT and Article 293 of UNCLOS).

165. Scholars have criticised this interpretive approach. Notably, Judge Paik (the former President of ITLOS) describes the SCS Tribunal's finding that Article 311 of UNCLOS applies to historic rights as "a significant extension" of the provision.³⁰⁷ Sophia Kopela queries the relevance of Articles 293 and 311 of UNCLOS, as well as Article 30 of the VCLT, to decide that China's nine-dash line claim cannot be accommodated within UNCLOS. On her view:

There is nothing in the reasoning of the Tribunal to explain why article 311, which explicitly refers to the relationship between [UNCLOS] and conventions and international agreements, could be analogically applied to the relationship between the LOSC and historic rights as rules of customary international law. Similarly, it is unclear why the Tribunal considered that article 30(3) of the Vienna Convention on the Law of Treaties (VCLT) would be applicable when this provision clearly refers to "successive treaties relating to the same subject matter." What is more, article 293 of the LOSC concerns dispute settlement and the applicable law and not the relationship between the LOSC and other rules of international law, including historic rights.³⁰⁸

166. Kopela is highly critical of the SCS Tribunal's decision to extinguish China's historic rights by implication. She notes that the key provision in UNCLOS which deals with the treaty's relationship with customary international law is its Preamble ("*matters not regulated by this Convention continue to be governed by the rules and principles of general international law*"), which the SCS Tribunal did not mention (an argument which Colombia also ran in *NICOL III*).³⁰⁹ Ultimately, she suggests that historic

³⁰⁷ J. Paik, 'South China Sea Arbitral Awards: Main Findings and Assessment', *Max Planck Yearbook of United Nations Law*, vol. 20(1) (2017), p. 402.

³⁰⁸ S. Kopela, 'Historic Titles and Historic Rights in the Law of the Sea in the Light of the South China Sea Arbitration' *Ocean Development & International Law*, vol. 48 (2017), p. 184. *See also* S. Kopela, 'Historic Rights in the South China Sea' in K. Zhou (ed), *Routledge Handbook of the South China Sea* (Routledge, 2021), p. 150.

³⁰⁹ S. Kopela, 'Historic Titles and Historic Rights in the Law of the Sea in the Light of the South China Sea Arbitration' *Ocean Development & International Law*, vol. 48 (2017), p. 184.

rights are *lex specialis* insofar as they are “established on the basis of a particularized regime”, meaning they “cannot be superseded by a general treaty without explicit reference [...]”.³¹⁰ As will be seen below, other commentators have offered similar comments about the SCS Tribunal’s termination of traditional fishing rights in the EEZ.³¹¹

167. Several Chinese commentators have made similar points to Kopela, including the Chinese Society of International Law,³¹² Ma,³¹³ and Ye.³¹⁴
168. Clive Symmons acknowledges the “controversy” of the ruling that Article 311 of UNCLOS extends to the interaction between UNCLOS and historic rights and describes this as an “arbitral ‘sleight of hand’”.³¹⁵ However, Symmons (who generally defends the historic rights elements of the 2016 Award) does not directly criticise the SCS Tribunal’s handling of Article 311 of UNCLOS. Likewise, Symmons does not criticise the SCS Tribunal for neglecting to discuss the Preamble of UNCLOS. In one piece, he only goes so far as to say (in a footnote) “[s]trangely perhaps, the Arbitral Tribunal never directly referred to the part of the UNCLOS Preamble that affirms that ‘matters not regulated by this convention continue to be governed by the rules and principles of general international law’”.³¹⁶

3. The 2016 Awards comments about the “comprehensiveness” of

³¹⁰ S. Kopela, ‘Historic Titles and Historic Rights in the Law of the Sea in the Light of the South China Sea Arbitration’ *Ocean Development & International Law*, vol. 48 (2017), p. 184.

³¹¹ See *infra*, para. 193.

³¹² Chinese Society of International Law, ‘The South China Sea Arbitration Awards: A Critical Study’, *Chinese Journal of International Law* 207, vol. 17(2) (2018), p. 472 (“the Convention does not fix the relationship between the Convention and general international law including rules regarding historic rights. The Tribunal maintained, the Convention provided comprehensive rules for resolving all issues relating to the law of the sea and it prevailed over rules of general international law inconsistent with it, by virtue of Articles 311, 293, and 309. This is wrong. Issues of historic rights are regulated by general international law”).

³¹³ M. Xinmin, ‘Merits Award Relating to Historic Rights in the South China Sea Arbitration: An Appraisal’, *Asian Journal of International Law*, vol. 8 (2018), pp. 16-17.

³¹⁴ Q. Ye, ‘Historic Rights in the South China Sea: A Chinese Perspective’ (2019) 7 *Korean Journal of International and Comparative Law* 208, p. 216.

³¹⁵ C. Symmons, *Historic Waters and Historic Rights in the Law of the Sea: A Modern Reappraisal* (2nd ed, Brill, 2019), p. 50.

³¹⁶ C. Symmons, ‘Historic rights in the light of the Award in the *South China Sea Arbitration*: what remains of the doctrine now?’ in S. Jayakumar et al (eds), *The South China Sea Arbitration: The Legal Dimension* (NUS Centre for International Law Series 2018), fn. 11.

UNCLOS have also been criticised by commentators

169. Another aspect of the SCS Tribunal's reasoning that has been picked up by critics is the proposition that UNCLOS's "comprehensiveness" as a piece of law justifies the extinguishment of traditional fishing rights in the EEZ regime. In looking at the provisions of UNCLOS to assess whether historic rights might have been extinguished, the SCS Tribunal repeatedly highlighted UNCLOS's comprehensiveness. For example, it stated:

the system of maritime zones created by [UNCLOS] was intended to be comprehensive and to cover any area of sea or seabed. The same intention for [UNCLOS] to provide a complete basis for the rights and duties of the States Parties is apparent in the Preamble, which notes the intention to settle "all issues relating to the law of the sea" and emphasises the desirability of establishing "a legal order for the sea." The same objective of limiting exceptions to [UNCLOS] to the greatest extent possible is also evident in Article 309, which provides that "[n]o reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention."³¹⁷

170. Symmons supports this aspect of the SCS Tribunal's reasoning, which is one of two main points he highlights when defending the overall conclusions of the 2016 Award on historic rights. Specifically, he agrees with the SCS Tribunal that UNCLOS was intended to be a comprehensive agreement on the oceans, and also that this can be gleaned from the Preamble and other provisions.³¹⁸
171. On the other hand, Kopela does not find UNCLOS's "comprehensiveness" a persuasive reason to extinguish historic rights. She suggests that the comprehensive nature of UNCLOS "does not presuppose that any previously established regimes were eliminated, especially since no provision was included to this effect".³¹⁹ In fact,

³¹⁷ 2016 Award, para. 245.

³¹⁸ C. Symmons, *Historic Waters and Historic Rights in the Law of the Sea: A Modern Reappraisal* (2nd ed, Brill, 2019), pp. 50-52.

³¹⁹ S. Kopela, 'Historic Titles and Historic Rights in the Law of the Sea in the Light of the South China Sea Arbitration' *Ocean Development & International Law*, vol. 48 (2017), p. 184; S. Kopela, 'Historic Rights and the South China Sea' in Keyuan Zhou (ed), *Routledge Handbook of the South China Sea* (Routledge, 2021), pp. 150-151.

her view is that whilst UNCLOS may have validated certain historic rights, “it cannot be inferred from the Convention or its *travaux préparatoires* that states intended for were willing to *generally* waive any pre-established historic rights”.³²⁰ Thus, the various reference to UNCLOS’s “comprehensiveness” across its provisions do not, for Kopela, justify the extinguishment of historic rights.

172. Similarly, Ma argues that the SCS Tribunal erroneously interpreted the Preamble to UNCLOS, and particularly the statement therein that UNCLOS aims to settle “all issues relating to the law of the sea”.³²¹ For Ma, this merely reflects the aspirations of UNCLOS States Parties, not the “status quo”.³²² To support the claim that UNCLOS does not address all issues relating to the law of the sea, Ma notes that a range of UNCLOS provisions refer to general international law (including the Preamble) and that prior judicial bodies applying UNCLOS have turned beyond UNCLOS to decide cases.³²³

4. The 2016 Award’s interpretation of UNCLOS provisions on the EEZ and continental shelf has also been criticised by commentators

173. Another area of debate between scholars is the SCS Tribunal’s interpretation of the provisions of UNCLOS dealing with the EEZ and continental shelf, which (together with the context of UNCLOS) are said by the SCS Tribunal to be “clear in superseding any historic rights that a State may once have had in the areas that now form part of the exclusive economic zone and continental shelf of another State”.³²⁴
174. Clive Symmons agrees with the SCS Tribunal that the provisions of UNCLOS relating to the EEZ (Article 62) and continental shelf (Article 77) supersede any

³²⁰ S. Kopela, ‘Historic Titles and Historic Rights in the Law of the Sea in the Light of the South China Sea Arbitration’ *Ocean Development & International Law*, vol. 48 (2017), p. 186.

³²¹ M. Xinmin, ‘Merits Award Relating to Historic Rights in the South China Sea Arbitration: An Appraisal’, *Asian Journal of International Law*, vol. 8 (2018), pp. 13-14, citing 2016 Award, para. 245.

³²² M. Xinmin, ‘Merits Award Relating to Historic Rights in the South China Sea Arbitration: An Appraisal’, *Asian Journal of International Law*, vol. 8 (2018), p. 14.

³²³ M. Xinmin, ‘Merits Award Relating to Historic Rights in the South China Sea Arbitration: An Appraisal’, *Asian Journal of International Law*, vol. 8 (2018), pp. 14-15 (referring to ITLOS in *M/V Saiga (Saint Vincent and the Grenadines v. Guinea)* and the arbitral tribunal in *Barbados v. Trinidad and Tobago*).

³²⁴ 2016 Award, para. 247.

historic rights a State once possessed, describing this as the SCS Tribunal’s “most telling and convincing verdict” on historic rights.³²⁵ For example, with respect to Article 62(3), Symmons construes this provision as giving the coastal State “an essentially unfettered discretion” in allocating its fishery resources to foreign fishermen.³²⁶ On this basis, Symmons agrees with the SCS Tribunal’s conclusion that “[UNCLOS] is clear in according sovereign rights to the living and non-living resources of the exclusive economic zone to the coastal State alone”.³²⁷ Symmons acknowledges that contrary views exist, but states that these views sacrifice clarity in the UNCLOS regime.³²⁸

175. On the other hand, Kopela argues that previously international courts and tribunals “have accepted the preservation of historic rights in parallel to the jurisdictional regime established by [UNCLOS]” (and, impliedly, the SCS Tribunal erred in its treatment of the EEZ and continental shelf provisions of UNCLOS).³²⁹ She references the ICJ’s judgments in *Tunisia/Libya*³³⁰ and *Gulf of Fonseca*,³³¹ which, on her view, stand for the proposition that “[s]ince historic rights and titles create a special regime related to the specific historic circumstances, it cannot be considered that historic claims can be phased out as a whole, but the history of each individual

³²⁵ C. Symmons, *Historic Waters and Historic Rights in the Law of the Sea: A Modern Reappraisal* (2nd ed, Brill, 2019), pp. 52-53.

³²⁶ C. Symmons, *Historic Waters and Historic Rights in the Law of the Sea: A Modern Reappraisal* (2nd ed, Brill, 2019), p. 53.

³²⁷ C. Symmons, *Historic Waters and Historic Rights in the Law of the Sea: A Modern Reappraisal* (2nd ed, Brill, 2019), p. 53.

³²⁸ C. Symmons, *Historic Waters and Historic Rights in the Law of the Sea: A Modern Reappraisal* (2nd ed, Brill, 2019), p. 54.

³²⁹ S. Kopela, ‘Historic Rights and the South China Sea’ in Keyuan Zhou (ed), *Routledge Handbook of the South China Sea* (Routledge, 2021), p. 151.

³³⁰ Sophia Kopela, ‘Historic Rights and the South China Sea’ in Keyuan Zhou (ed), *Routledge Handbook of the South China Sea* (Routledge, 2021), p. 151, citing *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, para. 100 (“Historic titles must enjoy respect and be reserved as they have always been by long usage”; “it seems clear that the matter continues to be governed by general international law which does not provide for a single ‘regime’ for ‘historic waters’ or historic bays but only for a particular regime for each of the concrete recognised cases of ‘historic waters’ or ‘historic bays’”).

³³¹ Sophia Kopela, ‘Historic Rights and the South China Sea’ in Keyuan Zhou (ed), *Routledge Handbook of the South China Sea* (Routledge, 2021), p. 151, citing *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, para. 384 (“clearly necessary [...] to investigate the particular history of the Gulf of Fonseca to discover what is the ‘regime’ of the Gulf resulting therefrom”).

case needs to be examined, taking into consideration [UNCLOS]’.³³²

176. Likewise, Ma finds the argument that the text of the EEZ and continental shelf provisions in UNCLOS override historic rights unavailing. In Ma’s eyes, these provisions and historic rights are “two separate legal regimes in the application of law”,³³³ with historic rights regulated only by general international law. Thus, according to Ma, the correct line of inquiry is not what the EEZ and continental shelf provisions say, but rather whether UNCLOS expressly eliminates any previously established legal regimes. Ma argues that the negotiating records of UNCLOS support this position.

(b) *Traditional fishing rights*

177. Leading commentary confirms that the question of whether traditional fishing rights can exist in the EEZ as a matter of law is still subject to significant uncertainty, notwithstanding the 2016 Award.
178. Referring to the ICJ’s decision in *NICOL III*, issued six years after the 2016 Award, Frances Anggadi and several other leading Australian commentators state that “[t]he Court’s failure to address the key legal question of whether traditional (or historic) fishing rights can exist as a matter of customary international law alongside the EEZ *perpetuates a lack of clarity on this issue in both the jurisprudence and the literature*” (emphasis added).³³⁴
179. For the abovementioned authors, the “lack of clarity” they observe manifests in two opposing schools of thought on the issue of traditional fishing rights in the EEZ:
- a) The “predominant” view (argued by Nicaragua in *NICOL III*), based on the *Gulf of Maine* case, is that “the exclusive sovereign rights of the coastal State over living resources in the EEZ extinguished historical rights of access to

³³² S. Kopela, ‘Historic Rights and the South China Sea’ in Keyuan Zhou (ed), *Routledge Handbook of the South China Sea* (Routledge, 2021), p. 151.

³³³ M. Xinmin, ‘Merits Award Relating to Historic Rights in the South China Sea Arbitration: An Appraisal’, *Asian Journal of International Law*, vol. 8 (2018), p. 18.

³³⁴ F. Anggadi, C. Goodman, N. Klein and D. Rothwell, ‘Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea: Implications for the Customary International Law of the Sea’ (2023) 54(3) *Ocean Development & International Law* 277, p. 290.

what had formerly been high sea fisheries”.³³⁵

- b) The contrary view (argued by Colombia in *NICOL III*, and which still enjoys “significant support” despite not being “predominant”) is that “historic rights should not be viewed as incompatible with UNCLOS (or the EEZ), but as exceptions recognized in customary international law”.³³⁶ This view is said to draw on cases such as *Tunisia/Libya* before the ICJ, *Eritrea/Yemen*, and the *Abyei* arbitration.

180. The authors go on to note that the 2016 Award “specifically rejected” the contrary view. However, they (i) do not cite the 2016 Award as a key pillar of the predominant view; and, more importantly, (ii) do not suggest the 2016 Award definitively settled the issue of traditional fishing rights in the EEZ. Quite the opposite, the authors note there is “significant support” for the contrary view and, as abovementioned, highlight a persistent “lack of clarity on this issue in both the jurisprudence and the literature”.³³⁷

181. Importantly, the authors received Judge Xue’s Declaration in *NICOL III* positively, stating it provides “helpful clarity” on the question of traditional fishing rights in the EEZ as a matter of customary international law.³³⁸ This is significant given that Judge Xue directly refutes the SCS Tribunal’s finding on traditional fishing rights in the EEZ.

182. The view that the 2016 Award did not foreclose the issue of traditional fishing rights in the EEZ has also been made by Sourabh Gupta. He notes that the divergent

³³⁵ F. Anggadi, C. Goodman, N. Klein and D. Rothwell, ‘Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea: Implications for the Customary International Law of the Sea’ (2023) 54(3) *Ocean Development & International Law* 277, p. 290.

³³⁶ F. Anggadi, C. Goodman, N. Klein and D. Rothwell, ‘Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea: Implications for the Customary International Law of the Sea’ (2023) 54(3) *Ocean Development & International Law* 277, p. 290.

³³⁷ F. Anggadi, C. Goodman, N. Klein and D. Rothwell, ‘Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea: Implications for the Customary International Law of the Sea’ (2023) 54(3) *Ocean Development & International Law* 277, p. 290.

³³⁸ F. Anggadi, C. Goodman, N. Klein and D. Rothwell, ‘Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea: Implications for the Customary International Law of the Sea’ (2023) 54(3) *Ocean Development & International Law* 277, p. 293.

conclusions reached by the *Eritrea/Yemen* tribunal, which found that traditional fishing rights could exist in the EEZ,³³⁹ and the SCS Tribunal, which did not, has meant that “legitimate debate clearly remains to be had over th[e] geographic scope” of traditional fishing rights.³⁴⁰

183. Importantly, the SCS Tribunal explained the fact that it reached the opposite conclusion to the *Eritrea/Yemen* tribunal by stating that the “[*Eritrea/Yemen*] tribunal was able to reach the conclusions it did only because it was permitted to apply factors other than the Convention itself”.³⁴¹ Indeed, Eritrea was not (and still is not) a party to UNCLOS, meaning the case was brought pursuant to an arbitration agreement which specified the applicable law as “the opinion that it will have formed on questions of territorial sovereignty [in the first of the two stages of the arbitration], the United Nations Convention on the Law of the Sea, and any other pertinent factor”.³⁴² By issuing findings on traditional fishing rights in the EEZ in a case brought specifically pursuant to UNCLOS, the SCS Tribunal was crossing new ground (meaning a parallel can be drawn between its work here, and its so-called “missionary work” on Article 121 of UNCLOS).
184. However, the fact that scholars suggest that there remains a debate on whether traditional fishing rights exist in the EEZ, despite the SCS Tribunal making the findings that it did, suggests commentators do not view the SCS Tribunal’s findings to be dispositive of this issue as a whole.
185. The ongoing debate on traditional fishing rights in the EEZ suggests that not all scholars were swayed by the SCS Tribunal. In fact, a number of aspects of the SCS Tribunal’s findings on traditional fishing rights have been overly criticised by leading

³³⁹ Colombia made this argument during the *NICOL III* case, *see supra* para. 150.

³⁴⁰ S. Gupta, ‘Historic Fishing Rights in Foreign Exclusive Maritime Zones: Preserved or Proscribed by UNCLOS?’ (2019) 7 *Korean Journal of International and Comparative Law* 226, p. 228. Later in the same article, Gupta also states “[i]t is no longer a question of *whether* these [historic] rights are protected and preserved by UNCLOS. They unequivocally are. The key outstanding issue that remains in dispute is the geographic scope of their exercise in foreign exclusive maritime zones”, *see Ibid.*, p. 239.

³⁴¹ 2016 Award, para. 803.

³⁴² 2016 Award, para. 259, *citing Sovereignty and Maritime Delimitation in the Red Sea (Eritrea/Yemen)*, Award of the Arbitral Tribunal in the Second Stage-Maritime Delimitation (17 December 1999), Annex I – The Arbitration Agreement.

scholars for several reasons.

186. *First* and foremost, commentators critique the manner in which the SCS Tribunal distinguished the *South China Sea* case from the *Eritrea/Yemen* arbitration, which allowed it to reach the opposite finding of the *Eritrea/Yemen* tribunal on traditional fishing rights in the EEZ.³⁴³ Sophia Kopela focuses on the SCS Tribunal’s statement that the *Eritrea/Yemen* tribunal “was empowered to—and in the Tribunal’s view did—go beyond the law on traditional fishing as it would exist under [UNCLOS]”.³⁴⁴ On her view, the suggestion that this occurred and could justify the SCS Tribunal’s opposite findings on traditional fishing rights is “unconvincing”.³⁴⁵ She recalls that the *Eritrea/Yemen* tribunal was specifically requested to apply UNCLOS in the arbitration and that, notwithstanding that it was also empowered to apply other factors, suggests that this would not give it a “*carte blanche* to apply whatever rules it considers relevant even when they are contrary to [UNCLOS]”.³⁴⁶ In a similar vein, Gupta states the SCS Tribunal “offered no satisfying reason, or defense, why the established jurisprudential basis by which non-exclusive ‘historic rights’ form in maritime spaces was, as of 12 July 2016, legally unsustainable”.³⁴⁷
187. *Second*, several scholars have critiqued the SCS Tribunal’s claim that Article 62(3) of UNCLOS supports the conclusion that UNCLOS extinguished traditional fishing rights in the EEZ. In summarising those criticisms, it is useful to recall the key finding made by the SCS Tribunal:

In the exclusive economic zone, in contrast [to archipelagic waters], traditional fishing rights are extinguished, except insofar as Article 62(3) specifies that “the need to minimize economic dislocation in States whose nationals have

³⁴³ It should be noted that the tribunal in *Eritrea/Yemen* considered elements of Islamic law as part of its analysis of traditional fishing rights. See *Sovereignty and Maritime Delimitation in the Red Sea (Eritrea/Yemen)*, Award of the Arbitral Tribunal in the Second Stage-Maritime Delimitation, paras. 87-112 (17 December 1999).

³⁴⁴ 2016 Award, para. 259.

³⁴⁵ S. Kopela, ‘Historic Titles and Historic Rights in the Law of the Sea in the Light of the South China Sea Arbitration’ *Ocean Development & International Law*, vol. 48 (2017), p. 194.

³⁴⁶ S. Kopela, ‘Historic Titles and Historic Rights in the Law of the Sea in the Light of the South China Sea Arbitration’ *Ocean Development & International Law*, vol. 48 (2017), p. 194.

³⁴⁷ S. Gupta, ‘Historic Fishing Rights in Foreign Exclusive Maritime Zones: Preserved or Proscribed by UNCLOS?’ (2019) 7 *Korean Journal of International and Comparative Law* 226, p. 247.

habitually fished in the zone” shall constitute one of the factors to be taken into account by the coastal State in giving access to any surplus in the allowable catch. The Tribunal considers the inclusion of this provision—which would be entirely unnecessary if traditional fishing rights were preserved in the exclusive economic zone—confirms that the drafters of the Convention did not intend to preserve such rights. The Convention does not, of course, preclude that States may continue to recognise traditional fishing rights in the exclusive economic zone in their legislation, in bilateral fisheries access agreements, or through regional fisheries management organisations. Such recognition would, in most instances, be commendable, but it is not required by the Convention, except to the extent specified in Article 62(3).³⁴⁸

188. Contesting this ruling, Gupta states that the “relevant factors” which a coastal State must take into account per Article 62(3) were “part-and-parcel of the debates related to preferential and patrimonial rights, which was subsequently subsumed within the Ad Hoc and Permanent Sea-Bed Committee and later the Third UN Conference negotiations to craft a treaty-based regime of entitled rights”.³⁴⁹ However, for Gupta, traditional fishing rights are not “entitled rights”, but rather “acquired” rights deriving from “immemorial, continuous, reasonable and certain usage”.³⁵⁰ Thus, on Gupta’s view, it is inappropriate to sweep up traditional fishing rights into Article 62(3).
189. Relatedly, Gupta contends that the SCS Tribunal erred in equating “habitual fishing” (which term appears in Article 62(3) of UNCLOS) with “historic fishing”.³⁵¹ For him, these concepts are entirely distinguishable, with “habitual fishing” connoting fishing that has occurred for some time, but not enough to meet the threshold of “historic fishing”.³⁵² To bolster this argument, Gupta refers to the records of the

³⁴⁸ 2016 Award, para. 804(b).

³⁴⁹ S. Gupta, ‘Historic Fishing Rights in Foreign Exclusive Maritime Zones: Preserved or Proscribed by UNCLOS?’ (2019) 7 *Korean Journal of International and Comparative Law* 226, p. 245.

³⁵⁰ S. Gupta, ‘Historic Fishing Rights in Foreign Exclusive Maritime Zones: Preserved or Proscribed by UNCLOS?’ (2019) 7 *Korean Journal of International and Comparative Law* 226, p. 245.

³⁵¹ S. Gupta, ‘Historic Fishing Rights in Foreign Exclusive Maritime Zones: Preserved or Proscribed by UNCLOS?’ (2019) 7 *Korean Journal of International and Comparative Law* 226, p. 245.

³⁵² S. Gupta, ‘Historic Fishing Rights in Foreign Exclusive Maritime Zones: Preserved or Proscribed by UNCLOS?’ (2019) 7 *Korean Journal of International and Comparative Law* 226, pp. 245-246. Here, Gupta points to *Barbados v. Trinidad & Tobago*, where Barbadian fishing off the coast of Tobago had occurred for

Third UN Conference on the Law of the Sea, which he suggests dealt with the notion of “habitual fishing” only “in the specific context of access to the surplus of the allowable catch and avoidance of wastages in the coastal State’s EEZ” (*i.e.*, not in a manner that should be taken as a denial of traditional fishing rights).³⁵³

190. Other commentators have made similar points to Gupta. Kopela, for example, argues that “Article 62(3) may not be considered to be the same as historic rights, which require more than habitual exercise of an activity”. In her view, the construction of Article 62(3) cannot be taken as proof that “it was the intention of states to eliminate any historic rights in EEZs” (a very similar argument to that which is made by Judge Xue in her Declaration).³⁵⁴
191. In a more recent piece, published in 2021, Kopela reiterated her position that the SCS Tribunal erred in finding that Article 62(3) of UNCLOS proves the EEZ extinguishes traditional fishing rights. Here, she stated that Article 62(3) was “the outcome of negotiations on the regulatory and management regime concerning how the coastal state would exercise its sovereign rights to ensure optimum utilisation of the natural resources”.³⁵⁵ These negotiation records, she continues, cannot support the conclusion that the treaty’s drafters intended to exclude traditional fishing rights whilst regulating access to the EEZ.³⁵⁶ This view is, however, not universally shared; some commentators have taken the strong view that States did intend to extinguish historic rights in the EEZ when negotiating UNCLOS.³⁵⁷

30 years and this was held not to give rise to a local tradition. On Gupta’s view, this Barbadian fishing practice would constitute “habitual fishing”.

³⁵³ S. Gupta, ‘Historic Fishing Rights in Foreign Exclusive Maritime Zones: Preserved or Proscribed by UNCLOS?’ (2019) 7 *Korean Journal of International and Comparative Law* 226, p. 246.

³⁵⁴ S. Gupta, ‘Historic Titles and Historic Rights in the Law of the Sea in the Light of the South China Sea Arbitration’ (2017) *Ocean Development and International Law* 181, p. 195.

³⁵⁵ S. Kopela, ‘Historic Rights and the South China Sea’ in Keyuan Zhou (ed), *Routledge Handbook of the South China Sea* (Routledge, 2021), p. 155.

³⁵⁶ S. Kopela, ‘Historic Rights and the South China Sea’ in Keyuan Zhou (ed), *Routledge Handbook of the South China Sea* (Routledge, 2021), pp. 155-156. *See also* W. M. Reisman and M. H. Arsanjani ‘Some Reflections on the Effects of Artisanal Fishery on Maritime Boundary Delimitation’, in Tafsir Malick Ndiaye and Rüdiger Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Brill 2007).

³⁵⁷ This view is notably held by former ITLOS Judge David Anderson, who was also part of the United Kingdom’s delegation to the Third UN Conference on the Law of the Sea. He states that, during the transition

192. It is notable that, in commenting on Article 62(3) of UNCLOS, the SCS Tribunal did not comprehensively walk through the negotiating history of this provision to establish if and how traditional fishing rights were discussed. Instead, the SCS Tribunal appeared to infer the intention of the drafters from the text of UNCLOS itself.³⁵⁸
193. *Third*, and relatedly, commentators suggest that UNCLOS cannot have terminated traditional fishing rights by implication (given, in their view, UNCLOS's text and *travaux* do not evince an explicit intention to extinguish traditional fishing rights).³⁵⁹
194. *Fourth*, scholars highlight that another reason to doubt the SCS Tribunal's finding that traditional fishing rights are not preserved in the EEZ is the logical incongruity of it when compared with the SCS Tribunal's simultaneous finding that traditional fishing rights continue post-UNCLOS in the territorial sea.
195. It will be recalled that, in reference to traditional fishing rights in the territorial sea, the SCS Tribunal held:

Finally, in the territorial sea, the Convention continued the existing legal regime largely without change. The innovation in the Convention was the adoption of an agreed limit of 12 nautical miles on the breadth of the territorial sea, not the development of its legal content. The Tribunal sees nothing that would suggest that the adoption of the Convention was intended to alter acquired rights in the territorial sea and concludes that within that zone

to UNCLOS, "there was strong opposition to claims to preserve historic rights or to grant special treatment for historical reasons". Further, he noted that "[t]he developing coastal states of Asia, Africa and the Americas, many of them newly independent, were determined, in particular, to put an end to foreign fishing fleets operating with their Exclusive Economic Zones (EEZs) on the basis of claims to historic fishing rights. They demanded nothing less than a revolution in the law of the sea", D. Anderson, 'Some Aspects of the Regime of Islands in the Law of the Sea' (2017) 32 *International Journal of Marine and Coastal Law* 316, p. 322.

³⁵⁸ S. Gupta, 'Historic Fishing Rights in Foreign Exclusive Maritime Zones: Preserved or Proscribed by UNCLOS?' (2019) 7 *Korean Journal of International and Comparative Law* 226, p. 245 (pointing to, e.g., the statement that the SCS Tribunal "[did] not consider it possible that the drafters of the Convention intended for traditional or artisanal fishing rights to survive the introduction of the exclusive economic zone").

³⁵⁹ S. Gupta, 'Historic Fishing Rights in Foreign Exclusive Maritime Zones: Preserved or Proscribed by UNCLOS?' (2019) 7 *Korean Journal of International and Comparative Law* 226, p. 246. ("it is an essential principle of law that consequential rights, such as privately-acquired rights, stemming from long-standing access and enjoyment, are not deemed to be – and cannot be – terminated by implication. To make a claim to the contrary, one would have to demonstrate that State Parties to the Convention intended to alienate or terminate the historically-acquired rights of traditional fishermen").

196. It is, however, somewhat bizarre that traditional fishing rights continue to exist in the territorial sea, where coastal States have sovereignty, and by extension “exclusive competence to regulate fisheries”,³⁶⁰ but such rights have been extinguished in the (more distant) EEZ, where coastal States have only limited sovereign rights balanced with the rights of other members of the international community.
197. A significant number of scholars have highlighted this point in the decade since the 2016 Award was issued. For example, in 2021, Whomersley wrote that “[i]t seems odd that foreign fishermen should continue to enjoy such rights in the zone adjoining the coast, but not in the zone beyond that”.³⁶¹ Likewise, Clive Symmons – despite generally defending the historic rights aspects of the 2016 Award – states in his 2019 work on historic rights that:³⁶²

it seems logically strange that third party historic claims in the more sovereign area of seas of another State (namely a territorial sea) should have led to greater rights for such a third State claiming historic rights; whereas, as seen, such third-party claimed rights in areas of lesser sovereignty (*viz.*, EEZs and continental shelves) should lead to no vested rights for third States.³⁶³

³⁶⁰ R. Churchill, V. Lowe, and A. Sander, *The law of the sea* (4th ed, Manchester University Press, 2022), p. 528. These authors also state that “[i]t also follows from a coastal State’s sovereignty that the fishing vessels of other States may not fish within its internal waters and territorial sea without its consent”.

³⁶¹ C. Whomersley, ‘The South China Sea Arbitration and its Implications’ in Keyuan Zhou (ed), *Routledge Handbook of the South China Sea* (Routledge, 2021), p. 443.

³⁶² In fact, Symmons says that preserving traditional fishing rights in the territorial sea (but not EEZ) is the “only overtly controversial finding by the SCS Tribunal, C. Symmons, *Historic Waters and Historic Rights in the Law of the Sea: A Modern Reappraisal* (2nd ed, Brill, 2019), p. 57.

³⁶³ C. Symmons, *Historic Waters and Historic Rights in the Law of the Sea: A Modern Reappraisal* (2nd ed, Brill, 2019), p. 57. In an earlier piece, dated 2018, Symmons similarly stated “it does certainly seem logically strange that third-party historic rights in the more sovereign area of another state (territorial sea) should lead to greater rights for that third state, whereas such third-party-claimed rights in areas of lesser coastal state sovereign rights (eg, EEZ and continental shelves) should lead to no vested rights for third states”, C. Symmons, ‘Historic rights in the light of the Award in the *South China Sea Arbitration*: what remains of the doctrine now?’, in S. Jayakumar et al (eds), *The South China Sea Arbitration: The Legal Dimension* (NUS Centre for International Law Series, 2018), p. 124.

Other scholars who have also made this point include Judge Paik,³⁶⁴ Gupta,³⁶⁵ and North,³⁶⁶ as well as W. Michael Reisman and Mahnoush Arsanjani (albeit writing before the 2016 Award).³⁶⁷

198. Symmons suggests that the SCS ruling on traditional fishing rights in the EEZ is “addedly anomalous” because of Article 56(2) of UNCLOS, which provides that, in its EEZ, a coastal State “shall have due regard for the rights and duties of other States”.³⁶⁸ In Symmons’ view, the SCS Tribunal brushed aside these potential anomalies “very laconically” by claiming the “law reflects the particular circumstances of the creation of the [EEZ]”.³⁶⁹

199. Overall, there is a sustained body of criticism concerning the SCS Tribunal’s handling of traditional fishing rights in the 2016 Award, focusing on several aspects of the SCS Tribunal’s reasoning. Furthermore, commentators take the view that the 2016 Award

³⁶⁴ Jin-Hyun Paik, ‘South China Sea Arbitral Awards: Main Findings and Assessment’ (2017) 20(1) *Max Planck Yearbook of United Nations Law* 367, pp. 405-406 (“The Tribunal considered that there is no contradiction between the different treatments, as the law reflects the different circumstances of the two maritime zones. However, it is questionable that prior established rights can restrict sovereignty of another State while it cannot restrict sovereign rights, which are much more limited than sovereignty, of another State”)

³⁶⁵ S. Gupta, ‘Historic Fishing Rights in Foreign Exclusive Maritime Zones: Preserved or Proscribed by UNCLOS?’ (2019) 7 *Korean Journal of International and Comparative Law* 226, pp. 246-247 (“[...] sovereign rights and jurisdiction over the EEZ, like sovereignty over the territorial sea, can only be exercised subject to the conditions laid down by international law. The limitations which international law imposes on the power of the State in respect of the latter’s ‘sovereign rights’ over the EEZ are greater than those it imposes in respect of the sovereignty over the territorial sea. It stands to reason, then, that a privately-acquired right which does not cease on a change of sovereignty (and obtains fully in the territorial sea, as the panelists themselves ruled), should not cease on the assigning of a newly-created ‘sovereign right’ in favor of the coastal State in its EEZ. To the contrary, it should apply more forcefully in the EEZ.”).

³⁶⁶ R. North, ‘Note — Traditional Fishing Rights in International Law: The *South China Sea Arbitration*’ (2017) 36(1) *University of Tasmania Law Review* 101, p. 106.

³⁶⁷ W. M. Reisman and M. H. Arsanjani ‘Some Reflections on the Effects of Artisanal Fishery on Maritime Boundary Delimitation’, in Tafsir Malick Ndiaye and Rüdiger Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (Brill 2007), p. 652 (stating that support for the proposition that traditional fishing rights continue to exist in the EEZ is provided by “an a fortiori argument to the effect that if the Convention reserved traditional rights in internal waters, which is the legal character of waters landward of archipelagic baselines and imports assimilation to the legal status of territory, it would surely reserve such rights in the EEZ”).

³⁶⁸ C. Symmons, *Historic Waters and Historic Rights in the Law of the Sea: A Modern Reappraisal* (2nd ed, Brill, 2019), p. 58.

³⁶⁹ C. Symmons, *Historic Waters and Historic Rights in the Law of the Sea: A Modern Reappraisal* (2nd ed, Brill, 2019), p. 58; 2016 Award, paras. 800-801.

has not settled the law on traditional fishing rights. This may explain the ICJ's decision to avoid the 2016 Award (and the question of traditional fishing rights in the EEZ more broadly) in the *NICOL III* case.

200. This Section III has shown that the 2016 Award has had a limited, if any, impact on the development of the law of the sea in jurisprudence and scholarship, with regard to questions concerning UNCLOS Article 121, the treatment of small islands and “rocks”, and the role of historic rights in the modern law of the sea. These aspects of the 2016 Award have received notably little attention in jurisprudence over the following decade and many commentators have criticised the Tribunal's relevant findings.
201. The ICJ has been particularly avoidant, turning down several opportunities to endorse or cite the 2016 Award's findings on the “regime of islands” under UNCLOS, as well as its conclusions with respect to traditional fishing rights in the EEZ. In fact, it seems the full bench of the ICJ has never so much as mentioned the 2016 Award in one of its judgments,³⁷⁰ even though it often refers to awards issued by other institutional and *ad hoc* tribunals in its judgments.³⁷¹ Further, only one individual opinion makes reference to the 2016 Award – namely that of Judge Charlesworth (the Australian Judge) in the case between Ukraine and Russia under CERD (in a context unrelated

³⁷⁰ References to the *South China Sea Arbitration* in general are few and far between in the ICJ's jurisprudence. The 2015 Award has seemingly been mentioned just once by the Court, in the recently decided maritime delimitation matter between Gabon and Equatorial Guinea. Here, the Court was asked to determine whether the “Bata Convention” constitutes a treaty. The Court briefly referenced the Award on Jurisdiction and Admissibility in the *South China Sea* case (which was cited several times by Gabon in its Counter-Memorial) when outlining the legal test for determining if a document or instrument has the force of law, but did not otherwise mention the *South China Sea* case, *Land and Maritime Delimitation and Sovereignty over Islands (Gabon/Equatorial Guinea)*, Judgment, I.C.J. Reports 2025, p. 32, para. 73.

³⁷¹ For example, the ICJ discussed the *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)* in *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2023, p. 444, para. 71. Likewise, in the *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* case, the Court raised the *Arbitration between Barbados and the Republic of Trinidad and Tobago (Maritime Delimitation in the Indian Ocean (Somalia v. Kenya))*, Judgment, I.C.J. Reports 2021, p. 251, para. 124; p. 265, para. 163), the *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)* (*Ibid*, p. 252, para. 128; p. 266, para. 165), and the *Arbitration regarding the Delimitation of the Maritime Boundary between Guyana and Suriname* (*Ibid*, p. 282, para. 207).

to the law of the sea) .³⁷²

202. ITLOS and even Annex VII arbitral tribunals have similarly appeared reluctant to engage with certain aspects of the 2016 Award, with the solitary exception of the references in the ITLOS *Climate Change* advisory proceedings to aspects of the Award's findings with respect to States' duty to protect the marine environment.

³⁷² Separate Opinion of Judge Charlesworth, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment, *I.C.J. Reports 2024*, para. 39, fn. 34 (in support of the proposition that "conduct amounting to the use of force undermines the dispute settlement proceedings pending before the Court and, in doing so, aggravates the ongoing dispute"). The 2015 Award has been mentioned in no fewer than three individual opinions, including the Declaration of Judge ad hoc Wolfrum in Arbitral Award of 3 October 1899. Judge ad hoc Wolfrum was an arbitrator on the SCS Tribunal.

IV. CONCLUSION ON THE 2016 AWARD'S LIMITED IMPACT ON THE DEVELOPMENT OF THE LAW OF THE SEA

203. A decade long perspective on the 2016 Award shows that the 2016 Award has had limited, if any, impact on State practice, jurisprudence and commentary with regard to UNCLOS Article 121, maritime claims based on small island features and historic rights. It thus appears that the 2016 Award is *anything but* a “seminal” or “landmark” ruling in these respects.
204. States (including a number who have publicly supported the 2016 Award and urged its acceptance by China) have largely *ignored* the key legal findings of the SCS Tribunal in their own practice where it comes to small island features and historic claims. The 2016 Award has thus failed to generate State practice consistent with its legal interpretation of key UNCLOS provisions.
205. International courts and tribunals have also widely ignored the SCS Tribunal's findings concerning Article 121 of UNCLOS, and historic and traditional fishing rights, including in cases where the 2016 Award had been pleaded by parties and was potentially apposite. Those findings of the SCS Tribunal have also been widely critiqued by international commentators since 2016.
206. The endorsement of aspects of the 2016 Award relating to protection of the environment and Part XII of UNCLOS contrasts with the widespread criticism (in scholarship) and silence (in jurisprudence and State practice) with regard to the 2016 Award's rulings in connection with UNCLOS Article 121, small islands and “rocks”, and historic rights.

