

# 《聯合國海洋法公約》第 121 條第 3 項的國際法屬性 —從條約法和過往國際法院的諮詢意見論證—

## The Nature of the United Nations Convention on the Law of the Sea Article 121, paragraph 3, in the International Law Hierarchy, Clarified with the Application of the Law of Treaties and the ICJ's Previous Advisory Opinions

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### 摘 要

由於 2012 年的《領土海洋紛爭案》中，國際法院（以下簡稱 ICJ）認為《聯合國海洋法公約》（以下簡稱《公約》）第 121 條第 3 項是已經成為國際習慣的一部分，因此 2016 年的中菲南海仲裁庭（以下簡稱「SCS 仲裁庭」）也認為第 3 項除了具備國際習慣法的地位，而且是作為限制性條款。不過有些國際法學者抱持著不同見解。為了釐清《公約》第 121 條第 3 項的國際法屬性，本文除了檢視《公約》之準備工作和締約之情況以及學者觀點外，將適用《維也納條約法公約》（以下簡稱《條約法公約》）和《關於條約解釋的嗣後的協定和嗣後的慣例的結論草案及其注釋》（以下簡稱《結論草案》），進行探討。本文由三個部分構成：《公約》第 121 條第 3 項和第 121 條的關係、第 121 條第 3 項和「區域」的關係，最後則是《公約》第 121 條第 3 項在國際法的定位，筆者將朝「通例」、「法之信念」和「基本重要性的創設規範性質」三個方向來檢視。而筆者最後的求證是：一、國家實踐顯示未要求岩礁的能力必須是自然的狀態下的能力；二、SCS 仲裁庭過度將第 121 條第 3 項的宗旨和目的偏向保護人類共同繼承財產（Common Heritage of Mankind：CHM），導致「不能」和「人類居住」的意義為特殊解釋；三、《公約》第 121 條第 3 項是一項條約規定，也可能是一項形成中的國際習慣法。

**關鍵詞：**海洋法公約第 121 條第 3 項、不能維持、人類居住、通例、法之信念、基本重要性的規範創設性質

## Abstract

In the 2012 *Territorial and Maritime Dispute (Nicaragua v. Colombia)* case, the International Court of Justice (hereinafter referred to as the ICJ) held that the United Nations Convention on the Law of the Sea (UNCLOS) Article 121, paragraph 3, have become part of customary international law. The South China Sea Arbitration Tribunal (the SCS Tribunal) also considered this provision a customary international law, the character of which is a provision of limitation. Nonetheless, some public lawyers have different opinions from that of the SCS Tribunal. In order to clarify the character of this article, the author will, besides examining the preparatory work of the Convention and the circumstances of its conclusion, as well as scholars' opinion, apply the application of the Vienna Convention on the Law of Treaties (the Law of Treaties) and the Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries (the Draft Conclusions). This article consist of three parts, the relation between the Article 121, paragraph 3 and the whole Article, the relation between the Article 121, paragraph 3 and the Area, as well as the position of the Article 121, paragraph 3 in the international law hierarchy, by observing from the three factors, that is, general practice, *opinion juris sive necessitates* and the presence of its fundamentally norm-creating character. The author will prove that, first, the practices show that rocks are not required to have a capacity in its natural form; secondly, the SCS Tribunal emphasized too much on the protection of the Common Heritage of Mankind as to overstress the terms, 'cannot' and 'human habitation', resulting into a special meaning; thirdly, Article 121, paragraph 3 is a conventional provision, and might be an ongoing customary international law as well.

**Keywords:** UNCLOS Article 121, paragraph 3, cannot sustain, human habitation, general practice, *opinion juris sive necessitates* and a fundamentally norm-creating character