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Legal Status of Low-Tide Elevations and Submerged Features

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ABSTRACT

The legal framework setting out the rights and obligations of States for uses of ocean space is the universally accepted 1982 United Nations Convention on the Law of the Sea (UNCLOS)[1]. UNCLOS provides that the sovereignty of a coastal State extends to its "land territory" and its internal waters. It also applies to the adjacent belt of sea known as the territorial sea, and in the cases of archipelagic States, to their archipelagic waters. Article 121 defines an island as a naturally formed area of "land" surrounded by, and above water, at high tide. Article 121(2) provides that the territorial sea and other maritime zones of an island are determined in the accordance with the provisions applicable to "other land territory". This implies that islands are also "land territory" subject to a claim of territorial sovereignty.

This paper will address the issue of whether under UNCLOS and general international law claims to territorial sovereignty can only be made to offshore features which meet the definition of an island, or whether claims to sovereignty can also be made to other off-shore features such as low-tide elevations, reefs, shoals or submerged features. It will argue that a claim to sovereignty can only be made with respect to land territory, including islands. Therefore, submerged features and low-tide elevations cannot be subject to a separate claim of sovereignty.

It will further argue that submerged features and low-tide elevations are part of the sea bed, and are governed by the rules and principles of the particular maritime zone in which they are situated. If the submerged feature or low-tide elevation falls within the territorial sea or archipelagic waters of the coastal State, they are under the sovereignty of that State. If they are within the 200 nautical mile (nm) exclusive economic zone (EEZ) of a State, they are governed by Part V of UNCLOS. If they are situated on the extended continental shelf of the coastal State, they are governed by Part VI.

HISTORICAL CONTEXT

Sovereignty over land territory

One of the fundamental principles of international law is that a State has sovereignty over its land territory, its internal waters (lakes, rivers, ports, etc) and to the airspace above them. The land territory of a State includes its mainland territory as well as islands under its sovereignty. An island is defined as naturally formed area of land, surrounded by water, which is above water at high tide.

[1] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS)

Claims to maritime zones can only be generated from baselines that are measured from land territory. This is principle is often described as the principle that "the land dominates the sea". The maxim is long-standing and has been cited with approval by international courts and tribunals on a number of occasions.

A State also has sovereignty over a belt of sea adjacent to its land territory, known as the territorial sea, as well as to the air space above the territorial sea and the seabed and subsoil below it. However, the sovereignty of a State in its territorial sea is subject to passage rights of other States and to other rules of international law. The breadth of the territorial sea was traditionally 3 nautical miles (nm) from the coast, but this was extended to 12 nm in UNCLOS.

Continental Shelf

To understand the current law on submerged features, we must examine it in the context of the development of the legal regime governing the continental shelf. The continental shelf is the submerged offshore seabed and subsoil beyond the limits of the territorial sea, which is the natural prolongation of the land territory of the coastal State. Two legal regimes were eventually developed to govern rights of the coastal State over the continental shelf, these being the continental shelf regime and the exclusive economic zone regime.

Seabed and subsoil beyond territorial sea

Prior to UNCLOS, all parts of the sea that were not included in the territorial sea or inland waters of a State were "high seas". It was accepted that the high seas were governed by the principle of freedom of the seas, and that no State may validly purport to subject any part of them to its sovereignty. The law governing the sea bed and subsoil that lay beneath the high seas was not so clear. This law evolved in the early part of the 20th century, at a time when most States were only claiming a 3 nm territorial sea.

In this first stage of this evolving law, States began to assert claims to the seabed and subsoil adjacent to their coast in order to exploit living resources of the sedentary species such as pearls, oysters and sponges. In a 1923 article in the British Yearbook of International Law, Sir Cecil Hurst concluded that a State could acquire rights of "sovereignty" in the seabed adjacent to its coast, but that such sovereignty could not conflict with the freedoms of navigation or fishing in the superjacent waters above the seabed.[2]

In the next stage coastal States began to claim rights to the seabed and subsoil in the waters adjacent to their coast, a move that was driven by a desire to exploit offshore hydrocarbons and minerals. In 1945 President Harry Truman of the United States issued what is known as the Truman Proclamation on the

[2] Cecil Hurst, "*Whose is the Bed of the Sea? Sedentary Fisheries Outside the Three-Mile Limit*" 4 Brit. Y.B. Int'l L. 34 1923-1924.

Continental Shelf[3], in which the Government of the United States asserted that the natural resources of the sea bed and subsoil of the continental shelf beneath the high seas appertained to the United States and were subject to its "jurisdiction and control". The Truman Proclamation prompted Chile in 1947 to assert claims of national "sovereignty" over the continental shelf adjacent to its coasts, as well as sovereignty over the seas adjacent to its coasts.[4] Other Latin American States followed. The claims made by coastal States were not uniform or consistent with respect to either the breadth of water being claimed or the types of sovereignty, jurisdiction and control being asserted over the water, the seabed and subsoil.

ILC studies leading to 1958 Convention on the Continental Shelf

When the international community began work in 1950s to codify and progressively develop the law of the sea, the status of the continental shelf was unclear. Writing in 1950, Sir Hersch Lauterpacht stated that he could see no practical difference between claims to sovereignty over the seabed and subsoil on the continental shelf and claims to jurisdiction and control over the natural resources of the continental shelf. However, a debate soon ensued as to whether the rights of coastal States should be characterized as "sovereignty" or as "jurisdiction and control."[5]

The first draft of the draft articles prepared by International Law Commission (ILC) in 1951 stated that "The continental shelf is subject to the exercise by the coastal State of control and jurisdiction for the purpose of exploring it and exploiting its resources."[6] The ILC Commentary to this draft article stated that: "Article 2 avoids any reference to the "sovereignty" of the coastal State over the submarine areas of the continental shelf. As control and jurisdiction by the coastal State would be exclusively for exploration and exploitation purposes, they cannot be placed on the same footing as the general powers exercised by a State over its territory and its territorial waters.[7] Following criticism by governments and writers as to the use of the phrase "control and jurisdiction", the phrase was replaced by "sovereign rights". The main reason why the ILC avoided using language suggesting that coastal States could claim sovereignty over the submarine areas of the continental shelf was the fear that it might interfere with principles of freedom of the seas which continued to apply to the superjacent waters and airspace above the continental shelf.[8] In its 1956 Report the Commission explained why it had elected to use the

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[3] Proclamation 2667 of September, 28 1945 - Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf. 10 Fed. Reg. 12,305 (1945). Codified as Executive Order 9633 of September 28, 1945.

[4] Louis B Sohn and John E Noyes, Cases and Materials on the Law of the Sea, (Transnational Publishers), page 500.

[5] H Lauterpacht, *Sovereignty Over Submarine Areas*, 27 British Yearbook of International Law 1950.

[6] Yearbook of the International Law Commission 1951, Volume II, *Report of the International Law Commission to the United Nations General Assembly*, Draft Articles on the Continental Shelf and Related Subjects, Part I, Continental Shelf, Article 2, page 141. Available at <http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1951_v2_e.pdf>.

[7] Ibid, Commentary, para 7, page 142.

[8] Myers S McDougal and William T Burke (eds), The Public Order of the Oceans: A Contemporary International Law of the Sea, (Yale University Press, 1962) page 697.

term "sovereign rights" rather than "sovereignty".[9] The use of the phrase "sovereign rights" also provoked a debate in the Committee on the Continental Shelf at the 1958 UN Conference. At one point the Committee adopted a US proposal to use the phrase "exclusive rights" instead of "sovereign rights," but in the Plenary Session the Indian proposal to use the term "sovereign rights" instead of "exclusive rights" was adopted so that the article would be consistent with the recommendation of the ILC.[10]

In summary, as the law on the continental shelf developed in the mid-twentieth century, the international community reached a consensus that a coastal State had no right to claim sovereignty over the seabed and subsoil adjacent to its coast beyond the territorial sea. Instead, the rights of the coastal State were limited to "sovereign rights" to explore and exploit the natural resources of shelf.

Islands and low-tide elevations

The law relating to islands and low-tide elevations was also uncertain under customary international law, but was clarified by the ILC in its work leading up to the 1958 Convention on the Territorial Sea and Contiguous Zone.

The late DP O'Connell reported that the customary international law in the nineteenth century was quite flexible as to circumstances in which offshore features could be used as basepoints in measuring the territorial sea. He stated that from the beginning of the nineteenth century small offshore features near the coast, including coral reefs, atolls and shoals, were used as territory generating territorial waters. In practice, features which could be used as ramparts of the coasts, whether dry or not, were used as basepoints in measuring the territorial sea.

Eventually a consensus emerged that there should be a distinction between drying rocks and shoals which were dry only at low tide, and features which were permanently dry, even at high tide. This consensus emerged to halt the artificial expansion of the territorial sea using basepoints unrelated to the mainland coast. The distinction was codified in the 1958 Convention on the Territorial Sea and Contiguous Zone in the definitions of "island" in Article 10 and "low-tide elevation" in Article 11. These articles read as follows:

> ***Article 10***
> 1. An island is a naturally-formed area of land, surrounded by water, which is above water at high-tide.
>
> 2. The territorial sea of an island is measured in accordance with the provisions of these articles.
>
> ***Article 11***
> 1. A low-tide elevation is a naturally-formed area of land which is surrounded by and above water at low-tide but submerged at high-tide. Where a low-tide elevation is situated wholly or partly at a distance not

[9] Yearbook of the International Law Commission 1956, Volume II, *Report of the International Law Commission to the United Nations General Assembly,* Commentary on Article 68, para 2, page 297. Available at <http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1956_v2_e.pdf>.

[10] McDougal and Burke, *supra* note 6, page 702.

exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.

2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own.

COMPOSITION OF ISLANDS AND LOW-TIDE ELEVATIONS

Both an island and a low-tide elevation are defined in UNCLOS as a "naturally formed area of land".[11] A question which arises is what constitutes "land". UNCLOS does not address this issue. It would appear from writers that the physical composition of the land (whether it is a mainland coast, an island, an elevation or other feature) does not affect its status, so long as it is comprised of "natural" material. Dipla writes that 'land' normally means "an elevation of the sea bed created through natural phenomena and consisting of soil or other types of earth material (sand, mud, gravel deposits, limestone mixed with coral debris, etc) but not ice."[12] Other commentators have noted that low-tide elevations can be mud flats or sand bars.[13]

A wide tolerance for material comprising features is evident as far back as the 1930 Codification Conference. The Harvard Research group, for example, would have measured the territorial sea from "any rock, coral, mud, sand or other natural soil formation which is exposed above the surface of the water."[14] O'Connell discusses State practice going back to 1805 with respect to a delimitation dispute in the matter of *The Anna*, in which it was held that small mud islands formed by driftwood and sand off the bar of Mississippi were counted as land.[15] Similarly the Bahama Banks, though submerged, were viewed as being territorial in character when framed by inhabited islands.[16]

In contrast, in a matter between the US and Alaska, the US Supreme Court was required to rule on whether a formation referred to as Dinkum Sands was territory capable of being defined as an island.[17] Dinkum Sands is a gravel and ice formation that becomes fully submerged on a seasonal basis. In this matter the US Supreme Court noted that the precedent of The Anna (referred to above) predated current law of the sea convention provisions and that it was not entirely clear whether the mudlumps would be treated today as islands or as low-tide elevations under the Convention.[18] It also found that

[11] UNCLOS, Articles 13 and 121(1).
[12] Haritini Dipla, *Islands* "The Max Planck Encyclopedia of Public International Law, Volume VI" (Oxford University Press 2006) at 406.
[13] J Ashley Roach and Robert Smith, "*United States Responses to Excessive Maritime Claims*" (Martinis Nijohoff, 2nd ed, 1996) at 67.
[14] McDougal and Burke, *supra* note 6, at 391
[15] D. O'Connell, *The International Law of the Sea – Volume 2* (ed A. Shearer, Clarendon Press, 1984), at 186.
[16] Ibid, at 189.
[17] United States v Alaska 117 Supreme Court 1888 (1997), US Supreme Court, 19 June 1997.
[18] The Convention being referred to in this instance was the 1958 Convention on the Territorial Sea and Contiguous Zone. Refer David Bederman, '*US State Boundaries Submerged Lands Act 1958 Geneva Convention on the Territorial Sea – Straight Baselines - Fringing Islands – Ice Elevations*' 92 AJIL, 1998.

there was "no precedent for treating as an island a feature that oscillates above and below mean high water," and concluded that Dinkum Sands was not an island.

Reefs and coral formations by nature do not fit into categories of land territory. Most coral reefs are constructed from polyps (tiny living creatures) and the calcium carbonate secreted by the polyps. Coral reefs are therefore living organisms rather than rock or mineral based inorganic material. Despite coral being organic material it is treated in the same manner as inorganic material where the law of the sea is concerned.

Aside from the question of material, there are additional problems in characterizing coral reefs. This is because they are almost always submerged, either entirely or with fringing reefs which consist of a chain of rocks, coral, shingle or sand, and may feature points that protrude above sea level. An extensive atoll or coral reef may span kilometers and have a number of points that are above the water at high tide. Prior to UNCLOS any protruding points qualified individually as points for measurement of the territorial sea.

UNCLOS PROVISIONS

The importance of UNCLOS

UNCLOS establishes a legal framework for all uses of the oceans. As of 12 September 2012, there were 162 parties, including the European Union. All States parties to the territorial and maritime disputes in the South China Sea and in the East China Sea are parties, except DPR Korea. Taiwan is not able to become a party because it is not recognized as a State by the United Nations.

UNCLOS is legally binding on all States parties and must be performed by them in good faith. All States parties have an obligation to bring their national laws into conformity with UNCLOS. It is a fundamental principle of the law of treaties that a State cannot use the provisions its internal law as justification for failure fulfill its treaty obligations.[19]

Provisions on islands, low-tide elevations and reefs

The provisions in UNCLOS with respect to islands and low-tide elevations are almost the same as those in the 1958 Convention on the Territorial Sea and Contiguous Zone. The definition of an island in Article 121(1) UNCLOS is the same as that in Article 10 of the 1958 Convention, and the definition of a low-tide elevation in Article 13 is virtually the same as that in Article 11 of the 1958 Convention.

Because low-tide elevations are not islands, they are not entitled to maritime zones of their own. However, in certain circumstances they can be used as basepoints in measuring the breadth of the territorial sea. Article 13 provides that if a low-tide elevation is situated within 12 nm of either the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea. However, if a State employs the use of straight baselines, such

[19] Articles 26 -27, Vienna Convention on the Law of Treaties, 22 May 1969, 1155 UNTS 331.

baselines cannot be drawn from low-tide elevations except in particular circumstances. Article 7(4) provides that straight baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or in instances where the drawing of straight baselines to and from such elevations has received general international recognition.

The most important change in UNCLOS is that a distinction is made in the maritime zones which can be claimed from features which meet the definition of an island. Article 121(2) provides that as a general rule, an island is entitled to the same maritime zones as land territory, that is, a territorial sea, a contiguous zone, an exclusive economic zone and a continental shelf. However, Article 121(3) creates an exception by stating that "rocks which cannot sustain human habitation or economic life of their own shall have not exclusive economic zone or continental shelf." The ambiguity in Article 121(3) has generated much debate, in part because no minimum size is provided to distinguish between a rock and an island, and no objective test is set out for examining the ability of an island to sustain human habitation or economic life. For example, both Korea and China have challenged Japan's claim that Okinotorishima is an island entitled to an exclusive economic zone and continental shelf, because it is rock within the meaning of Article 121(3).

The provisions in UNCLOS on baselines for measuring the breadth of the territorial sea also support the argument that a State cannot claim sovereignty over a submerged feature**.** Article 5 on the normal baseline provides that the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast. Submerged features do not have low-water lines along the coast. Also, Article 6 of UNCLOS on reefs provides that in the case of islands situated on atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea is the seaward low-water line of the reef, as shown by the appropriate symbol on charts officially recognized by the coastal State. Article 6 has a net effect of treating atolls in their entirety[20], providing that "[i]n the case of islands situated on atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea is the seaward low-water line of the reef, as shown by the appropriate symbol on charts officially recognized by the coastal State."

Provisions on the exclusive economic zone

One of most important changes in the legal regime governing the law of the sea is the agreement reached to permit States to establish an EEZ. The zone can extend out to 200 nm from the baselines from which the territorial sea is measured. The EEZ is not under the sovereignty of the coastal State and it is not part of the high seas. Rather, it is a specific legal regime under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions in the Convention.

Like the continental shelf, the EEZ is a resource zone in which the coastal State has "sovereign rights" to explore and exploit the natural resources of waters and of the seabed and subsoil. The coastal State also

[20] Hiran Jayewardene, *The Regime of Islands* (Martinus Nijhoff 1990) at 98.

has sovereign rights with regard to other activities for the economic exploitation of the zone. The coastal State also has jurisdiction necessary for the exploration and exploitation of the natural resources, as well as jurisdiction as set out in the convention over marine scientific research in the EEZ, protection and preservation of the marine environment in the EEZ, and the establishment of artificial islands, installations and structures in the EEZ.

At the same time, all States enjoy the high seas freedoms of navigation, overflight, and the right to lay submarine cables and pipelines in the EEZ.

Provisions on artificial islands, installations and structures

Another article in UNCLOS which is important for understanding the status of low-tide elevations is Article 60 on artificial islands, installations and structures in the EEZ. This article also applies to artificial islands, installations and structures on the continental shelf.[21]

Article 60 provides that the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of: (a) artificial islands; (b) installations and structures for the purposes provided for in Article 56 and other economic purposes; and (c) installations and structures which may interfere with the exercise of the rights of the coastal State in the zone. Coastal States have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations.

Under Article 208 coastal States have an obligation to adopt laws and regulations to prevent, reduce and control pollution of the marine environment arising from artificial islands, installations and structures under their jurisdiction, pursuant to Articles 60 and 80.

It should be noted that there is a difference between the rights and jurisdiction of the coastal State over artificial islands and the rights and jurisdiction of the coastal State over installations and structures. The coastal has exclusive rights and jurisdiction over artificial islands, but its rights and jurisdiction over installations and structures is limited to those used for "economic purposes." This presumably gives a State the right to construct an installation or structure for military purposes in the EEZ of another State, so long as the installation or structure does not interfere with the exercise of the rights of the coastal State in the zone.

Similarly, installations and structures may be constructed by States in the EEZ of another State if they are constructed for marine scientific research purposes. Such installations and structures must not be deployed so as to constitute an obstacle to established international shipping routes, and must bear identification marking indicating the State in which they are registered and have warning signals.[22] These installations and structures do not possess the status of islands, although a reasonable safety zone not exceeding 500 meters may be established around them.[23]

[21] UNCLOS, Article 80.
[22] UNCLOS, Articles 261, 262.
[23] UNCLOS, Articles 259, 260.

The term "artificial island" is not defined in UNCLOS. However, it generally refers to a feature which is above water at high tide because of land reclamation or other activities of man. In other words, it fails to meet the definition of an "island" under Article 121 because it is not a "naturally formed" area of land, but rather is a man-made feature. Installations and structures are also not defined, but they would refer things like buildings, lighthouses, research stations and oil platforms.

Article 60(8) provides that artificial islands, installations and structures in the EEZ do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.

The coastal State may, where necessary, establish reasonable safety zones around such artificial islands, installations and structures in which it may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures. The breadth of the safety zones shall be determined by the coastal State, but shall not exceed a distance of 500 metres around them.

Artificial islands, installations or structures may be constructed on low-tide elevations or submerged features. If they are constructed on a low-tide elevation, and that low-tide elevation is situated within 12 nm of the mainland or an island, that low-tide elevation can be used as a basepoint for measuring the breadth of the territorial sea. If they are constructed on a submerged feature, they cannot be used as basepoint.

Alex Oude Elferink[24] writes that an island that is reinforced with coastal defences in principle remains an island in the sense of UNCLOS Article 121 and an artificial island does not become an island if there is an accretion of land that is natural in origin. Islands that are newly formed by natural processes after human intervention in the natural environment will in principle fall under Article 121. The distinction between an island and an artificial island will necessarily involve an assessment of both law and fact.

UNCLOS does not provide sufficiently for situations in which the legal status of islands is changed by natural phenomena or artificial efforts.[25] Natural occurrences, such as accretion, avulsion and erosion, and sea-level rise can result in a shift in status from island to non-island, or from submerged feature to island; a shift which in turn may affect its legal status.

STATE PRACTICE ON SUBMERGED FEATURES

It is interesting to note that government representatives of some States have also acknowledged that a submerged feature cannot be the subject of a territorial dispute as such features lack territorial legal status. For example, in 2012 a diplomatic tussle emerged between South Korea and China over Socotra Rock/Ieodo/Suyan Rock. Socotra rock is a submerged rock located 4.6 metres below sea-level. South

[24] Alex Oude Elferink *"Artificial Islands, Installations, and Structures"* The Max Planck Encyclopedia of Public International Law, Vol 1 at 662.

[25] Choon-Ho Park "*The Changeable Legal Status of Islands and "Non-Islands" in the Law of the Sea: Some Instances in the Asia-Pacific Region*" in *Bringing New Law to Ocean Waters* (eds Caron and Scheiber, Martinus Nijhoff) 2004, at 490.

Korea claims that the rock falls within its EEZ. South Korea originally placed a warning beacon on the rock to serve as a navigational device, and subsequently constructed the Ieodo Ocean Research Station. The latter is an observatory facility complete with a laboratory, residential space and heli-deck and is reported to be an integrated meteorological and oceanographic observation base.[26] China claims that the submerged rock (which it refers to as Suyan rock) falls within its EEZ and protested the action.

What is notable about the diplomatic exchange that ensued is that both States expressed the view that since the rock is a submerged feature it lacks territorial status. The South Korean President was quoted by Yonhap News as declaring that "[f]irst of all, we have to understand that the Ieodo issue is not a territorial matter … because it is 4.6 meters under the sea's surface." Liu Weimin, China's Foreign Ministry Spokesperson, appeared to concur, stating that "China and the ROK have a consensus on the Suyan Rock, that is, **the rock does not have territorial status**, and the two sides have no territorial disputes."[27] This is particularly interesting in light of China's claim over a number of submerged features in the South China Sea, including Macclesfield Bank.

The States of Nicaragua and Colombia are currently involved in a territorial and maritime boundary dispute which is being heard before the International Court of Justice (ICJ). In this matter the court has been asked to determine sovereignty over several small insular features claimed by one or both of the parties and, following its determination as to sovereignty, delimit the maritime boundary between the parties.[28] The pleadings of both States demonstrate a reliance on the principle that the land dominates the sea and that claims to maritime zones must be made from the land.[29] Each State accuses the other of attempting to claim sovereignty over features that do not meet the definition of an island contained in UNCLOS Article 121 and thus are not entitled to a maritime zone.

Of particular interest in this case is the feature referred to as Quitasueno. Nicaragua claims that Quitasueno is a submerged bank which is not capable of generating any maritime zones. In reply Colombia does not dispute this argument but rather relies on a survey carried out by the Colombia Navy, seven years after proceedings were initiated at the ICJ, to argue that Quitasueno has a number of high-tide elevations, plus many more low-tide elevations, and therefore qualifies as an island. Nicaragua argues that the report of the Colombian Navy does not support the view that there are even small cays on Quitasueno, and that the survey contradicts earlier surveys which provide evidence that Quitasueno is completely submerged. In light of these arguments it is clear that the sovereignty issue regarding Quitasueno is likely to be decided on fact rather than law. What is interesting for our purposes is the clear indication from both States that a submerged feature is not capable of being subject to a claim of sovereignty. The decision of the ICJ, which will likely be issued before the end of 2012, will hopefully provide some clear guidance on this issue, and also on the rock versus island issue.

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[26] Jae-Seol Shim and In-Ki Min (of the Korea Ocean Research and Development Institute, South Korea) "*Construction of Ieodo Ocean Research Station and its Operation*", available online at <http://www.isope.org/publications/proceedings/ISOPE/ISOPE%202004/volume2/2004-swh-13.pdf>.

[27] Foreign Ministry Spokesperson Liu Weimin's Regular Press Conference on March 12, 2012. Available online at <http://www.fmprc.gov.cn/eng/xwfw/s2510/2511/t913936.htm>.

[28] *Territorial and Maritime Dispute Between Nicaragua and Colombia* (Nicaragua v Colombia), 2001.

[29] For example, Reply of the Government of Nicaragua, Volume 1, page 164 at 6.25.

ICJ DECISIONS ON LOW-TIDE ELEVATIONS

There are three decisions of the ICJ which deal with the status of low-tide elevations.

Eritrea/Yemen Arbitration (1998/1999)

The *Eritrea/Yemen* Arbitration Awards ("*Eritrea/Yemen*") were rendered by the Arbitral Tribunal over two stages in 1998 and 1999. The First Phase concerned issues of territorial sovereignty and the scope of the dispute over several islands in the Red Sea, whereas the Second Phase concerned the issue of maritime delimitation.

In the second phase the tribunal examined a reef which was permanently submerged, even at low-tide, and considered whether it could be used as a basepoint for measuring the breadth of the territorial sea. The Court stated:

> 143. Eritrea ,however, has in particular suggested a feature called the "Negileh Rock" which lies further out than these larger but still small and uninhabited islets. Yemen objected to the use of this feature by reason of the fact that on the BA Chart 171 this feature is shown to be a reef and moreover one which appears not to be above water at any state of the tide. A reef that is not also a low-tide elevation appears to be out of the question as a base point, because Article 6 of the Convention (which is headed "Reefs") provides:
>
> > In the case of islands situated on atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea is the seaward low-water line of the reef, as shown by the appropriate symbol on charts officially recognized by the coastal State.
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> 144. This difficulty about the Negileh Rock is reinforced if there is indeed a straight baseline system in existence for the Dahlaks, for paragraph 4 of Article 7 provides:
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> > 4. Straight baselines shall not be drawn to and from low-tide elevations, unless lighthouses of similar installations which are permanently above sea level have been built on them or in instances where the drawing of straight baselines to and from such elevations has received general international recognition.

Qatar v Bahrain Case (2001)

The 2001 *Qatar v. Bahrain Maritime Delimitation and Territorial Questions (Merits)* Judgment[30] ("*Qatar v. Bahrain*") is the last and most significant judgment in a series of cases concerning the dispute between Qatar and Bahrain over a number of maritime features in the Arabian/Persian Gulf. The dispute was first brought before the ICJ in 1991, and finally concluded in 2001.

There is no precise means of adjudging whether a feature is naturally formed or artificially formed. Each case must be examined on its own facts. For example, in the matter of *Qatar v Bahrain*[31] the question was raised as to whether the geographical feature of Qit'at Jaradah met the UNCLOS Article 121 definition of an island or whether it was a low-tide elevation. Qit'at Jaradah is a very small insular

[30] ICJ Rep 2001 40.

[31] Maritime Delimitation and Territorial Questions between Qatar and Bahrain (*Qatar v Bahrain*), Merits, International Court of Justice, accessible online at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=qb&case=87&k=61&p3=0>.

feature created through natural phenomena, this being alluvial accretion, but artificially built up through man-made structures placed on it. The ICJ found that it did meet the definition of an island.

Some of the ICJ judges expressed reservations with respect to both the finding and the danger of States artificially altering features in order to adjust their legal status. Judge Oda expressed concern over the lack of caution exhibited by Court in relation to an insular feature that had been the subject of artificial alteration, noting that "modern technology might make it possible to develop small islets and low-tide elevations as bases for structures, such as recreational or industrial facilities."[32] And further, that thought should have been given to "whether this type of construction would be *permitted* under international law and, if it were, what the *legal status* of such structures would be." Judge Vereshchetin also expressed reservations, stating that:

> "The opposing views of the experts, the absence of any evidence whatsoever to the effect that Qit'at Jaradah has ever been shown on nautical charts as an island, the ***alleged attempts of both States to artificially change the upper part of its surface***, do not allow me to conclude that Qit'at Jaradah has the legal status of an island … In my assessment, this tiny maritime feature … constantly changing its physical condition, cannot be considered an island having its territorial sea. (emphasis added).[33]

Both Parties agreed that the feature named *Fasht ad Dibal* is a low-tide elevation. Qatar maintained that because *Fasht ad Dibal* is a low-tide elevation, it cannot be appropriated. Bahrain contended that low-tide elevations by their very nature are territory, and can be appropriated in accordance with the criteria which pertain to the acquisition of territory.

In the view of the Court, the decisive question in the case was whether a State can acquire sovereignty by appropriation over a low-tide elevation situated within the breadth of its territorial sea when that same low-tide elevation lies also within the breadth of the territorial sea of another State.

The Court stated that international treaty law is silent on the question of whether low-tide elevations can be considered to be "territory". The Court also state that it is not aware of a uniform and widespread State practice which might have given rise to a customary rule which unequivocally permits or excludes appropriation of low-tide elevations.

The Court also pointed out that the difference in effects which the law of the sea attributes to islands and low-tide elevations is considerable. It concluded that it is not established that low-tide elevations can, from the viewpoint of the acquisition of sovereignty, be fully assimilated with islands or other land territory. The Court also stated that a low-tide elevation which is situated beyond the limits of the territorial sea does not have a territorial sea of its own, and as such does not generate the same rights as islands or other territory.

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[32] Dissenting Opinion of Judge Oda, 15 February 1995, *Qatar v Bahrain*, At 89 (para 9). Available online at <http://www.icj-cij.org/docket/files/87/7031.pdf>.

[33] Declaration of Judge Vereshchetin, 16 March 2001, at 184 (para 13). Available online <http://www.icj-cij.org/docket/index.php?p1=3&p2=1&PHPSESSID=66a15edfa6bb89698b26627e76c1d56b&case=87&code=qb&p3=4/>.

The Court concluded that in the present case there is no ground for recognizing the right of Bahrain to use as a baseline the low-water line of those low-tide elevations which are situated in the zone of overlapping claims, or for recognizing Qatar as having such a right. The Court accordingly concluded that for the purposes of drawing the equidistance line, such low-tide elevations must be disregarded.

Pedra Branca (Malaysia/Singapore) (2008)

The *Case Concerning Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (2008) ("*Pedra Branca*") was a dispute that concerned competing territorial sovereignty claims by Malaysia and Singapore over three features – Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge. Pedra Branca and Middle Rocks are islands. South Ledge is a low-tide elevation.

With regard to the sovereignty claims to the two islands, the Court held that Singapore had sovereignty over Pedra Branca and that Malaysia had sovereignty over Middle Rocks.

With regard to South Ledge, the Court however noted that there were special problems to be considered because South Ledge is a low-tide elevation. The Court recalled Article 13 of UNCLOS on low-tide elevations. The Court noted that South Ledge falls within the apparently overlapping territorial waters generated by the mainland of Malaysia, by Pedra Branca and by Middle Rocks. It recalled that in the Special Agreement and in the final submissions the Court was specifically asked by the Parties to decide the matter of sovereignty separately for each of the three maritime features. At the same time the Court observed that it had not been mandated by the Parties to draw the line of delimitation with respect to the territorial waters of Malaysia and Singapore in the area in question. In these circumstances, the Court concluded that sovereignty over South Ledge, as a low-tide elevation, belongs to the State in the territorial waters of which it is located.

In its discussion of the status of low-tide elevations, the Court quoted the following passages from paragraphs 205-206 of its judgment in the *Qatar v. Bahrain* case:

> "International treaty law is silent on the question whether low-tide elevations can be considered to be 'territory'. Nor is the Court aware of a uniform and widespread State practice which might have given rise to a customary rule which unequivocally permits or excludes appropriation of low-tide elevations . . . The few existing rules do not justify a general assumption that low-tide elevations are territory in the same sense as islands. It has never been disputed that islands constitute terra firma, and are subject to the rules and principles of territorial acquisition; the difference in effects which the law of the sea attributes to islands and low-tide elevations is considerable. It is thus not established that in the absence of other rules and legal principles, low-tide elevations can, from the viewpoint of the acquisition of sovereignty, be fully assimilated with islands or other land territory."

LOW-TIDE ELEVATIONS AND SUBMERGED FEATURES IN AREAS OF OVERLAPPING CLAIMS

In many cases there are low-tide elevations in areas of overlapping territorial sea claims, EEZ claims or continental shelf claims. As the ICJ held in the *Pedra Branca case*, if there is a low-tide elevation in an

area of overlapping territorial sea claims, it is under the sovereignty of the State in whose territorial sea it lies. Until the boundary issue is resolved, it is located in an area of overlapping claims.

If there is a low-tide elevation in an area of overlapping EEZ claims or continental shelf claims, there is no issue of territorial sovereignty. The low-tide elevation is part of the sea-bed. If it is within 12 nm from an island, it can be used as a basepoint in measuring the breadth of the territorial sea from the island. If it is not within 12 nm from an island, it forms part of the sea bed. It has no entitlement to maritime zones of its own. However, since it lies within the 200 nm EEZ of the coastal State, the coastal State would have sovereign right to explore and exploit the resources in the area around the feature. The same reasoning would apply if the low-tide elevation is situated in an area of overlapping continental shelf claims.

The same principles would apply to a submerged feature in the EEZ or on the continental shelf. It is part of the seabed. Once the maritime boundary is resolved, the State in whose EEZ it lies or within whose continental shelf it lies will have the right to explore and exploit the living and non-living natural resources of the submerged feature. Until the boundary is resolved, it is an area of overlapping claims.

If such a feature is situated in an area of overlapping EEZ or continental shelf claims, the two States concerned would be under the obligations set out in Articles 74 and 83 on the delimitation of EEZ and continental shelf boundaries. The maritime boundary is to be effected by an agreement between the two States. If no agreement can be reached within a reasonable time, the two States concerned shall resort to the dispute settlement procedures set out in Part XV of UNCLOS, unless they have exercised their right to opt out of the dispute settlement procedures for disputes on the delimitation of maritime boundaries.

Pending agreement on the maritime boundary, the States concerned, in a spirit of understanding and cooperation, are under an obligation make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

The obligation not to take unilateral action to jeopardize or hamper the reaching of a final agreement means that States cannot take any unilateral actions which would cause permanent change or damage in the area of over-lapping claims. For example, a State could not begin drilling for gas or oil in the area in dispute.

If a State has placed an installation or structure on a low-tide elevation or submerged feature in an area of overlapping EEZ or continental shelf claims, there is likely to be a dispute as to which State has jurisdiction over the installation or structure, since both States will claim that it lies within in their EEZ. The State adding the installation or structure runs the risk of the other State having jurisdiction over that feature if the maritime boundary issue is resolved in a manner which results in the feature being in the EEZ or on the continental shelf of the other State. It could also be in violation of its obligations under Articles 74 or 83 if it the installation or structures cause permanent change.

CONCLUSIONS ON THE LEGAL STATUS OF LOW-TIDE ELEVATIONS AND SUBMERGED FEATURES

Under UNCLOS, low-tide elevations and submerged features are not subject to a claim to sovereignty because sovereignty can only be claimed over land territory and islands. Low-tide elevations can be used as basepoints in measuring the breadth of territorial sea if they are situated with 12 nm of the mainland or an island.

Submerged features and low-tide elevations are part of the sea bed, and are governed by the rules and principles of the relevant zone. If they are within the territorial sea or archipelagic waters, they are under the sovereignty of the coastal State. If they are within the 200 nm exclusive economic zone of a State, they are governed by Part V of UNCLOS. If they are on the extended continental shelf of the coastal State, they are governed by Part VI.

Low-tide elevations and submerged features can be made into artificial islands or installations or structures can be built on them. In such cases the provisions of UNCLOS on artificial islands, installations and structures would be applicable with respect to jurisdiction, safety zones, etc. Also, a low-tide elevation would not lose its status as a low-tide elevation, and it could be used as a basepoint for measuring the breadth of the territorial sea if it is situated within 12nm from and the mainland land territory or an island.

If low-tide elevations or submerged features lie in areas of overlapping EEZ or continental shelf claims, there are limitations on what unilateral actions the claimant States can take with regard to the low-tide elevation or submerged feature.

APPENDIX: UNCLOS PROVISIONS ON ISLANDS AND LOW-TIDE ELEVATIONS

Article 5. Normal Baseline

Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State.

Article 6. Reefs

In the case of islands situated on atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea is the seaward low-water line of the reef, as shown by the appropriate symbol on charts officially recognized by the coastal State.

Article 7. Straight Baselines

4. Straight baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or except in instances where the drawing of baselines to and from such elevations has received general international recognition.

Article 13. Low-tide elevations

1. A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.

2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own.

Article 60. Artificial Islands, Installations and Structures in the Exclusive Economic Zone

1. In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of:

(a) artificial islands;

(b) installations and structures for the purposes provided for in article 56 and other economic purposes;

(c) installations and structures which may interfere with the exercise of the rights of the coastal State in the zone.

2. The coastal State shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations.

3. Due notice must be given of the construction of such artificial islands, installations or structures, and permanent means for giving warning of their presence must be maintained. Any installations or structures which are abandoned or disused shall be removed to ensure safety of navigation, taking into account any generally accepted international standards established in this regard by the competent international organization. Such removal shall also have due regard to fishing, the protection of the marine environment and the rights and duties of other States. Appropriate publicity shall be given to the depth, position and dimensions of any installations or structures not entirely removed.

4. The coastal State may, where necessary, establish reasonable safety zones around such artificial islands, installations and structures in which it may take appropriate measures to ensure the safety both of navigation and of the artificial islands, installations and structures.

5. The breadth of the safety zones shall be determined by the coastal State, taking into account applicable international standards. Such zones shall be designed to ensure that they are reasonably related to the nature and function of the artificial islands, installations or structures, and shall not exceed a distance of 500 metres around them, measured from each point of their outer edge, except as authorized by generally accepted international standards or as recommended by the competent international organization. Due notice shall be given of the extent of safety zones.

6. All ships must respect these safety zones and shall comply with generally accepted international standards regarding navigation in the vicinity of artificial islands, installations, structures and safety zones.

7. Artificial islands, installations and structures and the safety zones around them may not be established where interference may be caused to the use of recognized sea lanes essential to international navigation.

8. Artificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.

Article 80. Artificial Islands, Installations and Structures on the Continental Shelf

Article 60 applies mutatis mutandis to artificial islands, installations and structures on the continental shelf.

Article 121. Regime of islands

1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.

2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.

3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.

Article 246. Marine scientific research in the exclusive economic zone and on the continental shelf

1. Coastal States, in the exercise of their jurisdiction, have the right to regulate, authorize and conduct marine scientific research in their exclusive economic zone and on their continental shelf in accordance with the relevant provisions of this Convention.

2. Marine scientific research in the exclusive economic zone and on the continental shelf shall be conducted with the consent of the coastal State.

3. Coastal States shall, in normal circumstances, grant their consent for marine scientific research projects by other States or competent international organizations in their exclusive economic zone or on their continental shelf to be carried out in accordance with this Convention exclusively for peaceful purposes and in order to increase scientific knowledge of the marine environment for the benefit of all mankind. To this end, coastal States shall establish rules and procedures ensuring that such consent will not be delayed or denied unreasonably.

4. For the purposes of applying paragraph 3, normal circumstances may exist in spite of the absence of diplomatic relations between the coastal State and the researching State.

5. Coastal States may however in their discretion withhold their consent to the conduct of a marine scientific research project of another State or competent international organization in the exclusive economic zone or on the continental shelf of the coastal State if that project:

> (a) is of direct significance for the exploration and exploitation of natural resources, whether living or non-living;
>
> (b) involves drilling into the continental shelf, the use of explosives or the introduction of harmful substances into the marine environment;
>
> (c) involves the construction, operation or use of artificial islands, installations and structures referred to in articles 60 and 80;
>
> (d) contains information communicated pursuant to article 248 regarding the nature and objectives of the project which is inaccurate or if the researching State or competent international organization has outstanding obligations to the coastal State from a prior research project.

. . .

Article 258. Deployment and use

The deployment and use of any type of scientific research installations or equipment in any area of the marine environment shall be subject to the same conditions as are prescribed in this Convention for the conduct of marine scientific research in any such area.

Article 259. Legal status

The installations or equipment referred to in this section do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.

Article 260. Safety zones

Safety zones of a reasonable breadth not exceeding a distance of 500 metres may be created around scientific research installations in accordance with the relevant provisions of this Convention. All States shall ensure that such safety zones are respected by their vessels.

Article 261. Non-interference with shipping routes

The deployment and use of any type of scientific research installations or equipment shall not constitute an obstacle to established international shipping routes.

Article 262. Identification markings and warning signals

Installations or equipment referred to in this section shall bear identification markings indicating the State of registry or the international organization to which they belong and shall have adequate internationally agreed warning signals to ensure safety at sea and the safety of air navigation, taking into account rules and standards established by competent international organizations.