



MARITIME ZONES FROM ISLANDS AND ROCKS

Paper by
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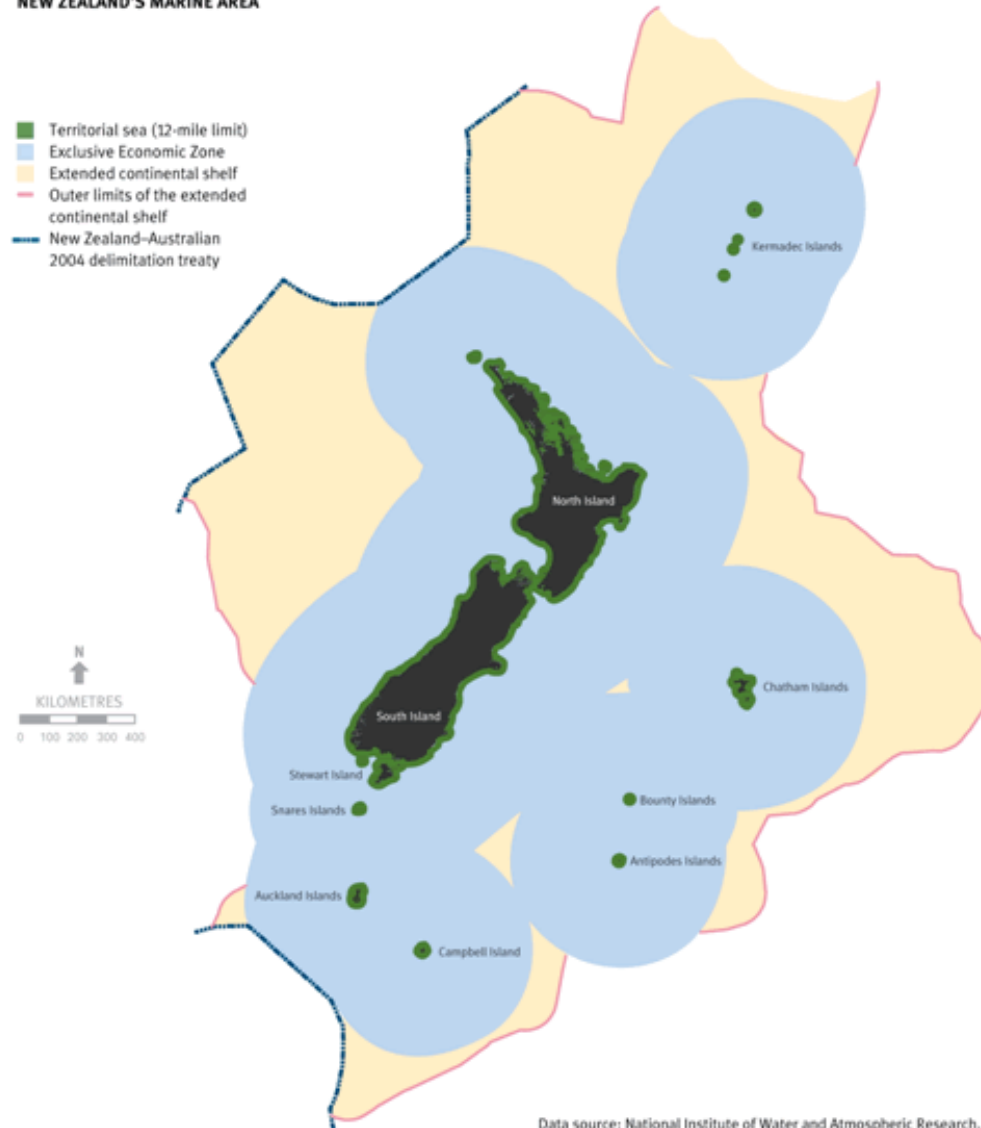
Basic Definition
and
Zone-Creating Capacity
of an Island in IL

. See Art 121(2) UNCLOS: “***Except as provided in para 5, the territorial sea, the contiguous zone, the exclusive economic zone [‘EEZ] and the continental shelf of an island are determined in accordance with the provisions of this Convention relating to other land territory*”**

. this means that islands generate all the maritime zones that mainlands do, and with the same baseline rules (confirmed *Nicaragua v. Colombia*);

NZ EEZ

+FIGURE 11.1:
NEW ZEALAND'S MARINE AREA



- . archipelagic waters also claimable under Art 47(1) in qualifying cases;
- . definition of 'Island' now *wholly* contained in Art 121(1) – thus eg, habitability and size are irrelevant (cf *Nicaragua v Colombia* (2012));
- . latter factors are relevant now, though, to “rocks” in para 3;
- . many writers (including textbook authors) have neglected the definition issue or dismissed it as straightforward ;
- . my first meeting with insular definition problems *in practice* came in the *US v Alaska* case in 1984 (SM Report 1996);

DINKUM SANDS



Definition of Island

- Now useful discussion of insular definition in *Qatar v Bahrain* and *Nicaragua v Colombia* cases;
- **Art 121(1): “... a naturally formed area of land, surrounded by water, which is above water at high tide”;**
- **Four** basic requirements in definition (“surrounded by water” straightforward): thus three *main* are:-
 - (a) **“Land”**:
 - implies some *terrestrial* composition (includes eg, coral; but cf argument in *Nicaragua v. Colombia*)
 - sea ice/ vegetation etc not included (non-mineral);
 - (b) **“Naturally Formed”**:
 - above-high tide elevation must *not be man-made*, or *directly* contributed to by *artificial* means;
 - if so, it is at most an *artificial* ‘island’ under Art 60(4)/(5), with max 500 m ‘safety zone’, especially if platform etc is fixed to sea floor as in SCS (eg, Mischief Reef);

MISCHIEF REEF



- arguably even a natural formation may be made into an artificial island by substantial build-up (as has happened in SCS) - a sort of 'hybrid island' as mentioned in the Joint Diss.Op. of J.Badjaoui et al in *Qatar* case;
- additional problem here is one of evidence – where does natural element exist where substantial man-made change? Cf 'House Rock' (on Eddystone) in the *Western Approaches Arbitration*, and PRC build-up on reefs in SCS;

EDDYSTONE Lighthouse



- several examples where this may have happened, eg, on marginal islands in Pacific by 'reef-building (Tonga etc);
- human intervention to prevent insular disappearance by repair (eg Kolbeinsey) or building surrounding caissons (Japan – Okinotorishima (one peak possibly only 20ins above high water) – caissons now higher than natural formations themselves) - may be ok (cf PRC CLCS protest - did not dispute insular status);

OKINOTORISHIMA 'Island'



Definition of Islands ctd

- (c) “**above water at high tide**”
- this is *most problematic* aspect of insular definition – little discussed by commentators;
- word “permanently” before phrase removed at UNCLOS I;
- very important in case of *low-lying* formations as in Spratlys and SCS;

Scarborough Shoal 'Rock'



Definition of Islands ctd

- first problem is what is *appropriate* (high) ***tidal datum***?
- here commented that diversity of state practice indicates no customary rule – any “reasonable datum” suffices (Antunes)
- but, practical problems where disputing states use *different datums*, as in *Western Approaches Arbitration* (highest equinotical/mean springs high tide) and *Nicaragua/Colombia* (re ‘QS 32’)(where ICJ required sufficient evidence)(cf similar LTE problems as in France/Belgium ts delimitation etc);

Quitásueño Bank



Definition of Islands ctd

- choices lie between a mean high tide (*minimalist*) and highest astronomical tide ('HAT' - *maximalist*) test – latter favoured by IHO;
- in *Nicaragua/Colombia*, Nicaragua's invocation of 'HAT' (rather than mean HT) put 'QS32' c. 1.2ms above high tide) - implicitly approved by ICJ;
- this speaker favours a maximalist HT test, as too liberal a datum could mean 'seasonal islands' or 'islands' often submerged, perhaps even at LT (cf problem of Dinkum Sands in *US v Alaska* (1996));
- this is not to say that 'permanence' above tidal datum is absolute requirement in IL;

Island Definition ctd

- for, ***exceptional*** weather or atmospheric conditions *may* be allowed for which temporarily inundate and elevation;
- deleted UNCLOS I phrase “in normal circumstances” still implicit in definition;
- arguable that mere seasonal or foreseeable inundations are excluded as ‘exceptional’ (eg regular ‘ice melt collapse’ in *US v Alaska* or monsoon waves - as opposed to hurricane/tectonic ones - giving ‘regular overwash’ (note also ‘global, warming’ problem here)
- arguable also that the recommended ‘tidal cycle’ of 18 and half/ 19 years *may* take account of some more exceptional conditions; but note impracticality of such test ;

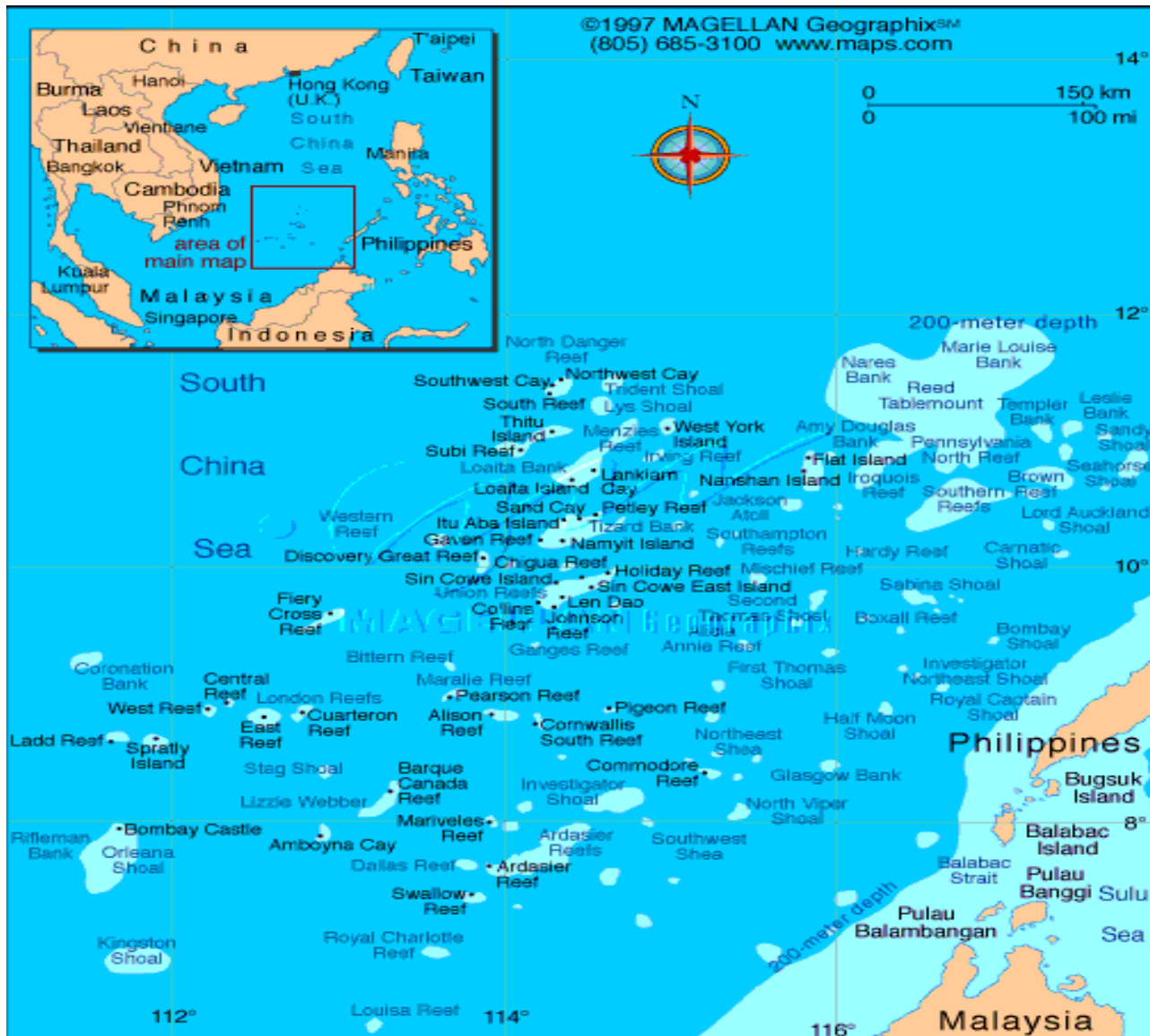
Island Definition ctd

- ***Problems relating to impermanency (of vertical or horizontal position) due to total / periodic erosion by natural forces:***
- this is *separable* from that of high tide datum compliance and was main problem in *US v Alaska*;
- Judge (SM) in latter case required that a formation must be “generally,” “normally” or “usually above HT datum
- formations not complying with such tests form residual category of LTEs, even if occasionally above HT datum (cf London Reefs in SCS described as “rocks that seldom cover” by Prescott) – insular *status* is not ‘ambulatory’ like baselines;
- *horizontal* impermanence (esp. if combined with vertical) and frequent) may also disqualify insular status (eg ‘migrating’ formation such as Cevi Ra Reef (Fiji));

Island Definition ctd

- ***Application of above insular tests to SCS***; many of 36 or so formations may fail above-high tide requirement (eg Louisa Reef or Mischief Reef may be mere LTEs like Subi Reef) or of very marginal insularity (eg Scarborough Reef/Fiery Cross Reef/Erica Reef/Loaita Bank/Investigator Reef;/Amboyna Cay) – see eg survey by Gjetnes and Hancox & Prescott;
- or marginal insular formations may effectively have become ‘artificial islands’ by substantial man-made build-up (eg, Swallow Reef); cf the dicta in *Qatar* case;
- forthcoming arbitration requested by the Philippines may objectively determine which of relevant formations (Mischief, McKennan, Gaven, Subi Reefs) are true ‘islands’ – may be spin-off as to other Spratly formations;

SPRATLY Islands



SUBI Reef



Definition of “Rocks” in Art 121(3) and Claimable Maritime Zones Therefrom

- This matter has now been written up very extensively – hence only an overview is attempted;
- UNCLOS III travaux preparatoires are unhelpful because of division of views there;
- despite this, only one State (Iran) appears to have made a positive dec of understanding on it under Art 310 of UNCLOS;
- one of few UNCLOS provisions which may *retrospectively cut down pre-existent claims*;
- **Art 121(3) says: “Rocks which cannot sustain human habitation or economic life of their own shall have no [EEZ] or continental shelf [cs]”**
- thus at least the *effect is clear*: any such ‘rock’ is only entitled to a ts and cz, and is automatically and mandatorily deprived of any EEZ/cs (even retrospectively – cf Rockall) - confirmed recently in *Nicaragua/Colombia* by ICJ (re ‘QS32’);

- ***What is the meaning of the initial wording?***
- UNLOS records unclear – numerous commentators have said wording is *ambiguous and vague* in respect of the *three elements* referred to - “**rocks**”, ‘**habitability**’ and ‘**economic viability**’; but at least it is implicit that the *4 aspects of definition of an ‘island’ also have here to be satisfied (confirmed by ICJ in Nicaragua v. Colombia)*;
- “**rocks**”: *not a geologically specific term* (eg, may include sand, coral)(but cf views of Prescott!) - curiously plural term - wording in my view an accident of drafting history;
- meaning of ‘rock’? – seemingly a *very small formation* – may in itself have some aspect of *independent* meaning (eg, Abel Island, Norway (1996) and *Jan Mayen* conciliation case) if ‘rock’ is not too small ;
- ‘**habitability**’ or ‘**economic viability**’: in a literal sense because of conjunction ‘or’, *either* test may exclude a rock from restrictive provision; but in my view this is an illusory point as the two tests *intrinsically inter-relate*

Definition of Rocks and Meaning of Habitability/Economic Viability

- **‘Habitability’:**
- actual habitation not required (fact of *past* habitation may be ‘two-edged sword’ though);
- what *potentiality* of future habitation is sufficient ? (evidenced, eg, by present limited human presence which is seasonal such as fishing)?
- arguably phrase “of its own” *also* qualifies this habitability requirement – thus any habitation should *not depend on artificial support from outside* (hence possible importance of natural water/human sustenance *on rock itself*);
- thus state officials or government-sent personnel (military, scientists etc are only an *artificial population* (cf SCS situation);

Economic Viability

- despite word “cannot”, *potentiality* of economic development may suffice;
- this potentiality should not include economic life arising *from a rock’s future EEZ/cs resources* because of phrase “*of its own*”;
- (any contrary interpretation would turn Art 121(3) on its head – ‘bootstrapping’ scenario);
- again, contemporary *outside state support* to supply ‘economic life’ element (eg, tourism as on Swallow Reef) should be ignored in any test;

State Practice on Art 121(3)

- this predominantly evidences claims of EEZ/cs for *every* insular formation, however small (stakes are high to do so) - eg, France, NZ, Brazil, USA, Venezuela (Aves Island), Japan (Okinotorishima);
- rare to date for a State to 'roll back' any EEZ/cs claim from a rock (see UK/*Rockall*) or to apply the para in its legislation (but cf Mexico (*Alijos*));

ROCKALL



State Practice on Art 121(3)

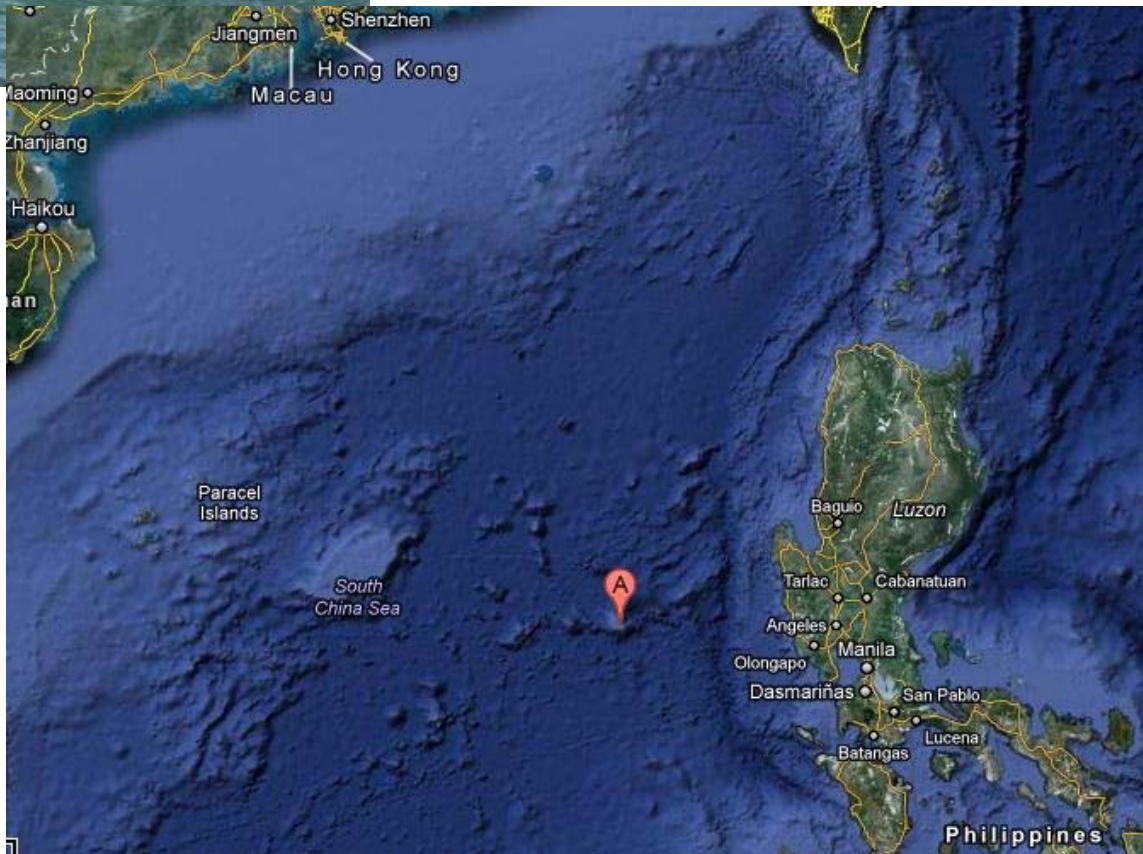
- cf acceptance of application to small formation('QS 32') by litigants in *Nicaragua v Colombia* (2012);
- and note evidence of *protests* by neighbouring states to such claims *as a part of State practice* (but not eg in case of Brazil and its 2004 CLCS submission)(re *remote* "rocks", see Judge Vukas in the *Volga* case and international admin of ocean space – protest here less likely);

State Practice on Art 121(3) ctd

- such prevalent state practice may deprive para 3 of *all material content* (such as US practice based on rock's mere ts generation qualifying it) – it must mean something!
- hence *Art 31 of Vienna Convention on Treaties* (interpretation “in good faith”) and Art 300 of UNCLOS important (fulfilment of UNCLOS provisions to be “in good faith”);

Elucidation Through Third Party Dispute Settlement?

- to date international tribunals (eg, ICJ in *Ukraine v. Romania*) have *sidestepped* interpreting/applying Art 121(3) (see ICJ attitude in *Nicaragua v. Colombia*);
- CLCS unlikely to do so because of self-imposed rule re baseline examination and the 'disputes proviso' (cf Japanese submission and resultant protests re Okinotorishima);
- recent (2013) Philippines request for Annex VIII arbitration (against PRC) re specified formations could be first occasion for a *specific* objective examination by a tribunal of Art 121(3) (Scarborough, Johnson Reef S, Cuarteron (pt of London Reefs), Fiery Cross);



2nd Largest Scarborough Reef Rock!



JOHNSON Reef-South China Sea



Fiery Cross Reef – South China Sea



Conclusion: Art 121(1) and (3) Applied to SCS (Spratly) Dispute

- As seen, many formation in SCS are not true islands – merely part of seabed or at best LTEs;
- some small ‘former islands’ may even now have become ‘*hybrid islands*’ – *artificial* islands with mere 500m safety zones (as also where installations are built on LTEs/seabed)
- evidence from ICJ in *Nicaragua/Colombia* case shows those formations that are claimed as ‘islands’ may be subjected to rigorous charting (hydrographic) evidence of such status in third party settlement;
- most commentators agree that at most only the two or three largest islands in the Spratlys could be considered *habitable or economically viable under Art 121(3)* (citing size, lack of past habitation or economic exploitation or fresh water etc); thus most formations only generate a ts / cz;

- the PRC protest to UN re *Japan's EEZ claim based on Okinotorishima* (to CLCS) could be a 'quasi-estoppel' on its most recent claims to potential EEZ/cs from *its similar rocks* claimed in *the Spratlys* (other ASEAN States seem to base any *extensive* SCS claims on *mainland-based* zones);
- only Prescott seems to argue otherwise on Art 121(3) issue!
- the ***Philippines arbitral request*** (if it proceeds) could determine both insular status and '*Art 121(3) (rocks) status*' in respect of the mentioned formations (see above), and by analogous application, to other SCS formations;

Conclusion ctd

. whether under Art 121 of UNCLOS certain of the maritime features claimed by both the PRC and the Philippines are islands, low tide elevations, or submerged banks, and, moreover, whether the specified formations (see above) are capable of having maritime zones greater than 12nms.