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Panel V.
Islands, Rocks and Low-tide Elevations:
Distinction and Legal status

Offshore Geographic Features and their Significance to Sovereignty and Maritime Claims

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STATUS OF ISLANDS, ROCKS AND LOW-TIDE ELEVATIONS

Offshore Geographic Features Generally

As will be explained below, the only off-shore features subject to appropriation and entitled to maritime claims of their own are islands, including the sub-category of islands knows as rocks. In addition, low-tide elevations can be of significance in drawing baselines from which the maritime zones are measured, and special rules on baselines apply to islands situated on reefs.

What confuses the situation is that offshore geographic features are often described as reefs, shoals, cays or banks. These features are not legal terms of art but it is helpful to have some idea of their meaning. They were described in the 2012 Nicaragua v. Columbia case as follows:

> 20. In the western part of the Caribbean Sea there are numerous reefs, some of which reach above the water surface in the form of cays. Cays are small, low islands composed largely of sand derived from the physical breakdown of coral reefs by wave action and subsequent reworking by wind. Larger cays can accumulate enough sediment to allow for colonization and fixation by vegetation. Atolls and banks are also common in this area. An atoll is a coral reef enclosing a lagoon. A bank is a rocky or sandy submerged elevation of the sea floor with a summit less than 200 metres below the surface. Banks whose tops rise close enough to the sea surface (conventionally taken to be less than 10 metres below water level at low tide) are called shoals. Maritime features which qualify as islands or low‑tide elevations may be located on a bank or shoal.

Definition of Islands and Low-Tide Elevations in UNCLOS

An island is defined in Article 121(1) of UNCLOS as a naturally formed area of land, surrounded by and above water at high tide. A low-tide elevation is defined in Article 13 of UNCLOS as a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide. In short, an island must be above water at high tide and a low-tide elevation must be above water at low-tide. These legal terms of art apply to all off-shore geographic features, notwithstanding the fact that they be described on maps or in Government gazettes as islands, rocks, reefs, shoals, cays or banks.

Both an island and a low-tide elevation are defined in UNCLOS as a 'naturally formed area of land'.[1] 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'

[1] UNCLOS arts. 13 and 121(1).

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.'[2] Other commentators have noted that low-tide elevations can be mud flats or sand bars.[3]

Reefs and coral formations by nature do not fit into the normal category of what we mean as 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. Nevertheless, despite the fact that coral is an organic material, reefs are treated in the same manner as inorganic material where the law of the sea is concerned.

The ICJ confirmed the above analysis in its 2012 decision in the Nicaragua v Columbia case. It stated that neither the composition nor the size of a feature is relevant in determining whether it meets the definition of an island:

> 37. No matter which tidal model is used, it is evident that QS 32 is above water at high tide. Nicaragua's contention that QS 32 cannot be regarded as an island within the definition established in customary international law, because it is composed of coral debris, is without merit. International law defines an island by reference to whether it is "naturally formed" and whether it is above water at high tide, not by reference to its geological composition. The photographic evidence shows that QS 32 is composed of solid material, attached to the substrate, and not of loose debris. The fact that the feature is composed of coral is irrelevant. Even using Nicaragua's preferred tidal model, QS 32 is above water at high tide by some 0.7 metres. The Court recalls that in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain)* (*Merits, Judgment, I.C.J. Reports 2001*, p. 99, para. 197), it found that Qit'at Jaradah was an island, notwithstanding that it was only 0.4 metres above water at high tide. The fact that QS 32 is very small does not make any difference, since international law does not prescribe any minimum size which a feature must possess in order to be considered an island. Accordingly, the Court concludes that the feature referred to as QS 32 is capable of appropriation.

Entitlement of Islands and Rocks to Maritime Zones

The most important change in UNCLOS is that a distinction is made in the maritime zones which can be claimed from features that 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

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2 Haritini Dipla, "Islands," in *The Max Planck Encyclopedia of Public International Law, Volume VI* (R. Wolfrum ed, Oxford University Press, 2006), 406.

3 J. Ashley Roach and Robert Smith, *United States Responses to Excessive Maritime Claims* (2nd ed, Martinus Nijohoff, 1996), 67.

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 no exclusive economic zone or continental shelf.'

In other words, the significance of Article 121, paragraphs (2) and (3) is one of "entitlement". Islands are entitled to the same maritime zones as other land territory, that is, a territorial sea, a contiguous zone, a continental shelf and an EEZ. Rocks, on the other hand, are not entitled to an EEZ or continental shelf of their own. They are only entitled to a territorial sea and a contiguous zone.

In its 2012 Judgement in the Nicaragua v. Columbia case, the ICJ agreed with this reading of Article 121 with respect to the entitlement to maritime rights from islands and rocks, and declared that the article was part of customary international law:

> The Court observes, however, that the entitlement to maritime rights accorded to an island by the provisions of paragraph 2 is expressly limited by reference to the provisions of paragraph 3. By denying an exclusive economic zone and a continental shelf to rocks which cannot sustain human habitation or economic life of their own, paragraph 3 provides an essential link between the long-established principle that "islands, regardless of their size, enjoy the same status, and therefore generate the same maritime rights, as other land territory" *(ibid.)* and the more extensive maritime entitlements recognized in UNCLOS and which the Court has found to have become part of customary international law. The Court therefore considers that the legal régime of islands set out in UNCLOS Article 121 forms an indivisible régime, all of which (as Colombia and Nicaragua recognize) has the status of customary international law.

Scholars are not in agreement on the object and purpose of Article 121(3). Kwiatkowska and Soons have argued that its objective is to limit the category of islands able to generate an EEZ extending to 200 nm and a continental shelf extending to the outer edge of the continental margin, thus preventing what would otherwise be a substantial limitation on area subject to the regimes of high seas and the common heritage of mankind.

An examination of the legislative history of Article 121(3) demonstrates that it was controversial from the outset. It was debated most extensively during the 1974 session of UNCLOS III in Caracus. The present text was inserted in 1975 by the Chairman of Committee II in the draft text known as the Informal Single Negotiating Text. In the subsequent negotiations from 1975 to 1982 various attempts were made to amend the paragraph or to delete it completely. The States which were in favour of deleting paragraph 3 include the United States, the United Kingdom, France and Japan. This is understandable because as former colonial powers, they claim a full 200 nm EEZ from small uninhabited offshore islands under their sovereignty. In the end, all attempts to reach a compromise

on amending Article 121 failed. This is because the delegations at the negotiations were divided according to whether or not they would benefit from the provision because they possessed small uninhabited offshore islands, or whether they felt that paragraph 3 was necessary to ensure that tiny uninhabitable islands did not become the legal basis for vast claims to resources of the oceans. The 1975 provision remained in the final text without amendments despite its obvious ambiguities because the delegates could not reach a compromise on clearer wording.

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, does "sustain" human habitation mean that a small community of people must be able to live on the island without outside assistance? Would this require the island to have a natural source of water and sufficient land to plant crops for food? And what is meant by "sustain economic life"? A major problem in analysing the literature on these issues is that many of the writers are putting forth arguments in support of the position of their country.

With respect to State practice, the most famous instant of a "pull-back" was by the United Kingdom, with respect to the island of Rockall following the protests of Ireland, Denmark (Faroes), and Iceland on the establishment by the United Kingdom of a continental shelf and 200 nm fishery zone around Rockall. (Brownlie, note 84 pp 148).

One of the most controversial cases in Asia on the issue of rocks vs islands is the Japanese claim to an EEZ and extended continental shelf to the islands of Okinotorishima. When Japan submitted their claim to an extended continental shelf to the Commission on the Limits of the Continental Shelf both China and Korea submitted Notes Verbale to the UN Secretary-General. Both China and Korea maintained that Okinotorishima is rock within the meaning of Article 121(3) and is not entitled to an EEZ and continental self of its own.[4]

Maritime Zones from Islands situated on Atolls and Islands having Fringing Reefs

The key to understanding article 6 of UNCLOS on reefs is that it is not applicable to all reefs. It is only applicable to" islands" situated on reefs or islands which have fringing reefs. It creates an exception to the general rule that the normal baseline is the low water line along the coast of the island. It provides that the seaward low-water line of the reef is the baseline for measuring the

[4] Chinese Note Verbale to the United Nations Secretary-General, No. CML/2/2009, February 6, 2009, accessed 14 November 2012, <http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/chn_6feb09_e.pdf>; Korean Note Verbale to the United Nations Secretary-General, No. MUN/046/09 February 27, 2009, accessed 14 November 2012 <http://www.un.org/Depts/los/clcs_new/submissions_files/jpn08/kor_27feb09.pdf>.

territorial sea from such islands. This article is not free from ambiguity, and has been the subject of some literature by technical experts.[5] Article 6 of UNCLOS, reads as follows:

> 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.

Low-Tide Elevations and Maritime Zones

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 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.

Although UNCLOS provides that only islands are entitled to maritime zones of their own, it does not expressly State that low-tide elevations are not subject to appropriation, that is, to a claim of sovereignty. The ICJ considered this issue in several cases, but its decisions were not entirely clear. However, in its 2012 judgement in the Nicaragua v Columbia case, the ICJ finally clarified the issue by declaring that low-tide elevations were not cable of appropriation:

> 26. It is well established in international law that islands, however small, are capable of appropriation (see, e.g., *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar* v. *Bahrain),Merits, Judgment, I.C.J. Reports 2001*, p. 102, para. 206). By contrast, low‑tide elevations cannot be appropriated, although "a coastal State has sovereignty over low‑tide elevations which are situated within its territorial sea, since it has sovereignty over the territorial sea itself" (*ibid.*, p. 101, para. 204) and low‑tide elevations within the territorial sea may be taken into account for the purpose of measuring the breadth of the territorial sea . . .

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

ISLANDS IN AREAS OF OVERLAPPING MARITIME CLAIMS

When the EEZ or continental shelf claims from the mainland territory of two States overlap, they have obligations under Articles 74 and 83 with respect to the areas of overlapping claims. The areas of overlapping claims become more complicated if there are islands belonging to one or both of the claimants in the areas of overlapping claims.

Several general comments can be made about the treatment of tiny offshore islands by international courts and arbitral tribunals in maritime boundary delimitation cases.

First, the cases usually arise because there are overlapping continental shelf and/or EEZ claims from the mainland territories of two opposite or adjacent States and the court or tribunal is tasked with drawing the maritime boundary between them, and one of the issues before the court or tribunal is what effect to give off-shore islands belonging to one of them when delimiting the maritime boundary between the two States.

Second, although it is sometimes argued that one or more of the islands should have no EEZ or continental shelf of its own because it is a rock within Article 121(3), the courts and tribunals have decided in maritime delimitation cases that they can delimit the maritime boundary without deciding the issue of whether a given features is a rock within Article 121(3).

> The Court cannot, therefore, accept Nicaragua's submission that an equitable solution can be achieved by drawing a 3-nautical-mile enclave around each of these islands. It concludes that Roncador, Serrana, the Alburquerque Cays and East-Southeast Cays are each entitled to a territorial sea of 12 nautical miles, irrespective of whether they fall within the exception stated in Article 121, paragraph 3, of UNCLOS. Whether or not any of these islands falls within the scope of that exception is therefore relevant only to the extent that it is necessary to determine if they are entitled to a continental shelf and exclusive economic zone. In that context, the Court notes that the whole of the relevant area lies within 200 nautical miles of one or more of the islands of San Andrés, Providencia or Santa Catalina, each of which — the Parties agree — is entitled to a continental shelf and exclusive economic zone. The Court recalls that, faced with a similar situation in respect of Serpents' Island in the *Maritime Delimitation in the Black Sea* case, it considered it unnecessary to determine whether that island fell within paragraph 2 or paragraph 3 of Article 121 of UNCLOS (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, pp. 122-123, para. 187). In the present case, the Court similarly concludes that it is not necessary to determine the precise status of the smaller islands, since any entitlement to maritime spaces which they might generate within the relevant area (outside the territorial sea) would entirely overlap with the entitlement to a continental

> shelf and exclusive economic zone generated by the islands of San Andrés, Providencia and Santa Catalina.

Third, in such cases the court or tribunal usually gives tiny offshore islands partial or no effect in delimiting the maritime boundary between the two States. The courts and tribunals do this by taking into account the characteristics of the offshore island in the delimitation process. They sometimes decide that the small islands should not be used as base points when constructing an equidistance line between the two States. For example, in the Columbia v. Nicaragua case the ICJ did not use three Columbian islands as basepoints in determining the equidistance line. It explained its position as follows:

> 202. So far as the Colombian coast is concerned, the Court considers that Quitasueño should not contribute to the construction of the provisional median line. The part of Quitasueño which is undoubtedly above water at high tide is a minuscule feature, barely 1 square m in dimension. When placing base points on very small maritime features would distort the relevant geography, it is appropriate to disregard them in the construction of a provisional median line. In the *Maritime Delimitation in the Black Sea* case, for example, the Court held that it was inappropriate to select any base point on Serpents' Island (which, at 0.17 square km was very much larger than the part of Quitasueño which is above water at high tide), because it lay alone and at a distance of some 20 nautical miles from the mainland coast of Ukraine, and its use as a part of the relevant coast "would amount to grafting an extraneous element onto Ukraine's coastline ; the consequence would be a judicial refashioning of geography, which neither the law nor practice of maritime delimitation authorizes" (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 110, para. 149). These considerations apply with even greater force to Quitasueño. In addition to being a tiny feature, it is 38 nautical miles from Santa Catalina and its use in the construction of the provisional median line would push that line significantly closer to Nicaragua. Colombia did not place a base point upon Serrana. The Court's decision not to place a base point upon Quitasueño means, however, that it must consider whether one should be placed upon Serrana. Although larger than Quitasueño, Serrana is also a comparatively small feature, whose considerable distance from any of the other Colombian islands means that placing a base point upon it would have a marked effect upon the course of the provisional median line which would be out of all proportion to its size and importance. In the Court's view, no base point should be placed on Serrana. The Court also considers that there should be no base point on Low Cay, a small uninhabited feature near Santa Catalina.

Fourth, international courts and arbitral tribunals sometimes also decide that the small islands will only be given a 12 nm territorial sea because to give it more would have a disproportionate effect on the maritime boundary, given the relative size of the islands compared to the mainland and the length of the coastlines of the islands and the mainland. In other cases they give the islands some effect in determining the boundary, but it is often are partial or reduced effect. In its 2102 decision in the Nicaragua v. Columbia case, the ICJ also followed this practice, as is shown by the quotation below:

> 238. That leaves Quitasueño and Serrana, both of which the Court has held fall on the Nicaraguan side of the boundary line described above. In the Court's view, to take the adjusted line described in the preceding paragraphs further north, so as to encompass these islands and the surrounding waters, would allow small, isolated features, which are located at a considerable distance from the larger Colombian islands, to have a disproportionate effect upon the boundary. The Court therefore considers that the use of enclaves achieves the most equitable solution in this part of the relevant area. Quitasueño and Serrana are each entitled to a territorial sea which, for the reasons already given by the Court (paragraphs 176-180 above), cannot be less than 12 nautical miles in breadth. Since Quitasueño is a rock incapable of sustaining human habitation or an economic life of its own and thus falls within the rule stated in Article 121, paragraph 3, of UNCLOS, it is not entitled to a continental shelf or exclusive economic zone. Accordingly, the boundary between the continental shelf and exclusive economic zone of Nicaragua and the Colombian territorial sea around Quitasueño will follow a 12-nautical-mile envelope of arcs measured from QS 32 and from the low-tide elevations located within 12 nautical miles from QS 32 (see paragraphs 181-183 above). In the case of Serrana, the Court recalls that it has already concluded that it is unnecessary to decide whether or not it falls within the rule stated in Article 121, paragraph 3, of UNCLOS (paragraph 180 above). Its small size, remoteness and other characteristics mean that, in any event, the achievement of an equitable result requires that the boundary line follow the outer limit of the territorial sea around the island. Theboundary will therefore follow a 12-nautical-mile envelope of arcs measuredfrom Serrana Cay and other cays in its vicinity.

LOW-TIDE ELEVATIONS IN AREAS OF OVERLAPPING MARITIME 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.[6] 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 and is not subject to appropriation. However, if it is within 12 nm from an island, it is within the territorial of that island, and 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 rights 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 to 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.[7]

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 in the area of over-lapping claims

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6 *Supra* note 62.

7 UNCLOS art. 74(3).

which would cause permanent change or damage or which have a permanent physical impact on the environment.[8] 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, a dispute could arise 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 the installation or structures cause permanent change.

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.[9]

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.[10]

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 States have exclusive rights and jurisdiction over artificial islands, but their rights and jurisdiction over installations and structures is limited to those used for 'economic purposes'.[11] This presumably gives a State the right to construct an installation or structure for

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8 Guyana v. Suriname, Arbitral Court, Award, September 17, 2007, 156, para. 407, accessed November 14, 2012, <http://www.pca-cpa.org/showpage.asp?pag_id=1147>.

9 UNCLOS art. 80.

10 UNCLOS art. 60(2).

11 UNCLOS art. 60(1)(a) and (b).

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.[12] 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.[13]

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.[14]

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[15] 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

12 UNCLOS arts. 261 and 262.

13 UNCLOS arts. 259 and 260.

14 UNCLOS art. 60(5).

15 Alex Oude Elferink "Artificial Islands, Installations, and Structures," *The Max Planck Encyclopedia of Public International Law, Volume 1* (R. Wolfrum ed, Oxford University Press, 2012) 662.

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.[16] 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.

ENVIRONMENTAL OBLIGATIONS CONCERNING ARTIFICIAL ISLANDS, INSTALLATIONS AND STRUCTURES

The State that occupies or controls an island, rock or low-tide elevation has obligations under UNCLOS to protect and preserve the marine environment from activities on such feature, including land reclamation works or the building of installations or structures. Under Article 194(1) of UNCLOS, States have an obligation to take all measures consistent with the Convention to prevent, reduce and control pollution of the marine environment from any source. Under Article 194(2), States shall take all measures necessary to ensure that activities under their jurisdiction and control are so conducted as to not cause damage by pollution to other States and their environment.

In addition to these general obligations, the International Tribunal for the Law of the Sea held in the MOX Plant Case and the Land Reclamation Case that States have a duty to cooperate or a due regard obligation with respect to planned activities under their jurisdiction and control that may pollute the marine environment of another State. The duty to cooperate set out in these cases seems to include a duty to give timely notice to the potentially affected State of the planned activities, to provide it with relevant information about the planned activities and to consult with it in good faith. It also implies an obligation to exchange information and to negotiate in good faith in order to balance the competing interests of the two States.

A good argument can be made that the above obligations apply to a State in control of an island or low-tide elevation that is located within the EEZ or on the continental shelf of another State.

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[16] 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* (Caron and Scheiber eds, Martinus Nijhoff, 2004), 490.

CONCLUSIONS

Under UNCLOS and the decisions of international courts and tribunals, 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 offshore 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 EEZ 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 of UNCLOS.

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 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 them.