

Artificial Islands in the South China Sea: The Legal Regime and  
Implications of the Award

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*Abstract*

*This Chapter examines the legal regime of artificial islands, as well as installations and structures, in the law of the sea, its treatment in the Award by the Tribunal in the matter of the South China Sea arbitration (Philippines v. China), and its implications. The environmental considerations regarding the construction of these artificial islands, and the Tribunal's criteria for deciding the status of the naturally formed features in the South China Sea, including those on which the artificial islands were constructed, have been considered in earlier Chapters and will not be discussed in this Chapter.*

**I. INTRODUCTION**

This Chapter examines the legal regime of artificial islands, as well as installations and structures, in the law of the sea, its treatment in the Award of the Tribunal *in the matter of the South China Sea Arbitration (Philippines v. China)*<sup>1</sup> and its implications. The environmental considerations regarding the construction of these artificial islands,<sup>2</sup> and the Tribunal's criteria for deciding the status of the naturally formed features in the South China Sea, including those on which the artificial islands were constructed, have been considered in earlier Chapters and will not be discussed in this Chapter.

This Chapter begins with a summary of the Award on the status and entitlements of artificial islands. It then proceeds to consider definitions of the terms 'artificial islands,' 'installations' and 'structures.' The Chapter then explains the legal regime of artificial islands. Next the Chapter examines the status of artificial islands constructed on low-tide elevations and their entitlements to maritime zones. The Chapter next turns to an

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<sup>1</sup> *In the Matter of the South China Sea Arbitration (Philippines/China)*, PCA Case No. 2013-19, Award (12 July 2016) (Award) online: <http://www.pcacases.com/pcadocs/PH-CN-20160712-Award.pdf>.

<sup>2</sup> These and other issues were earlier considered by the author in 'China's Shifting Sands in the Spratlys,' *ASIL Insight* vol. 19 issue 15 (15 July 2015) online: <https://www.asil.org/insights/volume/19/issue/15/chinas-shifting-sands-spratlys>.

examination of the question whether China’s activities in constructing the artificial islands could be considered to be military activities. Next is an examination of the Tribunal’s consideration of the lawfulness of China’s construction of an artificial island on Mischief Reef within the Philippine EEZ. There follows a brief consideration of the implications for artificial islands, installations on low-tide elevations within other claimants’ EEZ and/or continental shelves or in the high seas. The final substantive discussion expands on the Tribunal’s consideration of the legality of China’s straight baselines in the South China Sea. The Chapter ends with some conclusions.

## **II. SUMMARY OF THE AWARD ON STATUS AND ENTITLEMENTS OF ARTIFICIAL ISLANDS**

The Award in the arbitration between the Philippines and China decided that one of the seven artificial islands was constructed on a “rock” located on the Philippines continental shelf (Johnson Reef<sup>3</sup>) and three were located on rocks seaward of the Philippines EEZ/continental shelf (Cuarteron Reef,<sup>4</sup> Fiery Cross Reef,<sup>5</sup> Gaven Reef (North)<sup>6</sup>). Two others were located on low-tide elevations (LTEs) in the Philippines EEZ (Hughes Reef,<sup>7</sup> Mischief Reef<sup>8</sup>) and one other LTE was located seaward thereof (Subi Reef<sup>9</sup>). None of the artificial islands were created on submerged features. The Tribunal also decided that Gaven Reef (South) was a LTE.<sup>10</sup>

The Tribunal ruled that the artificial island on Mischief Reef within the Philippines EEZ was constructed without obtaining the Philippines consent as required by Article 60 of the Law of the Sea (LOS) Convention to which both the Philippines and China are party.<sup>11</sup> The Tribunal also ruled that LTEs are not subject to appropriation, but are part of

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<sup>3</sup> Award, p. 233 para 557.

<sup>4</sup> Award, p. 233 para 560.

<sup>5</sup> Award, p. 234 para 563.

<sup>6</sup> Award, p. 234 para 566.

<sup>7</sup> Award, p. 174 para 383(a), p. 473 para 1203B(3)(c).

<sup>8</sup> Award, p. 174 para 378, p. 256 para 632, pp. 259-60 paras 646, 647, p. 291 para 735, p. 355 para 887, pp. 411-12 para. 1025, p. 413 para 1030, p. 415 para 1040-43, p. 471 para 1203(A)(2)(b), p 473 para 1203B(3)(c), 1203B(3)(c)(14).

<sup>9</sup> Award, p. 174 para 383(c), p. 412 para 1025, p. 473 para 1203B(3)(c).

<sup>10</sup> Award, p. 174 para 383(b), p. 473 para 1203B(3)(c).

<sup>11</sup> Award, p. 414 para 1038, p. 476 para 1203B(14).

the continental shelf from which they rise.<sup>12</sup> Further the Tribunal held that human modification cannot change the seabed into a LTE or a LTE into an island.<sup>13</sup>

The Tribunal also found that the military activities exception (which China had properly exercised) did not apply to any of these features.<sup>14</sup> The Tribunal noted that ‘the Convention is clear with respect to the law governing artificial islands, installations and structures’ and that the artificial islands were not entitled to a territorial sea even if the feature on which they were constructed was so entitled.<sup>15</sup> However, as discussed below, the Award provides little guidance on distinguishing artificial islands from installations and structures.

### III. DEFINITION OF TERMS

The terms ‘artificial islands,’ ‘installations’ and ‘structures’ are not defined in the Convention. Collectively the terms ‘artificial installations,’ ‘offshore installations’ and ‘installations [i.e. structures] (offshore)’ have been defined as:

human made edifice[s] in the territorial sea, in the EEZ, on the continental shelf, in archipelagic waters, or in ocean space governed by UNCLOS, which [are] usually employed to explore for or exploit marine resources. Artificial islands, offshore installations or [structures] offshore may also be built for other purposes, such as marine scientific research, tide observations, resorts or residences, air terminals, transportation centers, traffic control, etc.

This compilation of definitions of terms not defined in the LOS Convention continues:

Artificial islands or other offshore installations as here defined are subject to all other jurisdictional and other limitations and requirements in UNCLOS, *e.g.*, that artificial islands or offshore installations can possess neither a territorial sea nor be considered as permanent

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<sup>12</sup> Award, p. 415 paras 1040, 1043, p. 474 para 1203B(4).

<sup>13</sup> Award, p. 131 para 305.

<sup>14</sup> Award, p. 413 para 1028.

<sup>15</sup> Award, p. 413 para 1031, p. 414 para 1033.

harbor works and the coastal States are responsible under UNCLOS for environmental protections required for artificial islands.<sup>16</sup>

Earlier the *Consolidated Glossary of Technical Terms used in the LOS Convention* prepared by the Technical Aspects of the Law of the Sea Working Group of the International Hydrographic Organization (IHO) defined these terms as follows:

Installations (off-shore), artificial islands and structures are [m]an-made structure[s] in the territorial sea, exclusive economic zone or on the continental shelf usually for the exploration or exploitation of marine resources. They may also be built for other purposes such as marine scientific research, tide observations, etc.<sup>17</sup>

Alex Oude Elferink has drawn further distinctions. He writes ‘an artificial island is an area of land that is above water at high tide that is not naturally formed.’<sup>18</sup> He continues: ‘an artificial island does not become an island in the sense of Art. 121 if there is an accretion of land that is natural in origin’ because it was not naturally formed.<sup>19</sup> He cautions that the distinction between an island and an artificial island ‘may require a complex assessments of law and fact.’<sup>20</sup>

He distinguishes installations and structures from artificial islands ‘in that the latter are built from man-made or natural materials what are piled on the seabed to form an area of land.’<sup>21</sup> The Tribunal did not follow this distinction when considering the construction on Mischief Reef, as discussed in section VIII below.

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<sup>16</sup>G. K. Walker (General Editor), *Definitions for the Law of the Sea: Terms Not Defined by the 1982 Convention* (Amersfoort: Martinus Nijhoff Publishers, 2012) 104.

<sup>17</sup> Reprinted in UN Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea: Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea* (UN publication Sales No. E.88.V.5\*, 1989) Appendix I p. 41.

<sup>18</sup> Alex G. Oude Elferink, ‘Artificial Islands, Installations and Structures’ in *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2013) para 3, online: <http://opil.ouplaw.com/> (by subscription). He draws this conclusion from the definition of an island in article 121(1) as being surrounded by and above water at high tide.

<sup>19</sup> *Id.* para 4.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Id.* para 5.

He then states that the requirement that artificial islands have to be above water at high tide does not apply to installations and structures.<sup>22</sup> In other words in his view installations and structures can be built on LTEs or submerged features, or even on the seabed, as well as on islands.<sup>23</sup>

He continues ‘[o]ther categories of man-made structures are not included in the terms artificial islands, installations, and structures’ citing submarine cables and pipelines.<sup>24</sup>

There is, however, another important distinction between artificial islands on the one hand and installations and structures on the other. Article 60(1) is clear that all artificial islands in the EEZ/shelf are subject to exclusive coastal State jurisdiction regardless of their purpose or use. However those installations and structures that do not have an economic purpose or whose use may not interfere with the exercise of the rights of the coastal State in the EEZ are not subject to the exclusive jurisdiction of the coastal State. How one ascertains the distinction between these two categories is not otherwise evident from the text of article 60 or the negotiating history of the Convention.<sup>25</sup> This question is further considered in section VII below while examining the Tribunal’s consideration of military activities on Mischief Reef.

One further clarification: the term ‘artificial island’ is used in two senses. The first is to denote an island that has been created by human effort, not naturally formed. The second is to describe what has been built on the artificial island. The term is used in the second sense in article 60(1)(a).

#### **IV. LEGAL REGIME OF ARTIFICIAL ISLANDS, INSTALLATIONS AND STRUCTURES**

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<sup>22</sup> *Ibid.*

<sup>23</sup> In the case of *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, [2008] ICJ Rep. 12, 66 para 166, in discussing Horsburgh lighthouse that had been built on the ‘rock’ Pedra Branca/Pulau Batu Puteh, whose sovereignty was disputed, the Court noted ‘As a matter of law, a lighthouse may be built on the territory of one State and administered by another State — with the consent of the first State.’ At the time the rock was constructed it was in the high seas of the Singapore Strait and under the sovereignty of the Sultan of Johor. The Court ruled that in the mid-twentieth century Singapore gained sovereignty over the rock from Malaysia. Article 121 was not addressed in the Judgment or the separate opinions.

<sup>24</sup> Elferink, *supra* note 18, para 7.

<sup>25</sup> See III *Virginia Commentary* 584-585 paras 60.15(b) and (c).

In its EEZ and on its continental shelf, the coastal State has the exclusive right to construct and to authorize and regulate the construction, operation and use of artificial islands, those installations and structures for the purposes provided for in article 56 (i.e. jurisdiction as provided for in the Convention with regard to the establishment and use of artificial islands, installations and structures) and other economic purposes, and installations and structures which may interfere with the exercise of the rights of the coastal State in the zone.<sup>26</sup> Note that the coastal State's jurisdiction (not sovereign rights) in its EEZ with regard to these artificial islands thus is much broader than with regard to installations and structures.<sup>27</sup> Further, it must be noted that in exercising its rights and performing its duties under the Convention in the EEZ/continental shelf, the coastal State must have due regard to the rights and duties of other States and must act in a manner compatible with the provisions of the Convention.<sup>28</sup>

It is clear from the text of article 60 that artificial islands, installations and structures do not possess the status of islands; they have no territorial sea of their own (or by implication no EEZ or continental shelf), and their presence does not affect the delimitation of the territorial sea, EEZ or the continental shelf.<sup>29</sup>

In the high seas all States have the freedom to construct artificial islands and other installations permitted under international law, subject to Part VI on the continental shelf where it extends beyond 200 nm. However, this and other freedoms of the high seas must be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and with due regard for the rights under the Convention with respect to activities in the Area.<sup>30</sup>

The Convention is also explicit that in the territorial sea off-shore installations and artificial islands are not considered as permanent harbour works which form an integral

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<sup>26</sup> LOS Convention, article 60(1).

<sup>27</sup> L. M. Alexander, *Navigational Restrictions within the New LOS Context: Geographical Implications for the United States* (1986) reformatted and edited by the author (Boston: Nijhoff/Brill Publishers, 2017) 11 ('emplacement of anti-submarine listening devices by one State on another's continental shelf does not [25] interfere with the latter's sovereign rights over its shelf resources; hence, it is not an infringement of the coastal State's rights on its shelf'). Concur, Elferink, *supra* note 18, para 13. For the competing arguments see R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd ed. (Manchester: Juris Publishing, 1999) 427-428. See further the text accompanying and following note 39 *infra*.

<sup>28</sup> LOS Convention, article 56(2).

<sup>29</sup> LOS Convention, article 60(8).

<sup>30</sup> LOS Convention, articles 87(1)(d), 87(2) and 147(2).

part of the harbour system and thus are not regarded as forming part of the coast or as basepoints from which to measure the breadth of the territorial sea.<sup>31</sup>

## V. STATUS OF ARTIFICIAL ISLANDS ON LOW-TIDE ELEVATIONS

The Tribunal ruled, as summarized above, that ‘[a]s a matter of law, human modification cannot change the seabed into a low-tide elevation or a low-tide elevation into an island. A low-tide elevation will remain a low-tide elevation under the Convention, regardless of the scale of the island installation built atop it.’<sup>32</sup> This conclusion immediately followed its quotation of the article 13 definition of a LTE as being a ‘naturally formed area of land’ and reference to the definition of an island in article 121 ‘as a naturally formed area of land.’ The Tribunal’s conclusion seems self-evidently correct.

The Tribunal considered that notwithstanding the use of the term ‘land’ in the physical description of a LTE, such LTEs ‘do not form part of the land territory of a State in the legal sense[] [r]ather they form part of the submerged landmass of the State and fall within the legal regimes for the territorial sea or continental shelf, as the case may be.’ The Tribunal thus subscribed to the ICJ’s view that ‘low-tide elevations cannot be appropriated, although a coastal State has sovereignty over the low-tide elevations which are situated within its territorial sea, since it has sovereignty over the territorial sea itself.’<sup>33</sup>

## VI. ENTITLEMENTS OF LOW-TIDE ELEVATIONS

The Tribunal observed, as summarized above, that article 13(2) states that except where a LTE falls within the breadth of a territorial sea generated from a high-tide feature, it generates no territorial sea of its own. The Tribunal noted that this article does not expressly state that a LTE is not entitled to an EEZ or continental shelf. However the Tribunal correctly stated that conclusion is ‘necessarily implied in the Convention [as it] follows automatically from the operations of Articles 57 and 76, which measure the

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<sup>31</sup> LOS Convention, article 11.

<sup>32</sup> Award, p. 131 para 305.

<sup>33</sup> Award, p. 132 para 309, quoting *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, [2012] ICJ Rep. 624 (19 Nov.), at p. 641 para 26.

breadth of the exclusive economic zone and continental shelf from the baseline of the territorial sea.’ The Tribunal correctly concluded ‘*ipso facto*, if a low-tide elevation is not entitled to a territorial sea, it is not entitled to an exclusive economic zone or continental shelf.’ The Tribunal also correctly concluded that the ‘same restriction follows implicitly from article 121(3), which provides that even certain high-tide features are deemed to be rocks that are ineligible to generate an exclusive economic zone or continental shelf.’<sup>34</sup>

## VII. MILITARY ACTIVITIES

In considering China’s activities on Mischief Reef, the Tribunal considered whether the military activities exception in article 298(1)(b), which China had properly exercised in June 2006 but not raised in the arbitral proceedings, precluded the Tribunal’s jurisdiction on this matter.<sup>35</sup>

The Tribunal referred to the extensive official denials that the construction had a military purpose, including explicit representations at the highest level of the PRC government.<sup>36</sup> In those circumstances the Tribunal decided to not deem the activities to be military in nature ‘when China itself has consistently resisted such classification and affirmed the opposite at the highest level. Accordingly, the Tribunal accept[ed] China’s repeatedly affirmed position that civilian use comprises the primary (if not the only) motivation underlying the dramatic alterations on Mischief Reef.’<sup>37</sup>

The Tribunal’s decision was in keeping with the international law rules attributing to the State the official positions of responsible Government officials, unilateral acts and estoppel.<sup>38</sup> Had the Tribunal nevertheless decided to examine the facts ‘on the ground’ of apparent Chinese military activities to determine pursuant to article 288(4) whether it had jurisdiction, and conclude that the Chinese representations to the contrary were simply

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<sup>34</sup> Award, p. 132 para 308.

<sup>35</sup> Award, pp. 404-407 paras 1011-1014, pp. 409-411 paras 1019-1023, pp. 412-413 paras 1026-1028.

<sup>36</sup> Award, p. 412 para 1027.

<sup>37</sup> Award, p. 413, para 1028.

<sup>38</sup> James Crawford, *Brownlie’s Principles of Public International Law*, 8th ed (Oxford: Oxford University Press, 2012) 415-416, 420-422.

untrue, it would likely have found it lacked jurisdiction to decide the Philippines claim regarding Mischief Reef.

The Award did not address, and probably needed not have addressed, the distinguishing factors between lawful foreign military activities on a coastal State's continental shelf, and unlawful military activities on the continental shelf that affect the coastal State's sovereign rights and jurisdiction over its resources. Kraska has argued that '[o]nly those military activities that rise to the level of or ... are of such scale that they do not have 'due regard' for the coastal state's rights to living and non-living resources of the EEZ and continental shelf are impermissible.'<sup>39</sup> This limitation, of course, applies only to installations and structures for economic purposes (article 60(1)(b)) and those which may interfere with the exercise of the rights of the coastal State in the EEZ (article 60(1)(c)). As discussed in section III above, such limitations do not apply to artificial islands, and thus the coastal State has exclusive right to construct and to authorize and regulate the construction, operation and use of all artificial islands whatever their purpose or use, and there is no foreign military activities exception applicable to artificial islands. Thus further examination of the distinction between artificial islands on the one hand and installations and structures on the other hand is warranted, and is undertaken in the next section in the context of the Tribunal's consideration of the construction activities on Mischief Reef.

### **VIII. CHINA'S CONSTRUCTION OF ARTIFICIAL ISLAND ON MISCHIEF REEF WITHIN THE PHILIPPINE EEZ**

The Tribunal found that Mischief Reef is located 125.4 nm from the archipelagic baseline of the Philippine island of Palawan,<sup>40</sup> and thus is well within and part of the Philippine EEZ and continental shelf.<sup>41</sup>

The Tribunal noted that the Convention is clear with respect to the law governing artificial islands, installations, and structures. Article 56(1)(b) of the Convention provides

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<sup>39</sup> James Kraska, 'Military Activities on the Continental Shelf,' *Lawfare* (22 August 2016) online: <https://www.lawfareblog.com/military-activities-continental-shelf>.

<sup>40</sup> Award, p. 122 para 290.

<sup>41</sup> Award, p. 260 para 647, p. 474 para 1203B(7).

that, within the exclusive economic zone, the coastal State enjoys ‘jurisdiction as provided for in the relevant provisions of this Convention with regard to: (i) the establishment and use of artificial islands, installations and structures.’ Article 60 then elaborates on this provision. Paragraphs (1) and (2) provide:

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.

With respect to the continental shelf, article 80 provides that ‘Article 60 applies *mutatis mutandis* to artificial islands, installations and structures on the continental shelf.’ This would include the continental shelf extending beyond 200 nm from the baseline from which the breadth of the territorial sea is measured.

The Tribunal stated these ‘provisions speak for themselves.’ The Tribunal explained:

In combination, they endow the coastal State—which in this case is necessarily the Philippines—with exclusive decision-making and regulatory power over the construction and operation of artificial islands, and of installations and structures covered by Article 60(1), on Mischief Reef. Within its exclusive economic zone and continental shelf, only the Philippines, or another authorised State, may construct or operate such artificial islands, installations, or structures.<sup>42</sup>

In its analysis the Tribunal ‘conclude[d] that China’s initial structures on Mischief Reef from 1995 onwards constituted installations or structures for the purposes of article

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<sup>42</sup> Award, p. 414 para 1035.

60(1).’ The Tribunal took China at its word that the original purpose of the structures was to provide shelter for fishermen and concluded that this is an economic purpose. The Tribunal also noted that the original structures, which China declined to permit fishermen from the Philippines to use, also had the potential to interfere with the exercise by the Philippines of its rights in the exclusive economic zone. Accordingly, the Tribunal held that pursuant to article 60 of the Convention, ‘only the Philippines could construct or authorise such structures’.<sup>43</sup>

The Tribunal then stated that:

China’s activities at Mischief Reef have since evolved into the creation of an artificial island. China has elevated what was originally a reef platform that submerged at high tide into an island that is permanently exposed. Such an island is undoubtedly “artificial” for the purposes of Article 60. It is equally clear that China has proceeded without receiving, or even seeking, the permission of the Philippines. Indeed, China’s conduct has taken place in the face of the Philippines protests. Article 60 is unequivocal in permitting only the coastal State to construct or authorise such artificial islands.

The Tribunal thus concluded that ‘China’s violation of its obligations [is] manifest.’<sup>44</sup>

The rationale for the Tribunal’s differentiation between structures and artificial islands is unclear. The Tribunal explained that initially the structures both had economic purposes and interfered with the Philippines exercise of the rights of its fishers in the EEZ as provided for in article 60(1)(b) and (c), but that it subsequently created an artificial island above water at high tide without authorization of the Philippines as required by article 60(1)(a). However, the aerial photograph of the construction by February 1999 of the smaller of the two sites at Mischief Reef equipped with a helipad, new communications equipment, and wharves<sup>45</sup> would seem to be an artificial island, not a ‘mere’ structure as characterized by the Tribunal, albeit not as large as those built later which the Tribunal characterized as artificial islands. In this situation the Tribunal did not follow Alex Elferink’s distinction.

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<sup>43</sup> Award, p. 414 para 1036.

<sup>44</sup> Award, pp. 414-415 paras 1037-1038.

<sup>45</sup> Award, p. 402 Figure 30.

As just mentioned, the Award did not elaborate on its rationale for distinguishing between structures/installations and artificial islands. One cannot help but notice that the Philippines initial characterization was that they were structures, and only later described the major construction as of an artificial island, which the Tribunal evidently adopted without explanation. Thus further analytical conclusions as to the differences are hard to draw from the award, and probably should not have been expected given the nature of China's activities were all governed by article 60(1). The conclusion thus is that the Award does not provide much help in discerning what distinguishes artificial islands from installations and structures for the purposes of article 60(1).

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It should be noted that analysis of China's construction on Hughes Reef, another Philippine low-tide elevation lying 180.3 nm from Palawan, had it been at issue in the case, would have been different, as Hughes Reef lies within 12 nm of two high-tide features, McKennan Reef and Sin Cowe Island.<sup>46</sup> Sin Cowe Island is occupied by Vietnam, while it is unclear if China occupies McKennan Reef. While all three of these features lie on the Philippines continental shelf, sovereignty claims could not be resolved by the Tribunal if it had been asked to do so, and thus the nature of the construction was not examined by the Tribunal.

#### **IX. IMPLICATIONS FOR ARTIFICIAL ISLANDS, INSTALLATIONS ON LOW-TIDE ELEVATIONS WITHIN OTHER CLAIMANTS EEZ/CONTINENTAL SHELVES OR IN THE HIGH SEAS**

It will be recalled that this Chapter began with a summary of the Tribunal's findings as to the status and entitlements of the two other low-tide elevations on which China had constructed artificial islands that were not otherwise at issue in the proceedings and thus were not further addressed by the Tribunal:

- Subi Reef, a LTE, lies 231.9 nm from Palawan, and within 12 nm of Sandy Cay (occupied by China) on the reefs west of Thitu (occupied by Vietnam).

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<sup>46</sup> Award, p. 174 para 384.

- Gaven Reef (South), another LTE, lies 203.0 nm from Palawan, and within 12 nm of the high-tide features Gaven Reef (North) (occupied by China) and Namyit Island (occupied by Vietnam).

Because of the conflicting sovereignty claims over these features and the underlying seabed, and the dispute as to whether or not they are in the high seas, the Tribunal would have been unable to rule on these features. The implications of the award on other artificial islands, installations and structures on other LTEs or on the high seas are thus limited to a reinforcement of the existing legal regime in the Convention.

## X. BASELINES

The Award also addressed the question of China's straight baselines in the South China Sea.

The Tribunal first noted that article 3(2) of China's Territorial Sea Law of 1992 mandated the use of straight baselines<sup>47</sup> and in 1996 issued a Declaration setting out the coordinates of the baselines.<sup>48</sup> The Tribunal then noted that China had drawn straight baselines around most of Hainan Island and the Paracels as a whole, but not as to the features it claimed in the Spratlys within the nine-dash line.<sup>49</sup> The Tribunal then addressed possible Chinese claims, and the relevant Convention rules, regarding both straight and archipelagic straight baselines.<sup>50</sup>

573. ... China's statements could also be understood as an assertion that the Spratly Islands should be enclosed within a system of archipelagic or straight baselines, surrounding the high-tide features of the group, and accorded an entitlement to maritime zones as a single unit. With this, the Tribunal cannot agree. The use of archipelagic baselines (a baseline surrounding an archipelago as a whole) is strictly controlled by the Convention, where Article 47(1) limits

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<sup>47</sup> People's Republic of China, Law on the Territorial Sea and the Contiguous Zone (25 February 1992), available at <[www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383846.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383846.htm)>, also available at <[www.un.org/depts/los/legislationandtreaties/pdf/chn\\_1992\\_la.pdf](http://www.un.org/depts/los/legislationandtreaties/pdf/chn_1992_la.pdf)>.

<sup>48</sup> See United Nations, Office of Legal Affairs, Division of Ocean Affairs and the Law of the Sea, *Law of the Sea Bulletin* No. 32, pp. 37-40 (1996).

<sup>49</sup> Award, p. 91 para 213.

<sup>50</sup> Award, pp. 236-237 paras 573-576 (footnotes omitted). The Tribunal did not comment on China's apparent prohibition on the use of the normal baseline.

their use to “archipelagic states”. Archipelagic States are defined in Article 46 as States “constituted wholly by one or more archipelagos and may include other islands.” The Philippines is an archipelagic State (being constituted wholly by an archipelago), is entitled to employ archipelagic baselines, and did so in promulgating the baselines for its territorial sea.<sup>51</sup> China, however, is constituted principally by territory on the mainland of Asia and cannot meet the definition of an archipelagic State.

574. In any event, however, even the Philippines could not declare archipelagic baselines surrounding the Spratly Islands. Article 47 of the Convention limits the use of archipelagic baselines to circumstances where “within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.” The ratio of water to land in the Spratly Islands would greatly exceed 9:1 under any conceivable system of baselines.

With regard to the possible use of straight baselines or archipelagic straight baselines in the Spratlys the Tribunal rejected their use, as follows:

575. The Convention also provides, in its Article 7, for States to make use of straight baselines under certain circumstances, and the Tribunal is aware of the practice of some States in employing straight baselines with respect to offshore archipelagos to approximate the effect of archipelagic baselines.<sup>52</sup> In the Tribunal’s view, any application of straight baselines to the Spratly Islands in this fashion would be contrary to the Convention. Article 7 provides for the application of straight baselines only “[i]n localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity.” These conditions do not include the situation of an offshore archipelago. Although the Convention does not expressly preclude the use of straight baselines in other circumstances, the Tribunal considers that the grant of permission in Article 7 concerning straight baselines generally, together with the conditional permission in Articles 46 and 47 for certain States to draw archipelagic baselines, excludes the possibility of employing straight baselines in other

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<sup>51</sup> Republic Act No. 9522: An Act to Amend Certain Provisions of Republic Act No. 3046, as Amended by Republic Act No. 5446, to Define the Archipelagic Baselines of the Philippines, and for Other Purposes, *Law of the Sea Bulletin* No. 70, p. 32 (footnote added by the author).

<sup>52</sup> See ILA Committee on Baselines under the International Law of the Sea, Study ‘Straight Baseline Segments >40.0 nm in length,’ (28 December 2015), online: <http://www.ila-hq.org/download.cfm/docid/E18E7457-B41E-4A67-AC8990DA33DAC0BB>.

circumstances, in particular with respect to offshore archipelagos not meeting the criteria for archipelagic baselines. Any other interpretation would effectively render the conditions in Articles 7 and 47 meaningless.<sup>53</sup>

With regard to the effect of contrary State practice, the Tribunal concluded:

576. Notwithstanding the practice of some States to the contrary, the Tribunal sees no evidence that any deviations from this rule have amounted to the formation of a new rule of customary international law that would permit a departure from the express provisions of the Convention.<sup>54</sup>

The Tribunal's reasoning here clearly indicates it would not approve of the straight baselines drawn by China around the Senkakus/Diaoyu Dao and the Paracels, or those of other States, such as Ecuador around the Galapagos, Portugal around the Azores, Denmark around the Faroe Islands,<sup>55</sup> the United Kingdom around the Turks and Caicos islands, and Argentina and the United Kingdom around the Malvinas/Falkland Islands.<sup>56</sup> The misuse of straight baselines is clearly supported by the number of protests in the public domain.<sup>57</sup> Ambassador Tommy Koh, President of the Third LOS Conference in its last two years, has often criticized the misuse of straight baselines.<sup>58</sup> The Award and state practice should provide powerful support for cases that might be brought under Part XV of the Convention.<sup>59</sup>

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<sup>53</sup> It will be recalled that the ICJ in its judgment on the merits in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)* observed that the method of straight baselines 'must be applied restrictively.' [2001] ICJ Rep. 40 (16 March) 103 para 211. Footnote added by the author.

<sup>54</sup> Concur, ILA Committee on Baselines, 'Washington 2014 Interim Report', para 60, online: <http://www.ila-hq.org/download.cfm/docid/B6AC9538-42A9-46CC-B7E11BAFFA8A4BA4>.

<sup>55</sup> These four baseline claims have all been protested by the United States and by others: Japan (Senkakus), Vietnam (Paracels), and Belgium, Spain and Sweden (Galapagos).

<sup>56</sup> See ILA, Washington 2014 Interim Report, para 39, and Roach and Smith, *Excessive Maritime Claims*, 3<sup>rd</sup> ed. (Nijhoff 2012) section 4.6.3.

<sup>57</sup> See ILA, Committee on Baselines, Protests Study (2 January 2016) online: <http://www.ila-hq.org/download.cfm/docid/EAB205DC-8032-46A9-9C420D6B3A0697D4>.

<sup>58</sup> E.g. in his address delivered on 10 December 2012 at the UN General Assembly on the occasion of the commemoration of the 30th anniversary of the opening for signature of the 1982 UNCLOS, Ambassador Koh said 'Some States have drawn straight baselines when they are not entitled to do so.' Tommy Koh, *The Tommy Koh Reader: Favourite Essays and Lectures* (Singapore: World Scientific, 2013) 58.

<sup>59</sup> See ILA, Committee on Baselines, 'Draft Study on Remedies' (1 April 2015) online: <http://www.ila-hq.org/download.cfm/docid/AE676CC6-520F-40A7-9DC7205354033C46>.

It will be recalled that China claims its territorial sea of 12 nm is measured from the straight baselines including those around the Paracels. On 25 October 2016, USS *Decatur* (DDG 73) conducted a freedom of navigation operation in the vicinity of the Paracels but more than 12 nm offshore of any of those islands. As the transit was described by the US DOD as ‘routine’ and ‘lawful,’ one can assume that the transit was, however, within the claimed 12 nm territorial sea from those straight baselines, thus asserting that the straight baselines were not lawfully drawn and exercising its high seas freedom of navigation. The Chinese reaction seems to confirm that view, stating the transit as ‘uninvited ent[ry]’ into China’s ‘territorial waters.’<sup>60</sup> That assumption has subsequently been confirmed.<sup>61</sup>

## XI. CONCLUSIONS

The Tribunal broke no new ground on the matters considered in this Chapter: artificial islands, low-tide elevations, military activities and straight baselines. Rather it reinforced the existing law. The Award is thus likely to be frequently quoted as authoritative on these matters, and thus influential as the law of the sea evolves. Whatever may be the views on other matters addressed in the Award, on these the Award will provide considerable support to those who wish to bring State practice into conformity with the requirements of the Convention as so frequently called for by all States in the General Assembly’s annual resolution on oceans and the law of the sea.<sup>62</sup> All of this can be viewed positively

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<sup>60</sup> See Julian Ku, ‘The Latest Freedom of Navigation Operation Opens the Legal Door to More Aggressive US Challenges to China’s Artificial Islands,’ *Lawfare* (24 October 2016) online: <https://www.lawfareblog.com/latest-us-freedom-navigation-operation-opens-legal-door-more-aggressive-us-challenges-chinas>, and Robert D. Williams, ‘Vietnam, the UNCLOS Tribunal, and the Latest U.S. FONOP in the South China Sea,’ *id.* (25 October 2016), online: <https://www.lawfareblog.com/vietnam-unclos-tribunal-and-latest-us-fonop-south-china-sea>.

<sup>61</sup> See Julian Ku, ‘U.S. Defense Department Confirms US Decatur Did Not Follow Innocent Passage and Challenged China’s Excessive Straight Baselines,’ *Lawfare* (4 November 2016) online: <https://www.lawfareblog.com/us-defense-department-confirms-uss-decatur-did-not-follow-innocent-passage-and-challenged-chinas>. For an account of China’s capture of the Paracels in 1974 from Vietnam based on Chinese documents, see Toshi Yoshihara, ‘The 1974 Paracels Sea Battle: A Campaign Appraisal,’ 69 *Naval War College Review* 41-65 (Spring 2016), available at <https://usnwc.edu/getattachment/7b5ec8a0-cc48-4d9b-b558-a4f1cf92e7b8/The1974ParacelsSeaBattle.aspx>.

<sup>62</sup> UNGA resolutions 71/L.26, November 25, 2016; 70/235, Dec. 23, 2015, para 5; 69/245, Dec. 29, 2014, para 5; 68/70, Dec. 9, 2013, para 5; 67/78, Dec. 11, 2012, para 5; 66/231, Dec. 23, 2011, para 5; 65/37, Dec. 7, 2010, para 5; 64/71, Dec. 4, 2009, para 5; 63/111, Dec. 5, 2008, para 5; 62/215, Dec. 18, 2007, para 5; 61/222, Dec. 20, 2006, para 5; 60/30, Nov. 29, 2005, para 5; 59/24, Nov. 17, 2004, para 4; 58/240, Dec. 23, 2003, para 4; 57/141, Dec. 12, 2002, para 3; 56/12, Nov. 28, 2001, para 3; 55/7, Oct. 30, 2000, para 3; 54/31, Nov. 24, 1999,

as promoting the rule of law at sea, and thus international peace and security. Thus the members of the Tribunal are to be thanked and congratulated for its unanimous decisions on these matters.

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para 3; 53/32, Nov. 24, 1998, para 3; 52/26\*, Nov. 26, 1997, para 2; 51/34, Dec. 9, 1996, para 2; 50/23, Dec. 5, 1995, para 2; 49/28, Dec. 6, 1994, para 2, all online:  
[http://www.un.org/Depts/los/general\\_assembly/general\\_assembly\\_resolutions.htm](http://www.un.org/Depts/los/general_assembly/general_assembly_resolutions.htm).