



# ***Legal Aspects of the Status and Entitlement of Offshore Features or The Law of Diminishing Status***

Never Stand Still

Faculty of Law

**Professor Rosemary Rayfuse**

***Scientia Professor in International Law  
University of New South Wales, Sydney***

***and***

***Kerstin Hesselgren Visiting Professor  
Faculty of Law, Lund University***

# Overview

- What are offshore features?
- What maritime entitlements do they generate?
- What happens to the status and entitlements of such features if their physical attributes change as a result of sea level rise? Is there a 'law of diminishing status'?
- If the legal status and entitlements of offshore features are diminished as a result of sea level rise, what implications does this have for Island States?

# Categorisation of Offshore Features

- **Historically:** no difference between naturally occurring and man-made features
- **UNCLOS I:** 'island' is 'a *naturally formed* area of land, surrounded by water, which is above water at high tide'



# Categorisation of Offshore Features

- **UNCLOS III: Law of the Sea Convention Article 121**

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

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

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



# Islands

- **‘an area of land’**
  - irrespective of geological/geomorphological composition, geographic location, size;
- **‘naturally formed’**
  - not constructed by humans
- **‘surrounded by water’**
  - completely detached from other territory
- **‘above high tide at all times’**
  - datum choice up to state
  - No temporal, altitude, or frequency requirements

# Rocks

- **naturally formed** and **above water at high tide**
  - controversy re whether only applies to geological rocks
  - size matters ( *Volga* (Prompt Release); *Jan Mayen*)
- **‘cannot sustain human habitation or economic life of their own’**
  - Past habitation/activity may indicate capacity
  - Other factors to consider: prevailing climate, proximity of other habited features, livelihood potential
  - *South China Sea Arb*:
    - must have capacity to sustain ‘in its natural form’ or ‘in its natural capacity’ = non-transient, settled population
    - mere presence of resources not enough

# Low Tide Elevations

- **Law of the Sea Convention: Article 13**

1. A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.
2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own.



# Man-Made Features

- Artificial Islands
- Offshore Installations
- Structures
- Key = these are all non-naturally occurring features



# Categories of Offshore Features

- **Islands**
- **Rocks (sub-set of 'Islands')**
- **Low tide elevations**
- **Artificial islands, installations, structures**

# Maritime Entitlements of Offshore Features

- **Islands:**
  - Territorial Sea, EEZ, Continental Shelf (Art 121(2))
- **Rocks:**
  - Territorial Sea (Art 121(3))
- **Low Tide Elevations:**
  - may affect breadth of Territorial Sea but if lying more than 12 nm from shoreline has no Territorial Sea of its own (Art 13)
- **Artificial islands, installations, structures:**
  - No entitlements (Arts 11 and 60(8))



# The Law of Diminishing Status?

Island



Rock:

Lose EEZ/CS?

Rock



LTE:

Lose TS?

LTE



Disappears: Lose basepoint?

Archipelagic State



Lose Archipelagic baselines?

Island State



Uninhabitable: Lose everything?

*Once an island/rock/LTE - Always an island/rock/LTE?*

or

*Can artificial reinforcement of LTEs and rocks have legal effect so as to change their legal status and entitlements?*



# Change by Natural Processes

- Legal effect may depend on whether change is accretive (slow) or avulsive (fast) (*Chamizal Tract*)
- **Accretion** = sovereignty changes so legal nature of feature changes
- **Avulsion** = no change of sovereignty so legal nature of feature unchanged
- **BUT:** State practice indicates avulsive changes may also lead to change in legal nature of feature (ie volcanic islands)



# Change Due to Human Intervention

- Preservation of existing naturally formed features does not deprive them of their status
- But - extension/modification by artificial means does not affect legal status
  - ie, cannot transform LTE into rock/island
  - artificial increase in height does not change status
- May extend zones as a result of artificial extension but cannot change their nature
  - *SCS Arb*: status of a feature must be ascertained on the basis of its earlier, natural condition, prior to the onset of the reclamation/construction activities



# Change Due to Human Intervention

- Natural features partly destroyed by nature may be rebuilt without affecting their status
- Man-made island within territorial sea of natural island cannot automatically adopt status of natural island if natural island disappears due to sea level rise or other event
- **NB:** if removed by artificial means against the will of the territorial sovereign then feature will not lose status  
*(Qatar/Bahrain)*



# The Statehood Dilemma

- **Archipelagic States:**
  - Archipelagic baselines may no longer satisfy Art 47
    - maximum length constraints of 100 nm with possibility of 3% up to 125 nm
    - maximum water to land ratio = 9 to 1
- **'Deterritorialised' States:**
  - If all islands of low-lying state rendered uninhabitable, accretion theory = will lose status and entitlements
  - Extreme case - may lose statehood

# Resolving the Statehood Dilemma

- Current SLR changes are avulsive not accretive so no change in status of natural features should occur (but query whether consistent with state practice)
- Disappearance of these features is being caused by artificial means (anthropogenically induced climate change) against the will of the States concerned so features should not lose their status and entitlements
- *South China Sea Arbitration* provides mixed support in as much as it suggests that it is the original natural state of the feature that matters - but problematic aspects of its interpretation of 'cannot sustain human habitation or economic life of their own' may counter this.



# Conclusion

- Legal status of offshore features - and hence their entitlements - is *prima facie* ambulatory.
- However, status of naturally occurring offshore features can be maintained - but not enhanced - by human intervention.
- Where intervention not possible due to cost, technical or other factors, legal arguments exist to support the maintenance and retention of the pre-existing status and entitlement of naturally occurring features.



**Thank you!**

