

CAN NATURAL FEATURES *EVER* BECOME ARTIFICIAL?

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THE QUESTION

- The legal framework:
 - Article 13(1) LOSC: “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 ...“
 - Article 121 (1) LOSC: “An island is a **naturally formed area of land**, surrounded by water, which is above water at high tide.”

THE QUESTION

- Judge Shigeru Oda's separate opinion in *Qatar v Bahrain* [2001] ICJ Rep 40
 - “Modern technology might make it possible to develop small islands and low-tide elevations as bases for structures, such as recreational or industrial facilities. Although the 1982 UN Convention does contain some relevant provisions (e.g. Arts 60 and 80), I consider that whether this type of construction would be *permitted* under international law and, if it were, what the *legal status* of such structures would be, are really matters reserved for future discussion.” [para 9]
 - So, can a previously naturally formed feature ever become an artificial one?

INTERPRETATION (1): NATURAL FEATURES *CAN* BECOME ARTIFICIAL ONES

- “Artificial Islands”
 - Possess all of the Article 121(1) LOSC characteristics, except the naturally-formed requirement.
 - And, low-tide elevations, reefs, seabed, islets and rocks (etc.) *may*, through artificial modification, become artificial islands.

INTERPRETATION (1): NATURAL FEATURES *CAN* BECOME ARTIFICIAL ONES

- The jurisprudence
 - E.g. *South China Sea Arbitration* 2016, see in relation to Mischief Reef [para 1037].
 - ‘China’s activities ... 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’.

INTERPRETATION (2): THIS CONNECTION MAY *NOT* BE SO EASILY MADE

- Nowhere in the LOSC is the connection between the non-naturally formed requirement and artificial islands, explicitly made.
 - A distinction between newly made artificial islands and modified formally natural features becoming artificial islands?
 - A hybrid nature?
 - Can it be both a natural and artificial feature for different legal questions?
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LEGAL STATUS OF ARTIFICIALLY MODIFIED, PREVIOUSLY NATURAL FEATURES

- Case study: *The South China Sea Arbitration* (2016)
 - ‘The inclusion of the term “naturally formed” in the definition of both a low-tide elevation and an island indicates that the status of a feature is to be evaluated on the basis of its natural condition. As 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 or installation built atop it.’ [para 305]

LEGAL STATUS OF ARTIFICIALLY MODIFIED, PREVIOUSLY NATURAL FEATURES

- Case study: *The South China Sea Arbitration* (2016)
 - Temporal dimension:
 - To Article 121(1) LOSC determinations
 - To Article 121(3) LOSC determinations

LEGAL STATUS OF ARTIFICIALLY MODIFIED, PREVIOUSLY NATURAL FEATURES

- Case study: *The South China Sea Arbitration* (2016)
 - What is to be legally valid? In other words, to what may any legal significance be attached?
 - And, what legal consequences flow from such recognition?
 - If only naturally-formed parts of the features are given sole legal salience, what role could *any* artificial modification have?

LEGAL STATUS OF ARTIFICIALLY MODIFIED, PREVIOUSLY NATURAL FEATURES

- Case study: *The South China Sea Arbitration* (2016)
 - The Tribunal’s treatment of Mischief Reef
 - “The Tribunal concludes that Mischief Reef is a low-tide elevation”. [para 378]

LEGAL STATUS OF ARTIFICIALLY MODIFIED, PREVIOUSLY NATURAL FEATURES

- Case study: *The South China Sea Arbitration* (2016)
 - The Tribunal's treatment of Mischief Reef
 - But can it also be an artificial island?

IMPLICATIONS

- Regime I:
 - Newly made non-naturally formed features captured by the recognised legal regime applicable to artificial islands. LOSC Arts 60, 80 etc.
 - Artificially modified coastline including artificially created islands off the coast captured by customary right to defend, reclaim and expand existing coastline.

IMPLICATIONS

- Regime 2:
 - Artificially modified naturally pre-existing features:
 - Either
 - Recognised as artificial construct (islands, installations, structures)
 - Or
 - Recognised only as they *previously* existed (South China Sea Arbitration)

IMPLICATIONS

- Ambiguous and hybrid legal nature of modified features
 - Requires clear regulation about the legal confines and consequences of modifying pre-existing features
 - Ought there be two regimes in the law of the sea regulating the issue of human modification differently?
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