CAN NATURAL FEATURES EVER BECOME ARTIFICIAL?

Dr Reece Lewis
LewisR74@cardiff.ac.uk
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’.
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?
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 1:
  – 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?
Dr Reece Lewis
Lecturer in Law, Cardiff University
LewisR74@Cardiff.ac.uk