Artificial Islands and International Law

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Exhibit 1
Exhibit 2
Exhibit 6
The Issues

1. Definition
2. Land Reclamation
3. Entitlement of the Coastal State
4. Jurisdiction of the Coastal State
5. Historic Waters
6. Dispute Resolution
7. Conclusions
Article 121 (1)

“An island is a naturally formed area of land, surrounded by water, which is above water at high tide”

Cf Rocks – Article 121 (3)

- Have no EEZ or Continental Shelf

Cf Low-tide elevations – Article 13 (1)

“A low-tide elevation is a natural formed area of law which is surrounded by water at low tide but submerged at high tide”

- When located within the territorial sea may be used as a basepoint
- When located beyond the territorial sea has no territorial sea of its own
Islands: Characteristics

1. Naturally Formed
2. Area of Land
3. Surrounded by Water
4. Above water at high tide
5. Size – distinguish Island from a Rock
Islands: Characteristics

Naturally Formed

- Low-tide elevations with lighthouses

- Article 7 (4) may be used as a basepoint for the territorial sea
- Does not convert the LTE into an island
- Assumes the LTE is within the limits of an existing territorial sea
Islands: Characteristics
O’Connell: Vol 1, 197

• ‘If the processes of nature can change an area from being seabed to being an island, the assisting of nature by reclamation, even if it be called ‘artificial’, is not altogether an ‘unnatural formation’

Papadakis: 93

• ‘Naturally-formed’, that is by natural processes, without human intervention, as in the case with dumping of sand and stones in shallow waters’

• ‘Area of land’, excluding, that is, any human construction like building up with concrete, installations etc
Artificial Islands: Definition

Article 60 (1)
In the EEZ the coastal State shall have the exclusive right to construct artificial islands

- Human intervention
- Not naturally formed
- Do not possess the status of islands
  - No territorial sea
  - Does not impact delimitation of the territorial sea, EEZ or CS

Article 80
- Article 60 applies mutatis mutandis in the Continental Shelf

Article 87
- Freedom to construct artificial islands in the high seas subject to Part VI (Article 80)
Land Reclamation

Land reclamation as an act ‘à titre de souverain’
- *Pedra Branca, Middle Rocks and South Ledge (Malaysia/Singapore) [2008]* ICJ Reps [274]

Within internal waters
- Entitlement as an act of the sovereign

Within the territorial sea
- Entitlement of the coastal state
  - Exercise of sovereignty over the TS including the seabed
  - *Straits of Johor (Malaysia v Singapore) ITLOS Case No. 12 2003*
    - Malaysia conceded importance of land reclamation
    - “Malaysia accepts the importance of land reclamation”
- Ports and Harbour works – Article 11
  - Which are an integral part of the harbour system are a part of the coast
  - Artificial islands are not considered permanent harbour works
- What coastal feature is the foundation for land reclamation
  - Mainland, island, rock, reef, low-tide elevation, shoal, cay, atoll

Beyond the territorial sea
- A low-tide/reef elevation beyond the territorial sea?
A coastal State can build an artificial island
1. Within internal waters and archipelagic waters
2. Within the territorial sea
3. Within the EEZ
4. Within the continental shelf
Limitations

- State is a coastal state in that geographic area
  - I.e. they are a territorial sovereign
- That the AI not become the basis for adjustment of baselines
- That the AI not generate a territorial sea or other maritime zone
- That the AI is subject to the provisions of Article 60
- That the AI not create marine environmental damage for adjoining states (including during its construction)
  - *Straits of Johor (Malaysia v Singapore)* ITLOS Case No. 12 2003
Jurisdiction: AI in the Territorial Sea

- Absolute jurisdiction
  - Civil
  - Criminal

BUT the AI does not create its own territorial sea and cannot be used as a basis for the extension of the territorial sea unless it can be used as a basepoint
  Ie. Where a lighthouse sits atop a low tide elevation
Jurisdiction: AI in the EEZ

- Coastal State has exclusive jurisdiction over the AI: Art 60
  - Includes customs, fiscal, health, safety and immigration
- Capacity to establish safety zones: Art 60 (3)
  - ‘to ensure the safety both of navigation and of the AI’
- Safety zone shall not exceed 500 metres, unless authorised by IMO

See
- *Arctic Sunrise (Netherlands v. Russian Federation)* (provisional measures) ITLOS 2013
Jurisdiction: AI in the Continental Shelf

- Coastal State jurisdiction under Article 60 applies *mutatis mutandis*: Article 80
- Any distinctive issues arise when the continental shelf extends beyond 200nm?
  - Intersection with the Article 87 freedoms of navigation and overflight
- Coastal state needs to exercise its rights so as to not ‘result in any unjustifiable interference with navigation and other rights and freedoms of other States’: Article 78 (2)
Jurisdiction: AI in the High Seas

- All states have a capacity to construct AI on the high seas: Article 87 (1)(d)
- Exercise of the right is subject to Part VI (continental shelf)
- The freedom is subject to constraints: Article 87 (2)
  - To be exercised ‘with due regard for the interests of other States in their exercise of the freedom of the high seas’
  - I.e. No undue impact upon the freedom of navigation and overflight
Navigation and Overflight

**AI in the Territorial Sea**
- Innocent Passage may be exercised subject to any safety zone declared around the AI
- No overflight in the TS

**AI in the EEZ**
- Freedom of navigation other than restrictions created by declared safety zone
- Overflight permission over than height restrictions created by a declared safety zone

**AI in the continental shelf**
- Freedom of navigation other than restrictions created by declared safety zone
- Overflight permission over than height restrictions created by a declared safety zone
Is there capacity to construct an AI within historic waters?

- Rights of the coastal State within historic waters
- Characterisation of the historic waters claim
  - What is the nature of the historic claim?
    - Fishing rights, resources rights, access rights, indigenous rights
    - Eg. Canada’s historic waters claim over the waters of the Northwest Passage
  - Cf. Historic bay as internal waters of the coastal State
- Is the historic waters claim equivalent to internal waters, territorial sea, EEZ/continental shelf?
China’s Nine Dash Line
Dispute Resolution

1. Diplomatic Protest
2. Exercise of navigational and overflight freedoms
   - US Freedom of Navigation program
3. Part XV LOSC subject to Article 298 declarations
   1. ITLOS
   2. Annex VII Arbitration
4. International Court of Justice
   1. Contentious case
   2. Advisory Opinion
Conclusions

- Coastal States are entitled to build artificial islands and undertake land reclamation
- The State must be a coastal State with a recognisable territorial claim and accompanying maritime claim
- Artificial islands do not generate similar sovereign entitlements to a natural island
- Artificial islands do not generate a maritime zone
- Artificial islands may generate a limited security zone impacting upon navigation and overflight
- States have diplomatic, political and legal options to contest the building of artificial islands and associated assertions of sovereignty and jurisdiction
• Oude Elferink ‘Artificial Islands, Installations and Structures’ Max Planck Encyclopedia of Public International Law (2013)
• Papadakis, The International Legal Regime of Artificial Islands (1977)
• Rothwell and Stephens, The International Law of the Sea 2nd (2015 IN PRESS)