Castles in the Sand: Engineering Insular Formations to Gain Legal Rights over the Oceans

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I Introduction

Globally, there are perhaps a half million insular formations—the collective term for islands, rocks, low-tide elevations, drying reefs, artificial islands, and other formations surrounded by water.¹ The South China Sea alone is home to some two hundred insular formations, “only about three dozen of which are permanently above water. Yet these specks of land, buffeted by typhoons, are valuable mainly because of the oil and natural gas that lie nearby in the intricate, folded layers of rocks beneath the sea.”² The United Nations Convention on the Law of the Sea (UNCLOS); often called a constitution for the oceans, governs the regulations of sovereign claims over ocean space.³ The UNCLOS

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² Robert D. Kaplan, Asia’s Cauldron: The South China Sea and the End of a Stable Pacific 10 (2d ed. 2015). Kaplan also notes that the Spratly Islands alone constitute some 150 features, “only forty-eight of which are above water all the time.” Id. at 170.
³ Tanaka, supra note 1, at 31.
confers onto some insular formations valuable maritime zones and *de minimis* zones—or none at all—to others. The provisions distinguishing the categories of insular formations under the UNCLOS are ambiguous, and authoritative bodies have not interpreted the relevant provisions to a great extent. In order to confer onto minor insular formations greater maritime zones, States have attempted to engineer the formations to meet required elements. The legal impact of engineering these formations is unclear.

The UNCLOS established the Exclusive Economic Zone (EEZ), a “resource-oriented zone” of primarily economic rights, over a swath of ocean up to 200 nautical miles (nm) seaward of a State’s baselines (usually the low-tide mark of the coast). The areas seaward of the EEZ and the juridical continental shelf (“the Area”) are *res communis*, and governed by the principle of the common heritage of mankind. Article 121(1) of the UNCLOS provides “An island is a naturally formed area of land, surrounded by water, which is above water at high tide.” Pursuant to Article 121(2), islands generate the same maritime zones afforded the mainland, including the EEZ, territorial sea, contiguous zone, and continental shelf, and the standard baseline rules apply. Some insular formations that would otherwise have little intrinsic value are, consequently, “of interest to States because of their generative capacity in respect of maritime zones.” Not all islands, however, rate an EEZ. As Romania correctly noted in their pleadings in the Black Sea case before the International Court of Justice (ICJ) “[a]ll natural features permanently above the sea at high tide are islands, whether large or small, wet or dry, arid or fruitful. But some islands are rocks covered by Article 121(3), with the consequences there stated.” The UNCLOS provides that “rocks”—a juridical not geological or geomorphological term—

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5 See UNCLOS, *supra* note 4, art. 1. See also Tanaka, *supra* note 1, at 150.

6 UNCLOS, *supra* note 4, art. 121(1).

7 Id. at 121(2) (“Except as otherwise 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.”) See also Clive Symmons, “Some Problems Relating to the Definition of ‘Insular Formations’ in International Law: Islands and Low-Tide Elevations”, at 5 (International Boundaries Research Unit, Maritime Briefing, Vol. 1, No. 5, 1995) (noting that implicitly, islands also enjoy rights to internal waters, historic bays and archipelagic waters when appropriate conditions are met).

8 Symmons, *supra* note 7, at 1.