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LAND AND SEA: RESOLVING CONTESTED LAND AND DISAPPEARING LAND DISPUTES UNDER THE UN CONVENTION ON THE LAW OF THE SEA

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Land and Sea: Resolving Contested Land and Disappearing Land Disputes under the UN Convention on the Law of the Sea

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Abstract: Revisiting themes from *Land and Sea: Two Sovereignty Regimes in Search of a Common Denominator*, this Chapter explores the interface between land and sea that has come into sharper relief in recent years. It briefly describes how different types of land interact with legal regimes for the allocation of maritime space, especially in relation to islands. From this basis, the Chapter explores how legal processes available under UNCLOS are being prevailed upon, or could be prevailed upon, not only to quiet maritime title but also to resolve territorial sovereignty conflicts persisting over islands. The Chapter further examines the matter of land lost to rising sea levels and human-made constructions of "land" along with the consequent implications for maritime allocations. It is argued that we need to recall that the common denominator between land and sea is a small one and the more we seek to align land and sea regimes, the more we end up reconstructing fundamental conceptions within international law.

Key Words: international dispute settlement, sea-level rise, territorial sovereignty disputes, maritime boundaries, UN Convention on the Law of the Sea, law of the sea, islands

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1. Introduction

I was privileged to have the opportunity to write a journal article with Lea Brilmayer, *Land and Sea: Two Sovereignty Regimes in Search of a Common Denominator*,[1] while a doctoral candidate at Yale Law School. The genesis of that article came over a slice of pizza at Yorkside Pizza one evening as we contemplated the reasons why a second round of oral arguments had been requested for the territorial sovereignty phase of the *Eritrea/Yemen* arbitration.[2] After extensive written and oral arguments, the Tribunal had sought further information about oil concession practice by the parties around the disputed islands. Well-familiar with the principle "the land dominates the sea", how could the purported exercise of rights over maritime space contribute to a determination of who owned the land in the first instance? Was this putting the cart before the horse? Should the cart be put before the horse?

In *Land and Sea*, we explored how land and sea regimes were different in international law, why they were different and, importantly, what they had in common. We observed the contrasting histories of each regime, recounting how the allocation of maritime space was predominantly a post-World War II development, occurring at a point in time when developing countries had emerged from decolonization and there was more emphasis

* Professor, UNSW Sydney Faculty of Law. I acknowledge the support of Macquarie University while writing this chapter. This chapter was written while on sabbatical from Macquarie as a MacCormick Fellow at the University of Edinburgh. My thanks to A/Professor Joanna Mossop for a very useful conversation during the formative stages of this chapter, and thanks also to Professor Alan Boyle and Dr James Harrison for comments on the arguments presented here. Any errors are of course my own.

[1] Lea Brilmayer & Natalie Klein, *Land and Sea: Two Sovereignty Regimes in Search of a Common Denominator*, 33 NYU J. INT'L L. & POL. 703-768 (2000-2001).

[2] Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute), Eritrea/Yemen (Oct. 9, 1998), (1998) XXII RIAA 211.

on legality and equity.[3] The equitable approach was sustainable in the initial allocation of extended maritime zones, as the areas had not been previously allocated or owned by other States.[4] There was no sense of giving up an exclusive, pre-existing entitlement. The resulting difference is that maritime space has been allocated by operation of law, whereas land was more commonly acquired through physical manifestations of authority.

We had anticipated in *Land and Sea* that the dispute settlement processes for assessing territorial sovereignty and maritime allocations were distinct.[5] The former required State consent whereas the latter would most likely fall within the compulsory dispute settlement system of UNCLOS. This distinction made sense as power over and possession of land would not and could not be readily challenged before a third party.[6] A State in physical occupation of disputed territory would not necessarily be amenable to an international court or tribunal deciding its occupation was illegal. Moreover, that State would have the option to ignore a decision that considered its physical occupation illegal, making rational choices between the potential consequences that would be faced in the event of non-compliance and the benefits of maintaining physical control over the land in question.

By contrast, compulsory, third-party processes were important in the allocation of maritime space, we argued, because of the need to quiet title.[7] States needed internationally marketable title over their maritime space to be able to exploit the resources. Reliance on legal constructs, exclusivity of title, and international recognition all contributed to why international judicial processes made sense.[8]

Consequently, we were able to argue that compliance with maritime judgments is more likely than compliance with land decisions; an illegal possessor will not necessarily vacate disputed land.[9] However, an illegal possessor of maritime space cannot necessarily market to third parties any rights over the marine resources.[10] The key factor, we concluded, was marketable title, although we also noted this common denominator "is limited to cases in which direct consumption of the particular property or asset in question is not possible".[11] Where marketable title was paramount, and not necessarily tied to direct consumption, the incentives to cheat were all but eliminated and adherence to norms the primary mode of operation. We noted that the land territory jurisprudence was heavily realist in tone; the power dynamics in relation to decision-making and actions over land are crucial. Maritime allocations, with a more egalitarian and equitable emphasis, reflect a norm-based approach to international relations. The normative regimes matter to realism, we argued, when the norms themselves carry value.

Since we wrote *Land and Sea*, developments in the international legal system prompt me to revisit the dynamics we explored in the year 2000. Although the marketability of title remains a relevant consideration for explaining maritime allocations,[12] there is an ongoing

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[3] Hence the continental shelf could not be acquired through occupation. *See* Brilmayer & Klein, *supra* note 1, at 710-712.

[4] *Id.* at 713.

[5] *Id.* at 740-746.

[6] An issue Lea explored further with Adele Faure: Lea Brilmayer & Adele Faure, *Initiating territorial adjudication: the who, how, when, and why of litigating contested sovereignty, in* LITIGATING INTERNATIONAL LAW DISPUTES: WEIGHING THE OPTIONS 192-229 (Natalie Klein ed., 2014).

[7] Brilmayer & Klein, *supra* note 1, at 732-734.

[8] *Id.* at 734-736.

[9] *Id.* at 748.

[10] *Id.*

[11] *Id.*, at 750. For example, if the State is very powerful and can use all the resources itself, as might be the case with China, this point is less apt.

[12] In recent developments, we can point to the increased number of blocks for oil and gas exploration being offered in coastal States' extended continental shelfs and the slow take up of those offers prior to the conclusion of the work of the Commission on the Limits of the Continental Shelf. *See* Robert Van de Poll and Clive

need to explain the difference between land and sea in international law. What we are now seeing is that territorial and maritime regimes are increasingly intertwined in different contexts, even in the face of their distinct antecedents and shared purpose of quieting title to allow sovereign enjoyment of the accompanying rights (as discussed in *Land and Sea*). Where this interface emerges most strongly is in relation to maritime allocations and the associated normative framework that are being asserted in the context of the legal regime established under the UN Convention on the Law of the Sea (UNCLOS).[13] Our maritime paradigm is overshadowing the dominant land paradigm in different ways. We therefore see that this dichotomy is now being blurred in different contexts; some of these situations have already been borne out in cases resolved under UNCLOS in recent years and others remain as hypothetical uses of the UNCLOS dispute settlement regime.

Is this liberalism with its emphasis on norms in the ascendency? Is our greater reliance on the UNCLOS institutions and principles to address intertwined land and sea concerns evidence of the importance of norms in international relations? Would realists argue that the assertions of these norms are instead continuing to ignore the anarchy and power dimensions that exist in the international system? And in promoting reliance on UNCLOS norms and institutions, do we run the risk of undermining those very institutions and processes on which States might otherwise rely to protect their rights?

This Chapter thus explores the interface between land and sea that has come into sharper relief in recent years. Part 2 briefly describes how different types of land interact with our legal regimes for the allocation of maritime space, especially in relation to islands. From this basis, Part 3 of this Chapter explores how legal processes available under UNCLOS are being prevailed upon, or could be prevailed upon, not only to quiet maritime title but also to resolve territorial sovereignty conflicts persisting over islands. Beyond questions of jurisdiction for courts and tribunals constituted under UNCLOS, we must face challenges to the very nature of land and maritime space and ask how we are to resolve these challenges. To what extent are our processes for allocating maritime entitlements influencing our views on what land is; and what territorial sovereignty entails? What does it tell us about our reliance on norms for quieting title? Are we thwarting the realist paradigm or ignoring it at our peril?

Part 4 of the Chapter examines another area where the interface between land and sea is (literally) blurring: first is the matter of land lost to rising sea levels and second are human-made constructions of "land" and consequent implications for maritime allocations. How well equipped are our existing territorial sovereignty and maritime allocation regimes to deal with these scenarios? Norm reliance comes to the fore, especially when we must address the situation of entire island-States being submerged. But as the international community takes decisions on how to respond to disappearing land, it remains to be seen if the power dynamics more commonly associated with possession of land will come to the fore and displace equitable concerns and deprioritize exclusive maritime allocations. For our appearing land, does marketable title provide an answer to how the legal regimes and power

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Schofield, *Pushing Beyond the 200 Nautical Mile Limit: Progress and Challenges in Exploration Efforts on the Extended Continental Shelf*, 2017 ABLOS Conference Presentation, Oct. 11, 2017, http://www.ablosconference.com/wp-content/uploads/2017/09/ABLOS9.pdf. Another interesting example, yet to be resolved, is the regulation of marine genetic resources in areas beyond national jurisdiction. These resources do not fit the existing paradigms of sedentary species and consideration is currently being given to whether they are or should be part of the common heritage of humankind or if a sui generis regime is needed for harvesting. *See generally* Joanna Mossop, *The Relationship between the Continental Shelf Regime and a New International Instrument for Protecting Marine Biodiversity in Areas Beyond National Jurisdiction*, ICES J. MAR. SCI., Jul.5, 2017, fsx111, https://doi.org/10.1093/icesjms/fsx111.

[13] United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, Art. 7, 1833 U.N.T.S. 397, *reprinted in* 21 ILM 1261 (1982) [hereinafter UNCLOS].

dynamics are responding to State activity in this regard? There are undoubtedly continued economic forces at play in determining State responses to the blurring of land and sea, but power and the rule of law are also critical elements. It is argued that we need to recall that the common denominator between land and sea is a small one and the more we seek to align land and sea regimes, the more we end up reconstructing fundamental conceptions within international law. Whether such a reconceptualization is good or necessary is a debate to continue in the decades to come.

2. Classifying and Connecting Land and Sea

Land remains the central starting point for sovereignty and States' title to both terrestrial and maritime space. The concept of a State encapsulates a territorial entity as well as an organized political and social community.[14] These dual elements may be drawn from the classic definition of statehood in the Montevideo Convention, which looks to the following qualifications: a permanent population; a defined territory; government, and the capacity to enter into relations with other States.[15] The territorial dimension remains a prime feature as "the physical foundation of power and jurisdiction, as well as nationality and, thus the basis upon which peace and security rest".[16]

Maritime title only accrues to States under international law. States have rights over different maritime zones extending from their coasts, with each maritime zone granting the coastal State different rights and requiring different duties to be performed. Within a State's baselines are internal waters, over which a State exercises full sovereignty,[17] and immediately outside a State's baselines is the territorial sea, which is also subject to a State's sovereignty but for a right of innocent passage granted to other States' vessels.[18] A coastal State is also entitled to a contiguous zone for certain policing purposes,[19] and an Exclusive Economic Zone (EEZ), which may extend up to 200 miles from its baselines and in which the coastal State has sovereign rights over the exploration and exploitation of the natural resources and exclusive jurisdiction over matters such as artificial islands, marine scientific research and the marine environment.[20] Other States retain certain high seas rights within the EEZ, the most important being the rights of navigation and overflight.[21] The coastal State also has sovereign rights over its continental shelf, which may extend to 200 miles or beyond depending on the particular seabed configuration and assessment process for the extent of an outer continental shelf.[22] The extent of the coastal State's rights diminish as the distances from the coast increase until the high seas are reached. The high seas remain an area over which no State exercises sovereignty.[23] The Area is the seabed beyond coastal State's national jurisdiction and is subject to a regime of common heritage of humankind.[24]

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[14] *See* Catherine Blanchard, *Evolution or Revolution? Evaluating the Territorial Sate-Based Regime of International law in the Context of Physical Disappearance of Territory Due to Climate Change and Sea-Level Rise*, 53 CAN. YBK INT'L L. 66, 72-73 (2015).

[15] Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. 19; 49 Stat 3097, art. 1.

[16] Derek Wong, *Sovereignty Sunk? The Position of "Sinking States" at International Law*, 14 MELB. J. INT'L L. 346, 365 (2013).

[17] A right of innocent passage through internal waters is granted where a State has enclosed waters by straight baselines. See UNCLOS, *supra* note 12, art. 8(2).

[18] *Id.* art. 2, art. 18.

[19] *Id.* art 33.

[20] *Id.* art. 56.

[21] *Id.* art. 58.

[22] *Id.* art. 76.

[23] *Id.* art 89.

[24] *See id*, Pt XI and the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS), July 28, 1994, 1836 U.N.T.S. 3.

Although we can commonly draw a clear distinction between what is land and what is sea,[25] it is important to acknowledge that the type of land has implications for what maritime allocations are generated. Islands have particular importance in any land and sea debate, primarily because a State's ownership of an island not only provides the State with more land from which to reap, among other things, economic and social benefits but also the potential to claim rights over the maritime areas surrounding the island. These maritime areas could be much larger than the land area generating these sea allocations. The extent and nature of the maritime rights that might be claimed will vary depending on the geographic location of the island and the island's relationship to the State that exercises sovereignty over that island.

The definition of an island is found in Article 121(1) of UNCLOS. It reads: "An island is a naturally formed area of land, surrounded by water, which is above water at high tide."[26] From that island, a State is then able to determine, consistent with the rules established in UNCLOS, allocations to a territorial sea, contiguous zone, EEZ and continental shelf.[27]

The exception to this grant of authority to States is where the island would be legally classified as a rock under Article 121(3) of UNCLOS. Article 121(3) reads: "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." The negative implication normally drawn from this provision is that an island will still have a territorial sea and a contiguous zone. The legal distinction drawn in UNCLOS between "islands" and "rocks" has been the subject of controversy, which is discussed in more detail in Part 3 below.

In requiring islands (and the less legally-entitled "rocks") to be above water at all times, islands are thus distinguished from low-tide elevations. 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".[28] A low-tide elevation will not generate any maritime zones for a State when it is "wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island".[29] However, if it does fall within the breadth of the territorial sea, the low-tide elevation may be used as part of the baseline for measuring the breadth of the territorial sea.[30] Thus, in this limited situation, the low-tide elevation counts as land generating additional maritime entitlements for the State because of its location close to other land that is being used for allocating a territorial sea.

In *Qatar v Bahrain*, the International Court of Justice (ICJ) assessed the difference between low-tide elevations and islands. The Court stated:

> It has never been disputed that islands constitute terra firma, and are subject to the rules and principles of territorial acquisition; the difference in effects which the law of the sea attributes to islands and low-tide elevations is considerable. It is thus not established that in the absence of other rules and legal principles, low-tide elevations can, from the viewpoint of the acquisition of sovereignty, be fully assimilated with islands or other land territory.[31]

On this basis, we can see that certain types of land do not count as land for all legal purposes, but they still have some limited significance for the purposes of maritime allocation.

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[25] There are exceptions, of course, if we recall ice-covered areas, extensive deltas and wetlands.
[26] UNCLOS, *supra* note 12, art. 121(1).
[27] *Id.* art. 121(2).
[28] *Id.* art. 13(1).
[29] *Id.* art. 13(2).
[30] *Id.* art. 13(1).
[31] Maritime Delimitation and Territorial Questions (Judgment) (Qatar v. Bahrain), 2001 I.C.J. 40 (Mar. 16), para. 206.

Islands serve a range of functions for States under international law. Primarily, islands provide the land territory over which the political entity of the State exercises sovereignty. It may be the case that the State is composed of one or more islands. Notable in this regard are the States qualifying as "archipelagic States" under UNCLOS. These States are constituted wholly by one or more archipelagos and may enclose their islands within archipelagic baselines if the criteria within UNCLOS are met.[32] There are of course other States, such as New Zealand, that are comprised entirely of islands even if they do not fall within the legal definition of an archipelagic State. For continental territories, islands augment the total land territory for the exercise of the State's sovereignty. This fact remains true irrespective of the location of the island as close to the coast of the continental territory or located some distance from the mainland.

In some circumstances, the location of the island matters. The island may be used as a basepoint for measuring the State's allocations of maritime zones, as allowed under Article 121(2). Where there is a fringe of islands in the immediate vicinity of the coast, a State may be entitled to draw a straight baseline around the outer islands thereby enclosing the waters around those islands as internal waters.[33] The location of an island may affect where a maritime boundary between neighboring States is drawn. In this regard, the effect of the island on the maritime boundary may vary depending on whether it lies close to the continental territory or whether it is mid-sea between the neighboring States.[34] The weight allocated to the island in assessing its relevance for the drawing of the maritime boundary may turn on the size of the island, as well as the population and society conducted on the island in question.[35]

In sum, it is critical to observe that there is a difference between land and sea. How the land might be classified—as island, rock, low-tide elevation, basepoint, archipelagic State—has consequences for the maritime allocation that flows from that land. Land, though, is the starting point. The ICJ has routinely recognized the principle that land dominates the sea,[36] commenting that it is "clear that maritime rights derive from the coastal State's sovereignty over the land, a principle which can be summarized as 'the land dominates the sea'".[37]

The principle of land dominates the sea is drawn from the connections between land and sovereignty, and with that sovereignty, State power. Max Huber articulated this view in

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[32] UNCLOS, *supra* note 12, art. 47(1) ("An archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.")

[33] *Id.* art. 7(1).

[34] A considerable body of jurisprudence has developed assessing the relevance of islands in the delimitation of maritime boundaries. For discussion, *see, e.g.*, Sean D. Murphy, *Chapter VII. Effects of islands on maritime boundary delimitation, in* COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW, The Hague Academy of International Law. Consulted online on 14 November 2017 http://dx.doi.org/10.1163/1875-8096_pplrdc_ej.9789004351332.C01.ch08; Clive Schofield, *The Trouble With Islands: The Definition And Role Of Islands And Rocks In Maritime Boundary Delimitation, in* MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA 19 (Seoung-Yong Hong & Jon M. van Dyke (eds), 2009).

[35] *See, e.g.*, Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh / Myanmar) (Case No 16) 2012 ITLOS Rep. 46, para. 147 (in relation to Saint Martin's Island); Maritime Delimitation and Territorial Questions (Judgment) (Qatar v. Bahrain), *supra* note 31, at 104-109 (in relation to the small island of Qit'at Jaradah).

[36] *See, e.g.*, North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment (1969) I.C.J. 3 (Feb. 20), 51-52; Territorial and Maritime Dispute (Nicaragua v. Colombia), 2012 I.C.J. 624 (Nov. 19), 674; Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment (2009) I.C.J. 61 (Feb. 3), 89.

[37] North Sea Continental Shelf Cases, *supra* note 36, at 51, para. 96; Aegean Sea Continental Shelf (Greece v. Turkey), 1978 I.C.J. 3 (Dec. 19) at 36, para. 86.

the *Island of Palmas* arbitration when he stated: "International law, the structure of which is not based on any super-State organisation, cannot be presumed to reduce a right such as territorial sovereignty, with which almost all international relations are bound up, to the category of an abstract right, without concrete manifestations."[38] The "concrete manifestations" are typically assumed to be land, but recent developments may make us pause to consider if those manifestations may also be maritime allocations. Is title to maritime space "concrete" enough? This issue will be explored more in Part 4. It is the potential elision of land and sea—the seeming merger of regimes—that also challenges our traditional constructs. Part 3 will explore how this is borne out when a contest over territory and the associated maritime allocation is tested through UNCLOS norms and institutions. In the discussion, we will observe the ascendancy of norms in regulating both land and sea.

3. Resolving Territorial Sovereignty and Maritime Allocation Disputes over Islands

Some of the most polemic and enduring territorial sovereignty disputes concern ownership over islands.[39] Where an island falls within the territorial sea of a State, it is generally presumed that the island is within the sovereignty of that State, unless a superior title is otherwise shown to exist.[40] Sovereignty may be attributed to a State where the island is formed as a matter of natural accretion or through an act of avulsion.[41] Yet where States are closely located together and sovereignty is contested over islands lying between them, it is not legally acceptable for a State to claim ownership over an island by virtue of the fact that each island falls within the territorial sea of another island as those features progress further out to sea away from the State's coast.[42] The *Eritrea / Yemen* arbitral tribunal considered that this "ingenious theory enunciated by Eritrea",[43] referred to as "leapfrogging" of baselines, could not generate sovereignty over the islands so encompassed.[44] Maritime principles could not be used to resolve a territorial sovereignty dispute in this instance.

Where ownership over an island is disputed between neighboring States, there may be particular difficulties in ascertaining where a maritime boundary might be drawn between them. Sovereignty over the island may entitle one of the States to more maritime space in the fixing of the boundary because of the distinct maritime entitlement accorded to the State with sovereignty over the island. This allocation of maritime rights is a key reason why disputes emerge and are not easily resolved between States; each State has an interest not only in the land itself because of its possible relevance to the State but also an interest in the sea surrounding the island. Land and sea both matter to a State in these situations, and potentially for similar reasons: the historic, cultural or social ties that may exist over the land and surrounding water, the defense or strategic importance according to the military concerns of the State, or because of the economic benefits that may derive from the land or sea, or both,

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[38] Island of Palmas (or Miangas) (US v Netherland) [1928] II R.I.A.A. 829, 839.

[39] Disputes over land boundaries also remain a source of considerable international tension and violence, but islands are taken as the focus in this Chapter because of their connections to the sea, as discussed in Part II.

[40] Second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation) (Eritrea / Yemen) (Dec. 17, 1999) (2006) XXII R.I.A.A. 335, para. 474.

[41] Though additional factors such as relevant treaties, effective occupation and acquiescence may also be relevant in this assessment. *See* VICTOR PRESCOTT & GILLIAN D. TRIGGS, INTERNATIONAL FRONTIERS AND BOUNDARIES: LAW, POLITICS AND GEOGRAPHY 174 (2008).

[42] Based on the principle that the territorial sea may extend 12 nautical miles from any island that falls within the territorial sea of the mainland coast, with that island being used as a basepoint. *See* Second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation) (Eritrea / Yemen), *supra* note 40, para. 473.

[43] *Id.* para. 473 (I recall describing it as cheeky when Lea explained it to me!).

[44] *Id.* para. 474. *See also* Maritime Delimitation and Territorial Questions (Judgment) (Qatar v. Bahrain), *supra* note 31, para. 207 (in relation to pushing the territorial sea boundary out further and further because of the location of low-tide elevations).

of the island. The importance of these interests may vary, making either the land or the sea more valuable to a State. These national perspectives may prove important, if not decisive, in resolving the competing claims over disputed islands or at least in settling a maritime boundary between the States concerned.

In situations where contested sovereignty cannot be readily resolved between the claimant States, additional challenges emerge where there is an acute interest in the associated maritime rights around the islands. In some instances, States may be able to agree on provisional arrangements pending the resolution of a maritime boundary dispute.[45] Otherwise the efforts to exercise maritime rights around the island may become a source of political, or even military, tension between the claimant States.

In light of the legal difficulties that flow from contested sovereignty over islands and the accompanying maritime rights, the question remains as to what procedures may be available in order to resolve these differences. Negotiations, and possibly mediation, will be the most common method upon which States rely. Obviously, the States concerned may consent to the resolution of their dispute at the ICJ,[46] or through ad hoc arbitration,[47] but, as we highlighted in *Land and Sea*, States may not wish to refer disputes over territory to third-party resolution entailing a binding decision, especially if one of those States is in occupation of the disputed territory in question.[48] In many situations, we have a stalemate between the States concerned – that stalemate either preventing full and proper use of the land and sea in question, or a compromise being reached between the claimant States with reduced rights for each being recognized in the shadow of the overarching dispute.

Faced with this predicament, what has emerged is that some States, judges and commentators have contemplated whether the compulsory dispute settlement regime within UNCLOS could be utilized to resolve the outstanding questions of maritime space and rights either in the face of the contested territory or scooping in the territorial dispute within the jurisdiction of the court or tribunal constituted under UNCLOS. There are different scenarios that might arise under UNCLOS, which will be explored in this Part:

- A State seeks to challenge the territorial sovereignty of a State as a direct claim;
- A State seeks to resolve the territorial sovereignty dispute as part of an overall resolution of its maritime boundary dispute;
- A State challenges the maritime conduct of the other claimant State, and the rights and duties of each State can only be ascertained once the ownership of the land is ascertained to know which State has rights over the accompanying maritime space; or
- The State seeks a determination of the maritime entitlement of disputed land features without attempting to resolve the ownership question.

Each of these scenarios raises questions of legal interpretation as to a court or tribunal's exercise of jurisdiction under UNCLOS and whether the claim raised is properly characterized as a dispute "relating to the interpretation or application" of the Convention.[49]

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[45] As required under Articles 74(3) and 83(3) of UNCLOS.

[46] As has occurred on different occasions. *See, e.g.*, Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia / Singapore) (2008) I.C.J. 14 (May 23); Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia / Malaysia) (2002) I.C.J. 625 (Dec. 17).

[47] The *Eritrea / Yemen* arbitration being the key example in this regard. See Award of the Arbitral Tribunal in the First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute), Eritrea/Yemen, *supra* note 2.

[48] Brilmayer & Klein, *supra* note 1, at 748. *See further* Brilmayer & Faure, *supra* note 13.

[49] *See* UNCLOS, *supra* note 12, art. 288.

But it also makes us question how the legal norms and regimes important to the allocation of marketable title are now being used to resolve territorial disputes that have not previously fallen within this frame. The very availability of the norms and institutions are encouraging actions that deviate from the political reality that States can occupy and control what happens on small pieces of land, such as islands. Yet those institutions are being tempted to bring the land and sea regimes into alignment. This point is seen in relation to the four dispute scenarios set out above, and also in the judicial classification of land for the purposes of allocating of maritime space. Does our normative-based approach to international relations trump the realist construct that otherwise applies in addressing questions of territorial sovereignty in international law? It is appearing so.

3.1 Direct Challenge to Territorial Sovereignty under UNCLOS

The first scenario of a direct challenge to territorial sovereignty was raised in an arbitration instituted by Mauritius against the United Kingdom in relation to the Chagos Archipelago.[50] Sovereignty was at issue because the United Kingdom separated out the Chagos Archipelago so as to retain control over the area when Mauritius gained its independence from the United Kingdom in 1968.[51] The key motivation for the United Kingdom at the time was to align with the defense strategy of the United States, which wished to establish a defense facility within the Indian Ocean.[52] An agreement was reached between Mauritius and the United Kingdom to this effect in September, 1965 in what the arbitral tribunal termed as the "Lancaster House Undertakings".[53] Among the Undertakings was a commitment that the United Kingdom would use its good offices with the United States to ensure that Mauritius would still have fishing rights as well as navigational facilities available as far as practicable.[54] Further, "if the need for the facilities of the islands disappeared the islands should be returned to Mauritius".[55] The United Kingdom has maintained that the Chagos Archipelago is British, but Mauritius has challenged the United Kingdom's rights and actions on different occasions, albeit to varying degrees.[56]

For the case instituted under UNCLOS, Mauritius had been particularly concerned with the United Kingdom's declaration of a Marine Protected Area (MPA) throughout the entire EEZ of the Chagos Archipelago. Mauritius claimed that the United Kingdom was not entitled to declare an MPA or other maritime zones because it was not the "coastal State" within the meaning of inter alia Articles 2, 55, 56 and 76 of UNCLOS.[57] Moreover, Mauritius argued it had rights as a "coastal State" within the meaning of *inter alia* Articles 56(1)(b)(iii) and 76(8) of UNCLOS.[58]

The United Kingdom considered that asking the Tribunal whether the United Kingdom was entitled to act as a "coastal State" was to challenge British sovereignty and such questions could not be resolved under UNCLOS.[59] The United Kingdom did not accept that the negotiators of UNCLOS ever contemplated sovereignty disputes being justiciable under UNCLOS dispute settlement procedures,[60] and that reading jurisdiction so broadly

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[50] Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom), Award of 18 March 2015, PCA Case No. 2011-03, https://www.pcacases.com/web/view/11.
[51] *Id.* para. 69.
[52] *Id.* paras 70-71.
[53] *Id.* para. 77.
[54] *Id.* (referring to Lancaster House Undertakings, para. 22(vi)).
[55] *Id.* (referring to Lancaster House Undertakings, para. 22(vii)).
[56] *See id.* paras 100-125.
[57] These provisions concern *inter alia* the rights that the coastal State may exercise over its maritime zones and the requirement to have regard to other international obligations in exercising those rights.
[58] Chagos Marine Protected Area Arbitration, *supra* note 50, para. 158.
[59] *Id.* para. 170.
[60] *Id.* para. 196.

risked an abuse of the dispute settlement procedure set out in Part XV of UNCLOS.[61] Mauritius did not agree that such an exception could be read into the grant of jurisdiction under UNCLOS and submitted that an express exclusion was necessary to put the issue outside the Tribunal's jurisdiction when considering the drafting history of UNCLOS.[62] Mauritius considered the circumstances presented to the Tribunal were "unique",[63] and a failure to resolve the issue would weaken the Convention's dispute settlement structure, exacerbating and prolonging the dispute between the States.[64]

The Tribunal thus needed to determine whether it had jurisdiction to resolve the sovereignty dispute presented by Mauritius. The Tribunal decided that in resolving whether Mauritius' claims represented a dispute "concerning the interpretation or application" of the Convention, as required for the exercise of jurisdiction, that it first had to consider the nature of the dispute and, second, if it was a matter of territorial sovereignty, to what extent was a tribunal "permit[ted] … to determine issues of disputed land sovereignty as a necessary precondition to a determination of rights and duties in the adjacent sea".[65] The evidence before the Tribunal clearly answered the first issue, namely that the dispute arising from claims as to which State was the "coastal State" did indeed relate to a question of land sovereignty over the Chagos Archipelago.[66]

More critically, was the dispute concerning land sovereignty within the Tribunal's jurisdiction? Academic commentary has taken different positions on this question. Talmon, for example, has argued: "It is generally acknowledged that the Convention does not deal with questions of sovereignty and other rights over land territory, and that disputes concerning these questions are not subject to the jurisdiction *ratione materiae* of UNCLOS arbitral tribunals."[67] Commentators, including ITLOS judges writing extra-judicially, have taken the opposite view in the context of maritime boundary disputes, which are discussed in the following section.[68]

In assessing the Convention's drafting history, the *Chagos Archipelago* Tribunal considered that it could not be reasonably expected that States would be sensitive enough about maritime boundary delimitations to subject them to optional exclusion whereas land sovereignty claims would be left within the compulsory proceedings entailing binding decisions. It is a common sense conclusion:

> In the Tribunal's view, had the drafters intended that such claims could be presented as disputes "concerning the interpretation or application of the Convention", the Convention would have included an opt-out facility for States not wishing their sovereignty claims to be adjudicated, just as one sees in Article 298(1)(a)(i) in relation to maritime delimitation disputes.[69]

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[61] *Id.* para. 198
[62] *Id.* para. 179.
[63] *Id.* para. 202.
[64] *Id.* para. 201.
[65] *Id.* para. 206.
[66] *Id.* para. 212 (addressing the first submission) and para. 229 (addressing the second submission).
[67] Stefan Talmon, *The South China Sea Arbitration: Is there a Case to Answer?, in* THE SOUTH CHINA SEA ARBITRATION: A CHINESE PERSPECTIVE 19, 31 (Stefan Talmon & Bing Bing Jia (eds), 2014) (and sources cited therein); Alex G. Oude Elferink, *The Islands in the South China Sea: How Does their Presence Limit the Extent of the High Seas and the Area and the Maritime Zones of the Mainland Coasts?* 32 OCEAN DEV'T & INT'L L. 169, 172 (2001); KRIANGSAK KITTICHAISAREE, THE LAW OF THE SEA AND MARITIME BOUNDARY DELIMITATION IN SOUTH-EAST ASIA 140 (1987).
[68] *See* below notes 82-89 and accompanying text.
[69] Chagos Marine Protected Area Arbitration, *supra* note 50, para. 217. Guilfoyle has commented to similar effect: "The received wisdom is that it was never intended that disputes as to sovereignty over coastline or maritime features such as islands would fall within the Convention's dispute resolution system. However, if this was the intention of the drafters it was poorly expressed in the final text. At best, the usual wisdom is supported

As rightly noted by the Tribunal, the sensitivities over land territory are much greater than those related to maritime territory.[70]

Judges Wolfrum and Kateka dissented on the Tribunal's determination that the sovereignty question lay outside the jurisdiction of the arbitral tribunal. The dissenting judges took issue with the Tribunal's conclusions drawn from the negotiating history of UNCLOS as to whether territorial sovereignty disputes were within jurisdiction. In this regard, they commented: "That the drafters did not foresee the possibility does not in itself justify reading a limitation into the jurisdiction of the international courts and tribunals acting under Part XV of the Convention."[71] Yet it is not so much a question of reading in a new limitation or exception to jurisdiction under UNCLOS,[72] or reading a limitation from Article 298 into Article 288.[73] Nor is it a matter of looking for inherent restrictions.[74] Rather it is a question of deciding whether a dispute is one "concerning the interpretation or application of this Convention" or not. The Tribunal characterized two of the claims of Mauritius as a dispute concerning territorial sovereignty and found that this dispute did not concern the interpretation or application of UNCLOS.

The dissenting judges considered that the arguments of Mauritius were focused more particularly on whether the United Kingdom had competence as the coastal State to establish the MPA, and was not a broader claim to sovereignty as the United Kingdom had argued.[75] As such, they concluded: "The differing views on the coastal State are the dispute before the Tribunal and the issue of sovereignty over the Chagos Archipelago is merely an element in the reasoning of Mauritius and not to be decided by the Tribunal".[76] Instead, despite commenting that sovereignty was not to be decided by the Tribunal, the dissenting judges determined that the excision of the Chagos Archipelago violated legal principles of decolonization and/or the principle of self-determination,[77] and that any consent to the detachment of the Archipelago was irrelevant because Mauritius effectively had no choice in the matter.[78]

The majority's decision in *Chagos Archipelago* made sense in its rejection of resolving territorial sovereignty disputes within the framework of UNCLOS dispute settlement. Yet the very challenge of territorial sovereignty by Mauritius before a tribunal constituted under UNCLOS reflects a State perception that land and sea are not, and increasingly cannot be, siloed for dispute resolution purposes. Moreover, as discussed further below, the *Chagos Archipelago* Tribunal did not definitively close the door on territorial sovereignty disputes being resolved through compulsory dispute settlement under UNCLOS. Such a move contradicts the power dynamic that would have more typically prevented a territorial sovereignty dispute from being resolved by a court or tribunal against the wishes of one of the parties.

3.2 Territorial Sovereignty Disputes as Part of Maritime Boundary Delimitations

There has been considerable speculation in academic commentary as to whether a court or tribunal constituted under UNCLOS would be able to resolve a territorial sovereignty dispute

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by the argument that the proposition was too obvious to warrant being expressly stated." Douglas Guilfoyle, *Governing the Oceans and Dispute Resolution: An Evolving Legal Order?, in* GLOBAL GOVERNANCE AND REGULATION: ORDER AND DISORDER IN THE 21ST CENTURY 177 (Danielle Ireland-Piper (ed.), 2017).

[70] Chagos Marine Protected Area Arbitration, *supra* note 50, para. 219.

[71] *Id.* Dissenting and Concurring Opinion, para. 27.

[72] *Id.* Dissenting and Concurring Opinion, para. 44.

[73] *Id.* Dissenting and Concurring Opinion, para. 39.

[74] *Id.* Dissenting and Concurring Opinion, para. 40.

[75] *Id.* Dissenting and Concurring Opinion, para. 8-17.

[76] *Id.* Dissenting and Concurring Opinion, para. 17.

[77] *Id.* Dissenting and Concurring Opinion, para. 70.

[78] *Id.* Dissenting and Concurring Opinion, para. 76.

as part of the process of delimiting a maritime boundary. These so-called "mixed disputes" have been presented by agreement of the parties for resolution at the ICJ.[79]

The issue is more problematic in the context of UNCLOS dispute settlement as the Convention does not specifically deal with rules relating to territorial sovereignty apart from one reference in Article 298. Article 298(1)(a) allows States to exclude disputes concerning maritime delimitation under Articles 15, 74 and 83 (relating to the territorial sea, EEZ and continental shelf, respectively) from the scope of compulsory proceedings entailing binding decisions. If a State party to UNCLOS does make a declaration to this effect, it is still possible for the maritime boundary dispute to be referred to compulsory conciliation under Annex V of UNCLOS provided various conditions are met. One of the conditions that precludes resort to conciliation is "for any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory".[80] A court or tribunal constituted under UNCLOS may seek to delimit a boundary to the extent that it is not impacted by a feature with contested sovereignty.[81]

One argument pursued in light of this exception to conciliation is that if territorial sovereignty disputes are to be excluded from compulsory conciliation then that indicates they were otherwise assumed to be with the scope of compulsory arbitration.[82] This *a contrario* reading of the UNCLOS provision is supported on the basis that it enables the full and proper resolution of the dispute before the court or tribunal.[83] In this vein, Rao has argued:

> If a court or tribunal were to refuse to deal with a mixed dispute on the ground that there are no substantive provisions in the Convention on land sovereignty issues, the result would be to denude the provisions of the Convention relating to sea boundary delimitations of their full effect and of every purpose and reduce them to an empty form.[84]

This approach reflects an effort to strengthen and expand the exercise of jurisdiction under the UNCLOS dispute settlement regime but does not confront the reality that States may not want a territorial sovereignty dispute resolved by a third-party.

From his discussion of the negotiations of UNCLOS, Adede has observed that the view of the President of the Third Conference on the Law of the Sea was that questions of

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[79] *See, e.g.*, Maritime Delimitation and Territorial Questions (Judgment) (Qatar v. Bahrain), *supra* note 31; Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria; Equatorial Guinea intervening), Merits, (2002) I.C.J. 303 (Oct. 10).

[80] UNCLOS, *supra* note 12, art. 298(1)(a)(i).

[81] Buga has noted, "Article 298(1)(a)(i) does not *preclude* submission of mixed-competence disputes to [UNCLOS] tribunals, but rather only limits their *scope*". Irina Buga, *Territorial Sovereignty Issues in Maritime Disputes: A Jurisdictional Dilemma for Law of the Sea Tribunals* 27 INT'L J. MAR. & COASTAL L. 65, 90 (2012) (emphasis in original).

[82] *See, e.g.*, P. Chandrasekhara Rao, *Delimitation Disputes under the United Nations Convention on the Law of the Sea: Settlement Procedures*, *in* LAW OF THE SEA, ENVIRONMENTAL LAW AND SETTLEMENT OF DISPUTES: LIBER AMICORUM JUDGE THOMAS A. MENSAH 887, 889-890 (Tafsir Malick Ndiaye & Rüdiger Wolfrum (eds), 2007). In this regard, Rao argues:

> Taken in its ordinary sense, the exclusionary clause suggests that but for its inclusion in the second proviso in article 298, paragraph (1)(a)(i), the question of a mixed dispute would have remained within the competence of a conciliation commission. As a logical corollary to this, it follows that, since the exclusionary clause does not apply to a compulsory procedure provided for in section 2 of Part XV, a mixed dispute, whether it arose before or after the entry into force of the Convention, falls within the jurisdiction of a compulsory procedure. If the intention of the Convention is to provide that the exclusionary clause in the second proviso made applicable to conciliation should apply with equal vigour to the compulsory procedures in section 2, then it ought to have made this clear in a provision applicable to such compulsory procedures. *Id.*

[83] *See, e.g.*, GUDMUNDUR EIRIKSSON, THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA 113 (2000).

[84] Rao, *supra* note 82, at 891.

territorial sovereignty were for general international law whereas UNCLOS was to address law of the sea disputes.[85] The exception in Article 298(1)(a) was added to assuage concerns of delegations to this effect.[86] Yet as evident from the opposing views presented by Mauritius and the United Kingdom in *Chagos Archipelago*, the UNCLOS negotiations do not resolve this point definitively. Academic commentary on the review of the negotiations has similarly reflected the differing views. Buga, for example, who has undertaken an excellent review of the literature, has noted as follows:

> It is clear that the prevailing view was that "pure" land territory disputes should not be dealt with directly in the Convention, although it is interesting that some delegates actually proposed their *inclusion*, "arguing that there was no difference between the two kinds of dispute [maritime or territorial] since both deal with areas over which sovereignty or sovereign rights might be exercised". Nevertheless, this leaves undecided the question of *concurrent* territorial issues (although former chairman Professor Sohn argues in his book that "mixed disputes … will be totally exempt from dispute settlement under the Convention").[87]

Churchill has suggested that the exception should apply beyond compulsory conciliation proceedings.[88] Similarly, Talmon proposes:

> Rather than constructing an argument *a contrario*, it may be argued *a fortiori* that if States are not obliged to submit a dispute to compulsory conciliation if it necessarily involves the concurrent consideration of an unsettled dispute concerning sovereignty or other rights over land territory, this must be true even more so in case of compulsory arbitration.[89]

Talmon's position aligns with the common sense conclusion of the *Chagos Archipelago* Tribunal. However, no court or tribunal constituted under UNCLOS is yet to be presented with this precise question and much may ultimately depend on the particular facts of the dispute and the claims asserted by the parties.[90] Arguably, resolving sovereignty over an island has the advantage of also quieting title over the accompanying maritime zones, but this approach does not surmount the initial importance of determining land sovereignty in accordance with the dispute settlement processes preferred for those questions. As with the direct challenges to sovereignty over UNCLOS, it is highly questionable that UNCLOS courts or tribunals have jurisdiction to resolve "mixed" disputes. States must alternatively consent to the mixed dispute going before the ICJ or other dispute settlement techniques must be trusted.

3.3 Incidental Resolution of Territorial Sovereignty Dispute under UNCLOS

The third scenario to contemplate concerns a State challenging the conduct of another State in a maritime area over which they both assert rights by dint of their competing claims of sovereignty over a disputed feature. Each claimant State would consider that it could act as the relevant coastal State off the disputed land, resulting in conflicting views as to respective rights and obligations. In that situation, the rights and duties of each State can only be

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[85] A.O. ADEDE, THE SYSTEM FOR THE SETTLEMENT OF DISPUTES UNDER THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 132 (1987).
[86] *Id.* at 159.
[87] Buga, *supra* note 81, at 70-71 (citations omitted, emphasis in the original).
[88] Robin R. Churchill, *The Role of the International Court of Justice in Maritime Boundary Delimitation, in*, OCEANS MANAGEMENT IN THE 21ST CENTURY: INSTITUTIONAL FRAMEWORKS AND RESPONSES 125, n. 51 (Alex G. Oude Elferink & Donald R. Rothwell (eds), 2004).
[89] Talmon, *supra* note 67, at 47.
[90] *See* Tullio Treves, *What have the United Nations Convention and the International Tribunal for the Law of the Sea to offer as regards Maritime Delimitation Disputes?, in* MARITIME DELIMITATION 63, 77 (Rainer Lagoni & Daniel Vignes (eds) 2006).

ascertained once the ownership of the land is determined. Knowledge of the State holding territorial sovereignty is critical in ascertaining which State has rights over the accompanying maritime space.[91]

The *Chagos Archipelago* Tribunal concluded that, where a dispute concerns the interpretation or application of UNCLOS, the jurisdiction of a court or tribunal pursuant to Article 288 extends to making such findings of fact or ancillary determinations of law as are necessary to resolve the dispute presented to it.[92] Where the "real issues in the case" and the "object of the claim" do not relate to the interpretation or application of the Convention, however, an incidental connection between the dispute and some matter regulated by the Convention is insufficient to bring the dispute, as a whole, within the ambit of Article 288.[93] The Tribunal did not categorically exclude that in some instances a minor issue of territorial sovereignty could indeed be ancillary to a dispute concerning the interpretation or application of the Convention.[94] While it is difficult to envisage a scenario where a State would ever consider a territorial sovereignty dispute as "minor", it is nonetheless notable that the Tribunal sought to delimit the contours of its decision.[95] The Tribunal correctly stated that it did not need to rule on the issue in the *Chagos Archipelago* case.[96]

The views of the Tribunal in this regard reflect a statement of incidental jurisdiction, which is an inherent power existing in international courts and tribunals to decide ancillary matters connected to a dispute over which the court or tribunal has jurisdiction.[97] A key exception to the exercise of incidental jurisdiction is where there is an express provision to the contrary or the law provides otherwise.[98] In this regard, Brown has noted that "there may be a *clause contraire* in the statute or rules of procedure of the international court or tribunal, or the exercise of an inherent power may more generally be inconsistent with the terms of the relevant statute or rules of procedure".[99] The exception was not articulated in the *Chagos Archipelago* award, however.

The ICJ has described incidental jurisdiction in the following terms:

> [I]t is permitted for certain types of claim to be set out as incidental proceedings, that is to say, within the context of a case which is already in progress … in order to ensure better administration of justice, given the specific nature of the claims in question.[100]

The ICJ had previously discussed its inherent powers in the 1974 *Nuclear Tests* case, where it held:

> [T]he Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand, to ensure that the exercise of its jurisdiction over the

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[91] But see decision on traditional fishing rights in *South China Sea* where the Tribunal considered that fishers from both China and the Philippines held traditional fishing rights and so the sovereignty over Scarborough Shoal was irrelevant. *See* The South China Sea Arbitration (Philippines v. China), Award of 12 July 2016, PCA Case No. 2013-19, https://www.pcacases.com/web/view/7 ("South China Sea (Award)").

[92] Chagos Marine Protected Area Arbitration, *supra* note 50, para. 220.

[93] *Id.* para. 220.

[94] *Id.* para. 221.

[95] Tanaka has suggested a low-tide elevation may be considered in this regard. Yoshifumi Tanaka, *Reflections on the Philippines / China Arbitration Award on Jurisdiction and Admissibility*, 15 L. & PRACTICE INT'L COURTS & TRIBUNALS 305, 319 (2016).

[96] Chagos Marine Protected Area Arbitration, *supra* note 50, para. 221.

[97] BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 266 (1953; *reprinted* 2006).

[98] *Id.* at 266-267.

[99] Chester Brown, *Inherent Powers in International Adjudication, in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 828, 845 (Cesare Romano, Karen Alter and Yuval Shany (eds), 2014).

[100] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia) (Counter-Claims) (Order) [1997] I.C.J. 243, 257, para. 30 (Dec. 17).

merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute.[101]

Other international courts and tribunals have affirmed the existence of their inherent powers in order to exercise powers that are not otherwise expressly conferred on them.[102]

Thus while jurisdiction may be set out under the constitutive instrument of the relevant court or tribunal, interpreting the scope of jurisdiction is a matter of implied powers.[103] The approach of a court or tribunal in this regard is similar to the implied powers doctrine that is often followed in assessing the scope of authority of international organizations.[104] Interpreting the scope of jurisdiction aligns with the *non ultra petita* principle, which provides that a tribunal "must not exceed the jurisdiction conferred upon it by the Parties, but it must also exercise that jurisdiction to its fullest extent".[105]

There are examples of law of the sea cases extending jurisdiction to resolve matters closely linked to the core of the dispute. In *Barbados/Trinidad and Tobago*, the tribunal constituted under Annex VII of UNCLOS considered that it had authority to examine the delimitation of the outer continental shelf because it was "sufficiently closely related" to the dispute that had been submitted by the applicant.[106] Although not constituted under UNCLOS, the arbitral tribunal formed to resolve questions of territorial sovereignty and to delimit the maritime boundary between Eritrea and Yemen considered that it could determine the relevant basepoints from straight baselines drawn around fringing islands even though Yemen had not presented its claims on those basepoints.[107]

One difficulty with this aspect of the *Chagos Archipelago* decision is that it refutes the view that questions of territorial sovereignty do not relate to the interpretation or the application of UNCLOS and this conclusion would seem to constitute "the law providing otherwise",[108] so as to prevent the exercise of incidental jurisdiction. If territorial sovereignty is not within jurisdiction, it should not follow that even a "minor issue" of territorial sovereignty can be decided as an ancillary matter. The *Chagos Archipelago* judgment on this point seems to be inconsistent with the established position on incidental jurisdiction and it was wrong to leave open the possibility of any territorial sovereignty dispute falling within a dispute concerning the interpretation or application of UNCLOS.[109]

No specific case has been presented under UNCLOS in this configuration at time of writing. As the current trend in case law under UNCLOS is for jurisdiction to be expanded

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[101] Nuclear Tests (Australia v France) [1974] I.C.J. 253, 259-260 (Dec. 20) (references omitted).

[102] These are discussed in Brown, *supra* note 99, 834-835 (referring to the Iran-US Claims Tribunal, an ICSID tribunal and the Appeals Chamber of the Special Tribunal for Lebanon in this regard).

[103] Buga, *supra* note 81, at78.

[104] *See* JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 59-64 (2nd ed, 2009). *See also* Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion [1949] I.C.J. 174, 182 (Apr. 11) ("Under international law, the Organisation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties").

[105] Continental Shelf (Libya v Malta) (Judgment) [1985] I.C.J. 13, 23, cited in Buga, *supra* note 81, at 78.

[106] In the Matter of An Arbitration between Barbados and the Republic of Trinidad and Tobago, Award of the Arbitral Tribunal, (Barbados / Trinidad & Tobago) (Arbitral Tribunal Constituted Pursuant to Article 287, and in Accordance with Annex VII, of the United Nations Convention on the Law of the Sea) (2006) 45 ILM 800 (2006), para. 213.

[107] Second stage of the proceedings between Eritrea and Yemen (Maritime Delimitation) (Eritrea / Yemen), *supra* note 40, para. 146.

[108] To use the language of Bin Cheng. *See supra* note 97.

[109] Nathan Kensey, *Having Your Jurisdiction and Eating it Too: the* Chagos Archipelago *(Mauritius v the United Kingdom) and Incidental Jurisdiction under UNCLOS*, Paper presented at the Joint ANZSIL / KSIL Workshop, December 4, 2015 (paper on file with author).

rather than read restrictively,[110] it must be foreseeable that a dispute of this kind will be presented under the UNCLOS dispute settlement regime. To do so will reflect the increasing reliance – potentially the acceptance – of UNCLOS norms and processes to resolve territorial sovereignty disputes for the purposes of ascertaining the proper allocation of maritime rights and duties. This approach would align with a stronger notion of public order of the oceans, but compliance may be problematic.

In the hypothetical realm, we can envisage that if the State in occupation of the land and purporting to exercise the relevant maritime rights against the complainant State prevails in the dispute so that its territorial sovereignty and maritime entitlements are confirmed by the international court or tribunal, compliance should not be a problem. However, if the other claimant State, which is not in possession of the territory, is determined to have sovereignty over the land and maritime entitlements, will the other State comply? If it is militarily stronger, the State in possession can continue to exclude physically fishing vessels or oil and gas companies from the maritime area in question even in violation of international law. Yet that same State would potentially have difficulties in exploiting the resources through the grant of fishing licenses or oil concessions if those in the market no long recognize the legal rights of the occupying State. Alternatively, those in the market may be satisfied that the overall power of the State is sufficient to protect their investment. The national interest (or pride) associated with title to territory may be too strong for a State to give up possession, or its claim in the face of adverse ruling, even where financial benefits may otherwise be derived from a recognition of maritime entitlement.

3.4 Determining Maritime Allocations when Territorial Sovereignty is Disputed

The above hypothetical could have potentially played out in the Philippines' case against China in 2013 in relation to the South China Sea. In the South China Sea, China, Taiwan, the Philippines, Viet Nam, Malaysia, and Brunei hold competing claims over different island groups, such as the Paracels and the Spratly islands, as well as over other islands and land features located throughout this semi-enclosed sea.[111] Efforts among the claimant States to exercise rights over fish or hydrocarbon resources have led to military confrontations and strong diplomatic demarches.[112]

The context of the *South China Sea* case concerned in part the disputed sovereignty over various land features in the South China Sea, but the Philippines did not seek to resolve the questions of territorial sovereignty.[113] Instead, among the claims asserted against China,[114] the Philippines argued that the maritime entitlements of the different land features could be ascertained as a question of interpretation of Article 121 of UNCLOS and hence was within the jurisdiction of the Tribunal.[115] China opted not to participate in the case,[116] but in a

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[110] *See* Natalie Klein, *The Vicissitudes of Dispute Settlement under the Law of the Sea Convention*, 32 INT'L J. MAR. & COASTAL L. 332 (2017); Kate Parlett, *Beyond the Four Corners of the Convention: Expanding the Scope of Jurisdiction of Law of the Sea Tribunals*, OCEAN DEV. & INT'L L 1, available at http://dx.doi.org/10.1080/00908320.2017.1327289 (2017).

[111] For a map of the claims, *see* Agora: The South China Sea, 107 AM. J. INT'L L. 95, 96 (2013).

[112] *See, e.g.*, M. Taylor Fravel, *China's Strategy in the South China Sea*, 33 CONTEMPORARY SOUTHEAST ASIA 292, 299-307 (2011).

[113] *See* The South China Sea Arbitration (Philippines v China), Award on Jurisdiction and Admissibility, Oct. 25, 2015, PCA Case No. 2013-19, https://www.pcacases.com/web/view/7, paras 152-153.

[114] The Philippines challenged the validity of China's claimed "nine-dash line" in the South China Sea as inconsistent with maritime allocations under the Convention and also claimed violations of UNCLOS in relation to the China's conduct in the South China Sea, including in the exercise of fishing rights and the protection and preservation of the marine environment.

[115] Article 286(1) of UNCLOS provides: "Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be

separate policy paper claimed that the case concerned questions of territorial sovereignty and were hence outside jurisdiction,[117] or were inherently related to a maritime boundary dispute and were thereby excluded from the Tribunal's jurisdiction by virtue of China's declaration under Article 298 of UNCLOS.[118]

The Philippines' argument created the curious position of wanting an ascertainment of maritime rights even where it was not known to which State those rights accrued. As I have argued elsewhere,[119] this position appeared to run against the fundamental principle of land dominating the sea because all it looks to is the existence of physical land, without accounting for the importance of a stable political and social community being ascertained to exercise the rights and duties enshrined in the entitlement. A coastal State would normally have both physical land and a stable political and social community by virtue of its statehood. These attributes would normally be essential to obtain and exercise rights over maritime space.

Each of the entitlements to different maritime zones is associated with a "coastal State". To demonstrate briefly:

- Art 2(1) provides: "The sovereignty of *a coastal State* extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea." [emphasis added]
- Article 55 provides: "The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of *the coastal State* and the rights and freedoms of other States are governed by the relevant provisions of this Convention." [emphasis added]
- Article 76(1) provides: "1. The continental shelf of *a coastal State* comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance." [emphasis added][120]

In identifying an entitlement without being able to name which State was entitled, the *South China Sea* Tribunal created further difficulties in ascertaining competing claims within those maritime areas. For example, despite the explicit wording of Article 86 that the provisions in Part VII of UNCLOS did not apply in the territorial sea, the Tribunal effectively applied Article 94 in Part VII to the territorial sea. It had to do that because it was not

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submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section." UNCLOS, *supra* note 12, art. 286(1).

[116] China was entitled to make this decision but in default of the defendant's appearance, the work of the tribunal still continues. *Id*. Annex VII, art. 9. The tribunal may decide the claims provided that it satisfies itself that it has jurisdiction and that the claim is well founded in fact and law. *Id.*

[117] Ministry of Foreign Affairs of the People's Republic of China, *Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines*, Dec. 7. 2014, http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml.

[118] Article 298 allows States to exclude from compulsory procedures certain specified disputes, including those concerning delimitation under Articles 15, 74 and 83 of UNCLOS. These provisions deal with delimitation of overlapping territorial seas, EEZs and continental shelves, respectively, between States with opposite or adjacent coasts. See further *id.* paras 57-75.

[119] Klein, *supra* note 110, 345-347.

[120] *See further id.* 346-347.

possible to say who was the "coastal State" for the more appropriate application of Article 21 concerning *inter alia* the safety of navigation in the territorial sea.

The *South China Sea* Tribunal ultimately determined that Subi Reef, Gaven Reef (South), Hughes Reef, Mischief Reef and Second Thomas Shoal were low-tide elevations. French has observed that in reaching this conclusion, the Tribunal effectively made a decision on sovereignty. He noted: "By finding that something is a low-tide elevation (the first-order question), incapable of being possessed by means of territoriality, the Tribunal has in essence ruled out the question of sovereignty (a second-order question)."[121]

Other features contested by the Philippines, Scarborough Shoal, Gaven Reef (North), McKennan Reef, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef, were ruled to be, in their natural condition, "rocks" within the meaning of Article 121(3). To ensure that there was no possibility of an overlapping Chinese maritime claim that would put the Philippines' claims outside the Tribunal's jurisdiction, the Tribunal further considered the status of other high-tide features in the Spratly Island group. It concluded that none of Itu Aba, Thitu, West York, Spratly Island, South-West Cay, and North-East Cay were capable of sustaining human habitation within the meaning of Article 121(3).[122] Hence, they were also rocks only entitled to a territorial sea and contiguous zone.

The important result of these determinations was that China and the Philippines did not have any overlapping EEZs or continental shelves that would have otherwise occurred if China ultimately did have sovereignty over the land features in question. The fortunate convenience associated with this determination was that the *South China Sea* Tribunal could progress to assess a variety of other claims the Philippines asserted against China, which could not have been determined if there was the specter of needing to resolve a maritime boundary dispute to ascertain the respective rights and duties at issue.

The incongruent position now created is that there are pockets of ocean that have been explicitly earmarked as maritime areas over which sovereignty is to be exercised but it is unknown which State may lawfully assert that sovereignty. Arguably the same was true before the decision in the *South China Sea* arbitration and what has at least been clarified is that there is not a mystery State entitled to claim sovereign rights or exercise exclusive jurisdiction over either an EEZ or continental shelf around these features. As these maritime zones are more extensive,[123] greater practical difficulties may have arisen if it were known that "a" State had exclusive rights within a large expanse of water but we did not know which State. While it worked out neatly in the context of the *South China Sea*, we cannot assume that a comparable result will always be achieved. If there is an EEZ or continental shelf belonging to "a" State around a disputed island, how can any State then proceed to benefit from the economic resources of that maritime allocation? The allocation of maritime space in this setting has done little to advance the marketability of any title.

The situation is not an entirely new one because there is other land that is disputed territory, or occupied, or involves contested government authority and still has maritime zones allocated. Perhaps what it demonstrates is that UNCLOS dispute settlement procedures cannot solve these problems and efforts to resolve some aspects of a broader dispute through

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[121] Duncan French, *In the Matter of the South China Sea Arbitration: Republic of Philippines v People's Republic of China, Arbitral Tribunal Constituted under Annex VII to the 1982 United Nations Law of the Sea Convention, Case No. 2013-19, Award of 12 July 2016*, 19 ENV'L L. REV. 48, 52 (2017). *See also* Murphy, *supra* note 34, at 237 (describing the issue of sovereignty as ancillary to the interpretation or application of the regime established under UNCLOS).

[122] South China Sea (Award), *supra* note 91, para. 621.

[123] Extending up to 200 nautical miles in relation to the EEZ and potentially even further for the continental shelf in line with the process under Article 76 of UNCLOS. *See above* notes 20-22 and accompanying text.

litigation do not ultimately assist. Our norms can only get us so far. At best, the "lawfare" involved is another facet to our larger political, and power-dominated, dispute.

For present purposes, what is interesting in the *South China Sea* decision to proceed to determine maritime "entitlements" is that it focuses on the physical existence of land. Far less relevant was the existence of any organized political or social community that would have the key interest in how rights and duties flowing from the entitlement would be exercised. Associating maritime entitlements with physical land, rather than with land plus an organized community as the essential features of a State, is relevant for our discussion in Part IV on maritime entitlements when land, and potentially the entire territory of States, physically disappear.

3.5 Assessing Land to Determine Maritime Allocations

Despite the tidy outcome arguably achieved in the *South China Sea* arbitration in relation to the maritime entitlements of the land features at issue, it remains important to consider *how* the Tribunal reached this result. It concerns the intertwining of land and sea again, as we must ask what the difference is between a rock and an island, since the latter allows for a far greater allocation of maritime space compared to the former. As noted above, the difference is drawn from particular features of an island in accordance with Article 121(3) of UNCLOS. If islands "cannot sustain human habitation or economic life of their own", they are deemed "rocks" that do not have an EEZ or continental shelf.[124] Much then turns on the interpretation and application of "cannot sustain human habitation or economic life of their own" and the *South China Sea* Tribunal has been the first international body to parse these words in detail and offer views on how they should be understood.

The Tribunal undertook a review of the text of Article 121(3), as well as considering the context, object and purpose of the LOSC and the negotiating history (the *travaux préparatoires*) so as to ascertain the meaning of Article 121(3). In relation to the actual consistency of the feature in question, the Tribunal concluded that what counted was whether it was naturally formed and above water at high tide. It did not matter from what the rock was naturally formed.[125]

In relation to a rock that "cannot" sustain human habitation or an economic life of its own, the Tribunal concluded that an objective determination was necessary as to whether the rock had the capacity to sustain human habitation or an economic life, not an assessment of whether the rock actually does do so.[126] Historical evidence could be considered in this context as indicative of the rock's capacity.[127]

The Tribunal further indicated that "sustain" had three components: (1) the "concept of support and provision of essentials"; (2) over a period of time rather than one-off or short-lived; and (3) a qualitative assessment as to a minimal standard.[128] These elements all then had to be read in the context of human habitation or an economic life and what it would mean to "sustain" either of those elements.

Assessing "human habitation" required the Tribunal to distinguish human habitation from the mere presence of humans. The latter would not suffice in assessing the characteristics of a rock, but an indeterminate threshold had to be reached.[129] In relation to that threshold, the Tribunal considered that a range of basic requirements would have to be met; these requirements being those "necessary to provide for the daily subsistence and

[124] UNCLOS, *supra* note 12, art. 121(3).
[125] South China Sea (Award), *supra* note 91, para. 482.
[126] *Id.* para. 483.
[127] *Id.* para. 484.
[128] *Id.* para. 487.
[129] *Id.* para. 492.

survival of a number of people for an indefinite time".[130] The Tribunal further noted that "[a] feature that is only capable of sustaining habitation through the continued delivery of supplies from outside does not meet the requirements of Article 121(3)."[131]

For "economic life of their own", like human habitation, this criterion was assessed as needing more than mere presence; it was not enough for there to be resources available but that some level of local human activity had to be involved in the exploitation, development and distribution of those resources.[132] In anticipating this engagement with human activity, the link between the concepts of human habitation and economic life was brought into sharper relief. Moreover, human engagement would be needed so that the economic life was not simply derived from extractive activities, particularly where those activities would have no benefit for any local population on the feature itself.[133] Moreover, the extractive activity had to occur on the land, or be connected with the land, of the feature itself and not merely occur in the waters around the feature.[134]

Taking all of these elements into consideration, it is evident that the Tribunal sought to laden the description of a "fully entitled" island with strong connections to human life and human activity. In terms of "sustain[ing] human habitation or an economic life of its own", the feature must go beyond mere usage as part of the wider activities of a State in the area, but be linked in with a stable community existence. It is a curious emphasis when recalling that this element of organized political and social community was ignored by the Tribunal in considering whether it could proceed to determine maritime entitlements in the absence of knowing who would have authority to regulate the community existence sought.

Having articulated the legal criteria drawn from the words "cannot sustain human habitation or economic life of their own", the *South China Sea* Tribunal sought to apply these standards to each of the features in question. As foreshadowed, the assessment was not always obvious on its face. The Tribunal decided that in such borderline cases, "the most reliable evidence of the capacity of a feature will usually be the historical use to which it has been put".[135] Amid that historical evidence, the human habitation that predated the establishment of EEZs would be considered more significant on the basis that it would be less likely that the activity was designed to enhance maritime claims under the LOSC.[136] In these circumstances, the Tribunal sought to draw on evidence of mining and fishing activities and the regulation of those activities.[137]

In taking this approach, the Tribunal utilized the type of evidence that would normally be assessed in deciding which State has sovereignty over disputed territory. Courts or tribunals seeking to ascertain territorial sovereignty have often considered what State was in "effective occupation" of the territory in question. Establishing effective occupation necessitates a consideration of whether a State has acted as if sovereign of the territory and whether it has shown its intention to act as sovereign.[138] It essentially requires "the continuous and peaceful display of territorial sovereignty".[139] The evidence that has been

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[130] *Id.*
[131] *Id.* para. 547.
[132] *Id.* para. 499.
[133] *Id.* paras. 499-500.
[134] *Id.* para. 503. As such, economic life derived from the EEZ or the continental shelf of the feature could not be considered as meeting this criterion. *Id.* para. 502.
[135] *Id.* para. 549.
[136] *Id.* para. 550.
[137] *Id.* paras. 617-619.
[138] *See, e.g.*, Legal Status of Eastern Greenland (Denmark v Norway), Judgment, Apr. 5, 1933, PCIJ Ser. A/B, No. 53, 45-46. The "intention" to act as sovereign has received less emphasis in other cases, such as the *Island of Palmas* and *Minquiers and Ecrehos*. See MALCOLM N. SHAW, INTERNATIONAL LAW 513 (2008).
[139] Island of Palmas (or Miangas) (US v Netherland) [1928] II R.I.A.A. 829, *supra* note 38, 839.

used for this purpose includes the adoption and enforcement of legislation or regulations, as well as activities by State officials or activities of private persons regulated by State officials on the territory and around the territory in question.

It should not be any surprise to us that an assessment of the classification of land should in fact address criteria that are typically associated with territorial sovereignty. What was decisive was the quality of the occupation, the extent of human habitation, which became determinative for the extent of the maritime allocations for those areas of land. The predominance of the land over the sea was recognized in this instance.

While normative processes are being brought to bear in these scenarios, they cannot fully disguise the realities of the power dynamics at play. The *South China Sea* Tribunal's characterization of the land features in question ran counter to State practice in varied instances.[140] In emphasizing the interpretation and application of the relevant norms, the Tribunal sought to hold true to what it considered the reasons behind the establishment of the EEZ.[141] In this regard, these maritime areas had to be for the benefit of an actual population rather than for the pure economic benefit of a sovereign State that otherwise has no connection with the land in question in the absence of that human habitation. Yet if States are proceeding to make extended maritime zone claims off small features that may be better classified as "rocks" rather than "islands" in light of the *South China Sea* decision, has the now-incorrect classification of the land in question reduced the marketability of the maritime rights? If there had already been international recognition of the State's claims and, moreover, its exclusive authority over the maritime area was and is generally recognized, irrespective of the *South China Sea* decision, arguably no damage is done to the economic rights in question. However, challenges may now start to emerge against the certainty of maritime allocations on the basis of the *South China Sea* case where States wish to support the rights of its fishing vessels to harvest resources on what may now be perceived as high seas rather than in the EEZ of a coastal State. With the possible undermining of the marketability of title off small marine features, the door has instead been opened to (perhaps only short-term) instability as maritime allocations are recalibrated.

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In sum, we have seen in our actual and hypothetical cases under UNCLOS that the maritime dimensions to the dispute have brought norm-reliance to the fore. In these scenarios, the applicant States concerned are depending on a full and proper operation of legal processes to determine and uphold the rights at stake in the maritime areas at issue, even if – or perhaps irrespective of – sovereignty over land being contested. The shift to the normative emphasis and prioritizing of the resolution of maritime disputes is understandable when the power dynamics and limited dispute resolution options exist for settling territory sovereignty disputes. As mentioned previously, the view might be taken that it is better to provide legal answers to some aspects of a dispute when it is not possible to resolve all legal questions that might arise. Yet we can see that in proceeding down this path we are challenging the long-standing principle of the land dominates the sea. How satisfactory are the results of moving away from this approach? Further challenges to our land and sea paradigm are to be considered in the following Part. Part 4 will address other situations that

[140] *See* Natalie Klein, Agora Contribution, *Rocks and Islands after the* South China Sea *Arbitration*, 34 AUST. Y. BK INT'L L. 21, 28-30 (2016); Alex G. Oude Elferink, *The South China Sea Arbitration's Interpretation of Article 121(3) of the LOSC: A Disquieting First*, JCLOS Blog, (Sept. 7, 2016) available at: https://site.uit.no/jclos/2016/09/07/the-south-china-sea-arbitrations-interpretation-of-article-1213-of-the-losc-a-disquieting-first/ ("At the moment, there is an abyss between the tribunal's approach and the practice of many States.")

[141] South China Sea (Award), *supra* note 91, paras. 512-520.

may require a readjustment of maritime allocations and provide further consideration of when maritime rights are marketable.

4. Disappearing and Appearing Land

The connections between land and sea have come into more prominence as greater consideration is accorded to the consequences of sea-level rise on the territorial and maritime rights of States. The two situations that emerge in this regard concern, first, the changing coastlines of States, which has implications for the maritime allocations to which the State is entitled off its land mass, and, second, the potential disappearance of an island State. Scholars and policy-makers have already contemplated a variety of responses to these scenarios, and the proposed legal responses are summarized in the sections that follow.

The important question that emerges for our purposes is what do these changes mean for the land and sea sovereignty regimes? Ensuring stability would be important in preserving the value of marketable title over maritime areas. Relying on an equitable distribution of maritime space and international recognition of maritime rights through international processes becomes even more important in the context of maintaining existing rights and expectations in the use and allocation of maritime space. How well this can be achieved will depend on the political will of states to act. But the situation prompts a return to the deeper debate that underlies the law of the sea in relation to the extent exclusive claims should be recognized in the face of shared, inclusive interests in maritime space (the latter captured by the principle of *mare liberum*)? If there is an opportunity to release more maritime space to common usage, should that be preferred or prioritized over ongoing recognition of exclusive maritime space that no longer accords with the pre-existing constructs of either the legal regimes allocating maritime zones or the very need for land to be able to claim those maritime zones?

Connected with responses to sea-level rise, but also distinct activities, are land reclamation as well as other human efforts to fortify coastlines, and the construction of artificial islands and other structures at sea. A range of legal consequences flow from these actions, as was evidenced in the *South China Sea* arbitration. This "appearance" of land is assessed in this Part, and it is demonstrated that this sort of human effort has reduced import in the assertion of rights over maritime space. The approach is consistent with the underpinnings of the normative regime that prompted the allocation of maritime space through legal processes and further affirms the ongoing relevance of *mare liberum*.

4.1 Changing Coastlines

It is well accepted that significant sea-level rise is occurring across the globe.[142] The change in sea levels will fluctuate in different locations because of the offshore and onshore geographic conditions, and the consequences of that sea level rise will vary.[143] From a legal perspective, the change in sea levels is relevant in relation to the baselines from which all maritime zones are measured. The normal baseline is the low-water line along the coast,[144] and is the predominant baseline used by States.[145] With sea levels rising, the low-water line

[142] *See generally* Mary-Elena Carr, Madeleine Rubenstein, Alice Graff and Diego Villarreal, *Sea Level Rise in a Changing Climate: What do we Know?, in* THREATENED ISLAND NATIONS: LEGAL IMPLICATIONS OF RISING SEAS AND A CHANGING CLIMATE 15, 25-31 (Michael B. Gerrard and Gregory E. Wannier (eds), 2013).

[143] Clive Schofield and David Freestone, *Options to Protect Coastline and Secure Maritime Jurisdictional Claims in the Face of Global Sea Level Rise, in* THREATENED ISLAND NATIONS: LEGAL IMPLICATIONS OF RISING SEAS AND A CHANGING CLIMATE 141, 142-143 and 145 (Michael B. Gerrard and Gregory E. Wannier (eds), 2013) (also noting that some scientists have also suggested that islands or some coastlines may adapt and grow rather than inevitably face erosion).

[144] UNCLOS, *supra* note 12, art. 5.

[145] Schofield and Freestone, *supra* note 143, at 157.

will shift further landward and some basepoints may be completely inundated. With the baselines moving in this direction, the outer-limits of the maritime zones (such as the territorial sea, EEZ and continental shelf) would also recede since the starting point to measure the extent of each zone is drawn from the basepoints or baselines of the coast.[146]

Systems of straight baselines would also be affected by sea-level rise. Straight baselines may be used "[i]n localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity",[147] so long as they follow the general direction of the coast,[148] and meet other conditions set out in Article 7 of UNCLOS. Article 7(2) contemplates that "natural conditions" may render a coastline "highly unstable", allowing for basepoints to be selected "along the furthest seaward extent of the low-water line" and thereby maintained notwithstanding that line receding until the coastal State officially changes the baselines.[149] Although this provision was drafted with the specific situation of Bangladesh under consideration, it could be read as applying to changing coastlines in the light of sea-level rise.[150]

Low-tide elevations will also be affected by sea-level rise, which will have a concomitant effect on a State's maritime zones potentially. As noted in Part II, under Article 13 of UNCLOS, a low-tide elevation within a State's territorial sea may be used as a basepoint. A fully submerged feature could not be relied upon for the same purpose. Another maritime measurement that could be affected through sea-level rise, including the submersion of particular land features, concerns the calculations for drawing archipelagic baselines.[151] Article 47(1) provides for a ratio of land area to water area that must be met for an archipelagic State to be able to use baselines joining "the outermost points of the outermost islands and drying reefs of the archipelago".[152] The archipelagic State might not only lose land features as a result of sea-level rise, but it may also lose the right to claim archipelagic waters and hence sovereignty over the waters between its islands.

The prospect of the outer limit of maritime zones shifting is problematic for stability in terms of changing the allocation of rights and duties in different maritime space. States risk losing rights to natural resources as a result. The extent of the impact in this regard may depend on the rate of sea level rise in any particular area and how frequently a State issues large-scale charts marking the State's baselines. One suggestion has been that a State could "freeze" its baselines once published on charts it recognizes and presents to the UN Secretary-General under the requirements of UNCLOS.[153] This approach allows for stability in the outer limits of the State's maritime zones but could create navigational issues with out-of-date information.[154]

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[146] *See* UNCLOS, *supra* note 12, art. 4 (addressing the outer limit of the territorial sea); art. 57 (describing the breadth of the EEZ); art. 76 (referring to the definition of the continental shelf).
[147] *Id.* art. 7(1).
[148] *Id.* art. 7(3).
[149] *Id.* art. 7(2).
[150] *See* Schofield and Freestone, *supra* note 143, at 159; Rosemary Rayfuse, *Sea Level Rise and Maritime Zones: Preserving the Maritime Entitlements of "Disappearing States", in* THREATENED ISLAND NATIONS: LEGAL IMPLICATIONS OF RISING SEAS AND A CHANGING CLIMATE 167, 181-182 (Michael B. Gerrard and Gregory E. Wannier (eds), 2013) [hereinafter "Rayfuse, *Sea Level Rise*"].
[151] Blanchard, *supra* note 14, at 82.
[152] UNCLOS, *supra* note 12, art. 47(1).
[153] *Id.* art. 5 and art. 16. *See* discussion in Schofield and Freestone, *supra* note 143, at 162.
[154] Schofield and Freestone suggest that two charts could be used: one map that is "recognized by the coastal State" and submitted to the UN, and another that is more accurate and available as a navigational chart. Schofield and Freestone, *supra* note 143, at 162.

In light of the potential for these sorts of ambulatory baselines,[155] proposals have been made to decouple the outer limit of maritime zones from those baselines.[156] Caron proposes freezing the outer limits of maritime allocations as they are at present a reflection of what is considered equitable, and acceptable, as agreed under UNCLOS.[157] A counter-argument would be that if there is an opportunity to return a greater maritime area to designation of high seas or to the Area, more States would ultimately benefit. As noted at the outset of this Part, each approach returns us to the classic Groatian-Selden debate as between open and closed seas. Rayfuse has noted the significance of freezing the outer limits as compared to freezing the baselines. She has observed that once baselines are fixed, a greater maritime area will gradually come under the exclusive sovereignty of the coastal State as coasts recede and a larger area becomes subject to the internal waters regime.[158] Internal waters are the waters that lie on the landward side of baselines, including straight baselines, and over which States have total sovereignty and jurisdictional control.[159] Where the outer limits of an EEZ or continental shelf are fixed, rather than fixing the baselines, there is still a possibility of a State's territorial sea boundary shifting to account for the changing low-water line due to sea-level rise. It would therefore be anticipated that boundaries of each of the maritime zones (territorial sea, contiguous zone, EEZ and continental shelf) would need to be fixed.

If maritime boundaries are to be fixed at a certain point in time (either the baselines or the outer limits), there remains a question as to what point in time should be selected.[160] Hayashi proposes doing so at the date a State publishes its baselines consistent with Article 16 of UNCLOS. A difficulty with the "freezing" approach is that there are instances where States dispute the baselines or maritime allocations that are being claimed by another State. Rayfuse suggests that, similar to Antarctica, the disputed claim is frozen and left to be resolved through "normal processes".[161]

Commentators have remarked upon the possibility that an island entitled to a full complement of maritime zones under Article 121(2) of UNCLOS may lose this status if the island is no longer able to support human habitation or an economic life.[162] The question raised in this setting is whether the State with sovereignty over that island then loses the rights it had accrued in an EEZ or continental shelf around what should now be classed as a rock. Soons has suggested that it may be permissible to maintain an island artificially so that it does not become a rock under Article 121(3).[163]

This conundrum finds some response in the *South China Sea* arbitration. Although not addressing the status of features that had lost land or lost attributes associated with an island, the Tribunal indicated that any assessment has to look at the natural conditions of the feature. If regard must be had to the natural status of the feature, it could be argued that the island was

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[155] As discussed in Alfred H.A. Soons, *The Effects of a Rising Sea Level on Maritime Limits and Boundaries*, 37 NETH. INT'L L. REV. 207, 216-218 (1990); David D. Caron, *When Law Makes Climate Change Worse: Rethinking the Law of Baselines in Light of a Rising Sea Level*, 17 ECOLOGY L. Q. 621, 634 (1990); Rayfuse, *Sea Level Rise*, *supra* note 150, at 171 (drawing on the work of Soons, Caron and others).

[156] Schofield and Freestone, *supra* note 143, at 162; Rayfuse, *Sea Level Rise*, *supra* note 150, at 188.

[157] Caron, *supra* note 155, at 640-641.

[158] Rosemary Rayfuse, *International Law and Disappearing States: Utilising Maritime Entitlements to Overcome the Statehood Dilemma* (November 7, 2010) [2010] UNSWLRS 52 available at: http://ssrn.com/abstract=1704835, at 6 [hereinafter "Rayfuse, *Disappearing States*"].

[159] An exception here is that waters enclosed by straight baselines are still subject to the regime of innocent passage. UNCLOS, *supra* note 12, art. 8(2).

[160] Rayfuse, *Disappearing States*, *supra* note 158, at 6 (citing M Hayashi, "Sea Level Rise and the Law of the Sea: Legal and Policy Options" *Proceedings of International Symposium on Islands and Oceans*, Ocean Policy and Research Foundation (2009) 78, 84).

[161] Rayfuse, *Disappearing States*, *supra* note 158, at 6.

[162] Schofield and Freestone, *supra* note 143, at 147.

[163] Soons, *supra* note 155, at 223.

fully entitled to an EEZ and continental shelf and that this entitlement remains even if human-induced climate change has contributed to sea-level rise. The counter-argument would be that an assessment of the natural state should take into account changes wrought by nature, such as sea-level rise. The focus would then need to be on the point in time that the assessment is made. It could hence be suggested that greater stability is achieved if a feature that had once been recognized as entitled to an EEZ and continental shelf should maintain these entitlements consistent with expectations of the global community.

Could this reasoning still hold if a feature that was an island is reduced to a low-tide elevation eventually? Or disappeared altogether? Arguments in favor of stability would once again have relevance in this regard. In the context of prescription as a mode of territorial acquisition, Shaw has written, "it reflects the need for stability felt within the international system by recognizing the territory in the possession of a state for a long period of time and uncontested cannot be taken away from that state without serious consequences for the international order".[164] This policy could be equally applicable in situations where maritime allocations would change relatively suddenly. This emphasis on stability also comes to the fore, and has been applied in a maritime context, in relation to the doctrine of historical consolidation. Historic consolidation "is founded on proven long use, which reflects a complex of interests and relations resulting in the acquisition of territory (including parts of the sea)".[165] The circumstances are of course not identical so it may not be appropriate to transplant the policy behind these doctrines into another domain. Nonetheless, the importance of stability and continuity resonates with a policy preference to recognize the ongoing rights of States over certain maritime space even in the event of the bases of those claims changing. The *South China Sea* decision to focus on natural conditions preferred an approach that cut against recent changes to land and preferred the earlier status quo.

Maritime boundary delimitation cases have not been amenable to accounting for changing or unstable coastal conditions thus far. For example, in *Bangladesh v India*, the Tribunal stated:

> …issue is not whether the coastlines of the Parties will be affected by climate change in the years or centuries to come. It is rather whether the choice of base points located on the coastline and reflecting the general direction of the coast is feasible in the present case and at the present time.[166]

Similar resistance to accounting for coastal instability is evident in *Nicaragua v Honduras*,[167] and *Romania v Ukraine*.[168]

Nonetheless, one situation where the outer limits of a State's maritime jurisdiction are unlikely to shift despite receding coastlines is in the context of agreed maritime boundaries between neighbouring States. Where the extended maritime zones between opposite or adjacent States overlap, those States will need to reach agreement as to the maritime boundary between them.[169] Once that maritime boundary is fixed by treaty, it would not change because of any shift in the low-water line as such treaties are not subject to change

[164] MALCOLM N. SHAW, INTERNATIONAL LAW 504 (2008).
[165] *Id.* at 507.
[166] Bay of Bengal Maritime Boundary Arbitration (Bangladesh v India) Award of July 7, 2014, PCA Case No. 2010-16, http://www.pcacases.com/web/view/18, para. 214.
[167] Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras) (2007) I.C.J. 661 (Oct. 8), para. 277.
[168] Maritime Delimitation in the Black Sea (Romania v Ukraine) (2009) I.C.J. 62, (Feb. 3), para. 131.
[169] In accordance with Articles 74(1) and 83(1) of UNCLOS. *See* UNCLOS, *supra* note 12, arts. 74(1) and 83(1).

even in the event of "subsequent fundamental change of circumstances".[170] The States concerned may agree to shift the line in a subsequent agreement, particularly if one State is more affected by sea-level rise along its coast than another but it could not be readily expected that once negotiated and agreed, States would be too willing to reconsider a boundary's position. In a similar vein, States that undertake the process for recognition of an outer continental shelf through the Commission for the Limits of the Continental Shelf will be able to establish "permanent" boundaries in accordance with UNCLOS.[171]

Beyond agreed maritime boundaries, or declarations following the outer-continental shelf process under UNCLOS, it remains to be seen what processes may otherwise be put in place to ensure stability in maritime allocations as the land generating those allocations changes. While a new treaty or a protocol to UNCLOS may provide a mechanism for ensuring consistency in approach to this issue and maintaining stability and order in the oceans, the political palatability of such an option is likely low in light of previous difficulties in negotiating treaties responding to climate change.[172] Soons has contemplated the possibility of customary international law emerging to address the legal effects of sea-level rise on maritime jurisdiction, and considers a rule may be recognized that permits States to maintain territorial sea and EEZ outer limits "at a certain moment in accordance with the general rules in force at that time".[173] While the formation of customary law may be criticized as too slow and impractical,[174] we have seen customary law develop relatively rapidly in the law of the sea following the Truman Proclamation and increasing State claims to continental shelves. A powerful State declaring its outer maritime boundaries to be final and binding *erga omnes* irrespective of changes to its coastline henceforth could similarly catalyze claims by other States in comparable circumstances. It would then be the case that on the back of this State practice, a treaty or protocol, or perhaps a UN General Assembly resolution,[175] could be more readily adopted. The normative importance in allocation of maritime space remains apparent in the scenario of changing coastlines, as does the significance of the marketability of title in adjusting to changing conditions. This emphasis on norms makes sense in this instance as the continued physical presence of land, and sovereignty over that land, persists without disruption to our fundamental precepts of territorial sovereignty and the principle of the land dominates the sea. What may be challenged instead is the ongoing priority accorded to *mare liberum*. The situation changes and all these disruptions emerge when the land disappearing constitutes an entire State, as next addressed.

4.2 Disappearing States

[170] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, art. 62(2)(a); Aegean Sea Continental Shelf (Greece v. Turkey), 1978 I.C.J. 3 (Dec. 19) at 35-36. *See also* Soons, *supra* note 155, at 222.

[171] UNCLOS, *supra* note 12, art. 76(9). *See* Rayfuse, *Disappearing States*, *supra* note 158, 5 (citing proposals by M Hayashi, "Sea Level Rise and the Law of the Sea: Legal and Policy Options" *Proceedings of International Symposium on Islands and Oceans*, Ocean Policy and Research Foundation (2009) 78, 79).

[172] Schofield and Freestone, *supra* note 143, at 162-163. The International Law Association established an "International Law and Sea-Level Rise Committee" to develop proposals addressing the impact of sea-level rise under international law, including in relation to maritime zones, territory, statehood, nationality and human rights. A final report is to be submitted in August, 2018. *See* International Law Association International Law and Sea-Level Rise Committee, *Interim Report: 2016*, Johannesburg Conference (2016), http://www.ila-hq.org/index.php/committees (outlining mandate, as well as current discussions and proposals under consideration).

[173] Soons, *supra* note 155, at 225.

[174] *See* Rayfuse, *Disappearing States*, *supra* note 158, at 7.

[175] Although a UN General Assembly resolution would be non-binding, if it attracted a consensus vote, it could be seen as crystallising the position in customary international law if it aligned with the practice of States.

While some States may be concerned about losing part of their land territory through coastal erosion and sea-level rise, some small island States face the prospect of being entirely subsumed by the ocean, or otherwise being left with uninhabitable land, because of sea-level rise. For example, Kiribati, the Maldive Islands, the Marshall Islands and Tuvalu may be at risk.[176] Some States are already acting to remove populations from existing islands,[177] or contemplating what to do with displaced populations from island States that are entirely inundated.[178]

If there is no more land, is there still a State? It requires that we step away from the idea that a State is the physical land mass and embodies a political and social construct.[179] As I argued above, this understanding should have precluded recognizing entitlements to maritime zones when the political and social construct responsible for land could not be identified.

Soons has proposed that alternative territorial structures may be necessary, and suggested acquiring new territory from another State by treaty of cession, or merging with another State (potentially creating a federation).[180] In the former scenario, there may still be scope for claims to new maritime entitlements from the ceded territory, but a merger or union may extinguish the disappearing State's maritime allocation.[181]

Rather than take a position that a State just ceases to exist, Rayfuse has argued that the concept of a deterritorialized State could be recognized. She points to the Knights of Malta and, previously, the Holy See as examples of entities recognized as sovereign international subjects even in the absence of territory in possession.[182] Moreover, a form of "functional" sovereignty has been recognized in relation to supra-national organizations such as the European Union or governments-in-exile.[183] Consequently, "international law already recognizes that sovereignty and nation may be separated from territory".[184] In the context of States disappearing as a result of sea-level rise, the construct would involve a representative authority of the State acting on behalf of the people of the State within the international system and, most relevant for present purposes, still being able to exercise maritime rights over and benefitting from the pre-existing maritime zones.[185] As Rayfuse recognizes, there are difficulties associated with the concept and, for the management of maritime zones, particularly in the monitoring, control, surveillance and enforcement of resource exploitation, in ensuring that conservation and management requirements are met, and in distributing the income derived from the exploitation of marine resources are distributed to the displaced population.[186]

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[176] *See* Rayfuse, *Disappearing States*, *supra* note 158, at 1.

[177] Examples cited in this regard include India's decision to move 10,000 people from the island of Lohachara in the Bay of Bengal as a precaution and the relocation of 2,600 inhabitants from the Papua New Guinean Cateret Islands. *See* Schofield and Freestone, *supra* note 143, at 151.

[178] *See* Jonathan Adams, *Rising sea levels threaten small Pacific island nations*, NY TIMES, May 3, 2007, http://www.nytimes.com/2007/05/03/world/asia/03iht-pacific.2.5548184.html.

[179] Grote Stoutenburg has examined whether such States can continue to function in the international sphere. *See* Jenny Grote Stoutenberg, *When Do States Disappear? Thresholds of Effective Statehood and the Continued Recognition of "Deterritorialized" Island States*, *in* THREATENED ISLAND NATIONS: LEGAL IMPLICATIONS OF RISING SEAS AND A CHANGING CLIMATE 57 (Michael B. Gerrard and Gregory E. Wannier (eds), 2013).

[180] Soons, *supra* note 155, at 230. *See also* Caron, *supra* note 155, at 650 (discussing the latter proposal).

[181] Blanchard, *supra* note 14, at 96.

[182] Rayfuse, *Disappearing States*, *supra* note 158, at 10.

[183] *Id.* at 10-11.

[184] *Id.* at 11.

[185] *Id. See also* Blanchard, *supra* note 14, at 98; Jörgen Ödalen, *Underwater Self-determination: Sea-level Rise and Deterritorialised Small Island States*, 17 ETHICS, POL'Y & ENV'T 225, 230 (2014).

[186] Rayfuse, *Disappearing States*, *supra* note 158, at 12.

This scenario presents a distinct challenge to our land dominates the sea principle. Without any land, a State seemingly has no more rights to maritime areas. Rayfuse has asserted, "[e]stablishment and maintenance of maritime entitlements is a quintessential hallmark of statehood".[187] However, maritime entitlements are not so much a hallmark of statehood but rather a consequence of statehood in our current international legal order. The deterritorialized State "detaches State and statehood from territory".[188] But can the maritime allocation also be detached from States and statehood?

In the *South China Sea* arbitration, the Tribunal was willing to divorce the political and social construct of the State from the physical landmass for the purpose of ascertaining entitlements. The entitlements to a territorial sea, or potentially to an EEZ or continental shelf, could accrue, under the Tribunal's reasoning, even when there was no knowledge as to who (which State) was entitled. There is a shift occurring in the reasoning. Traditionally, physical land plus community (that is, a State) produced maritime entitlements. Under the *South China Sea* case, physical land, in the absence of a known community, could produce maritime entitlements. Now with deterritorialized States, it is proposed that community, without physical land, can produce maritime entitlements.

Thinking of the State as divorced from land, but seemingly still with sea, is justified when a conceptual shift away from the territorial focus of sovereignty and statehood occurs. Blanchard has presented possible paradigms for exploring this possibility, including diasporas and cosmopolitanism, global governance, and through equity and moral duties.[189] The latter may seem particularly compelling when the fate of people on particular island States is contemplated. Stoutenburg argues that if the international community cannot act to prevent the disappearance of island States, it should at least acknowledge their entitlement to survive as a legal community.[190]

Alternatively, we can think purely in terms of boundaries rather than the space that falls within the boundaries and avoid classification of that space. In this scenario, we can focus on the stability of boundaries and the fundamental importance attributed to that under international law. "One of the core principles of the international system is the need for stability and finality in boundary questions and much flows from this."[191] If boundaries have been set out in a treaty, the international frontier so defined becomes permanent.[192] Perhaps the outer limits of maritime zones noted in nautical charts submitted to the UN need to be reflected in a multilateral treaty so as to gain this level of notoriety under international law, irrespective of the land or sea space actually involved.

Ultimately, critical to the resolution of legal challenges arising with disappearing coasts and lands is political willingness and endorsement of powerful actors in the international community, which reflects our realist paradigm. Such willingness and endorsement may be forthcoming when it is recalled that those actors' own exclusive rights and maritime jurisdiction may be under challenge, at least in relation to sea-level rise and shifting coastlines. To preserve existing maritime claims and promote stability in the public order of the oceans, all coastal States have an interest in resolving the issue of shifting baselines and boundaries. Devising acceptable normative regimes for this purpose will be

[187] *Id*.
[188] Blanchard, *supra* note 14, at 102.
[189] *Id*. at 108-115.
[190] Grote Stoutenburg, *supra* note 179, at 87. See also Blanchard, *supra* note 14, at 114.
[191] SHAW, *supra* note 164, at 522. *See also* Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment, (1962) I.C.J. 6, 34 (June 15); Territorial Dispute (Libya v. Chad), Judgment, Merits, (1994) ICJ Rep 6, 37 (Feb. 3); Dubai v. Sharjah Border Arbitration (1981) 91 I.L.R. 543, 578 (Oct. 19).
[192] SHAW, *supra* note 164, at 529.

critical. In this regard, it could be argued that the self-interest of States and the importance of normative regimes align.

Yet does this interest extend to the continued recognition of maritime zones where a State no longer has the physical land that generated the maritime zones? On the one hand, the rationale of stability in maritime boundaries and rights over maritime space applies equally to disappearing States as it does to disappearing coasts. Consistency could be expected in this regard. On the other hand, to follow this approach requires States to move away from the territorial construct associated with maritime entitlements, and indeed the territorial construct that has been so fundamental to the international legal system for centuries. Moreover, to recognize ongoing maritime zones in the absence of physical land would disallow the resurgence of *mare liberum* and the ongoing importance of the inclusive interests of all States. The policy motivation of the *South China Sea* Tribunal in assessing what features were rocks rather than islands and hence avoiding large claims to exclusive rights over ocean space on the basis of a small physical feature arguably runs counter to maintaining exclusive rights over large maritime areas in the absence of any physical feature.

While arguments of equity are important in addressing the rights of those living in territory that becomes uninhabitable because of climate change, another difficult reality of the current international legal regime is that the law of the sea has always prioritized geography as it exists. Consequently, while some consideration is accorded to land-locked States and to geographically-disadvantaged States in the law of the sea, there is a definite skew of advantage for coastal States. International law has done very little to rectify this geographic inequality to date. It raises the question of whether the disappearing States will (or should) instead fall into a category of geographically-disadvantaged States if they are "deterritorialized" and will receive the consideration that is afforded to other States in this category. Perhaps it is the prospect of additional States joining this group that may provide greater impetus for coastal States to take the rights granted to land-locked States and geographically-disadvantaged States more seriously in matters such as the allocation of fish catch surplus and in the impending operation of Article 82, which will require collection and disbursement of funds from exploitation of the extended continental shelf.

4.3 Land Creation

As part of their responses to sea-level rise, or generally to maintain coastlines in the face of different climatic and other conditions, States have sought to reclaim land or otherwise fortify their coasts. Efforts in this regard include constructing sea walls, wave reduction structures or other "hard engineering options".[193] Schofield and Freestone note that "[i]t is generally accepted that coastal States can, by implementing such measures, stabilize portions of their baselines and thereby preserve their associated maritime zone entitlements".[194] These activities may have, however, a negative environmental impact, potentially extending to neighboring States.[195]

A low-tide elevation or fully submerged feature cannot be transformed into an island through human activity, such as reclamation activity or construction of a lighthouse or the like.[196] The feature does not become an island because the legal definition of an island

[193] Schofield and Freestone, *supra* note 143, at 151.
[194] *Id*. See also Soons, *supra* note 155, at 222.
[195] Schofield and Freestone, *supra* note 143, at 152-154.
[196] Robert Lavalle, *Not Quite a Sure Thing: The Maritime Area of Rocks and Low-Tide Elevations under the UN Law of the Sea Convention*, 19 INT'L J. MAR. & COASTAL L. 43, 58 (2004); Robert Beckman, "International Law and China's Reclamation Works in the South China Sea" (Paper presented at 2nd Conference on South China Sea, National University of Singapore and Nanjing University, 24-25 April 2015) 7 [Draft paper], https://cil.nus.edu.sg/wp-content/uploads/2015/04/Beckman-Nanjing-Draft-17-April-2015.pdf.

requires it to be "naturally formed" under Article 121(1) of UNCLOS.[197] The International Law Commission had supported this position during its work on the law of the sea prior to the adoption of the 1958 law of the sea conventions.[198] The International Law Commission's commentary on islands noted:

> …the following are not considered islands and have no territorial sea: (i) Elevations which are above water at low tide only. Even if an installation is built on such an elevation and is itself permanently above water – a lighthouse, for example, the elevation is not an "island" as understood in this article. …[199]

An example of such a feature is Ieodo or Socotra Rock, which lies between South Korea and China in the Yellow Sea. It is fully-submerged but Korea has constructed a research facility on it.[200] Both States consider that it falls within their respective EEZs.[201]

States have nonetheless undertaken an effort to add to small island features, that are naturally formed and above water at high tide, to ensure that their maritime claims extending from those features may be sustained. A prime example in this regard has been Japan's efforts over Okinotorishima. Okinotorishima lies in a 7.8km^2 coral reef, extending 4.5km from east to west and 1.7km from north to south, with a circumference of 11km.[202] Most of the reef is under water, even at low tide, and there were originally six islets above water level but due to rising tides there remained only two, Eastern Islet and Northern Islet. At high tide, these islets were described as "70 centimeters above water… [and] the size of two king-size beds".[203] Similarly, it was stated that Eastern Islet was 90cm above water at low tide and 6cm above water at high tide, while Northern Islet was 1m above water at low tide and 16cm above the water at high tide.[204] However, Japan performed extensive construction works upon Okinotorishima, and this work has significantly increased the size of these two islets and established a third islet, the Southern Islet, Minami-Kojima. After concrete encasing was added, each of the islets has a diameter of 60m and there is a 140m platform in the lagoon that has a heliport and large three-story building.[205]

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[197] The island can consist of any sort of land, including coral, so long as it is naturally formed and above water at high tide. See Territorial and Maritime Dispute (Nicaragua v Colombia) (Judgment) [2012] I.C.J. 624, (Nov. 19) 645, para. 37.

[198] Convention on the Continental Shelf, 29 April 1958, 499 U.N.T.S. 311; Convention on the High Seas, 29 April 1958, 450 U.N.T.S. 11; Convention on Fishing and Conservation of the Living Resources of the High Seas, 29 April 1958, 559 U.N.T.S. 285; Convention on the Territorial Sea and the Contiguous Zone, 29 April 1958, 516 U.N.T.S. 205.

[199] Report of the International Law Commission Covering the work of its Eighth Session, UNGAOR, U.N. Doc A/3159 (1956); 2 *Yearbook of the International Law Commission* 253, 270 (1956). But see Kwaitkowska and Soons who have argued that a lighthouse or other aid to navigation would give an island an "economic life of its own" because of the value to shipping. See Barbara Kwiatkowska and Alfred H. A. Soons, *Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own*, 21 NETH. YBK INT'L L. 139, 167-168 (1990).

[200] *See* Lily Kuo, *Will a Tiny, Submerged Rock Spark a New Crisis in the East China Sea?*, THE ATLANTIC, Dec. 9, 2013, https://www.theatlantic.com/china/archive/2013/12/will-a-tiny-submerged-rock-spark-a-new-crisis-in-the-east-china-sea/282155/

[201] *See* Shannon Tiezzi, *Is China Ready to Solve One of Its Maritime Disputes?*, THE DIPLOMAT, Nov. 7, 2015, https://thediplomat.com/2015/11/is-china-ready-to-solve-one-of-its-maritime-disputes/.

[202] Yann-Huei Song, *Okinotorishima: A "Rock" or an "Island"? Recent Maritime Boundary Controversy between Japan and Taiwan/China, in* MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW OF THE SEA 145, 148 (Seoung-Yong Hong and Jon M. Van Dyke (eds), 2009); *Okino-Tori-Shima* (2016) Hawaii eBook Library <http://www.hawaiilibrary.net/articles/okino-tori-shima>.

[203] Jon M. Van Dyke, *The* Romania-Ukraine *Decision and Its Effect on East Asian Maritime Delimitations, in* GOVERNING OCEAN RESOURCES: NEW CHALLENGES AND EMERGING REGIMES 43, 58 (Jon M. Van Dyke et. al. (eds), 2013).

[204] Song, *supra* note 202, at 148.

[205] Marika Vilisaar, *Sino-Japanese Maritime Jurisdictional Disputes in the East China Sea*, 4 ACTA SOCIETATIS MARTENSIS 229, 242, 245 (2010).

The core of the dispute over Japan's activities in relation to Okinotorishima appears to be whether rocks can be transformed into islands through human intervention.[206] Chinese commentators have argued that the natural characteristics of Okinotorishima demonstrate that it falls within the definition of a rock and submitted that Japan's activities have been undertaken subsequent to the adoption of UNCLOS with the intent of solidifying Japan's claim to the features as islands entitled to an EEZ and continental shelf.[207]

The difficulty for China with its position on Okinotorishima has been that it cuts against China's activities on features in the South China Sea and its own extensive land reclamation activities. If China is unwilling to recognize Japan's actions as creating islands from rocks then it would not have clean hands in claiming islands based on its own activities transforming the characteristics of what were determined to be either rocks or low-tide elevations in their natural condition.[208] One commentator has suggested that China's interests in undertaking reclamation works on the features in the South China Sea relate more to strategic and military concerns rather than seeking to claim greater access to resources.[209] The *South China Sea* Tribunal confirmed that construction activities on low-tide elevations do not change their status. The land reclamation efforts of China, which have greatly increased the size, habitability and use of different features, could not change the classification of the feature. Instead, the Tribunal had regard to the "earlier, natural condition, prior to the onset of significant human modification".[210]

Under UNCLOS, constructions matter on coastlines or coastal features in different situations. In the context of straight baselines, Article 7(4) allows low-tide elevations to be used as basepoints where "lighthouses or similar installations which are permanently above sea level have been built on them". States using straight baselines therefore may be advantaged against a receding baseline if construction occurs on islands, rocks or low-tide elevations and ensures their possible selection as basepoints from which to measure maritime zones. Even if a feature is fully submerged but has a structure on it, and is in a location that is suitable for the drawing of straight baselines under Article 7 of UNCLOS, its prior recognition may still be sufficient for its continued use.[211]

For artificial islands, structures and installations outside a coastal State's territorial sea, the legal regime is governed by Article 60 of UNCLOS. Under Article 60, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of artificial islands, as well as installations and structures related to the exercise of the coastal State's economic rights within the EEZ. These constructions are to have no relevance in relation to maritime allocation, as they "do not possess the status of islands"; nor do they have a "territorial sea of their own" and, moreover "their presence does not affect the delimitation of the territorial sea, the [EEZ] or the

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[206] *See, e.g.*, Yann-huei Song, *The Application of Article 121 of the Law of the Sea Convention to the Selected Geographical Features Situated in the Pacific Ocean*, 9 CHINESE J. INT'L L. 663 (2010); Guifang (Julia) Xue, *How Much Can a Rock Get? A Reflection from the Okinotorishima Rocks*, 1 CHINA OCEANS L. REV. 1 (2011); Jun Qui and Wenhua Liu, *Should the Okinotori Reef be entitled to a Continental Shelf? A Comparative Study on Uninhabited Islands in Extended Continental Shelf Submissions*, CHINA OCEANS L. REV. 221, 221 (2009).

[207] *See, e.g.*, Xue, *supra* note 206, at 7-11.

[208] The doctrine of "clean hands" is generally intended to prevent a State presenting arguments of wrong-doing when it has also been engaged in comparable wrong-doing. *See* Stephen M. Schwebel, *Principle of Clean Hands*, MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW (2013).

[209] Nong Hong, *Land Reclamation Activities in the South China Sea: Legal Interpretation and Political Implication*, Proceedings of the Workshop on Recent Developments in the South China Sea Arbitration and their Implications, October 6-9, 2015, Taipei, Taiwan, 40, 44 (copy on file with author).

[210] South China Sea (Award), *supra* note 91, para. 511.

[211] Article 7(4) refers to "instances where the drawing of baselines to and from such elevations [with constructions on them] has received general international recognition". UNCLOS, *supra* note 12, art. 7(4).

continental shelf."[212] While UNCLOS thus draws a line between artificial and naturally formed islands, the reality is that the former may blur with the latter due to changing geographic conditions.

Stoutenberg has argued that human construction to protect a natural feature should not transform it into an artificial island or installation on the basis that it "would not try to *generate* maritime entitlements through artificial means, but only aim to *preserve* its already recognized rights".[213] However, what would be the result if the land was ultimately entirely human-made as its natural features are washed away? *Re Duchy of Sealand* tells us that territory must "consist in a natural segment of the earth's surface".[214] Yet under the *South China Sea* ruling, the focus on the natural condition of the feature in question is important and if that is the benchmark, the disappearance of the original feature and replacement with human-made construction may still be acceptable for classification as land that generates maritime entitlements.

However, we must take into account that there is limited recognition under international law, and particularly the law of the sea, of human effort in establishing rights to maritime areas. Maintaining a limited recognition of human constructions on land for the purpose of asserting claims to maritime space would be consonant with *mare liberum* in terms of allowing for greater areas of maritime space available to all States. Other factors at play include the disallowance of more wealthy and technically-advanced States benefitting at the expense of other State's (or States') claims. This approach is consistent with the initial development of the continental shelf, as we discussed in *Land and Sea*, where rights to the continental shelf could not be established by way of occupation. The normative regime would therefore hold sway in scenarios where powerful States create land. It will, however, be tested in the South China Sea in the future, potentially, if China proceeds to assert rights to the maritime resources around its artificially constructed islands over which it claims sovereignty, despite the findings of the *South China Sea* Tribunal. As China may well be capable of exploiting its resources without engagement of foreign investors, the marketability of the title will not be relevant.[215]

5. Concluding Remarks

This Chapter has demonstrated that there is much that continues to challenge and operationalize the land and sea dichotomy. The dichotomy can still be explained by the contrasting approaches of realism and norm-based theories. Yet in this Chapter, I have identified a number of efforts where the realist paradigm is being confronted, or subverted, through the inclusion of territorial questions into the UNCLOS dispute settlement process. There are legitimate queries to be made as to whether this is consistent with the intended operation of UNCLOS dispute settlement. The continued expansion of UNCLOS jurisdiction may ultimately undermine the success of the UNCLOS regime if that regime is used for purposes beyond the interpretation and application of UNCLOS. States may respond in different ways if they consider that jurisdiction is being exercised in politically inappropriate or arguably unlawful ways under UNCLOS dispute settlement proceedings. For example, China opted not to appear in the *South China Sea* case,[216] arguing that the case was

[212] *Id.* art. 60(8).
[213] Grote Stoutenberg, *supra* note 179, at 62 (emphasis in original).
[214] *Re Duchy of Sealand* (1989) 80 I.L.R. 683, 685. *See further* Blanchard, *supra* note 14, at 95.
[215] As observed above, marketable title is most relevant where a State is not able to consume directly the resources at issue. *See supra* note 10 and accompanying text.
[216] China was entitled to take this step, but it did not preclude the tribunal from continuing the arbitration. *See supra* note 116 and accompanying text.

concerned with matters of territorial sovereignty and has since disavowed the validity of the judgment.[217]

This Chapter has also assessed the importance of land in the context of that land changing or disappearing and the implications for maritime entitlements. Our realist construct demands that land generate maritime entitlements, but there are also strong expectations associated with stability and the maintenance of rights once acquired. If maritime entitlements are to be maintained when land decreases or vanishes, reliance on norms again comes to the fore, backed by the self-interested States keen to secure their own power bases and resources. This motivation might be enough when thinking about changing coastlines, but potentially will not extend for the protection of States that will disappear or become uninhabitable.

These small States are not in the numeric majority and lack political, military or economic power. Their situation can be contrasted to that of the Group of 77 during the UNCLOS negotiations when the New International Economic Order was in the ascent, and common heritage of humankind was established in the relation to the deep seabed.[218] Nor is their situation presently comparable to the time that the continental shelf doctrine was developed prior to the adoption of the 1958 Convention on the Continental Shelf when the principle of self-determination was gaining momentum during the period of decolonization post-World War Two.[219] Upholding and responding to the human rights of the individuals and groups impacted may ultimately be a greater priority than reconceptualizing the territorial primacy that exists within the international legal system.

A reliance on norms would be essential to develop and operationalize the concept of the deterritorialized State, especially if it were to entail ongoing recognition of maritime rights in the absence of land. It is valid to question whether this is consistent with the policy approach of the *South China Sea* Award in denying extended maritime zones to small features. The restrictions that currently exist on recognizing human intervention in the generation of maritime space are consistent with this policy approach. Ultimately, it accords with support for *mare liberum*, which has undergirded the law of the sea for many centuries and persists to this day despite many challenges to its position in the operation of international law.

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[217] *See* Ministry of Foreign Affairs of the People's Republic of China, *Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines*, July 12, 2016, http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1379492.shtml.

[218] *See* Brilmayer & Klein, *supra* note 1, at 712-713.

[219] *Id*. at 712.