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Much ado about rocks

Melda Malek

Why it is timely, three decades on, for states to take stock of the UNCLOS 1982

The United Nations Convention on the Law of the Sea 1982 (UNCLOS) was the culmination of almost a decade of active negotiations between states on how the oceans should be navigated, explored, exploited and governed. Naturally, as in any negotiations, compromises were often sought when parties could not quite see eye to eye on certain issues.

UNCLOS contains a lot of acceptable compromises between the negotiating states and this has led to many open ended or ambiguous provisions that all parties are comfortable with. One such provision is Article 121 on the Regime of Islands.

The advent of modern international law of the sea allows more ocean space to be claimed by coastal states as territorial seas, contiguous zones, exclusive economic zones (EEZ) or

continental shelves. Article 121 further allows for islands, irrespective of their geographical size, to generate maritime zones in the same manner as that of a mainland. Certain criteria, however, have to be fulfilled, before an island could be allowed to generate an EEZ and continental shelf. Article 121 (3) provides that, “[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf”. What constitute a ‘rock’ and or an ‘island’ has never been fully tested. Robert Beckman’s apt, “if it’s yours it’s a rock and if it’s mine it’s an island” seems to be the rule of thumb for many states in defining if a maritime feature is an island or a rock.

Due to the resource security value that is closely linked to islands, it is understandable why neighbouring states continue to dispute and debate the status of the oft times tiny rocks in the middle of an open sea.

Whilst the status of features that are ‘above water at high tide’ is ambiguous, international law and jurisprudence are clear on the legal status of low tide elevations (LTE) or maritime features that are perpetually submerged underwater in that they do not have the ability to generate maritime zones nor can sovereignty be exercised over them unless they are within the territorial sea limits of a state.

Article 13(2) of UNCLOS provides, “[w]here a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island, it has no territorial sea of its own.” In both Qatar/Bahrain (2001) and Pulau Batu Puteh/ Pedra Branca (2008), it was laid out that a coastal state has sovereignty over LTEs which are situated within its territorial sea since it has sovereignty over the territorial sea itself. This principle emphasised that sovereignty cannot be exercised over an LTE or anything less than a LTE, if the feature is beyond the territorial sea limit.

Despite the provisions of UNCLOS and jurisprudence that make clear the lesser status of LTEs or submerged features, they continue to generate attention by being elevated to a central role in many disputes.

In an overlapping EEZ dispute between China and Korea, Socotra Rock, which is submerged in five metres of water, became the bone of contention between the two states.

In the South China Sea, where multiple claimants and multi-layered territorial and maritime disputes over islands and limits have resulted in deadlocks, not all of the maritime features claimed are islands or rocks within the meaning of Article 121. Some, such as Macclesfield Bank, Luconia Shoals, and James Shoals are just LTEs at best. As such, they ought to remain as part of the continental shelf of whichever coastal states they lie on.

The concern is that this tendency of coastal states to place larger than life meaning and importance on tiny rocks, LTEs, and submerged features may lead to creeping jurisdiction of coastal states into areas that ought to be reserved for the common heritage of mankind.

Almost three decades since UNCLOS came into being, there is a need for state parties to revisit the purpose and objectives of the constitution of the oceans. This 'package deal' stands for peaceful purposes, balance and equity, sustainability and cooperation. Any ambiguity in the provisions ought to be interpreted in good faith, taking into account the interests of other states.