

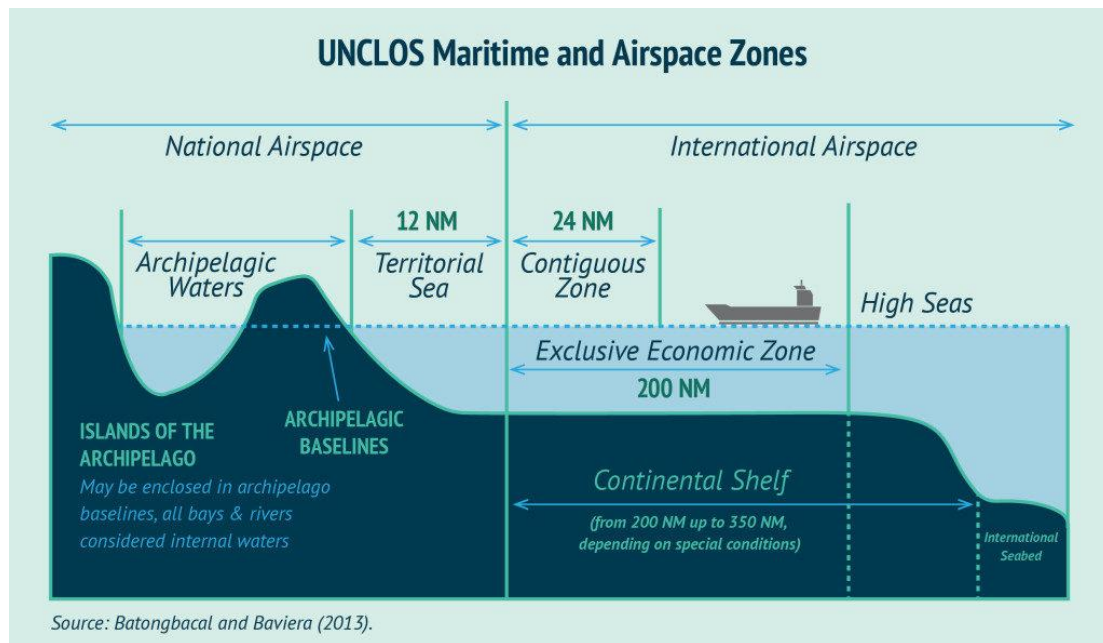
Event Report: Lecture by Professor Sean Murphy on “International Law Relating to Islands”

On 13 December 2016, Professor Sean Murphy of the George Washington University Law School and member of the United Nations International Law Commission delivered a lecture titled “International Law Relating to Islands”. Co-organised by the Singapore Branch of the International Law Association and Rajah & Tann Singapore LLP, the topics covered in the lecture included:

- the meaning of “island” in international law, and whether artificial islands generate maritime entitlements ;
- the relevance of islands in generating maritime zones;
- the acquisition of sovereignty over islands;
- the effects of islands on maritime delimitation
- the legal ramifications for the effect of climate change for islands; and
- the prospects for resolving island-related disputes peacefully.

Professor Murphy gave participants a *tour de force* of public international law relating to islands, focusing in particular on how the Hague-based tribunal in the recent *Philippines v China* arbitration (constituted under Annex VII of the 1982 United Nations Convention on the Law of the Sea (‘UNCLOS’), with the Permanent Court of Arbitration acting as the registry) analyzed the issue of what constituted “islands” in the South China Sea.

Professor Murphy explained that, in its award, the tribunal had gone into detail to distinguish an island, from a rock or a low tide elevation under international law. The difference is not merely a semantic one. While a low-tide elevation is not entitled to a separate maritime zone, a rock and an island are entitled to a territorial sea and a contiguous zone. But an island, unlike a rock, is also entitled to an exclusive economic zone (‘EEZ’) and continental shelf rights. (See diagram below).



The tribunal directed its analysis towards the objective capability of the feature, whether in its natural condition, it could sustain human habitation and economic life on its own.

Professor Murphy opined, however, that one area which bears mention is the tribunal's scant examination of state practice regarding its indicia for an island. While the tribunal examined the UNCLOS text and *travaux préparatoires* at length, there seemed relatively little emphasis on contemporary state practice.

Professor Murphy noted that there are some features that have customarily been accepted as islands, but which would arguably not have the requisite indicia that the tribunal set out, for example, because of harsh weather conditions that would make it difficult to sustain human habitation and economic life on a putative island. (Professor Murphy cited the example of Jan Mayen in the Arctic Ocean). This could possibly lead to subsequent difficulties in applying the indicia from the *Philippines v China* award to other cases.

Professor Murphy suggested, however, that the indicia the tribunal used need only be applied where features are so small as to call into question whether they are islands, rocks or merely low-tide elevations.

Among other things, the tribunal found that none of the features in the Spratly Islands generates an EEZ, nor can the Spratly Islands generate an EEZ collectively as group. As such, the Tribunal declared that certain portions of the disputed area fell within the

Philippines' EEZ and did not overlap with any possible Chinese entitlement. The tribunal's conclusion that Itu Aba (Taiping Island) is a rock and not an island will certainly generate further discussion, in Professor Murphy's view.

Professor Murphy contrasted this with the case between Malaysia and Singapore over Pedra Branca, where the ICJ found tacit acceptance of Singapore's title, explaining that it is difficult to see how China can maintain tacit acceptance or historic title in relation to the 9-dash line.

Professor Murphy also highlighted the need for more action to examine and define the legal consequences of climate change on islands and for climate refugees. He noted the lack of treaties or effective global initiatives that address the problem of disappearing islands due to rising sea levels. While the current climate change regime in international law centers on state obligations to reduce emissions, there are no agreements that focus on the loss of land mass or even entire features due to rising sea levels. This is a current and pressing issue; for example, five of the Solomon Islands have disappeared underwater over the past 70 years with the most recent disappearing as recently as 2011.

Indeed, disappearing islands raise difficult and novel issues for international law. For example, the question of whether states would still have rights to maritime zones that existed prior to islands disappearing. As it currently stands, UNCLOS suggests that this is not the case. Land territory is required to generate a maritime zone.

Professor Murphy recognised that this does not appear to be an equitable outcome for climate refugees who are left without redress, and yet how international law will address this problem remains an open question.

The active question and answer session after the lecture, moderated by Ms. Rena Lee, a Senior State Counsel with the International Affairs Division of the Attorney-General's Chambers of Singapore, was equally illuminating, and concluded with Professor Murphy positing that, in his view, the Philippines v China award may be the first of several decisions from international courts and tribunals that clarify questions on disputed features within the South China Sea. In particular, the tribunal's reasoning as to whether a feature is an island, on the one hand, or a "rock[]" which cannot sustain human habitation or economic life of [its] own", on the other, is likely to guide future legal developments.

In summary, Professor Murphy's talk provided a comprehensive overview of the pertinent international law issues relating to islands, and also highlighted some of the lacunas that international law may have to address in the future. The Singapore branch of the ILA and Rajah & Tann Singapore LLP express their deepest gratitude to Professor Murphy for taking the time to deliver this very illuminating talk, and look forward to related events, such as a conference in January 2017 at the Centre for International Law ('CIL') of the National University of Singapore which will be chaired by Professor S Jayakumar, Professor Tommy Koh, Professor Robert Beckman, and Professor Lucy Reed.

Speaker's biography

Professor Sean D. Murphy is the Patricia Roberts Harris Research Professor of Law at the George Washington University Law School in Washington DC. Since 2012, he is also a Member of the United Nations International Law Commission, where he serves as Special Rapporteur for Crimes against Humanity. An associate member of Matrix Chambers in London, Professor Murphy advises and litigates on a wide range of international law issues on behalf of States, international organizations, non-governmental organizations, corporations, and individuals before international and national courts and tribunals.

Matthew Koh (*Associate, International Arbitration, Construction & Projects, Rajah & Tann Singapore LLP*), & **Alexis Ang** (*Research Associate, Asian Business & Rule of Law Initiative, Singapore Management University School of Law*)