

# Herbert Smith

## Public international law e-bulletin

### A rock or an island? The significance of Okinotorishima and its status under the international law of the sea

Okinotorishima is an atoll in the Philippine Sea. Most of it reportedly lies below sea level even at low tide, with only two small areas appearing above the surface at high tide: one the size of a twin bed and the other of a "small bedroom". In May 2012 the Asian media was flooded by reports on whether Okinotorishima was an island or a mere rock, a distinction of considerable significance for international law of the sea purposes, as it may determine Japanese sovereignty claims over the surrounding continental shelf and its potentially vast natural resources.

#### Background

In November 2008, Japan submitted its claim of a continental shelf spanning seven seabed areas to the UN Commission on the Limits of the Continental Shelf ("CLCS"). The CLCS was established under the UN Convention on the Law of the Sea ("UNCLOS") in order to make recommendations to States in relation to their claims to an extended continental shelf, which, if applied by the State concerned, become final and binding.

China disputed Japan's claim over three areas measured from Okinotorishima on the ground that Okinotorishima was in fact a *"rock that cannot sustain human habitation or economic life of its own"* under Article 121(3) of UNCLOS and, as such, should not have its own continental shelf. South Korea also submitted a similar argument to the CLCS.

In June 2012, the CLCS published its recommendations on part of Japan's claim. However, the CLCS declined to make any recommendations as to the areas surrounding Okinotorishima *"until such time as the matters referred to in the [submissions by China and South Korea] have been resolved"*. This is perhaps unsurprising given that the practice and procedure of the CLCS is not to consider a submission which involves a dispute unless consent is given by all States party to the dispute (as has been seen recently, for example, with the Myanmar/Bangladesh dispute, now resolved by ITLOS (see [here](#)) and the Falkland Islands). But just why does the extent of Japan's continental shelf matter and why is this question so politically and economically sensitive?

#### Economic and political significance of the legal status of Okinotorishima

Under international law, the sea, the seabed and its subsoil are divided between (i) zones under the jurisdiction of coastal States, including the territorial sea, exclusive economic zone ("EEZ") and continental shelf areas; and (ii) areas that are beyond the limits of national jurisdiction, including the high seas and "The Area" (which is the continental shelf that forms part of the "common heritage of

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#### Contacts



**Dominic Roughton**  
Partner, Tokyo  
+81 3 5412 5432



**Andrew Cannon**  
Senior associate,  
London  
+44 20 7466 2852



**Peggy Leung**  
Senior associate, Hong  
Kong  
+852 2101 4205

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mankind" under UNCLOS).

Under UNCLOS, the EEZ of a coastal State extends 200 nautical miles (230.2 miles) from the baseline of that State. By contrast, UNCLOS provides that a coastal State's continental shelf can extend beyond the 200 nautical mile limit where the outer edge of the physical continental shelf so extends. States may claim sovereign rights over the resources of the sea and seabed within these limits.

Under UNCLOS (Article 121), an "island" is defined as "*a naturally formed area of land, surrounded by water, which is above water at high tide*". Islands (except "*rocks which cannot sustain human habitation or economic life of their own*") have their own continental shelf. The economic impact of categorisation as an "island", as opposed to a "rock", is therefore crucial. The State that has sovereignty over such an island will have sovereignty over its continental shelf for the purpose of exploiting its natural resources. In addition, under UNCLOS the State has the exclusive right to construct and authorise the use of (i) artificial islands, and (ii) installations and structures for economic purposes on its continental shelf and has the right to regulate, authorise and conduct marine scientific research there. Confirmation that an area is Japan's continental shelf would allow it to argue that certain politically important structures and research installations in the relevant area require its authorisation.

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### **Do recommendations by the CLCS affect EEZ claims?**

Japan also claims an EEZ arising from Okinotorishima. Within an EEZ a coastal State similarly enjoys sovereign rights with regard to the exploration and exploitation of natural resources in the water and seabed of the zone and other economic exploitation and exploration activities. It also has jurisdiction over artificial islands, installations and structures, marine scientific research and the protection and preservation of the marine environment. However, again, this claim would not be viable if Okinotorishima is merely a "rock", because such a rock cannot generate an EEZ.

The CLCS has made clear that its role only concerns issues relating to the UNCLOS provisions for the establishment of a continental shelf.<sup>1</sup> It does not make determinations with regard to the extent of any State's EEZ. However, it is likely that the CLCS would need to determine whether Okinotorishima is an "island" or a mere "rock" before making a recommendation on Japan's claim of a continental shelf for it. In which case, the CLCS' ultimate recommendation may indeed have an impact on Japan's claim to an EEZ for Okinotorishima, based as it is on the claim that Okinotorishima is an island. In light of the economic and political significance of an EEZ, the question is a pressing one.<sup>2</sup>

The case study of Okinotorishima illustrates some of the issues that can arise from continental shelf claims made to the CLCS (currently numbering 60). Given the huge volume of undiscovered oil and gas reserves estimated to lie offshore, the recommendations by the CLCS will have a broader impact, and will be followed very closely by those operating in the energy and natural resources sector in particular.

*For further information please contact Dominic Roughton at [dominic.rougton@herbertsmith.com](mailto:dominic.rougton@herbertsmith.com); Peggy Leung at [peggy.leung@herbertsmith.com](mailto:peggy.leung@herbertsmith.com) or Andrew Cannon at [andrew.cannon@herbertsmith.com](mailto:andrew.cannon@herbertsmith.com)*

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<sup>1</sup> *Progress of work in the Commission on the Limits of the continental Shelf - Statement by the Chairperson (Twenty-fourth session) (CLCS/64)* at [http://www.un.org/Depts/los/clcs\\_new/commission\\_documents.htm#Statements by the Chairman of the Commission](http://www.un.org/Depts/los/clcs_new/commission_documents.htm#Statements%20by%20the%20Chairman%20of%20the%20Commission)

<sup>2</sup> See further: Song YH, "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*, ed. Seoung-Yong Hong and Jon M. Van Dyke (The Netherlands: Martinus Nijhoff, 2009) at 145; see also <http://www.japanfocus.org/-yukie-yoshikawa/2541>.

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This message is sent by Herbert Smith, 23/F Gloucester Tower, 15 Queen's Road Central, Hong Kong.  
Tel: +852 2845 6639. e-mail: [asia@herbertsmith.com](mailto:asia@herbertsmith.com).

這個信息是由史密夫律師事務所發出。地址：香港皇后大道中15號告羅士打大廈23字樓，  
電話：+852 2845 6639，電郵：[asia@herbertsmith.com](mailto:asia@herbertsmith.com)。

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