When can we pretend?

Can the law pretend?

_I know not “seems”_ (Hamlet 1.ii.76)
The South China Seas Arbitration (2016)

Figure 1: South China Seas Dispute
Fiery Cross Reef: Then

Figure 2: Fiery Cross Reef. Survey by HMS Rifleman (1866) (with enlargement)


Figure 3: The status of Fiery Cross Reef, January 22 2006.

Fiery Cross Reef: Now

Figure 4: The status of Fiery Cross Reef, June 3 2016. Clearly showing extensive scale of the modification efforts.

Mischief Reef: Then

Figure 5: China Chart No. 18500 (depicting height of 1.0 metres above Mean Sea Level in S.E. corner)

Mischief Reef: Now

Figure 6: Mischief Reef, July 22 2016.
What is the effect of this on the status of the features?

• ‘The inclusion of the term “naturally formed” in the definition of both a low-tide elevation and an island indicates that the status of a feature is to be evaluated on the basis of its natural condition. As a matter of law, human modification cannot change the seabed into a low-tide elevation or a low-tide elevation into an island. A low-tide elevation will remain a low-tide elevation under the Convention, regardless of the scale of the island or installation built atop it.’ (The South China Sea Arbitration (The Republic of Philippines v The People’s Republic of China) (12 July 2016) Award on the Merits, PCA Case No. 2013-19, [305], referring to Articles 13 and 121(1) LOSC.)

• ‘China’s construction on [these features], however extensive, cannot elevate its status from rock to fully entitled island.’ (The South China Sea Arbitration (The Republic of Philippines v The People’s Republic of China) (12 July 2016) Award on the Merits, PCA Case No. 2013-19, [565])
Application of this principle

Retention of its original status?
Legal Fictions: a working definition and its application

The supposition of the truthfulness of an untruth

Conscious falsity

To achieve some utility or purpose (}
Is this an appropriate thing for UNCLOS to do?

Denying the reality its supposed to grapple with?
Fiction of Geographic Reality

- Ambulatory effect of baselines and ability to “freeze” reality.

- Islands within bays: Art 10(3)
  
  “Islands within an indentation shall be included as if they were part of the water area of the indentation.”