

Massive Island-Building and International Law

Written by vuquangtiep
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China's massive island building is both a provocative alteration of the security situation in the South China Sea and blow for the marine environment, but it cannot be justified either as "entirely within China's sovereignty" or as consistent with maritime law.



Within the short span of a year, China's rapid construction of artificial islands in the disputed Spratlys has radically changed the geographical and security landscapes in the South China Sea.

This island construction has so far created over eight million square metres of real estate in the open sea, outstripping other countries' reclamation activities by far, and shows no sign of abating. Hundreds of millions of tons of sand and coral have been dredged from the seabed and dumped atop fragile coral reefs that are vital components of the maritime ecology. Marine experts expect that the work has already caused disastrous and essentially irreversible environmental impacts.

The newly created and enlarged islands will be infrastructure that facilitates China's projection of force and assertion of control not just in the disputed Spratlys area but also over most of the South China Sea, deep into the exclusive economic zones (EEZs) that by any reasonable interpretation of international laws on maritime delimitation would rightfully belong to other countries. Although conflicting claims have existed over the islands and these EEZs for decades, a precarious balance has endured until now partly because China's nearest military infrastructure is hundreds of miles further to the north. Defence planners in other claimant countries now have to face a future without this protection by distance.

Another concern is whether China will use the newly created or enlarged islands to attempt to make new maritime claims. First, China might well claim a 12-nautical-mile territorial sea, or some sort of vague “military alert zone”, around each of Mischief Reef and Subi Reef, which would infringe on the international community’s freedom of navigation and overflight that currently exists in these areas. Second, China might assert territorial seas around other newly created or enlarged islands that are close to islands being garrisoned by other countries, which would bring it into direct conflicts with the other claimants. Third, the creation and enlarging of the islands may embolden China in its claim for EEZ for the entire Spratly archipelago, exacerbating the maritime disputes in the region.

China justifies the island building by arguing that “China’s activities on relevant islands and reefs of the Nansha Islands fall entirely within China’s sovereignty and are totally justifiable.” [\[1\]](#) Some analysts have argued further that it is not breaking any maritime law. However, these arguments can be shown to be flawed in a number of respects.

First, Fiery Cross Reef, Johnson South Reef, Cuarteron Reef, Hughes Reef and Gaven Reef are the subjects of a sovereignty dispute. It is therefore bad faith for a claimant to completely and irreversibly alter their geographical characters. If one day an international court is given the jurisdiction to resolve the dispute and rules that these islands belong to a country other than China then the damage to these reefs from today’s island building activities has already and irretrievably impaired that country’s rights.

Second, since Mischief Reef and Subi Reef in their natural state are under water at high tide and more than 12 nautical miles from other islands, customary international law does not allow any country to claim sovereignty over them. Therefore the island building activities at these reefs cannot be within China’s sovereignty. Furthermore, it would be illegal for China or any country to claim sovereignty over the newly created artificial islands at these locations.

Third, the United Nations Convention on the Law of the Sea (UNCLOS) does not allow China to use the artificial islands at Mischief Reef and Subi Reef to claim 12-nautical-mile territorial seas or EEZs beyond: artificial islands are only entitled to a safety zone that can extend to at most 500 metres.

Fourth, China is violating UNCLOS articles 192 and 123, which are on the protection of the marine environment, especially in enclosed and semi-enclosed seas such as the South China Sea. Article 192 states that “States have the obligation to protect and preserve the marine

environment”, while article 123 requires the countries bordering an enclosed sea to “coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment”. While each of the parties in the Spratlys dispute would naturally think that it, and it alone, has the rights to build on the disputed islands and reefs, it is undeniable that they all have a duty to protect and preserve the marine environment of the semi-enclosed and environmentally vulnerable South China Sea.

In its 2003 ruling on the Malaysia vs Singapore dispute over the latter’s reclamation activities, the International Tribunal on the Law of the Sea (ITLOS) directed “Singapore not to conduct its land reclamation in ways that might cause irreparable prejudice to the rights of Malaysia or serious harm to the marine environment, taking especially into account the reports of the group of independent experts.” Singapore complied with the tribunal’s ruling. China, however, has completely disregarded its obligations to UNCLOS by dredging hundreds of millions of tons of sand and coral from the seabed and dumping them over eight million square metres of coral reefs that are vital fish spawning grounds, without any assessment by independent experts, and without any coordination or even consultation with other littoral countries.

Fifth, the fact that the Spratlys area is subjected to territorial and maritime disputes brings us to another violation of UNCLOS. Articles 74 and 83 of the Convention requires that in areas of conflicting EEZ or extended continental shelf claims, the claimants “in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement.” In its 2004 ruling on the Guyana vs Suriname dispute, the Permanent Court of Arbitration (PCA) has interpreted this clause to mean that the claimants are not allowed to unilaterally cause permanent changes to the area under dispute.

By all accounts, Mischief Reef is an area of EEZ under dispute, while Subi Reef could be an area of EEZ or extended continental shelf under dispute, where UNCLOS articles 74 and 83 and the Guyana-Suriname ruling are clearly applicable. The building of islands on Mischief Reef and Subi Reef clearly violates these articles.

Unlike Mischief Reef and Subi Reef, Fiery Cross Reef, Johnson South Reef, Cuarteron Reef, Hughes Reef and Gaven Reef are either naturally above high tide or situated within 12 nautical miles of other islands. According to UNCLOS, they are surrounded by territorial seas. Therefore, China’s island building at these reefs takes place within the territorial seas and it might seem that UNCLOS articles 74 and 83 and the Guyana-Suriname ruling (which apply only to the EEZ and the extended continental shelf) are not relevant. However, a closer look suggests otherwise. It is well known that coral reefs are important fish spawning grounds of the

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oceans and sea, and their destruction affects fish stock far beyond the reefs' adjacent waters. Massive island building on reefs can therefore have permanent effects on the EEZ beyond these reefs' territorial seas. In the case of the Spratlys, that EEZ is disputed, therefore UNCLOS articles 74 and the Guyana-Surinam ruling apply, which means actions that cause permanent changes to that EEZ are illegal even if the actions themselves take place in the territorial sea.

In summary, China's massive island building is both a provocative alteration of the security situation in the South China Sea and blow for the marine environment, but it cannot be justified either as "entirely within China's sovereignty" or as consistent with maritime law. In fact, if China claims sovereignty over Mischief Reef and Subi Reef and maritime zones based on those features, that will be an audacious attempt to rewrite international law.

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The author is a writer on the South China Sea disputes. His articles have appeared in national newspapers in Vietnam and the Philippines, on the BBC website, CogitASIA, Yale Global, RSIS Commentaries, The Diplomat, East Asia Forum and other websites.

[1] http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1189470.shtml