

Ever since last year when satellite imagery confirmed that China was constructing artificial islands in the South China Sea, journalists, security specialists and even government officials uncritically have adopted terminology that obfuscates rather than clarifies the issues at stake. No term has been so abused as “land reclamation” both in its everyday usage and legal meaning.

A commentary written by Chinese academic Shen Dingli argues that there is no prohibition in international law about land reclamation. He cites the examples of Shanghai city, Japan’s Kansai International Airport, Hong Kong and Dubai. None of these examples are comparable to what is taking place in the South China Sea.

Let’s be clear: China is not reclaiming land in the South China Sea in order to improve conditions on a land feature – an island – that has deteriorated due to the impact of the environment or human use. China is dredging sand from the seabed and coral reefs to create artificial islands. China misleadingly states it is reclaiming land on islands over which it has sovereignty. This is not the case. China is building artificial structures on low tide elevations (submerged features at high tide) and rocks. China cannot claim sovereignty over these features. These features are not entitled to maritime zones or airspace.

Artificial islands have a distinct meaning in international law. Under the United Nations Convention on the Law of the Sea (UNCLOS) sovereignty over artificial islands can only be exercised by a coastal state in its Exclusive Economic Zone (EEZ). Article 56 states, “In the exclusive economic zone, the coastal State has...jurisdiction... with regard to ... the establishment and use of artificial islands, installations and structures...” Article 60 gives the coastal state “exclusive right to construct... artificial islands.” And Article 80 extends this provision to artificial islands on a coastal state’s continental shelf.

All seven of the features that China presently occupies and has converted into artificial islands are the subject of legal proceeding brought by the Philippines before the UN’s Arbitral Tribunal. The Philippines Notification and Statement of Claim argued that under UNCLOS Mischief Reef, McKennan Reef, Gaven Reef and Subi Reef are submerged features and both Mischief Reef and McKennan Reef form part of the Philippines’ continental shelf. Further, the Philippines argued that Scarborough Shoal, Johnson Reef, Fiery Cross Reef and Cuarteron Reef are rocks under UNCLOS. All of these features lie within the Philippines’ EEZ or continental shelf.

In summary, China considers these features to be islands in the legal sense and therefore claims not only sovereignty over them but a territorial sea, EEZ, continental shelf and airspace above them. The Philippines argues

Beijing’s legal alchemy

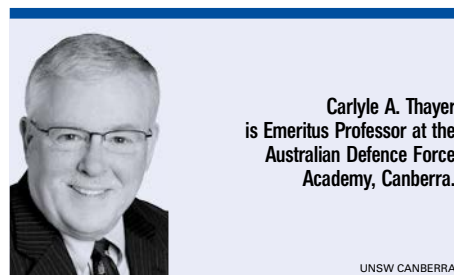
China is not reclaiming land, it is building artificial islands as forward staging bases for its military | By Carlyle Thayer



that these features are submerged banks, reefs and low tide elevations that do not qualify as islands under UNCLOS but are part of the Philippines continental shelf, or the international seabed.

The issue of China’s construction of artificial islands has been befuddled by three other issues. The first issue concerns China’s attempt to enforce its jurisdiction over 12 nautical miles of water surrounding these artificial islands and the airspace above these features. Chinese law requires the promulgation of baseline prior to the assertion of sovereign jurisdiction over mari-

time zones. With the exception of the Paracels, China has not promulgated any baseline over the features it occupies.



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It should be noted that all of China’s artificial islands are located close to features occupied by Vietnam. If these features were

entitled to a 12 nautical mile territorial sea China’s zone would overlap a similar zone claimed by Vietnam. The bottom line is that all of these features are contested and signatories to UNCLOS are enjoined not to take actions that would change the status quo.

China’s assertions of sovereign rights in these circumstances represent a form of legal alchemy in which China attempts to convert submerged features and rocks into naturally formed islands.

China has repeatedly challenged flights by military aircraft from the Philippines and the United States ordering them to leave what Chinese military officials call a “military alert area” or a “military security zone.” If media reports are accurate that United States warships have refrained from encroaching within 12 nautical miles of the artificial islands and US military aircraft have not directly overflown these features then Chinese legal alchemy will have succeeded.

The second issue concerns the equivalency of China’s so-called land reclamation with similar efforts by Vietnam, Malaysia and the Philippines. China argues that the other claimants upset the status long ago and China is only catching up. The critical question is what activities have been carried out since 2002 and for what purpose?

The Philippines has carried out land reclamation on Palawan. Palawan is a naturally formed land feature and qualifies as an island under international law. The Philippines has sovereignty over Palawan and therefore may legally reclaim land for whatever purpose.

The case of Vietnam is different. Satellite imagery of Vietnamese-occupied Sand Cay and West London Reef, published by the Asia Maritime Transparency Initiative (AMTI), indicates that since 2010 Vietnam has expanded these features by 21,000 and 65,000 square meters, respectively. Does size matter? Journalists, academic commentators and government officials are quick to note that the scope and scale of China construction dwarfs that of the other claimants. Vietnam’s so-called land reclamation amounts to 1.9 percent of the area built by China.

None of these commentators, including the AMTI, have put “land reclamation” in the South China Sea in proper context. Secretary of Defense Ashton Carter’s call for Vietnam to halt “land reclamation” is misguided. The litmus test is not the extent of artificial construction but the intent behind this construction. China and all of the other claimants are signatories to the non-binding Declaration on Conduct of Parties in the South China Sea (DOC) agreed to in November 2002.

Under the DOC the signatories agreed “to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability...” Quite clearly none of the land reclamation undertaken by the Philippines or enlargement carried out by Vietnam rises to the point of complicating or escalating disputes and affecting peace and stability in the South China Sea.

China’s actions, on the other hand, have complicated disputes. China’s construction of artificial islands directly subverts UNCLOS and represents a preemptive move against any decision by the Arbitral Tribunal. China has changed “facts on the ground” and presented the region with a fait accompli. China is already challenging the freedom of navigation and overflight of naval vessels and aircraft as well as fishermen in the area. For example, there are current reports that a Chinese warship fired at Filipino fishermen near one of China’s artificial islands.

China’s construction activities have affected regional peace and stability because of China’s repeated statements that the artificial islands will serve defense purposes. China has repeatedly proclaimed its right unilaterally to declare and enforce an Air Defence Identification Zone over the South China Sea. A Chinese commentator has gone so far to argue China should confront Australian military aircraft flying over the airspace above China’s artificial islands and if necessary shoot them down.

China has reportedly ceased “land reclamation” on four of its features and moved to consolidate its presence by building piers, harbors and multi-storey buildings. The construction of a 3,110 meter long runway on Fiery Cross Reef coupled with reports that a similar airstrip will be built at Subi Reef provide the infrastructure to support the deployment of all types of military aircraft in China’s current inventory. Suddenly and at short notice China can transform ostensibly civilian and scientific facilities into forward staging bases for military operations.

The third issue relates to the impact on the marine environment by China’s construction activities. As a signatory to UNCLOS China is bound to protect the marine environment. Chinese officials repeatedly claim that they have taken into account the environmental impact of their construction activities and no harm is being done. China’s assertions are challenged by Philippine officials as well as marine scientists. Satellite imagery clearly shows dredging marks on coral reefs adjacent to where China is building artificial islands.

No, China is not reclaiming land. China is building forward staging bases on artificial islands for its fishing fleet, oil and gas exploration vessels and maritime law enforcement vessels. When China completes building its infrastructure, including long range radar, it will be only a matter of time before military aircraft and naval warships make their appearance.

In sum, China has succeeded in legal alchemy by transforming UNCLOS into “international law with Chinese characteristics.” This development will bolster China’s assertion of “indisputable sovereignty” over the South China Sea. China is slowly and deliberately excising the maritime heart out of Southeast Asia. ■

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