

Robert Beckman For The Straits Times

China's reclamation work in S. China Sea raises issues

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A photograph taken in February of the Johnson South Reef in the South China Sea, a reef occupied by China but also claimed by the Philippines and Vietnam. According to the Philippine Foreign Affairs Department, this photo appears to show large-scale reclamation being carried out in stages by China. -- PHOTO: DEPARTMENT OF FOREIGN AFFAIRS, THE PHILIPPINES

By Robert Beckman For The Straits Times

The international media has reported that China is undertaking large-scale reclamation works on several of the seven reefs it occupies in the Spratly Islands.

The 2002 Asean-China Declaration on the Conduct of Parties in the South China Sea states that the parties undertake to exercise self-restraint in the conduct of activities that would complicate or escalate the disputes in the area.

Although reclamation works and the construction of installations and structures on occupied features would seem to be inconsistent with this provision, China, Malaysia, the Philippines and Vietnam have all undertaken such activities on the features they occupy and control in the Spratly Islands.

What is new is the scale of the reclamation works being undertaken by China. It has been reported that China is expanding Fiery Cross Reef (Yongshu Reef) so that it will be 2 sq km in size.

This would be a very significant change, as that reef would then be as large as the combined size of the 13 largest islands in the Spratly Islands.

Reefs occupied by China

China occupies and controls seven reefs in the Spratly Islands, the legal status of which is at issue in the case between the Philippines and China that is before an international arbitral tribunal established under the dispute-settlement provisions in the United Nations Convention on the Law of the Sea (Unclos).

Although China has decided not to participate in that case, the matter is proceeding without China's participation, as provided for under Unclos.

In the arbitration case, the Philippines admits that three of the seven reefs meet the definition of an island, that is, they are naturally formed areas of land surrounded by and above water at high tide. If so, they are capable of a claim to sovereignty and to maritime zones of their own.

However, the islands on the three reefs occupied by China are very small and contain little vegetation. Therefore, the Philippines maintains that they should be classified as "rocks which cannot sustain human habitation or economic life of their own".

If so, they would be entitled to a 12 nautical mile territorial sea, but not to an exclusive economic zone (EEZ) or continental shelf of their own.

With regard to the remaining four reefs occupied by China, the Philippines maintains that they are not islands under Unclos as they are submerged at high tide. Therefore, they are not subject to a claim of sovereignty and are not entitled to any maritime zones of their own.

Issues of international law on the status of the reefs

If the scale of China's recent reclamation works is correct, this raises interesting issues of international law.

First, will the reclamation works strengthen China's sovereignty claim to the Spratly Islands under international law?

The answer is "no". Vietnam, the Philippines and Taiwan also claim sovereignty over the islands/features occupied by China.

Once there is a dispute over sovereignty, the state that occupies and controls the islands/features cannot strengthen its sovereignty claim by undertaking reclamation or building installations and structures.

Second, can China use reclamation to convert submerged reefs into islands capable of supporting human habitation or economic life of their own that are entitled to maritime zones of their own?

Again, the answer is "no". This is because an "island" is defined as a "naturally formed" area of land surrounded by and above water at high tide. If a feature is above water at high tide because of reclamation works, it is an "artificial island".

Under Unclos, an artificial island is not entitled to any maritime zones of its own, not even a 12 nautical mile territorial sea. Therefore, the reclamation works on features that are submerged at high tide will not change their legal status.

Third, can China use reclamation to convert a "rock which cannot sustain human habitation or economic life of its own" into an island that would be entitled to an EEZ and continental shelf of its own?

There is no clear answer to this question. However, as an island is defined as a "naturally formed area of land" surrounded by and above water at high tide, it seems reasonable to conclude that it should not be permissible to use artificial means to change a rock into an island entitled to an EEZ and continental shelf of its own.

Other issues of international law

Questions also arise on whether Unclos and international law impose any other restraints on China in conducting reclamation works on the features it occupies and controls.

One issue is whether China's large-scale reclamation works are consistent with its obligation under Unclos to protect and preserve the marine environment.

If a state is planning activities in an area under its jurisdiction and control that may have significant harmful effects on the marine environment of other states, it has a "duty to cooperate" with those states. It must consult the states that might be affected in advance, and in good faith.

It may also have to undertake an environmental impact assessment and share the results with the potentially affected states.

In this case, the Philippines is a potentially affected state because three of the features on which China is undertaking reclamation works are either just inside or just outside its 200 nautical mile EEZ.

Vietnam is also a potentially affected state because it occupies reefs very close to those occupied by China.

In addition, given that the geographic features in question are in the middle of an area that is the subject of highly contentious sovereignty and maritime disputes, China is under an obligation under international law to exercise restraint and not take unilateral actions that would permanently change the status quo regarding the features in question.

This is especially so in this case because the status of the very features on which China is doing major reclamation works is the subject of an ongoing case before an international arbitral tribunal.

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