

South China Sea Tension on Fire: China's Recent Moves on Building Artificial Islands in Troubled Waters and Their Implications on Maritime Law

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Abstract

In recent years, China has created artificial islands (or 'large constructions') on several reefs located in the South China Sea, which the adjacent states also claim sovereignty over. Such acts have thus been regarded as a significant move by China to further expand its power and influence in this area and have again raised tensions in the South China Sea region. This article aims to analyse the implications of these artificial islands under the United Nations Convention on the Law of the Sea (UNCLOS). Firstly, an overview of the main artificial islands in the world will be conducted. Secondly, the author will examine the relevant provisions within the context of UNCLOS. Then, a case study concerning China's recent construction of large artificial islands will be carried out, followed by analysis of this action under the UNCLOS. Finally, given that the UNCLOS remains silent on the definition of an artificial island, the application of relevant provisions could turn out to be confusing and disconnected. Hence, the author suggests that either a specific amendment should be made to the UNCLOS, or a code of conduct should be concluded in order to settle the disputes arising in this region.

Keywords

South China Sea, UNCLOS, artificial island, China, Nansha Islands, maritime code of conduct

1. Introduction

Since 2014, China has been creating artificial islands atop several reefs in the Nansha Islands (Spratly Archipelago) located in the South China Sea, which the Philippines, Vietnam, Malaysia, Brunei and Taiwan also claim sovereignty over. Recently, a satellite image showed that China has been building a runway on the Yongshu Island (Fiery Cross Reef), which could serve both military and civilian purposes and which is assumed to be part of China's plan to land military aircrafts in the area. Such acts have thus been regarded as a significant move by China to further expand its power and influence in this area, which has again raised tensions in the South China Sea region.

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This article therefore endeavours to analyse the implications of these artificial islands under the United Nations Convention on the Law of the Sea (UNCLOS).² In the first section of this article, the basic concept of an artificial island will be briefly introduced, followed by an overview of the existing artificial islands worldwide. Secondly, the author will examine the relevant provisions within the context of the UNCLOS. Subsequently, a case study concerning China's recent construction of large artificial islands and facilities on top of the reefs will be carried out, followed by an analysis of this action under the UNCLOS. Finally, owing to the fact that the UNCLOS remains silent on the definition of an artificial island, the author will conclude by offering observations and providing possible solutions, specifically on the case of the South China Sea.

2. Basic concept of artificial islands

Artificial islands are man-made 'constructions created by man's dumping of natural substances like sand, rocks and gravel';³ rather than those formed by Mother Nature. They are surrounded by water and remain above sea level during high tide.⁴ The functions of such islands could vary from deep-water ports or airports to the housing of nuclear power plants.⁵ In addition, some artificial islands have been built to isolate certain groups of people, while others were constructed to mitigate coastal erosion and the rise of sea levels resulting from global warming.⁶ More recently, given that the oceans contain abundant resources that humans need, states have begun to construct artificial islands as a way of extending their land territory into the sea in order to gain easy access to such resources.⁷

While the construction of artificial islands has certain advantages, such as an increase in land area and to satisfy the needs of human activities, such acts still have drawbacks. The creation of these islands not only results in high expenses⁸ but could lead to serious marine environmental damage⁹ and

2 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).

3 Alfred H A Soons, 'Artificial Islands and Installations in International Law' (1974) Occasional Paper Series 22, University of Rhode Island Law of the Sea Institute, 3 <<https://repositories.tdl.org/tamug-ir/handle/1969.3/27383>> accessed 25 July 2015.

4 Bahman Aghai Diba, 'Legal Regime of the Artificial Islands in the Persian Gulf' (*Payvand Iran News*, 9 July 2009) <<http://payvand.com/news/09/sep/1071.html>> accessed 21 May 2015.

5 Soons (n 3) 1.

6 Fabrizio Bozzato, 'Dryland: Artificial Islands as New Oceanscapes' (2013) 17 *Journal of Futures Studies* 1, 2-5.

7 Nikos Papadakis, 'Artificial Island in International Law' (1975) 3 *Maritime Studies and Management* 33, 33.

8 Sigurdur Sigurdarson and others, 'Icelandic-Type Berm Breakwater for the Hambantota Artificial Island Revetment, Application of Geometrical Design Rules' (2014) 34 *Coastal Engineering Proceedings* 1, 4.

9 Huakun Yan and others, 'Simulation of Different Sea-Crossing Traffic Route Structures' Effects on the Marine Environment for the Dalian Large-Scale Offshore Airport Island' (2014) 52 *Journal of Hydraulic Research* 583, 596.



the destruction of the ecosystem.¹⁰ Additionally, it is of great concern that land subsidence and soil liquefaction could occur during earthquakes.¹¹

To date, there are numerous artificial islands in existence worldwide, including the Flevopolder, which was built by the Netherlands and is currently the largest.¹² Moreover, other European countries, such as Austria, Germany, Denmark, France and the United Kingdom, and Asian countries, such as Japan, Singapore and Malaysia, as well as the United States, have also constructed artificial islands to serve different purposes, mainly for the reclamation of land, the creation of floating cities and other forms of infrastructure, the exploitation of natural resources, scientific research, tourism, immigration centres for the purpose of combating diseases or to cope with hydrological natural disasters.¹³

3. 'Artificial island-relevant' provisions within the context of the UNCLOS

While going through the content of the UNCLOS, one could find several provisions containing the term 'artificial islands.' Yet the UNLCOS does not explicitly define the specific meaning and legal status of the term.¹⁴ Therefore, in this section, the relevant provisions concerning artificial islands will be discussed.¹⁵

3.1 'Islands' under the UNCLOS

Throughout history, artificial islands have, from time to time, been treated as natural islands if they meet certain conditions, including 'formulations surrounded by water', 'remaining permanently above the surface at high tide' and 'the competence for human to inhabit'.¹⁶ However, Article 121(1)

10 'Land Reclamation: The Advantages and Disadvantages' (14 September 2013) <www.zulkarnainazis.com/2013/09/land-reclamation-advantages-and.html> accessed 3 July 2015.

11 *ibid.*

12 Erik Lacitis, 'Decades of Toxic Waste Dredged from the Duwamish' (*The Seattle Times*, 22 March 2014) <www.seattletimes.com/seattle-news/decades-of-toxic-waste-dredged-from-the-duwamish/> accessed 21 May 2015.

13 New World Encyclopedia, 'Artificial Island' <www.newworldencyclopedia.org/entry/Artificial_island> accessed 3 July 2015; Grigoris Tsaltas, Tilemachos Bourtzis and Gerasimos Makis Rodotheatos, 'Artificial Islands and Structures as a Means of Safeguarding State Sovereignty against Sea Level Rise: A Law of the Sea Perspective' (6th ABLOS Conference "Contentious Issues in UNCLOS – Surely Not?", Monaco, October 2010).

14 Florentina Moise, 'Islands and Their Capacity to Generate Maritime Zones: Case Law Romania V. Ukraine' (2008) <www.duo.uio.no/bitstream/handle/10852/22760/template_thesis.pdf?sequence=1> accessed 6 July 2015.

15 In fact, the term 'artificial islands' could also include other artificial installations and constructions. However, the discussion in this article mainly focuses on artificial islands *per se*.

16 Keyuan Zou, 'The Impact of Artificial Islands on Territorial Disputes over the Spratly Islands' (*East Sea/ South China Sea Studies*, 21 July 2011) <<http://nghiencuubiendong.vn/en/conferences-and-seminars-/second-international-workshop/597-the-impact-of-artificial-islands-on-territorial-disputes-over-the-spratly-islands-by-zou-keyuan>> accessed 22 May 2015.



UNCLOS stipulates that: 'An island is a naturally formed area of land, surrounded by water, which is above water at high tide.' In light of this provision, several conditions should be considered in the determination of 'islands' in a legal sense. Firstly, an 'island' should constitute an 'area of land', which should further meet two elements: (1) 'an insular feature must be attached to the seabed', and (2) 'it must have the nature of *terra firma*'.¹⁷ Moreover, there is also no criterion regarding the size of an island in Article 121, and this has been reaffirmed by the International Court of Justice (ICJ) in the *Qatar v Bahrain* case.¹⁸ Secondly, an island must be surrounded by water. Finally, referring to Article 121(1), an island should be 'naturally formed' and 'above water at high tide'. Despite the fact that the provision does not explain to what extent a land above water at high tide could be seen as an island, it could probably be inferred that the provision intended to exclude islands that are completely man-made and those that would be submerged by the ocean during high tide (also known as 'low-tide elevations') from being able to obtain the legal status of islands under the Convention. In fact, Articles 60(8) and 80 UNCLOS further prescribe that an artificial island constructed in the Exclusive Economic Zone (EEZ) or on the continental shelf 'does not possess the status of [an] island'. Additionally, as compared to the islands specified in Articles 10(2) and 121(2), which could be used as a base point to measure sea zones, artificial islands within the context of Article 60(8) 'have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf'. The wording of the above-mentioned provisions thus supports such an argument.

On the other hand, it is highly debated whether the legal status of islands should be decided according to the factors provided for in Article 121(3),¹⁹ as the provision does not expressly state what a 'rock' is, nor does it identify the differentiating line between 'rocks' and 'other types of islands'.²⁰ Consequently, the relationship between Article 121(1)-(2) and Article 121(3) has become questionable: should Article 121(3) be read in conjunction with the previous two paragraphs? Are 'rocks' in Article 121(3) a sub-category of islands or are they an exception to the regime of islands set out in paragraphs 1 and 2?²¹

Further, the vague relationship between rocks and islands also brings into question whether an island should meet the 'socio-economic' requirements provided for in paragraph 3, not to mention that the wording of Article 121(3) *per se* does not clarify whether the concept of 'economic life' should be of a productive or commercial nature only,²² or whether the phrase 'of their own' should be strictly interpreted as 'a State could not create necessary conditions by injecting an artificial econom-

17 Yoshifumi Tanaka, *The International Law of the Sea* (Cambridge University Press 2012) 63.

18 See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain Case (Qatar v Bahrain)* (Merits) [2001] ICJ Rep 97.

19 UNCLOS, art 121(3) provides that: 'Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.'

20 Robin Rolf Churchill and Alan Vaughan Lowe, *The Law of the Sea* (Manchester University Press 1999) 50.

21 See Tanaka (n 17) 66.

22 *ibid.*



ic life, based on resources from its other land territory,²³ for this would appear to contradict with the precedent of Jan Mayen.²⁴

3.2 The legality of constructing artificial islands in different maritime zones

As is set out in Article 11 UNCLOS,²⁵ artificial islands do not qualify for permanent harbour works. This suggests that coastal states are not entitled to claim the rights associated with the permanent harbour works in the determination of the baseline and measurement of maritime zones when it comes to artificial islands. Besides, the UNCLOS still contains other provisions that are applicable to artificial islands. Hence, in the following content, the permissibility of building artificial islands in different maritime zones will be examined.

3.2.1 Internal waters and territorial seas

Since the sovereignty of a coastal state extends to its internal waters and territorial seas,²⁶ the state reserves the right to construct an artificial island in these areas. However, exceptions to the right of innocent passage enjoyed by other coastal states or land-locked states could be claimed if: (1) 'the establishment of straight baselines has the effect of enclosing as internal waters areas which had not previously been considered as such,'²⁷ or (2) in the case of territorial seas.²⁸ Therefore, when an artificial island is to be built, other states' rights of navigation should be taken into consideration. However, this is not to suggest that these types of islands cannot be constructed in regions that foreign ships sail through on a regular basis. If (1) there is 'no alternative site for their location and if the benefits resulting from the construction of the island ... in that particular area outweigh the inconvenience it causes to navigation,'²⁹ (2) such siting does not 'cause injury in or to the territory of other States,'³⁰ or (3) as long as it does not infringe the use of the contiguous zones and the adjoining territorial sea of another state,³¹ the construction would be permissible.

23 Derek William Bowett, *The Legal Regime of Islands in International Law* (Oceana Pubn 1978) 34.

24 See Tanaka (n 17) 67.

25 UNCLOS, art 11 provides that: 'For the purpose of delimiting the territorial sea, the outermost permanent harbour works which form an integral part of the harbour system are regarded as forming part of the coast. Off-shore installations and artificial islands shall not be considered as permanent harbour works.'

26 UNCLOS, art 2(1) provides that: 'The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.' Art 2(3) further provides that: 'The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.'

27 UNCLOS, art 8(2).

28 UNCLOS, art 17.

29 Nilkos Papadakis, *The International Legal Regime of Artificial Islands* (Brill Archive 1977) 4.

30 *ibid* 5.

31 *ibid*.



3.2.2 The Exclusive Economic Zone (EEZ)

Article 56(1)(b)(i) UNCLOS entitles coastal states to exercise jurisdiction to establish and use artificial islands. Article 60(1)(a) and (2) further elaborates that a state owns the exclusive right 'to construct and to authorize and regulate the construction, operation and use of' and enjoys 'exclusive jurisdiction over'³² artificial islands, and these provisions aim to ensure the comprehensive establishment of regulatory authority of coastal states.³³ Moreover, coastal states have the discretion to establish safety zones, which all ships must respect,³⁴ around the artificial islands and such zones should conform to international standards.³⁵ Yet the interests of other states, for instance rights of navigation, should be taken into account by a number of safeguards pursuant to the same Article.³⁶ Last but not least, as mentioned above, artificial islands do not have territorial seas, nor do they have any impact on maritime delimitation.³⁷

3.2.3 Continental shelf

Basically, a coastal state is allowed to exercise its sovereign rights over its continental shelf for exploration and exploitation purposes.³⁸ With regard to artificial islands built in such zones, the UNCLOS reemphasised the rationale delivered in Article 5(4) Continental Shelf Convention.³⁹ As a result, by making Article 60 UNCLOS *mutatis mutandis* applicable to Article 80 UNCLOS, artificial islands constructed on the continental shelf are not granted territorial seas, nor do such islands affect the delimitation of the maritime zones.

3.2.4 High seas and 'the Area'

Although the UNCLOS recognises the construction of artificial islands in such zones as a freedom of the high seas,⁴⁰ the Convention prohibits states from subjecting 'any part of the high seas to [their]

32 Including jurisdiction in terms of customs, fiscal, health, safety and immigration laws and regulations: UNCLOS, art 60(2).

33 Erik Jaap Molenaar, 'Airports at Sea: International Legal Implications' (1999) 14 *The International Journal of Marine and Coastal Law* 371, 375.

34 UNCLOS, art 60(6).

35 UNCLOS, art 60(4)-(5).

36 UNCLOS, art 60(3) and (7).

37 UNCLOS, art 60(8).

38 UNCLOS, art 77(1).

39 Convention on the Continental Shelf (adopted 29 April 1958, entered into force 10 June 1964) 499 UNTS 311; art 5(4) of the Convention on the Continental Shelf provides that installations and devices that are under the jurisdiction of a coastal State 'do not possess the status of islands, they have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea of the coastal State.'

40 UNCLOS, art 87(1)(d).



sovereignty,⁴¹ and thus denies any claims on maritime zones stemming from such islands.⁴² This principle is also applicable to the International Sea Bed Area,⁴³ for under Article 147(2)(e) UNCLOS, installations used to carry out activities in the Area do not have a 'territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf'.

4. Case study: China's moves on building artificial islands in troubled waters

4.1 Troubled waters? An overview of the South China Sea dispute

The South China Sea dispute has had a long history, with ten countries⁴⁴ bordering the area in question. The importance of the South China Sea lies in its significant sources of energy (oil and natural gas), its function as a strategic passage route (for surveillance, sea-lane interdiction and other naval operations), its abundance of fisheries resources and its use as a legal basis for claiming maritime zones.⁴⁵ Hence, the region has always been an area with ongoing clashes of sovereignty claims, which have drawn great international concern.

The disputes in the South China Sea can mainly be attributed to the overlapping EEZs of the adjacent countries in some areas of the Spratly Islands.⁴⁶ In fact, before the entitlement of EEZs under the UNCLOS, there were no apparent disputes in the region.⁴⁷ Since Brunei took the lead and issued its claim over a portion of the Spratly Islands in 1988, China, Vietnam, Malaysia, the Philippines and Taiwan have all subsequently made their respective sovereignty claims to the islands.⁴⁸ Given that the primary focus of this article regards China's recent activities in the South China Sea, the following content will thus discuss the claim made by China.

41 UNCLOS, art 89.

42 Churchill and Lowe (n 21) 51.

43 *ibid.*

44 Namely Taiwan, China, the Philippines, Vietnam, Brunei, Malaysia, Indonesia, Singapore, Thailand, and Cambodia. However, the main claimants in this region are the first seven countries mentioned above.

45 Yann-Huei Song, 'United States and Territorial Disputes in the South China Sea: A Study of Ocean Law and Politics' (2002) 1 *Maryland Series in Contemporary Asian Studies* 1, 19-25.

46 Mary Fides A Quintos, 'Artificial Islands in the South China Sea and Their Impact on Regional (in)Security' (2015) 2 *FSI Insights* 1-11.

47 Shicun Wu, *Solving Disputes for Regional Cooperation and Development in the South China Sea: A Chinese Perspective* (Elsevier 2013) 4.

48 *ibid.*



4.2 China's recent moves on building artificial islands in the South China Sea

4.2.1 A review of China's claim in the South China Sea

As is known, China has claimed all of the islands and most of the South China Sea for historical reasons, it but has not defined the borders of sovereignty claimed in those waters.⁴⁹ Such a claim can be traced back to the Xia Dynasty (2183-1752 B.C.), when the entire South China Sea was claimed by China.⁵⁰ In 1947, the Republic of China (ROC) government drew an eleven-dash line (U-shaped Line) in the South China Sea on the Chinese map, which included 'the Spratly Islands and other chains that the ruling KMT party declared, were now under Chinese sovereignty'.⁵¹ Later on, in 1953, the People's Republic of China (PRC) government reissued a nine-dash line, which had deleted the two dashes that were once claimed by the former government in the Gulf of Tonkin, to reinforce its claim of historical waters.⁵² Since the international maritime regulatory regime began to develop, China has codified its claims via domestic legislation. Among these laws, the combination of the 1992 Law on the Territorial Waters and Their Contiguous Areas and the Law on the Exclusive Economic Zone and the Continental Shelf provides the Chinese government with a basis for claiming four-fifths of the South China Sea.⁵³

After China's ratification of the UNCLOS in 1996, its assertion and tactics in the South China Sea have become more prominent with regard to the diplomatic, administrative and military aspects.⁵⁴ These strategies have thus triggered constant maritime disputes in these contested waters.

4.2.2 China's recent establishment of artificial islands in the South China Sea

In 2014, China was spotted shipping construction materials for the creation of new islands in the Spratly Archipelago.⁵⁵ Then, in February 2015, satellite images showed that China had initiated its reclamation work on six of the reefs in the Archipelago, with the expansion of a few small, concrete platforms into a 'large facility' atop of the Gaven Reefs and by constructing an 'air strip capable' island

49 Jeremy Page and Trefor Moss, 'China's Claim in the South China Sea: The Short Answer' (*The Wall Street Journal*, 27 May 2015) <<http://blogs.wsj.com/briefly/2015/05/27/chinas-claims-in-the-south-china-sea-the-short-answer/>> accessed 28 May 2015.

50 Xavier Furtado, 'International Law and the Dispute over the Spratly Islands: Whither UNCLOS?' (1999) 21 *Contemporary Southeast Asia* 386, 388.

51 Mohan Malik, 'Historical Fiction: China's South China Sea Claims' (2013) 176 *World Affairs* 83, 88.

52 Li Jinming and Li Dexia, 'The Dotted Line on the Chinese Map of the South China Sea: A Note' (2003) 34 *Ocean Development & International Law* 287, 290.

53 M Taylor Fravel, 'China's Strategy in the South China Sea' (2011) 33 *Contemporary Southeast Asia: A Journal of International and Strategic Affairs* 292, 294; see also Malik (n 51) 89.

54 See Fravel (n 53) 299-310.

55 Joel Guinto, 'China Builds Artificial Islands in South China Sea' (*Bloomberg Business*, 19 June 2014) <www.bloomberg.com/bw/articles/2014-06-19/china-builds-artificial-islands-in-south-china-sea> accessed 28 May 2015.



with a runway that serves military and civilian purposes along the Yongshu Island.⁵⁶ In fact, similar infrastructures were also built on the Johnson South Reef and the Hughes Reef.⁵⁷ A few months later, artillery weapons were detected on these islands, moved there by China.⁵⁸ These continuous actions have again aroused deep concern worldwide, and the international community is highly suspicious that China intends to utilise the islands as a basis for strengthening its land reclamation.

In mid-2015, Chinese officials reaffirmed that such projects 'do not affect the freedom of navigation and overflight enjoyed by all countries in accordance with international law in the South China Sea.'⁵⁹ They also stated that these constructions are 'well within the scope of China's sovereignty and [are] justified, legitimate and reasonable,'⁶⁰ due to its sufficient historical evidence and non-disputable claims of rights and interests in this area.⁶¹

4.3 Analysis

In this section, the author attempts to analyse the aforementioned case of China under the UNCLOS and to provide possible solutions.

56 Greg Torode, 'China to Project Power from Artificial Islands in South China Sea' (*Reuters*, 19 February 2015) <<http://uk.reuters.com/article/2015/02/19/uk-southchinasea-reefs-china-idUKKBN0LN0JE20150219>>, accessed 28 May 2015; Katie Hunt, 'Report: China Building New Islands in Disputed Waters' (*CNN*, 18 February 2015) <<http://edition.cnn.com/2015/02/17/asia/china-south-china-sea-reclamation/>> accessed 28 May 2015; Jeremy Bender, 'China Is Building Its First Runway on a Disputed Island Chain in the South China Sea' (*Business Insider*, 16 April 2015) <www.businessinsider.com/china-constructing-runway-in-south-china-sea-2015-4> accessed 28 May 2015.

57 Paul Vale, 'Beijing Constructs Chain of Artificial Island Fortresses in Disputed Region of South China Sea' (*The Huffington Post UK*, 20 February 2015) <www.huffingtonpost.co.uk/2015/02/20/chin-building-chain-of-island-fortresses-in-disputed-region-of-south-china-sea_n_6721364.html> accessed 28 May 2015.

58 Matthew Rosenberg, 'China Deployed Artillery on Disputed Island, U.S. Says' (*The New York Times*, 29 May 2015) <www.nytimes.com/2015/05/30/world/asia/chinese-artillery-spotted-on-spratly-island.html?_r=0> accessed 29 May 2015; James Rush, 'Artillery Weapons Detected on Artificial Islands Built by China, US Claims, in What It Calls a "Disturbing" Development in South China Sea' (*The Independent*, 29 May 2015) <www.independent.co.uk/news/world/asia/us-claims-artillery-weapons-have-been-detected-on-artificial-islands-built-by-china-in-what-it-calls-a-disturbing-development-in-south-china-sea-10284280.html> accessed 29 May 2015.

59 Christopher Bodeen, 'Artificial Island in South China Sea Almost Finished, Is "Lawful, Reasonable and Justified," Government Says' (*National Post*, 16 June 2015) <<http://news.nationalpost.com/news/world/artificial-island-in-south-china-sea-almost-finished-is-awful-reasonable-and-justified-government-says>> accessed 5 July 2015.

60 Katie Hunt, 'Island Building in South China Sea "Justified," Says Chinese Admiral' (*CNN*, 1 June 2015) <<http://edition.cnn.com/2015/06/01/asia/china-defends-island-building/>> accessed 5 July 2015.

61 *ibid.*



4.3.1 The fuse of conflicts: the missing definition of 'artificial island' within the UNCLOS

Chinese government officials have refused to comment on the satellite images of the expansion of its constructions in the South China Sea.⁶² As a matter of fact, China has never officially confirmed that it is building artificial islands in the South China Sea. Instead, they tend to call these objects 'facilities' or 'constructions.'⁶³ Therefore, the main issue is whether these objects can be classified as artificial islands under the UNCLOS.

Unfortunately, as mentioned in this article, given that the UNCLOS lacks a clear definition of what an artificial island is⁶⁴ and that there is no case law that directly addresses this issue, different interpretations can be made. Some suggest that artificial islands are lands with the characteristic of human intervention in their formation process,⁶⁵ while others argue that artificial islands 'are created by expanding existing islets, construction on existing reefs, or amalgamating several natural islets into a bigger island',⁶⁶ or describe an artificial island as 'a temporary or permanent fixed platform made by man surrounded by water and above water at high tide.'⁶⁷ Nevertheless, in practice, the distinction between a 'naturally-formed' island and an 'artificial' one is not always easy to determine: it could be stated that an artificial island constructed from the ground up falls within the scope of artificial islands, but what about the situation where a state builds a dam in the sea and the sand brought in by the current eventually accumulates into an island? Should such an island be considered as naturally or artificially formed?⁶⁸ The contested objects in the case of China were constructed on or extend from the foundations of reefs or naturally-formed islands. Therefore, such objects are actually combinations of natural and artificial factors, which would lead us back to the deadlock of what constitutes an artificial island within the context of UNCLOS. Consequently, the ambiguity of the subject matter referred to in the artificial island-related UNCLOS provisions certainly left a loophole that could weaken the legal effects of the Convention.

62 Jeremy Page and Julian E Barnes, 'China Expands Island Construction in Disputed South China Sea' (*The Wall Street Journal*, 18 February 2015) <www.wsj.com/articles/china-expands-island-construction-in-disputed-south-china-sea-1424290852> accessed 29 May 2015.

63 See Shannon Tiezzi, 'Chinese Official: South China Sea Construction "Primarily for Civilian Purposes"' (*The Diplomat*, 28 May 2015) <<http://thediplomat.com/2015/05/chinese-official-south-china-sea-construction-primarily-for-civilian-purposes/>> accessed 30 May 2015.

64 Tracing back to the history of law-making, on one hand, the relevant report of the 1930 Codification Conference mentioned that 'the definition of the term "island" did not exclude artificial islands'. On the other hand, however, Article 6 of the draft articles on continental shelf, adopted in 1953, provided that 'installations necessary for the exploration and exploitation of the continental shelf did not possess the status of island'. Therefore, divergence existed on this issue from the very beginning. *Summary Record of the 260th Meeting*, extract from the Yearbook of the International Law Commission Vol 1 (1954) 90.

65 See Tanaka (n 17) 64.

66 Bahman Aghai Diba, 'Legal Regime of the Artificial Islands in the Caspian Sea' (*Payvand Iran News*, 12 May 2011) <www.payvand.com/news/11/dec/1046.html> accessed 30 May 2015.

67 Rudolf Bernhardt, *Encyclopedia of Public International Law* (Law of the Sea: New York 1989) 38.

68 Churchill and Lowe (n 20) 50.



4.3.2 Could China's act of building artificial islands really strengthen its sovereign claims in the region?

As previously mentioned, China has long asserted its sovereign rights through historical claims, mainly with the nine-dash line. However, such arguments are generally rejected by scholars, since they fail to meet the requirements of 'historic waters'.⁶⁹ According to the interpretation of the ICJ in the *Anglo-Norwegian Fisheries* case, the term 'historic waters' ordinarily means 'waters which are treated as internal waters but which would not have that character were it not for the existence of historic title'.⁷⁰ Despite the argument that 'the regime of historic waters could not be an exception because there were no general rules of international law' regarding the determination of historical waters,⁷¹ the nine-dash line does not seem to be compatible with the three basic elements of a title to historic waters, which are: (1) the exercise of authority over the area, (2) the continuity of the exercise of authority, and (3) the acquiescence of other states.⁷²

Regarding the first and second elements, all of the maps issued by China before 1909 marked the Hainan Province as its southernmost point, which did not include the South China Sea.⁷³ Besides, the frequent fishery activities in the area could not be considered as sufficient evidence to support the exercise of governmental authority. In addition, Tran Truong Thuy pointed out that China officially admitted in Article 1 of the Declaration of the Government of the People's Republic of China on China's Territorial Sea⁷⁴ that the 'islands are separated from the mainland *by the high sea*', so China ought to acknowledge that it does not own the right to exercise authority in the area.⁷⁵ As for the third element, it is apparent that the adjacent states have been radically objecting for the past several decades to China's claim in the South China Sea.⁷⁶ The recent developments of the ongoing *Sino-Philippine*

69 Tran Truong Thuy, 'China's U-Shaped Line in the South China Sea: Possible Interpretations, Asserting Activities and Reactions from Outside' (30 September 2012) 2-6 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2233274> accessed 4 June 2015.

70 *Anglo-Norwegian Fisheries between United Kingdom and Norway Case (United Kingdom v Norway)* (Judgment) [1951] ICJ Rep 130.

71 Tanaka (n 17) 57.

72 UN Secretariat, 'Juridical Regime of Historic Waters, Including Historic Bays', UN Doc A/CN.4/143 (F) [1962] Yearbook of the International Law Commission 3.

73 Thuy (n 69) 3-4.

74 Art 1 of the Declaration of the Government of the People's Republic of China on China's Territorial Sea provides that: 'The breadth of the territorial sea of the People's Republic of China shall be twelve nautical miles. This provision applies to all territories of the People's Republic of China including the Chinese mainland and its coastal islands, as well as Taiwan and its surrounding islands, the Penghu Islands, the Dongsha Islands, the Xisha Islands, the Zhongsha Islands, the Nansha Islands and all other islands belonging to China which are separated from the mainland and its coastal islands by the high seas.' The full text of the Declaration is available at <www.chinausfocus.com/wp-content/uploads/2014/08/Annex1-4.pdf> accessed 25 July 2015.

75 Thuy (n 69) 4.

76 See generally Mark J Valencia, 'Wither the South China Sea Disputes' in Tran Truong Thuy, Nguyen Thuy Minh and Le Thuy Trang (eds), *The South China Sea: Cooperation for Regional Security and Development* (Diplomatic Academy of Vietnam 2009).



Arbitration case also support this point.⁷⁷ Hence, it could likely be inferred that China intends to reinforce its sovereign claims in the South China Sea by building the said constructions. But would such moves actually help? These moves would likely result in meeting the requirement of the first element, but would be inconsistent with the second and third elements; for, on the one hand, the creation of the constructions was just recently initiated, and whether it fits the definition of ‘continuous’ in terms of length of time might be arguable. On the other hand, the nearby states expressed their opposition when they discovered China’s recent conduct in the South China Sea.⁷⁸ Consequently, China’s acts of building artificial islands would perhaps not strengthen its original claims, but shall instead lead to more conflicts.

4.3.3 Possible solutions

4.3.3.1 Fixing the lacuna by amending the UNCLOS

At this point, it is worth exploring why the UNCLOS avoided defining the term ‘artificial islands’. Keyuan Zou assumed that based on the findings in Nikos Papadakis’s work, there are various sorts of artificial islands,⁷⁹ and each and every type has its own respective legal status,⁸⁰ which might attribute to the complexities of definitional problems.⁸¹ However, the avoidance of defining such terms would make the application of ‘artificial island-related’ provisions confusing, for there is no standardised criteria when it comes to the determination of what constitutes an artificial island under the UNCLOS regime, and should this remain unclarified, the discussion regarding the application of the relevant articles would be meaningless.

It is also worth noting that a definition of artificial islands was provided for in the draft of the Convention on Offshore Units, Artificial Islands and Related Structures Used in the Exploration for and Exploitation of Petroleum and Seabed Mineral Resources, proposed in 2001 by the Comité Maritime International, which has cooperated with the IMO Legal Committee for many years. Under this Convention, an artificial island shall refer to:

77 However, China had refused to participate in the arbitral proceedings. See generally Michael Sheng-Ti Gau, ‘The Sino-Philippine Arbitration on the South China Sea Disputes: A Case Study on the Efficacy of Unclos Annex Vii Tribunal’ (2015 ILA-ASIL Asia-Pacific Research Forum ‘Integrating the Asia-Pacific: Why International Law Matters?’, Taipei, May 2015). For the latest updates on this case, see Permanent Court of Arbitration, *The Republic of the Philippines v The People’s Republic of China* <www.pca-cpa.org/showpage65f2.html?pag_id=1529> accessed 2 August 2015.

78 Hunt (n 60).

79 Types of artificial islands mentioned in Nikos Papadakis’s book include sea cities, artificial islands for economic use, fisheries and fish-farming, installations for the exploitation of non-natural resources, entertainment installations, military installations, etc, see Papadakis (n 29).

80 Zou (n 16).

81 *ibid.*



a permanent installation or structure rigidly affixed to the sea bed and used or intended for use for Economic Activities, including wellheads and associated equipment, but shall not include [pipelines] or installations formed from natural dredged materials or fill of natural origin.⁸²

Therefore, such examples could probably serve as a reference for any amendments to the UNCLOS in the future.

However, one challenge to this solution lies in the difficulties of implementation. Given that the nature of the UNCLOS is a treaty, the State Parties still possess the right to make reservations to specific provisions or even choose to withdraw from it altogether, which turns out to be the same dilemma that most international conventions face. Such shortcomings could further lower the legal effects of the Convention and its potential governance in the international community.

4.3.3.2 'Artificial island-related' provisions as customary international law?

The making of customary international law consists of two factors, namely 'a constant and uniform usage practised by the States' and '*opinio juris*'.⁸³ Unlike treaties that are only binding to contracting states, customary international law is binding to all states once they have come into being.

It is often stated that a number of provisions within the UNCLOS possess the characteristics of customary international law, such as those on innocent passage and navigational rights and freedoms.⁸⁴ Meanwhile, Yoshifumi Tanaka has also discussed the customary law nature of Article 121 UNCLOS, stating that dating back to the time when the 1980 UNCLOS draft was issued, the Conciliation Commission regarded Article 121(1)(2) as a reflection of 'the present status of international law'.⁸⁵ Furthermore, in the *Qatar v Bahrain* case, the ICJ elaborated that Article 121(2) UNCLOS reflects the characteristics of customary international law.⁸⁶ As for Article 121(3), it is quite difficult to find evidence proving the requirements of state practices and *opinio juris* that constitute customary international law, since it is rare for states to incorporate the provision into their domestic legislation, and the domestic courts of the states do not deal with cases concerning the provision.⁸⁷

As for the construction of artificial islands, apart from the absent uniform definition of an artificial island, whether customary international law could be formed in such a scenario is questionable, for the state practices of building artificial islands have never been consistent and have not gone through

82 Art 1.1(a) of the Convention on Offshore Units, 'Artificial Islands and Related Structures Used in the Exploration for and Exploitation of Petroleum and Seabed Mineral Resources' (2004) <www.comitemaritime.org/Uploads/Newsletters/2004/Binder1.pdf> accessed 6 July 2015.

83 Malcolm N Shaw, *International Law* (Cambridge University Press 2008) 75-76.

84 James L Malone, 'The United States and the Law of the Sea after UNCLOS III' (1983) 46 *Law and Contemporary Problems* 29, 33.

85 Tanaka (n 17) 67.

86 *ibid.*

87 *ibid.*



the test of time. Hence, even though it is not uncommon to codify customary international law into treaties, customary international law concerning artificial islands has not been made under the current conditions.

4.3.3.3 Code of conduct

China and ASEAN have signed the Declaration on the Conduct of Parties in the South China Sea, an unofficial agreement between the two parties in 2002,⁸⁸ which 'set out four trust and confidence building measures and five voluntary cooperative activities.'⁸⁹ In this Declaration, the parties reaffirmed that 'the adoption of a code of conduct in the South China Sea would further promote peace and stability in the region and agree to work, on the basis of consensus, towards the eventual attainment of this objective.'⁹⁰ However, the code of conduct on the South China Sea is still going through the negotiating process and has not yet come to be.⁹¹

By examining the existing international or regional codes of conduct, one would discover that they fit the elements of soft law.⁹² Although the codes of conduct are not binding on the parties, they serve more flexible purposes compared to those of treaties, and have thus been adopted more frequently in the modern international community. Through the negotiation of an international code of conduct, which specifically defines an artificial island, or a regional code of conduct on the South China Sea, such a solution could be a feasible alternative to the amendment of the UNCLOS.

88 Ed Flanagan, 'China May Build "Artificial Island" in Disputed Waters' (*NBC News*, 9 June 2014) <www.nbcnews.com/news/world/china-may-build-artificial-island-disputed-waters-n126101> accessed 5 June 2015.

89 Carlyle A Thayer, 'Asean's Code of Conduct in the South China Sea: A Litmus Test for Community-Building?' (2012) 10 *The Asia-Pacific Journal* 20 <www.japanfocus.org/-Carlyle_A_-Thayer/3813/article.html> accessed 26 July 2015.

90 *ibid.*

91 See generally Carlyle A Thayer, 'Asean, China and the Code of Conduct in the South China Sea' (2013) 33 *SAIS Review of International Affairs* 75; Clint Richards, 'Code of Conduct for South China Sea Unlikely, Yet ASEAN Made Progress' (*The Diplomat*, 11 August 2014) <<http://thediplomat.com/2014/08/code-of-conduct-for-south-china-sea-unlikely-yet-asean-made-progress/>> accessed 5 June 2015; 'US Condemns China's Reclamation in South China Sea, Urges Regional Agreement on Code of Conduct' (*Emerging Equity*, 30 May 2015) <<http://emergingequity.org/2015/05/30/u-s-condemns-chinas-reclamation-in-south-china-sea-urges-regional-agreement-on-code-of-conduct/>> accessed 5 June 2015.

92 Christine M Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *International and Comparative Law Quarterly* 850, 851.



5. Conclusion

As was expressed by Judge Oda of the ICJ in the *Qatar v Bahrain* case:

Modern technology might make it possible to develop small islets and low-tide elevations as bases for structures, such as recreational or industrial facilities. Although the 1982 United Nations Convention does contain some relevant provisions (e.g. Arts 60 and 80), I consider whether this type of construction would be permitted under international law and, if it were, what the legal status of such structures would be, are really matters to be reserved for future discussion.⁹³

In summary, the construction of artificial islands could indeed stimulate conflicts on national sovereignty, maritime security, and the utilisation and development of natural resources. If not properly dealt with, such conflicts could raise tensions in ongoing international disputes and already troubled waters. Over the past 18 months, China has reclaimed more than 2,000 acres of land in the South China Sea, which is far more than the sum of those claimed by other neighbouring states.⁹⁴

Although the UNCLOS gives coastal states the right to construct artificial islands, such states are obliged to comply with the rules of the Convention and pay due respect to other states' rights in the respective maritime zones. Nevertheless, the rights and obligations mentioned above should be built on the premise that an unambiguous definition of an artificial island be given. Such a problem could be directly dealt with by amending the UNCLOS, but as was mentioned in this article, such an approach has its flaws. Besides, due to the fact that customary international law relating to artificial islands cannot be formed under the current circumstances, the most appropriate solution might be the conclusion of a code of conduct. Once the rules and a definition of an artificial island are laid down and regulated, the extent to which a state is entitled to build artificial islands could be determined. Such an agreement thus has the potential to diminish the current disputes and lead to better cooperation in the region.

⁹³ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain Case (Qatar v Bahrain)* (Judgement of 16 March 2001, Separate Opinion of Judge Oda) 125 <www.icj-cij.org/docket/files/87/7031.pdf> accessed 6 July 2015.

⁹⁴ Charles Clover and Geoff Dyer, 'US Struggles for Strategy to Contain China's Island-Building' (*Financial Times*, 7 June 2015) <www.ft.com/intl/cms/s/0/54414c0e-0a6f-11e5-82e4-00144feabdc0.html> accessed 8 June 2015.