

# THE SOUTH CHINA SEA DISPUTE: PHILIPPINE SOVEREIGN RIGHTS AND JURISDICTION IN THE WEST PHILIPPINE SEA\*

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## ABSTRACT

The root cause of the South China Sea dispute is the map containing the nine-dashed line submitted by China to the United Nations in 2009. In 2013, the Philippines submitted an arbitration case against China to rule on the extent of maritime entitlements of certain land features, regardless of what state exercises sovereignty over them. The case involved an interpretation of the United Nations Convention on the Law of the Sea (UNCLOS) provisions on maritime entitlements, and did not involve delimitation of overlapping seas, exclusive economic zones (EEZs), or continental shelves between or among coastal states. In July 2016, the arbitral tribunal constituted under Annex VII of the UNCLOS ruled against China's nine-dashed line claim. This work details the interactions between the Philippines and China in the years leading up to the arbitration case. It also examines the issues raised by the Philippines in the arbitration case and the resolutions presented by the arbitral tribunal. Proposals for enforcement mechanisms and peaceful courses of action honoring the Philippine claim, as well as those of its neighbors, are also presented.

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## I. INTRODUCTION

### A. Constitution for the Oceans and Seas of Our Planet

The United Nations Convention on the Law of the Sea or UNCLOS is the constitution for the oceans and seas of our planet. UNCLOS governs maritime disputes among member states. UNCLOS codified customary international law, introduced novel concepts like the exclusive economic zone and the extended continental shelf, and institutionalized the common heritage of mankind. It is considered the most comprehensive treaty ever devised by man—with its own dispute settlement mechanism. UNCLOS was adopted on December 10, 1982 and entered into force on November 16, 1994. To date, UNCLOS has been ratified by 167 states and the European Union. All the states involved in the South China Sea dispute have ratified UNCLOS.

The well-entrenched doctrine in the Law of the Sea is that “*land dominates the sea.*” Simply put, all maritime zones or entitlements are measured from the coast of continental land, island or rock above water at high tide.<sup>1</sup> As stated in *North Sea Continental Shelf*,<sup>2</sup> “the land is the legal source of the power which a State may exercise over territorial extensions to seaward.”<sup>3</sup> The rights of a coastal state over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.<sup>4</sup> If the coastal state does not explore the continental shelf or exploit its natural resources, *no one may undertake such activities without the express consent of the coastal state.*<sup>5</sup>

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<sup>1</sup> United Nations Convention on the Law of the Sea (UNCLOS) arts. 3, 57 & 76, Dec. 10, 1982, 1833 U.N.T.S. 3.

<sup>2</sup> *North Sea Continental Shelf* (Ger. v. Ned.) (Ger. v. Den.), Judgment, 1969 I.C.J. 3, (Feb. 20).

<sup>3</sup> *Id.* at 52, ¶ 96.

<sup>4</sup> UNCLOS art. 77, ¶ 3.

<sup>5</sup> Art. 77, ¶ 2.

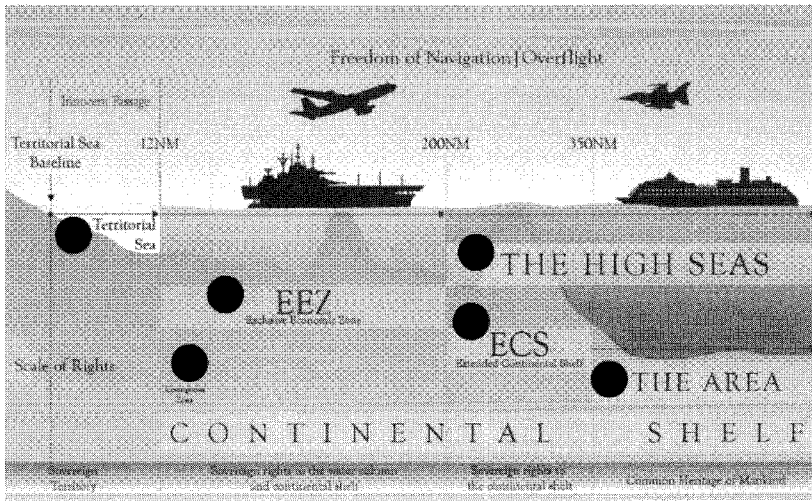


FIGURE 1: MARITIME ZONES UNDER THE UNCLOS<sup>6</sup>

1. *Territorial sea*: 12 NM from baselines; like land territory except there is right of innocent passage for foreign ships.
2. *Contiguous Zone*: 12 NM from the outer limit of 12 NM territorial sea; limited jurisdiction for immigration, fiscal, customs, and sanitation purposes.
3. *Exclusive Economic Zone* or *EEZ*: 200 NM measured from the baselines or 188 NM measured from the outer limit of the 12 NM territorial sea; specific sovereign rights and jurisdiction only within the 188 NM area. The EEZ is a legal concept based on distance from the baselines and does not depend on the geomorphology of the continental shelf.
4. *Extended Continental Shelf* or *ECS*: the outer limits of a coastal state’s continental shelf beyond 200 NM; not exceeding 150 NM measured from the outer limit of the EEZ, or if there is a drop to a 2,500 meter isobath before the 150 NM limit, the ECS shall not exceed 100 NM from such 2,500 meter isobath; living resources belong to all mankind, while non-living resources and sedentary species belong to the

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<sup>6</sup> In the South China Sea, because of its geology and geomorphology, the maximum maritime entitlement that a coastal state can claim under UNCLOS is 350 NM from basepoints along its coast. China is the only coastal state in the South China Sea claiming a maritime entitlement far in excess of 350 NM from its coast.

adjacent coastal state. The ECS is a geomorphological concept starting from the outer limit of the EEZ at 200 NM from the baselines.

5. *High seas*: beyond the EEZ; living resources belong to all mankind; in the ECS, non-living resources and sedentary species belong to the adjacent coastal state.<sup>7</sup>
6. *The Area*: beyond the ECS; all the living and non-living resources belong to all mankind. The Area is administered by the International Seabed Authority (ISA), a creation of UNCLOS. Member-states wishing to explore and exploit the seabed in the Area must secure a permit from the ISA.

## B. Geologic Features in the Sea

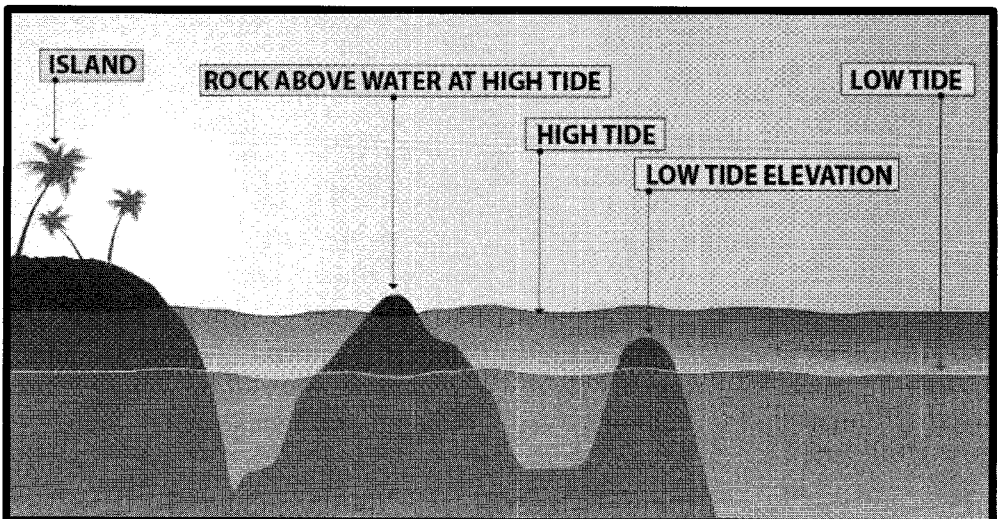


FIGURE 2: GEOLOGIC FEATURES IN THE SEA

<sup>7</sup> “The high seas are open to all states, whether coastal or land-locked. Freedom of the high seas [...] comprises, *inter alia*, [...] freedom of fishing”. UNCLOS art. 87; “No state may validly purport to subject any part of the high seas to its sovereignty.” Art. 89.

Continental land, islands, and rocks above water at high tide are entitled to a territorial sea of 12 NM measured from baselines along the coast.<sup>8</sup>

Continental land and islands capable of human habitation or economic life of their own are entitled to a 200 NM EEZ measured from the baselines along the coast (or 188 NM measured from the outer limit of the territorial sea). In addition, such continental land or island is entitled to an ECS not exceeding 150 NM from the outer limit of its EEZ. If there is a drop to a 2,500 meter isobath before the 150 NM limit, the ECS cannot exceed 100 NM from the 2,500 meter isobath. The maximum maritime zone a coastal state can claim is 150 NM from the outer limit of its 200 NM EEZ or 100 NM from the 2,500 meter isobath.<sup>9</sup>

An *island* is defined as a “naturally formed” area of land, surrounded by water, and above water at high tide.<sup>10</sup> Rocks not capable of human habitation or economic life of their own are only entitled to a territorial sea of 12 NM.<sup>11</sup>

A *low-tide elevation* (LTE) is a naturally formed area of land (rock, reef, atoll, or sandbar) surrounded by water, above water at low tide but submerged at high tide. An LTE is part of the continental shelf, and is not land or territory, and thus has no territorial sea, territorial airspace or any maritime zone.<sup>12</sup> An LTE beyond the territorial sea is not subject to appropriation or sovereignty by any state.

A *rock above water at high tide*, even if it protrudes only a few inches above the water, is entitled to a 12 NM territorial sea around it and a territorial airspace above the rock and the territorial sea.<sup>13</sup> The surface area of this 12 NM territorial sea is 155,165 hectares of maritime space, more than twice the land area of Metro Manila of 63,000 hectares. All the living and non-living resources within the territorial sea belong to the state that has sovereignty over such tiny rock.

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<sup>8</sup> Art. 3.

<sup>9</sup> Arts. 57, 76.

<sup>10</sup> Art. 121.

<sup>11</sup> Art. 121.

<sup>12</sup> Art. 13.

<sup>13</sup> Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 I.C.J. 624, ¶ 37 (Nov. 19).

### C. Baselines for Measuring the Breadth of the Territorial Sea

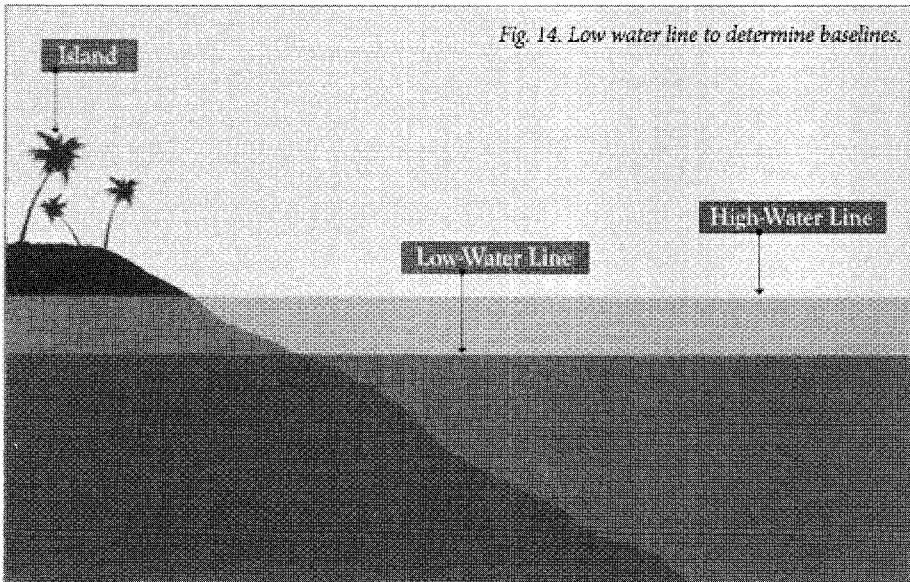


FIGURE 3: LOW WATER LINE TO DETERMINE BASELINES

The *normal baseline* for measuring the breadth of the territorial sea is the low-water line along the coast of continental land or island as marked on large-scale charts officially recognized by the coastal state. In case of islands situated on atolls or islands with fringing reefs, the baseline is the seaward low-water line of the reef.<sup>14</sup>

Where the coastline is deeply indented and cuts into, or there is a fringe of islands along the coast in its immediate vicinity, *straight baselines* may be drawn joining appropriate points of the farthest seaward extent of the low-water line. The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.<sup>15</sup>

<sup>14</sup> UNCLOS arts. 4 & 5.

<sup>15</sup> Art. 7.

For an archipelagic state like the Philippines, the *archipelagic baselines* for measuring the breadth of the territorial sea are the outermost points of the outermost islands and drying reefs, provided that:

- (a) within such baselines are included the main islands; and
- (b) the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1.

Straight lines are drawn joining such outermost points and the waters thus enclosed are archipelagic waters over which the state exercises sovereignty subject to archipelagic sea-lane passage. The drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago.

Where an LTE is situated wholly or partly within the territorial sea, the low-water line on that LTE may be used as the baseline for measuring the breadth of the territorial sea.<sup>16</sup>

#### **D. Archipelagic Baselines of the Philippines**

In *Magallona v. Ermita*,<sup>17</sup> a unanimous decision penned by Justice Antonio T. Carpio on August 16, 2011, the Philippine Supreme Court upheld the constitutionality of Republic Act No. 9522, which was enacted in 2009 to align the Philippine baselines to conform with UNCLOS. The Supreme Court rejected the argument that the Treaty of Paris lines should be the baselines of the Philippines from where to measure its territorial sea, EEZ and ECS. The Supreme Court declared:

Absent an UNCLOS III compliant baselines law, an archipelagic State like the Philippines will find itself devoid of internationally acceptable baselines from where the breadth of its maritime zones and continental shelf is measured. This is recipe for a two-fronted disaster: first, it sends an open invitation to the seafaring powers to freely enter and exploit the resources in the waters and submarine areas around our archipelago; and *second, it weakens the country's case in any international dispute over Philippine maritime space.* These are consequences Congress wisely avoided.

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<sup>16</sup> Art. 13, ¶ 1.

<sup>17</sup> G.R. No. 187167, 655 SCRA 477, Aug. 16, 2011.

The enactment of UNCLOS III compliant baselines law for the Philippine archipelago and adjacent areas, as embodied in RA 9522, allows an internationally-recognized delimitation of the breadth of the Philippines' maritime zones and continental shelf. *RA 9522 is therefore a most vital step on the part of the Philippines in safeguarding its maritime zones, consistent with the Constitution and our national interest.*<sup>18</sup>

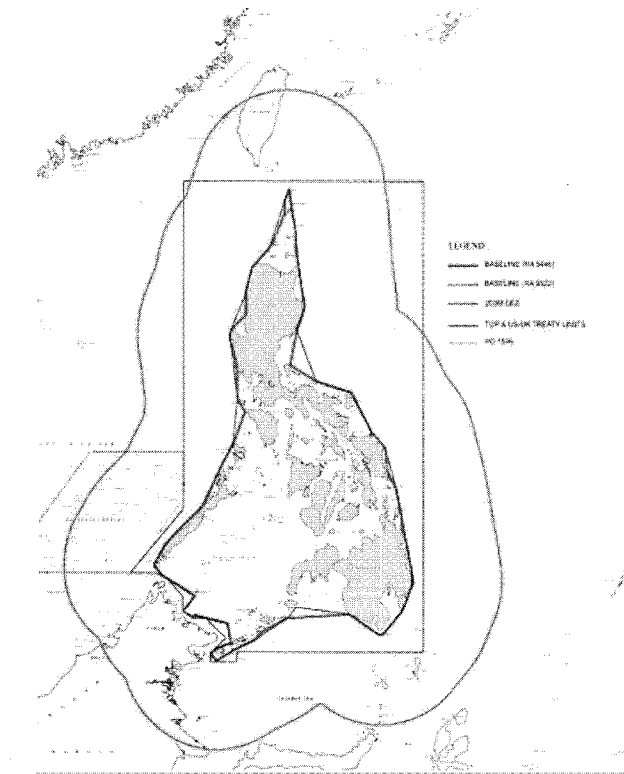


FIGURE 4: MAP INCLUDED IN *MAGALLONA V. ERMITA*

The Supreme Court foresaw that one day the Philippines would have to question the validity of China's alleged historic rights, under the nine-dashed line, to claim maritime entitlements. If the Philippines held on to the Treaty of Paris lines as its baselines to claim maritime entitlements, the Philippines would have its own historic rights claim that clearly violates UNCLOS. In short, the Philippines would be guilty of the same violation of UNCLOS as China. The legal maxim is clear—he who comes to court must come with clean hands.

<sup>18</sup> *Id.* at 506-507. (Emphasis supplied.)



## II. ROOT CAUSE OF THE SOUTH CHINA SEA DISPUTE

### A. The Nine-Dashed Line Claim of China

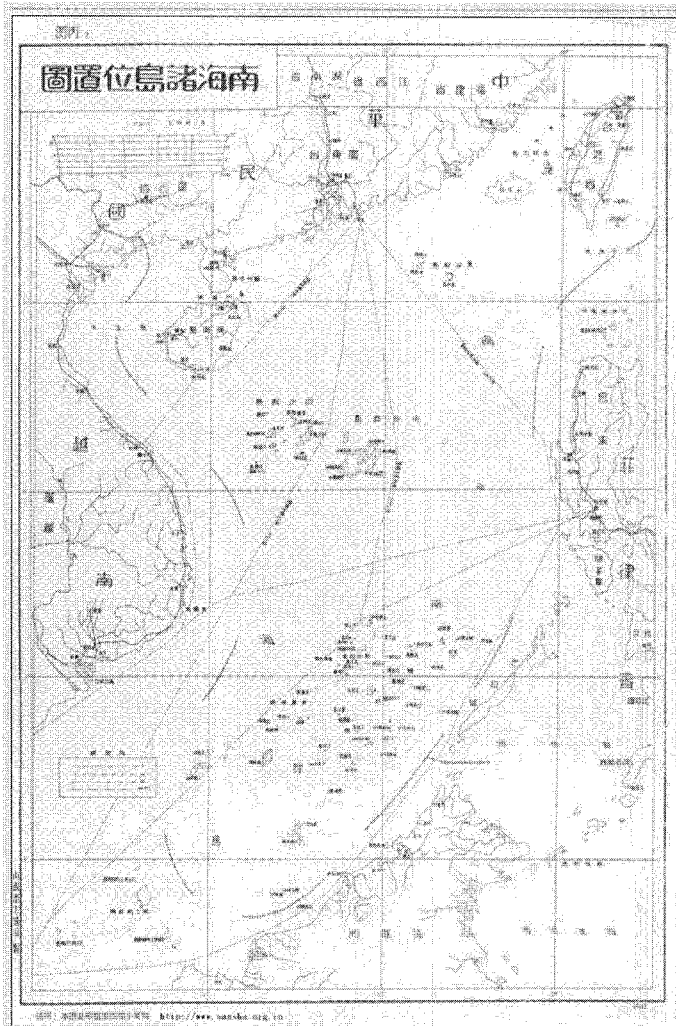


FIGURE 5: CHINA'S ORIGINAL 1947 MAP WITH 11 DASHES

In December 1947, the Kuomintang Government of China adopted the nine-dashed line claim. The claim was embodied in a map, entitled *Location Map of the South Sea Islands*, released within China in February 1948, with eleven dashes forming a broken U-shaped line covering almost the entire South China Sea.

The title of the map indicates a claim to islands, not the sea. China did not explain the meaning or basis of the eleven dashes, nor did China give the coordinates of the eleven dashes. China claimed the islands enclosed by the eleven dashes, namely Dongsha Islands (Pratas), Xisha Islands (Paracels), Zhongsha Island (Macclesfield Bank), and Nansha Islands (Spratlys). China was silent on any claim to the surrounding waters.

Significantly, Huangyan Island (Scarborough Shoal), or its previous name Min'zhu, is not mentioned in the map. Thus, Scarborough Shoal is not one of the islands that China claimed under its 1947 eleven-dashed line map. Further, Zhongsha Island (Macclesfield Bank) is not an island because it is fully submerged, its highest peak being 9.2 meters below sea level.

In 1950, China, under communist rule, announced the removal of two dashes in the Gulf of Tonkin without any explanation. The line became known as the nine-dashed line.

## B. Main Driver of the South China Sea Dispute

In 2009, Vietnam and Malaysia jointly submitted to the United Nations (UN) their extended continental shelf claims.<sup>19</sup> China protested the claims and submitted to the UN a map of its nine-dashed line, claiming “indisputable sovereignty” over all the islands and the “adjacent” waters enclosed by the line, and “sovereign rights and jurisdiction” over the “relevant” waters enclosed by the line.<sup>20</sup>

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<sup>19</sup> On May 6, 2009, Malaysia and the Socialist Republic of Vietnam submitted jointly to the Commission on the Limits of the Continental Shelf, in accordance with Article 76, paragraph 8 of the UNCLOS, information on the limits of the continental shelf beyond 200 NM from the baselines from which the breadth of the territorial sea is measured in respect of the southern part of the South China Sea. *Submissions to the Commission: Joint submission by Malaysia and the Socialist Republic of Viet Nam*, COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF WEBSITE, available at [http://www.un.org/depts/los/clcs\\_new/submissions\\_files/submission\\_mysvnm\\_33\\_2009.htm](http://www.un.org/depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm).

<sup>20</sup> On May 7, 2009, China submitted to the Commission on the Limits of the Continental Shelf its communication with regard to the joint submission made by Malaysia and Vietnam. See *Communications received with regard to the joint submission made by Malaysia and Viet Nam to the Commission on the Limits of the Continental Shelf*, COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF WEBSITE, available at [http://www.un.org/depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/chn\\_2009re\\_mys\\_vn\\_m\\_e.pdf](http://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vn_m_e.pdf).

This was the first time that China officially announced its nine-dashed line claim to the world. Still, China did not give the coordinates of the dashes. Neither did China explain the meaning or basis of the dashes, or the meaning of “adjacent” and “relevant” waters. The terms “adjacent” and “relevant” waters are not UNCLOS terms.

China’s nine-dashed line claim, through which it is aggressively asserting “indisputable sovereignty over the islands in the South China Sea and the adjacent waters” and “sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil” enclosed by the dashes, is the main driver of the South China Sea dispute.

China’s nine-dashed line claim is bereft of basis under international law. The well-entrenched doctrine in international law is that “*land dominates the sea*,” and all maritime entitlements must be measured from baselines along the coast of continental land, island or rock above water at high tide. China’s nine-dashed line does not comply with this basic requirement of UNCLOS.

Chinese legal scholars like Judge Zhiguo Gao of the International Tribunal for the Law of the Sea (ITLOS), and Profs. Bing Bing Jia and Keyuan Zuo admit that what China claims beyond the islands and their UNCLOS-derived maritime entitlements is not “sovereignty.” Chinese legal scholars theorize that China’s claim to “sovereign rights and jurisdiction” to exploit the fishery, oil, gas, and other resources within the nine-dashed line, beyond the islands and their UNCLOS-derived maritime entitlements, emanates from “historic rights” formed in the long course of history.<sup>21</sup>

In short, these Chinese legal scholars claim that China is entitled to rights akin to EEZ and ECS rights *beyond* what UNCLOS provides, even at the expense of depriving other coastal states of their own EEZs and ECSs. No other state has made even a remotely similar claim. China wants a *sui generis* right to claim the resources of almost the entire South China Sea, as if there were no other land mass or coastal states that border the same sea.

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<sup>21</sup> Zhiguo Gao & Bing Bing Jia, *The Nine-Dash Line in the South China Sea: History, Status and Implications*, 107 AM. J. INT’L L. 98 (2013); Zou Keyuan, *China’s U-Shaped Line in the South China Sea Revisited*, 43 OCEAN DEV. & INT’L L. 18 (2012).

In 2013, China released a new map of China, adding a tenth dash on the eastern side of Taiwan. Thus, China's nine-dashed line is still growing. In its 2013 map, China claimed the ten dashes as its "national boundary." The shading on the ten dashes is the same shading on the lines marking China's continental land boundary. SinoMaps Press published this 2013 map under the jurisdiction of China's State Bureau of Surveying and Mapping, making it an official Chinese government map.



FIGURE 6: CHINA'S 2013 MAP WITH ITS TEN DASHES AS CHINA'S "NATIONAL BOUNDARY"

In its *Note Verbale*<sup>22</sup> of June 7, 2013 to China, the Philippines expressed its “strong objection to the indication that the nine-dashed line represents China’s national boundary in the West Philippine Sea/South China Sea.” The Philippines had to protest because what is enclosed by a state’s “national boundary” is its national territory.

### C. Ramifications of China’s “National Boundary” as Delineated by its Nine-Dashed Line

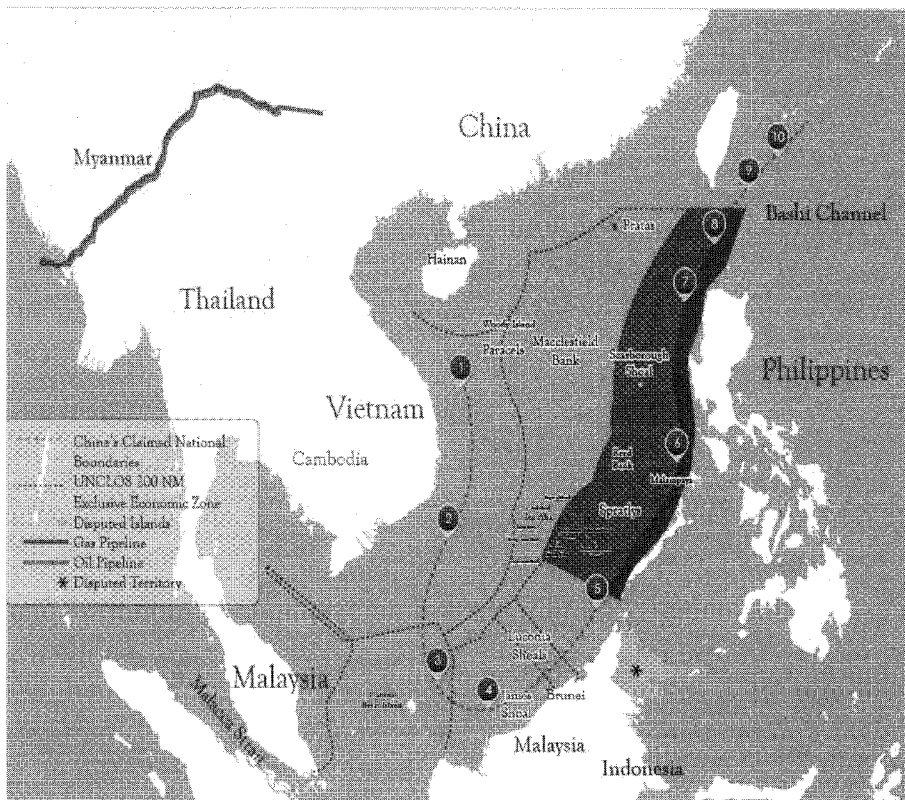


FIGURE 7: RAMIFICATIONS OF CHINA’S NINE-DASHED LINE ON PHILIPPINE MARITIME ENTITLEMENTS<sup>23</sup>

<sup>22</sup> Michaela del Callar, *China's New 10-Dash Line Map Eats into Philippine Territory*, GMA NEWS ONLINE, July 26, 2013, available at <http://www.gmanetwork.com/news/story/319303/news/nation/china-s-new-10-dash-line-map-eats-intophilippine-territory>.

<sup>23</sup> The dark blue shaded area is what will be left of Philippine territorial sea and EEZ under China's nine-dashed line claim.

China's nine-dashed line claim encloses about 85.7 percent of the entire South China Sea, equivalent to 3 million square kilometers of the 3.5 million square kilometers total surface area of the South China Sea.<sup>24</sup> Just over one-half of the world's seaborne trade passes through the South China Sea, valued at 5.3 trillion U.S. dollars annually.<sup>25</sup> The dark blue shaded area is what will be left of Philippine territorial sea and EEZ under China's nine-dashed line claim. Malaysia stands to lose about 80 percent of its EEZ in Sabah and Sarawak facing the South China Sea, as well as most of its active gas and oil fields in the same area. Vietnam will lose about 50 percent of its total EEZ, Brunei about 90 percent of its total EEZ, and Indonesia about 30 percent of its EEZ facing the South China Sea in Natuna Islands, whose surrounding waters comprise the largest gas field in Southeast Asia.<sup>26</sup>

For the Philippines, what is at stake in the South China Sea are: (1) about 80 percent of its EEZ comprising 381,000 square kilometers of maritime space, including the entire Reed Bank and part of the Malampaya gas field;<sup>27</sup> and (2) 100 percent of its ECS estimated at over 150,000 square kilometers of maritime space.<sup>28</sup> Either the Philippines keeps these maritime entitlements or loses them to China.

Effectively, China's nine-dashed line claim encroaches on over 531,000 square kilometers of Philippine EEZ and ECS, including all the fishery, oil, gas, and mineral resources found within this vast area, which is larger than the total land area of the Philippines of about 300,000 square kilometers. This Chinese aggression is the gravest external threat to the Philippines since World War II.

The dashes are only 64 kilometers from Balabac Island, which is the southernmost island in Palawan, 70 kilometers from the coast of Burgos, Ilocos Norte, and 44 kilometers from Y'ami Island, which is the northernmost island in Batanes.<sup>29</sup> The Philippines will be left with only a sliver of water as its territorial sea and EEZ. The Philippines and China will have an extremely long common sea border, from Balabac Island in southern Palawan to Y'ami Island

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<sup>24</sup> Estimate by author.

<sup>25</sup> 1.2 trillion U.S. dollars bound for the United States.

<sup>26</sup> Area enclosed by nine-dashed line estimated by author.

<sup>27</sup> In the Matter of the South China Sea Arbitration (Republic of the Philippines v. People's Republic of China), Merits Hr'g Tr., Nov. 24, 2015, PCA Case No. 2013-19 (Perm. Ct. Arb. 2016), at 58:6-11, available at <http://www.pcacases.com/web/sendAttach/1547>.

<sup>28</sup> Area of ECS estimated by author.

<sup>29</sup> U.S. State Department, *Limits in the Seas No. 143 China: Maritime Claims In The South China Sea*, available at <https://www.state.gov/documents/organization/234936.pdf>.

in northern Batanes, stretching over 1,550 kilometers. This has far-reaching ramifications for present and future generations of Filipinos on the following:

1. National security
2. Energy security
3. Food security
4. Merchant marine and commercial aviation
5. Mineral resources security
6. Environmental security

**D. Core Dispute Between China and Philippines:  
China's Claim to 80 Percent of Philippine EEZ**

The core dispute between China and the Philippines is obvious—China wants to grab 80 percent of Philippine EEZ in the South China Sea. But to obfuscate matters, China is re-framing the South China Sea dispute as a contest between China and the United States, with the U.S. containing or constraining the rise of China, and the Philippines having allied itself with the U.S.

As a world naval power, the paramount national interest of the U.S. is freedom of navigation and over-flight so its military vessels and aircraft can sail and fly, and conduct military activities, in the high seas and EEZs of the world, including the South China Sea. On the other hand, China asserts that foreign military vessels and aircraft cannot conduct military activities in China's EEZ without China's prior permission. This is the dispute between China and the U.S. in the South China Sea. The Philippines has no interest in this dispute as the Philippines has no blue-water navy or long-range air force that can sail and fly in the high seas and EEZs of the world.

The paramount national interest of the Philippines in the South China Sea is to protect its EEZ from Chinese encroachment. This is why the Philippines filed the arbitration case against China. Obviously unable to match China's military might, the Philippines brought China to an UNCLOS tribunal, where the legality of China's encroachment could be resolved peacefully by arbitration solely in accordance with the Law of the Sea. The UNCLOS tribunal is a forum where warships, warplanes and nuclear bombs do not count.

Under the nine-dashed line, China claims the Reed Bank off the coast of Palawan, James Shoal off the coast of Sarawak, and the waters within the EEZ of Vietnam. China prohibits foreign fishing vessels from fishing in the high seas of the South China Sea, including portions of the waters of the Natuna Islands, without permission from China. In short, China claims all the resources within the nine-dashed line, which encloses about 85.7 percent of the South China Sea.

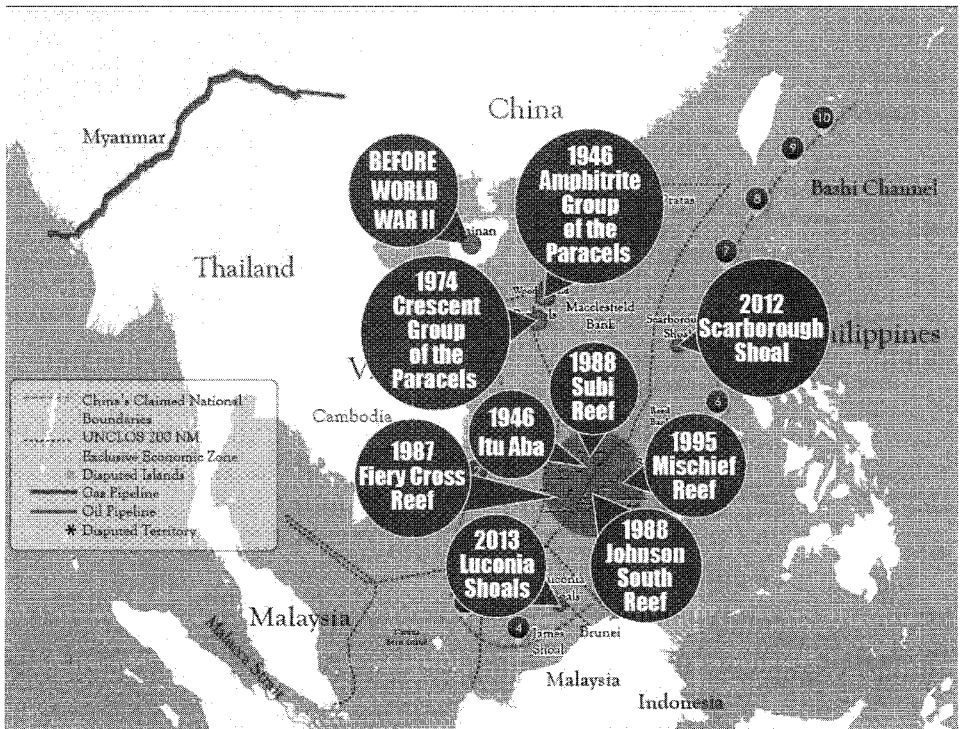


FIGURE 8: CHRONOLOGY OF CHINA’S CREEPING EXPANSION IN THE SOUTH CHINA SEA

Before World War II, China’s southernmost defense perimeter was Hainan Island. Before the war, China did not have a single soldier or sailor stationed in any island in the South China Sea other than in Hainan Island.



In 1946, right after the war, China took over the Amphitrite Group of the Paracels and Itu Aba in the Spratlys following the defeat of the Japanese, moving China's defense perimeter southward.<sup>30</sup>

In 1974, China forcibly dislodged the South Vietnamese from the Crescent Group of the Paracels.<sup>31</sup>

In 1987, China occupied Fiery Cross Reef, a two-square meter high-tide elevation protruding less than a meter above water at high tide. China occupied Fiery Cross Reef on the pretext of building a weather radar station to assist UNESCO in its global oceanic survey. In 2014-2015, China dredged and reclaimed Fiery Cross Reef into a 270-hectare island, hosting a military airbase with a three-kilometer military grade runway and a seaport.

In 1988, China forcibly evicted Vietnam from Johnson South Reef, moving farther south China's defense perimeter in the Spratlys.<sup>32</sup>

Also in 1988, China seized Subi Reef from the Philippines by erecting a radar structure and military facilities on the reef. Subi Reef is an LTE outside Philippine EEZ but within its ECS, thus forming part of Palawan's continental shelf. Subi Reef is just outside the 12 NM territorial sea of the Philippine-occupied Pagasa (Thitu) Island. Under UNCLOS, only the Philippines can erect structures or create an artificial island on Subi Reef. The waters surrounding Subi Reef are part of the high seas of the South China Sea.<sup>33</sup>

In 1995, China seized Mischief Reef from the Philippines. China at that time explained that the stilt structures it built on Mischief Reef were mere shelters for Chinese fishermen. In 2014-2015, China dredged Mischief Reef and created a 590-hectare artificial island, hosting an air-and-naval base with a three-kilometer military grade runway. Mischief Reef, located 125 NM from Palawan, is an LTE within Philippine EEZ. As an LTE beyond the territorial sea of any state, Mischief Reef is part of the continental shelf of the adjacent

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<sup>30</sup> See *Paracel Islands*, ENCYCLOPÆDIA BRITANNICA, available at <https://www.britannica.com/place/Paracel-Islands> (last updated July 20, 1998).

<sup>31</sup> *Id.*

<sup>32</sup> Joe Hung, *Chinese expansion of Spratly reefs*, THE CHINA POST, Oct. 27, 2014, available at <http://www.chinapost.com.tw/commentary/china-post/joe-hung/2014/10/27/420373/Chinese-expansion.htm>.

<sup>33</sup> See *Subi Reef Tracker*, ASIA MARITIME TRANSPARENCY INITIATIVE, available at <https://amti.csis.org/subi-reef-tracker> (last visited Dec. 30, 2016).

coastal state, which is the Philippines. Under UNCLOS, only the Philippines can exploit the natural resources or erect structures on Mischief Reef.<sup>34</sup>

Since 2012, China has been periodically laying sovereignty steel markers on the seabed of James Shoal. On January 26, 2014, a Chinese taskforce composed of three warships from the South China Sea Fleet of the People's Liberation Army (PLA) held a sovereignty oath-swearing ceremony in the waters of James Shoal.<sup>35</sup> James Shoal is a fully-submerged area at 22 meters below sea level, more than 950 NM from Hainan Island and only 43 NM from Malaysia's coast in Bintulu, Sarawak, and within Malaysia's EEZ.

In 2012, China seized Scarborough Shoal from the Philippines. From April to June 2012, there was a standoff between Philippine and Chinese vessels around Scarborough Shoal. The Americans brokered a mutual withdrawal to which both sides agreed. The Philippine vessels withdrew but the Chinese vessels did not. In November 2012, China informed the Philippines that the Chinese vessels would remain permanently in Scarborough Shoal.<sup>36</sup>

In 2013, China seized Luconia Shoals from Malaysia. Malaysian National Security Minister Shahidan Kassim posted on Facebook on June 2, 2015 photos of Luconia Shoals, 84 NM from Sarawak, and a foreign ship with this statement: "This is not an area with overlapping claims. In this case, we're taking diplomatic action."<sup>37</sup>

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<sup>34</sup> Michael Richardson, *Chinese Gambit: Seizing Spratly Reef Without a Fight*, NEW YORK TIMES, Feb. 17, 1995, available at [http://www.nytimes.com/1995/02/17/news/17ihtsprat\\_1.html](http://www.nytimes.com/1995/02/17/news/17ihtsprat_1.html).

<sup>35</sup> Stuart Grudgings, *Insight - China's Assertiveness Hardens Malaysian Stance in Sea Dispute*, REUTERS, Feb. 26, 2014, available at <http://uk.reuters.com/article/ukmalaysia-china-maritime-insight-idUKBREA1P1Z020140226>.

<sup>36</sup> Greg Torode, *Filipino Albert del Rosario A Lone Asean Voice Taking on China*, SOUTH CHINA MORNING POST, Dec. 9, 2012, available at <http://www.scmp.com/news/asia/article/1100795/filipino-albert-del-rosario-lone-asean-voice-taking-china>.

<sup>37</sup> Jason Ng & Trefor Moss, *Malaysia Toughens Stance with Beijing over South China Sea*, THE WALL STREET JOURNAL, June 8, 2015, available at <http://www.wsj.com/articles/malaysia-toughens-stance-with-beijing-over-south-china-sea-1433764608>.

That foreign ship, which anchored on Luconia Shoals in April 2013 and never left, is a Chinese coast guard vessel. Luconia Shoals cover 100 square miles and have a sandbar above water at high tide. Luconia Shoals comprise one of the largest reef formations in the South China Sea and are rich in oil and gas deposits.<sup>38</sup>

In June 2015, China conducted its first air-sea military drill in the Bashi Channel between Taiwan and the Philippines. China announced that in the future it would conduct regular air-sea military drills in the Bashi Channel.<sup>39</sup>

The creeping, eastward expansion of China's military outposts towards the nine-dashed line will allow China to enforce the nine-dashed line as China's national boundary in the South China Sea.

### E. China's "Malacca Dilemma"

Before 2013, China faced what it called the "Malacca Dilemma." Eighty percent of China's petroleum imports (and traded goods) had to pass through the narrow Malacca Strait. President Hu Jintao complained that "certain major powers" were bent on controlling the Malacca Strait. On June 15, 2004, the China Youth Daily declared: "[W]hoever controls the Strait of Malacca will also have a stranglehold on the energy route of China."<sup>40</sup> If the Malacca Strait were closed, China's economy would grind to a halt. China resolved the Malacca Dilemma in two ways.

*First*, China built oil and gas pipelines, running parallel to each other for 771 kilometers, from the coast of Myanmar in Kyaukphyu in the Bay of Bengal to Kunming in China's Yunan Province. The gas pipeline became operational in October 2013 and the oil pipeline in January 2015. Since then 30 percent of China's petroleum imports pass through these two pipelines, reducing to 50 percent China's petroleum imports that pass through the Malacca Strait.

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<sup>38</sup> *Id.*

<sup>39</sup> See Ben Blanchard, Manuel Mogato & J.R. Wu, *China Military Conducts Drills Near Taiwan, Philippines*, REUTERS, June 10, 2015, available at <http://www.reuters.com/article/us-china-defence-drills-idUSKBN0OQ0YC20150610>.

<sup>40</sup> Ian Storey, *China's Malacca Dilemma*, 6 CHINA BRIEF 8 (2006) available at <https://jamestown.org/program/chinas-malacca-dilemma>.

*Second*, China built in 2014-2015 an airbase with a seaport in Fiery Cross Reef in the Spratlys for the dual purpose of enforcing the nine-dashed line as China's national boundary and protecting China's petroleum imports that still pass through the Malacca Strait. Luconia Shoals, which China seized from Malaysia in April 2013, being much closer to the Malacca Strait than Fiery Cross Reef, will most likely be reclaimed and developed by China in the near future into an air-and-naval base. Such a base will more effectively protect China's petroleum imports (and traded goods) that pass through the Malacca Strait, aside from enforcing the nine-dashed line as China's national boundary in the South China Sea.

#### **F. China Claims Resources and Geologic Features**

In February 2010, the Philippines awarded a Service Contract (SC) to Sterling Energy (predecessor of Forum Energy) for Block SC 72 in the Reed Bank. China protested and sent a *Note Verbale* to the Philippines on February 22, 2010, "express[ing] its strong objection and indignation" and asserting "indisputable sovereignty, sovereign rights and jurisdiction over the Nansha Islands (Spratlys) and its adjacent waters." China demanded that the Philippines "withdraw the Service Contract immediately." China sent another *Note Verbale* on May 13, 2010 again demanding that the Philippines "immediately withdraw the decision to award the Service Contract" to Sterling Energy. Block SC 72 is 85 NM from Palawan, well within Philippine EEZ, and 595 NM from Hainan Island.<sup>41</sup>

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<sup>41</sup> In the Matter of the South China Sea Arbitration (Phil. v. China), Award, PCA Case No. 2013-19 (Perm. Ct. Arb. 2016) [hereinafter "Final Award"], ¶¶ 654-5, available at <http://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf>.

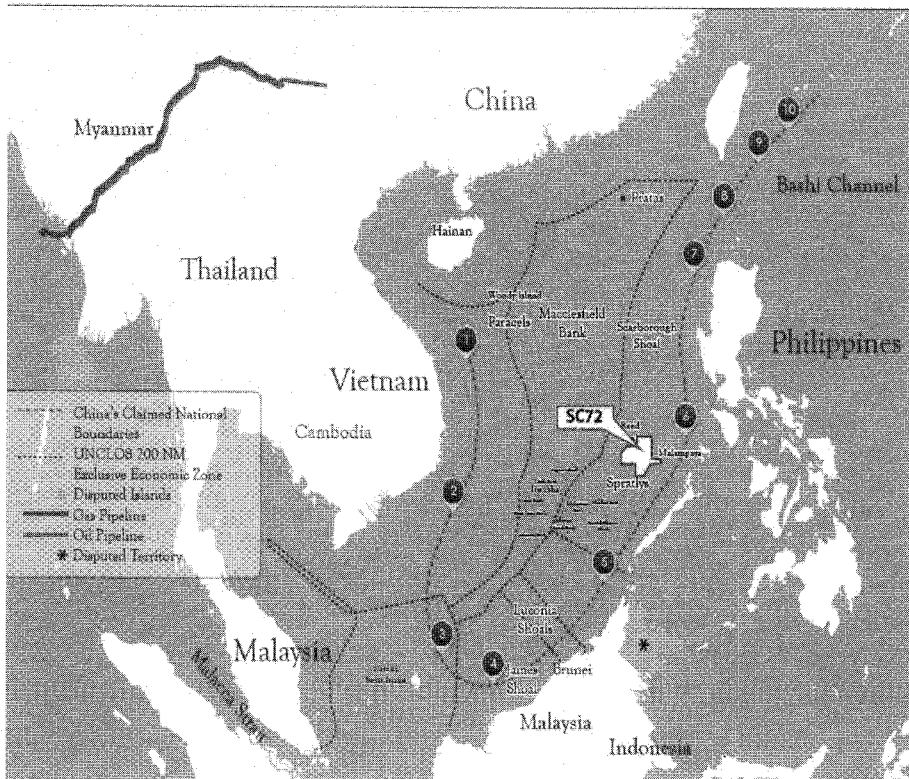


FIGURE 9: BLOCK SC 72 IN THE REED BANK

On August 2, 2010, the Nido Petroleum office in Manila received an email directly from the Chinese Embassy. The Embassy requested a meeting between the Chinese First Secretary and the Nido Petroleum vice-president. The meeting was held on August 6, 2010 in Manila. The Chinese First Secretary showed the Nido Petroleum vice-president a map depicting China's nine-dashed line, and informed him that the area covered by Nido Petroleum's service contract (Block SC 58) was "claimed by" the People's Republic of China. Since then, Nido Petroleum has not made any exploration within Block SC 58.<sup>42</sup>

<sup>42</sup> Rafael Seguis, Undersecretary for Special and Ocean Concerns, Department of Foreign Affairs, Republic of the Philippines, Memorandum to the Secretary of Foreign Affairs of the Republic of the Philippines (July 30, 2010) (unpublished); Anthony Ferrer, Country Representative, Nido Petroleum, Letter to the Office of the Undersecretary, Department of Energy of the Republic of Philippines (Oct. 7, 2013) (unpublished).

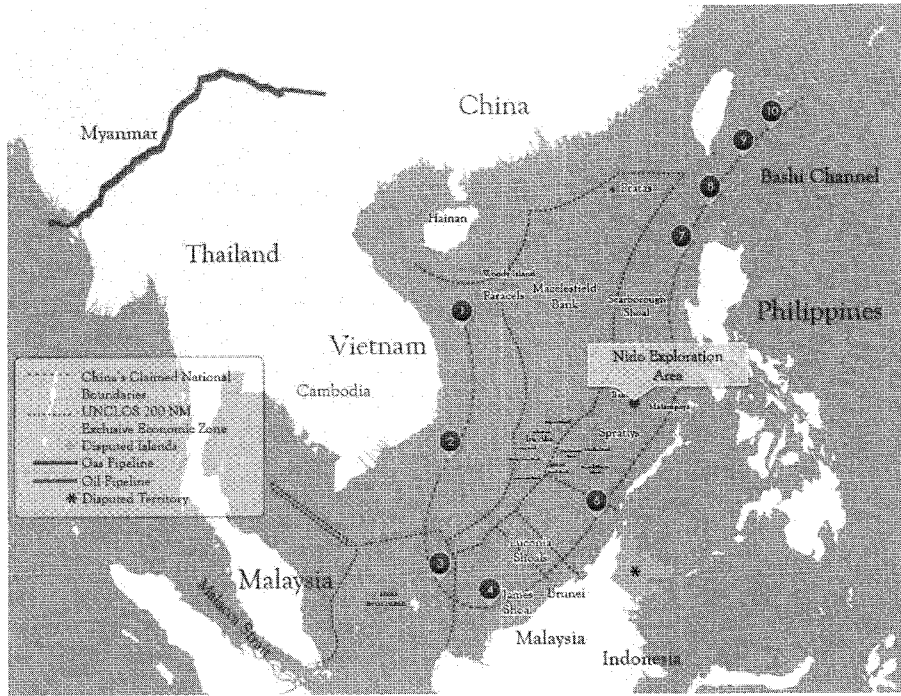


FIGURE 10: NIDO EXPLORATION AREA

In 2011, the Philippines invited bids for the exploration of Area 3 and Area 4 in the Reed Bank, well within Philippine EEZ. On July 4, 2011, China protested and sent a *Note Verbale* to the Philippines:

The Chinese government urges the Philippine side to immediately withdraw the bidding offer in Areas 3 and 4, refrain from any action that *infringes on China's sovereignty and sovereign rights*.<sup>43</sup>

<sup>43</sup> *Final Award*, ¶ 667. (Emphasis supplied.)

Since 2011, Chinese coast guard vessels have prevented Philippine-commissioned ships from undertaking oil and gas surveys in the Reed Bank, which is entirely within Philippine EEZ.<sup>44</sup> The nine-dashed line also cuts through Malampaya, the Philippines' largest operating gas field that supplies 40 percent of the energy requirement of Luzon. Malampaya will run out of gas in 10 years.<sup>45</sup> There is urgency to develop Reed Bank as a replacement for the rapidly depleting Malampaya; otherwise, there will be 10 to 12 hours of brownouts everyday in Luzon 10 years hence.

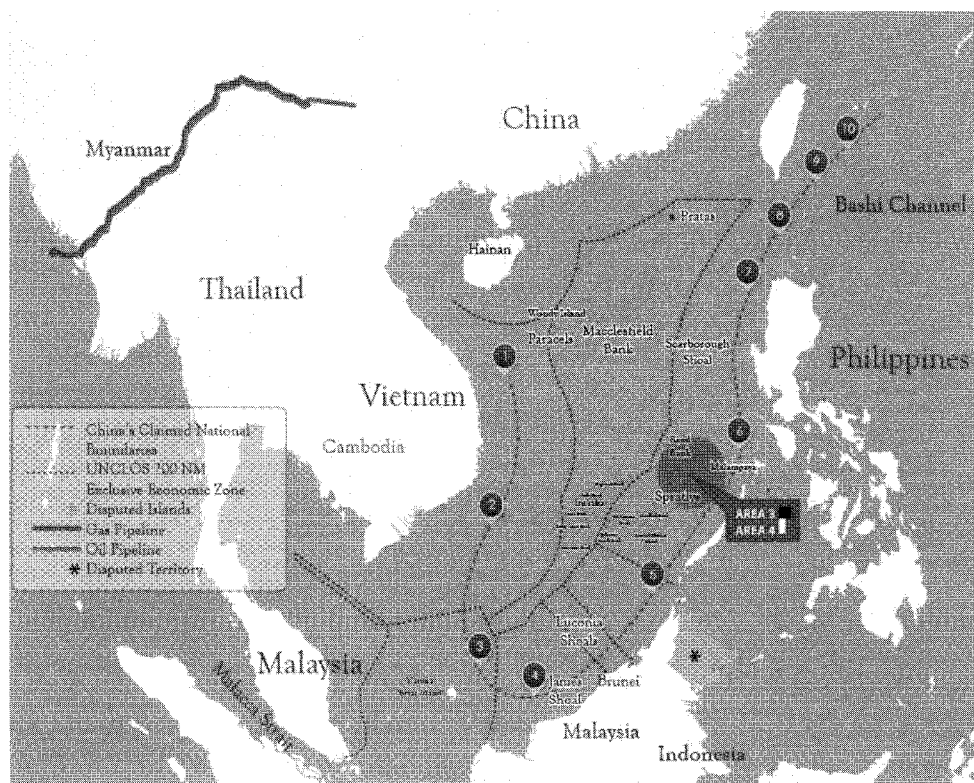


FIGURE 11: AREAS 3 AND 4 IN REED BANK

<sup>44</sup> See Chichi Conde, Karl John Reyes & Abigail Kwok, *Malacanang: Reed Bank is 80 Miles from Palawan, 500 Miles from China*, INTERAKSYON, June 9, 2011, available at <http://interaksyon.com/article/5323/malacanang-reed-bank-is-80-miles-from-palawan-500-miles-from-china>.

<sup>45</sup> See *Malampaya Gas Field Can Fuel Plants after 2030*, RAPPLER, Sept. 29, 2014, available at <http://www.rappler.com/business/industries/173-power-and-energy/70470/malampaya-fuel-plants-2030>.

In 2012, China publicized for international bidding concession blocks within the EEZ of Vietnam. In 2014, China placed the 1 billion U.S. dollars HD 981 oil rig some 130 NM from Vietnam's coast, well within Vietnam's EEZ. In protest, Vietnamese workers in export processing zones in Vietnam rioted—burning several Chinese factories. A Vietnamese fishing boat sank near the oil rig after being rammed by a Chinese vessel.<sup>46</sup>

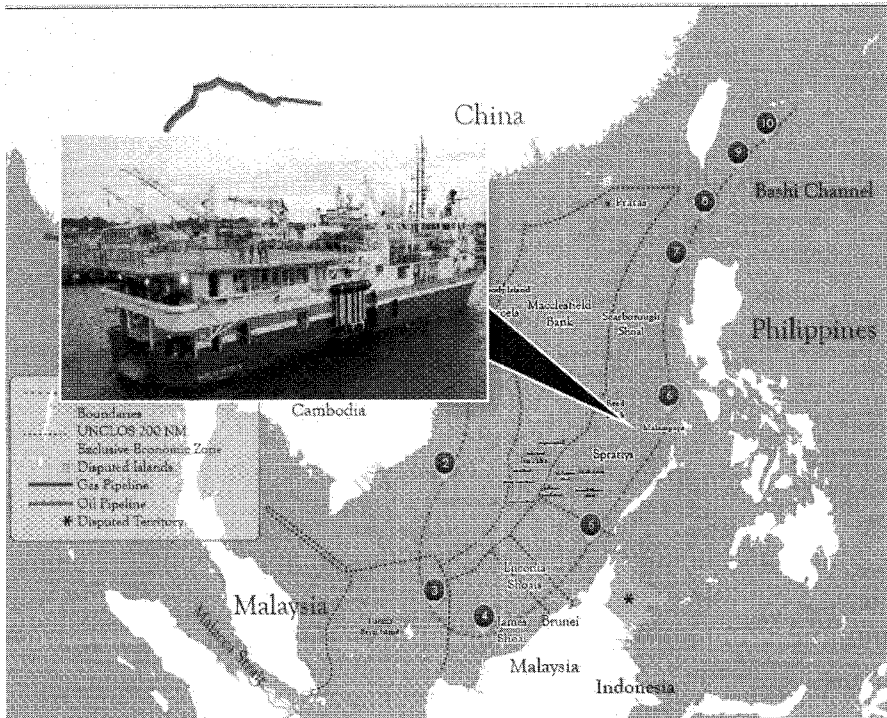


FIGURE 12: MV VERITAS VOYAGER<sup>47</sup>

<sup>46</sup> Paul Leaf, *Learning from China's Oil Rig Standoff with Vietnam*, THE DIPLOMAT, Aug. 30, 2014, available at <http://thediplomat.com/2014/08/learning-from-chinas-oilrig-standoff-with-vietnam>.

<sup>47</sup> Which was prevented by Chinese Coast Guard vessels from undertaking oil and gas surveys in Reed Bank on March 2011.



On March 19, 2016, KP Hiu 11, an Indonesian maritime enforcement vessel, arrested and put on board eight Chinese fishermen illegally operating the fishing boat Kway Fey within the EEZ of Indonesia's Natuna Islands facing the South China Sea. KP Hiu 11 towed Kway Fey towards Natuna. A Chinese coast guard vessel followed, and within Natuna's territorial sea, rammed Kway Fey, successfully prying it loose from the towing KP Hiu 11. KP Hiu 11 headed home with the nine Chinese fishermen but without Kway Fey. China later claimed that Kway Fey was operating within China's "traditional fishing grounds."<sup>48</sup>

All these acts of China, among so many others, demonstrate beyond doubt that China is claiming, beyond its UNCLOS-derived maritime entitlements, sovereign rights and jurisdiction to all the waters, fishery, oil, gas, mineral resources, as well as the seabed and subsoil, enclosed by the nine-dashed line as if the South China Sea were a Chinese lake.

### G. China's Grand Design in the South China Sea

China's grand design is to control the South China Sea for *economic and military purposes*. China wants all the fishery, oil, gas, and mineral resources within the nine-dashed line. In the 1990s, China was taking only 20 percent of the annual fish catch in the South China Sea. Today, China is taking 50 percent (and growing) of the annual fish catch in the South China Sea as more than 80 percent of its coastal waters are already polluted.<sup>49</sup> China has the largest fishing fleet in the world, with some 220,000 sea-going vessels, about 2,600 of which go all the way to East Africa.<sup>50</sup> China's fish consumption is the highest in the world considering its 1.4 billion population.<sup>51</sup>

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<sup>48</sup> Ristian Atriandi Supriyanto, *Breaking the Silence: Indonesia vs China in the Natuna Islands*, THE DIPLOMAT, Mar. 23, 2016, available at <http://thediplomat.com/2016/03/breaking-the-silence-indonesia-vs-china-in-the-natuna-islands/>. (Emphasis supplied.)

<sup>49</sup> Adam Minter, *The Cost to Doing Nothing in the South China Sea*, BLOOMBERG VIEW, Nov. 16, 2015, available at <https://www.bloomberg.com/view/articles/2015-11-16/the-cost-to-doing-nothing-in-the-south-china-sea>.

<sup>50</sup> Zhang Hangzhou, *China's Fishing Industry: Current Status, Government Policies, and Prospects*, paper presented at a Maritime Power Conference at CNA Conference Facility in Arlington, Virginia, available at [https://www.cna.org/cna\\_files/pdf/China-Fishing-Industry.pdf](https://www.cna.org/cna_files/pdf/China-Fishing-Industry.pdf) (July 28-29, 2015).

<sup>51</sup> *China Tops World in Catch and Consumption of Fish*, NATIONAL GEOGRAPHIC WEBSITE, available at <http://press.nationalgeographic.com/2010/09/22/china-tops-catch-consumption-fish/>.

China is the largest net importer of petroleum in the world.<sup>52</sup> China wants the lion's share of the oil and gas in the South China Sea. The Chinese estimate that the South China Sea holds 130 billion barrels of oil,<sup>53</sup> and if this is correct, the South China Sea has more oil than either Kuwait or the United Arab Emirates.<sup>54</sup> A reserve of 130 billion barrels of oil can supply China's oil needs for 22 years.<sup>55</sup>

The South China Sea is also rich in methane hydrates—said to be one of the fuels of the future. China wants to secure all these methane hydrates, which can fuel China's economy for 130 years.<sup>56</sup>

China also wants the South China Sea as a sanctuary for its nuclear-armed submarines—free from surveillance by U.S. submarine-hunting Poseidon aircraft or U.S. nuclear-powered attack submarines. China wants a second-strike nuclear capability, joining the ranks of the U.S. and Russia.

A second-strike capability means a nuclear power, after its land-based nuclear weapons are obliterated in a pre-emptive first-strike by a nuclear-armed enemy, can still retaliate with its nuclear-armed ballistic missile submarines. This second-strike capability deters an enemy from making a pre-emptive first strike.

## H. “Separated by a Narrow Body of Water”

On February 25, 2016, Chinese Foreign Minister Wang Yi told his audience at the Center for Strategic and International Studies in Washington, D.C.: “*We are neighbors (with the Philippines) just separated by a narrow body of water,*” referring to the sliver of maritime space between the nine-dashed line and the Philippine coastline in the West Philippine Sea. Wang Yi also declared in the same forum that the decision of Philippine officials to file the arbitration case

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<sup>52</sup> Candace Dunn, *China is Now the World's Largest Importer of Petroleum and Other Liquid Fuels*, US ENERGY INFORMATION WEBSITE, at <https://www.eia.gov/todayinenergy/detail.php?id=15531>.

<sup>53</sup> Robert Kaplan, *Why the South China Sea is So Crucial*, BUSINESS INSIDER, Feb. 20, 2015, available at <http://www.businessinsider.com.au/why-the-south-china-sea-is-so-crucial-2015-2>.

<sup>54</sup> *Top 10 Countries With The World's Biggest Oil Reserves*, GLOBAL EUROPEAN ANTICIPATION BULLETIN WEBSITE, available at <http://geab.eu/en/top-10-countries-with-the-worldsbiggest-oil-reserves> (last visited Apr. 2, 2017).

<sup>55</sup> In 2016, China's oil consumption was 1.7 billion barrels. Assuming an annual increase in consumption of 10 percent, 130 billion barrels of oil will last for 22 years.

<sup>56</sup> Tim Maverick, *Motive Behind South China Sea Takeover*, WALL STREET DAILY, Oct. 5, 2015, available at <https://www.wallstreetdaily.com/2015/10/05/methane-hydrates-south-china-sea>.

was “irresponsible to the Filipino people and the future of the Philippines.” Wang Yi imperiously believes that Philippine officials would have acted responsibly if they accepted as a fact that China and the Philippines are “just separated by a narrow body of water.”<sup>57</sup>

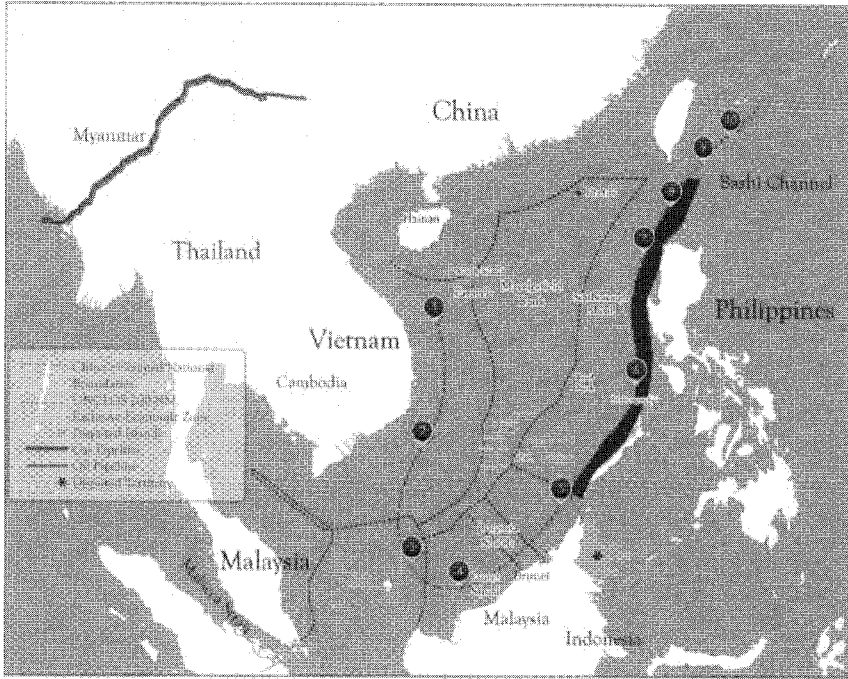


FIGURE 13: THE “NARROW BODY OF WATER” SUPPOSEDLY SEPARATING CHINA AND THE PHILIPPINES<sup>58</sup>

<sup>57</sup> See *Statesmen’s Forum: Wang Yi, Minister of Foreign Affairs, PRC*, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES WEBSITE, available at <https://www.csis.org/events/statesmens-forum-wang-yi-minister-foreign-affairs-prc>.

<sup>58</sup> The dark blue shaded area is what will be left of the Philippine EEZ and territorial sea in the South China Sea if China succeeds in making the nine-dashed line China’s national boundary. The dark blue shaded area is what Chinese Foreign Minister Wang Yi referred to as the “narrow body of water” that separates the Philippines and China.

## I. China's Militarization of the South China Sea

During his visit to Washington, D.C. in September 2015, Chinese President Xi Jinping pledged that China would not militarize the artificial islands that China built in the Spratlys. However, by March 2017, China had completed building concrete hexagonal structures, 66 feet long and 33 feet wide, with retractable roofs, on Mischief Reef, Fiery Cross Reef and Subi Reef in the Spratlys.<sup>59</sup>

These hardened structures will obviously house China's HQ-9 anti-aircraft missiles that have a speed of Mach 4.2 and an operational range of 200 kilometers. These are the same missiles that China installed on Woody Island in the Paracels in 2016.

China can now declare and impose an Air Defense Identification Zone (ADIZ) in the South China Sea, with only the northeastern part of the South China Sea not covered by the radar of its anti-aircraft missile system. An air and naval base in Scarborough Shoal will complete China's radar coverage of the entire South China Sea, backed up by anti-aircraft missile batteries covering a radius of 200 kilometers. Such air and naval base in Scarborough Shoal will also secure the Bashi Channel—China's outlet to the Pacific for its nuclear-armed ballistic missile submarines based in Hainan Island.

In addition, China's three-kilometer military grade runways and hardened hangars on Fiery Cross Reef, Subi Reef and Mischief Reef can accommodate a total of 72 jet fighters and fifteen bombers, transporters and refueling aircraft.<sup>60</sup>

Chinese Premier Li Keqiang bewildered everyone when he stated on 24 March 2017 that the Chinese military facilities in the Spratlys are there to maintain "freedom of navigation." More incredibly, Li Keqiang declared that the military facilities will not militarize China's artificial islands in the Spratlys.<sup>61</sup>

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<sup>59</sup> Tim Maverick, *Motive Behind South China Sea Takeover*, WALL STREET DAILY, Oct. 5, 2015, available at <https://www.wallstreetdaily.com/2015/10/05/methane-hydrates-south-china-sea>.

<sup>60</sup> Michael Brady, *China's South China Sea ambitions require a diplomatic response*, ASIA TIMES, Apr. 1, 2017, available at <http://www.atimes.com/china-continues-militarization-south-china-sea>.

<sup>61</sup> Colin Packham, *China: Even if we're putting missiles on South China Sea islands, we're not militarizing them*, REUTERS, Mar. 25, 2017, available at <http://www.businessinsider.com/china-even-if-were-putting-missiles-on-south-china-seaislands-were-not-militarizing-them-2017-3>.

China has a maritime militia consisting of hundreds of thousands of fishermen who are well-trained to spy on foreign warships, harass foreign fishing vessels, and act as eyes and ears for the PLA Navy. Their fishing vessels, numbering about 20,000, are equipped with China's Beidou satellite navigation and communications system. Their fuel is subsidized by the Chinese Government. The PLA's official newspaper declared: "Putting on camouflage these fishermen qualify as soldiers, taking off the camouflage they become law-abiding fishermen."<sup>62</sup>

Under its 2015 China Military Strategy (CMS), China is shifting from offshore waters defense to combined offshore waters defense and open seas protection. The CMS declares that the traditional mentality that land outweighs the sea must be abandoned. Instead, the CMS attaches great importance to managing the seas and oceans and "protecting maritime rights and interests."<sup>63</sup> The phrase "protecting maritime rights and interests" means enforcing the nine-dashed line as China's national boundary.

China's coast guard is the largest blue water coast guard fleet in the world. China has more coast guard vessels than Japan, Vietnam, Indonesia, Malaysia, and the Philippines combined. In 2016, China deployed its second 10,000-ton coast guard vessel, the world's largest blue water coast guard vessels.

China is mass-producing destroyers, frigates, corvettes, and other warships at a faster rate than any other country in world history during peacetime. According to the U.S. Office of Naval Intelligence, "[d]uring 2014 alone, more than sixty naval ships and crafts were laid down, launched, or commissioned, with a similar number expected through the end of 2015."<sup>64</sup> In 2016, China commissioned eighteen ships, including destroyers, frigates and corvettes.<sup>65</sup>

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<sup>62</sup> Christopher Cavas, *Little Blue Men Take Navy's Place in Disputes*, DEFENSE NEWS, Nov. 2, 2015, available at <http://www.defensenews.com/story/defense/naval/2015/11/02/china-lassen-destroyer-sprately-islands-south-china-seaandrew-erickson-naval-war-college-militia-coast-guard-navy-confrontationterritorial-dispute/75070058>.

<sup>63</sup> See *China's Military Strategy*, CHINA DAILY, May 26, 2015, available at [http://www.chinadaily.com.cn/china/2015-05/26/content\\_20820628.htm](http://www.chinadaily.com.cn/china/2015-05/26/content_20820628.htm).

<sup>64</sup> Alexander Sullivan & Andrew Erickson, *The Big Story Behind China's New Military Strategy*, THE DIPLOMAT, June 5, 2015, available at <http://thediplomat.com/2015/06/the-big-story-behind-chinas-new-military-strategy>.

<sup>65</sup> *Worried by Trump, China Plays Catch-Up with US Navy*, WORLD IS ONE NEWS, Feb. 26, 2017, available at <https://www.wionews.com/world/worried-by-trump-chinaplays-catch-up-with-us-navy-12803>.

China wants to make the South China Sea a sanctuary for its nuclear-armed ballistic missile submarines, safe from surveillance by U.S. Poseidon aircraft which can drop torpedoes from the air. China's four Jin- class nuclear-powered submarines are expected to be equipped with new nuclear-armed missiles with a range of at least 7,500 kilometers, putting the entire continental U.S. within reach if the missiles are launched from the mid-Pacific.

### III. INTER-STATE DISPUTES IN THE SOUTH CHINA SEA

#### A. Territorial Disputes

The dispute in the South China Sea is rooted in conflicting territorial and maritime claims over islands, rocks, reefs, and maritime zones among six countries bordering the South China Sea.

A territorial dispute refers to conflicting claims of *sovereignty* over (1) continental land, (2) islands, whether or not capable of human habitation or economic life of its own, or (3) rocks above water at high tide. General principles of international law govern territorial disputes in the South China Sea.

A territorial dispute can be settled only by agreement of the parties through negotiations, through voluntary submission to international arbitration or by adjudication in the International Court of Justice (ICJ) if the parties have accepted the jurisdiction of the Court or reach a special agreement to refer the matter to the Court. No claimant state can bring another claimant state to compulsory arbitration on the territorial dispute without the consent of the latter, unless there is a prior acceptance of compulsory jurisdiction by both parties under Article 36(2) of the ICJ Statute, or a prior treaty requiring submission of the territorial dispute to compulsory arbitration (e.g. the Pact of Bogota). These exceptional situations do not apply to the disputant states in the South China Sea.

In the *Spratly Islands*, China, Vietnam, the Philippines, Malaysia, and Brunei have territorial disputes, with China and Vietnam claiming the entire Spratlys, while the Philippines and Malaysia claiming only certain islands and rocks above water at high tide. Louisa Reef, within Brunei's EEZ and about 1 meter above water at high tide, is claimed by Brunei, and by China as Nantong Reef.

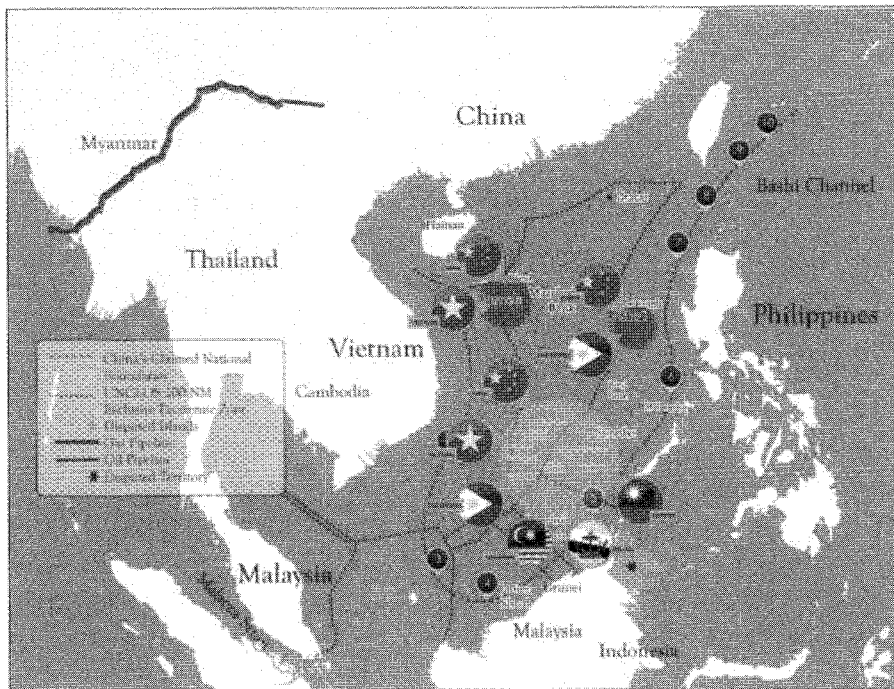


FIGURE 14: SOUTH CHINA SEA DISPUTANT STATES

China and Vietnam have a territorial dispute over the *Paracels*.

China and the Philippines have a territorial dispute over *Scarborough Shoal*. The maritime entitlements of rocks above water at high tide, like Scarborough Shoal, can be independently determined without deciding which state exercises sovereignty over the rocks. One does not need to know which state has sovereignty over such rocks to conclude with certainty that such rocks are not capable of sustaining human habitation or economic life of their own. Not a single blade of grass grows on the rocks of Scarborough Shoal, and not a single drop of fresh water can be squeezed from those rocks. Scarborough Shoal, whose biggest rock is 1.2 meters above water at high tide, can generate only a 12 NM territorial sea, regardless of which state has sovereignty over the shoal.

## B. Maritime Disputes

A maritime dispute can refer to, *inter alia*, (1) overlapping maritime entitlements, e.g. territorial sea,<sup>66</sup> EEZs,<sup>67</sup> and ECS<sup>68</sup> or (2) disputes on the interpretation or application of UNCLOS. The latter governs maritime disputes in the South China Sea.

For UNCLOS states parties, a maritime dispute can be settled by agreement of the parties through negotiations, and failing that, through compulsory arbitration.<sup>69</sup> All disputant states in the South China Sea dispute have ratified UNCLOS.

Under Article 298(a)(i) of UNCLOS, states parties can opt out of compulsory arbitration on disputes involving, *inter alia* (1) sea boundary delimitation of overlapping maritime entitlements, and (2) disputes involving “historic bays or titles.” These are the grounds in Article 298 that China invoked in questioning the jurisdiction of the Arbitral Tribunal. China opted out of compulsory arbitration in 2006.

The term “historic bays” refers to waters in deeply indented bays or gulfs that have acquired the status of internal waters. The term “historic titles” can only be invoked in the delimitation of the territorial sea.<sup>70</sup> A “historic title” means ownership or sovereignty.

In short, the opt-out clause applies only to disputes involving overlapping territorial seas, overlapping EEZs or overlapping ECSs, and disputes involving the territorial sea or deeply indented bays or gulfs forming part of internal waters.

A state party that opts out of compulsory arbitration can still be subject to compulsory conciliation. A state party cannot opt out of compulsory conciliation.<sup>71</sup>

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<sup>66</sup> UNCLOS art. 15.

<sup>67</sup> Art. 74.

<sup>68</sup> Art. 83.

<sup>69</sup> Art. 298, ¶ 1(a)(i).

<sup>70</sup> Art. 15.

<sup>71</sup> Art. 298, ¶ 1(a)(i).



China, on the one side, and on the other side, Vietnam, the Philippines, Malaysia, Brunei, and Indonesia have a *maritime* dispute with China whose nine-dashed line encroaches on the EEZs of these five ASEAN states.

The dispute between the Philippines and China involves the EEZ and ECS<sup>72</sup> of the Philippines in the West Philippine Sea, which forms part of the South China Sea. Under Administrative Order No. 29 (2012), the West Philippine Sea refers to the waters covered by the maritime entitlements (territorial sea and EEZ) of the Philippines in the South China Sea. The West Philippine Sea also includes the Philippine ECS. Under Article 77(3) of UNCLOS, the right of the Philippines to its continental shelf, including its 150 NM extended continental shelf, does not depend on any occupation or proclamation. Such continental shelf inheres *ipso facto* and *ab initio* to the Philippines by virtue of its sovereignty over its land territory.

#### IV. THE SOUTH CHINA SEA ARBITRATION CASE: REPUBLIC OF THE PHILIPPINES V. PEOPLE'S REPUBLIC OF CHINA

The five major issues that the Philippines raised in the arbitration are:<sup>73</sup>

1. China's Historic Rights Claim — China's claim to historic rights beyond its territorial sea is contrary to UNCLOS. The nine-dashed line has no legal basis and cannot generate any maritime entitlement (territorial sea, exclusive economic zone or extended continental shelf).
2. Geologic Features in the Spratlys — No geologic feature in the Spratlys is capable of human habitation or economic life of its own so as to generate a 200 NM EEZ that can overlap with Palawan's EEZ.
3. China-Occupied Geologic Features in the Spratlys — The Arbitral Tribunal has jurisdiction to rule on the maritime entitlement and status (whether LTE or High-Tide Elevation) of geologic features. These are not sovereignty disputes. A claim to an EEZ is not a claim to sovereignty because a state cannot exercise sovereignty over its EEZ, which is a maritime entitlement first created and

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<sup>72</sup> In the South China Sea Arbitration, the Philippines did raise the issue of China's encroachment of Philippine EEZ although China's nine-dashed line encroaches on Philippine ECS.

<sup>73</sup> See *Vinal Award*.

governed by UNCLOS. The status of an LTE beyond the territorial sea cannot involve any sovereignty dispute because such LTE is incapable of sovereign ownership. Moreover, maritime entitlement is separate from sea boundary delimitation because a geologic feature's maritime entitlements do not always or necessarily overlap with the maritime entitlements of another state.

4. Scarborough Shoal — Scarborough Shoal is a rock above water at high tide, and is entitled only to a 12 NM territorial sea. Filipino fishermen have traditional fishing rights in the territorial sea of Scarborough Shoal, regardless of which state exercises sovereignty over the shoal.
5. Harm to the Marine Environment — China caused severe harm to the marine environment.

#### **A. China's Historic Rights Claim**

On China's historic rights claim, the Arbitral Tribunal upheld the Philippine position that:

1. The nine-dashed line cannot serve as legal basis to claim any maritime entitlement (territorial sea, EEZ or ECS) under UNCLOS. In short, "there is no legal basis for any Chinese historic rights, or sovereign rights and jurisdiction beyond those provided for in the Convention in the waters of the South China Sea encompassed by the 'nine-dash line.'"<sup>74</sup>
2. China's maritime entitlements, just like those of other coastal states, cannot extend beyond the limits prescribed under UNCLOS, which requires maritime entitlements to be claimed only from baselines along the coast of continental land, island or rock above water at high tide.
3. All historic rights in the EEZ, ECS and high seas were extinguished upon effectivity of UNCLOS:

[A]ny historic rights that China may have had to the living and non-living resources within the 'nine-dash line' were superseded, as a matter of law and as between the

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<sup>74</sup> *Final Award*, ¶ 631.

Philippines and China, by the limits of the maritime zones provided for by the Convention.<sup>75</sup>

4. Moreover:

[T]he Tribunal concludes that China's claim to historic rights to the living and non-living resources within the 'nine-dash line' is incompatible with the Convention to the extent that it exceeds the limits of China's maritime zones as provided for by the Convention.<sup>76</sup>

*1. Fallacy of China's Historic Claim*

Historical facts, even if true, relating to discovery and exploration in the Age of Discovery (early 15th century until the 17th century) or even earlier, have no bearing whatsoever in the resolution of maritime disputes under UNCLOS. Neither Spain nor Portugal can revive its 15th century claims to ownership of oceans and seas of our planet, despite the 1481 Papal Bull confirming the division of the then undiscovered world between Spain and Portugal.<sup>77</sup> Similarly, the sea voyages of the Chinese Imperial Admiral Zheng He, from 1405 to 1433, can never be the basis of any claim to the South China Sea. Neither can historical names serve as basis for claiming the oceans and seas.

The South China Sea was not even named by the Chinese but by European navigators and cartographers. To the Chinese during the period of the dynasties, and later the Republic of China and the People's Republic of China, the sea was simply the "South Sea" (Nan Hai) without the word "China."<sup>78</sup> India cannot claim the Indian Ocean, and Mexico cannot claim the Gulf of Mexico, in the same way that the Philippines cannot claim the Philippine Sea, just because historically these bodies of water have been named after these countries.

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<sup>75</sup> *Id.* ¶ 262.

<sup>76</sup> *Id.* ¶ 261.

<sup>77</sup> *Papal Bull*, NEW WORLD ENCYCLOPEDIA, available at [http://www.newworldencyclopedia.org/entry/papal\\_bull](http://www.newworldencyclopedia.org/entry/papal_bull) (last modified Mar. 20, 2015).

<sup>78</sup> BILL HAYTON, THE SOUTH CHINA SEA: THE STRUGGLE FOR POWER IN ASIA 701 (2014).

Neither can ancient conquests be invoked under international law to claim territories. Greece cannot claim Egypt, Iran, Turkey, and the land stretching up to Pakistan just because Alexander the Great conquered that part of the world from 334-323 BCE.<sup>79</sup> Neither can Mongolia claim China just because Genghis Khan conquered China, with his grandson Kublai Khan founding the Yuan Dynasty of Mongols that ruled China from 1279 to 1368 CE.<sup>80</sup> Neither can Italy claim the land conquered and ruled by the Roman Empire from 27 BCE to 476 CE, stretching from Europe to the Middle East.<sup>81</sup>

Under international law, as held in the *Island of Palmas Case*,<sup>82</sup> a state cannot maintain title to territory based on discovery alone where subsequent to such discovery another state has shown “continuous and peaceful display of territorial sovereignty” over the same territory. Since the 19th century, the rule in international law has been that discovery alone does not vest title, which can arise only if followed within a reasonable period by continuous and peaceful display of sovereignty through “effective occupation.” Even in the 16th century, actual possession within a reasonable time was necessary to maintain title to territory acquired through discovery.<sup>83</sup>

Under UNCLOS, a state can only invoke “historic” rights to claim a territorial sea or internal waters in deeply indented bays or gulfs along the coast of the mainland, like in the Gulf of Fonseca.<sup>84</sup> Historic rights or historic title cannot be invoked to claim EEZs or ECSs. The creation of the EEZ under Article 56 of UNCLOS with “sovereign rights,” which means supreme rights, accorded to the adjacent coastal state, extinguished all historic rights or claims by other states to the EEZ of a coastal state. The word “exclusive” in the term EEZ means the economic exploitation of the zone is exclusive to the adjacent coastal state. No one may exploit the natural resources in the EEZ without the express consent of the coastal state.<sup>85</sup>

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<sup>79</sup> Frank W. Wallbank, *Alexander the Great: King of Macedonia*, ENCYCLOPEDIA BRITANNICA, available at <https://www.britannica.com/biography/Alexander-the-Great> (last updated Apr. 7, 2015).

<sup>80</sup> See JOHN MAN, KUBLAI KHAN (2006).

<sup>81</sup> *Roman Empire*, ENCYCLOPEDIA BRITANNICA, available at <https://www.britannica.com/place/Roman-Empire> (last updated Oct. 24, 2016).

<sup>82</sup> *Island of Palmas (U.S. v. Neth.)*, 2 R.I.A.A. 829 (Perm. Ct. Arb. 1928).

<sup>83</sup> *Id.*

<sup>84</sup> *Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.)*, 1992 I.C.J. 351 (Sept. 11). See UNCLOS art. 10.

<sup>85</sup> Art. 77, ¶ 3.

By virtue of its sovereignty over land, a coastal state has *ipso facto* and *ab initio* inherent right to a continental shelf.<sup>86</sup> A coastal state's right to a continental shelf does not depend on any occupation or proclamation.<sup>87</sup>

China actively participated in the negotiations of the UNCLOS from 1973 to 1982. China aligned itself with the developing coastal countries that demanded a 200 NM EEZ where the coastal state has *exclusive sovereign rights* to exploit the EEZ. China never claimed that historic rights could be an exception to the exclusive sovereign rights of coastal states in their EEZs. In fact, the 200 NM EEZ was agreed upon on the clear understanding that all historic claims of other states in the EEZ of a coastal state were deemed extinguished.<sup>88</sup>

China made the following *formal declaration* upon its ratification of UNCLOS on June 7, 1996: "In accordance with the provisions of the United Nations Convention on the Law of the Sea, the People's Republic of China shall enjoy sovereign rights and jurisdiction over an exclusive economic zone of 200 nautical miles and the continental shelf."<sup>89</sup>

*Upon ratification, China did not claim any historic rights or jurisdiction beyond its entitlements under UNCLOS.* In fact, China expressly aligned its declared maritime rights in accordance with what UNCLOS prescribed for the EEZ and the continental shelf.

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<sup>86</sup> North Sea Continental Shelf (Ger. v. Ned.) (Ger. v. Den.), Judgment, 1969 I.C.J. 3, 22 (Feb. 20).

<sup>87</sup> UNCLOS art. 77, ¶ 3.

<sup>88</sup> *Final Award*, ¶ 393; WU SHICUN & KIEYUAN ZOU, ARBITRATION CONCERNING THE SOUTH CHINA SEA: PHILIPPINES VERSUS CHINA 128 (2016); Zheng Wang, *China and UNCLOS: An Inconvenient History*, THE DIPLOMAT, July 11, 2016, available at <http://thediplomat.com/2016/07/china-and-unclos-an-inconvenient-history>; Haryo Budi Nugroho, *Chinese Leadership on the Law of the Sea: Then and Now*, THE JAKARTA POST, July 20, 2016, available at <http://www.thejakartapost.com/academia/2016/07/20/chinese-leadership-on-the-law-of-the-sea-then-and-now.html>.

<sup>89</sup> UN Office of Legal Affairs Treaty Section, Multilateral Treaties Deposited with the Secretary-General, at 450, ¶ 1, U.N. Doc. ST/LEG/SER.E/26 (Apr. 1, 2009). Law of the People's Republic of China on the Exclusive Economic Zone and the Continental Shelf, art. 14 (1998), available at <http://www.asianlii.org/cn/legis/cen/laws/lotprocoteezatcs790/>.

The first time that a Chinese law mentioned “historical rights” in relation to China’s maritime claims was in China’s 1998 Act on the EEZ and Continental Shelf, after China signed in 1982 and ratified the UNCLOS in 1996. Article 14 of the 1998 Act enigmatically states: “No provision of this Law can prejudice historical rights of the People’s Republic of China.” There was no explanation of the nature, basis or scope of these “historical rights.”<sup>90</sup>

Even assuming, *quod non*, historic rights can be claimed beyond the territorial sea, the following conditions must first be satisfied for historic rights to be valid under international law: *first*, the state actually exercised authority over the area where it claims historic rights; *second*, the state exercised that authority continuously and for a long period of time; and *third*, other states either acquiesced in or failed to oppose the exercise of such authority.<sup>91</sup>

China’s nine-dashed line claim fails to satisfy any of these conditions.

Despite the irrelevance of historical facts, such as ancient discovery, exploration or conquests, to present-day maritime claims under UNCLOS, China persists in invoking “historical facts” as basis for its nine-dashed line claim. China, however, does not specify what these historical facts are.<sup>92</sup>

## 2. Maps and Historic Rights

China points to ancient Chinese maps as “historical facts” to claim the islands, rocks, reefs, and waters within the nine-dashed line in the South China Sea. China, however, refuses to show to the world these ancient maps. In any event, under international law, a map per se does not constitute a territorial title or a legal document to establish territorial rights. In the *Frontier Dispute Case*,<sup>93</sup> the ICJ explained the evidentiary value of maps in this way:

[M]aps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed

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<sup>90</sup> Law of the People’s Republic of China on the Exclusive Economic Zone and the Continental Shelf art. 14 (1998), available at <http://www.asianlii.org/cn/legis/cen/laws/lotprocoteezates790/>.

<sup>91</sup> UN Secretariat, Juridical Regime of Historic Waters, Including Historic Bays, at 13, ¶ 80, U.N. Doc No. A/CN.4/143 (Mar. 9, 1962), available at [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_143.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_143.pdf).

<sup>92</sup> *Wang Yi Press Conference*, VOLTAIRE NETWORK WEBSITE, available at <http://www.voltairenet.org/article182652.html>.

<sup>93</sup> *Frontier Dispute (Burk. Faso v. Mali)*, Judgment, 1986 I.C.J. 554 (Dec. 22) (Citations omitted.)

by international law with intrinsic legal force for the purpose of establishing territorial rights. Of course, in some cases maps may acquire such legal force, but where this is so the legal force does not arise solely from their intrinsic merits: it is because such maps fall into the category of physical expressions of the will of the State or States concerned.

This is the case, for example, when maps are annexed to an official text of which they form an integral part. Except in this clearly defined case, maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts.<sup>94</sup>

Thus, for maps to constitute binding material and relevant evidence as against other states, the contending parties must agree to such maps. This is a matter of common sense, as one state cannot just unilaterally draw a map to claim an entire sea or territory and use such map as evidence of title against another state or the whole world. A state cannot enlarge its rights under international law by its own unilateral acts or domestic legislations in contravention of international law. The Philippines cannot draw a U-shaped line in the Pacific Ocean and claim the enclosed waters as its indisputable territory just because the ancestors of the Filipinos, the Austronesians, crisscrossed the Pacific Ocean in their *balangays* 3,000 years ago. Yet, this is exactly what China did in 1947 when China drew its nine-dashed line claim in the South China Sea, citing as basis supposed “historical facts.”

However, maps officially published by a state delineating its territory or boundaries, while not binding on other states, may bind the publishing state itself under the principle of estoppel. As the ICJ held in *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*<sup>95</sup> quoting an earlier decision:

[A]s the Boundary Commission in *the Eritrea/Ethiopia* case said:

The map still stands as a statement of geographical fact, especially when the State adversely affected has itself produced and disseminated it, even against its own interest.

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<sup>94</sup> *Id.* at 582.

<sup>95</sup> *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay. v. Sing.)*, Judgment, 2008 I.C.J. 12 (May 23).

The Court concludes that those maps (published by Malaya/Malaysia) tend to confirm that Malaysia considered Pedra Branca/Pulau Batu Puteh fell under the sovereignty of Singapore.<sup>96</sup>

This principle applies to official maps published by various Chinese Dynasties from 1136 CE to 1896.

Since China refuses to disclose its ancient maps supposedly showing its indisputable sovereign ownership over the South China Sea, we shall examine China's ancient maps as published by (1) the Chinese Dynasties, (2) Chinese individuals, and (3) foreign map makers.

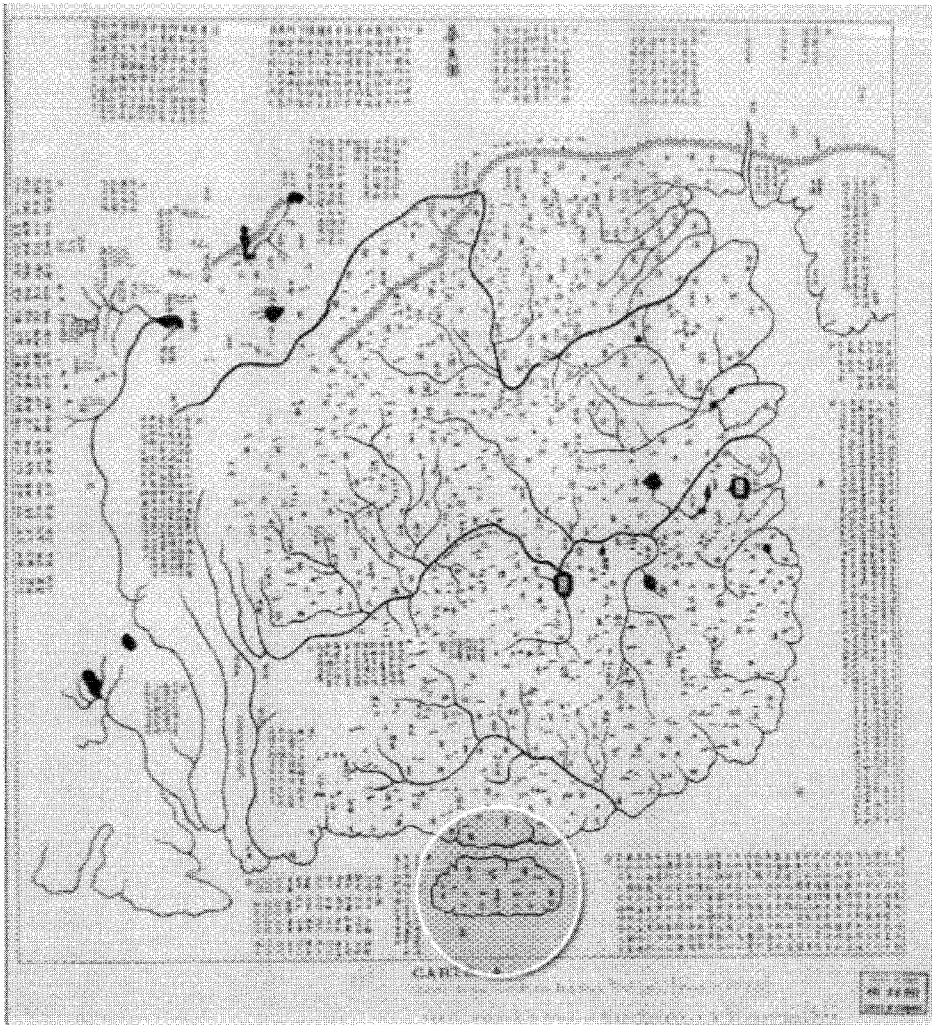
i. Ancient Maps of China by Chinese Dynasties  
or Authorities and by Chinese Individuals

From the start of the Southern Song Dynasty in 960 CE until the end of the Qing Dynasty in 1912, or for almost a millennium, the southernmost territory of China has always been Hainan Island, with its ancient names being Zhuya, then Qiongya, and thereafter Qiongzhou, based on official and unofficial maps of China.

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<sup>96</sup> *Id.* at 95. (Citations omitted.)

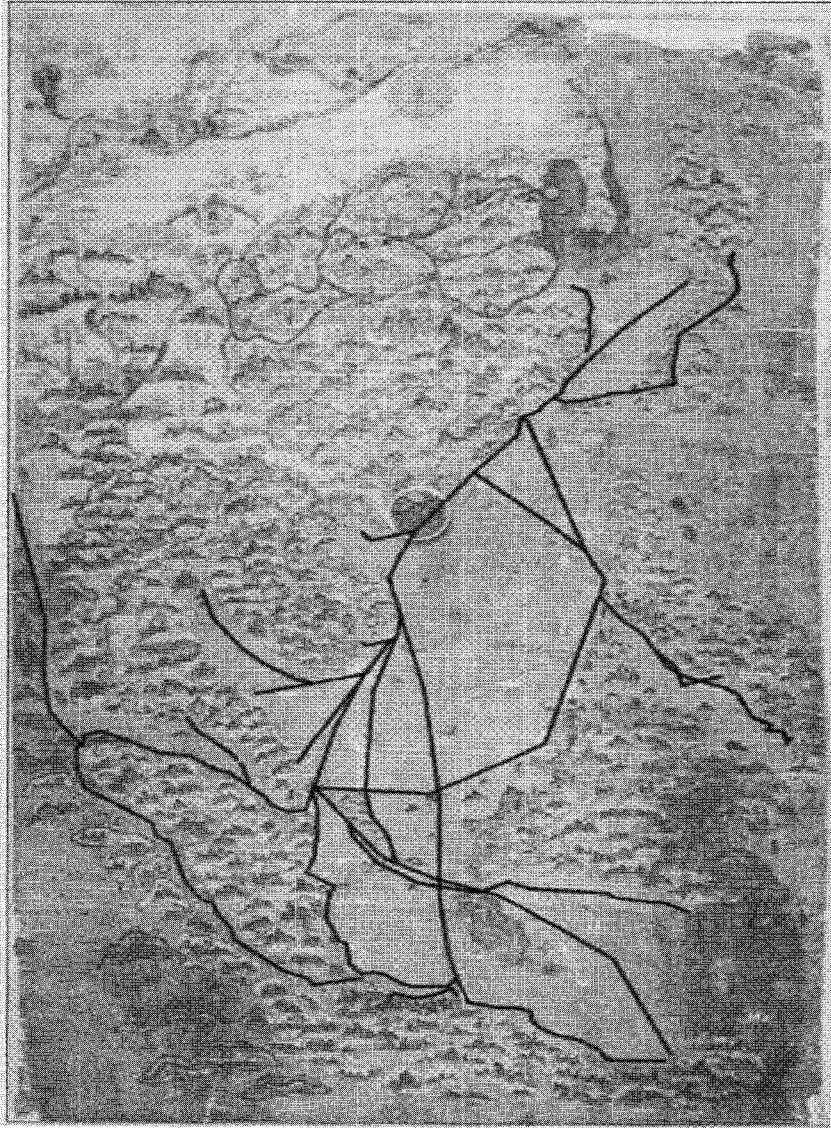




MAP 1: 1136 HUA YI TU OR MAP OF CHINA AND THE BARBARIAN COUNTRIES<sup>97</sup>

<sup>97</sup> Engraved in stone in Fuchang 1136 CE during the Nan Song Dynasty. This map of China was published in 1903 in France from a rubbing of the stone engraving. The stone map is now in the Forest of Stone Steles Museum in Xi'an, China. The stone map shows Hainan Island as the southernmost territory of China. The annotations on the sides of the map are not part of the stone engraving. This digital reproduction is from the U.S. Library of Congress. *Hua Yi Tu*, US LIBRARY OF CONGRESS WEBSITE, available at <https://www.loc.gov/item/2002626771>.

This is map number 60 in *Atlas of Ancient Maps in China - From the Warring States period to the Yuan Dynasty (476 BCE - CE 1368)*, published in Beijing in 1990 by the Cultural Relics Publishing House.



MAP 2: 1606-1624 SELDEN MAP OF CHINA<sup>98</sup>

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<sup>98</sup> Published sometime between 1606 and 1624 during the Ming Dynasty. The maker of the map is not named but was most likely a Chinese considering that the annotations on the map are in the Hokkien/Fukien dialect. This map shows China, South Asia, Southeast Asia, and East Asia. The South China Sea is conspicuously at the center of the map. Trade routes are marked on the map by lines. This map shows China with Hainan Island as its southernmost territory. John Selden bequeathed this map in 1659 to the Bodleian Library of the University of Oxford.

The Selden Map of China was re-discovered in 2008 from the basement files of the Bodleian Library of the University of Oxford, where it had gathered dust for 350 years from the time the executors of the estate of John Selden delivered the map to the Bodleian Library.<sup>99</sup> There are two things unique about the map itself. *First*, China is not shown as the center of the world but as part of Southeast Asia and East Asia. For this reason, this map is probably not an official map of the Ming Dynasty. *Second*, this map shows the shipping trade routes in South Asia, Southeast Asia and East Asia. Trade routes had not previously appeared in any Chinese map. The shipping trade routes traverse Japan, Taiwan, China, the Philippines, Borneo, Vietnam, Thailand, Malaysia, Indonesia (Java and Sumatra), Myanmar, and Goa in India, *strikingly showing that the South China Sea was a free and open international shipping waterway used by all coastal and trading nations during the Ming Dynasty.*

There is another unique circumstance accidentally related to this map—the persona of its owner after whom the map is named. John Selden (1584-1654) was an English jurist and philosopher. He was a polymath, prolific writer and an Orientalist. In 1635, under the King's patronage, he wrote *Mare Clausum*, the Closed Sea.<sup>100</sup> *Mare Clausum* refutes Hugo Grotius' *Mare Liberum*, the Free Sea.<sup>101</sup> *Mare Clausum* articulated England's position then that the oceans and seas were subject to appropriation and ownership by individual states. The same view was held by Spain and Portugal at that time. *Mare Clausum* was written in answer to the Netherland's position, expressed in Grotius' 1609 *Mare Liberum*, that the oceans and seas of our planet belonged to all mankind. The Dutch jurist Cornelius van Bynkershoek later carved out as sovereign territory the territorial sea—a narrow belt of coastal waters extending to 3 miles from the shore, the distance that a cannon ball could travel as calculated by Ferdinando Galiani.

The maritime space and resources beyond this three-mile territorial sea belonged to all nations, and was thus incapable of appropriation and ownership by any state. This idea of the *Free Sea* by Grotius, the founder of international law, became the foundation of the law of the sea.

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<sup>99</sup> *The Selden Map of China*, BODLEIAN DIGITAL LIBRARY WEBSITE, available at <http://seldenmap.bodleian.ox.ac.uk>.

<sup>100</sup> JOHN SELDEN, OF THE DOMINION OF, OR, OWNERSHIP OF THE SEA (Marchamont Nedham trans., 1972) (1635).

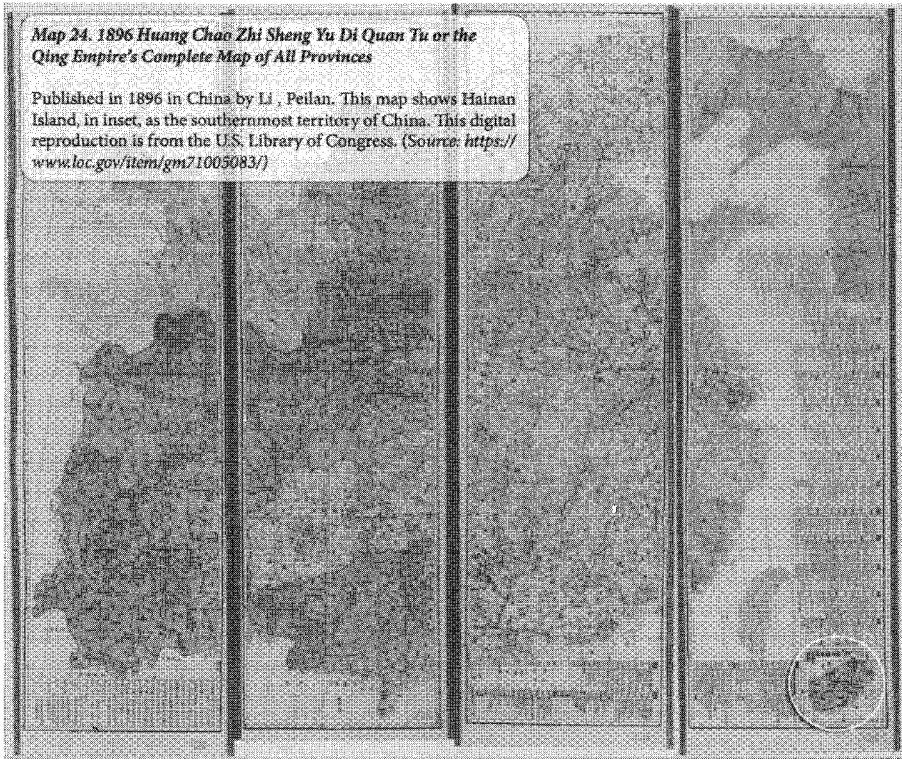
<sup>101</sup> HUGO GROTIUS, THE FREEDOM OF THE SEAS 6-8 (Ralph Van Deman Magoffin trans., 1916) (1609).

Today, England, Spain, and Portugal, together with the overwhelming majority of members of the UN, are parties to UNCLOS,<sup>102</sup> which is founded on the fundamental principle espoused by Grotius, that beyond the territorial sea, the oceans and seas are incapable of sovereign ownership by states. China is also a party to UNCLOS, but its position in the South China Sea adopts the *Mare Clausum* idea of John Selden, an idea which international law and the world have long ago rejected.

Ironically, John Selden, the advocate of the closed sea, bequeathed to the world the Selden Map of China, which depicts the South China Sea as a free and open international shipping waterway used by all coastal and trading nations during the Ming Dynasty. Even more ironic is that John Selden wrote *Mare Clausum* after he acquired the map.

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<sup>102</sup> One-hundred sixty-seven (167) countries, including the European Union, are parties to UNCLOS. States-parties to UNCLOS comprise 86% of the total 193 UN Member-States.



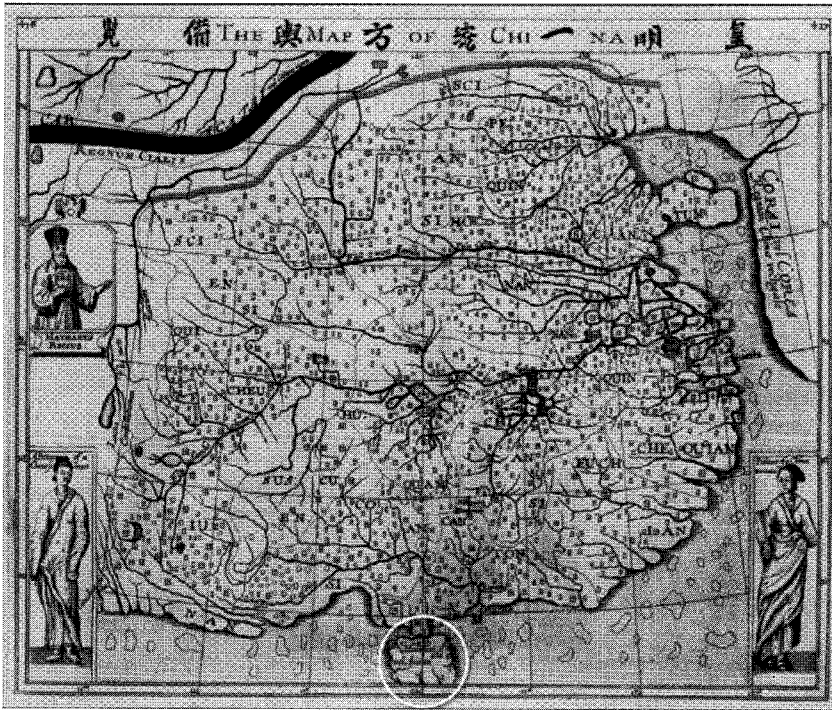
MAP 3: 1896 HUANG CHAO ZHIE SHENG YU DI QUAN TU OR THE QING EMPIRE'S COMPLETE MAP OF ALL PROVINCES<sup>103</sup>

## ii. Ancient Maps of China by Foreigners

Before Portuguese navigators coined the name South China Sea, the sea was known to Asian and Arab navigators as the *Champa Sea*, after the Cham people who established a great maritime kingdom in Central Vietnam from the late 2<sup>nd</sup> to the 17<sup>th</sup> century.<sup>104</sup>

<sup>103</sup> Published in 1896 in China by Li, Peilan. This map shows Hainan Island, in inset, as the southernmost territory of China. This digital reproduction is from the U.S. Library of Congress. Li Peilan, *Huang chao zhi sheng yu di quan tu*, available at <https://www.loc.gov/item/gm71005083/>.

<sup>104</sup> Adam Bray, *The Cham: Descendants of Ancient Rulers of South China Sea Watch Maritime Dispute from Sidelines*, NATIONAL GEOGRAPHIC, June 18, 2014, available at <http://news.nationalgeographic.com/news/2014/06/140616-south-china-sea-vietnam-china-cambodia-champa>.



MAP 4: 1625 THE MAP OF CHINA [HUANG MING YITONG FANG YU BEI LAND—  
COMPREHENSIVE VIEW MAP OF THE IMPERIAL MING]<sup>105</sup>

The Chams had sailboats with outriggers, similar to the sailboats of the Austronesians. The ancestors of the Chams spoke a Malayo-Polynesian language, derived from the Austronesian language. The early Chams are believed to have migrated by sea from Borneo to central Vietnam starting in 500 BCE.<sup>106</sup>

The islands in the Champa Sea were called *pulo*. In Filipino, the Philippine national language, which is also derived from the Austronesian

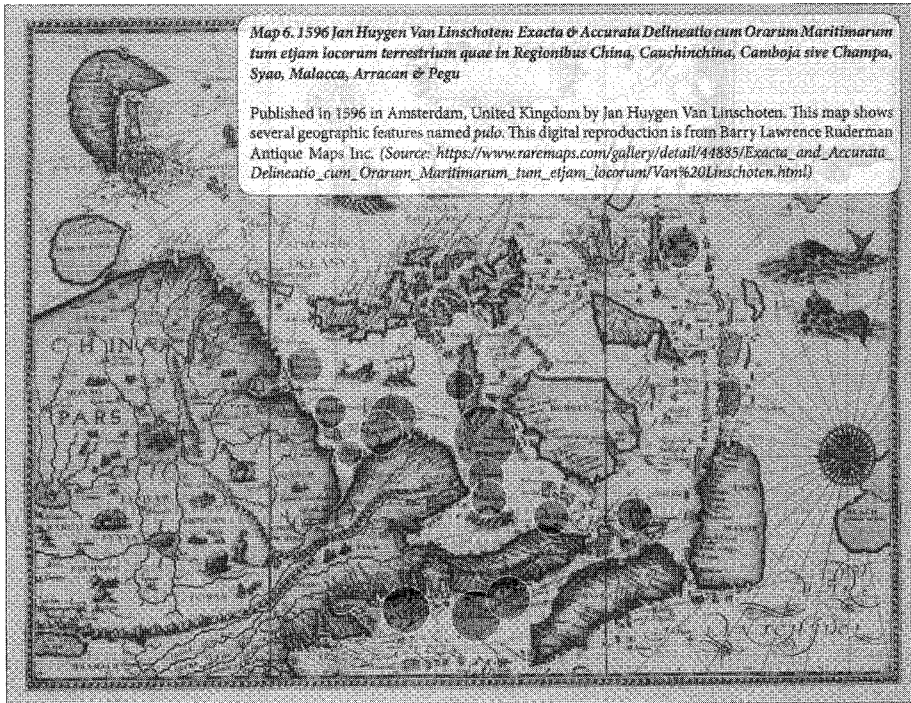
<sup>105</sup> Published in London, United Kingdom in 1625. This appears to be the first map of China published in Europe. Samuel Purchas made this map based on an original Chinese woodblock map given to him at the time he was translating Hugo Grotius' *Mare Liberum*. This map shows Hainan Island as the southernmost territory of China. *Samuel Purchas: The Map of China [Huang Ming yitong fang yu bei and—Comprehensive view map of the Imperial Ming]*, BARRY LAWRENCE RUDERMAN ANTIQUE MAPS INC WEBSITE, available at [http://www.raremaps.com/gallery/detail/39290hs/The\\_Map\\_of\\_China\\_Huang\\_Ming\\_yitong\\_fang\\_yu\\_bei\\_lan\\_Comprehensive\\_view/Purchas.html](http://www.raremaps.com/gallery/detail/39290hs/The_Map_of_China_Huang_Ming_yitong_fang_yu_bei_lan_Comprehensive_view/Purchas.html).

<sup>106</sup> JOACHIM SCHLIESINGER, THE KINGDOM OF PHAMNIET: AN EARLY PORT STATE IN MODERN SOUTHEASTERN THAILAND 27 (2017).

language, *pulo* means an “island, isolated place.”<sup>107</sup> When the Portuguese reached the Champa Sea, they learned that the inhabitants called their islands *pulo*. This explains why early European maps depicting this sea prefix the names of the islands with the word *pulo*.

The ancient Chinese named the sea *Nan Hai* or the South Sea. The ancient Chinese never called this sea the South China Sea.

The ancient Malays also called this sea *Laut Cbidol* or the South Sea, as recorded by Pigafetta in his account of Ferdinand Magellan’s circumnavigation of the world from 1519 to 1522. In Malay, which is likewise derived from the Austronesian language, *laut* means sea and *kidol* means south.<sup>108</sup>



MAP 5: 1596 JAN HUYGEN VAN LINSCHOTEN: EXACTA ET ACCURATA<sup>109</sup>

<sup>107</sup> *Pulo*, TAGALOG-DICTIONARY, available at <https://www.tagalog-dictionary.com/search?word=pulo> (last visited Dec. 29, 2016).

<sup>108</sup> C. Donaldson, *In Search of a Sea: the Origins of the Name Mare Lantchidol*, 10 THE GREAT CIRCLE 136-48 (1988).

<sup>109</sup> DELINEATIO CUM ORARUM MARITIMARUM TUM ETJAM LOCORUM TERRESTRIUM QUAE IN REGIONIBUS CHINA, CAUCHINCHINA, CAMBOJA SIVE CHAMPA, SYAO, MALACCA, ARRACAN ET PEGU. Published in 1596 in Amsterdam by Jan Huygen Van Linschoten. This

### 3. *Southernmost Territory of China Based on Official Documents*

#### i. China's Own Constitutions

When the Qing Dynasty ended in 1912, the Chinese republicans led by Dr. Sun Yat Sen established the Republic of China. The provisions of five (5) Constitutions of the Republic of China<sup>110</sup> state:

1. "The territory of the Republic of China is *composed of 22 provinces, Inner and Outer Mongolia, Tibet and Qinghai.*"<sup>111</sup>
2. "The territory of the Republic of China continues to be the *territory of the former empire.*"<sup>112</sup>
3. "The territory of the Republic of China *continues to be the traditional territory.*"<sup>113</sup>
4. "The territory of the Republic of China continues to be the *territory it owned in the past.*"<sup>114</sup>
5. "The territory of the Republic of China shall be that encompassed by its *traditional boundaries.*"<sup>115</sup>

As shown in the maps of the Qing Dynasty, one of the 22 provinces is Guangdong, which includes Hainan Island as the southernmost territory of China. All these Constitutions of China reiterated that China's national territory was "*the territory of the former empire,*" "*the traditional territory,*" "*the territory it owned in the past,*" and "*its territory [...] encompassed by its traditional boundaries.*"

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map shows several geographic features named *pulo*. Jan Huygen Van Schoten, *Exacta & Accurata Delineatio cum Orarum Maritimarum tum etiam locorum terrestrium quae in Regionibus China, Cauchinchina, Camboja sive Champa, Syao, Malacca, Arracan, Pegu*, available at [https://www.raremaps.com/gallery/detail/44885/Exacta\\_and\\_Accurata\\_Delineatio\\_cum\\_%20Orarum\\_Maritimarum\\_tum\\_etiam\\_locorum/Van%20Linschoten.html](https://www.raremaps.com/gallery/detail/44885/Exacta_and_Accurata_Delineatio_cum_%20Orarum_Maritimarum_tum_etiam_locorum/Van%20Linschoten.html).

<sup>110</sup> CHINA NAT'L. CENTER FOR TIBETAN STUDIES, REGULATION OF THE REPUBLIC OF CHINA CONCERNING RULE OVER TIBET (1999).

<sup>111</sup> ROC PROV. CONST. (1912), art. 3 ch. 1. (Emphasis supplied.)

<sup>112</sup> ROC CONST. (1914), art. 3 ch. 1. (Emphasis supplied.)

<sup>113</sup> ROC CONST. (1924), art. 3 ch. 2. (Emphasis supplied.)

<sup>114</sup> ROC CONST. (1937). (Emphasis supplied.)

<sup>115</sup> ROC CONST. (1946). (Emphasis supplied.)



All these constitutional provisions are from an official publication of the People's Republic of China, entitled Regulations of the Republic of China Concerning Rule Over Tibet.<sup>116</sup> *The editorial comment in these Regulations explains the words "former empire" as "referring to the Qing Dynasty."*

Thus, after the fall of the Qing Dynasty, the new Republic of China reiterated to the world that its territory remained the same as the territory of the Qing Dynasty, with Hainan Island as China's southernmost territory.

Based on all the Dynasty maps of China, maps made by Chinese individuals and maps made by foreigners, from the Song Dynasty in 1136 to the end of the Ching Dynasty in 1912, China's territory ended in Hainan Island, and never extended beyond Hainan Island. China's territory never included the Paracels, Scarborough Shoal or the Spratlys.

## ii. China's Official Declaration

China had been telling the world that its southernmost territory was Hainan Island, but in 1932 the Chinese officially claimed for the first time that Hainan Island included the Paracels. In a *Note Verbale* to the French Government on September 29, 1932 protesting the French occupation of the Paracels, the Chinese Legation in Paris filed this *Note Verbale* with the French Government:

On the instructions of its Government, the Legation of the Chinese Republic in France has the honor to transmit its Government's reply to the Foreign Ministry's Note of 4 January 1932 on the subject of the Paracel Islands.

According to the reports on the Si-Chao-Chuin-Tao (Paracel) Islands drawn up in the Year XVII of the Chinese Republic (1926) by Mr. Shen-Pang-Fei, President of the Commission of Inquiry into these islands, and to the files of these islands compiled by the Department of Industry of Kwangtung Province, the islands lie between longitude 100°13' and 112°47' east. More than 20 in number, large and small, most of them are barren sandbanks, 10 or so are rocks and 8 are true islands. The eastern group is called the Amphitrites and the western group the Crescent. *These groups lie 145 nautical miles from Hainan Island, and form the southernmost part of Chinese territory.*<sup>117</sup>

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<sup>116</sup> CHINA NAT'L CENTER FOR TIBETAN STUDIES, REGULATION OF THE REPUBLIC OF CHINA CONCERNING RULE OVER TIBET (1999).

<sup>117</sup> (Emphasis supplied.)

Clearly, China's 1932 *Note Verbale* declared: "These groups (the Paracels) lie 145 nautical miles from Hainan Island, and *form the southernmost part of Chinese territory.*" In short, China's territory did not extend farther south than 145 NM from Hainan Island. China's territory never included the Spratlys and Scarborough Shoal.

In the *Nuclear Tests Case*,<sup>118</sup> the ICJ declared:

It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being henceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.<sup>119</sup>

Under international law, the 1932 *Note Verbale* of China to France is an official declaration that is binding on China, in the same way that China's definition of its national territory in its five Republican Constitutions from 1912 to 1946 is binding on China.

In its nine-dashed line claim, China asserts that its southernmost border is James Shoal, 80 NM from the coast of Bintulu, Sarawak, Malaysia. James Shoal is a fully submerged reef, 22 meters under water, entirely within Malaysia's 200 NM EEZ, more than 950 NM from Hainan Island and more than 400 NM from Itu Aba in the Spratlys. Under UNCLOS, the maximum maritime zone that a state can claim is 150 NM from the outer limit of its 200 NM EEZ (or 100 NM from the 2,500 m isobath between 200 and 350 NM from the baselines, a limitation which does not apply to China based on the geology and geomorphology of the South China Sea).

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<sup>118</sup> *Nuclear Tests Case (Austl. v. Fr.)*, 1974 I.C.J. 253 (Dec. 20).

<sup>119</sup> *Id.* at 267.

Under international law, a state's border must either be a land territory, a river or a territorial sea—which are all subject to its full sovereignty. A state cannot appropriate as its sovereign territory a fully submerged area beyond its territorial sea.<sup>120</sup>

Bill Hayton, a well-known British journalist, writes:

How did the Chinese state come to regard this obscure feature, so far from home, as its southernmost point? I've been researching the question for some time while writing a book on the South China Sea. The most likely answer seems to be that it was probably the result of a translation error.

In the 1930s, China was engulfed in waves of nationalist anxiety. The predation of the Western powers and imperial Japan, and the inability of the Republic of China to do anything meaningful to stop them, caused anger both in the streets and the corridors of power. In 1933, the republic created the "Inspection Committee for Land and Water Maps" to formally list, describe and map every part of Chinese territory. It was an attempt to assert sovereignty over the republic's vast territory.

The major problem facing the committee, at least in the South China Sea, was that it had no means of actually surveying any of the features it wanted to claim. Instead, the committee simply copied the existing British charts and changed the names of the islands to make them sound Chinese. We know they did this because the committee's map included about 20 mistakes that appeared on the British map — features that in later, better surveys were found not to actually exist.

The committee gave some of the Spratly Islands Chinese names. North Danger Reef became Beixian (the Chinese translation of "north danger"); Antelope Reef became Lingyang (the Chinese word for antelope). Other names were just transliterated so, for example, Spratly Island became Sipulateli and James Shoal became Zengmu. And this seems to be where the mistakes crept in.

But how to translate "shoal"? It's a nautical word meaning an area of shallow sea where waves "shoal" up. Sailors would see a strange area of choppy water in the middle of the ocean and know the area was shallow and therefore dangerous. James Shoal is one of many similar features in the Spratlys.

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<sup>120</sup> *Final Award*, ¶ 1040.

But the committee didn't seem to understand this obscure English term because they translated "shoal" as "*tan*"— the Chinese word for beach or sandbank — a feature which is usually above water. The committee, never having visited the area, seems to have declared James Shoal/Zengmu Tan to be a piece of land and therefore a piece of China.<sup>121</sup>

Clearly, Chinese leaders and cartographers claimed James Shoal as China's southernmost border without even seeing James Shoal. Certainly, no Chinese could have gone ashore to "visit" James Shoal. James Shoal is the only "national border" in the world that is fully submerged, beyond the territorial sea of the claimant state, and even beyond the high seas.

#### *4. Historical and Geopolitical Misconceptions*

##### *i. China's "Century of Humiliation"*

There is a narrative that other countries have no right to question China's historic rights claim to the South China Sea because China has suffered enough during China's "century of humiliation"<sup>122</sup> at the hands of Western Powers. But the Philippines never humiliated China and never occupied a square inch of Chinese territory.

On the contrary, Filipinos were at war with the Americans in 1900 at the same time that the Boxers were fighting the Eight-Nation Alliance that included the U.S. and Japan.<sup>123</sup> An expeditionary force of the Eight-Nation Alliance occupied and looted Beijing in August 1900. The expeditionary force was sent to relieve the Foreign Legation Quarter in Beijing from a siege by the Boxers.

The Philippines was also colonized and oppressed for over three-and-a-half centuries by Western Powers.

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<sup>121</sup> Bill Hayton, *How a Non-Existent Island Became China's Southernmost Territory*, SOUTH CHINA MORNING POST, Feb. 9, 2013, available at <http://www.scmp.com/comment/insight-opinion/article/1146151/how-non-existent-island-became-chinas-southernmost-territory>.

<sup>122</sup> See Matt Schiavenza, *How Humiliation Drove Modern Chinese History*, THE ATLANTIC, Oct. 25, 2013, available at <http://www.theatlantic.com/china/archive/2013/10/how-humiliation-drove-modern-chinese-history/280878/>.

<sup>123</sup> See *Philippine-American War*, NEW WORLD ENCYCLOPEDIA, available at [http://www.newworldencyclopedia.org/entry/philippine-american\\_war](http://www.newworldencyclopedia.org/entry/philippine-american_war) (last modified Apr. 26, 2015); *Boxer Rebellion*, NEW WORLD ENCYCLOPEDIA, available at [http://www.newworldencyclopedia.org/entry/Boxer\\_Rebellion](http://www.newworldencyclopedia.org/entry/Boxer_Rebellion) (last modified Sept. 2008).

The Rape of Nanjing in December 1937 was followed by the destruction of Manila in February 1945 as the second most devastated city in World War II.<sup>124</sup>

Certainly, China cannot use its “Century of Humiliation” argument to encroach on Philippine maritime entitlements under UNCLOS in the South China Sea.

## ii. The 1823 Monroe Doctrine as Justification for the Nine-Dashed Line

U.S. President James Monroe laid down the Monroe Doctrine on December 2, 1823. The European Powers, according to Monroe, must recognize that the Western Hemisphere is the sphere of interest of the U.S.<sup>125</sup> There are those who assert<sup>126</sup> that the nine-dashed line claim is China’s version of the Monroe Doctrine. But under the Monroe Doctrine, the U.S. never claimed the seas of the Western Hemisphere. In 1823, there was no UN, no ICJ and no UNCLOS. At that time, war was a legitimate means of annexing territory. The 1945 UN Charter has outlawed wars of aggression, and since then, the use or threat of force has no longer been a legitimate means of annexing territory.

## iii. Containment of China by the United States

Yet another narrative is that the South China Sea dispute is part of the U.S. policy to contain or constrain the rise of China.<sup>127</sup> But the interests of the world naval powers such as the U.S. are freedom of navigation and over-flight for military vessels and aircraft. This means the freedom to sail, fly and *conduct military activities (like hydrographic surveys, intelligence, surveillance and reconnaissance operations, and military maneuvers) in the high seas and EEZs* of the world, as well as to exercise the right of innocent passage in the territorial seas without prior notice to the coastal states. China’s position is that foreign military activities in

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<sup>124</sup> See *Scarred by History: The Rape of Nanjing*, BBC NEWS, at <http://news.bbc.co.uk/2/hi/asia-pacific/223038.stm> (last updated Apr. 11, 2005); Ricardo C. Morales, *The Americans Destroyed Manila in 1945*, RAPPLER, Feb. 4, 2015, available at <http://www.rappler.com/newsbreak/iq/82850-americans-destroyed-manila-1945>.

<sup>125</sup> Monroe Doctrine (1823), OURDOCUMENTS.GOV, available at <https://www.ourdocuments.gov/doc.php?flash=true&doc=23> (last visited Apr. 2, 2017).

<sup>126</sup> See ROBERT KAPLAN, ASIA’S CAULDRON: THE SOUTH CHINA SEA AND THE END OF A STABLE PACIFIC (2014).

<sup>127</sup> See Shannon Tiezi, *Yes, the US Does Want to Contain China (Sort of)*, THE DIPLOMAT, Aug. 8, 2015, available at <http://thediplomat.com/2015/08/yes-the-us-doeswant-to-contain-china-sort-of>.

China's EEZ can only be allowed with prior permission from China, and that innocent passage of military vessels and aircraft through its territorial sea requires prior notice to China.<sup>128</sup>

In contrast, the interest of ASEAN coastal states such as the Philippines is the right to exploit the resources in their own EEZs, which are being encroached by China. The ASEAN coastal states have no practical interest for their military vessels and aircraft to conduct military activities in the high seas and EEZs of the world, or to exercise innocent passage through China's territorial sea. In fact, Malaysia and Vietnam, along with China, are among the minority of 27 states that hold the view that there is no freedom for foreign military vessels and aircraft to conduct military activities in the EEZs of coastal states.<sup>129</sup>

Recently, however, China has been conducting military activities in the EEZs of other coastal states without prior permission from the coastal states. From May 17 to 21, 2015, Russian and Chinese warships conducted joint naval exercises, including live-fire exercises, in the Mediterranean Sea.<sup>130</sup> There are no high seas, but only overlapping EEZs, in the Mediterranean Sea. In 2015, Chinese naval vessels exercised innocent passage through U.S. territorial sea in Alaska without prior notice to the U.S.<sup>131</sup>

## B. Geologic Features in the Spratlys

There are about 750 geologic features lying off the coast of Palawan, collectively referred to as the Spratlys. Most are submerged at all times while others are above water only at low tide. Only 28 features remain above water at high tide. The largest high-tide feature, Itu Aba, is only 0.43 square kilometer (43 hectares). The rest of the geologic features range in size from 0.36 square kilometer (Pagasa or Thitu) to less than two kilometers.

On whether the geologic features in the Spratlys generate any EEZ, the Arbitral Tribunal upheld the Philippine position that:

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<sup>128</sup> James Houck & Nicole Anderson, *The United States, China, and Freedom of Navigation in the South China Sea*, 13 WASH. U. GLOBAL STUD. J. REV. 441, 447 (2014).

<sup>129</sup> *Id.*

<sup>130</sup> Franz-Stefan Gady, *China and Russia Conclude Naval Drill in Mediterranean*, THE DIPLOMAT, May 22, 2015, available at <http://thediplomat.com/2015/05/china-and-russia-conclude-naval-drill-in-mediterranean>.

<sup>131</sup> Gordon Chang, *Chinese Warships Sail into American Waters*, WORLD AFFAIRS, Sept. 10, 2015, available at <http://www.worldaffairsjournal.org/blog/gordon-g-chang/chinese-warships-sail-american-waters>.

1. None of the geologic features (rocks and islands) in the Spratlys is capable of “human habitation or economic life of [its] own” so as to be entitled to a 200 NM EEZ.
2. Since no geologic feature claimed by China has an EEZ that overlaps with Palawan’s EEZ, the Arbitral Tribunal has jurisdiction to rule on the maritime disputes in the Spratlys.
3. The Spratlys cannot be taken as a single unit to determine capability to sustain human habitation or economic life.
4. To be entitled to a 200 NM EEZ, there must be the “(a) objective capacity of a feature, (b) in its natural condition, to sustain either (c) a stable community of people or (d) economic activity that is neither dependent on outside resources nor purely extractive in nature.”<sup>132</sup>
5. Itu Aba, the largest geologic feature in the Spratlys, does not satisfy this requirement. Thus, Itu Aba is entitled only to a 12 NM territorial sea.

The Arbitral Tribunal stated:

If the historical record of a feature indicates that nothing resembling a stable community has ever developed there, the most reasonable conclusion would be that the natural conditions are simply too difficult for such a community to form and that the feature is not capable of sustaining such habitation.<sup>133</sup>

Since none of the Spratly features generates an EEZ, the remaining disputed waters in the Spratlys refer only to the territorial seas around the geologic features above water at high tide. These remaining disputed waters in the Spratlys comprise not more than 1.5 percent of the 3.5 million square kilometers of maritime space in the South China Sea.

#### *1. China’s Claim to the Scarborough Shoal*

China claims that the Cairo, Potsdam and San Francisco Conferences awarded the Spratlys to China.

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<sup>132</sup> Press Release, The South China Sea Arbitration (Phil. v. China) (July 12, 2016) [hereinafter “Press Release”], at 9, available at <https://www.pcacases.com/web/sendAttach/1801>. (Emphasis supplied.)

<sup>133</sup> *Final Award*, ¶ 549.

The 1943 Cairo Conference, attended by Roosevelt, Churchill and Chiang Kai-shek, produced a press release that “*territories taken from China by Japan*, including Manchuria, Taiwan and the Pescadores, would be returned to the control of the Republic of China after the conflict ended.”<sup>134</sup> The Spratlys were never mentioned because these islands were not taken by Japan from China. Japan seized the Paracels from the French, and the Spratlys were unoccupied when Japan seized these islands. China never possessed the Spratlys until 1946 when it took over Itu Aba after Japanese forces left Itu Aba.

From July to August 1945, the Potsdam Conference among Truman, Churchill (later Atlee) and Stalin discussed how to administer a defeated Germany. The conference also produced the Potsdam Declaration, through which the U.S., UK, and China threatened Japan with “prompt and utter destruction” if it did not immediately surrender (the Soviet Union did not sign the declaration because it had yet to declare war on Japan).<sup>135</sup> The Potsdam Declaration never mentioned the Spratlys; the Potsdam Declaration never awarded these islands to China.

In the 1951 San Francisco Peace Conference, China was not represented. The motion of the USSR to award the Paracels and the Spratlys to China was defeated by a vote of 46-to-3, with one abstention.<sup>136</sup> Under the Treaty, “Japan renounce[d] all right, title and claim to the Spratly Islands and to the Paracel Islands.” However, the Treaty did not award the Spratlys or the Paracels to any country. The Pratas was placed under the trusteeship of the U.S. The People’s Republic of China denounced the resulting Treaty as illegal and claimed the Paracels, Spratlys and Pratas island as part of China.<sup>137</sup>

In a speech delivered on February 25, 2016 at the Center for Strategic and International Studies, Washington, D.C., Chinese Foreign Minister Wang Yi stated that:

[T]he three treaties that stipulate the Philippines’ territory, the first in 1898, the second in 1900 and the third in 1930, all regulated the

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<sup>134</sup> See U.S. Department of State, *The Cairo Conference, 1943*, U.S. DEPARTMENT OF STATE, available at <https://2001-2009.state.gov/r/pa/ho/time/wwii/107184.htm> (last accessed Dec. 29, 2016). (Emphasis supplied.)

<sup>135</sup> See *The Potsdam Conference, 1945*, OFFICE OF THE HISTORIAN, available at <https://history.state.gov/milestones/1937-1945/potsdam-conf> (last accessed Dec. 29, 2016).

<sup>136</sup> U.S. Department of State Publication, Record of Proceedings of Conference for the Conclusion and Signature of the Treaty of Peace with Japan 119, 292 (1951).

<sup>137</sup> David Lai, *Document No. 1: Asia-Pacific: A Strategic Assessment*, in THE RISE OF CHINA 51-2 (Douglas C. Lovelace, Jr. ed, 2013).



Philippines' western boundary line at 118 degrees east longitude. Areas in the west of the 118 degrees east longitude do not belong to the Philippines. But the Nansha (Spratlys) islands claimed now by the Philippines, the Huangyan (Scarborough Shoal) islands, are all in the west of the 118 degrees east longitude.<sup>138</sup>

The 1898 Treaty of Paris<sup>139</sup> between Spain and the U.S. drew a rectangular line wherein Spain ceded to the U.S. all of Spain's territories found within the treaty lines. The Spratlys and Scarborough Shoal are outside of the treaty lines.

However, when the Americans came to the Philippines after the signing of the 1898 Treaty of Paris, they found out that there were many islands belonging to Spain lying outside of the treaty lines. Thus, a second treaty, the 1900 Treaty of Washington,<sup>140</sup> had to be signed. Spain clarified in this second treaty that it had also relinquished to the U.S. "all title and claim of title, which (Spain) may have had at the time of the conclusion of the Treaty of Peace of Paris, to any and all islands belonging to the Philippine Archipelago, *lying outside the lines*" of the Treaty of Paris. Thus, Spain ceded the Spratlys and Scarborough Shoal to the U.S. under the 1900 Treaty of Washington.

## 2. *The Spratlys in Ancient Maps*

As early as 1630, ancient maps depicted unnamed geologic features lying off the coast of Paragua or Paragoa. In 1734, the Murillo Velarde map, printed in Manila and mother of all Philippine maps, named these features, for the first time in any map, Los Bajos de Paragua, literally the shoals of Paragua. Paragua is the Spanish name for the island of Palawan. Thus, Los Bajos de Paragua means the shoals of Palawan.

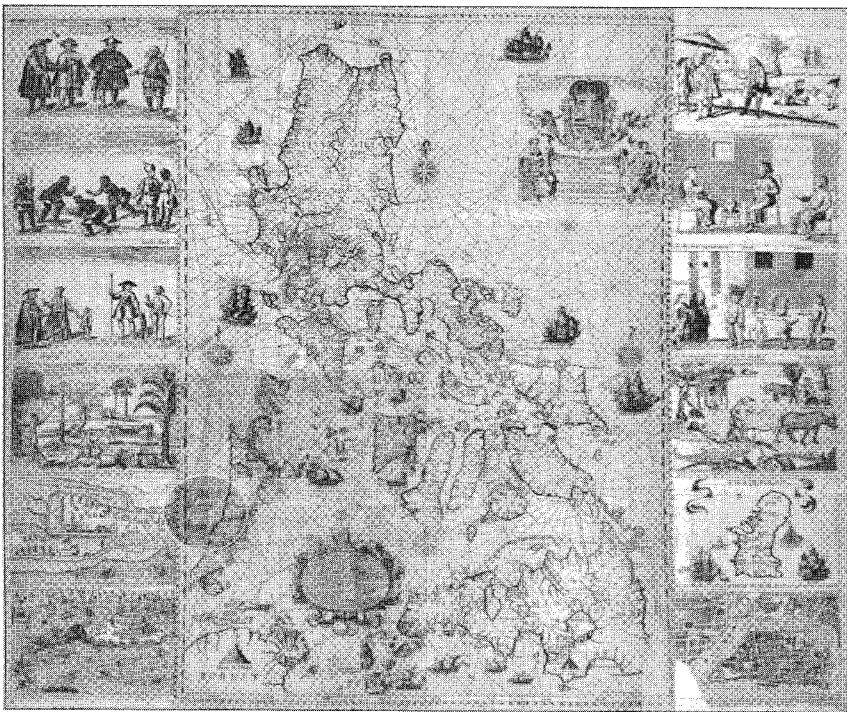
China claims that the Cairo, Potsdam and San Francisco Conferences awarded the Spratlys to China. These geologic features, the shoals of Palawan, are the Spratlys. There is no earlier map from either China or Vietnam showing that the Spratlys form part of their territory.

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<sup>138</sup> *Supra* note 57.

<sup>139</sup> Treaty of Peace Between the United States of America and the Kingdom of Spain art. 3, Dec. 10, 1898, U.S.-Kingdom of Spain, *available at* [http://avalon.law.yale.edu/19th\\_century/sp1898.asp](http://avalon.law.yale.edu/19th_century/sp1898.asp).

<sup>140</sup> Treaty Between the Kingdom of Spain and the United States of America for Cession of Outlying Islands of the Philippines, Nov. 7, 1900, U.S.-Kingdom of Spain, *available at* <http://www.gov.ph/1900/11/07/the-philippine-claim-to-a-portion-of-north-borneo-treaty-between-the-kingdom-spain-and-the-united-states-of-america-for-cession-of-outlying-islands-of-the-philippines-1900>.



MAP 6: 1734 CARTA HYDROGRAPHICA Y CHOROGRAPHICA DE LAS YSLAS FILIPINAS<sup>141</sup>

### 3. *Itu Aba*

Apart from its maritime claims under its nine-dashed line, China also separately claims that Itu Aba and other islands in the Spratlys generate EEZs that overlap with Philippine EEZ in Palawan facing the West Philippine Sea. To be entitled to an EEZ, an island must be capable of “human habitation or economic life of [its] own.”<sup>142</sup> The Philippine position, affirmed by the Arbitral Tribunal in its Award, is that Itu Aba is not capable of sustaining human habitation or economic life of its own, and thus does not generate an EEZ.

Article 121(3) of UNCLOS prescribes the conditions for a geologic feature to be entitled to a 200 NM EEZ. The Arbitral Tribunal summarized that Article 121(3) requires that *the geologic feature must have the objective capacity, in its natural condition, to sustain either a stable community of people or economic activity that*

<sup>141</sup> This is an important early map of Southeast Asia and the Philippines. This map shows the unnamed Spratlys as part of the Philippines. Jan Jansson, *Indiae Orientalis Nova Descriptio*, 1630, available at [https://www.raremaps.com/gallery/detail/45716/Indiae\\_Orientalis\\_Nova\\_Descriptio/Jansson.html](https://www.raremaps.com/gallery/detail/45716/Indiae_Orientalis_Nova_Descriptio/Jansson.html)

<sup>142</sup> UNCLOS art. 121(3).

*is not dependent on outside resources or purely extractive in nature.*<sup>143</sup> This is the first time that an international tribunal explained the meaning of an island that is entitled to an EEZ under Article 121(3).

When UNCLOS was negotiated, the fishery and other resources in the territorial seas of many populated geologic features were rapidly being depleted and were becoming insufficient to sustain the population living in those geologic features. Thus, the EEZ was created to provide more fishery and other resources exclusively to the population living in the adjacent geologic features—the “stable community of people” actually living there. Without a “stable community of people,” a geologic feature necessarily has no entitlement to an EEZ.

The geologic feature must sustain, based on its “*natural condition*,” a stable community of people. The term “natural condition” excludes water from a desalination plant<sup>144</sup> or imported to soil. In 1993, Taiwan installed two desalination plants on Itu Aba,<sup>145</sup> supplying drinking water to its government personnel stationed there and also water to maintain vegetable gardens and fruit trees. If Taiwan also imported topsoil, then vegetables and fruits grown with such topsoil do not constitute sustenance from the “natural condition” of the geologic feature. The phrase “natural condition” refers to the life-sustaining resources found on the geologic feature, including its territorial sea.

If there is doubt whether the “natural condition” can sustain human habitation, then recourse must be made to historical evidence whether the geologic feature ever hosted a stable community of people in the past, absent intervening factors like war that could lead to depopulation. If the geologic feature never hosted a stable community of people, then the “most reasonable conclusion” would be that the geologic feature is incapable on its own of sustaining a stable community of people. The Arbitral Tribunal found that this is the actual situation of Itu Aba.

The Arbitral Tribunal ruled:

The principal features of the Spratly Islands are not barren rocks or sand cays, devoid of fresh water, that can be dismissed as uninhabitable on the basis of their physical characteristics alone. At the same time, the features are not obviously habitable, and their capacity even to enable human survival appears to be distinctly

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<sup>143</sup> See *Press Release*.

<sup>144</sup> *Final Award*, ¶ 511.

<sup>145</sup> *Id.* ¶ 428.

limited. In these circumstances, and with features that fall close to the line in terms of their capacity to sustain human habitation, the Tribunal considers that the physical characteristics of the features do not definitively indicate the capacity of the features. Accordingly, the Tribunal is called upon to consider the historical evidence of human habitation and economic life on the Spratly Islands and the implications of such evidence for the natural capacity of the features.<sup>146</sup>

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For the Tribunal, the criterion of human habitation is not met by the temporary inhabitation of the Spratly Islands by fishermen, even for extended periods. [...] [T]he Tribunal considers human habitation to entail the non-transient inhabitation of a feature by a stable community of people for whom the feature constitutes a home and on which they can remain. This standard is not met by the historical presence of fishermen that appears in the record before the Tribunal. Indeed, the very fact that the fishermen are consistently recorded as being 'from Hainan,' or elsewhere, is evidence for the Tribunal that they do not represent the natural population of the Spratlys. Nowhere is there any reference to the fishermen 'of Itu Aba', 'of Thitu,' or 'of North Danger Reef' nor is there any suggestion that the fishermen were accompanied by their families. Nor do any of the descriptions of conditions on the features suggest the creation of the shelter and facilities that the Tribunal would expect for a population intending to reside permanently among the islands. Rather, the record indicates a pattern of temporary residence on the features for purposes, with the fishermen remitting their profits, and ultimately returning, to the mainland.<sup>147</sup>

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The Tribunal sees no indication that anything fairly resembling a stable human community has ever formed on the Spratly Islands. Rather, the islands have been a temporary refuge and base of operations for fishermen and a transient residence for labourers engaged in mining and fishing. The introduction of the exclusive economic zone was not intended to grant extensive maritime entitlements to small features whose historical contribution to human settlement is as slight as that. Nor was the exclusive economic zone intended to encourage States to establish artificial populations in the hope of making expansive claims, precisely what

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<sup>146</sup> *Final Award*, ¶ 616.

<sup>147</sup> *Id.* ¶ 618.

has now occurred in the South China Sea. On the contrary, Article 121(3) was intended to prevent such developments and to forestall a provocative and counterproductive effort to manufacture entitlements.

The Tribunal sees no evidence that would suggest that the historical absence of human habitation on the Spratly Islands is the product of intervening forces or otherwise does not reflect the limited capacity of the features themselves. Accordingly, the Tribunal concludes that Itu Aba, Thitu, West York, Spratly Islands, South-West Cay, and North-East Cay are not capable of sustaining human habitation within the meaning of Article 121(3). The Tribunal has also considered, and reaches the same conclusion with respect to, the other, less significant high-tide features in the Spratly Islands, which are even less capable of sustaining human habitation, but does not consider it necessary to list them individually.<sup>148</sup>

### C. China-Occupied Geologic Features in the Spratlys

China has reclaimed all the seven reefs it occupies in the Spratlys—Fiery Cross Reef, Johnson South Reef, Gaven Reef, Cuarteron Reef, McKennan Reef, Mischief Reef, and Subi Reef.

The Arbitral Tribunal ruled:

1. Of the seven reefs China occupies in the Spratlys, five are high-tide elevations (above water at high tide)—Fiery Cross Reef, Johnson South Reef, Gaven Reef, Cuarteron Reef, and McKennan Reef; these reefs are entitled to a 12 NM territorial sea.
2. The two other reefs—Mischief Reef and Subi Reef—are LTEs not entitled to a territorial sea. Mischief Reef is within Philippine EEZ and forms part of Philippine continental shelf. Only the Philippines can erect structures or artificial islands on Mischief Reef. China cannot appropriate an LTE, like Mischief Reef, situated within Philippine EEZ and beyond any territorial sea. China's structures on such an LTE are illegal. Although the Arbitral Tribunal did not state it, Subi Reef is within Philippine ECS. As an LTE, Subi Reef forms part of the continental shelf of the Philippines and only the Philippines can erect structures or artificial islands on Subi Reef.

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<sup>148</sup> *Id.*, ¶¶ 621-22.

3. Reed Bank is entirely submerged and forms part of Philippine EEZ as it is within 200 NM from the Philippine baselines. Ayungin Shoal, occupied by the Philippines, is also an LTE within Philippine EEZ.

The Arbitral Tribunal upheld the Philippine position on these issues except for Gaven Reef and McKennan Reef, which the Philippines argued are only LTEs but the Arbitral Tribunal ruled are high-tide elevations entitled to a 12 NM territorial sea.

China's reclamations violate not only UNCLOS but also the 2002 ASEAN-China Declaration of Conduct, which states that the parties undertake to exercise self-restraint, including "refraining from [...] inhabiting presently uninhabited islands, reefs, shoals, cays and other features."<sup>149</sup>

#### *1. Reclamations on High-tide Elevations*

A rock above water at high tide is land territory that generates a 12 NM territorial sea and territorial airspace above the land and its territorial sea. Reclamations made on a rock above water at high tide are expansions of insular land territory and are valid under UNCLOS.

A state cannot be faulted for reclaiming on its own sovereign territory—and a rock above water at high tide is sovereign territory with a 12 NM territorial sea and territorial airspace. However, a state doing massive reclamation must consult its coastal neighbors,<sup>150</sup> "protect and preserve the marine environment,"<sup>151</sup> and thus must not destroy or harm the marine environment.

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<sup>149</sup> 2002 Declaration on the Conduct of Parties in the South China Sea, *available at* [http://asean.org/?static\\_post=declaration-on-the-conduct-of-parties-in-the-south-chinase](http://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-chinase) a-2 (last updated Oct. 17, 2012).

<sup>150</sup> "States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavor, directly or through an appropriate regional organization: (a) to coordinate the management, conservation, exploration and exploitation of the living resources of the area; (b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment [...]." UNCLOS art. 192.

<sup>151</sup> Art. 192.

Pending resolution of the territorial dispute, China cannot be faulted for its reclamations on rocks above water at high tide, except for its failure to consult its neighbors and for the massive destruction to the marine environment. However, China has also reclaimed on LTEs, such as Mischief Reef and Subi Reef, which are not land territory and do not have a territorial sea and territorial airspace. *China is the only claimant state reclaiming on LTI's beyond the territorial sea and within the EEZ and ECS of another coastal state—the Philippines.* This is a violation of UNCLOS. The Philippines has reclaimed only small areas on real islands above water at high tide, and it cannot be faulted for such minor reclamations on land territory.

The South China Sea is a semi-enclosed sea as it consists primarily of territorial seas and EEZs of coastal states.<sup>152</sup>

Johnson South Reef is a high-tide elevation within Philippine EEZ. It is located 184.7 NM from the archipelagic baseline of the Philippine island of Palawan and 570.8 NM from China's baseline point 39 [Dongzhou (2)] adjacent to Hainan Island. In 1988, Chinese naval forces forcibly dislodged the Vietnamese soldiers guarding this high-tide elevation. Over sixty-nine Vietnamese soldiers died in the battle.<sup>153</sup>

McKenna Reef is a high-tide elevation within Philippine EEZ. It is within 12 NM of Sin Cowe Island, 181.3 NM from the archipelagic baseline of the Philippine island of Palawan and 566.8 NM from China's baseline point 39 [Dongzhou (2)] adjacent to Hainan Island. The total reclaimed area is approximately 6.8 hectares with a 6-storey primary building of approximately 4,128 square meters and a port facility with one jetty and one pier that can cater to a 130-meter ship.<sup>154</sup>

Quarteron (Calderon) Reef is a high-tide elevation outside Philippine EEZ but within its ECS.<sup>155</sup> It is 245 NM from the archipelagic baseline of the Philippine island of Palawan and 585.3 NM from China's baseline point 39 [Dongzhou (2)] adjacent to Hainan Island.

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<sup>152</sup> Art. 122.

<sup>153</sup> *Final Award*, ¶ 287; See Hung, *supra* note 32.

<sup>154</sup> *Id.* ¶¶ 287, 382.

<sup>155</sup> *Id.* ¶¶ 285, 339.

Fiery Cross (Kagitingan) Reef has a solitary 2-square meter rock that is about 0.6 meters above water at high tide.<sup>156</sup> It is just outside Philippine EEZ but within its ECS. It is 254.2 NM from the archipelagic baseline of the Philippine island of Palawan and 547.7 NM from the China's baseline point 39 [Dongzhou (2)] adjacent to Hainan Island. In 1987, UNESCO agreed that China would build a weather station on Fiery Cross Reef as part of UNESCO's global oceanic survey. That weather station would later turn out to be a Chinese military facility.<sup>157</sup>

Fiery Cross Reef is now a Chinese airbase with a seaport. The airbase, with a 3,000-meter runway, sits on a 270-hectare reclaimed area, larger than the 213-hectare Woody Island which hosts China's airbase in the Paracels. The Fiery Cross Reef reclamation is also larger than the combined naturally-formed areas of the twenty largest islands in the Spratlys, and more than twice the area of Diego Garcia Island, the U.S. airbase in the Indian Ocean.

As Admiral Harry Harris, commander of the U.S. Pacific Command, stated:

A 10,000-foot (3 KM) runway is large enough to take a B-52, almost large enough for the Space Shuttle, and 3,000 feet longer than what you need to take off [on] a 747.<sup>158</sup>

Gaven (Burgos) Reef is outside of Philippine EEZ but within its ECS. Gaven Reef (North) is 203.0 NM from the archipelagic baseline of the Philippine island of Palawan and 544.1 NM from China's baseline point 39 [Dongzhou (2)] adjacent to Hainan Island. Gaven Reef (South) is 200.5 NM from the archipelagic baseline of the Philippine island of Palawan and 547.4 NM from China's baseline point of 39 [Dongzhou (2)] adjacent to Hainan. Gaven Reef is a high-tide elevation within 12 NM of Namyit Island.<sup>159</sup>

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<sup>156</sup> *Id.* ¶ 341.

<sup>157</sup> *Id.* ¶¶ 286, 343; James Brown, *China's Interests in the South China Sea*, 66 UNITED SERVICE 21 (2014).

<sup>158</sup> See Kevin Baron, *China's New Islands are Clearly Military, U.S. Pacific Chief Says*, DEFENSE ONE, July 24, 2015, available at <http://www.defenseone.com/threats/2015/07/chinas-new-islands-are-clearly-military/118591>.

<sup>159</sup> *Final Award*, ¶¶ 288, 365.



## 2. Reclamations on Low-tide Elevations

Only the adjacent coastal state has the right to create artificial islands, or erect structures, on LTEs within its EEZ or ECS.<sup>160</sup>

Artificial islands or structures put up by a state other than the coastal state, within the EEZ or ECS of the coastal state, are illegal under UNCLOS. Reclamations by China in Mischief Reef and Subi Reef, which are LTEs within the EEZ and ECS of the Philippines, respectively, are illegal under UNCLOS.

Even if the reclamation were legal under UNCLOS, the reclamation of an LTE would not change the legal status of the LTE for purposes of entitlement to maritime zones. An LTE (which does not have a territorial sea) does not become an island (which has a territorial sea) by virtue of reclamation. Even if the reclamation makes the LTE permanently above water at high tide, it remains an LTE generating no territorial sea or territorial airspace.<sup>161</sup>

Mischief Reef and Subi Reef, which are both LTEs, are now covered with sand and permanently above water at high tide. However, China's own nautical charts prior to the reclamations designate these geologic features as LTEs, just like Philippine nautical charts. The nautical charts of other countries, such as those of the United Kingdom, the U.S., Japan, Russia, and Vietnam are unanimous in their designations of these geologic features as LTEs. Actual surveys made by the UK (1862-1868, 1920s, 1930s), France (1930s), and Japan (1920s, 1930s) also show these geologic features as LTEs.<sup>162</sup>

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<sup>160</sup> "Artificial islands, installations and structures in the exclusive economic zone:

1. In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of:

(a) artificial islands;

(b) installations and structures for the purposes provided in Article 56 (exploitation of non-living resources in the seabed, marine scientific research, protection and preservation of marine environment) and other economic purposes.

2. The coastal state shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations."

Article 60 applies *mutatis mutandi* to artificial islands, installations and structures on the continental shelf. UNCLOS art. 60(1)-(2).

<sup>161</sup> "Artificial islands, installations and structures 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, the exclusive economic zone, or the continental shelf." Art. 60(8).

<sup>162</sup> *Final Award*, ¶¶ 327-32.

Mischief (Panganiban) Reef is a circular atoll with a diameter of 7.4 KM and a lagoon area of 3,600 hectares. The average depth inside the lagoon is 26 meters. It is an LTE situated 125.4 NM from Palawan, well within the 200 NM Philippine EEZ. As an LTE outside the territorial sea of any state,<sup>163</sup> Mischief Reef is part of the continental shelf of the Philippines. Mischief Reef is 598.1 NM from China's baseline point 39 [Dongzhou (2)] adjacent to Hainan Island. As of July 2016, China has created an artificial island of 590 hectares in Mischief Reef, China's largest reclamation in the Spratlys. China can garrison thousands of troops on Mischief Reef. With an air and naval base on Mischief Reef between Palawan and all the Philippine-occupied islands in the Spratlys, China can block Philippine ships from re-supplying Philippine-occupied islands in the Spratlys. The Chinese media call Mischief Reef China's Pearl Harbor in the South China Sea.<sup>164</sup>

Subi (Zamora) Reef is an LTE outside of Philippine EEZ but within its ECS. Subi Reef is just outside the 12 NM territorial sea of the 37-hectare Pagasa (Thitu) Island, the largest island occupied by the Philippines in the Spratlys. Subi Reef is 231.9 NM from the archipelagic baseline of the Philippine island of Palawan and 502.2 NM from China's baseline point 39 [Dongzhou (2)] adjacent to Hainan Island. The total area of Subi Reef, including the lagoon and rim of the reef, is 16 square kilometers. In its original state, Subi Reef's lagoon was 22 meters deep. Subi Reef's location, size and depth make it ideal for a naval base with an airfield.<sup>165</sup> As of July 2016, China has created an artificial island of 394 hectares in Subi Reef. China has constructed a three-kilometer runway on Subi Reef.

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<sup>163</sup> *Id.* ¶ 378.

<sup>164</sup> Chan Kai Yee, *China to Turn Mischief Reef into "Pearl Harbor of the South China Sea"*, CHINA DAILY MAIL, June 23, 2015, available at <https://chinadailymail.com/2015/06/23/china-to-turn-mischief-reef-into-pearl-harbor-of-the-southchina-sea>.

<sup>165</sup> *Vinal Award*, ¶ 368.

### 3. Reclamations in the High Seas

China cannot invoke Freedom of the High Seas to create artificial islands in the high seas, like in Subi Reef. Subi Reef is within Philippine ECS.

Under Article 87(d),<sup>166</sup> the freedom to construct artificial islands and other installations in the high seas is subject to two conditions. *First*, the freedom cannot be exercised in the ECS of a coastal state under Part VI of UNCLOS. Under Section 80 of Part VI, only the adjacent coastal state can erect “artificial islands, installations and structures on the continental shelf.” Thus, China’s construction of an artificial island in Subi Reef, an LTE in the high seas but within Philippine ECS, is illegal under UNCLOS. *Second*, Article 88 prohibits the construction of artificial islands and installations for non-peaceful purposes, that is, military purposes. Article 88 of UNCLOS mandates that “the high seas shall be reserved for peaceful purposes.”

On April 9, 2015, China explained that the reclamations are intended to “improve the living and working conditions of those stationed on the islands.” Chinese Foreign Ministry Spokeswoman Hua Chunying asserted that China was building “civil functioning facilities such as typhoon shelters, navigation aids, search-and-rescue centers, marine meteorological forecasting stations, fishing services, and civil administration offices.” The Spokeswoman, however, added that the reclamations would also be used for China’s military defense.<sup>167</sup>

The high seas, which can only be used for peaceful purposes, are part of the global commons belonging to all mankind. China’s creation of an artificial island in the high seas, for use as a military facility, sets a dangerous precedent. If other states follow China, the high seas of our planet will be greatly militarized.

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<sup>166</sup> “The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States: [...] (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI [...].” UNCLOS art. 87.

<sup>167</sup> Foreign Ministry Spokesperson Hua Chunying’s Regular Press Conference on 9 April 2015, FMPRC.GOV.CN, Apr. 9, 2015, available at [http://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/t1253488.html](http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1253488.html).

#### 4. *Grand Theft of Global Commons*

All States, coastal and landlocked, have the right to fish in the high seas of the world. The fish in the high seas belong to all mankind.

Since 1999, China through Hainan Province has unilaterally imposed a 3-month annual fishing moratorium, from mid-May to late-July, even in waters of the high seas. Violators of the ban face fines, confiscation of fishing equipment, and even criminal charges.<sup>168</sup>

More recently, China's fishery law, as implemented by Hainan Province's 2014 Fishery Regulations, bars foreign fishing vessels from operating in the high seas of the South China Sea unless they secure permission from Chinese authorities. Article 35 of the Hainan Province's 2014 Fishery Regulations<sup>169</sup> mandates that "foreign fishing vessels entering the waters under the jurisdiction of this province (Hainan) to engage in fishery operations or fishery resource surveys shall secure approval from relevant departments of the State Council." The Fishery Regulations, which took effect on January 1, 2014, apply to Macclesfield Bank, which is part of the high seas.

Hainan's Fishery Regulations authorize Chinese maritime administration vessels to apprehend foreign fishing vessels operating without permission from Chinese authorities. Chinese authorities can seize the fish catch and fishing equipment of these foreign vessels operating in Macclesfield Bank, and even fine these fishing vessels up to 83,000 U.S. dollars.

In a *Note Verbale* dated July 6, 2015, China demanded that the Philippines "respect China's territorial sovereignty, sovereign rights and jurisdiction, and [...] educate its own fishermen, so that they can strictly abide by the fishing moratorium [...]." China warned that "Chinese law-enforcing authorities will strengthen their maritime patrols and other law-enforcing actions, investigate and punish the relevant fishing vessels and fishermen who violate the fishing moratorium."<sup>170</sup>

All states of the world, coastal and landlocked, are affected parties because China is appropriating for itself the fishery resources in the high seas.

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<sup>168</sup> *Final Award*, ¶ 210.

<sup>169</sup> Isaac Kardon, *Hainan Revises Fishing Regulations in the South China Sea; New Language, Old Ambiguities*, 14 CHINA BRIEF 3 (2014), available at [https://jamestown.org/wp-content/uploads/2014/01/China\\_Brief\\_Vol\\_14\\_Issue\\_2\\_.pdf](https://jamestown.org/wp-content/uploads/2014/01/China_Brief_Vol_14_Issue_2_.pdf).

<sup>170</sup> *Final Award*, ¶ 710, n. 733.

The fishery resources beyond the EEZs of coastal states belong to all mankind.

By appropriating for itself the fishery resources in the high seas of the South China Sea, China is committing a grand theft of the global commons.

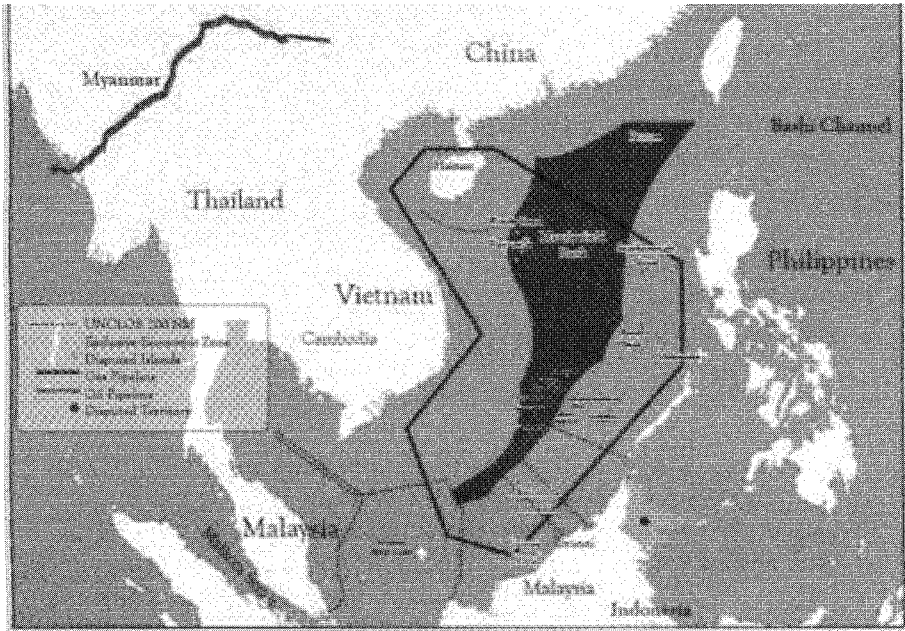


FIGURE 15: THE HIGH-SEAS (DARK BLUE SHADED AREA) IN THE SOUTH CHINA SEA

In China's nine-dashed line claim, China insists that what are found in what is internationally known as Macclesfield Bank (English Bank in earlier maps) are islands, which China calls Zhongsha Islands (plural), which means Central Sandy Islands. Macclesfield Bank is not an island because it is a fully submerged atoll, the highest point being 9.2 meters below sea level. With an area of approximately 6,500 square kilometers, Macclesfield Bank is one of the largest atolls in the world.<sup>171</sup>

<sup>171</sup> Jerry Esplanada & Norman Bordadora, *Philippines Protests China's Moving In on Macclesfield Bank*, INQUIRER.NET, July 6, 2012, available at <http://globalnation.inquirer.net/43171/philippines-protests-china's-moving-in-on-macclesfield-bank>.

Under UNCLOS, an island is defined as a naturally formed area of land, surrounded by water, and *above water at high tide*. How a fully submerged atoll can be called Zhongsha Islands is yet another lie that China is foisting on coastal states in the South China Sea. The undeniable fact is Macclesfield Bank, being fully submerged and beyond the territorial sea of any coastal state, is under international law and UNCLOS not capable of appropriation by any state.<sup>172</sup> It cannot even form part of an EEZ because it is more than 200 NM from Hainan Island and Luzon. The waters and living resources of Macclesfield Bank are part of the high seas, belonging to all mankind. China cannot unilaterally appropriate for itself what international law and UNCLOS have reserved for all mankind. To do so would amount to another grand theft of what belongs to all nations, coastal and landlocked.

Even if an island satisfied the criterion for an EEZ, the island may not be given a full EEZ if there is an overlap with the EEZ of a much bigger island or with continental land.

In the *Territorial and Maritime Dispute Case*,<sup>173</sup> the ICJ ruled:

The Court begins by observing that [...] “a substantial difference in the lengths of the parties’ respective coastlines may be a factor to be taken into consideration in order to adjust or shift the provisional delimitation line”<sup>174</sup>

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In the present case, the disparity between the relevant Colombian coast and that of Nicaragua is approximately 1:8.2. [...] This is undoubtedly a substantial disparity and the Court considers that it requires an adjustment or shifting of the provisional line, especially given the overlapping maritime areas to the east of the Colombian islands.<sup>175</sup>

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<sup>172</sup> *Final Award*, ¶ 1040.

<sup>173</sup> *Territorial and Maritime Dispute (Nicar. v. Colom.)*, 2012 I.C.J. 624 (Nov. 19).

<sup>174</sup> *Id.* ¶ 209.

<sup>175</sup> *Id.* ¶ 211.

[The] disparity in coastal lengths is so marked as to justify a significant shift. The line cannot, however, be shifted so far that it cuts across the 12-nautical-mile territorial sea around any of the Colombian islands [...]<sup>176</sup>

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The Court considers that it must take proper account both of the disparity in coastal length and the need to avoid cutting either State off from the maritime spaces into which its coasts project. In the view of the Court, an equitable result which gives proper weight to those relevant considerations is achieved by continuing the boundary line out to the line 200 nautical miles from the Nicaraguan baselines along lines of latitude.<sup>177</sup>

In *Bangladesh v. Myanmar*,<sup>178</sup> the ITLOS ruled:

St. Martin's Island is an important feature which could be considered a relevant circumstance in the present case. However, because of its location, giving effect to St. Martin's Island in the delimitation of the exclusive economic zone and the continental shelf would result in a line blocking the seaward projection from Myanmar's coast in a manner that would cause an unwarranted distortion of the delimitation line. The distorting effect of an island on an equidistance line may increase substantially as the line moves beyond 12 nm from the coast.

For the foregoing reasons, the Tribunal concludes that St. Martin's Island is not a relevant circumstance and, accordingly, decides not to give any effect to it in drawing the delimitation line of the exclusive economic zone and the continental shelf.<sup>179</sup>

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<sup>176</sup> *Id.* ¶ 233.

<sup>177</sup> *Id.* ¶ 236.

<sup>178</sup> Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (*Bangl. v. Mya.*) [hereinafter "Delimitation in the Bay of Bengal"], Judgment, ITLOS Case No. 16, 2012 ITLOS Reports 4 (Mar. 14), available at [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_16/C16\\_Judgment\\_14\\_03\\_2012\\_rev.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/C16_Judgment_14_03_2012_rev.pdf).

<sup>179</sup> *Id.* at 318-9.

In boundary delimitation of overlapping EEZs and ECSs, the objective under UNCLOS is to achieve an “equitable solution.”<sup>180</sup>

As applied in Law of the Sea cases, this means that if there is a substantial disparity in the lengths of the opposing relevant coasts, there must be adjustments in the median line so that the maritime entitlements will be reasonable and mutually balanced. The adjustments must not produce such disproportion in the maritime entitlements as to create an inequitable result.

*The overriding criterion is the length of the opposing relevant coasts in the overlapping maritime zones. In Nicaragua v. Colombia, a ratio of 1:8.2 in favor of Nicaragua (for every 1 kilometer of coast for Colombia, there are 8.2 kilometers of coast for Nicaragua) was ruled a substantial disparity, with the result that Colombia was not given any EEZ facing Nicaragua.*

Even assuming, *quod non*, that Itu Aba is capable of human habitation or economic life of its own, its very short coast as against the very long opposite coast of Palawan will still not entitle Itu Aba to any EEZ facing Palawan. In the case of Itu Aba and Palawan, the ratio of the relevant coasts is 1:495 in favor of Palawan (for every one kilometer of coast for Itu Aba, there are 495 kilometers of coast for Palawan). This is not only substantial disparity, but also total disparity.

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<sup>180</sup> “The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.” UNCLOS art. 74(1).



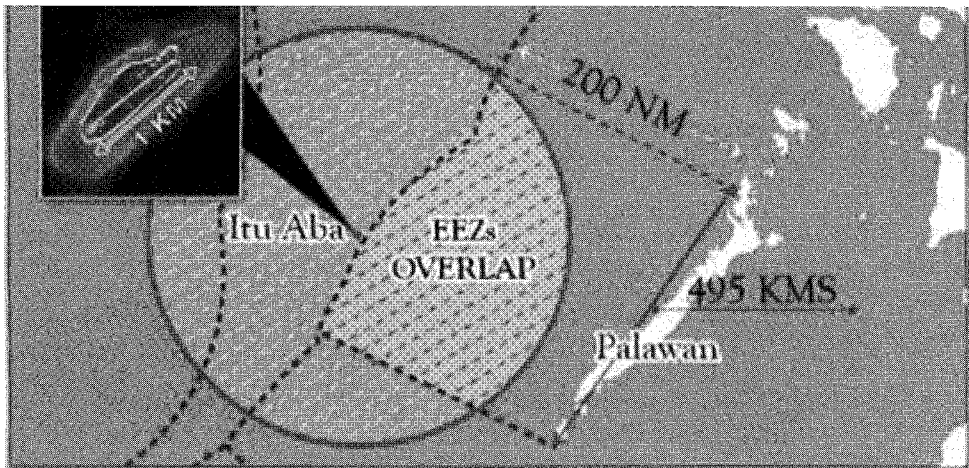


FIGURE 16: ITU ABA V. PALAWAN

*In short, if submitted to compulsory arbitration or compulsory conciliation,<sup>181</sup> Itu ABA cannot be given any EEZ facing Palawan, even if Itu ABA is capable of human habitation or economic life of its own.*

#### D. Scarborough Shoal

Scarborough Shoal's lagoon has an area of 58 square miles or 150 square kilometers (15,000 hectares). Located 124 NM from Zambales, Scarborough Shoal is rich in fish and is one of the traditional fishing grounds of Filipino fishermen. The shoal is a high-tide elevation, with the biggest rock protruding 1.2 meters above water at high tide.

The Arbitral Tribunal upheld the Philippine position on the status of Scarborough Shoal:

1. Scarborough Shoal is a high-tide elevation entitled to a 12 NM territorial sea but not to a 200 NM EEZ since obviously it is not capable of human habitation.

<sup>181</sup> A state that has opted out of compulsory arbitration on sea boundary delimitation or on historic bays or title can still be subjected to compulsory conciliation. The framers of UNCLOS made sure that all maritime disputes on sea boundary delimitation or on historic bays or title would be resolved through compulsory process under the UNCLOS dispute settlement mechanism. *See* Art. 298(1)(a)(i).

2. The territorial sea of Scarborough Shoal, which includes the lagoon, is a traditional fishing ground of Filipino, Chinese, and Vietnamese fishermen. China cannot prevent Filipino fishermen from fishing in the territorial sea of Scarborough Shoal.

In China's Manila Embassy website, China claims Scarborough Shoal because the shoal was allegedly the observation point in the South China Sea where Guo Shoujing erected in 1279 CE an astronomical observatory. The website states:

Huangyan Island was first discovered and drew (sic) into China's map in China's Yuan Dynasty (1271-1368 CE). In 1279, Chinese astronomer Guo Shoujing performed surveying of the seas around China for Kublai Khan, and Huangyan Island was chosen as the point in the South China Sea.<sup>182</sup>

However, in 1980, China's Ministry of Foreign Affairs officially declared that the observation point in the South China Sea that Guo Shoujing erected in 1279 is in Xisha or what is internationally called the Paracels, a group of islands more than 380 NM from Scarborough Shoal. China issued this official statement to bolster its claim to the Paracels to counter Vietnam's strong historical claim to the same islands. China's Ministry of Foreign Affairs stated:

Early in the Yuan Dynasty, an astronomical observation was carried out at 27 places throughout the country. In the 16th year of the reign of Zhiyuan (1279) Kublai Khan [...] personally assigned Guo Shoujing, the famous astronomer and Deputy Director of the Astronomical Bureau, to do the observation in the South China Sea. According to the official History of the Yuan Dynasty, Nanhai, Gou's observation point, was "to the south of Zhuya" and "the result of the survey showed that the latitude of Nanhai is 15°N." *The astronomical observation point Nanhai was today's Xisha Islands. It shows that Xisha Islands were within the bounds of China at the time of the Yuan dynasty.*<sup>183</sup>

China cannot now claim that Scarborough Shoal is where Guo Shoujing erected in 1279 his observation point in Nan Hai (South Sea) because

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<sup>182</sup> See EMBASSY OF THE PEOPLE'S REPUBLIC OF CHINA IN THE REPUBLIC OF PHILIPPINES, available at <http://ph.china-embassy.org/eng>.

<sup>183</sup> Chinese Ministry of Foreign Affairs, *China's Sovereignty over Xisha and Zhongsa Islands is Indisputable*, Feb. 18, 1980, BEIJING REV. (Emphasis supplied.)

China had already identified Xisha (the Paracels) as the observation point when China presented its argument against Vietnam in 1980.

Besides, Guo Shoujing could not have used Scarborough Shoal as an observation point. The biggest rock on Scarborough Shoal is just 1.2 meters above water at high tide, and not more than six to ten people can stand on it. It is physically impossible to erect, or operate, the massive astronomical observatories of Guo Shoujing on the tiny rocks of Scarborough.

Gou Shoujing built 27 astronomical observatories—26 in the mainland and one in Nan Hai (South Sea). One observatory in the mainland, the Gaocheng Astronomical Observatory in Henan Province, still exists today and it is a massive stone structure 12.6 meters high. Such an observatory could not have been built on Scarborough Shoal in 1279.

As early as 1631, an unnamed shoal off the western coast of Central Luzon appeared in European maps. In 1734, the Murillo Velarde map, published in Manila and the mother of all Philippine maps, gave this shoal its first name—Panacot—a Tagalog word which means danger, a warning to ships that there are rocks in the area. Subsequent maps would refer to the shoal as Scarborough, after the British tea clipper named Scarborough that struck the rocks of the shoal on September 12, 1748. The other name for the shoal is Bajo de Masinloc, which means the shoal of Masinloc, a coastal town in Zambales facing the South China Sea.

### **E. Harm to the Marine Environment**

On the harm to the marine environment, the Arbitral Tribunal ruled that China violated its obligation under UNCLOS to “protect and preserve the marine environment” when China:

1. Dredged and built islands on seven reefs;
2. Failed to prevent its fishermen from harvesting endangered species like sea turtles, corals, and giant clams in the Spratlys and Scarborough Shoal.

China failed to even notify other coastal states regarding the massive reclamations on seven geologic features in the South China Sea. Article 123 of UNCLOS requires coastal states in semi-enclosed seas to “cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention [...] with respect to the protection and preservation of the marine environment.”<sup>184</sup>

The South China Sea is a semi-enclosed sea because its waters consist primarily (75 to 80%) of territorial and EEZ waters.<sup>185</sup>

The Arbitral Tribunal ruled that China “*caused permanent and irreparable harm to the coral reef ecosystem.*” This is the first time that an international tribunal applied the UNCLOS provision on the protection and preservation of the marine environment. Under Article 290 of UNCLOS, the proper tribunal may prescribe provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending a final decision.<sup>186</sup>

China reclaimed on all the seven atoll reefs it occupies in the Spratlys. However, China also dredged 10 other reefs for filling materials for the seven reefs it reclaimed.<sup>187</sup> To put in perspective the destruction of these seventeen atoll reefs, Tubbataha, the UNESCO World Heritage Marine Park in the Sulu Sea, has only three atoll reefs.

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<sup>184</sup> “States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention.” UNCLOS art. 123.

<sup>185</sup> See Art. 122.

<sup>186</sup> “If a dispute has been duly submitted to a court or tribunal which considers that prima facie it has jurisdiction under this Part or Part XI, section 5, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.” Art. 290(1).

<sup>187</sup> J. Ashley Roach, *China’s Shifting Sands in the Spratlys*, VIETNAMNET, July 28, 2015, available at <http://english.vietnamnet.vn/fms/marine-sovereignty/137126/china-sshifting-sands-in-the-spratlys.html>.

## **F. Other Issues Raised in the Arbitration**

The Arbitral Tribunal also ruled that:

1. China violated the exclusive right of the Philippines to its EEZ when China:
  - a. Interfered with fishing activities of Filipino fishermen within Philippine EEZ, including imposing a fishing moratorium within Philippine EEZ;
  - b. Interfered with petroleum activities of Philippine-commissioned vessels within Philippine EEZ;
  - c. Failed to prevent Chinese fishermen from fishing within Philippine EEZ, and d. Constructed an artificial island and structures on an LTE (Mischief Reef) within Philippine EEZ.
2. China violated its obligation not to aggravate the dispute during the arbitration when China:
  - a. Dredged the reefs, reclaimed and built the islands while the proceedings were ongoing; and
  - b. Destroyed the evidence of the natural condition of the geologic features at issue when China dredged and reclaimed them while the proceedings were ongoing.
3. China violated its obligation to observe maritime safety when Chinese coast guard vessels crossed the path of Philippine vessels at high speed.

The Arbitral Tribunal upheld the Philippine position on these issues.

## **G. Issues the Arbitral Tribunal Refused to Rule on**

The Arbitral Tribunal refused to rule on the standoff between Philippine marines and Chinese coast guard vessels in Ayungin Shoal in the Spratlys, stating that this issue involves “military activities” outside its jurisdiction.

The Philippines asked the Arbitral Tribunal to direct China to respect in the future the rights and freedoms of the Philippines under UNCLOS. The Arbitral Tribunal also declined to rule on this issue since bad faith is not presumed in the performance of duties under UNCLOS, which already mandates the parties to comply in good faith with their obligations under UNCLOS.

## V. ENFORCEMENT OF THE ARBITRAL AWARD

### A. Disputed Area Before and After the Award

China has failed to revive John Selden's argument that a state can appropriate as its own sovereign waters an entire or almost an entire sea. At bottom, this is the core issue in the South China Sea dispute—a direct attack on the Grotian foundation of the Law of the Sea. But the Award in the South China Sea arbitration case has confirmed and entrenched the fundamental rule that a state can claim maritime entitlements only to the extent expressly allowed under UNCLOS, which is truly the constitution for the oceans and seas of our planet.

Thus, China and the Philippines, which have both ratified UNCLOS, have the obligation to comply in good faith with the Award.<sup>188</sup>

McKenna Reef, Johnson South Reef and Scarborough Shoal are now the only three disputed land features occupied by China within the entire Philippine EEZ. Mischief Reef is not a land feature.

The Arbitral Tribunal ruled that these three land features generate only a 12 NM territorial sea, with no EEZ.

The Philippine EEZ in the South China Sea has an area of about 381,000 square kilometers. Deducting the 4,650 square kilometers total territorial seas of McKenna Reef, Johnson South Reef and Scarborough Shoal, the Philippines has an EEZ of about 376,350 square kilometers in the South China Sea *free from any Chinese claim*.

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<sup>188</sup> “The award shall be final and without appeal, unless the parties to the dispute have agreed in advance to an appellate procedure. It shall be complied with by the parties to the dispute.” UNCLOS art. 11, Annex VII.

“State parties shall fulfill in good faith the obligations assumed under this Convention[...].” Art. 300.

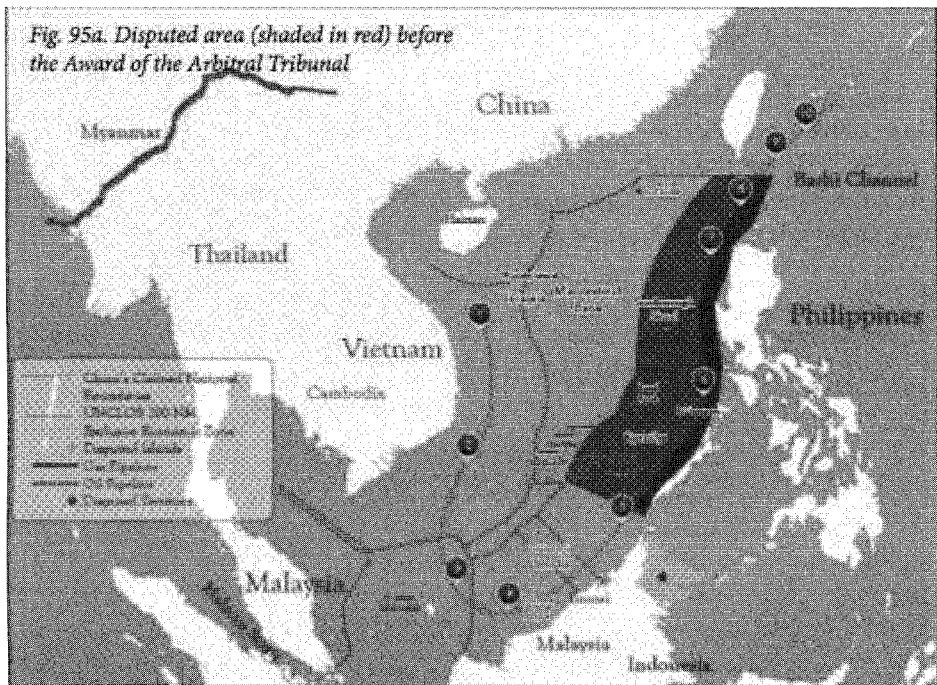


FIGURE 17: DISPUTED AREA (SHADED IN RED) BEFORE THE AWARD OF THE ARBITRAL TRIBUNAL

*This maritime area is larger than the total land area of the Philippines of about 300,000 square kilometers. All the living and non-living resources in this maritime area—the fish, oil, gas, and other minerals—belong exclusively to the Philippines.*

Paragraph 2, Section 2, Article XII, of the 1987 Philippine Constitution provides: “*The State shall protect the nation’s marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens.*”<sup>189</sup>

<sup>189</sup> CONST. art. XII, § 2(2). (Emphasis supplied.)

The Philippines is mandated by the Constitution to protect Philippine EEZ in the West Philippine Sea as affirmed by the Arbitral Tribunal in the Award. The Constitution has tasked the Armed Forces of the Philippines “to secure the sovereignty of the State and the integrity of the national territory.”<sup>190</sup> The President, as Commander-in-Chief of the Armed Forces and Chief Architect of the foreign policy of the Philippines, is duty-bound to carry out this mandate of the Constitution.

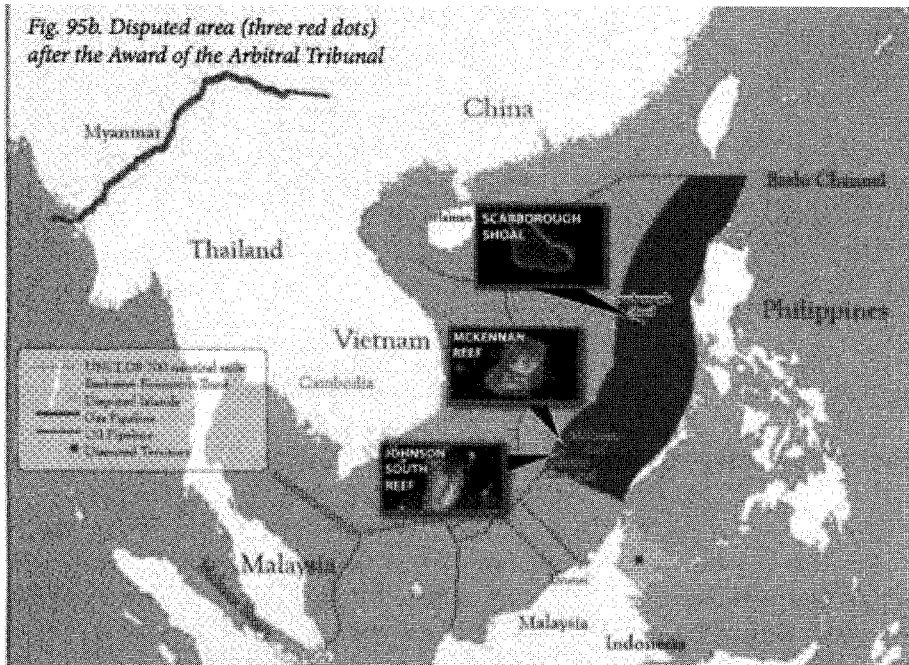


FIGURE 18: DISPUTED AREA (THREE RED DOTS) AFTER THE AWARD OF THE ARBITRAL TRIBUNAL

Thus, the Philippines must conduct naval and aerial patrols in its EEZ in the West Philippine Sea. The Philippines must also always assert its sovereign rights and jurisdiction over its EEZ in the West Philippine Sea in all its relations and dealings with foreign states.

<sup>190</sup> Art. II, § 3.



There are two aspects in the enforcement of the Award:

1. Enforcement of the Award by the world's naval powers with respect to freedom of navigation and overflight for military vessels and aircraft, including the conduct of military activities, in the high seas and EEZs of the South China Sea. Such freedom of navigation and over-flight is a paramount national interest of the world's naval powers.
2. Enforcement of the Award by the Philippines with respect to its exclusive right to exploit the resources of its EEZ in the South China Sea.

### **B. Enforcement of the Award by World Naval Powers**

The world naval powers will enforce the Award by sailing and flying, and conducting military activities, in the high seas and EEZs of the South China Sea:

1. The U.S. has declared that its military forces will continue to operate in the South China Sea in accordance with international law. The U.S. Chief of Naval Operations John Richardson stated: "The U.S. Navy will continue to conduct routine and lawful operations around the world, including in the South China Sea, in order to protect the rights, freedoms and lawful uses of sea and airspace guaranteed to all. This will not change."<sup>191</sup>
2. France has urged the 27-nation European Union to coordinate naval patrols in the South China Sea to ensure a "regular and visible" presence in the disputed waters illegally claimed by China. French Defense Minister Jean-Yves Le Drian said that the protection of freedom of the seas is vital from an economic standpoint and is concerned a loss of this right in the South China Sea might lead to similar problems in the Arctic Ocean or Mediterranean Sea.<sup>192</sup> Russia has recently adopted regulations requiring all foreign vessels to secure prior permission from Russia

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<sup>191</sup> See *US Navy Says It Will Operate in South China Sea*, PRESSTV, July 20, 2016, available at <http://www.presstv.ir/detail/2016/07/20/476110/us-navy-south-china-sea>.

<sup>192</sup> See Arthur Dominic Villasanta, *France Urges European Union to Join It in Patrolling the South China Sea*, YIBADA, July 31, 2016, available at <http://en.yibada.com/articles/147065/20160731/france-urges-european-union-join-patrolling-south-china-sea.htm>.

before sailing through its “water area” in the North Sea Route. Russia’s “water area” includes its EEZ.<sup>193</sup>

3. British Ambassador to the U.S. Kim Darroch disclosed that British Typhoon fighter jets that visited Japan in October 2016 flew over the South China Sea in their return flight to assert freedom of overflight. He added:

Certainly, as we bring our two new aircraft carriers on-stream in 2020, and as we renew and update our defense forces, they will be seen in the Pacific. And we absolutely share the objective of this U.S. administration, and the next one, to protect freedom of navigation and to keep sea routes and air routes open.<sup>194</sup>

### **C. Enforcement of the Award by the Philippines**

The resolution of the South China Sea dispute is certainly not limited to an option of either “war or talk” with China. The successful arbitration case filed by the Philippines against China proves that the “war or talk” thinking is just too naive. There is a menu of options available to the Philippines to enforce the Award, such as:

1. The Philippines can sue in a jurisdiction that ratified UNCLOS in case China installs oil or gas platforms within Philippine EEZ. The Philippines can ask the court having jurisdiction to attach the assets, located in its jurisdiction, owned by Chinese entities involved in installing or operating these platforms.
2. The Philippines can recover damages from China in the proper forum for severe harm to the marine environment in the Spratlys as ruled in the Award.

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<sup>193</sup> Sally de Boer & Sean Fahey, *Arctic Security and Legal Issues in the 21st Century*, THE MARITIME EXECUTIVE, Mar. 1, 2017, available at <http://www.maritime-executive.com/editorials/arctic-security-and-legal-issues-in-the-21st-century>.

<sup>194</sup> See David Brunnstrom, *British Fighters to Overfly South China Sea, Carriers in Pacific after 2020: Envoy*, REUTERS, Dec. 2, 2016, available at <http://www.reuters.com/article/us-britain-southchinasea-fighters-idUSKBN13R00D>.

3. The Philippines can move for the suspension of China's exploration permits in the Area until China complies with the Award, on the ground that China is accepting benefits from the seabed provisions of the Convention but is refusing to comply with its obligations under the dispute settlement provisions of the Convention. The framers call UNCLOS a "package deal" of rights and obligations. A state party cannot cherry pick, that is, avail of the rights without complying with the obligations.
4. The Philippines can likewise move before the U.N. Commission on the Limits of the Continental Shelf (CLCS) for the suspension of China's application for an ECS in the East China Sea until China complies with the Award.
5. The Philippines can negotiate its maritime boundaries with Malaysia (EEZ and ECS) and Vietnam (ECS), applying the Arbitral Tribunal's ruling that no geologic feature in the Spratlys generates an EEZ and that the nine-dashed line has no legal effect on maritime entitlements. This will result in state practice adopting the rulings in the Award.
6. The Philippines can delineate its ECS from Luzon and file its claim with the CLCS, there being no legal impediment from the nine-dashed line. China, the only opposite coastal state, can raise two grounds to oppose the Philippine ECS claim. First, China can again raise its nine-dashed line claim but the CLCS is bound by the Award of the Arbitral Tribunal. Second, China can claim that the Philippine ECS overlaps with China's ECS, but this means China accepts that the Philippines has an EEZ from Luzon. If China does not oppose the Philippine claim to an ECS, then the CLCS will recommend to the Philippines the adoption of its ECS. This is the dilemma that China will face if the Philippines files an ECS claim.
7. Philippine navy and coast guard vessels and aircraft can continue to patrol Philippine EEZ in the West Philippine Sea. Under the Philippine-U.S. Mutual Defense Treaty<sup>195</sup> (MDT), any armed

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<sup>195</sup> "Each Party recognizes that an armed attack in the Pacific area on either of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common dangers in accordance with its constitutional processes." Mutual Defense Treaty

attack on a Philippine public vessel (navy or coast guard) in the Pacific area (clarified to include the South China Sea)<sup>196</sup> is a ground to invoke the MDT. Thus, the MDT covers Philippine navy and coast guard vessels and aircraft patrolling Philippine EEZ in the West Philippine Sea. The U.S. has declared that China must comply with the ruling of the Arbitral Tribunal, recognizing the right of the Philippines to patrol the West Philippine Sea.

UNCLOS is a convention that provides for both rights and obligations. A state party cannot cherry pick, that is, avail of the rights without complying with the obligations.

The Manila Trench within Philippine EEZ off the western coast of Luzon will not prevent the Philippines from claiming an ECS. Natural prolongation of the continental shelf, as an alternative geomorphological basis (in contrast to physical distance) to claim an EEZ under Article 76 of UNCLOS, is not a separate and independent criterion to claim an ECS. As held in *Bangladesh v. Myanmar*, “[t]he Tribunal therefore cannot accept Bangladesh’s contention that, by reason of the *significant geological discontinuity* dividing the Burma plate from the Indian plate, Myanmar is not entitled to a continental shelf beyond 200 NM.”<sup>197</sup>

Under Article 77 of UNCLOS, the Philippines has “sovereign rights,” to the exclusion of all other states, to explore and exploit specified natural resources in its ECS.<sup>198</sup> These natural resources are all the oil, gas, minerals, and other non-living resources, including living sedentary species. Sedentary species are organisms that at the harvestable stage are immobile on or under the seabed, or unable to move except in constant physical contact with the seabed or subsoil. Examples of sedentary species are abalone, clams and oysters.

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Between the United States and the Republic of the Philippines, art. IV, Aug. 30, 1951, Phil-U.S., available at [http://avalon.law.yale.edu/20th\\_century/phil001.asp](http://avalon.law.yale.edu/20th_century/phil001.asp).

<sup>196</sup> Letter of U.S. Secretary of State Cyrus Vance to Philippine Secretary of Foreign Affairs Carlos P. Romulo (Jan. 6, 1979); Letter of U.S. Ambassador to the Philippines Thomas C. Hubbard to Foreign Secretary Domingo L. Siazon (May 24, 1999.)

<sup>197</sup> *Delimitation in the Bay of Bengal*. (Emphasis supplied.)

<sup>198</sup> “1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources. 2. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.” UNCLOS art. 77(1)-(2).

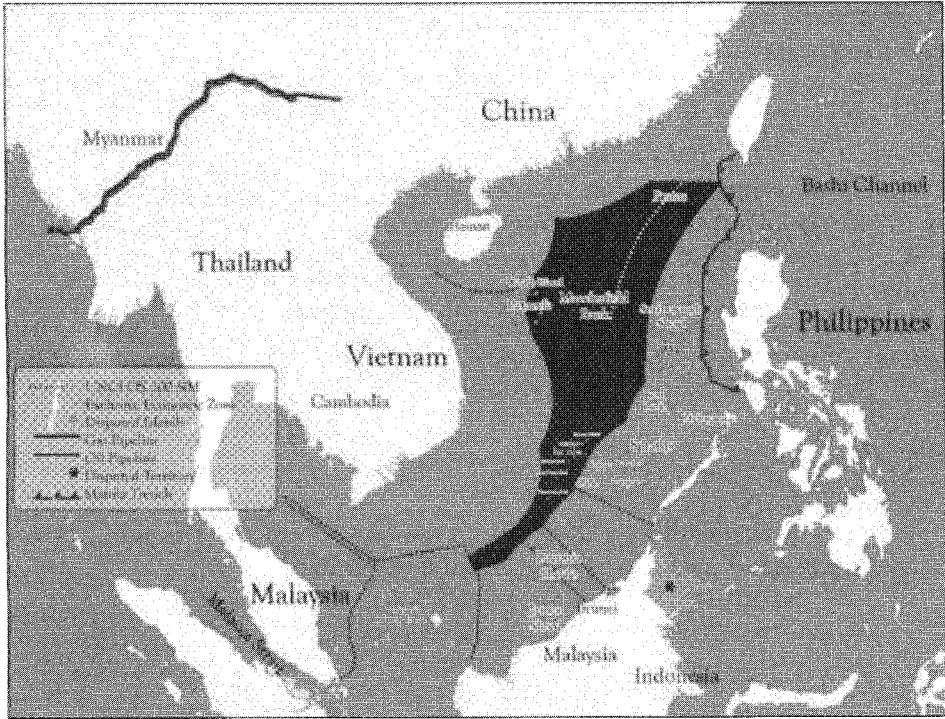


FIGURE 19: PHILIPPINE EXTENDED CONTINENTAL SHELF<sup>199</sup>

Other states cannot undertake exploration or exploitation activities of such natural resources in Philippine ECS without the express consent of the Philippines. The water column, as well as the living resources in the water column, in the ECS belongs to mankind and there is freedom to fish in such water column. There is freedom of navigation and overflight in the ECS.

<sup>199</sup> The white dotted line in the dark blue area represents the Philippine extended continental shelf from Luzon.

## D. Entrenchment of the Rulings in Subsequent Cases

Over time, the Award in the Philippines-China arbitration case will be followed by other international arbitral tribunals, cementing the rulings as principles of international law. For example, the standard for what constitutes an island capable of human habitation or economic life of its own would most likely be applied in succeeding cases. Also, the extinguishment of historic claims in the EEZ, ECS and high seas would certainly be reiterated in succeeding cases. Coastal states that stand to benefit from the rulings will naturally invoke and apply these rulings. This will create a body of legal literature fortifying the rulings as the authoritative interpretation of UNCLOS.

### 1. *World Powers and Rulings of International Tribunals*

Dr. Graham Allison, Director of the Harvard Kennedy School's Belfer Centre for Science and International Affairs, has argued:

When the Netherlands sued Russia (The Arctic Sunrise Case) [...] (Russia) ignored the tribunal's (ITLOS) order that the crew be released while the dispute was being resolved [...]

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[A]n Arbitral Tribunal (in the Chagos Marine Protected Area Arbitration) ruled for Mauritius and against Britain ... The British government disregarded the ruling [...]

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In the Nicaragua case (Military and Paramilitary Activities in and Against Nicaragua), when the court (ICJ) found in favor of Nicaragua and ordered the U.S. to pay reparations, the U.S. refused.<sup>200</sup>

But an analysis of the facts of these cases reveals a more complicated reality. The winning state in an international arbitration does not have to humiliate the losing state in exacting compliance with the award. Language can be found to allow the losing state to comply with the award without admitting fault or wrongdoing, or losing face, as long as the winning state secures a

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<sup>200</sup> Graham Allison, *Heresy to Say Great Powers Don't Bow to Tribunals on Law of the Sea?*, THE STRAITS TIMES, July 16, 2016, available at <http://www.straitstimes.com/opinion/heresy-to-say-great-powers-dont-bow-to-international-courts>.

satisfactory result. The award of “reparations” can be paid as “economic aid.” After all, a rose by any other name smells as sweet as a rose; compliance by any other name is as satisfactory as compliance.

i. The Arctic Sunrise Case<sup>201</sup>

On November 22, 2013, the ITLOS, upon a provisional measure requested by the Netherlands, ordered Russia to immediately release the Arctic Sunrise crew and vessel, upon the posting of a bond by the Netherlands in the amount of 3.6 million euros, to be posted with the Russian Federation in the form of a bank guarantee. Russia refused to participate in the proceedings and refused to comply with the ITLOS order.

On December 18, 2013, the Russian Parliament amended its amnesty law to include hooliganism, the crime that the Arctic Sunrise crew were charged. Before Christmas day of December 2013, or just over a month after the ITLOS order, Russian President Putin pardoned the Arctic Sunrise crew who were then allowed to leave Russia. The Arctic Sunrise vessel was likewise allowed to leave. Putin stated that the crew and vessel were released under Russian law, and not because of the ITLOS order.<sup>202</sup>

ii. Chagos Marine Protected Area Arbitration<sup>203</sup>

On March 18, 2015, the Arbitral Tribunal ruled that in establishing the Marine Protected Area surrounding the Chagos Archipelago, the United Kingdom breached its obligations under Articles 2(3), 56(2), and 194(4) of UNCLOS. These provisions required the United Kingdom to consult Mauritius before establishing the marine protected area. The United Kingdom has an undertaking to return the Chagos Archipelago to Mauritius when the United Kingdom, the former colonial power, will no longer need the Archipelago for defense purposes.

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<sup>201</sup> Arctic Sunrise Arbitration Case (Neth. v. Russ.), Order, ITLOS Case No. 22 (Int'l Trib. for the Law of the Sea 2013), *available at* [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no.22/Order/C22\\_Ord\\_22\\_11\\_2013\\_orig\\_Eng.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.22/Order/C22_Ord_22_11_2013_orig_Eng.pdf).

<sup>202</sup> See *Greenpeace Arctic Sunrise: Russia 'Frees Protest Ship'*, BBC NEWS, June 6, 2014, *available at* <http://www.bbc.com/news/world-europe-27736927>.

<sup>203</sup> Chagos Marine Protected Area Arbitration (Mauritania v. U.K.), Award, PCA Case No. 2011-03 (Perm. Ct. Arb. 2011), *available at* <http://www.pcacases.com/pcadocs/MU-UK%2020150318%20Award.pdf>.

On June 15, 2015, MP Patrick Grady of the UK Parliament raised a parliamentary inquiry to the Secretary of State for Foreign and Commonwealth Affairs as to “what steps the Government is taking to comply with the award of the Arbitral Tribunal in the case of Chagos Marine Protected Area Arbitration (*Mauritius v. U.K.*) dated 18 March 2015.” On June 23, 2015, MP James Duddridge, Under-Secretary for Foreign and Commonwealth Affairs, replied:

The Government wishes to implement the award in the spirit of greatest possible cooperation, and has written to the Mauritian government several times since the award, making a proposal to hold consultations about the protection of the marine environment as early as July.<sup>204</sup>

Clearly, the United Kingdom readily complied with the Award of the Arbitral Tribunal.

### iii. Military and Paramilitary Activities In and Against Nicaragua<sup>205</sup>

In 1986, the ICJ ruled that the U.S. violated the territorial integrity of Nicaragua when the U.S. armed the *contra* rebels and mined the territorial waters of Nicaragua, among others. The U.S. had refused to participate in the proceedings and also refused to comply with the ruling, which directed the U.S. and Nicaragua to negotiate the amount of damages the U.S. should pay Nicaragua.

Nicaragua asked the ICJ to proceed with the hearings on the amount of damages, which Nicaragua claimed run into billions of dollars. In 1991, while the proceedings were on-going, the U.S. and Nicaragua entered into an understanding: without conceding any liability, the U.S. would provide 541 million dollars in economic aid (not reparations) to Nicaragua and resume commercial relations with Nicaragua if Nicaragua would withdraw the pending case with the ICJ.<sup>206</sup>

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<sup>204</sup> British Indian Ocean Territory: Marine Protected Areas, Written Question 2407 Asked by MP Patrick Gray and Answered by MP James Duddridge (June 23, 2015), *available at* <http://www.parliament.uk/written-questions-answers-statements/written-question/commons/2015-06-15/2407>.

<sup>205</sup> Military and Paramilitary Activities in and against Nicaragua (*Nicar. v. U.S.*), Merits, 1986 I.C.J. 14 (June 27).

<sup>206</sup> “Diplomats and officials quoted in the press indicated that U.S. officials had stressed to Mrs. Chamorro that U.S. aid depended on her willingness to drop the case.”



On June 5, 1991, Nicaragua's National Assembly overwhelmingly repealed the law requiring the U.S. to pay damages to Nicaragua. On September 12, 1991, Nicaragua informed the ICJ that Nicaragua "[p]laces on record the discontinuance by the Republic of Nicaragua of the proceedings instituted by the Application filed on 9 April 1984."<sup>207</sup>

In short, Nicaragua accepted the arrangement with the U.S. that resulted in the termination of the dispute.

## 2. *China's Three Warfares*<sup>208</sup>

In 2003, China's Communist Party, Central Committee and Central Military Commission approved the strategy of the Three Warfares<sup>209</sup>—a strategy designed to control the South China Sea for economic and military purposes without firing a single shot.

China will avoid an armed attack on Philippine military vessels and aircraft in the South China Sea considering the defense treaty obligation of the U.S. to the Philippines. The last thing China will do is force the U.S. to intervene militarily in the South China Sea dispute. Thus, China has adopted the Three Warfares strategy—a strategy to win the war without waging a kinetic war.

### i. First Warfare: Historic Right to South China Sea

In its Position Paper of December 7, 2014, China makes this startling claim: "Chinese activities in the South China Sea date back to over 2,000 years ago. China was the first country to discover, name, explore, and exploit the resources of the South China Sea Islands and the first to continuously exercise sovereign powers over them."

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HUMAN RIGHTS WATCH, *FEELING PEACE: HUMAN RIGHTS AND RECONCILIATION IN NICARAGUA UNDER THE CHAMORRO GOVERNMENT* 52 (1991).

<sup>207</sup> Correspondence, The Agent of the Republic of Nicaragua to the Registrar (Sept. 12, 1991), at 484, *available at* <http://www.icj-cij.org/docket/files/70/9635.pdf>.

<sup>208</sup> See Stefan Halper, CHINA: THE THREE WARFARES, Report to the US Pentagon's Office of Net Assessment (May 2013), *available at* <https://cryptome.org/2014/06/prc-three-wars.pdf>

<sup>209</sup> Timothy A. Walton, "Firing First Effectively: Lessons the Chinese Have Drawn From The Way The Us Enters Conflict That Informs Their Use Of The Three Warfares" in CHINA: THE THREE WARFARES, *id.* at 202.

But the Arbitral Tribunal ruled:

The Tribunal sees *no evidence* that, prior to the Convention, *China ever established a historic right* to the exclusive use of the living and non-living resources of the waters of the South China Sea, whatever use it may have made of the Spratly Islands themselves.<sup>210</sup>

This First Warfare of China is now dead in the water.

ii. Second Warfare: Legal Exception to UNCLOS

China claims that its historic right to the South China Sea waters predates UNCLOS and therefore cannot be governed by UNCLOS. In short, the narrative is that China's historic right is an exception to UNCLOS. China has sent hundreds of scholars to the U.S., Canada, and Europe to take up graduate studies in the Law of the Sea and International Relations. These scholars have written numerous articles and dissertations justifying China's historic right as an exception to UNCLOS.

But the Arbitral Tribunal ruled that all historic rights in the EEZ and ECS were extinguished upon the effectivity of UNCLOS:

[T]he Tribunal concludes that China's claim to historic rights to the living and non-living resources within the 'nine-dash line' is incompatible with the Convention.<sup>211</sup>

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[A]ny historic rights that China may have had to the living and non-living resources within the 'nine-dash line' were superseded, as a matter of law and as between the Philippines and China, by the limits of the maritime zones provided for by the Convention.<sup>212</sup>

This Second Warfare of China has been declared incompatible with UNCLOS and is now also dead in the water.

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<sup>210</sup> *Final Award*, ¶ 631. (Emphasis supplied.)

<sup>211</sup> *Id.* ¶ 211.

<sup>212</sup> *Id.* ¶ 262.

iii. Third Warfare: Huge Naval and Air Bases  
Will Intimidate Other Claimant States

China's three huge air and naval bases in the Spratlys project overwhelming power. This will intimidate other claimant states into submission, allowing China to enforce the nine-dashed line as its national boundary.

But the Arbitral Tribunal ruled that the nine-dashed line cannot serve as legal basis to claim maritime entitlements, and thus there are high seas and EEZs in the South China Sea. China's air and naval bases built on low-tide elevations have no territorial sea or territorial airspace. The world naval powers will sail and fly, and conduct military activities, in the high seas and EEZs of the South China Sea. They may even sail in the waters around, and fly in the airspace above, these air and naval bases built on artificial islands.

Furthermore, the Arbitral Tribunal ruled that the Philippines has exclusive sovereign rights to its EEZ. The Philippines will have to lead in fighting the battle to enforce its exclusive right to its EEZ. This battle involves:

1. Marshaling support from other ASEAN states prejudiced by the nine-dashed line;
2. Using world opinion to convince the Chinese people to comply with international law as embodied in the Award. Understandably, China's Government will not comply with the Award if the Chinese people do not understand that the nine-dashed line has no historical or legal basis;
3. Convincing UNCLOS coastal states that it is to their best interest to help protect the Philippines' right to its EEZ; otherwise, in the future their more powerful neighbors might also covet their EEZs;
4. Adopting a credible anti-access, area denial military strategy; and
5. Creatively resorting to lawfare.

## E. Issues Affecting Joint Development between China and the Philippines

All disputant States should follow UNCLOS by respecting the 200 NM EEZ of each coastal state. *Beyond the EEZs*, disputant states can agree on joint development of the mineral resources in any overlapping maritime zone, while shelving the sovereignty issue over the islands and rocks. China can even be given a bigger share in the joint development of the disputed areas beyond the EEZs of coastal states.

But China's proposal for joint development in the EEZs of all coastal states—except China's EEZ—is a case of what is mine is mine alone but what is yours belongs to both of us.

### 1. *China's Precondition for Joint Development*

China has one precondition for joint development—that other states concede China's sovereignty over all geologic features and waters within the nine-dashed line. Any state that agrees to such precondition will have to immediately vacate, and turn over to China, any island or rock such state presently occupies. Not a single ASEAN disputant state has accepted China's offer.

In explaining the concept of joint development, China has officially declared that the concept of “setting aside dispute and pursuing joint development” has the following four elements:

1. *The sovereignty of the territories concerned belongs to China.*
2. When conditions are not ripe to bring about a thorough solution to *territorial dispute*, discussion on the issue of sovereignty may be postponed so that the dispute is set aside. *To set aside dispute does not mean giving up sovereignty. It is just to leave the dispute aside for the time being.*
3. *The territories under dispute* may be developed in a joint way.
4. The purpose of joint development is to enhance mutual understanding through cooperation and create conditions for the eventual resolution of *territorial ownership*.<sup>213</sup>

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<sup>213</sup> See Ministry of Foreign Affairs of the People's Republic of China, *Set Aside Dispute and Pursue Joint Development*, FMPRC.GOV.CN, available at <http://www.fmprc.gov.cn/>

Joint development under China's definition is only within the EEZ of the Philippines and EEZs of other coastal states, never within China's EEZ. In short, joint development is not reciprocal. Joint development is not on territory, but on the EEZ. *A dispute over the EEZ is not a territorial dispute but a maritime dispute.* To accept China's contrary definition that there is a territorial dispute over the EEZ is to admit that the subject matter of the Arbitral Tribunal's Award is a territorial dispute, making the Award null and void since the Arbitral Tribunal has no jurisdiction over territorial disputes.

## 2. *Philippine Constitutional Constraints*

For China, that their "sovereignty" over the Reed Bank is acknowledged by the Philippines is "fundamental" to any joint development. Philex Petroleum learned this firsthand during its May 2012 negotiations with China National Offshore Oil Company (CNOOC) over the Reed Bank.<sup>214</sup> This, of course, is not possible under the Philippine Constitution.

The Philippine Constitution defines "National Territory" as "territories over which the Philippines has *sovereignty or jurisdiction* [...] including [...] *the seabed, the subsoil [...] and other submarine areas.*"<sup>215</sup> Under UNCLOS, as affirmed by the Arbitral Tribunal, the Philippines has "sovereign rights and *jurisdiction*" over its EEZ in the West Philippine Sea.

Moreover, the Constitution specifically provides that:

The State shall protect the nation's marine wealth in its [...] exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens.<sup>216</sup>

In short, to accept China's offer of joint development is not only iniquitous, it also violates the Philippine Constitution.

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mfa\_eng/ziliao\_665539/3602\_665543/3604\_665547/t18023.shtml (last accessed Dec. 29, 2016).

<sup>214</sup> Aide Memoire, Meeting between CNOOC and PHILEX Petroleum, Beijing, addressed to the President of the Philippines from MV Pangilinan (May 2 2012); Theresa Marterlino-Reyes/Vera Files, *Chinese firm rejects MUP offer for share in PH project in Reed Bank*, ABS-CBN NEWS, Mar. 9, 2017, available at <http://news.abs-cbn.com/business/03/09/14/chinese-firm-rejects-mvp-offer-shareph-project-reed-bank>.

<sup>215</sup> CONST. art. I. (Emphasis supplied.)

<sup>216</sup> Art. XII, § 2(2).

## F. The Spratlys as an International Maritime Peace Park

The eggs and larvae of fish that spawn in the Spratlys are carried by currents to the coasts of China, Vietnam, Luzon, Palawan, Malaysia, Brunei, Natuna Islands, as well as the Sulu Sea. The Spratlys are the breeding ground of fish in the South China Sea.

Of the total world annual fish catch, 12 percent comes from the South China Sea, valued at 21.8 billion dollars. The South China Sea has 3,365 species in 263 families of fish. The South China Sea is one of the top five most productive fishing zones in the world in terms of total annual fish catch.<sup>217</sup> Twelve countries with two billion people border the South China Sea. A large number of the coastal population of these countries depend on fish from the South China Sea for their protein.

To ensure that the Spratlys will remain the South China Sea's breeding ground where fish spawn, Dr. John W. McManus has proposed that the Spratlys be declared an international marine peace park.<sup>218</sup> This is a win-win solution to the territorial dispute in the Spratlys (the Arbitral Tribunal's Award does not resolve the territorial dispute). This is particularly favorable to China which takes 50 percent (and growing) of the annual fish catch in the South China Sea. All claimant states shall suspend for 100 years their territorial claims and declare all LTEs and high-tide features in the Spratlys, and an area of 3 NM around each feature, as an international marine peace park for the benefit of all coastal states in the South China Sea.

The claimant states will hold on to whatever islands or structures they now possess. Only coast guard personnel, vessels, and aircraft can be stationed in the Spratlys. The islands or structures can only be used for marine scientific research and eco-tourism.

There is a precedent to this. The 1994 peace agreement between Israel and Jordan created the Red Sea Marine Peace Park in the Gulf of Aqaba in the Red Sea.

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<sup>217</sup> U. Rashid Sumaila & William Cheung, *Boom or Bust: The Future of Fish in the South China Sea*, OCEAN RECOVERY ALLIANCE, Nov. 5, 2015, available at <http://www.oceanrecov.org/news/ocean-recovery-alliance-news/boom-or-bust-the-future-of-fish-in-the-south-china-sea.html>.

<sup>218</sup> John McManus, *The Spratly Islands: A Marine Peace Park?*, 23 *AMBIO* 181 (1994). See John McManus, Kwang-Tsao Shao & Szu-Yin Lin, *Toward Establishing a Spratly Islands International Marine Peace Park: Ecological Importance and Supportive Collaborative Activities with an Emphasis on the Role of Taiwan*, 41 *OCEAN DEV. & INT'L L.* 270 (2010).

Marine ecologists from China, Taiwan, the Philippines, and Vietnam support a Spratlys marine protected area.

Kwang-Tsao Shao, a marine-biodiversity expert at Taiwan's Academia Sinica in Taipei, says that at meetings that include his mainland peers, there is consensus from ecologists on both sides of the strait that the region should be set aside as a marine protected area.<sup>219</sup>

Prof. Edgardo Gomez, Philippine national scientist for marine biology, and other marine biologists at the University of the Philippines Marine Science Institute, support a marine protected area in the Spratlys.<sup>220</sup>

Professors Nguyen Chu Hoi and Vu Hai Dang, Vietnamese marine ecologists, support a marine protected area in the Spratlys.<sup>221</sup>

Dr. McManus has warned that:

If we don't do this (establish a marine protected area), we are headed toward a major, fisheries collapse in a part of the world where [that] will lead to mass starvation.<sup>222</sup>

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<sup>219</sup> David Cyranoski, *South China sea ruling sparks conservation fears*, NATURE, July 20, 2015, available at <http://www.nature.com/news/south-china-searuling-sparks-conservation-fears-1.20279>.

<sup>220</sup> James Borton, *Marine Peace Park Plan Offers Promise for South China Sea*, GEOPOLITICALMONITOR.COM, Oct. 25, 2015, available at <https://www.geopoliticalmonitor.com/marine-peace-park-plan-offers-promise-for-south-china-sea>.

<sup>221</sup> Nguyen Chu Hoi & Vu Hai Dang, *Building a Regional Network and Management Regime of Marine Protected Areas in the South China Sea for Sustainable Development*, 18 J. INT'L WILDLIFE L. & POL'Y 128 (2015).

<sup>222</sup> See Julie Makinen, *China Has Been Killing Turtles, Coral and Giant Clams in the South China Sea, Tribunal Finds*, LOS ANGELES TIMES, July 13, 2016, available at <http://www.latimes.com/world/asia/la-fg-south-china-sea-environment-20160713-snap-story.html>.

## VI. A FINAL WORD

It is a well-recognized rule of international law that:

Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations. When the conditions for this are met, the binding character of such declarations is based on good faith; States concerned may then take them into consideration and rely on them; such States are entitled to require that such obligations be respected.<sup>223</sup>

Such unilateral declarations may be made by the head of state or government, or by the minister of foreign affairs.<sup>224</sup>

The leaders of the nation must exercise utmost deliberation, consistency, and perseverance in seeking ways to enforce what the Arbitral Tribunal has finally awarded to the Philippines as its own EEZ in the West Philippine Sea. This is in compliance with the mandate of the Constitution that the “State shall protect the nation’s marine wealth in its [...] exclusive economic zone.”

There is no room for error—for allowing any waiver, express or implied, of the sovereign rights and jurisdiction of the Philippines over its vast EEZ in the West Philippine Sea, an area larger than the total land area of the Philippines.

Every act, declaration and statement of the leaders of the nation on the enforcement of the Award of the Arbitral Tribunal must be carefully studied and weighed to prevent any opposing state from claiming that the Philippines has abandoned, expressly or impliedly, what it has won in the arbitration case.

Likewise, the ICJ has stated that “silence may also speak [...] if the conduct of the other state calls for a response.”<sup>225</sup> Acquiescence is “equivalent to tacit recognition manifested by unilateral conduct which the other party may

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<sup>223</sup> International Law Commission, *Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, with Commentaries Thereto* (2006), Guiding Principle 1, available at [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_9\\_2006.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_9_2006.pdf). See also *Nuclear Tests Case (Austl. v. Fr.)*, 1974 I.C.J. 253, 267 (Dec. 20).

<sup>224</sup> *Id.* Guiding Principle 4.

<sup>225</sup> *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay. v. Sing.)*, Judgment, 2008 I.C.J. 12 ¶ 120 (May 23).



interpret as consent.”<sup>226</sup> In international law, the oft-quoted definition of acquiescence is:

[T]he inaction of a State which is faced with a situation constituting threat or infringement of its rights [...] Acquiescence thus takes the form of silence or absence of protest in circumstances which generally call for a particular reaction signifying an objection.<sup>227</sup>

Silence or inaction can be interpreted as a state’s acceptance of a factual or legal situation.<sup>228</sup>

Thus, any violation or infringement of the Award or of Philippine territory by other states, such as exploration activities by other states within Philippine EEZ or the installation of facilities on LTEs within Philippine EEZ, or on high-tide elevations forming part of Philippine territory, must be promptly protested formally to prevent any opposing state from claiming acquiescence by the Philippines.<sup>229</sup>

Failure to heed this caveat, for any reason, is unforgivable.

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<sup>226</sup> *Id.*

<sup>227</sup> Ian MacGibbon, *The Scope of Acquiescence in International Law*, 31 BRIT. Y.B. INT’L L. 143 (1954).

<sup>228</sup> Sophia Kopela, *The Legal Value of Silence as State Conduct in the Jurisprudence of International Tribunals*, 29 AUST. Y.B. INT’L L. 87 (2010).

<sup>229</sup> See Responsibility of States for Internationally Wrongful Acts, Nov. 2001, Supplement No.10 (A/56/10), arts. 4-5.