

107th ASIL Annual Meeting
Marriott Renaissance, April 3-6, 2-13

**Stepping Out of the Politics: Legal Solutions
to Maritime Disputes in Asia**

Role of ASEAN and the Philippines v China Case

Robert Beckman

Director, Centre for International Law (CIL)
National University of Singapore

CIL
Centre for International Law
www.cil.nus.edu.sg



Factors at Play in disputes

1. Nationalism
2. History
3. Resources
4. Freedoms of seas (military activities) in the EEZ
5. Changing Balance of Maritime Power & US-China Rivalry
6. International Law, especially UNCLOS

Categories of Disputes

1. Territorial Sovereignty Disputes

- Not likely to go to 3rd Party
- Solution: “Set aside disputes & jointly develop resources”
- - JDA not possible until agreement on “areas” for JD

2. Maritime Disputes

- Boundary delimitation disputes
- Legality of China’s “9-dash line” claim under UNCLOS & IL
- Islands, Rocks and Low-Tide Elevations

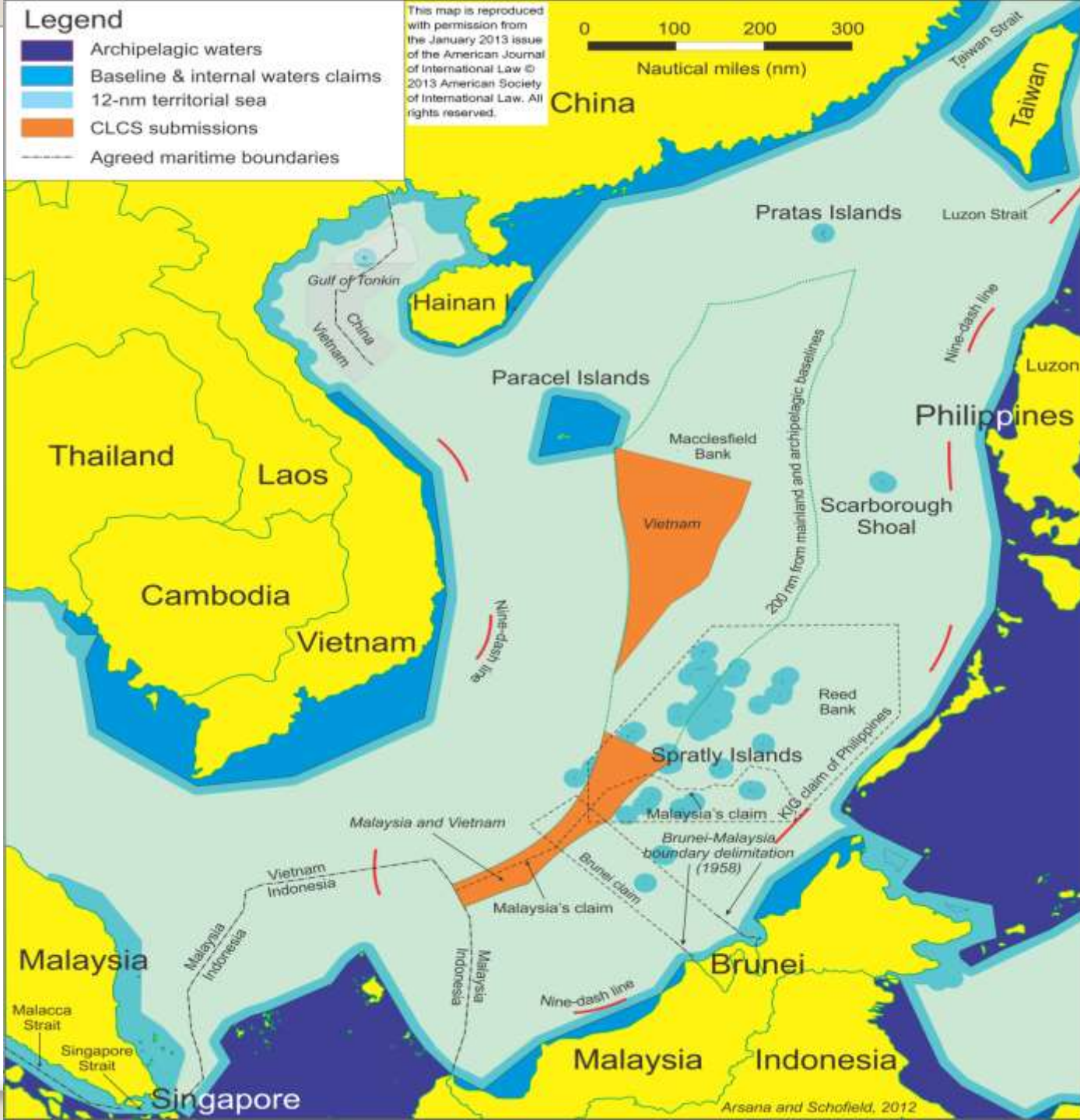
Legend

- Archipelagic waters
- Baseline & internal waters claims
- 12-nm territorial sea
- CLCS submissions
- Agreed maritime boundaries

This map is reproduced with permission from the January 2013 issue of the American Journal of International Law © 2013 American Society of International Law. All rights reserved.

0 100 200 300

Nautical miles (nm)



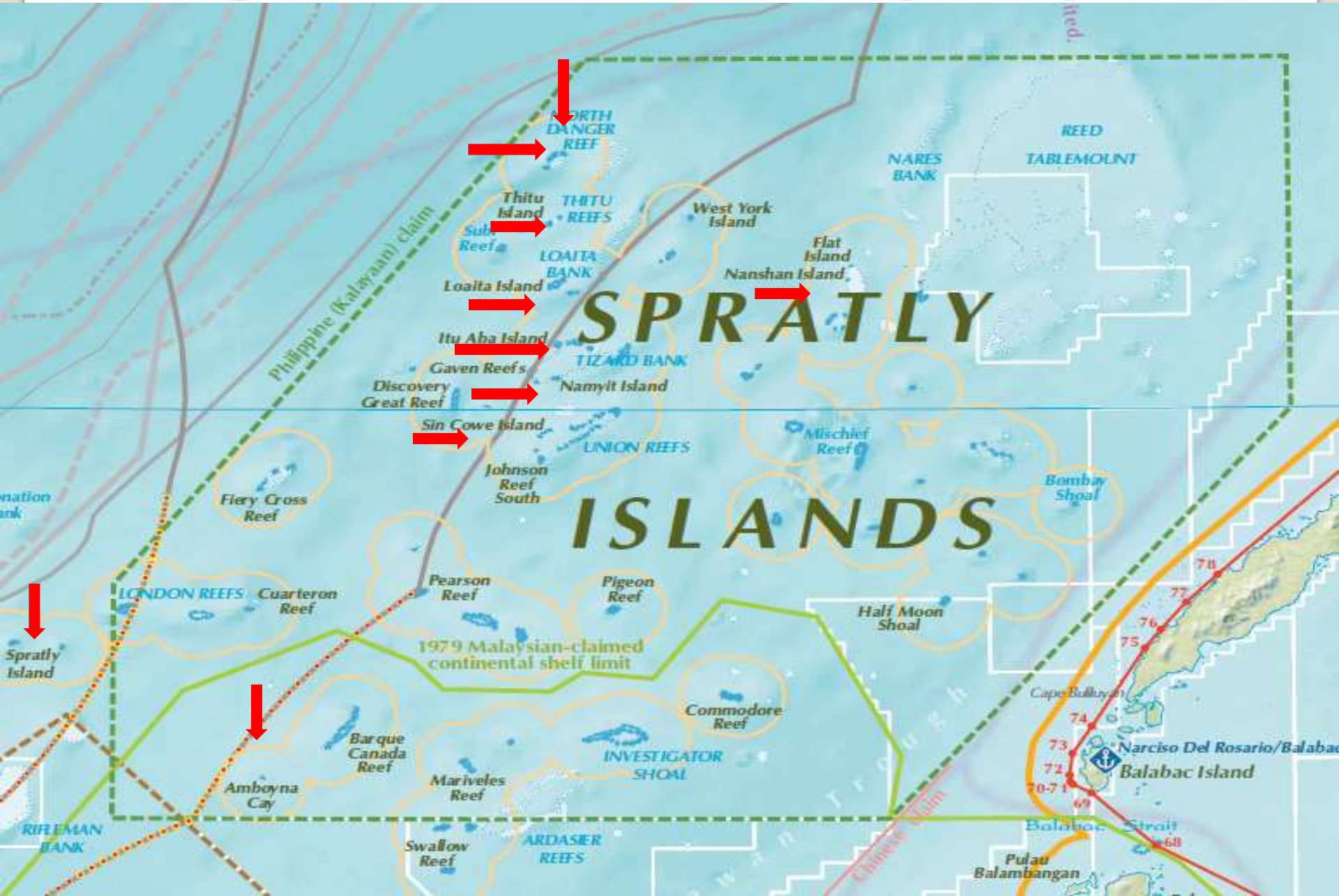
ASEAN & the South China Sea

- Concern that since 2009 that China is asserting claims in manner that is not consistent with UNCLOS and IL
- US rebalance to Asia welcomed, but ASEAN is interested in engaging China, not in containing it
- Common interests:
 1. ASEAN centrality on peace & security issues
 2. Peaceful settlement and non-use of force
 3. Confidence-building measures including China
 4. Cooperative measures between ASEAN and China
 5. Mechanisms to manage potential conflicts in SCS

Overview of the Spratly Islands

- More than 130 “geographic features” in Spratly Islands
- Less than 40 meet the definition of an island in Article 121
- Only 10-13 are large enough to be entitled in principle to an EEZ and CS of their own
- Total dry land area of the 13 largest is less than 2 km²
- Itu Aba - the largest and only island with fresh water – is 400 x 1400 metres
- Many of the occupied features are low-tide elevations or submerged reefs which have been turned into artificial island

10 largest islands in the Spratlys



Itu Aba / Taiping (Taiwan)



Image © 2011 DigitalGlobe

© 2011 MapIt

10°22'35.34" N 114°21'57.51" E elev. 24 ft

©2010 Google

Eye alt 3685 ft

Imagery Date: 2/17/2008

Occupied Features in Spratlys

- At least 44 are occupied with installations and structures:
 - Vietnam 25 (5 of largest)
 - Philippines 8 (5 of largest)
 - **China** 7
 - Malaysia 3
 - Taiwan 1 (Itu Aba, the largest)

China / Philippines / Vietnam / Taiwan / Malaysia



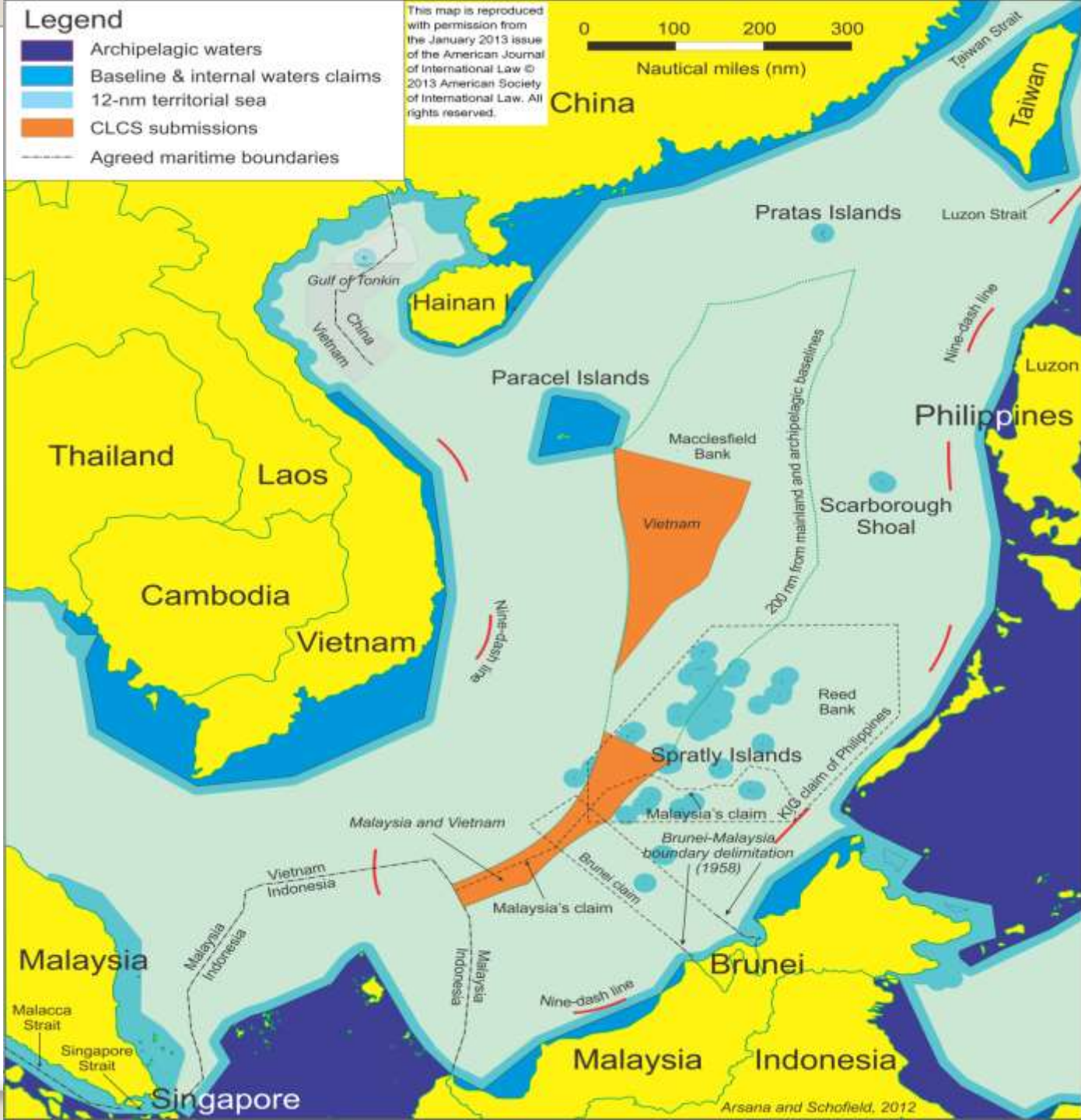
Legend

- Archipelagic waters
- Baseline & internal waters claims
- 12-nm territorial sea
- CLCS submissions
- Agreed maritime boundaries

This map is reproduced with permission from the January 2013 issue of the American Journal of International Law © 2013 American Society of International Law. All rights reserved.

0 100 200 300

Nautical miles (nm)



CIL

Centre for International Law

China's & Philippines' Claims

CHINA'S POSITION:

1. **Sovereignty** over islands and their adjacent waters
2. **Sovereign Rights and Jurisdiction** in the EEZ and Continental Shelf measured from the islands
3. **Historical Rights and Jurisdiction** (and **control**) over the natural resources in and under the waters within the 9-dashed line ?

PHILIPPINES' POSITION:

1. "land dominates the sea"
2. Any claim to maritime space must be from **land territory**, including islands, not from a historical map

UNCLOS Issues

- Can China's claim to **"historic rights"** be reconciled with UNCLOS provisions on sovereign right of coastal State to explore & exploit resources of EEZ and Continental Shelf
- Which features are **islands** entitled in principle to an EEZ and continental shelf of their own?
- Which features are **"rocks"** entitled only to 12 nm territorial sea?
- Which features are **low-tide elevations** entitled to no maritime zones of their own?
- Who has jurisdiction over **installations and structures on low-tide elevations** or submerged feature?

Philippines Institutes Annex VII Arbitral Proceedings against China

- On **22 January 2013** Philippines initiated arbitral proceedings against China under Annex VII of UNCLOS by giving China its Notification and the Statement of Claim
- Philippines alleged that there are disputes between the parties on the interpretation and application of provisions of UNCLOS and these disputes could not be resolved by consultation and negotiation
- Philippines expressly states that the disputes fall outside the excluded categories in **China's Declaration under Art 298** (boundary delimitation and historic title)
- Philippines also gave notice that it was appointing ITLOS Judge Rudiger Wolfrum as its arbitrator

Legality of Nine-Dash Line

- The main objective of the case is to challenge the legality of China's maritime claims inside the nine-dash line
- Requests Tribunal to rule that China can only make claims from land territory (including islands)
- Tribunal will have to consider whether there is a legal basis for China's claims to "historic rights" over resources inside the nine-dash lines

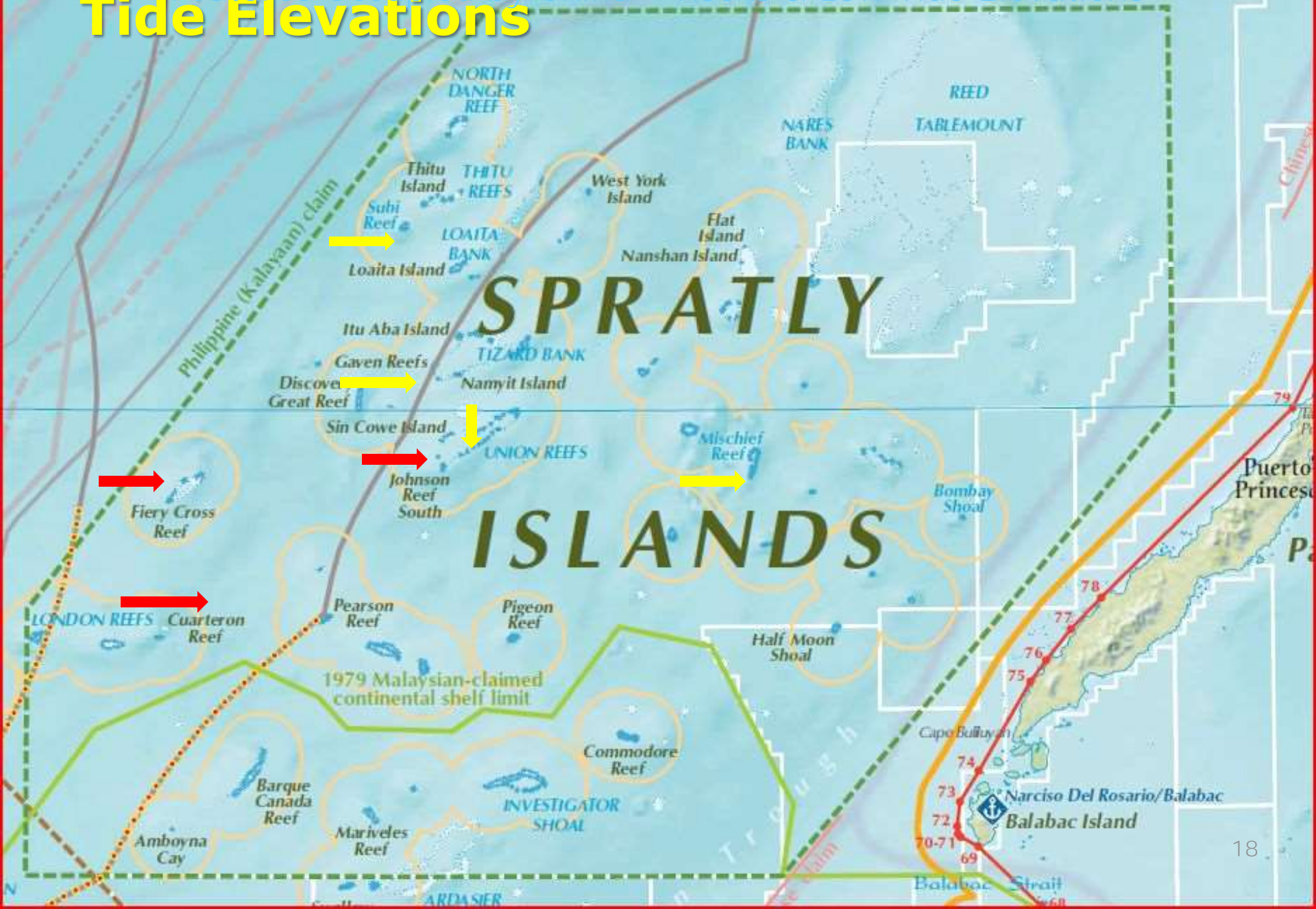


Islands v Rocks under Article 121

- The case also raises issues on the interpretation of Article 121
- Admits that Scarborough Shoal and 3 other reefs occupied by China are islands because parts of them are “naturally formed areas of land surrounded by and above water at high tide”
- Asserts that they are only entitled to a 12 nm territorial sea because they are “rocks which cannot sustain human habitation or economic life of their own”
- Argues that China has no right to resources outside the 12 nm territorial sea

Chinese Occupied Islands and Low Tide Elevations

Features Occupied by China – Rocks & Low-Tide Elevations



Cuarteron Reef

9°55'N, 115°32'E (reef above water at high tide in US map) Isolated atoll,
Closest potential island is Spratly Island, over 50nm away

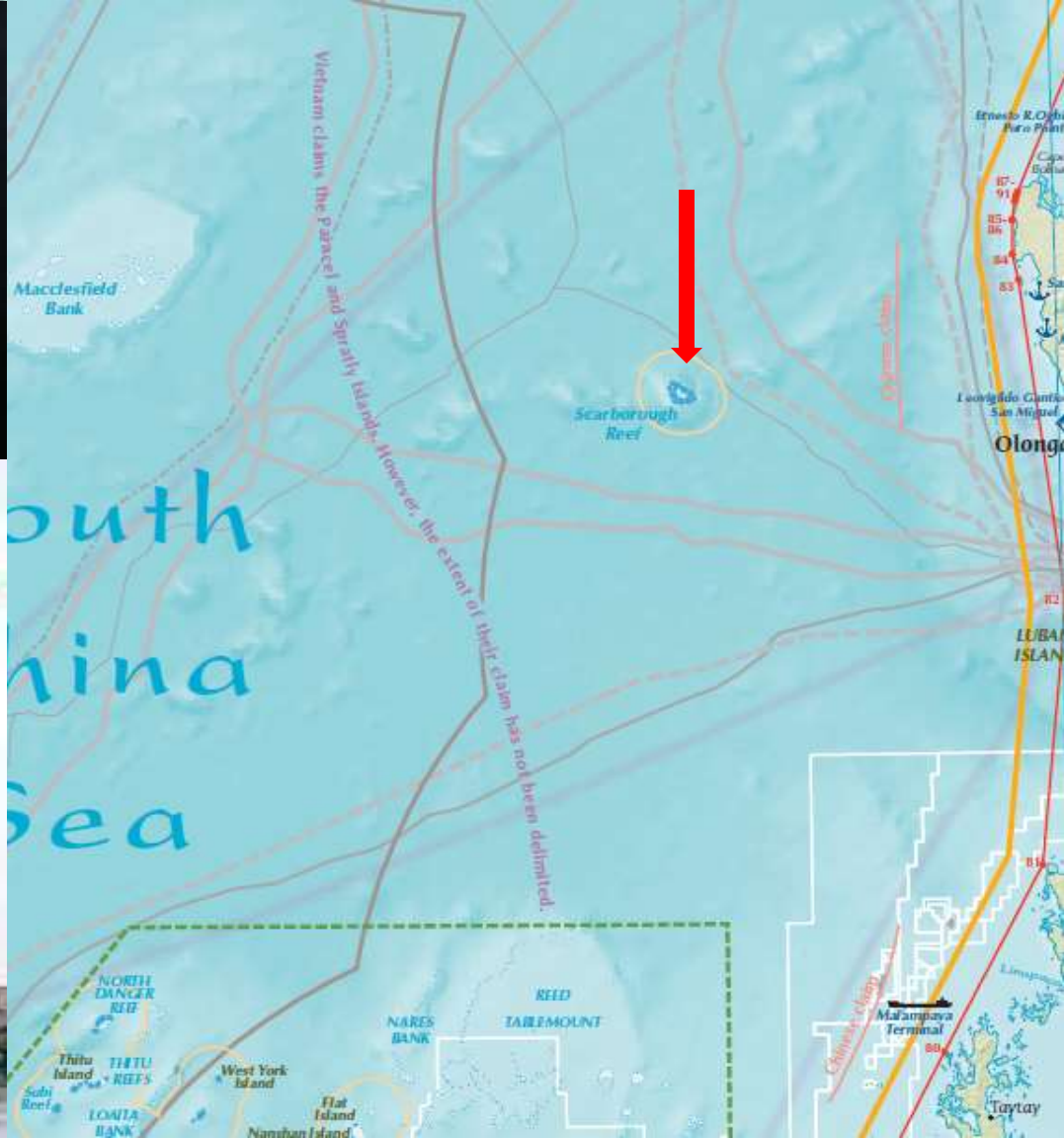


Fiery Cross Reef

9°38'N, 112°57'E (reef above water at high tide in US map) Isolated atoll,
Closest potential islands are Spratly Island & Sin Cowe Island over 60nm away



Scarborough Shoal



Submerged Features

- Also argues that three of the reefs occupied by China are low-tide elevations or completely submerged
- Argues that these features are not subject to a claim to sovereignty and not entitled to maritime zones of their own
- Argues that these features are part of the seabed and the State on whose continental shelf they lie has jurisdiction
- Argues that China's occupation of the submerged features is unlawful

Chinese Occupied Islands and Low Tide Elevations

Features Occupied by China – Rocks & Low-Tide Elevations



Mischief Reef (not in Google earth)

9°55'N, 115°32'E (Reef in US map) Isolated atoll,
Closest potential islands are Sin Cowe East Island and
Nanshan Island, 40-60nm away



Source: T's Public Gallery, Private Web Allowed, Sept. 4, 2007
<http://www.tzoddel.org.au/SouthChinaSea>

Timeline for Arbitral Process

- **21 Feb 2013 (30 days)** – Deadline for China to appoint arbitrator who can be its national
- **22 Feb - 8 March (2 weeks)** – Philippines can request ITLOS President to appoint one arbitrator on behalf of China; He must appoint within 30 days of the request from UN List of Arbitrators
- **23 March 2013 (60 days)** – Deadline for appointment of remaining 3 arbitrators by parties (from UN List of Arbitrators)
- **24 March - 6 April 2013 (2 weeks)** – If fail to reach agreement, Philippines can request ITLOS President to appoint remaining 3 arbitrators; ITLOS President must appoint within 30 days of the request (these appointments must be from UN List of Arbitrators)

Default of Appearance

Annex VII, Article 9

- If one party fails to appear to defend the case, other party may request tribunal to continue and make an award
- **Absence of a party or failure to defend case is not a bar to the proceedings**
- Before making an Award, the arbitral tribunal must satisfy itself that :
 - (1) it has jurisdiction; and
 - (2) the claim is well founded in fact and law

Finality of the Award

- The Award is final and without appeal
- It shall be complied with by the parties to the dispute
- There is no mechanism by which the Tribunal or the Philippines can enforce the Award
- If China fails to implement the Award, the Philippines can go back to the Arbitral Tribunal and for further orders

Conclusions

1. The main legal issue is that China is asserting maritime claims that are not consistent with UNCLOS
2. China's statements and conduct suggest that it is claiming "historic rights" to resources inside the nine-dash line
3. China's actions are a threat to the States bordering the South China Sea and to the legal order established in UNCLOS
4. Arbitral decision should clarify legal issues and pressure China to limit its claims to maritime zones from islands, which would set the stage for "setting aside the disputes and jointly developing the resources"