

Roundtable on South China Sea Disputes

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Session 8. UNCLOS Dispute Settlement Regime

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Part 1

UNCLOS Part XV

Rationale for DSM in Part XV

- States negotiating UNCLOS recognized that a dispute settlement mechanism (DSM) must be part of “package deal”
- DSM necessary to have an effective method of peacefully resolving future disputes on interpretation or application of the provisions of the Convention
- DSM necessary to ensure that the agreed text of the Convention had stability, certainty and predictability
- DSM needed to protect the agreed package of compromises against destruction through unilateral interpretations

Guiding Principle of DSM in Part XV

- General principle is that the “will of the parties” shall prevail
- Parties to a dispute may by agreement select any method they wish for settling their dispute
- Even if one of the DS procedures provided for in UNCLOS has started, the parties can agree “at any time” to adopt a special method for resolving their dispute

Structure of Part XV

- Section 1. General Provisions
- Section 2. Compulsory Procedures Entailing Binding Decisions
- Section 3. Limitations and Exceptions to the Applicability of Section 2

Section 1. Obligation to Exchange Views

- Art 283. When a dispute arises between States Parties concerning the interpretation or application of the provisions of the Convention,

the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means

Section 2. Article 286

Article 286. Application of procedures under this section

Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, **where no settlement has been reached by recourse to section 1**, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

Section 2 and “consent theory”

- General principle is that, subject to the exceptions in Section 3, any dispute between parties over the interpretation or application of a provision of the Convention which cannot be resolved by the procedures in Section 1, is subject to the system of compulsory procedures entailing binding decisions in Section 2
- By becoming a party to UNCLOS, State Parties are giving their consent in advance to the procedures in Section 2 which allow one party to unilaterally refer the dispute to adjudication or arbitration if it cannot be resolved by negotiation

Choice of Procedure - Article 287

- A State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:
 1. INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA (ITLOS) established in accordance with Annex VI;
 2. INTERNATIONAL COURT OF JUSTICE (ICJ);
 3. ARBITRAL TRIBUNAL constituted in accordance with Annex VII;
 4. SPECIAL ARBITRAL TRIBUNAL constituted in accordance with Annex VIII

“Default Procedure”

Article 287 (5):

If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to ARBITRATION in accordance with Annex VII, unless the parties otherwise agree.

- Since none of the claimants to sovereignty over islands in the South China Sea have selected a procedure, the default procedure (Arbitration under Annex VII) would apply, unless they otherwise agree.

Rationale for Limitations and Exceptions in Articles 297 and 298

- Disputes on certain provisions in UNCLOS are so sensitive in some States that if they were subject to the compulsory procedures entailing binding decisions in Section 2, it could prevent those States from becoming parties to the Convention
- Therefore, the drafters had to strike a balance between the desire for a universally accepted Convention and the desire to have disputes on all the provisions subject to the compulsory procedures entailing binding decisions
- **Compromise: Limitations and Exceptions in Articles 297 and 298**

Article 297. Limitations on Applicability of Section 2

- 297(2) & (3) exclude from Section 2 the discretionary decisions of coastal States in regulating Marine Scientific Research and disputes concerning the conservation & management of Fisheries in its EEZ
- 297(1) provides that two categories of disputes are subject to the compulsory procedures entailing binding decisions in section 2:
 - disputes on the exercise of freedoms and rights in the EEZ as provided in Article 58
 - disputes on whether a coastal State has acted in contravention of specified international rules and standards to protect the marine environment

Article 298. Optional Exceptions to Applicability of Section 2

States Parties have the option to formally declare that they do not accept Section 2 for following categories of disputes:

- the interpretation or application of **Articles 15, 74 and 83 relating to sea boundary delimitations**, or those involving **historic bays or titles**
- disputes concerning **military activities and disputes concerning law enforcement activities** relating to rights and jurisdiction of coastal States over fishing and marine scientific research in the EEZ
- Disputes in respect of which the UN Security Council is exercising the functions assigned it by the UN Charter

Dispute on Jurisdiction

Article 288. Jurisdiction

- 1. A court or tribunal referred to in Article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.
- 4. In the event of a dispute over whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.

Applicable Law [Article 293]

- Article 293 provides that a court or tribunal having jurisdiction under this section shall apply
 - this Convention and
 - other rules of international law not incompatible with this Convention.

Binding Force of Decisions

Article 296 provides that:

1. Any decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute.
2. Any such decision shall have no binding force except between the parties and in respect of that particular dispute.

Part 2

Annex VII Arbitration

Appointment of Arbitrators

- Total of 5 Arbitrators
- Party instituting proceedings appoints one arbitrator at the same time that it institutes proceedings
- Other Party then has 30 days to appoints one member
- Remaining three arbitrators appointed by agreement of the parties, but if they are unable to agree, they shall be appointed by the President of ITLOS
- If other Party fails to cooperate, the Party instituting the proceedings may request the ITLOS President to appoint the remaining 4 arbitrators from the UN list of arbitrators

Arbitral Procedure

- Unless the Parties to the dispute otherwise agree, the arbitral tribunal shall determine its own procedure, assuring to each party a full opportunity to be heard and to present its case
- Parties to the dispute have a duty to facilitate the work of the arbitral tribunal, and shall provide it with all relevant documents, facilities and information

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 Arbitral Tribunal or the Philippines can enforce the Award
- If China fails to implement the Award, the Philippines can go back to the Arbitral Tribunal for further orders

Settlement of the Case / Provisional Measures

- The case can be settled by agreement of the parties at any time prior to the issuance of the Award
- Once the Arbitral Tribunal has been established, any party to the dispute can request Provisional Measures from the Tribunal

Interpretation or Implementation of the Award

- Any controversy between the Parties regarding the interpretation or implementation of the Award may be submitted by either Party for decision to the arbitral tribunal

Part 3

Philippines v China Case

What Philippines Does NOT Seek

1. Does NOT seek a determination of which Party enjoys **sovereignty over the islands** claimed by them
2. Does NOT request any **delimitation of maritime boundaries**
3. Philippines is conscious of China's Declaration under Article 298 and has avoided raising any subjects or making any claims that China excluded from arbitral jurisdiction
4. Claims do not fall within China's Declaration under Article 298:
 1. Do not concern boundary delimitation
 2. Do not involve historic bays or titles or military activities or law enforcement activities

Relief Sought by the Philippines

1. Declare that China's rights to **maritime areas** are those established by UNCLOS
2. Declare that China's maritime claims based on its **9-dash line** are contrary to UNCLOS and invalid
3. Declare China's occupation of **four submerged features** is unlawful
4. Declare that **Scarborough Shoal** and **three other reefs** it occupies are "**rocks**" within Article 121(3) entitled only to a 12 nm territorial sea

Relief Sought by the Philippines

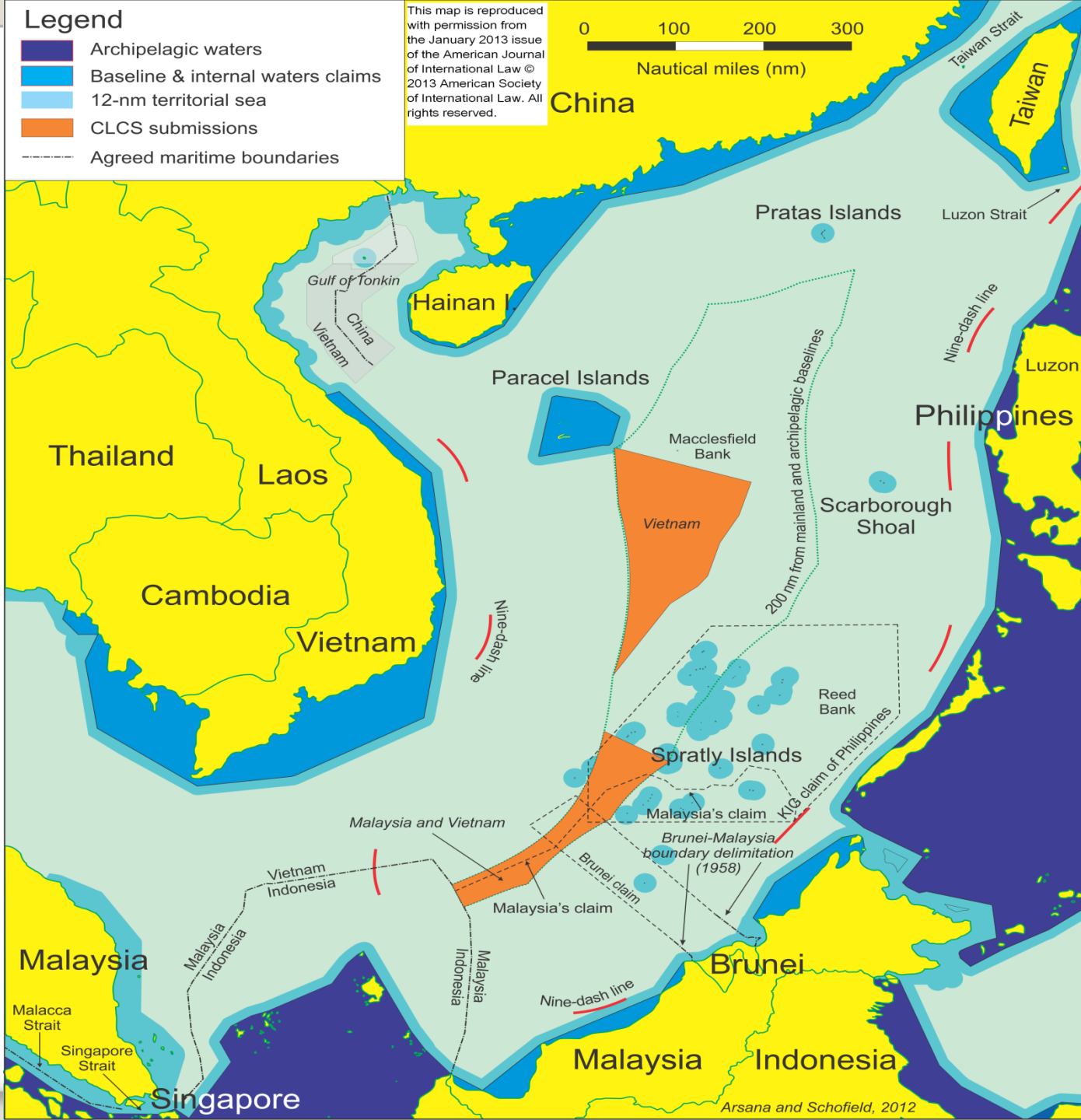
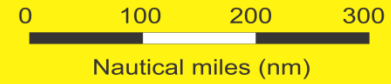
5. Declare that China has unlawfully claimed and unlawfully exploited living and non-living resources in the Philippines' EEZ and on the Philippines' continental shelf
6. Declare that China has unlawfully interfered with navigation rights and other rights of the Philippines in areas within and beyond its 200 nm EEZ



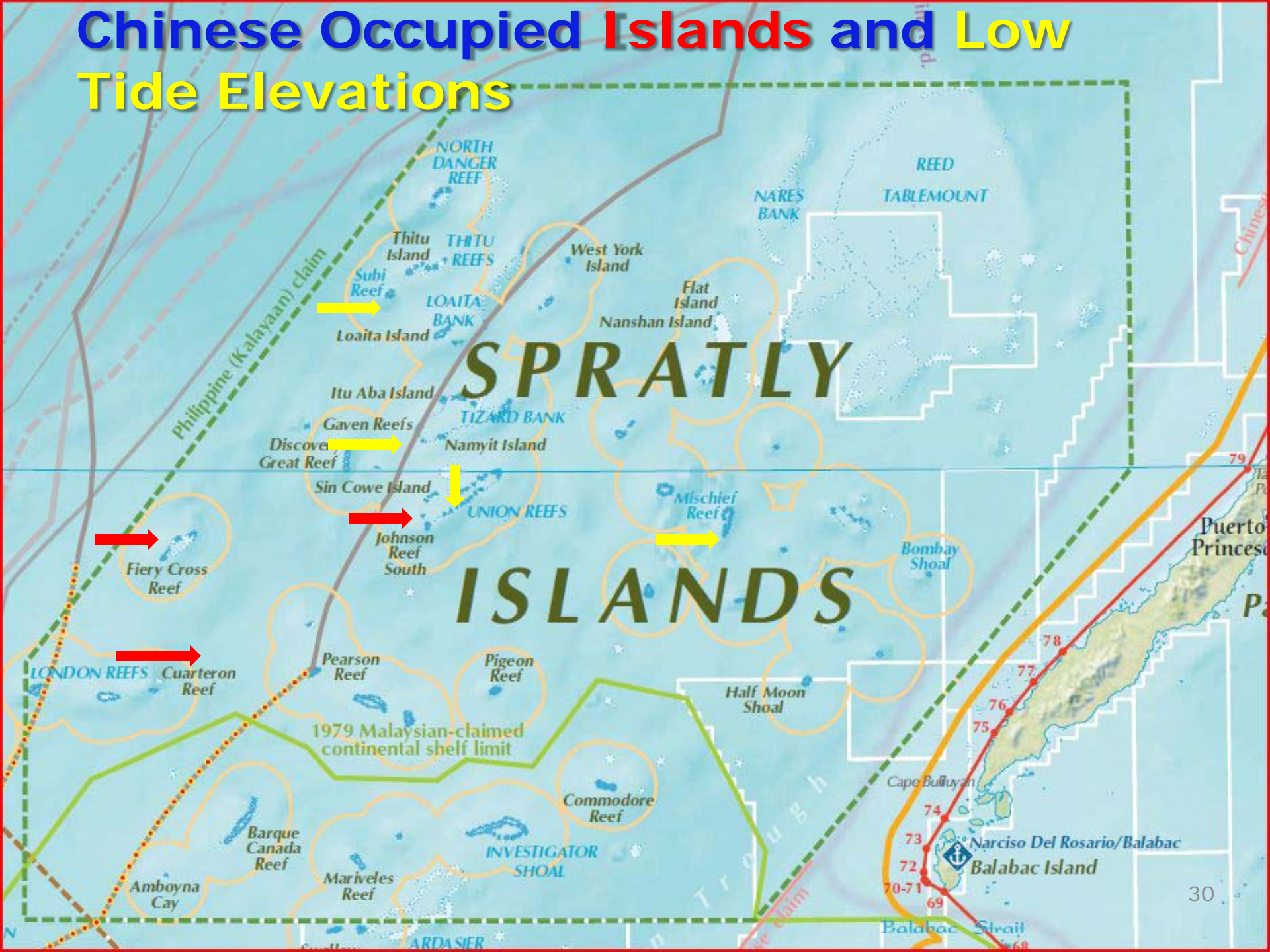
Legend

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

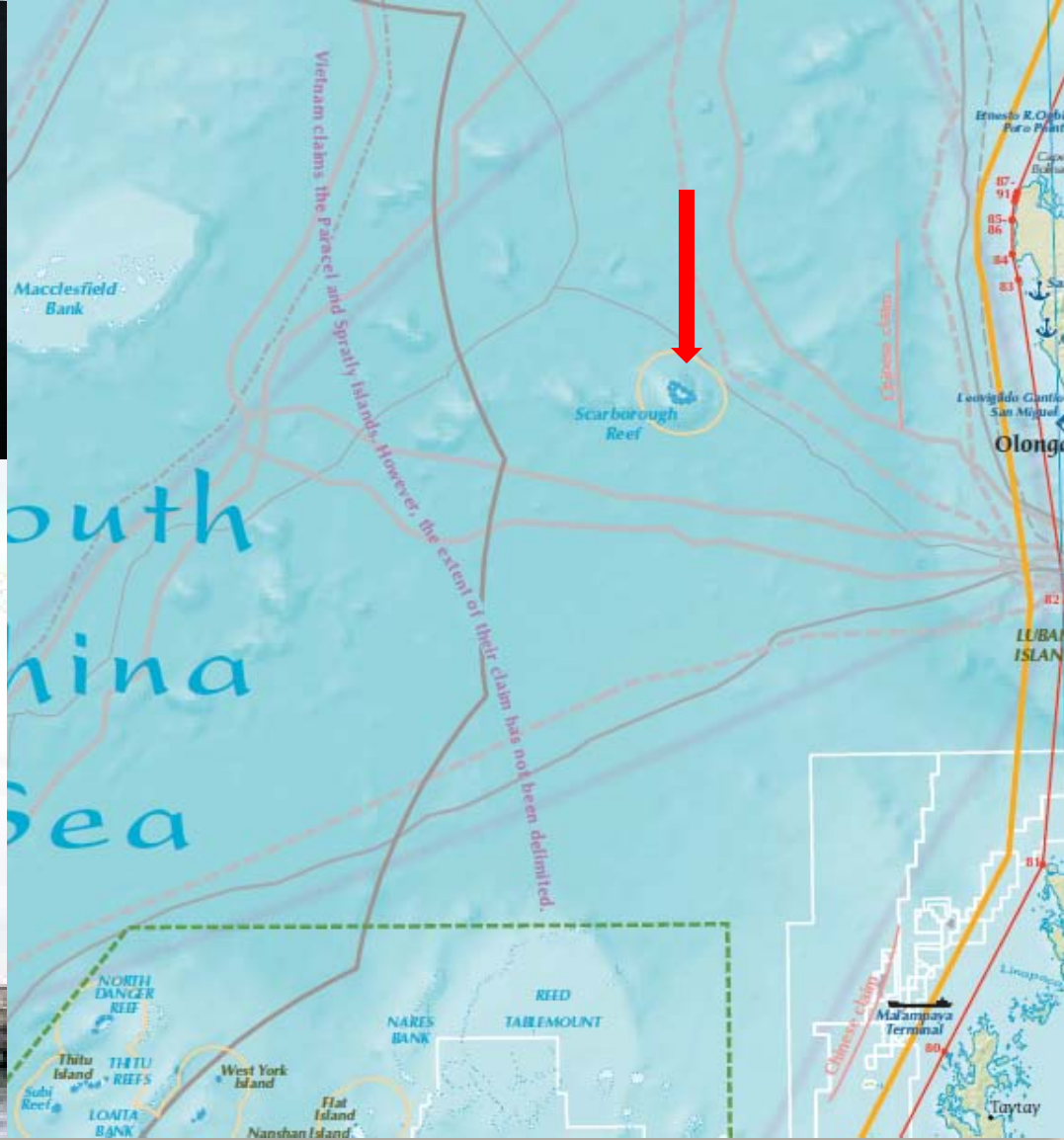
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Chinese Occupied Islands and Low Tide Elevations



Scarborough Shoal



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



Mischief Reef

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, Picasa Web Albums, Sept. 4, 2007
<http://www.mrdlibary.edu/SouthChinaSea>

Major Issue on whether the Tribunal has Jurisdiction

- How broadly or narrowly will the Arbitral Tribunal interpret the language of Article 298 excluding the following categories of disputes:
 - “disputes concerning the interpretation or application of **articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles**”

What the Tribunal Cannot Decide

- Tribunal cannot decide which State has the better claim to sovereignty over any of the disputed islands
- If the Tribunal's Award leaves open the possibility that one or more of the islands in the Spratlys is entitled in principle to an EEZ and continental shelf of its own (even if it is currently occupied by others), it cannot determine the EEZ boundary between those islands and the main archipelago of the Philippines

Thanks for your Attention !

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