

2015 ILA-ASIL ASIA-PACIFIC RESEARCH FORUM

*Integrating the Asia-Pacific: Why
International Law Matters?*

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The Philippines v China Case

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CIL

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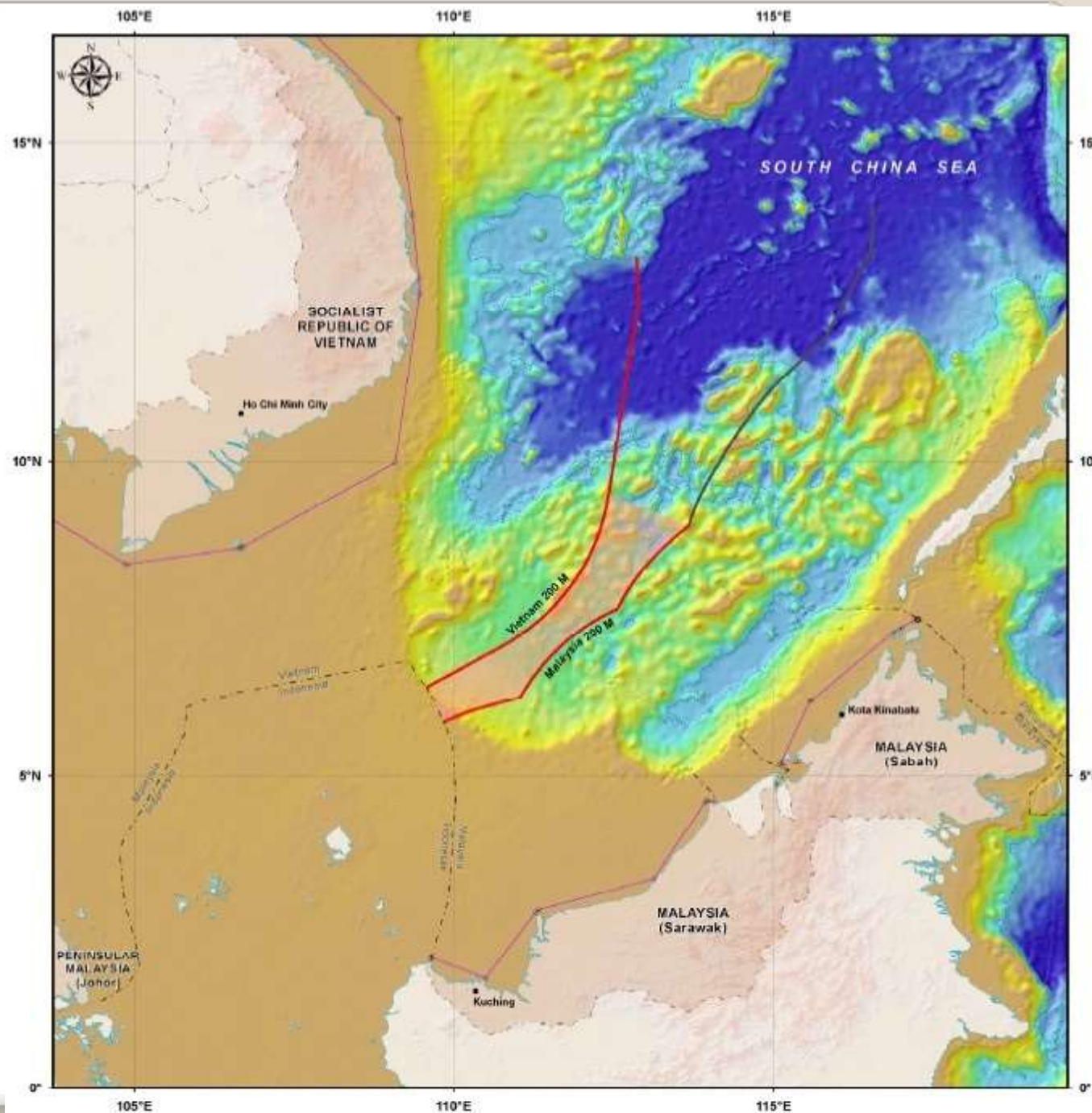


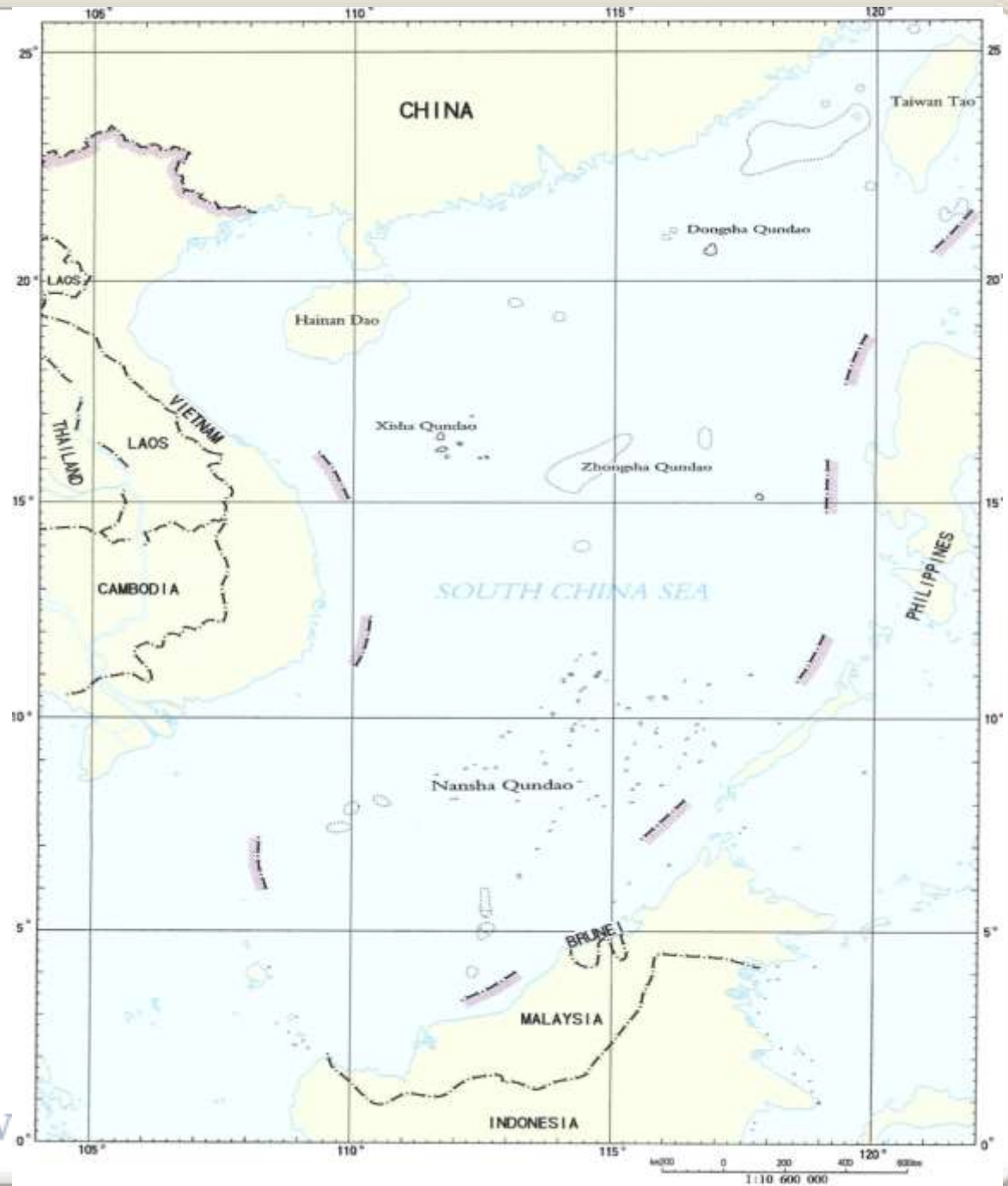
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Part 1

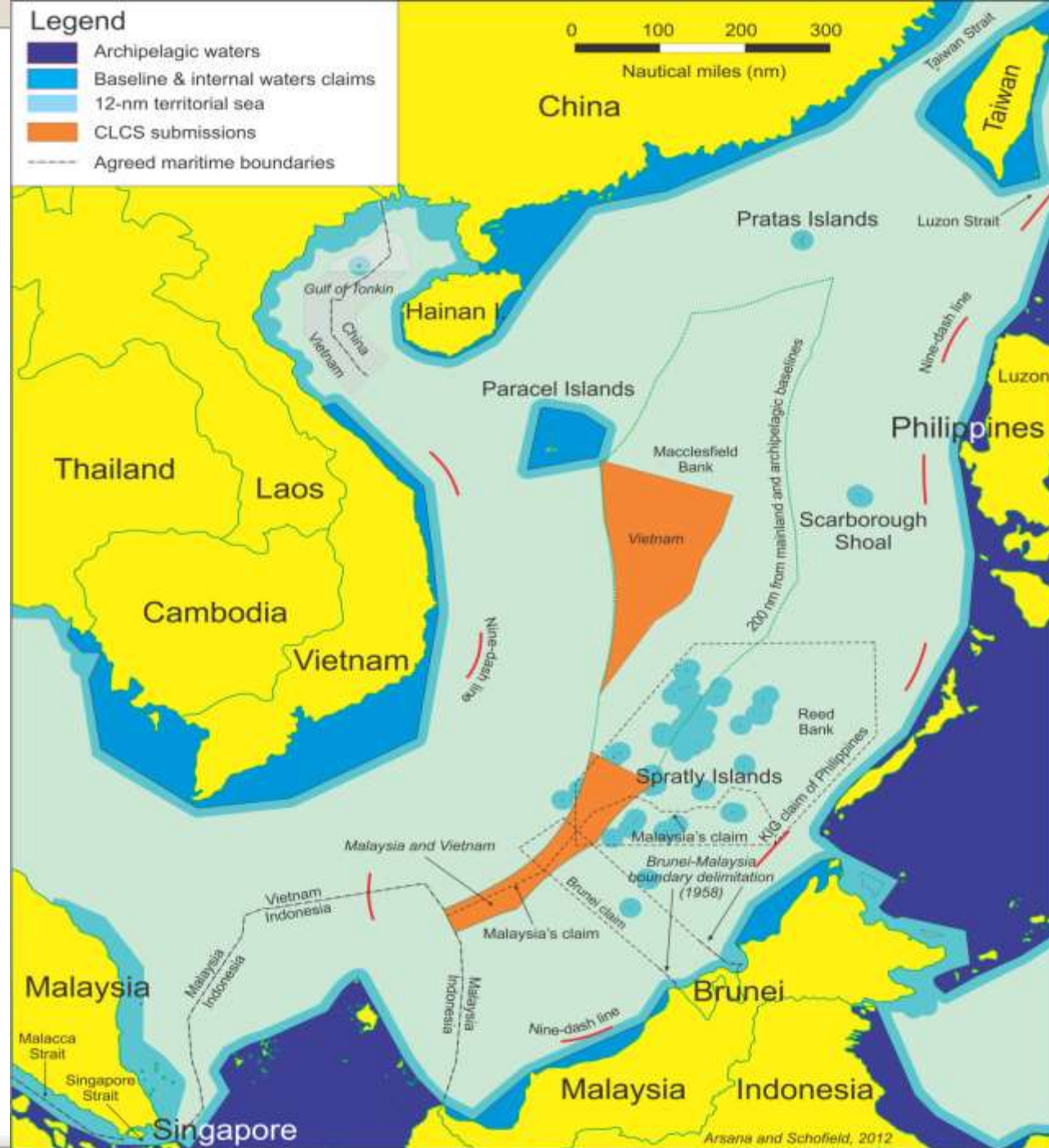
Philippines v China Arbitration The Background





Legend

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



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UNCLOS Part XV

- Any dispute on the interpretation or application of the provisions of the Convention that cannot be resolved by negotiation is subject to the compulsory procedures entailing binding decisions at the unilateral request of any party to the dispute
- States “Consent” to these procedures when they become party a party to UNCLOS
- Consent for a particular dispute is not required

Exceptions to Compulsory Jurisdiction

- Applies only to disputes on the interpretation or application of the provisions of UNCLOS – does not apply to sovereignty disputes
- States can declare that they do not accept the compulsory procedures for certain categories of disputes, including disputes concerning
 - Disputes on **historic bays or titles**
 - Disputes on the provisions in UNCLOS on **delimitation of maritime boundaries**
 - Disputes on **military activities**
- If a dispute arises on whether the court or tribunal has no jurisdiction because the dispute falls within one of the exceptions, **such dispute shall be resolved by the court or tribunal**

Part 2

Philippines v China Arbitration Institution of Proceedings & Statement of Claim

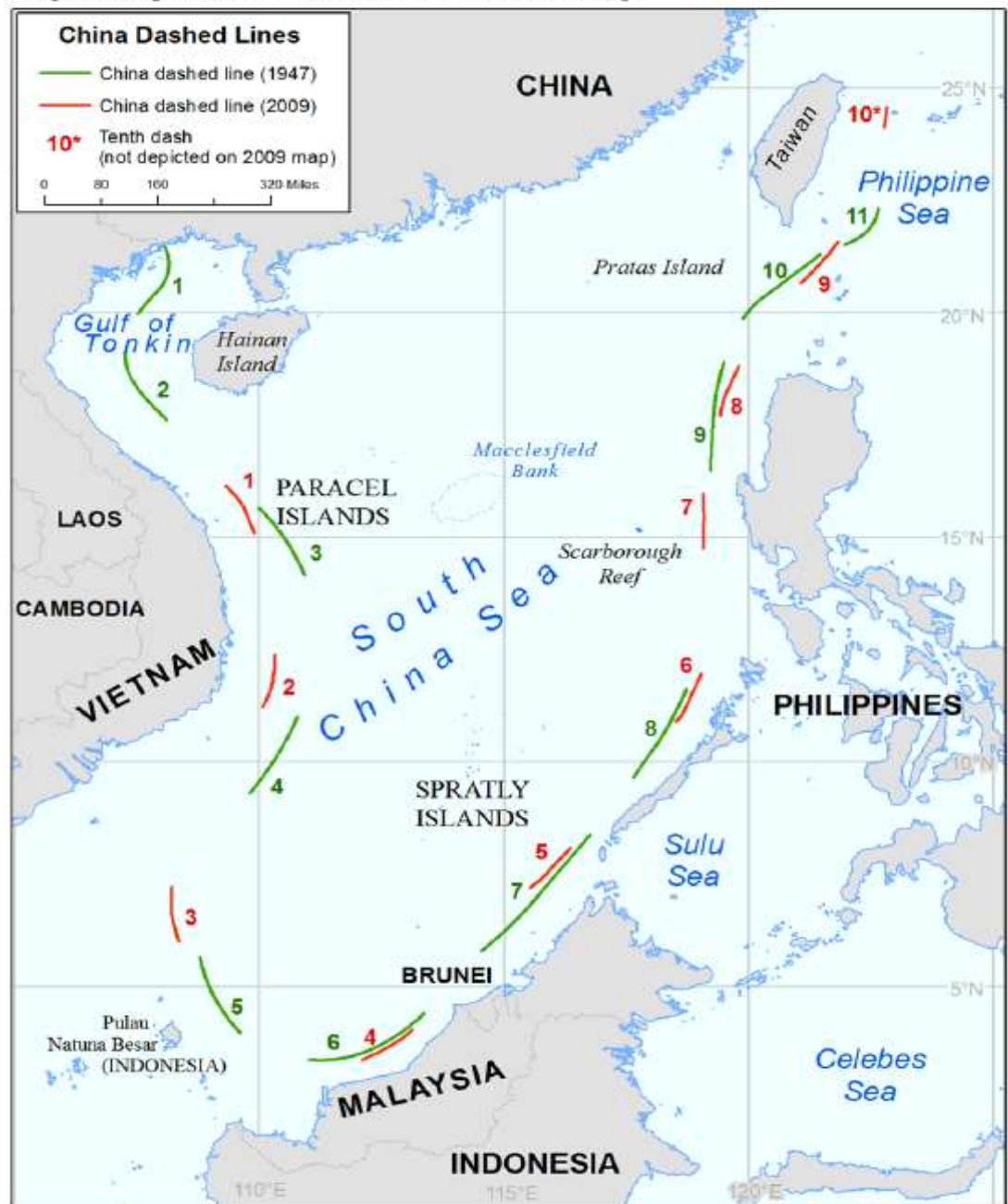
What Philippines Does NOT Seek

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 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 121(3) entitled only to a 12 m territorial sea

Map 5: Comparison of Dashed Line in 2009 and 1947 Maps



Scarborough Shoal Incident



Scarborough Shoal



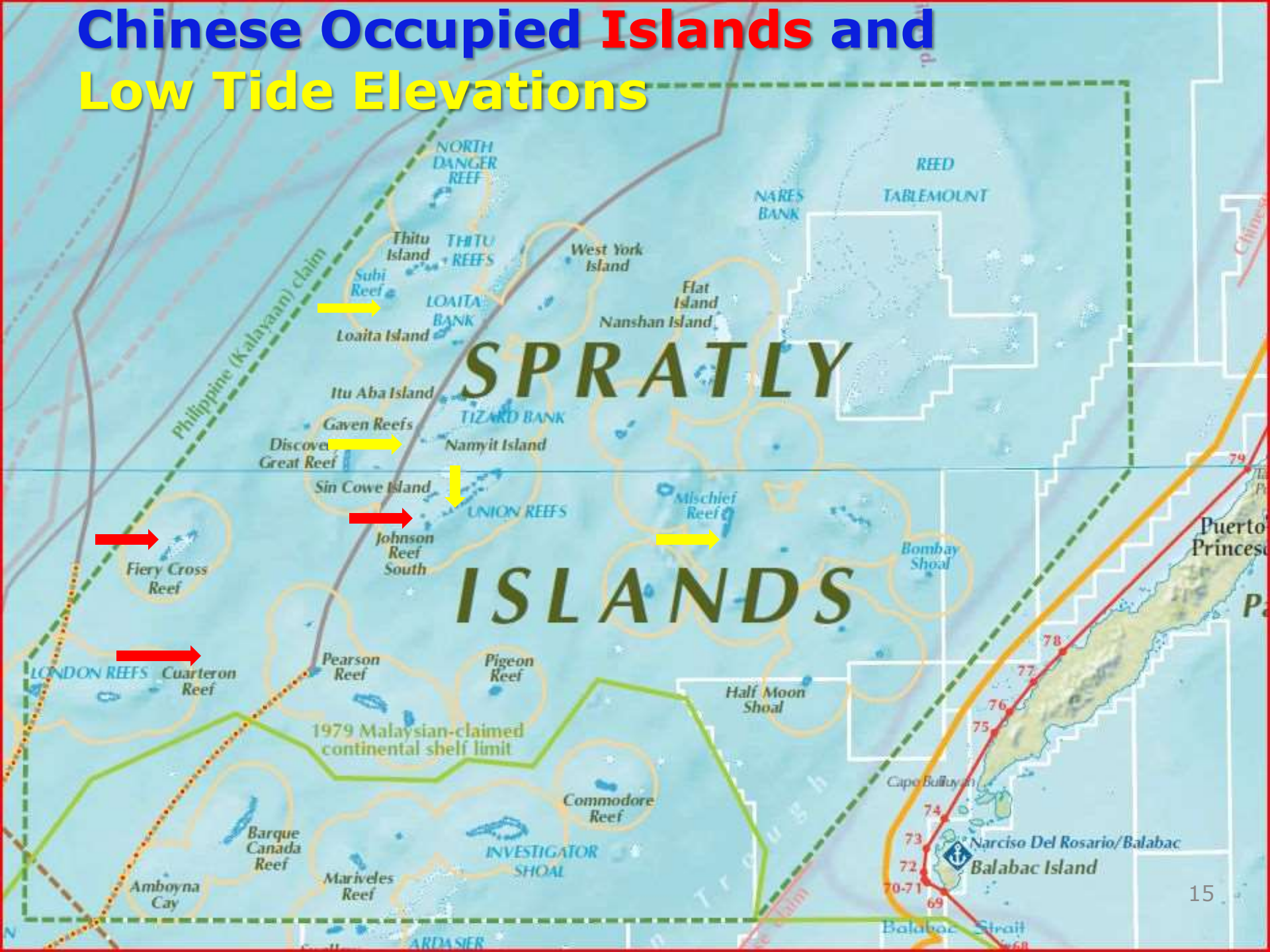


时事新闻：船相撞导致一人失踪。

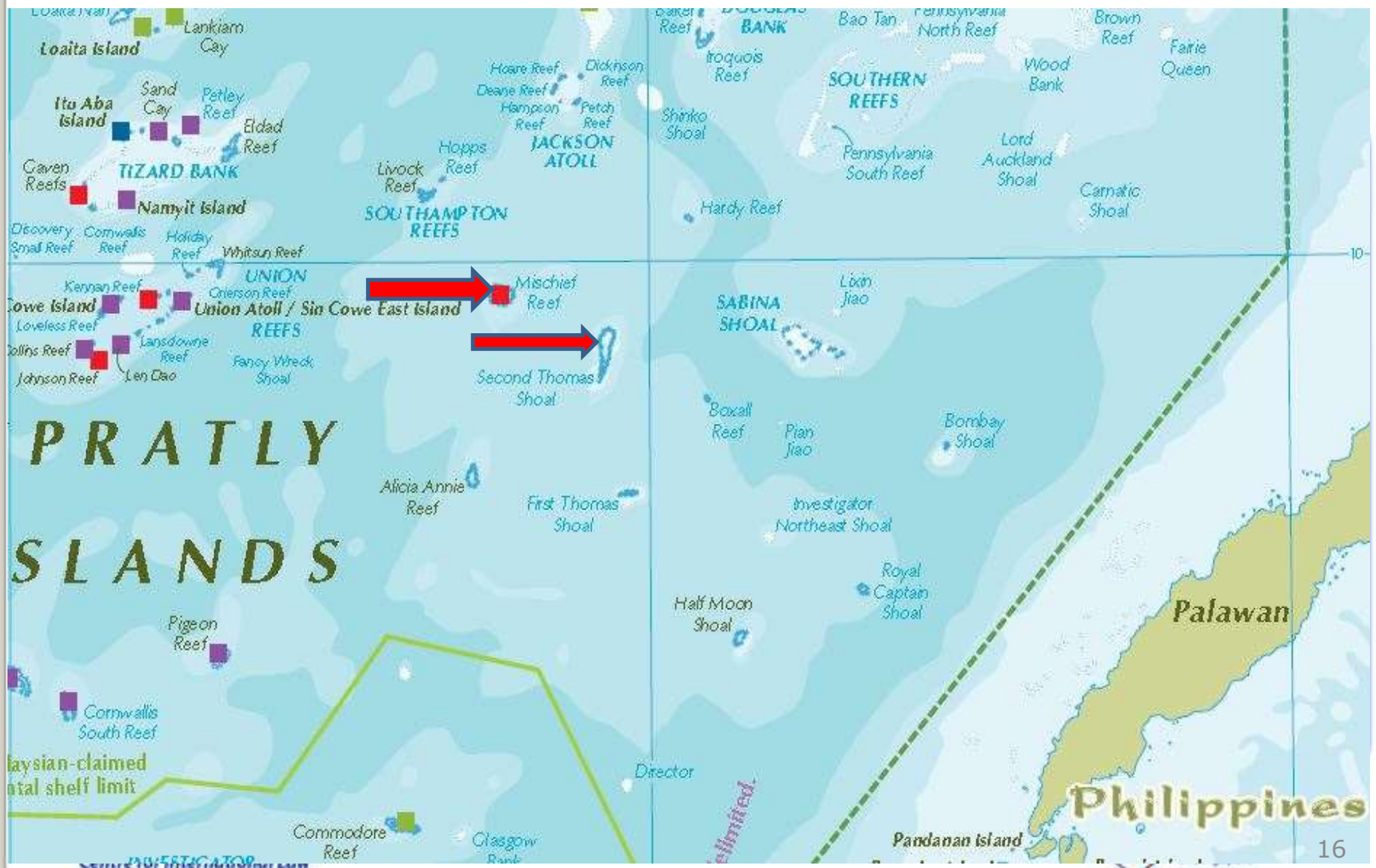
• 国家食品药品监督管理局发布



Chinese Occupied Islands and Low Tide Elevations



Mischief Reef and Second Thomas Shoal



Mischief Reef: Low-Tide Elevation with Installations & Structures?



Source: The Public Gallery, Proton Web Albums, Sept. 4, 2007.
<http://www.middlebury.edu/SouthChinaSea>

Second Thomas Shoal



Part 3

Philippines v China Arbitration Procedural Developments

Procedural Issues

1. Selection of the Tribunal
2. Challenge to Jurisdiction
3. Nonappearance of a Party
4. Finality of the Award

Procedural in the Arbitration -1

- 23 Jan 2013 – Philippines instituted proceedings
- 19 Feb 2013 – China rejected proceedings and remaining 4 arbitrators appointed by the President of ITLOS
- 27 August 2013: Tribunal adopted **Rules of Procedure** and fixed **30 March 2014** as the date on which the Philippines must submit its **written Memorial on all issues – jurisdiction and the merits.**

Procedural in the Arbitration - 2

- 30 March 2014: **Philippines submitted Memorial.**
- 3 June 2014: Tribunal issued Procedural Order No. 2
 - fixing **15 Dec 2014** as the **date for China to submit its Counter-Memorial**

Developments in December 2014

- **5 Dec 2014** – Vietnam submitted official Statement to the Tribunal through the PCA Registry
- **5 Dec 2014** – US State Department published “Limits of the Sea” Study analysing China’s maritime claims based on the nine dash line map
- **7 Dec 2014** – China published Position Paper giving the reasons why it believes the Tribunal has no jurisdiction
- **15 Dec 2014** - date for China to submit its Counter-Memorial

China's Position Paper of 7 Dec 2014

1. The essence of dispute is territorial sovereignty over maritime features in the SCS, which is beyond scope of UNCLOS
2. China and the Philippines have agreed, through bilateral instruments and the 2002 Declaration on the Conduct of Parties in the SCS, to settle their relevant disputes through negotiations.
3. Subject-matter would constitute an integral part of maritime delimitation between the two countries, thus falling within the scope of China's declaration under article 298

Procedure in the Arbitration - 3

- **17 December 2014** – Tribunal's Issued Procedural Order No. 3 – submitted Questions to the Philippines and asked them to make a Supplemental Submission by 15 March 2015
 - Tribunal also requested Philippines and China to give their views on Vietnam's Official Statement
- **15 March 2015** – Philippines Supplemental Submission – 9 vols and 3000 pages

Procedure in the Arbitration - 4

- Procedural Order on No. 4 of 22 April 2015
- Decision to treat China's Position Paper of 7 December as a formal objection to Jurisdiction
- Separate Hearing at the PCA in The Hague **20-21 July** on jurisdiction and any other preliminary issues.
- If find jurisdiction on some or all of the issues, will then proceed to hear the merits
- Likely to delay final award until second half of 2016

Procedural Issues for July Hearing

- No procedural order yet on the procedure to be followed in the hearing on 20-21 July
- Not clear whether Hearing will be public
- If not public, not clear when transcripts of proceedings will be released
- Not clear who will be permitted to attend
- Not clear how the Tribunal will treat Vietnam's official Statement

Reclamations and UNCLOS

1. Will not enhance rights & jurisdiction to resources in maritime zones
2. The Arbitral Tribunal has been asked to rule on the legal status of the features that are being extensively reclaimed
3. China may be in breach of obligations under UNCLOS to ensure that activities under its jurisdiction and control to not cause significant pollution of the marine environment - duty to do EIA and to apply precautionary approach

Part 4

Conclusions

Conclusions

1. China's refusal to participate in the arbitral proceedings enhances chances that Tribunal will rule it has jurisdiction
2. China's refusal to participate is being viewed as a challenge to the dispute settlement regime in UNCLOS
3. China's insistence that it has rights and jurisdiction in the EEZ of other States because of "historical rights" is a threat to the UNCLOS legal regime
4. All parties and interested States will have to evaluate their positions after the Tribunal's decision

Thanks for Your Attention

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