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**THE SOUTH CHINA SEA: PROSPECTS FOR
COOPERATION TO MANAGE THE DISPUTES**

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Outline of Presentation

1. Implications of the Philippines v China case
2. Implications of China's Land Activities
3. The Current Impasse and a Possible Way Forward

Part 1

Implications of the PvC Case

Tribunal's Decision on Jurisdiction

- The Philippines' submissions reflect disputes concerning the interpretation and application of UNCLOS;
- The submissions are not about sovereignty or maritime delimitation;
- The 2002 Declaration of Conduct and other agreements between China & the Philippines did not prevent the Philippines from instituting proceedings
- The Philippines has fulfilled obligations to exchange views under Article 283.

Tribunal's Decision on Jurisdiction

- Tribunal has held that the 15 submissions of the Philippines raise issues of interpretation and application of UNCLOS
 - It has jurisdiction to decide 7 submissions
 - The decision on whether it has jurisdiction over 7 other submission will be decided together with merits
 - It asked Philippines to clarify and narrow 1 submission

Simplification of Decision

- It has decided it has jurisdiction to decide the **status** and **maritime entitlement** of the **features** in the Spratlys – islands, rocks and LTEs
- Before it can decide whether certain of China's conduct in the Philippine's EEZ is lawful, it must make decisions on merits relating to:
 - (1) China's historic rights/title within the 9 dash line
 - (2) Whether any islands are entitled to an EEZ

Historic Rights & Nine Dash Line

- Tribunal will decide whether any “historic rights” of China in the SCS inside the EEZ of other States continued after it ratified UNCLOS
- Tribunal may decide whether claims to maritime zones must be from land territory, including islands, in accordance with UNCLOS (and not from the nine-dash line map)

Tribunal may decide that it does not have jurisdiction over some disputes

- If Tribunal decides that the largest islands claimed by China (e.g., Itu Aba) are entitled in principle to an EEZ, it will create areas of overlapping EEZ claims.
- To decide if actions of China in these areas of overlapping EEZ claims were within EEZ of Philippines, the Tribunal would have to engage in delimitation of boundaries, which is outside its jurisdiction

Impact of the Tribunal's Decision

- It could significantly strengthen the legal and moral position of the Philippines and the other ASEAN claimants
- It could make it difficult for China to continue to take actions which imply that it has rights and jurisdiction over resources everywhere within the nine-dash line
- It is legally binding on China, but the Tribunal has no means of enforcing its decision if China decides to ignore it
- If China defies the decision and acts contrary to it, it risks being regarded as a rising superpower that has no respect for international law

Decision will not resolve underlying disputes in South China Sea

- **Sovereignty Disputes**

- Tribunal only has jurisdiction over disputes on UNCLOS, and UNCLOS has no provisions on how to determine sovereignty over islands

- **Delimitation of Maritime Boundaries**

- China submitted a Declaration under UNCLOS Article 298 excludes disputes on boundary delimitation from the jurisdiction of the tribunal

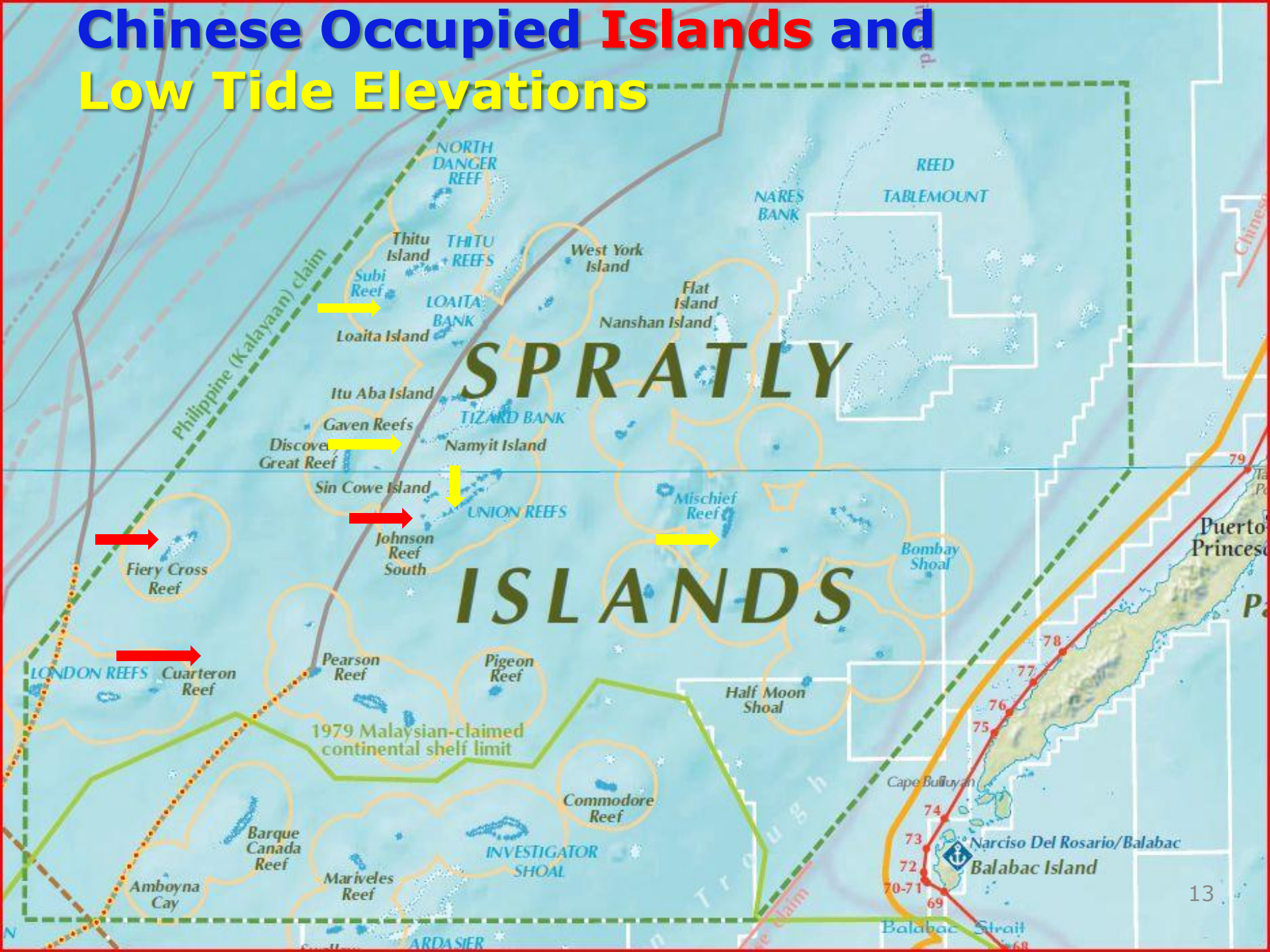
Implication of Decision on article 121 for other States

- Tribunal may give an authoritative interpretation of Article 121(3) on “rocks which cannot sustain human habitation or economic life of their own”
- Although decision is technically binding only on China and the Philippines, other States will be under pressure to bring their practice on islands, rocks and low-tide elevations into conformity with the Tribunal’s interpretation
- None of other claimants have clarified which features they claim are islands and which are rocks.

Part 2

Implications of China's Land Reclamation Activities

Chinese Occupied Islands and Low Tide Elevations



Legality of Reclamation Activities

- Tribunal **is not** likely to rule on the issue of whether China's reclamation activities are per se illegal under UNCLOS
- Tribunal **is** likely to address the issue of whether China's reclamation activities can change the **status** of the features and their **entitlement** to maritime zones
- Tribunal **may** also address the issue of whether China's reclamation activities are consistent with its obligations under UNCLOS to protect and preserve the marine environment

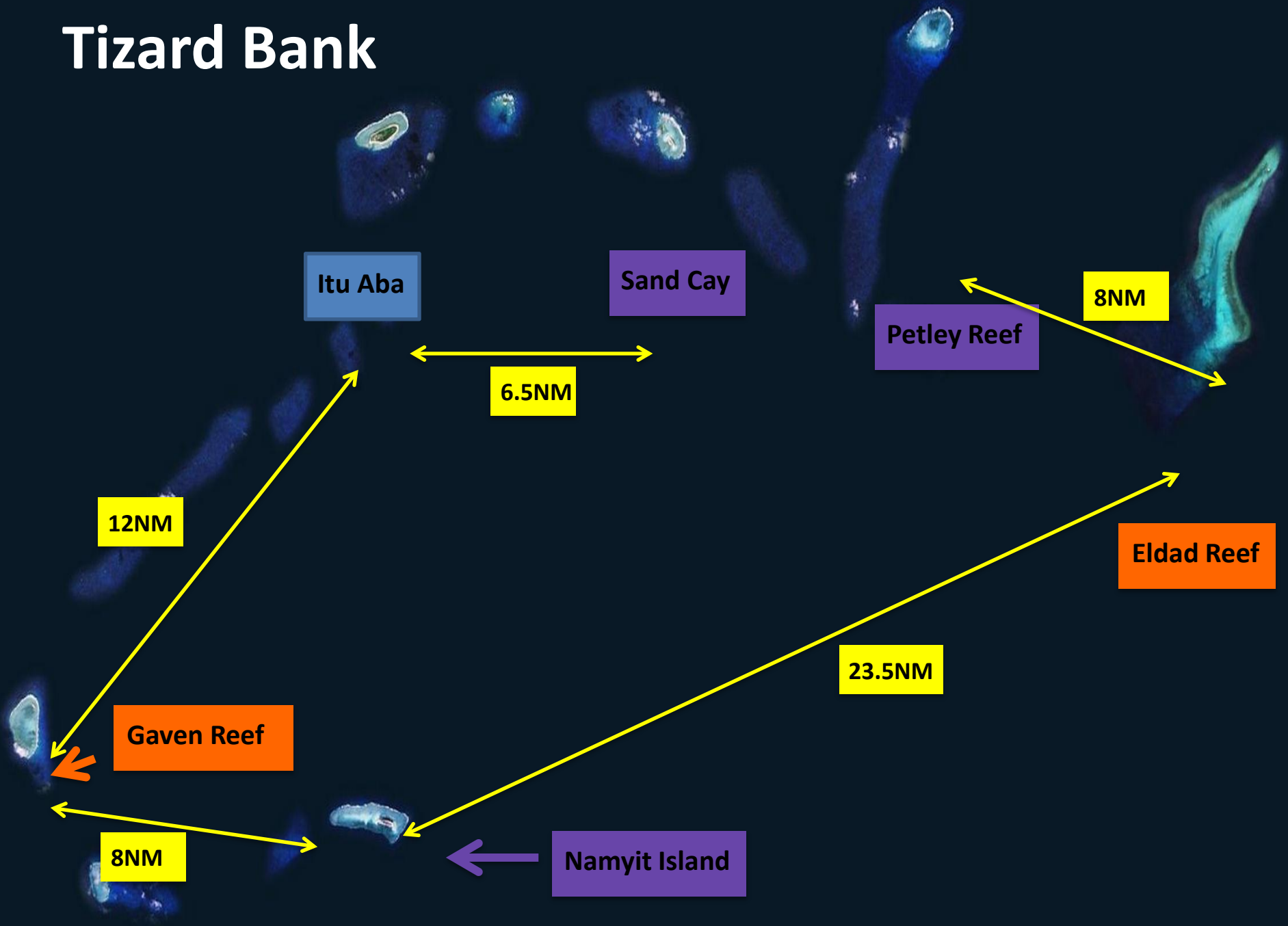
Practical Effect of the “Artificial Islands”

- Even if China cannot enhance its maritime claims from the features it is reclaiming under international law, the reclamation activities will have a very significant practical effect
 - China will be in occupation and control of “artificial islands” in the Spratlys that are several times larger than the combined size of all of the natural islands
 - China will be in a stronger position to assert jurisdiction and control in the disputed waters
 - China will have effectively created a “new status quo” in the Spratlys

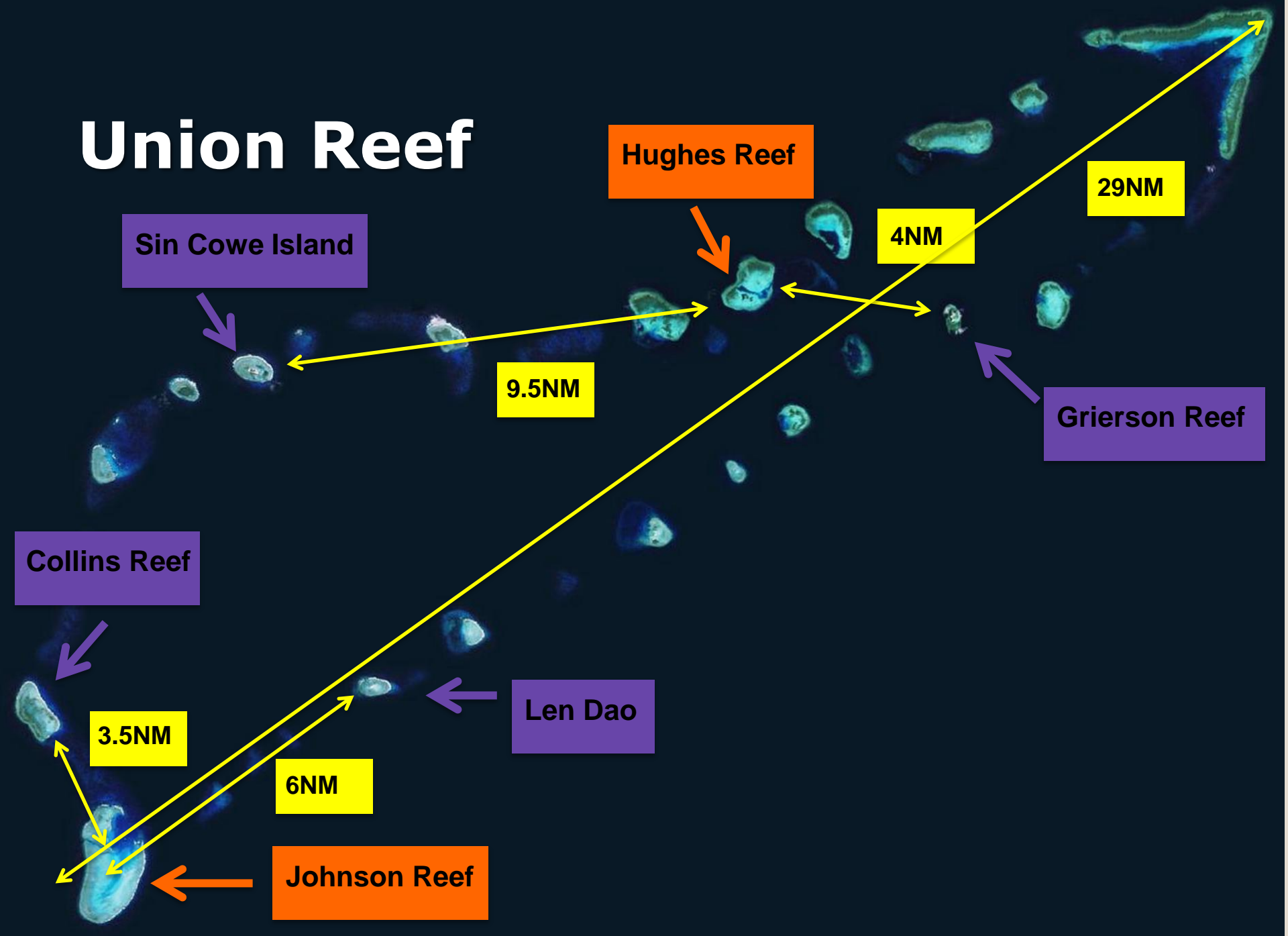
Artificial Islands increase risk of incident between claimants

- Artificial islands are located very close to other reefs occupied by other claimants
- All the occupied features are militarized to a certain extent
- Close proximity and change of military balance of power increase risk of an incident

Tizard Bank



Union Reef



Sin Cowe Island

Hughes Reef

29NM

4NM

9.5NM

Grierson Reef

Collins Reef

Len Dao

3.5NM

6NM

Johnson Reef

US FON Programme

- The US Freedom of Navigation Programme also challenges China's policies of:
 - deliberate ambiguity on the nine-dash line and the nature of its claims in the South China Sea
 - asserting rights and jurisdiction in the waters surrounding the features it occupies
- BUT the FON programme:
 - will not resolve the underlying disputes over sovereignty and maritime boundaries
 - could trigger actions by China that would increase tensions, especially if Japan joins the US

Part 3

The Current Impasse and a Possible Way Forward

China – The Practical Reality

1. The decision will identify China as a Rising Power that is challenging & threatening the legal regime governing the oceans
2. China is not likely to acknowledge or comply with the decision of the Tribunal
3. China is not likely to clarify its position of the nine-dash line or the status and entitlement of the features
4. If China continues to assert rights in the SCS that are contrary to the decision of the Tribunal, ASEAN claimants may invoke the dispute settlement mechanism in UNCLOS
5. China's consistent position is that it wants to resolve the disputes through **bilateral negotiations** with ASEAN claimant States

ASEAN Claimants – Practical Reality

1. ASEAN claimants will re-evaluate their position after the decision of the Tribunal on the Merits of the Case
2. The law governing the status and entitlement of the features is likely to be clearer
3. ASEAN claimants will be under pressure to bring their own claims into strict conformity with UNCLOS as interpreted by the Tribunal
4. The Decision will not address the underlying disputes
5. The ASEAN States will still have to deal with a China that is in control of the largest features in the Spratlys

Can both sides recognize that their current positions are unsustainable?

1. China should understand that it will pay a very high price if it continues to attempt to further its interests through power in defiance of international law
2. ASEAN claimants must accept that the underlying disputes cannot be resolved by international law and international courts and tribunals.
3. China must understand that it is not possible for the ASEAN claimants to appear to back down on their claims to the resources in their EEZ
4. ASEAN claimants must understand that it may not be politically possible for China to reverse course and bring its claims into conformity with UNCLOS

A Way Forward ?

- Both sides agree to **set aside the disputes** on sovereignty and the disputes on maritime claims
- Both sides agree to enter into **provisional arrangements of a practical nature**, pending the eventual settlement of the sovereignty disputes and settlement of maritime boundaries
- Pending agreement on provisional arrangements, all claimants agree to **refrain from actions that would jeopardize or hamper** the negotiation of an agreement on provisional arrangements or agreements to finally resolve the sovereignty and maritime boundary disputes in the SCS

Setting Aside the Disputes on a “Without Prejudice” basis

1. No claimant gives up or surrenders in any manner its historic position on sovereignty, maritime boundaries, historic rights or sovereign rights, etc.
2. No claimant recognizes the legitimacy of the claims or historic positions of any other claimant
3. Any provisional arrangements that are agreed upon cannot be taken into account in any subsequent negotiations or procedures aimed at finally resolve the sovereignty and maritime disputes

Negotiations for Interim Arrangements on a “Without Prejudice” basis

- The claimants agree that any statements made, positions taken or compromises made in the negotiations to reach agreement on provisional arrangements cannot in any way be considered as evidence that any claimant:
 - Has recognized the legitimacy of the claims of any other claimant or
 - Has given up or modified in any way its own position on issue of sovereignty or maritime claims

Advantages of Proposal

1. China could enter the process without clarifying its nine-dash line or its sovereignty and maritime claims
2. ASEAN claimants could enter the process without modifying in any way their position on their own claims or their position on China's claims
3. Taiwan could also declare that it will abide by the provisional arrangements.
4. The “without prejudice” clauses ensure that the positions a claimant takes in negotiations on interim arrangements cannot be used against them later

Types of Interim Arrangements

1. Measures to reduce the risk of potential conflicts between government vessels
2. Measures to establish cooperative regimes on matters of common interest, including the protection and preservation of the marine environment and the promotion of marine scientific research
3. Joint Development Arrangements on fishing resources and oil and gas resources

Legal basis - UNCLOS Article 123

States bordering an enclosed or **semi-enclosed sea** shall endeavor, directly or through an appropriate regional organization:

- (a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea;
- (b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;
- (c) to coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;
- (d) to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article.

Legal Basis: Arts 74 & 83 Delimitation of EEZ & CS boundaries

3. Pending agreement [on EEZ and CS boundaries] as provided for in paragraph 1,

the States concerned, in a spirit of understanding and cooperation, shall

make every effort to enter into provisional arrangements of a practical nature

and, during this transitional period, **not to jeopardize or hamper** the reaching of the final agreement.

Such arrangements shall be **without prejudice** to the final delimitation.

Major Obstacles

1. Lack of trust and confidence
2. How to define the **area of overlapping claims** subject to the Provisional Arrangements
3. How to address the rights and interests of outside powers in the area of overlapping claims
4. How to deal with the issue of Jurisdiction in the area of overlapping claims
5. How to structure Joint Development Arrangements

Proposal – Ask UN Secretary-General to appoint Panel of Experts

1. Claimants should jointly request the UN Secretary-General to use his good offices to appoint a panel of 3 independent and neutral experts to prepare a REPORT recommending specific provisional arrangements.
2. The Report of the Panel of Experts should include a proposed agreement in which the claimants would agree to:
 - 1) Specific Provisional Arrangements in designated areas
 - 2) A suggested timetable for implementing the provisional arrangements
 - 3) Procedures for monitoring whether the claimants are complying with the provisional arrangements

Advantages of the Recommendation

- All the claimants will be required to abandon their irreconcilable historic positions and negotiate based on the specific recommendations in the report of the Panel of Experts
- The Panel of Experts will be permitted to make recommendations that take into account all factors – history, international law, economics, security, the environment, etc
- The Report will not be legally binding, but it will put pressure on claimants to negotiate in good faith based on the report
- The procedure gives all Claimants a face-saving way out of an otherwise intractable dispute

Thanks for Your Attention

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