

# Some Jurisdictional Issues in the South China Sea Arbitration:

## Exceptions under Article 297 and 298 and the Application of the Monetary Gold Principle

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# Structure

- Exceptions to Jurisdiction
  - Article 297(1)
  - Article 297(3)
  - Article 298
- Monetary Gold Principle
- Archipelagic baselines

# Exceptions under Article 297 and 298

# Interpretation of Art.297(1)

- Application of Article 297(1)
  - Approach of the Tribunal in the *Chagos MPA Arbitration* (paras 306-318)
    - This is an inclusive approach to Article 297(1) based on the use of the evolving content of the article during its drafting as evidenced in the *travaux préparatoires* of the Law of the Sea Convention
  - Not a limiting provision
    - Para 928
  - Only applicable coastal State is the Philippines, so also no limitation
    - Para 930



# Art 297(3) - SCS Arbitration

- Because the areas of the South China Sea at issue for Submission No. 8 can only constitute the exclusive economic zone of the Philippines, the Tribunal also considers that Article 297(3)(a) and the law enforcement exception in Article 298(1)(b) of the Convention pose no obstacle to its jurisdiction. These provisions serve to limit compulsory dispute settlement where a claim is brought against a State's exercise of its sovereign rights in respect of living resources in its *own* exclusive economic zone. These provisions do not apply where a State is alleged to have violated the Convention in respect of the exclusive economic zone of another State. The Tribunal therefore concludes that it has jurisdiction with respect to the Philippines' Submission No. 8.
- Para 695

# Article 298

- Declaration under article 298:
  - The Government of the People's Republic of China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention.
- 25 August 2006

# Nature of China's Claims

- Tribunal accepted that “historic title” provided an exception under Article 298(1)(a)(i)  
– Para 215
- Tribunal considered the nature of “historic title”  
– Para 217-227
- Tribunal formed the view that the nature of China's historic rights in the South China Sea fell short of a claim to title and therefore Article 298(1)(a) did not form an applicable exception to its jurisdiction  
– Para 228-229



# Nature of China's Claims

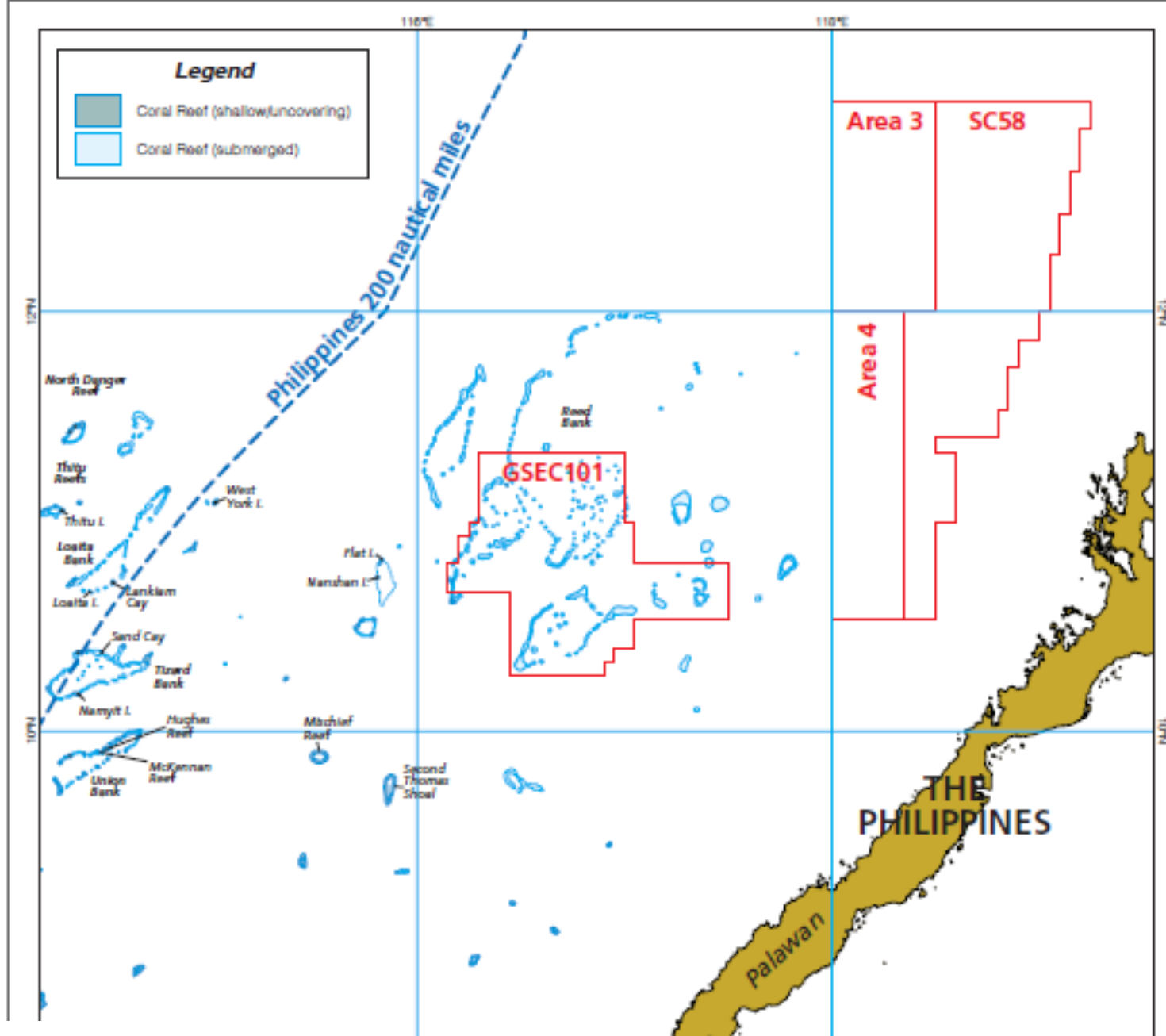
- Having concluded that the exception to jurisdiction in Article 298(1)(a)(i) is limited to disputes involving historic titles and that China does not claim historic title to the waters of South China Sea, but rather a constellation of historic rights short of title, the Tribunal holds that it has jurisdiction to consider the Philippines' Submissions No. 1 and 2. As China has not made such a claim, the Tribunal need not consider whether there would be any limit to the application of Article 298 to expansive claims of historic title extending well beyond those that may have been anticipated when the Convention was concluded in 1982.

– Para 229



# Delimitation

- Philippines sought a declaration that Second Thomas Shoal and Mischief Reef were within its EEZ
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- Tribunal found that neither Second Thomas Shoal nor Mischief Reef were features capable of appropriation
- Tribunal found that no features in the South China Sea generated an EEZ
- Therefore, there could be no delimitation issue

– Para 409



# Military Activities

- In determining whether Chinese activities at Mischief Reef are military in nature, the Tribunal takes note of China's repeated statements that its installations and island construction are intended to fulfil civilian purposes. The Tribunal also takes note of the public statement of China's President Xi Jinping that "[r]elevant construction activities that China are undertaking in the island of South – Nansha Islands do not target or impact any country, and China does not intend to pursue militarization."

– Para 1027

# Military Activities

- The Tribunal will not deem activities to be military in nature when China itself has consistently resisted such classifications and affirmed the opposite at the highest level. Accordingly, the Tribunal accepts China's repeatedly affirmed position that civilian use comprises the primary (if not the only) motivation underlying the dramatic alterations on Mischief Reef. As civilian activity, the Tribunal notes that China's conduct falls outside the scope of Article 298(1)(b) and concludes that it has jurisdiction to consider the Philippines' Submission.

– Para 1028

# Military Activities

- There is no question that all of the significant high-tide features in the Spratly Islands are presently controlled by one or another of the littoral States, which have constructed installations and installed personnel. This presence, however, is predominantly military or governmental in nature and involves significant outside supply.
- Para 578



# Monetary Gold Principle

# Monetary Gold

- The nature of the Monetary Gold Principle
- Application of the Principle
  - No jurisdiction
  - Limitation on jurisdiction
- Application in the SCS Arbitration



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# Monetary Gold

- The Court cannot decide such a dispute without the consent of Albania. But it is not contended by any Party that Albania has given her consent in this case either expressly or by implication. To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent.

– p.32

# Monetary Gold

- Albania has not submitted a request to the Court to be permitted to intervene. In the present case, Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania.

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# Nicaragua/Honduras

- As for the endpoint, neither Nicaragua nor Honduras in each of their submissions specifies a precise seaward end to the boundary between them. The Court will not rule on an issue when in order to do so the rights of a third party that is not before it, have first to be determined (see Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954, p. 19). Accordingly, it is usual in a judicial delimitation for the precise endpoint to be left undefined in order to refrain from prejudicing the rights of third States.  
– para 312
- The Court then uses this as a basis for justifying its failure to develop tri-points or terminal points in Tunisia/Libya (para 130); Libya/Malta (para 21-23); Cameroon/Nigeria; Equatorial Guinea intervening (para 238, 245 and 307)

# SCS Arbitration

- Finally, the Tribunal does not consider that the military or other governmental personnel presently stationed on the features in the Spratly Islands by one or another of the littoral States suffice to constitute “human habitation” for the purposes of Article 121(3). These groups are heavily dependent on outside supply, and it is difficult to see how their presence on any of the South China Sea features can fairly be said to be sustained by the feature itself, rather than by a continuous lifeline of supply and communication from the mainland. Military or other governmental personnel are deployed to the Spratly Islands in an effort to support the various claims to sovereignty that have been advanced.

- Para 620



# SCS Arbitration

- Read correctly, *Monetary Gold* calls for a court or tribunal to refrain from exercising its jurisdiction where the “legal interests [of a third State] would not only be affected by a decision, but would form the very subject-matter of the decision.” The circumstances of *Monetary Gold*, however, “represent the limit of the power of the Court to refuse to exercise its jurisdiction,” and any more expansive reading would impermissibly constrain the practical ability of courts and tribunals to carry out their function...

# Monetary Gold

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# SCS Arbitration

- The Tribunal considers that, to the extent it has examined certain features claimed by China (that are also claimed by Malaysia) for the purposes of assessing the possible entitlements of China in areas to which Malaysia makes no claim, the legal interests of Malaysia do not form “the very subject-matter of the dispute” and are not implicated by the Tribunal’s conclusions.

– para 640

# Interpretation of Monetary Gold

- The present situation is different from the few cases in which an international court or tribunal has declined to proceed due to the absence of an indispensable third party, namely in *Monetary Gold Removed from Rome in 1943* and *East Timor* before the International Court of Justice and in the *Larsen v. Hawaiian Kingdom* arbitration.<sup>152</sup> In all of those cases, the rights of the third States (respectively Albania, Indonesia, and the United States of America) would not only have been affected by a decision in the case, but would have “form[ed] the very subject-matter of the decision.” Additionally, in those cases the lawfulness of activities by the third States was in question, whereas here none of the Philippines’ claims entail allegations of unlawful conduct by Viet Nam or other third States.
  - para 181, SCS Arbitration (Jurisdiction & Admissibility)

# Malaysia as a third party

- Tribunal referred to three reasons why Malaysia's interests were not affected:
  - Malaysia is not bound by the outcome (para 637)
  - Malaysia did not assert in a 1979 map nor subsequently any of the features generate the full range of maritime zones (para 638-639)
  - Malaysia-Vietnam Joint CLCS submission (para 638)

# Malaysia as a third party

- 1979 Map of Malaysia continental shelf
  - Malaysia extent legislation in 1979 limited the continental shelf to areas of 200 metres water depth
  - Malaysia claimed no EEZ until 1984
- CLCS Submission
  - Submission at para 4.2
  - Malaysian *note verbale* in relation to the submission stated:
    - “...the Joint Submission is without prejudice to the position of States which are parties to a land or maritime dispute in consonance of Paragraph 5(b) of Annex I of the Commission’s Rules of Procedure.”



# Vietnam as a third party

- Vietnam does not object to the case proceeding but also does not wish to intervene.
- “After reading the written pleadings of the Philippines, the Ministry of Foreign Affairs of Viet Nam is of the view that some of Viet Nam’s rights and interests of a legal nature in the South China Sea may be involved, and even affected in this arbitration.”
  - para 2, Annex 468
  - 14 December 2014



# SCS Arbitration (Jurisdiction)

- Similarly, the absence of other States as parties to the arbitration poses no obstacle. Like Viet Nam, Malaysia and Indonesia have received copies of the pleadings and attended the hearings as observers and Brunei Darussalam has been provided with copies of documents. No argument has been made by China, the Philippines, or the neighbouring States that their participation is indispensable to the Tribunal proceeding with this case.

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# Archipelagic Baselines

# SCS Arbitration

- In any event, however, even the Philippines could not declare archipelagic baselines surrounding the Spratly Islands. Article 47 of the Convention limits the use of archipelagic baselines to circumstances where “within such baselines are included the main islands and an area in which 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.” The ratio of water to land in the Spratly Islands would greatly exceed 9:1 under any conceivable system of baselines.
- Para 574





# Basepoints?



# Distance from Philippines to the Nearest Features

- Second Thomas Shoal is known as “Ren’ai Jiao” (仁爱礁) in China and “Ayungin Shoal” in the Philippines. It is 104.0 nautical miles from the archipelagic baselines of the Philippine island of Palawan
- Bombay Shoal is less than 54 nautical miles from Palawan
- Half Moon Shoal is 54 nautical miles from Palawan
- Royal Captain Shoal is 41 nautical miles from Palawan

# Basepoints?

- Article 47:
  - 4. Such baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the nearest island.





Source: *New York Times* – 31 March 2014

[https://www.nytimes.com/2014/04/01/world/asia/beijing-and-manila-in-dispute-over-reef.html?\\_r=0](https://www.nytimes.com/2014/04/01/world/asia/beijing-and-manila-in-dispute-over-reef.html?_r=0)





# Basepoints?

- Approximately halfway between Second Thomas Shoal and Palawan are Bombay Shoal and Royal Captain Shoal
    - They are about 30 miles apart
  - Half Moon Shoal is 25 nm southwest of Royal Captain Shoal
  - All these features are reported as currently undeveloped, and all are within 100 nm of Palawan Island
  - Bombay Shoal is described by Hancox and Prescott as having drying rocks to 0.6 metres, with a tidal amplitude of 1.2 metres
  - Royal Captain Shoal has drying rocks to 1.2 metres
  - Half Moon Shoal is reported as having “one inclined rock on the east side [which] stands one metre above high water”
- 
- Hancox & Prescott, “A Geographical Description of the Spratly Islands and an Account of Hydrographic Surveys amongst those Islands” (1996) 1(6) *Maritime Briefing* 1 at 30
    - Rosenberg, *Digital Gazetteer of the South China Sea*, <http://www.southchinasea.org/2011/08/19/digital-gazetteer-of-the-spratly-islands/>

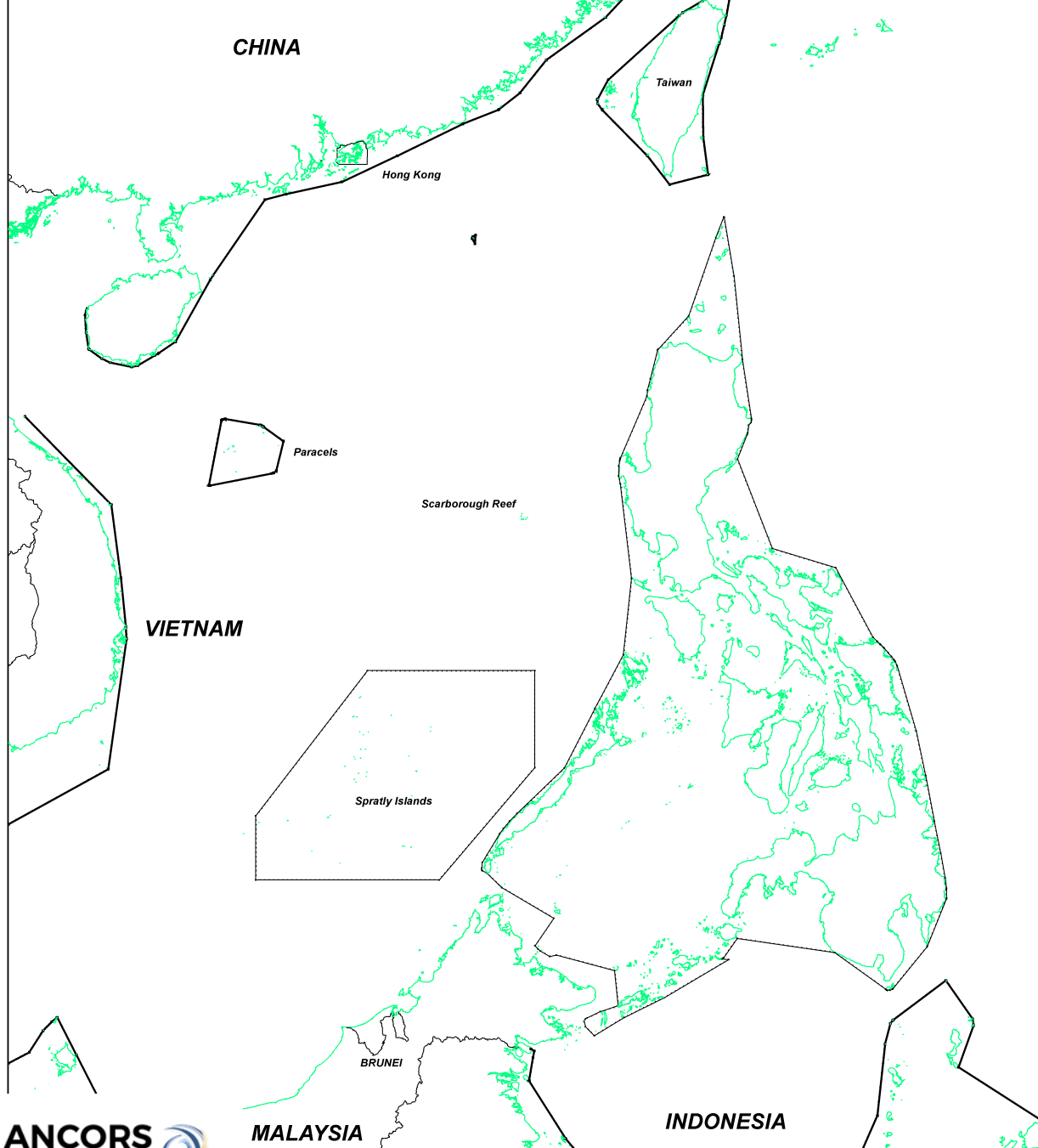


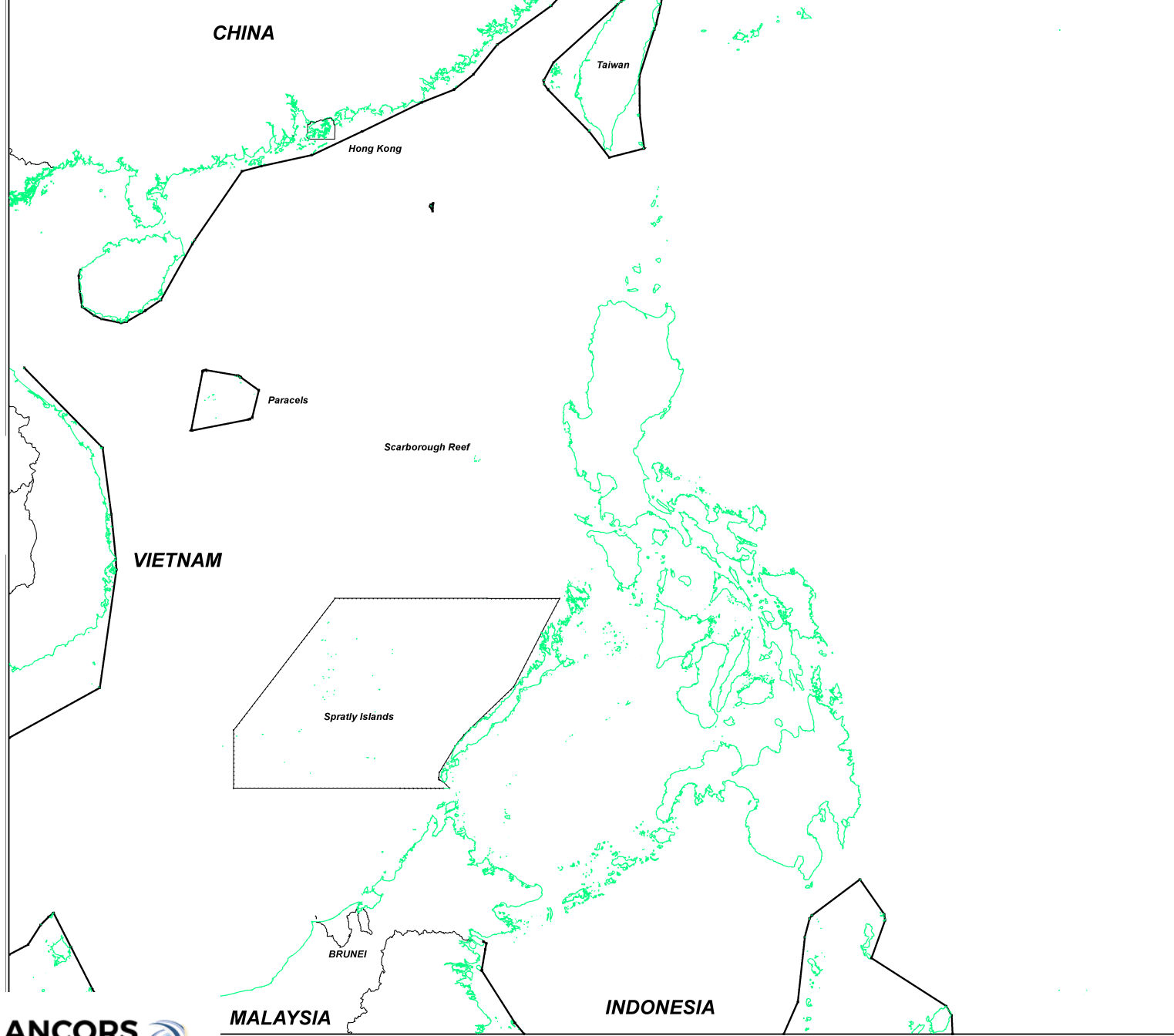
# Basepoints?



# Land/Water Ratio

- Article 47:
  - 1. An archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which 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.





**CHINA**

Taiwan

Hong Kong

Paracels

Scarborough Reef

**VIETNAM**

Spratly Islands

BRUNEI

**MALAYSIA**

**INDONESIA**



# Complying with Article 47

- Water Area of the Philippines: 589,739 km<sup>2</sup>
- Land Area of the Philippines: 298,170 km<sup>2</sup>
- Water to Land Area Ratio: 1.98 to 1
  
- Water Area of Kalayaan Box: 235,923 km<sup>2</sup>
- Water Area of Connecting Polygon: 255,062 km<sup>2</sup>
  
- Total Water Area of Philippines and Connecting Polygon: 844,801 km<sup>2</sup>
  
- Water to Land Area Ratio: 2.83 to 1
  
- Total number of existing baselines: 101
- Total number over 100 nm in length: 3
  
- Areas sourced from *Limits in the Seas* No. 142



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