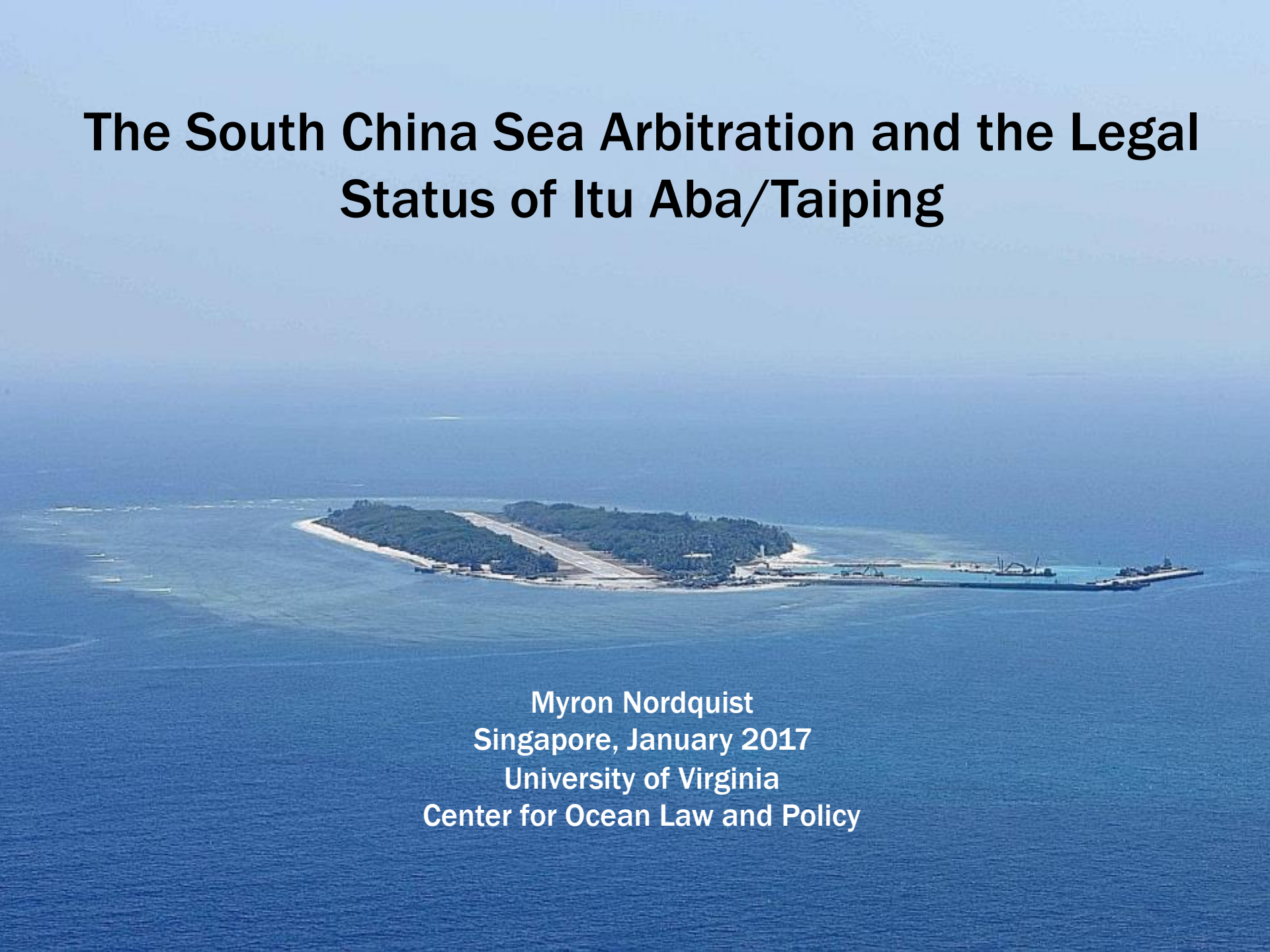


# **The South China Sea Arbitration and the Legal Status of Itu Aba/Taiping**



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Singapore, January 2017  
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# SOUTH CHINA SEA MARITIME CLAIMS



- ~250 islands, atolls, reefs, shoals, skerries and sand bars
- Archipelagos
  - Macclesfield Bank
  - Spratly Islands
  - Pratas Islands
  - Paracel Islands
  - Scarborough Reef

# LEGISLATIVE HISTORY OF 121

- **1930 Conference for the Codification of International Law**
  - “Every island has its own territorial sea. An island is an area of land, surrounded by water, which is permanently above high-water mark.”
- **International Law Commission’s (ILC) draft articles on the law of the sea (1956)**
  - “Every island has its own territorial sea. An island is an area of land, surrounded by water, which in normal circumstances is permanently above high-water mark.”
- **The First Conference on the Law of the Sea (1958)**
  - “An island is a naturally-formed area of land, surrounded by water, which is above water at high-tide. The territorial sea of an island is measured in accordance with the provisions of these articles.”
- **Third Law of the Sea Conference (1973)**

# THIRD LAW OF SEA CONFERENCE

- The regime of islands and related entitlement and offshore delimitation impacts proved to be as challenging to resolve as any set of problems at the Third Conference
- Plethora of oral and written formal and informal proposals
  - Greece and Turkey expressed contrasting views about island topics
  - Venezuela and Iran refuse to accede still today in large part because of the regime of islands text
- Subcommittee II
- Geneva Session (1975)
  - Islands Working Group established
  - Objections to SNT Article 121

# ARTICLE 121

## REGIME OF ISLANDS

- 1. An island is a **naturally formed** area of land, surrounded by water, which is above water at high tide.
- 2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.
- 3. Rocks which cannot **sustain human habitation** or economic life of their own shall have no exclusive economic zone or continental shelf.

# VIENNA CONVENTION ON LAW OF TREATIES (VCLT)

- VCLT considered customary international law
- Article 31 (1): A treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their context and in the light of its object and purpose.
  - (2) context includes the text and related agreements
  - (3) together with context, subsequent agreements, state practice and relevant rules of international law taken into account
- Article 32: Supplemental means of interpretation available if means under article 31 “(a) leaves the meaning *ambiguous or obscure*; or (b) Leads to a result that is manifestly absurd or unreasonable”
- There is a virtual consensus that some of the language of Article 121(3) is ambiguous and arguably even obscure

# SCS ARBITRATION AWARD 121 TEXTUAL ANALYSIS

- Tribunal considers the terms: “rocks”, “cannot”, “sustain”, “human habitation”, “or” and “economic life of their own”
- **“Rocks”**: the term encompasses more than just geological composition
- **“Cannot”**: the Tribunal first acknowledges that “121(3) indicates a concept of capacity”, but errs by injecting the qualifier of “natural form”
- **“Sustain”**: Tribunal asserts that the term has three components:
  - concept of the “support and provision of essentials”
  - concept of time
  - a minimum “proper standard” for a feature to remain viable
- **“Economic life of their own”**: “must have the ability to support an independent economic life, without relying predominantly on the infusion of outside resources or serving purely as an object for extractive activities without the involvement of a local population” (Para. 498)
  - Economic activity derived from a possible economic zone or continental shelf must necessarily be excluded

# SCS AWARD CONTEXTUAL ANALYSIS

- The Tribunal predictably found the text of Article 121 to be sufficiently ambiguous to look to the “context of the treaty in light of its object and purpose.”
- Tribunal asserts “Article 121(3) must...be interpreted in conjunction with...Article 13 concerning low-tide elevations” because of a perceived “system of classifying features.” (para. 507).
  - In reality, Article 121(3) was not drafted, negotiated or amended in conjunction with low-tide elevations under Article 13, but instead as an exception to the first two paragraphs of Article 121
- Tribunal contends that the purpose of the Article 121(3) exception is as a “counterpoint to the expanded jurisdiction of the exclusive economic zone.” (para. 516)
  - In reality, it was inserted by contingent of coastal states seeking to limit the strength of islands in maritime delimitation negotiations



# PROPER INTERPRETATION OF ARTICLE 121

- The island must be “naturally” formed; that is, not man-made or artificially formed
- Objective criteria such as physical size, number of inhabitants, geographical location and other characteristics were proposed, deliberated upon and *rejected* for inclusion in the text of Article 121(3)
- Human habitation: No meaningful discussion was held about water, naturally drinkable or not and no reference is made to water in the text of UNCLOS
- The language in the third paragraph text is not limited to past habitation or economic capacity as applied to Itu Abo/Taiping, but includes its future potential or capability to “sustain human habitation or economic life of its own”
- Legal evaluation of the term “sustain” begins at the time of the case filing as any other time selection in a properly constituted legal case would be completely arbitrary

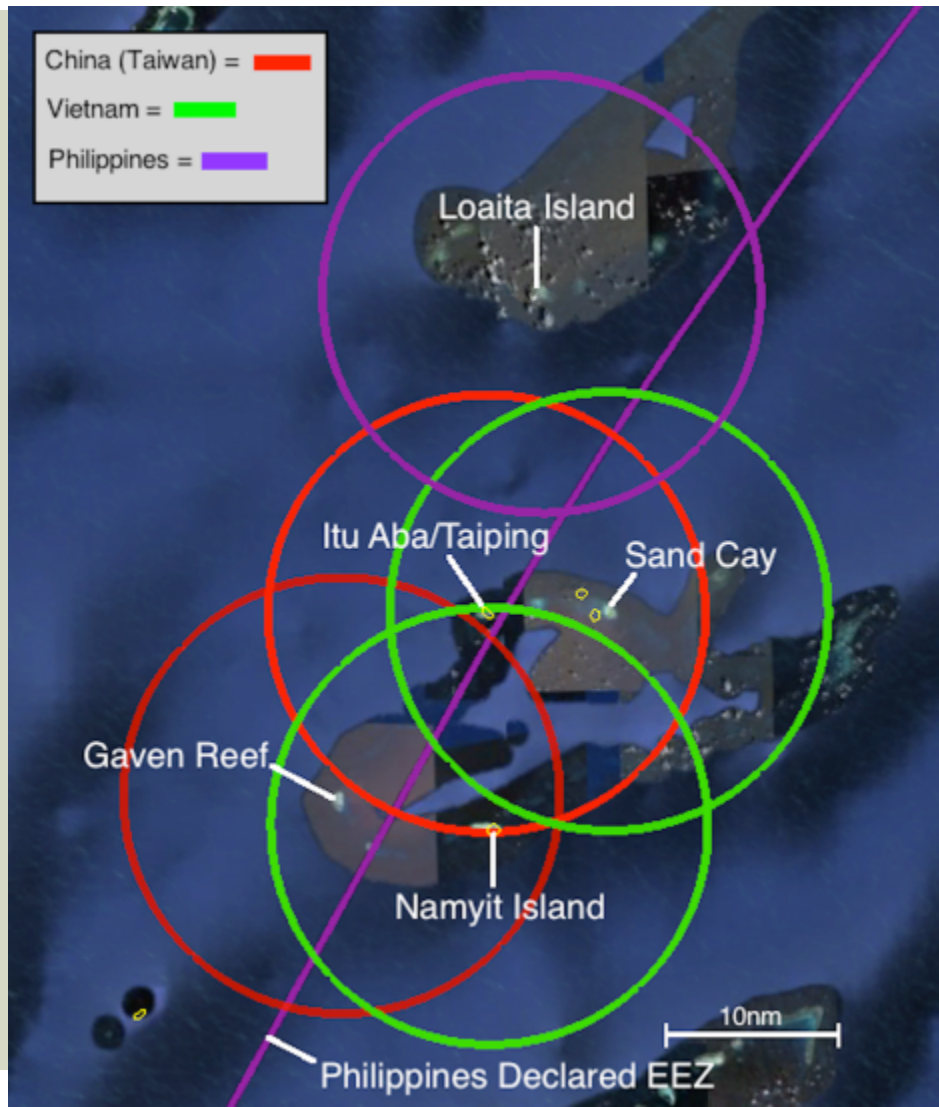
# INTERPRETATION AND/OR APPLICATION OF ARTICLE 121(3) TO ITU ABA/TAIPING

- Head of the Taiwan Authority Ma Ying-jeou of the Taiwan Authority visited Itu Aba/Taiping (28 January 2016) in a speech stated facts on the ground:
  - Itu Aba/Taiping is no longer solely dependent for electricity on generators run by imported diesel fuel and is projected to raise its electrical supply to run 40% on an expanded solar power system
  - Human habitation and economic life were sustained on Itu Aba/Taiping by mobile telecommunications, postal services, satellite television, air services, and ship's services
  - Itu Aba/Taiping objectively meets all reasonably conceivable requirements for the definition of an “island” both with respect to interpretation and application of Article 121(3) of the Convention

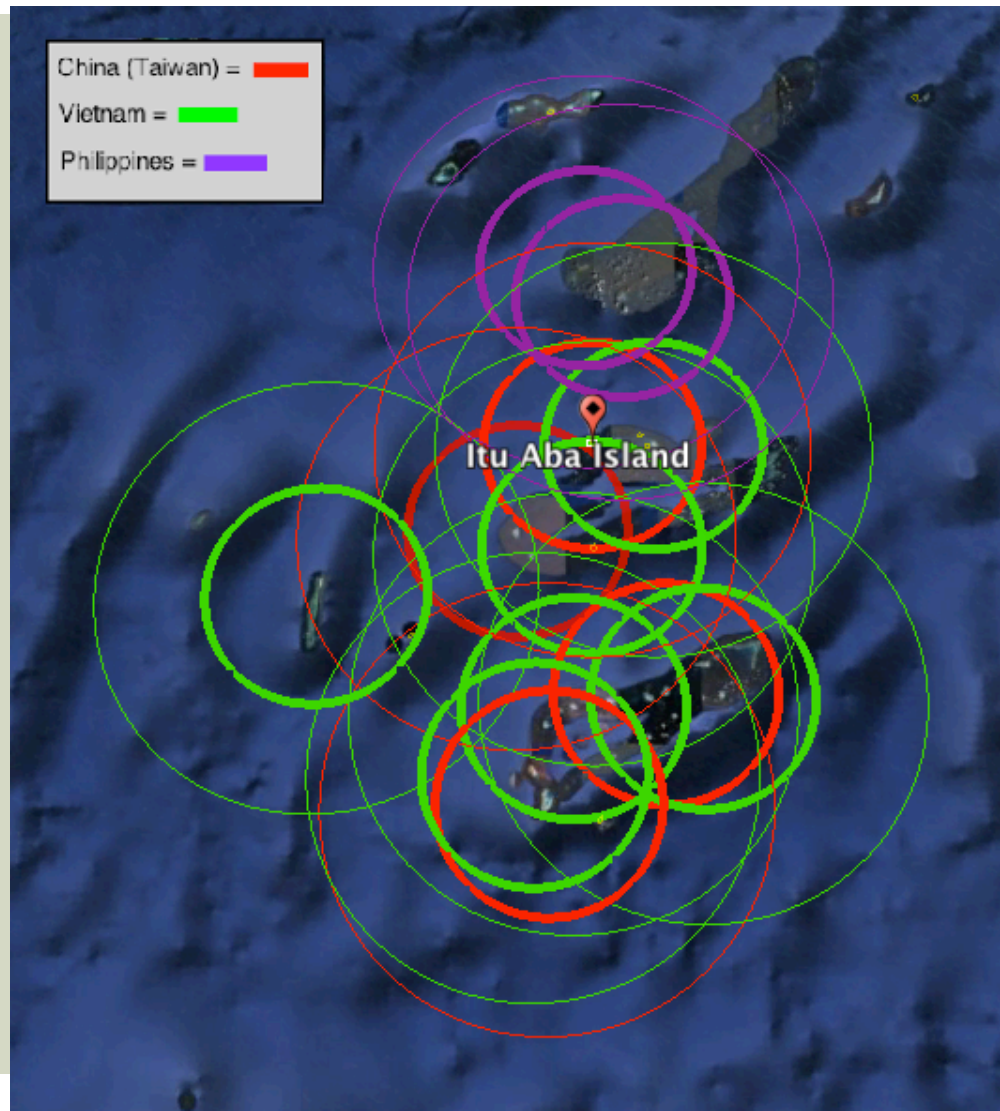
# JURISDICTION: ARTICLE 298

- 1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under [the general provisions], declare in writing that it does not accept any one or more of the procedures provided for in [compulsory procedures] with respect to one or more of the following categories of disputes:
  - (a) (i) disputes **concerning** the interpretation or application of articles 15 [(Territorial Sea Delimitation)], 74 [(EEZ Delimitation)] and 83 [(Continental Shelf)] relating to sea boundary delimitations, or those involving historic bays or title...

# TERRITORIAL SEA OVERLAP

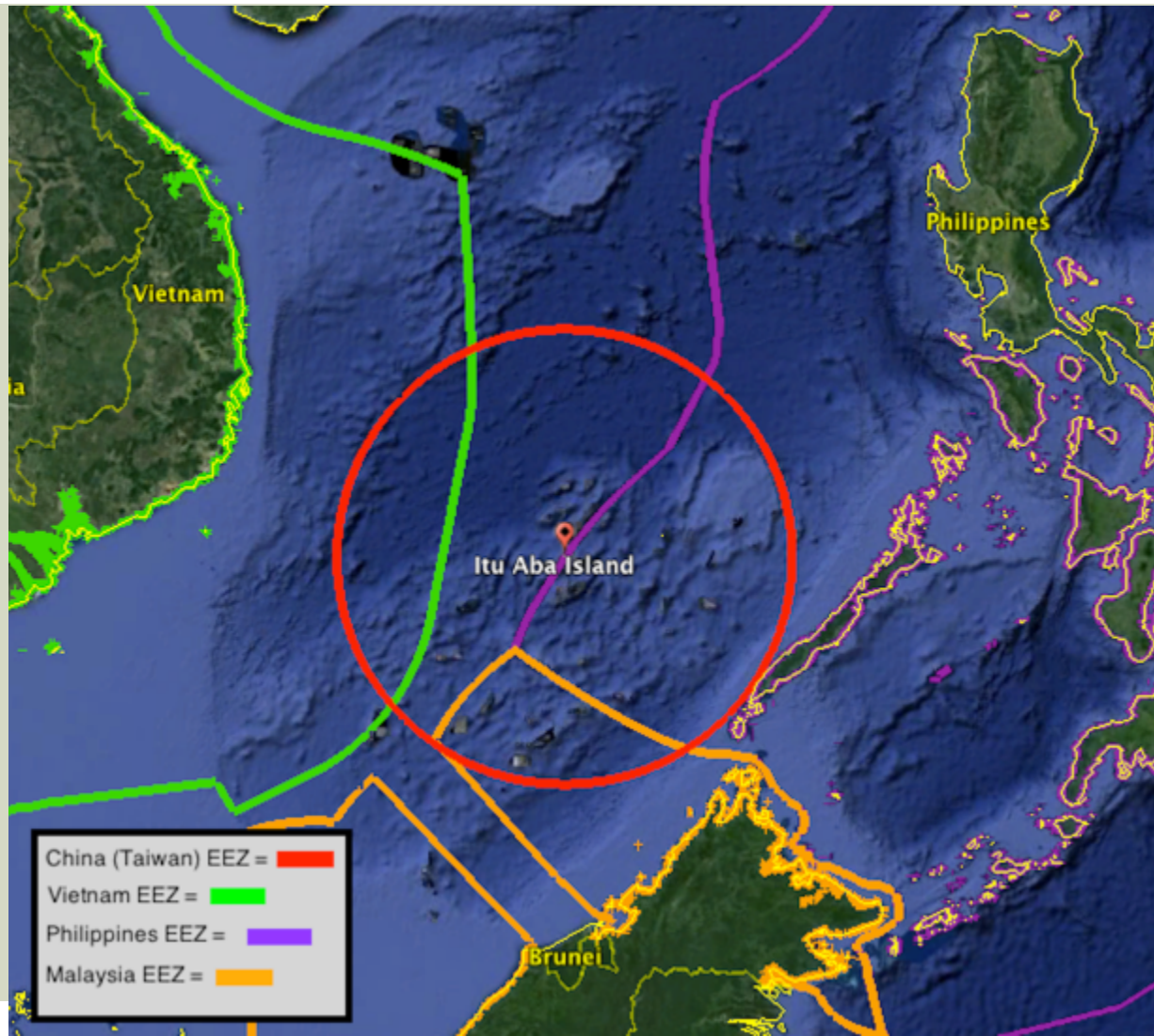


# CONTIGUOUS ZONE OVERLAP





# ITU ABA/TAIPING ISLAND ENTITLEMENT



# CONCLUSIONS

- The Award in the *South China Sea* case failed to apply the proper interpretation of the admittedly ambiguous Article 121 to Itu Aba/Taiping
- The resolution by the Tribunal in the Award is, unfortunately, no improvement on the actual Convention text adopted by the delegates to the Third Conference
- The Award does not comport with the compromise text found in Article 298
- Article 296(2) ensures that this Award will not be binding precedent
- The legal effect of the 500-page Award with respect to islands is likely to be more honored in the breach than in international acceptance.
- Future tribunals are likely to interpret Article 121 in accordance with the Convention text where jurisdictional pressures surrounding the dispute do not lead to over-reaching political determinations for procedural reasons