

**MIMA – JAPAN Maritime Cooperation:  
Law of the Sea Workshop 2018**

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**UNCLOS AS A RULES-BASED LEGAL  
ORDER FOR THE OCEANS**

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# OUTLINE OF PRESENTATION

1. **“Grand Bargains” in UNCLOS establish a Legal Order for the Oceans**
2. **UNCLOS & Maritime Claims in the South China Sea**
3. **“Freedom of Navigation Operations” in the South China Sea**

# Part 1

## **“Grand Bargains” in UNCLOS Establish a Legal Order for the Oceans**

# Current Status of UNCLOS

- Near universal acceptance – 168 Parties including EU
- All coastal States in East & Southeast Asia except Cambodia and DPR Korea
- USA is not a party but it regards most of the provisions of UNCLOS as binding on it under customary international law

# Preamble to 1982 UNCLOS

- **RECOGNIZING** the desirability of establishing through this **Convention**,  
with due regard for the sovereignty of all States,  
**a legal order for the seas and oceans**  
which will facilitate international communication, and  
will promote the peaceful uses of the seas and oceans,  
the equitable and efficient utilization of their resources,  
the conservation of their living resources,  
and the study, protection and preservation of the marine  
environment

# UNCLOS: SOVEREIGNTY Disputes OVER Offshore Island

- States can claim territorial sovereignty over land territory, including islands
- UNCLOS has no provisions on how to determine which State has the better claim to sovereignty over disputed islands
- States cannot claim sovereignty over seabed or low-tide elevations

# Maritime Zones under UNCLOS

## “the land dominates the sea”

1. An **island** is a *naturally formed area of land* surrounded by and above water at high tide, and is entitled to all maritime zones: Territorial Sea, Contiguous Zone, Continental Shelf and Exclusive Economic Zone
2. **Rocks** *which cannot sustain human habitation or economic life of their own* have no EEZ or continental shelf
3. **Low-tide elevations** are not subject to a claim of sovereignty and are not entitled to maritime zones of their own
4. **Artificial islands** are not entitled to any maritime zones

# “Grand Bargain” on Territorial Sea and Archipelagic Waters

- **Territorial Sea** limit of 12 nm
- **Archipelagic Waters** for Archipelagic States
- Sovereignty in territorial sea and archipelagic waters subject to passage regimes
  - **Innocent Passage**: territorial sea
  - **Transit Passage**: straits used for international navigation
  - **Archipelagic Sea Lanes Passage**: archipelagic waters



# Result of Grand Bargain on Sovereignty & Passage

- Passage Regimes in UNCLOS were negotiated to address issue of passage through the Straits of Malacca and Singapore and through the Indonesian Archipelago
- Passage regimes critically important for two superpowers in 1970s - USA and USSR
- Naval Powers can move aircraft carriers from one ocean to another through choke points with air cover above and submarine cover below
- Major Beneficiary today: China

# Indonesia: the Indo-Pacific Fulcrum

CIL

CENTRE FOR INTERNATIONAL LAW  
National University of Singapore



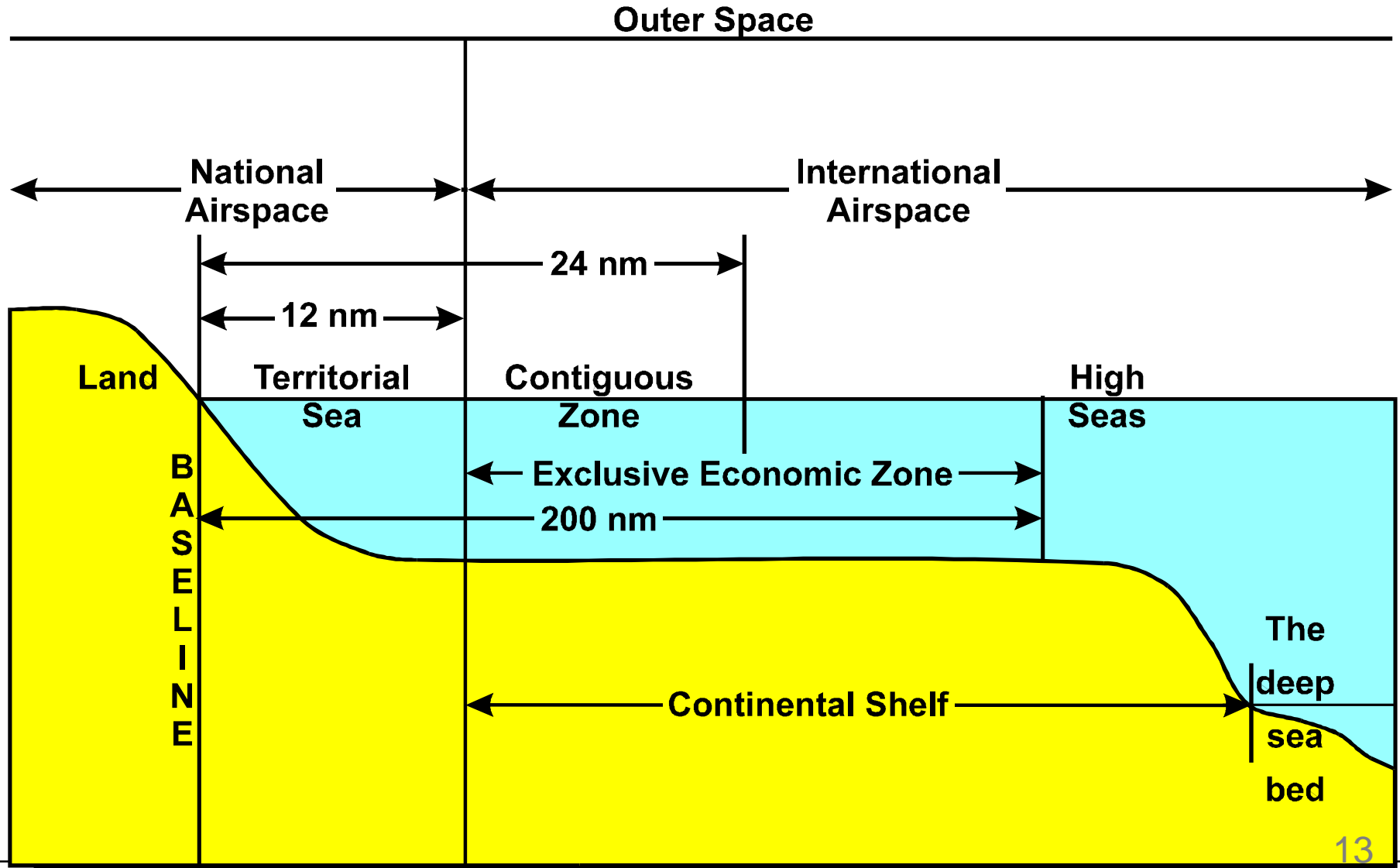


- UNCLOS gives China passage rights through First Island Chain
- China must pass through choke points to access Pacific Ocean and Indian Ocean

# “Grand Bargain” on Sovereign Rights to Natural Resources

- **Exclusive Economic Zone (EEZ)** extending to 200 nm
  - Coastal State sovereign right to natural resources
  - No recognition of “historic rights” of States that historically fished in waters that are now EEZ of other States
- **Continental Shelf** – new definition - broad shelf States may extend continental shelf to outer edge of continental margin
- **High Seas** – freedom of fishing in waters beyond 200 nm
- **The Area** – deep seabed beyond outer limit of continental shelf -- The Area and its resources are the “common heritage of mankind”

# LEGAL REGIMES OF THE OCEANS AND AIRSPACE



# Exclusive Economic Zone

- Not subject to sovereignty of coastal State
- Not part of high seas
- A “specific legal regime” in which UNCLOS sets out:
  1. Rights and Jurisdiction of Coastal States
  2. Rights and Freedoms of other States

# Rights & Freedoms in the EEZ

- **Coastal State** has **sovereign rights** for the purpose of exploring and exploiting the **natural resources** and with regard to **other activities for economic exploitation & exploitation of the zone**
- **All States** have **freedoms of navigation and overflight** and of laying of cables and pipelines, and **other internationally lawful uses of the sea related to these freedoms . . .**



- Coastal State has **jurisdiction** as provided in the **Convention** over fisheries, offshore installations and structures, marine scientific research, other economic activities
  - No provisions in the Convention give coastal States jurisdiction over military activities in the EEZ
- For all other activities, the high seas rules on jurisdiction apply in the EEZ
  - Piracy, collisions, exclusive jurisdiction of flag State



# Continental Shelf

- New Definition of Continental Shelf
- Coastal States permitted to make “extended” continental shelf claim beyond 200 nm to outer edge of the continental margin
- Claims made by submitting technical information to Commission on the Limits of the Continental Shelf (CLCS) by May 2009

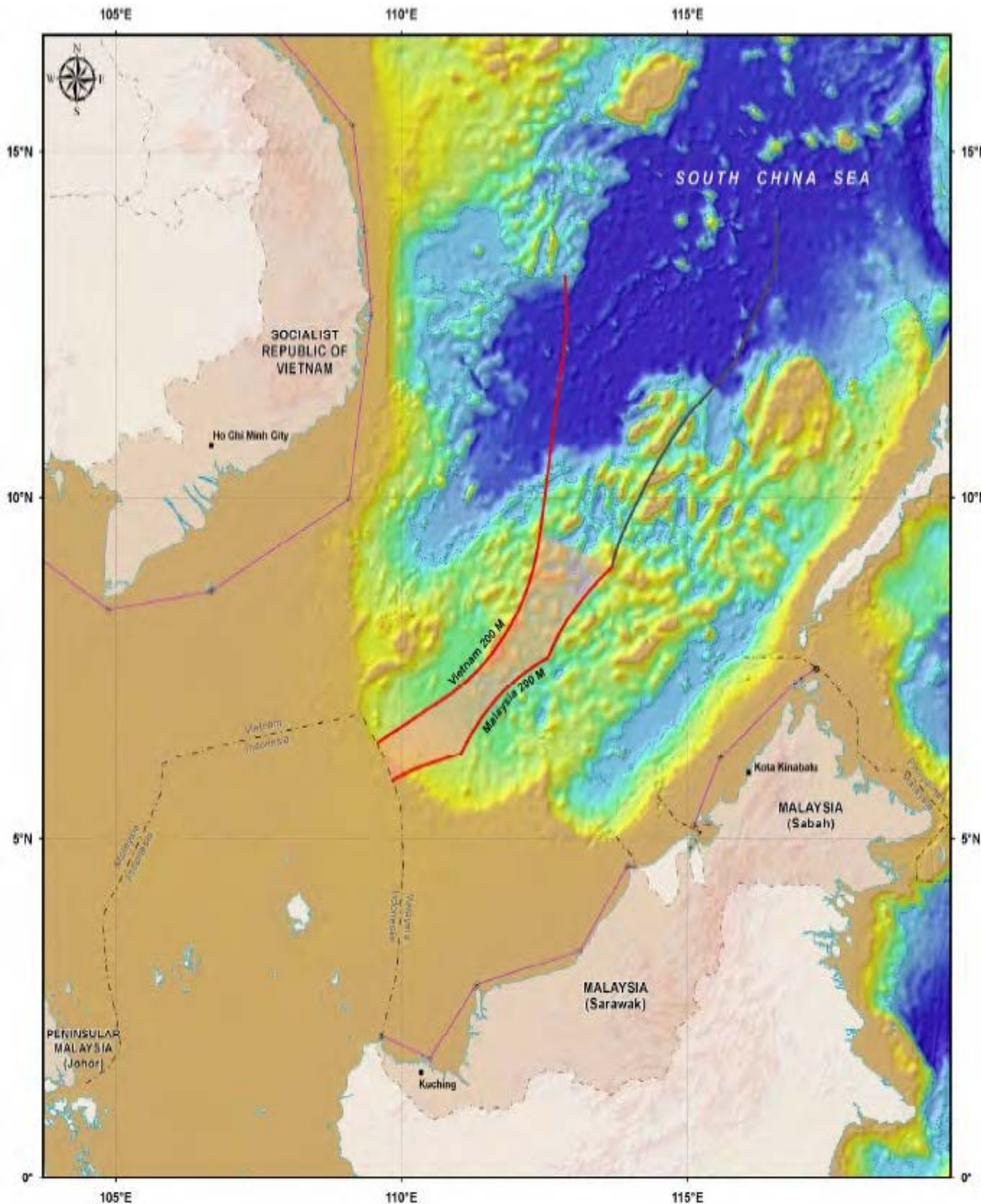
# Key Elements of “Package Deal”

- **No Reservations** allowed
- **Compulsory Binding Dispute Settlement Regime**
  - Any dispute between two parties that cannot be resolved by negotiations is subject to compulsory binding procedures in Section 2 of Part XV
  - Exceptions and exclusions are very limited
  - States “consent” to the compulsory binding dispute system when they become a party to UNCLOS

## Part 2

# UNCLOS and Maritime Claims in the South China Sea

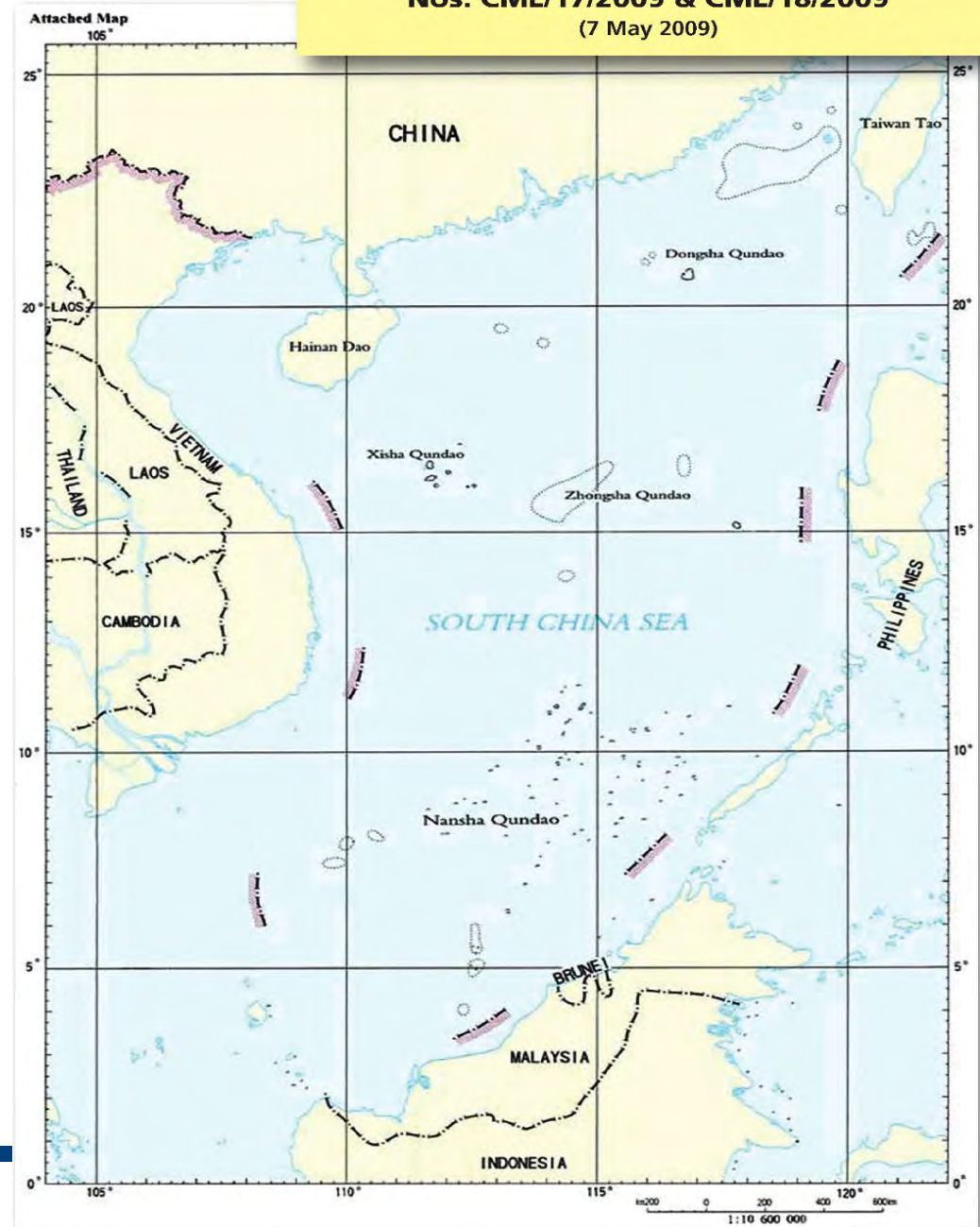
- To prepare to make submissions to CLCS on outer continental shelf May 2009 deadline Malaysia, Philippines and Vietnam clarified their maritime claims
- Philippines brought archipelagic baselines into conformity with UNCLOS and claimed EEZ only from baselines around its main archipelago
- None of ASEAN claimants claimed an EEZ from any of the islands in the Spratly Islands over which they claimed sovereignty



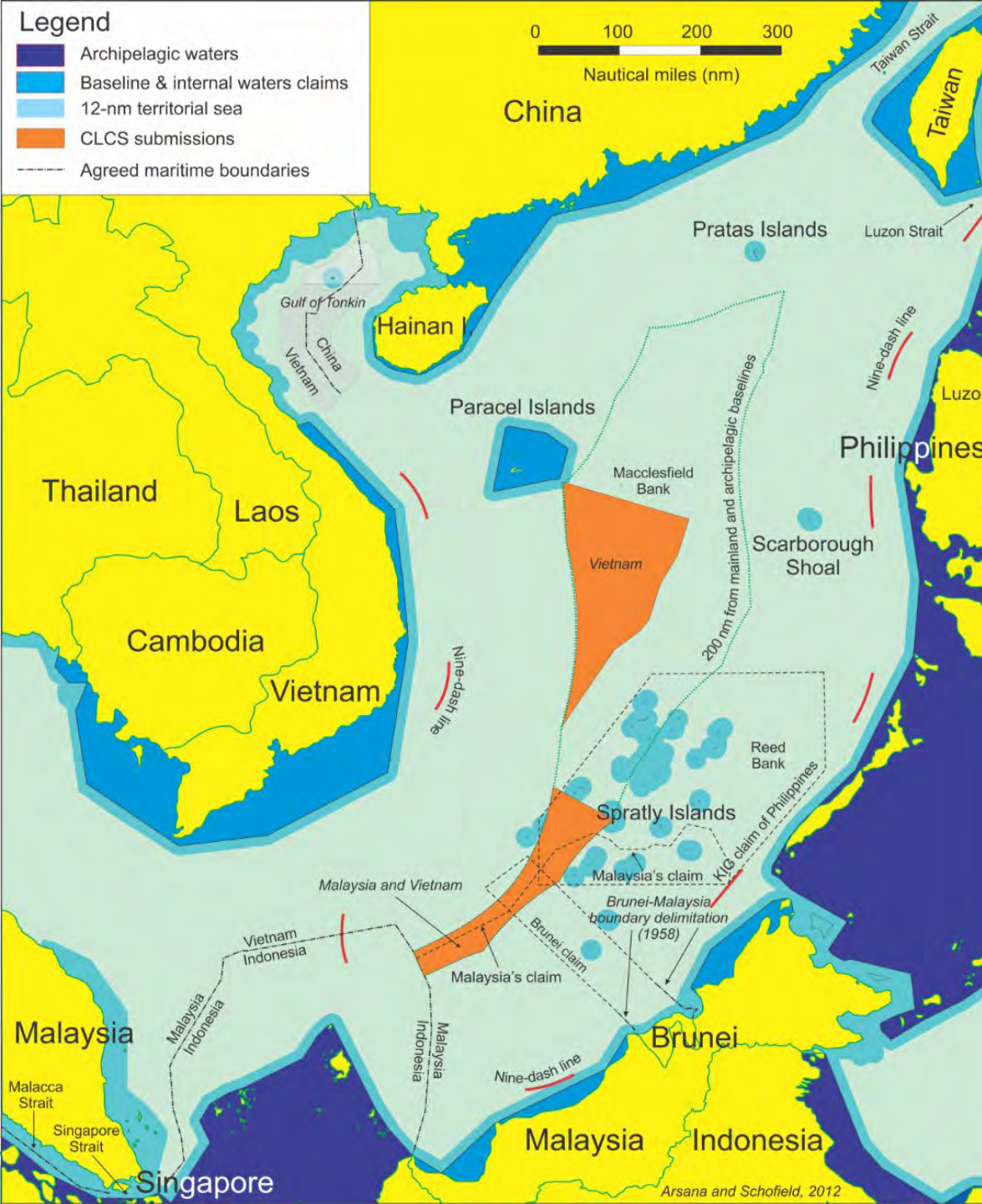
- Joint Submission of Malaysia and Vietnam to CLCS - 6 May 2009
- Clarified EEZ limit
- Claimed EEZ only from mainland
- Implied that all islands were “rocks”

## China sent Note Verbale to UNSG on 7 May 2009:

- China has indisputable sovereignty over the islands in the SCS and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof  
(see attached map).







- Maritime Zones in South China Sea
- Philippines also clarified that was claiming EEZ only from archipelagic baselines

# Philippines v China Arbitration

- 22 Jan 2013 - Philippines instituted proceedings
- China adopted policy of non-appearance, non-participation and non-compliance
- 29 Oct 2015 Arbitral Tribunal Award on Jurisdiction
- 12 July 2016 Arbitral Tribunal Award on Merits



# Ruling of Tribunal on Status & Entitlement of Features

- None of the high-tide features (islands) in the Spratly Islands generate entitlements to an EEZ or continental shelf because they are “rocks” within Article 121(3)
- Mischief Reef is a low-tide elevation that is not capable of appropriation and does not generate entitlements to maritime zones
- Not permissible under UNCLOS to draw straight baselines around mid-ocean archipelago

# Ruling of Arbitral Tribunal on China's Claim to “historic rights”

- **China's claims to historic rights within the 'nine-dash line'** are contrary to UNCLOS and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under UNCLOS;
- To the extent China had **historic rights** to resources in the waters of the South China Sea, such rights were extinguished by the entry into force of UNCLOS to the extent they were incompatible with the system of maritime zones in UNCLOS

# Effect of Ruling

- States occupying features in Spratlys can claim only a territorial sea from those that meet the definition of an island
- If features are low-tide elevations that are above water at high tide because of construction activities, they are not entitled to any maritime zones of their own
- Only areas of overlapping maritime claims between China and ASEAN States in the seas surrounding the Spratly Islands is in the 12 nm territorial sea surrounding those features that are “islands”







Scale 1:2,500,000

0 40 Kilometers  
0 20 40 Nautical Miles

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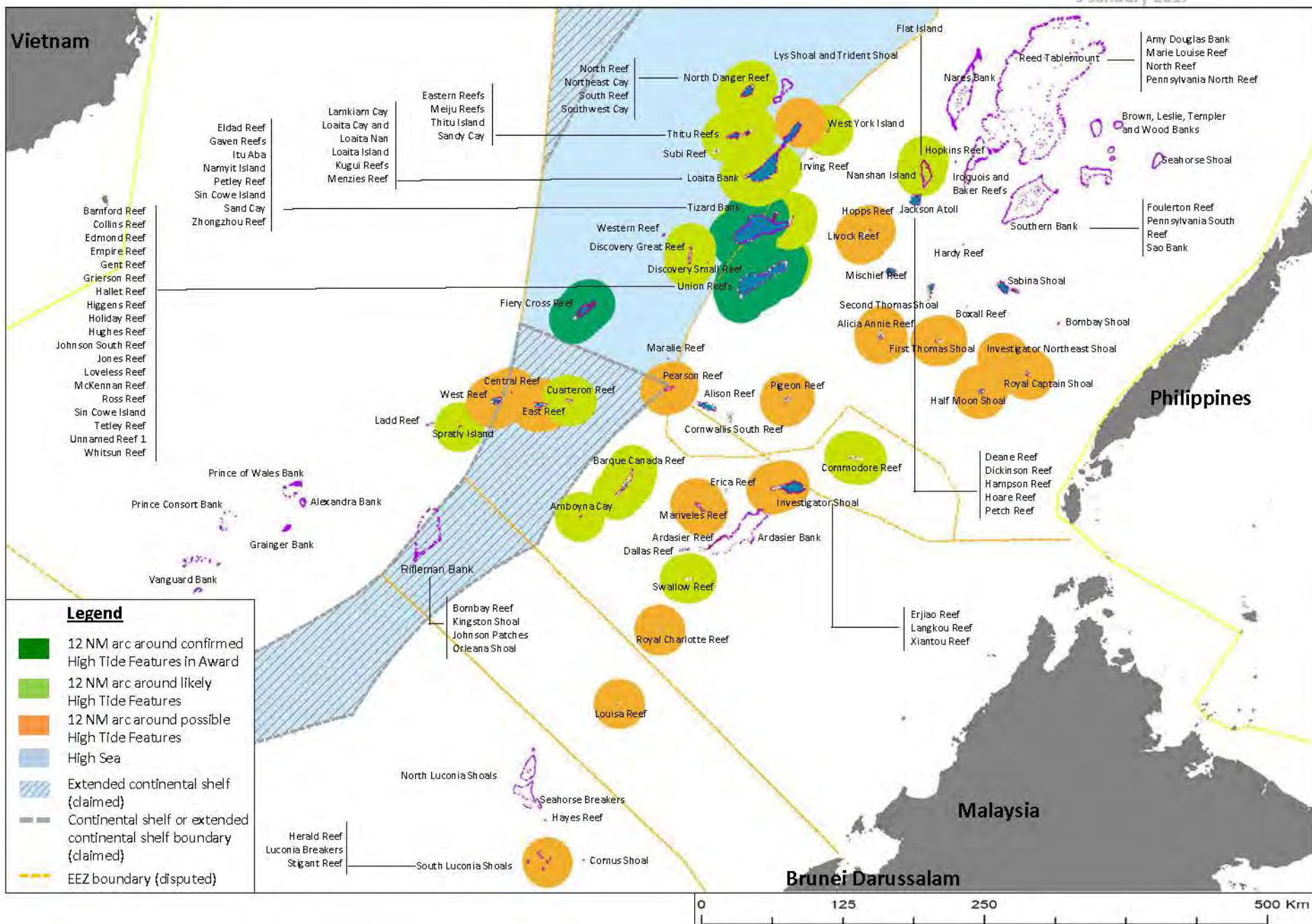
Philippine (Kalayaan) claim

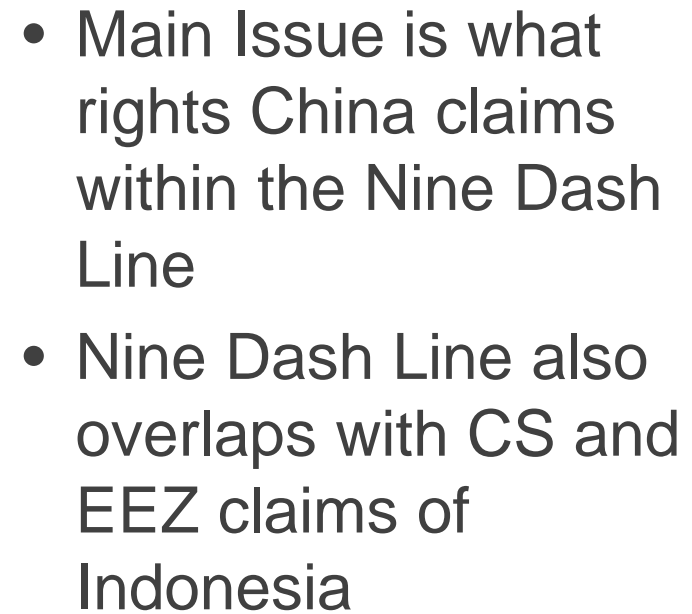




# Spratlys' Geographic Features – Maritime Zones based on the 12 July 2016 Arbitral Award

Youna Lyons  
Centre for International Law  
9 January 2017







# China's Statements in 2016 after the Arbitral Award

- China has territorial sovereignty and maritime interests in the South China Sea, including;
  - **sovereignty** over the South China Sea Islands consisting of the Spratly Islands, the Paracel Islands, Pratas Island and Macclesfield Bank
  - **maritime zones** from the islands, including internal waters, territorial sea, contiguous zone, exclusive economic zone and continental shelf.
- “In addition, China has **historic rights** in the SCS.”
- “The above positions are consistent with relevant international law and practice.”

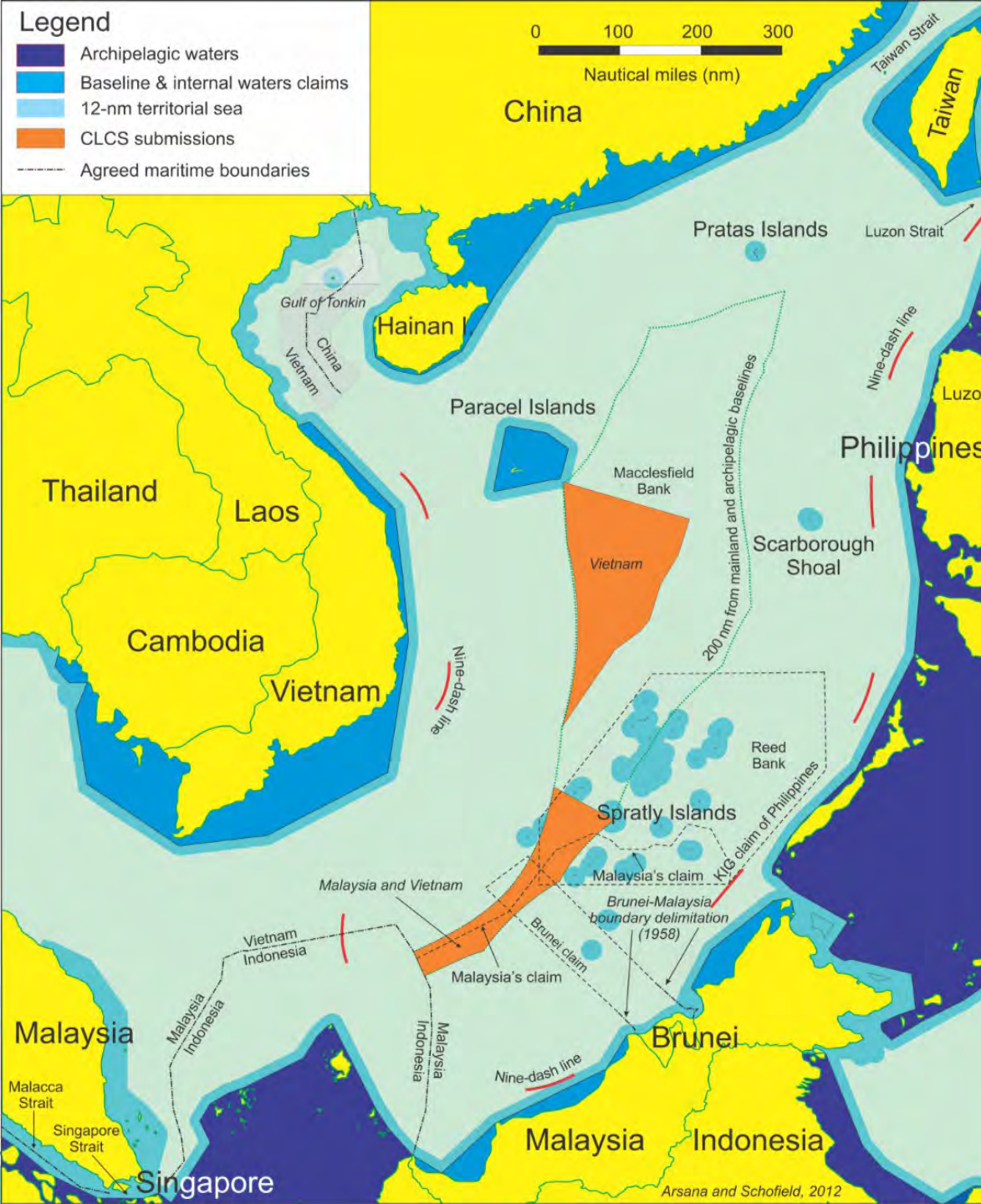
## Part 3

# **“Freedom of Navigation Operations” in the South China Sea**

- US Freedom on Navigation Operations are widely misunderstood
- They consist of diplomatic protests and operational challenges:
  - to maritime claims not in conformity with UNCLOS
  - to attempts to restrict military activities by other States in a manner that is not consistent with UNCLOS
- Rationale is that if no challenges are made the States concerned will maintain that their claims are valid because of acquiescence

# Current Tension Between US & China in SCS

- Current tension in South China Sea is because the US (and others) are conducting operational challenges to China's assertion that it has a right to restrict passage of military vessels and military activities in waters surrounding the features China occupies or claims sovereignty over; or
- Past tension with US was because of operations of US warships and aircraft in EEZ off the coast of Hainan (e.g., EP-3 Incident)

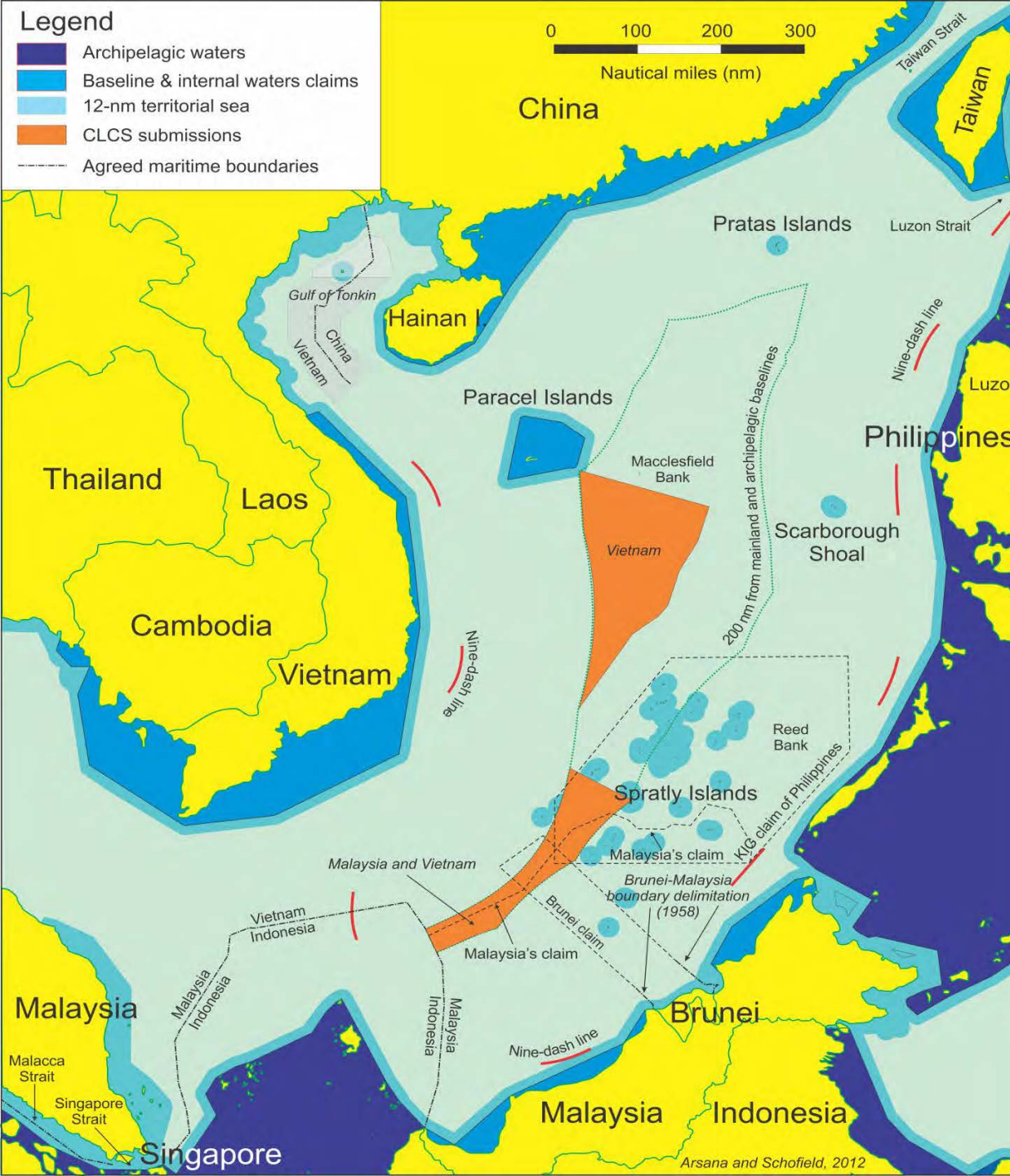


## Sovereignty Disputes:

- 1.Paracel Islands
- 2.Spratly Islands
- 3.Scarborough Shoal
- 4.Maccesfield Bank

- US no position on 1-3
- US Challenges China's claim to sovereignty over Macclesfield Bank

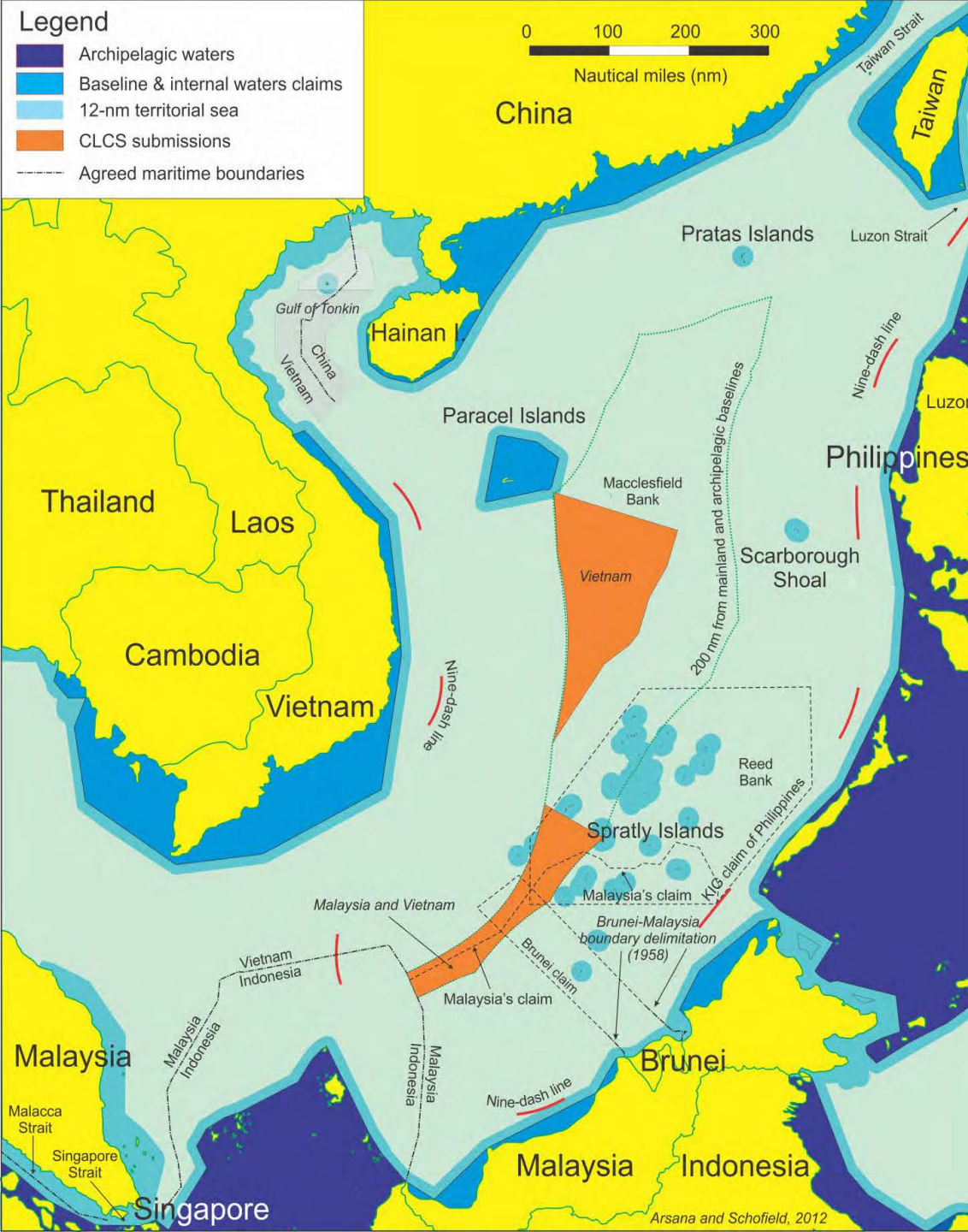




## Disputes on Baselines

US challenges:

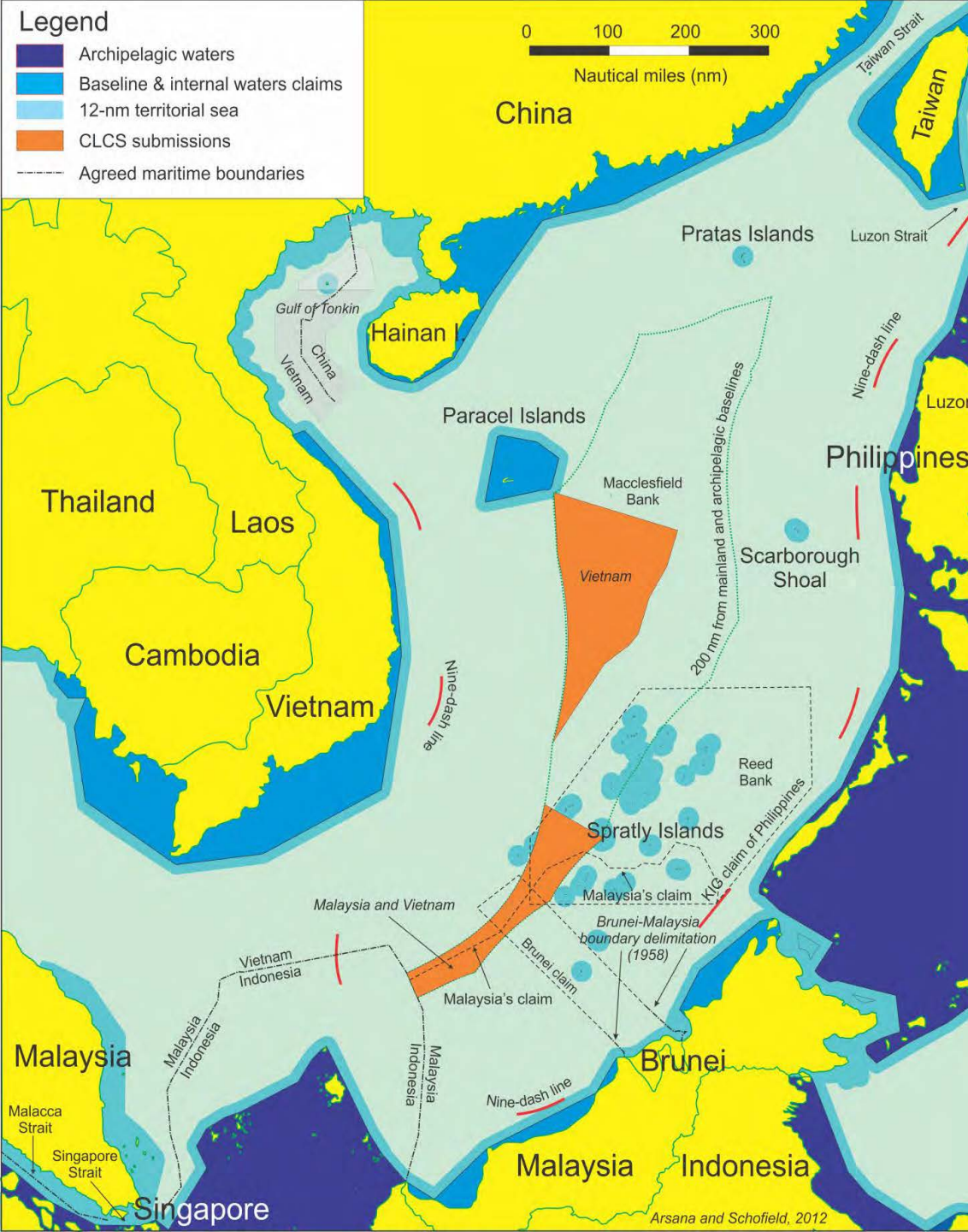
1. Straight Baselines along coast of China & Vietnam
2. Straight baselines of China around Paracels



## Nine-Dash Line & Historic Rights

- US supports Arbitral Award
- Nine Dash Line is no basis for claiming “historic rights” to fisheries or oil & gas in EEZ of other States

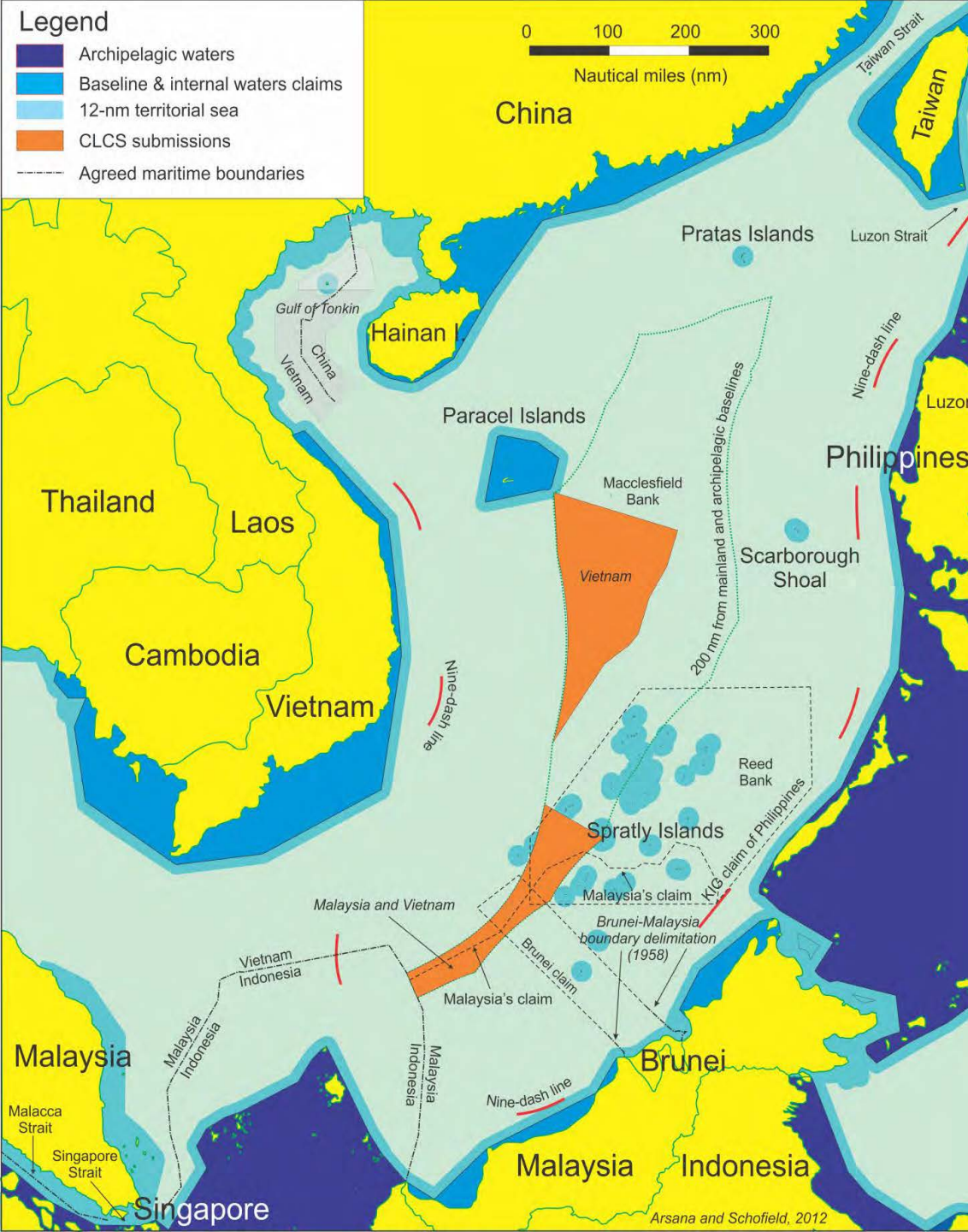




## Innocent Passage of Warships in 12 nm Territorial Sea

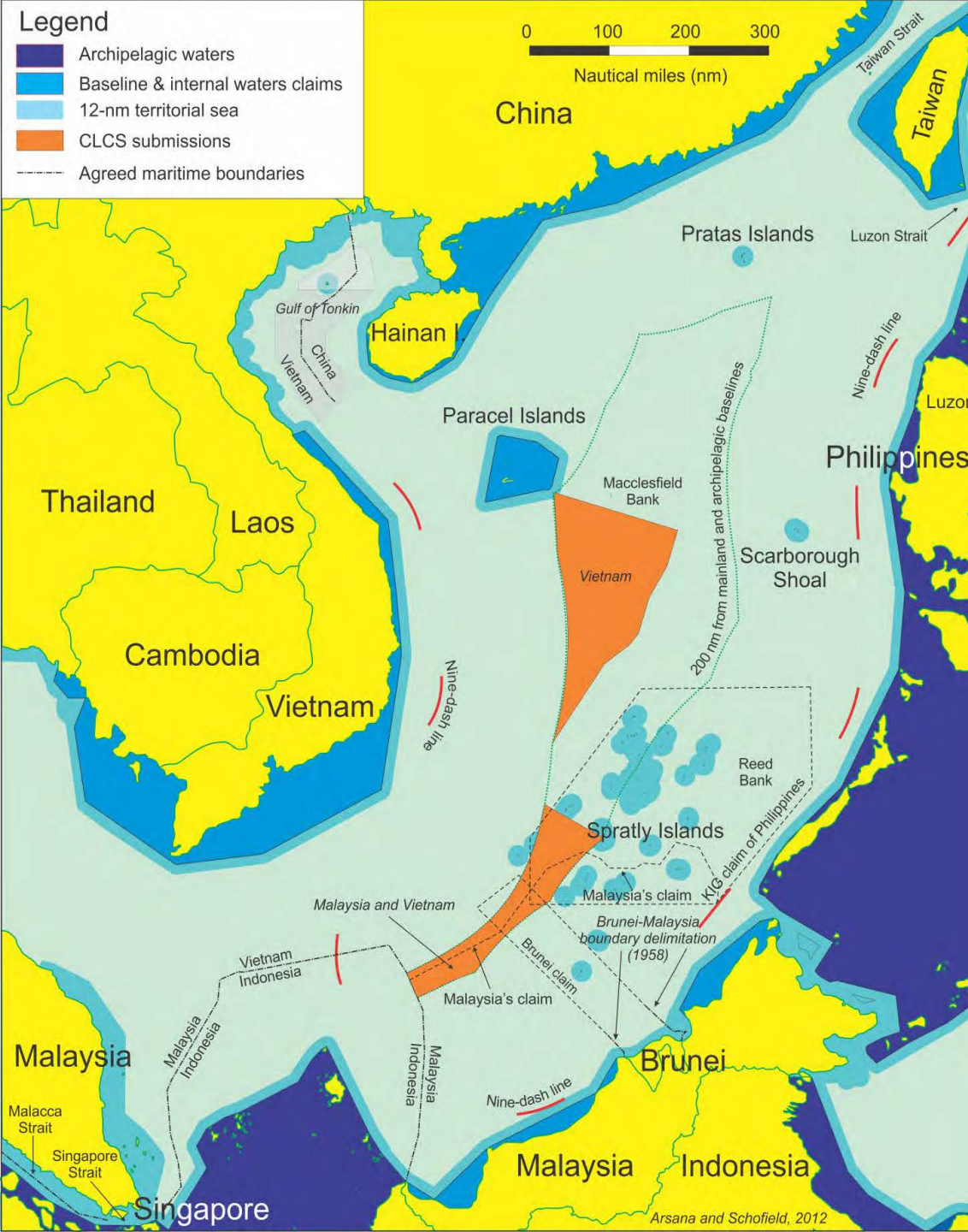
- China maintains that foreign warships require authorization
- US warships exercise innocent passage within 12nm of disputed islands





## Low-Tide Elevations not entitled to territorial sea

- US challenges claim by China over waters around Mischief Reef
- US asserts it has high seas freedoms when passing with 12 nm of a low-tide elevation



## Military Activities in EEZ

- US asserts right to conduct military activities outside territorial sea of any State
- China objects to such military activities as threat to its security
- e.g., EP-3 Incident 70 nm off Hainan in 2001

# Conclusions

1. UNCLOS continues to represent a rules-based order that balances the interests of coastal States & naval powers
2. As a rising naval power with global maritime interests, it is arguably in China's best interests to accept and follow UNCLOS
3. ASEAN States bordering the SCS are not likely to agree that China has "historic rights" or "sovereign rights" to exploit the natural resources in their EEZ
4. Any cooperative mechanisms in the SCS should be consistent with the provisions in UNCLOS

# The Future?

1. Will China recognize that the provisions in UNCLOS on passage rights and military activities favour its national interests as a rising naval power?
2. Can China and ASEAN negotiate compromises on access to resources in the South China Sea in areas within the EEZ of ASEAN bordering States?
3. Can current tensions in the South China Sea be reduced through the ASEAN-China Code of Conduct and/or through an Incidents at Sea Agreement between China and the external powers with rights and interests in the South China Sea?



# Thanks for your Attention

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