

THE 14TH SOUTH CHINA SEA INTERNATIONAL CONFERENCE

“ PEACEFUL SEA - SOLID RECOVERY ”

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CIL

CENTRE FOR INTERNATIONAL LAW
National University of Singapore

SESSION 6:

Rules of the Roads for Non-Traditional and Cross-cutting Domains

Aviation Safety in the South China Sea

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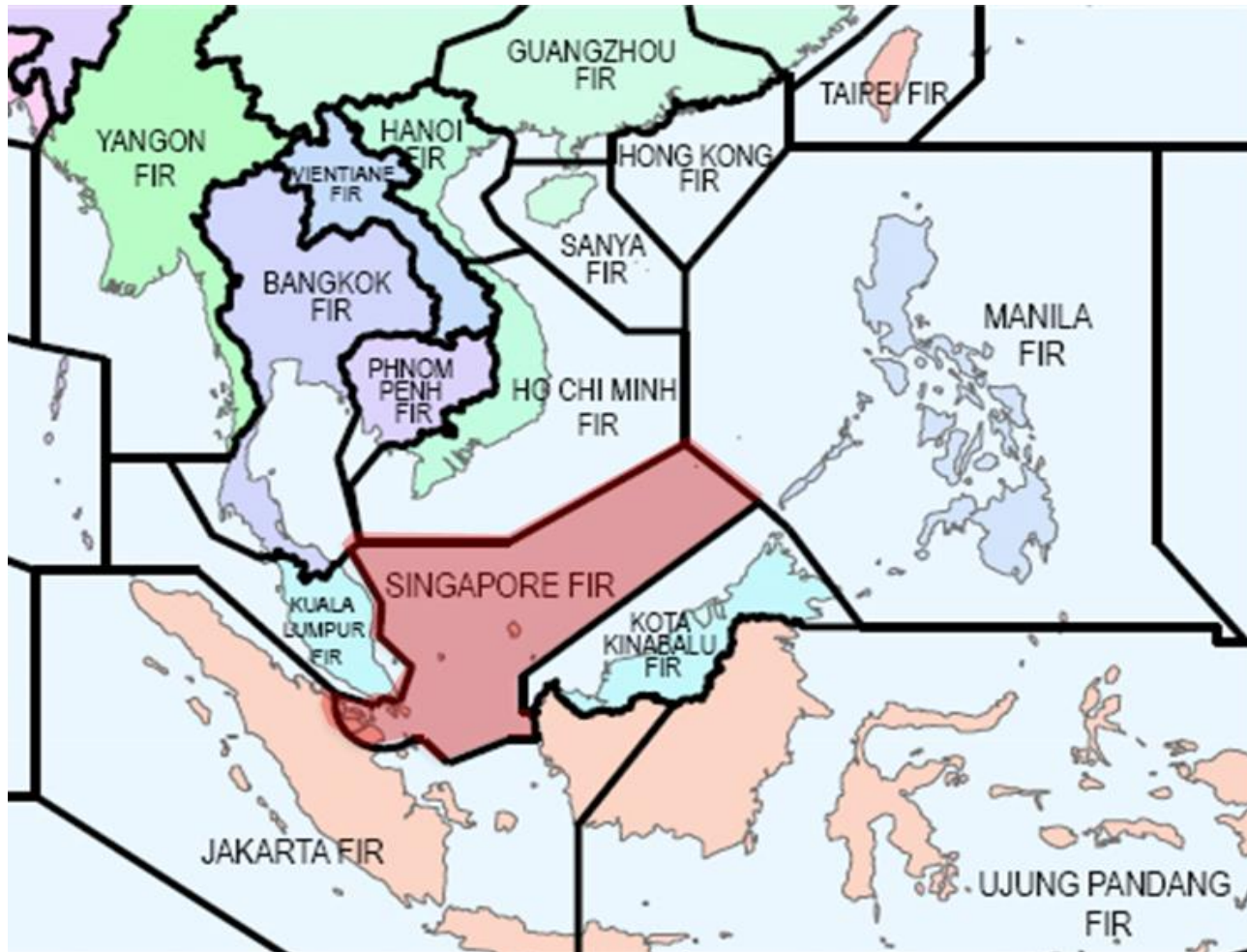
Part 1

Role of the ICAO in Safety of Air Navigation

ICAO AND FIRS

- Commercial Aircraft are governed by the **International Civil Aviation Organization (ICAO)**
- The ICAO establishes **Flight Information Regions (FIRs)** and appoints a civilian authority known as the **Air Traffic Services (ATS) Authority** to manage the airspace in each FIR
- The role of the ATS Authority is to ensure safe and efficient flow air traffic within its FIR
- **Civilian aircraft** are required to file flight plans with the ATS Authority before entering an FIR;
- **State aircraft** are not required to file flight plans or contact the ATS Authority, but many do so;
- In any case, **State aircraft** are required to fly with **due regard to the safety of other aircraft**

Flight Information Regions in SCS

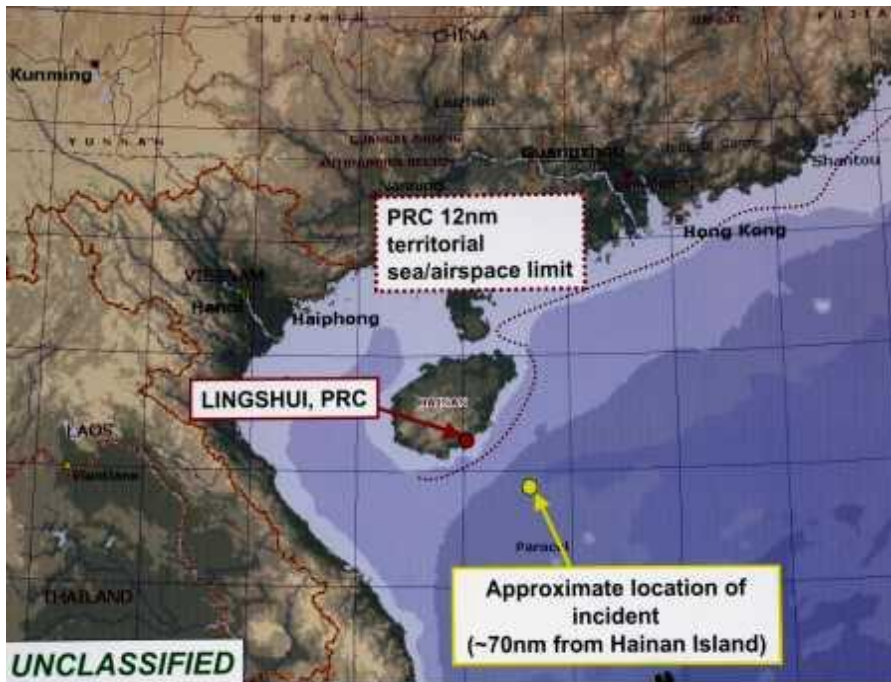


Part 2

Incidents Giving Rise to Concerns on Aviation Safety in the South China Sea

2001 EP-3 Incident

Location of Incident



EP-3 Spy Plane



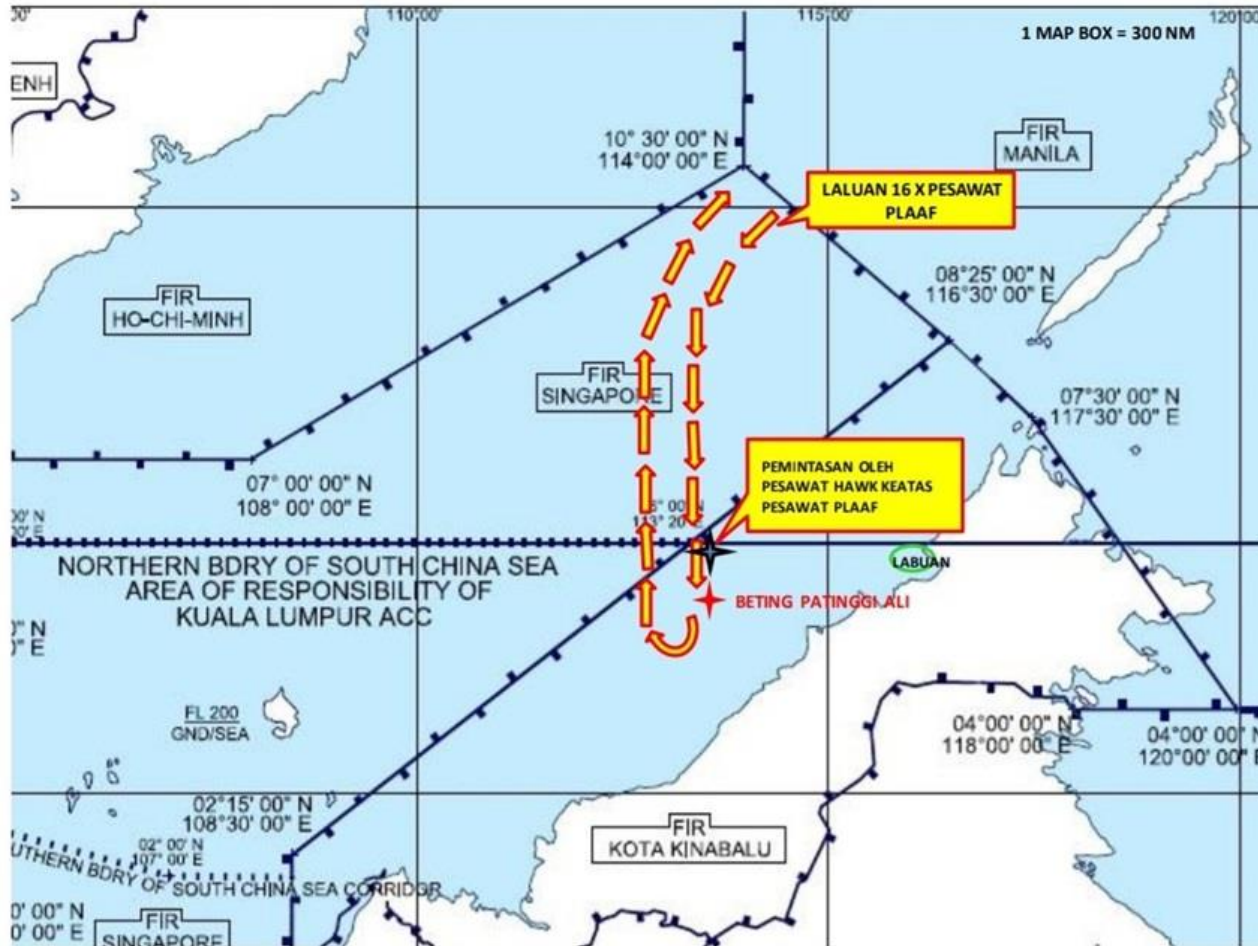
Press Report August 2020 – China Concern that US spy planes in SCS 'creating risk' for civilian aircraft

- US Air Force is creating risks for passenger flights over the South China Sea with its **close-in reconnaissance missions near the Chinese coast**, a Chinese military source & observers have warned.

US E-8C surveillance craft



May 2021 – Chinese Aircraft Approach Malaysia



May 2021 – Chinese PLA Aircraft approached Malaysian Coast

- According to a 1 June statement by the Royal Malaysian Air Force (RMAF) on 31 May, a formation of 16 transport aircraft from the People's Liberation Army Air Force (PLAAF) was monitored as it approached the coastline of Sarawak, in east Malaysia.
- The 16 PLA aircraft first passed through the Flight Information Region (FIR) administered by Singapore, then that of Malaysia.
- After radio communications failed to elicit a response, a pair of RMAF Hawk light combat aircraft were sent to identify and intercept the Chinese aircraft.
- After making visual contact, the PLAAF formation turned back north, passing within 60 nautical miles (nm) of Malaysia.
- RMAF statement protested the formation flight as a 'serious matter that threatens national security and aviation safety'.
- China's foreign ministry countered that the PLAAF was conducting 'routine flight training' and exercising 'freedom of overflight in the relevant airspace'.

26 May 2022 - Chinese Intercept Australian P-8 Maritime Surveillance Aircraft over SCS

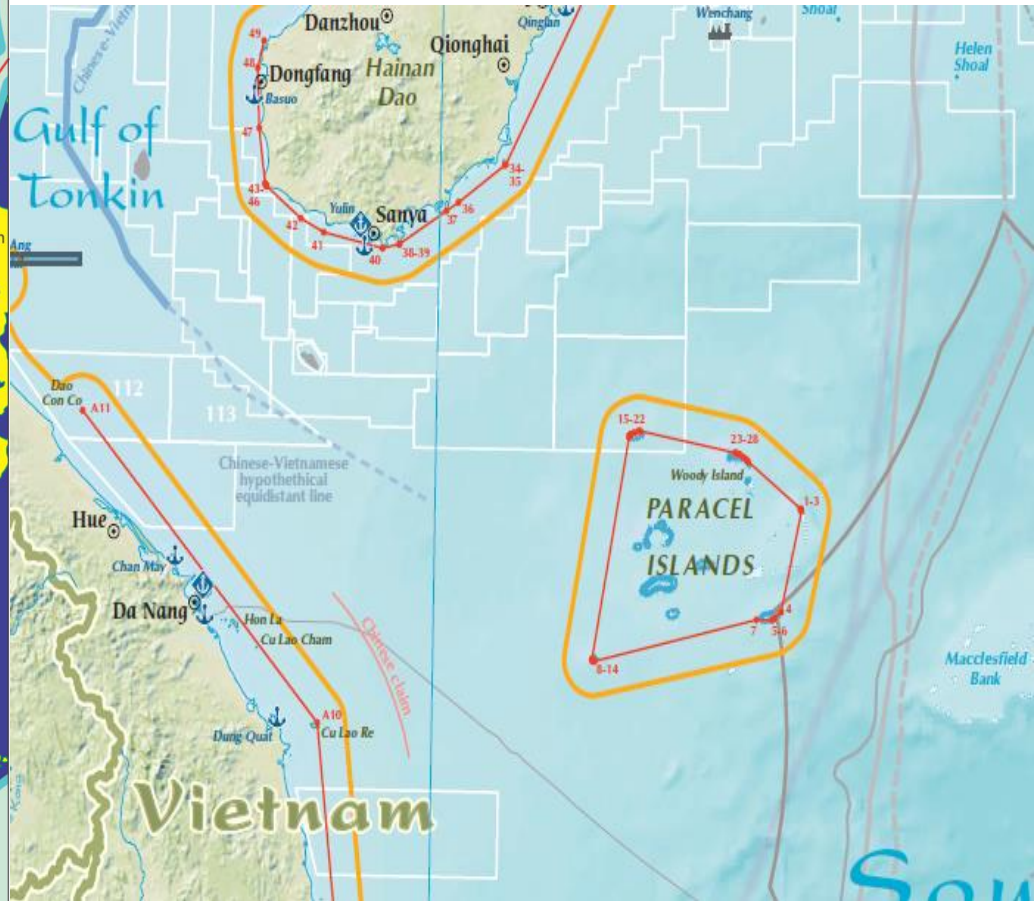
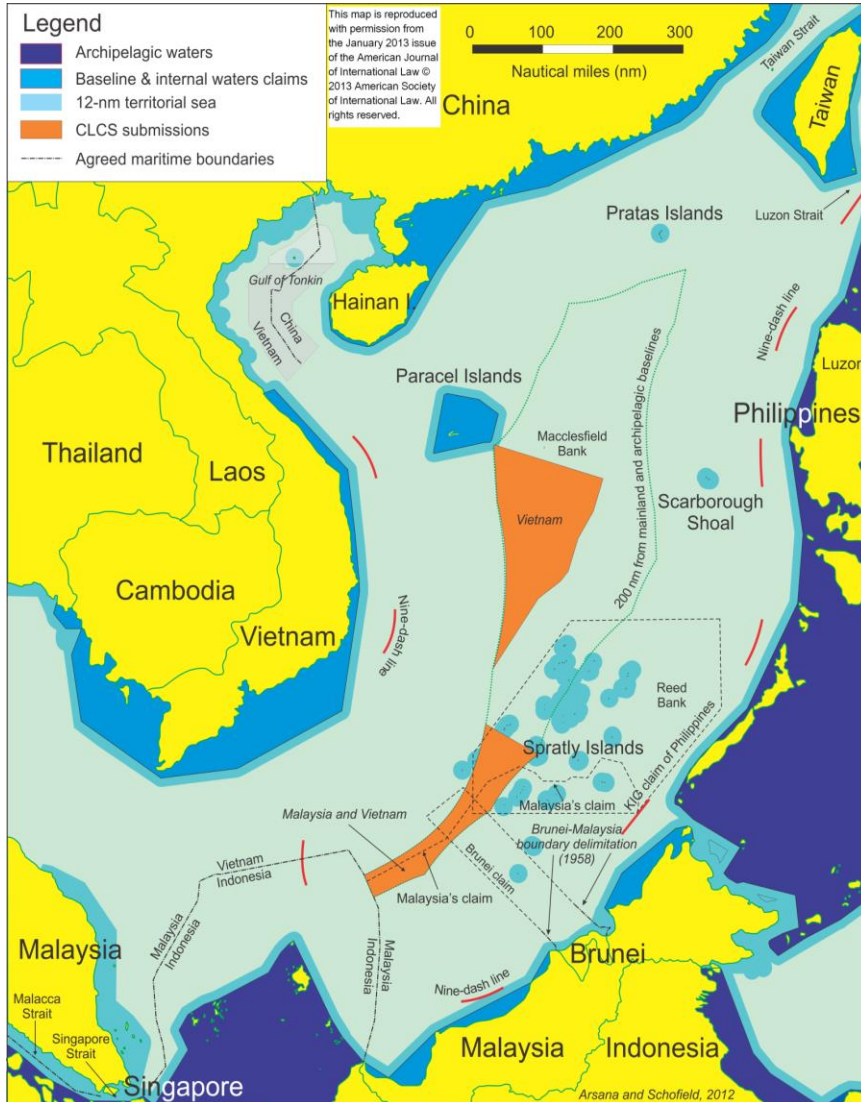
- Australia's Department of Defence said that on May 26, 2022, a Royal Australian Air Force P-8 maritime surveillance aircraft was intercepted by a Chinese J-16 fighter aircraft during a routine patrol over the South China Sea.
- The intercept resulted in a **dangerous maneuver that posed a safety threat to the P-8 aircraft and its crew** and the Australian government has raised its concerns about the incident with the Chinese government.



Chinese Statement on 26 May 2022 Incident involving Australian P-8A

- Senior Colonel Tan Kefei, spokesperson for China's Ministry of National Defense in response to a Chinese media query about the incident:
 - On May 26, an Australian P-8A entered the airspace near China's Paracel Islands for close-in reconnaissance and continuously **approached China's territorial airspace** over the **Xisha Islands** in disregard of repeated warnings from the Chinese side.
 - The PLA Southern Theater Command dispatched naval and air forces to identify and verify the Australian plane and warn it off
 - The Australian warplane has **seriously threatened China's sovereignty and security** and the countermeasures taken by the Chinese military are professional, safe, reasonable and legitimate

Xisha (Paracel) Islands



Part 3

1982 UNCLOS on Airspace & Overflight

Overflight in Airspace subject to Sovereignty

- States have **sovereignty** over their land territory, **internal waters**, **territorial sea** and **archipelagic waters**
- There is **no right of overflight** over these areas with **two exceptions**:
 1. The Right of **Transit Passage** in Straits used for International Navigation includes the right of overflight for aircraft
 2. The Right of **Archipelagic Sea Lanes Passage** through the archipelagic waters of archipelagic States includes the right of overflight for aircraft

Freedom of over flight in areas not subject to sovereignty

- All States have the **Freedom of over flight** on the **High Seas**
- In the 200 nm **Exclusive Economic Zone**, all States enjoy the **freedoms referred to in article 87 of navigation and over flight . . ., and other internationally lawful uses of the sea related to these freedoms,** such as those associated with the operation of . . **aircraft . . .** and compatible with the other provisions of this Convention

“Due Regard” Obligation

Article 58(3)

- In exercising their rights and performing their duties in the EEZ, States shall have **due regard** to the **rights and duties** of the coastal State and shall comply with the **laws and regulations adopted by the coastal State in accordance with the provisions of this Convention** and other rules of international law in so far as they are not incompatible with this Part.

US Position on UNCLOS & Overflight

- US position is the **military surveys** by ships or **aircraft** in the EEZ are **lawful uses of the sea** related to the **freedoms of navigation** and **overflight**
- The US position also is that:
 - it has **freedom of overflight** in the air space outside the 12 nm territorial sea of islands
 - It has **freedom of overflight** over features such as Mischief Reef because they are low-tide elevations not subject to a claim of sovereignty and not entitled to any maritime zones of their own

Article 7

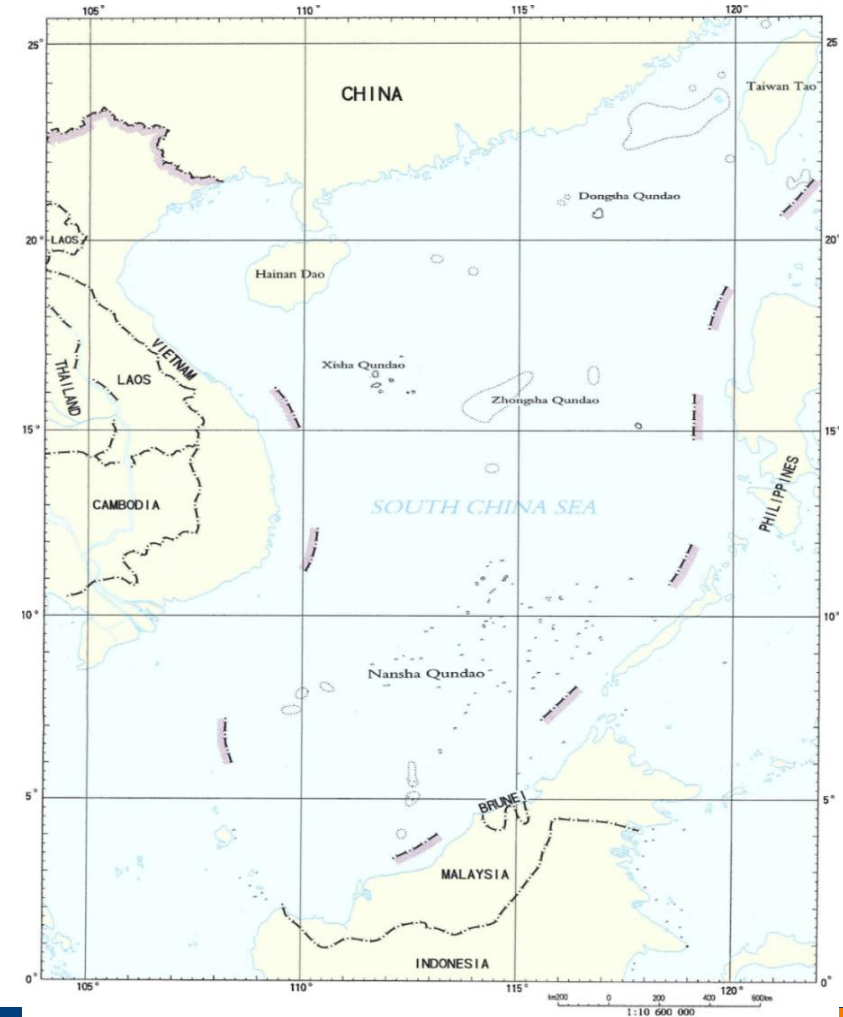
- Foreign organizations of individuals that wish to conduct **surveying and mapping** in the territorial air, land or waters, or **other sea areas under the jurisdiction of the PRC**, shall be subject to approval

Note: The phrase “**other sea areas under the jurisdiction of the PRC**” is not defined; it is also used in various other PRC laws

- The phrase is sometimes also used with reference to the waters within the “nine-dash line”

China's Claim in the South China Sea

- China's Note Verbale of 7 May 2009 to UNSG officially objecting to the Joint Submission of Malaysia & Vietnam of 6 May 2009 and the Separate Submission of Vietnam of 6 May 2009
- “China has indisputable **sovereignty over the islands** in the South China Sea 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).”



Occupied Features in Spratly Islands

China / Philippines / Vietnam / Taiwan / Malaysia



MILITARISATION OF THE SOUTH CHINA SEA

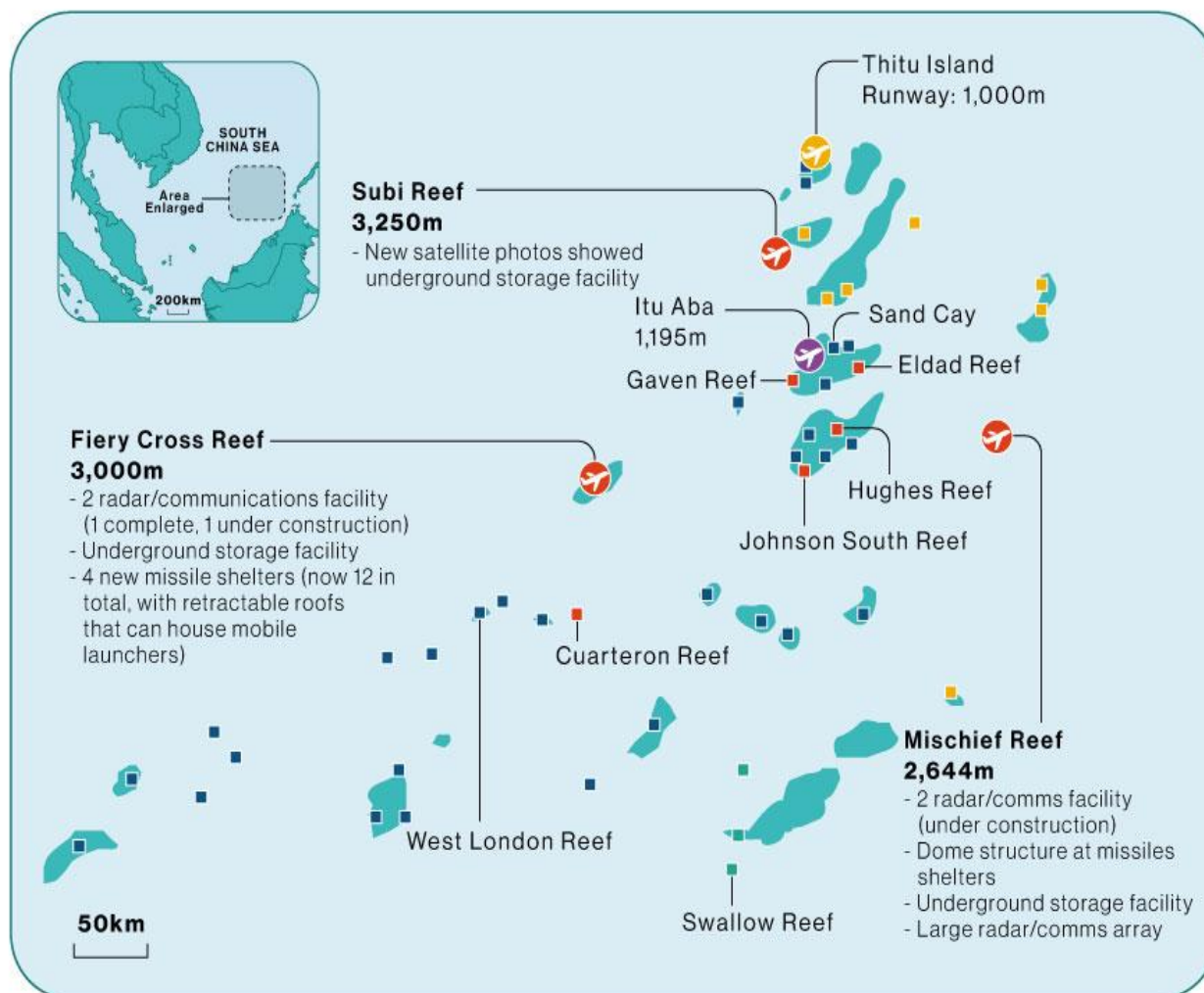


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Claims, major outposts and facilities (by country)

China Malaysia Philippines Taiwan Vietnam



ASEAN Post
9 August 2022

- Militarising The South China Sea Amid A Pandemic
- Anna Rosario Malindog-Uy

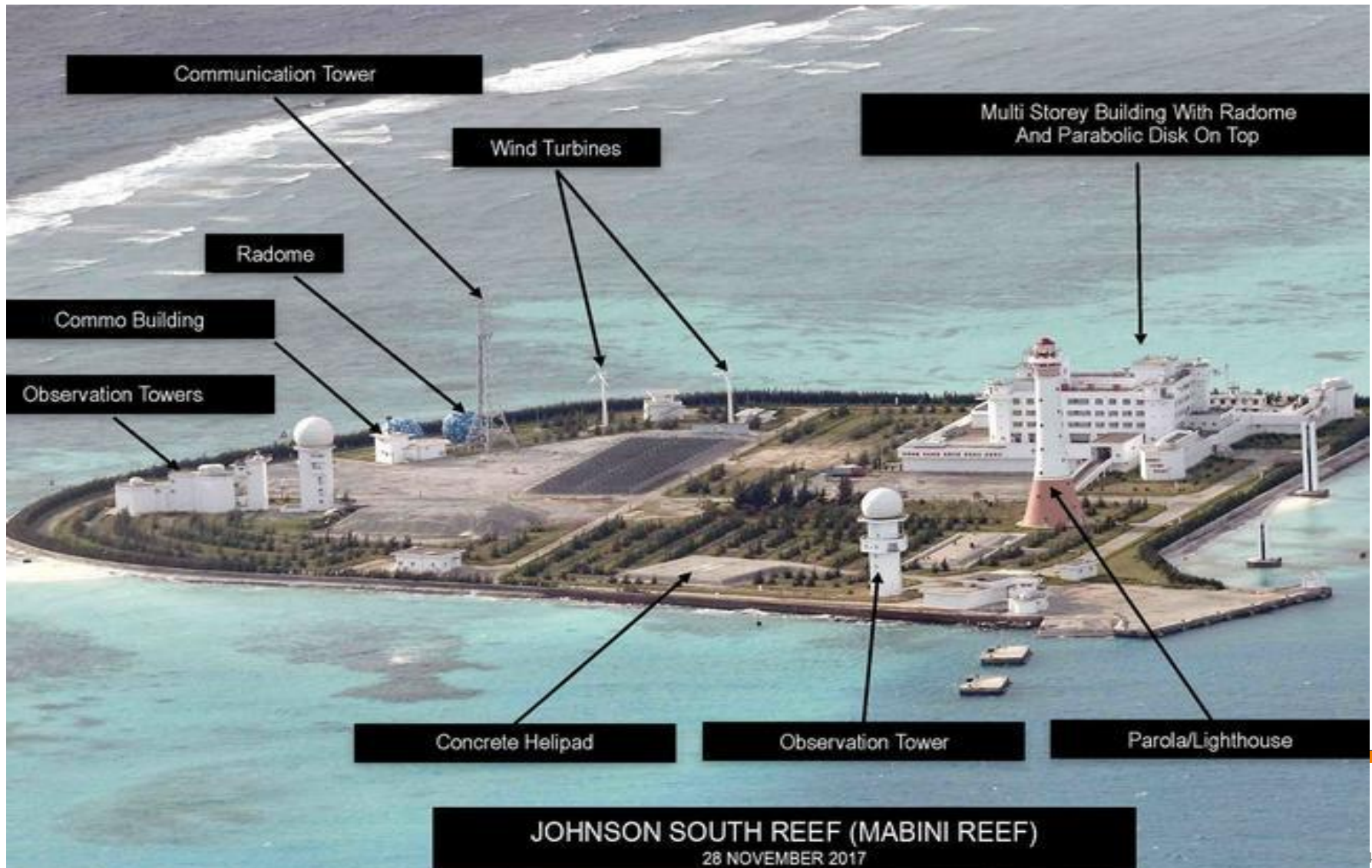
Subi Reef



Fiery Cross Reef



Militarization of Islands in the South China Sea: Johnson South Reef



IN THIS OCT. 25, 2022 AERIAL PHOTO, BUILDINGS AND COMMUNICATION STRUCTURES ARE SEEN ON THE CHINA-BUILT ARTIFICIAL ISLAND AT **MISCHIEF REEF** IN THE SPRATLY ISLANDS, SOUTH CHINA SEA. (PHOTO: EZRA ACAYAN/GETTY IMAGES)



IN THIS OCT. 25, 2022 AERIAL PHOTO, BUILDINGS, AIRSTRIPS AND COMMUNICATION STRUCTURES ARE SEEN ON THE ARTIFICIAL ISLAND BUILT BY CHINA IN **MISCHIEF REEF** IN SPRATLY ISLANDS, SOUTH CHINA SEA. (PHOTO: EZRA ACAYAN/GETTY IMAGES)
(PHOTO: EZRA ACAYAN/GETTY IMAGES)



IN THIS OCT. 25, 2022, AERIAL PHOTO, AN AIRCRAFT IS SEEN ON THE TARMAC OF THE ARTIFICIAL ISLAND BUILT BY CHINA AT **MISCHIEF REEF** IN THE SPRATLY ISLANDS, SOUTH CHINA SEA. (PHOTO: EZRA ACAYAN/GETTY IMAGES)



Part 4

2014 US-China MOU on Safety of Air Encounters

2014 US-China MOU on Safety of Air and Maritime Encounters

2.10.5 United States-China Memorandum of Understanding Regarding the Rules of Behavior for Safety of Air and Maritime Encounters

- In November 2014, the United States and China entered into a memorandum of understanding (MOU) regarding the rules of behavior for the safety of air and maritime encounters.
- The MOU is not legally binding, but is an effort to:
 - (1) strengthen adherence to existing international law;
 - (2) improve operational safety at sea and in the air;
 - (3) enhance mutual trust; and
 - (4) develop a new model of military-to-military relations between the United States and China.

2014 US-China MOU on Safety of Air and Maritime Encounters

- The MOU consists of three annexes.
- The first annex is the terms of reference.
- The second annex is the Rules of Behavior for Safety of Surface-to-Surface Encounters (Surface Rules).
- The **third annex** was concluded in September 2015 and is the **Rules of Behavior for Safety of Air-to-Air Encounters (Air Rules)**.

2014 US-China MOU on Safety of Air and Maritime Encounters

- The Third Annex seeks to avert aviation incidents in international airspace between military aircraft of the United States and China.
- The **Air Rules**, like the rest of the MOU, is not legally binding and does not create any new substantive obligations.
- Most of the understandings reached in the **Air Rules** are already binding under international law, which requires military aircraft to fly in accordance with the rules applicable to civilian aircraft to the extent practicable, and to exercise due regard during air-to-air encounters.

2014 US-China MOU on Safety of Air and Maritime Encounters

The **Air Rules**

- 1) encourage active communication during air-to-air encounters,
- 2) require intercepted aircraft to avoid reckless maneuvers,
- 3) reinforce the right to FON and overflight in warning areas, and
- 4) require aircraft to avoid actions that may be seen as provocative by the other State's aircraft.

Part 5

ASEAN and Safety of Air Navigation

Joint Declaration of the ASEAN Defence Ministers on Defence Cooperation To Strengthen Solidarity for a Harmonised Security, 2022

- 3. **COMMIT** to the maintenance and promotion of peace, security, stability, safety and **freedom of navigation in and overflight** above the South China Sea;
pursuing peaceful resolution of disputes in accordance with the universally recognised principles of international law, including the 1982 UNCLOS;
exercising **self-restraint in the conduct of activities and avoid actions that could complicate or escalate the situation**;
reaffirming the importance of upholding international law, including **1982 UNCLOS**, while enhancing mutual trust and confidence;

Joint Declaration of the ASEAN Defence Ministers on Defence Cooperation To Strengthen Solidarity for a Harmonised Security, 2022

- 4. **EMPHASISE** the need to maintain and promote an environment conducive to the early conclusion of an effective and substantive **COC** in accordance with international law, including the 1982 UNCLOS, while underlining the full and effective implementation of the DOC in its entirety, thus **welcoming confidence-building measures** such as Code for Unplanned Encounters at Sea (CUES), **Guidelines for Air Military Encounters (GAME)**, . . .to promote communication, mutual trust and confidence so as to reduce tensions and the risk of accidents, misunderstandings and miscalculation in the air and at sea;

Thanks for your attention!

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