

South China Sea: Realpolitik Trumps International Law

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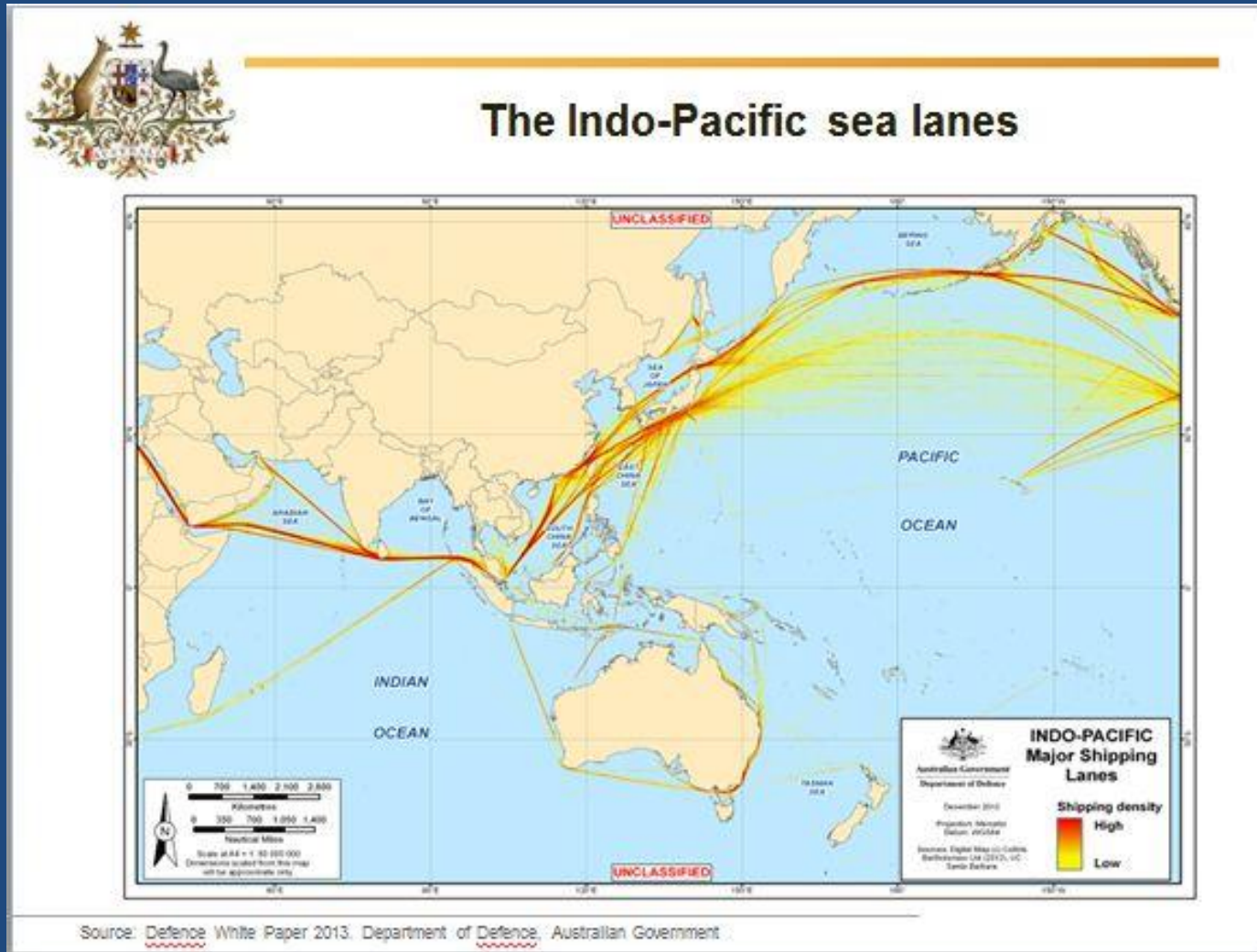
Outline

1. Geo-Strategic Importance of the South China Sea
2. United Nations Convention on the Law of the Sea (UNCLOS)
3. Award by the Arbitral Tribunal

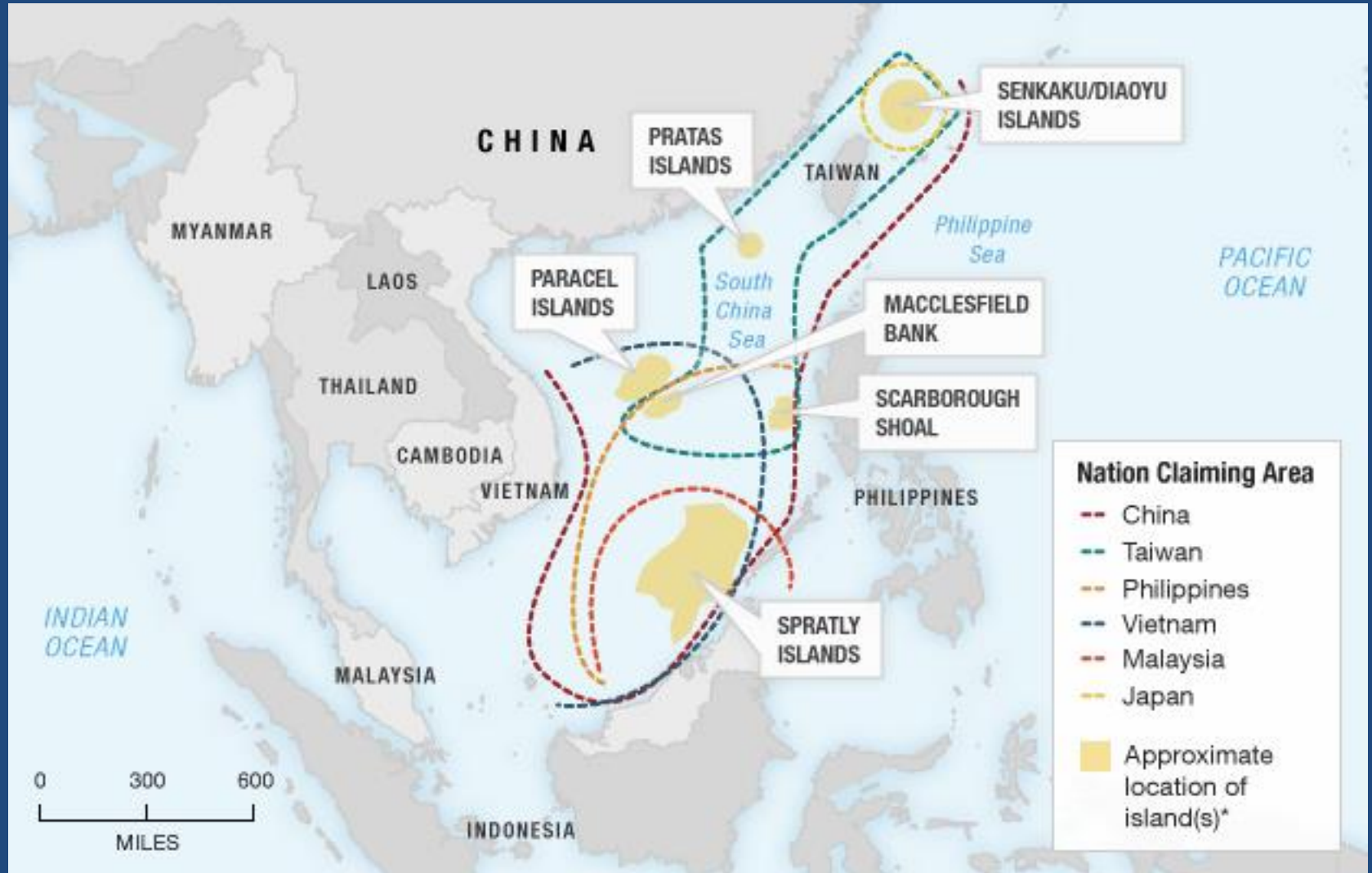
Outline

4. China's Assertiveness and Militarisation of its Artificial Islands
5. ASEAN-China Code of Conduct
6. U.S. Freedom of Navigation Operational Patrols
7. Conclusion

1. Geo-Strategic Importance of the South China Sea



Geographical Features



Shipping Routes

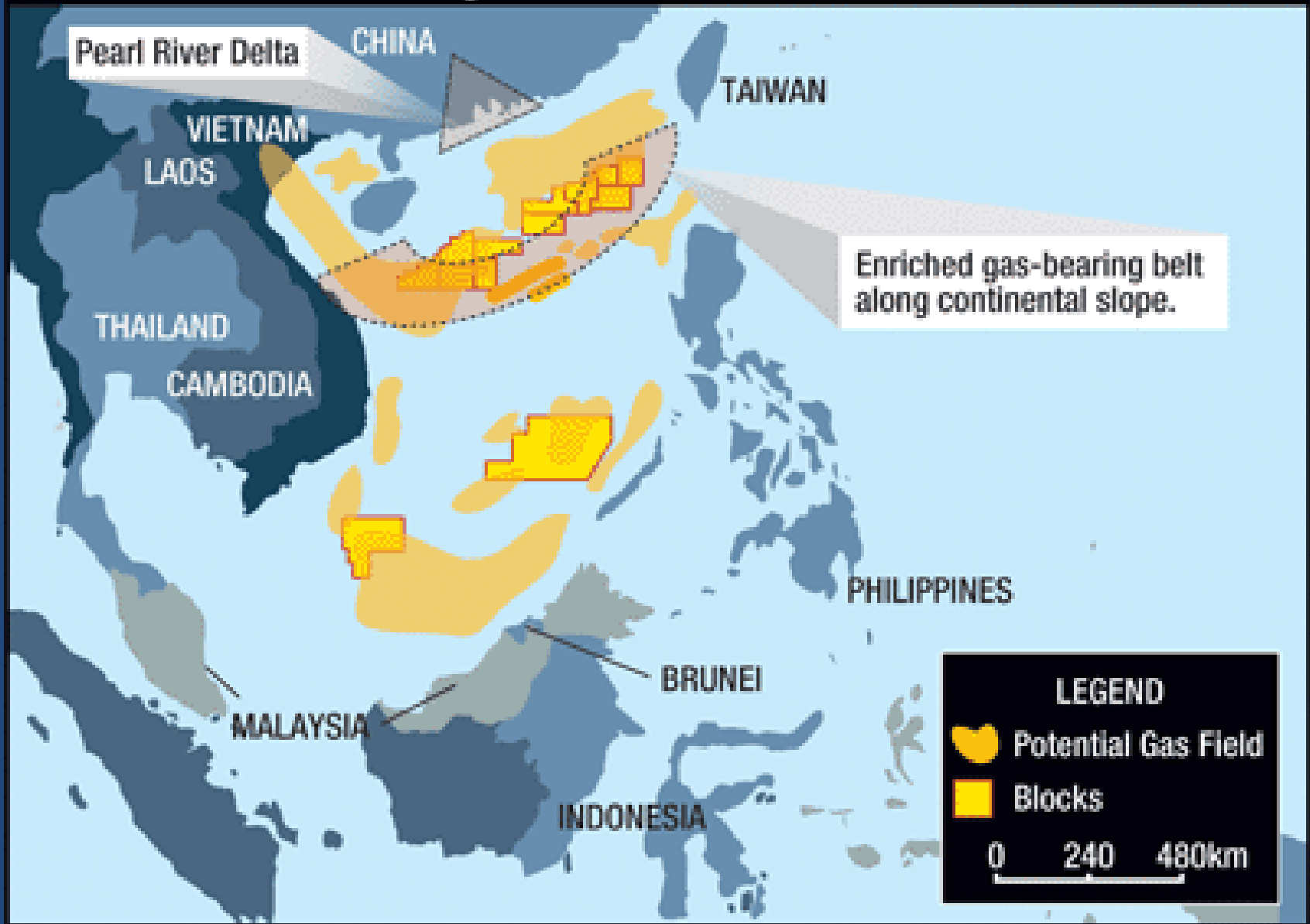


Major crude oil trade flows in the South China Sea (2011)

million barrels per day



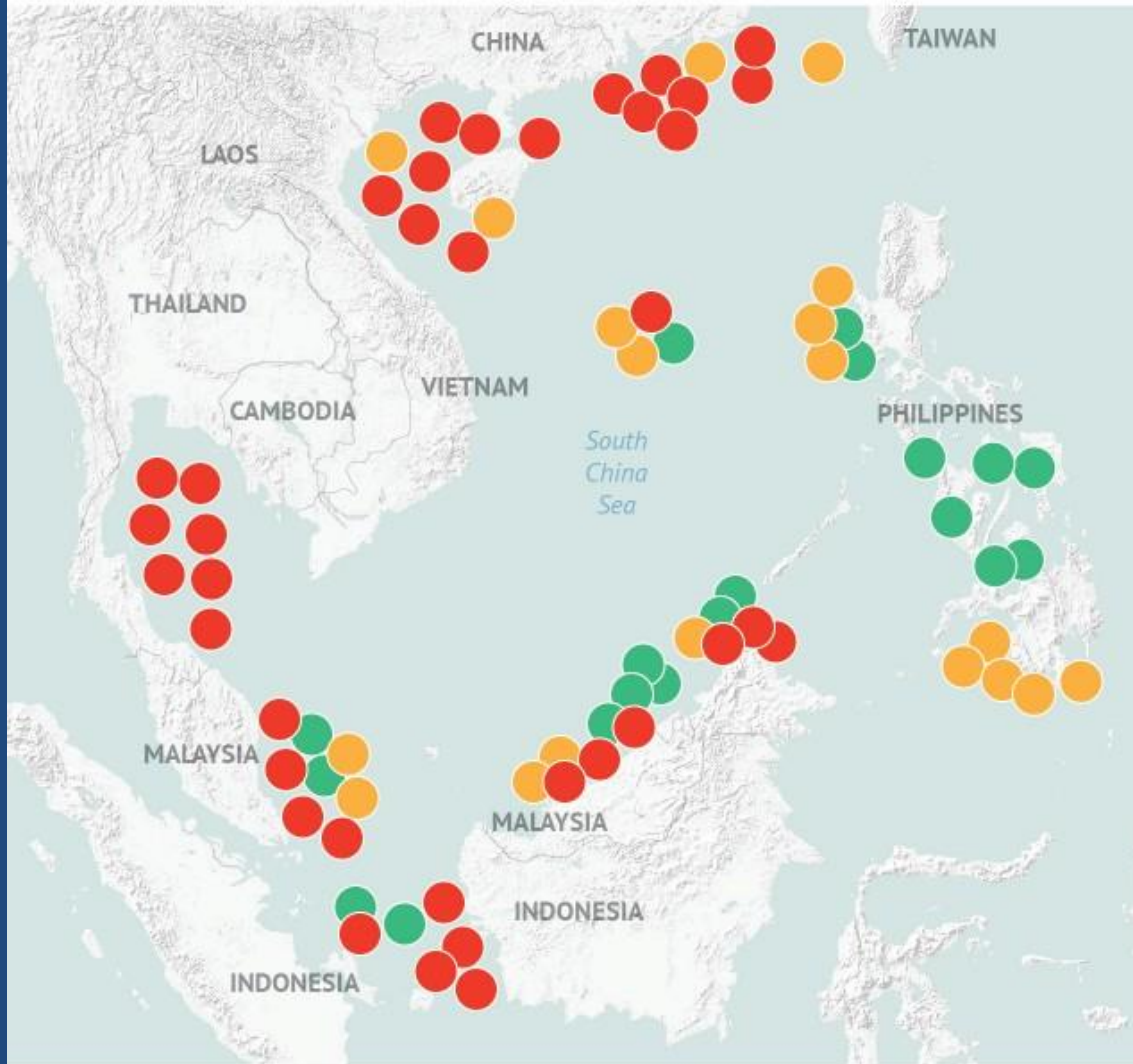
Gas-bearing Zones in the South China Sea



The South China Sea's Depleted Fisheries

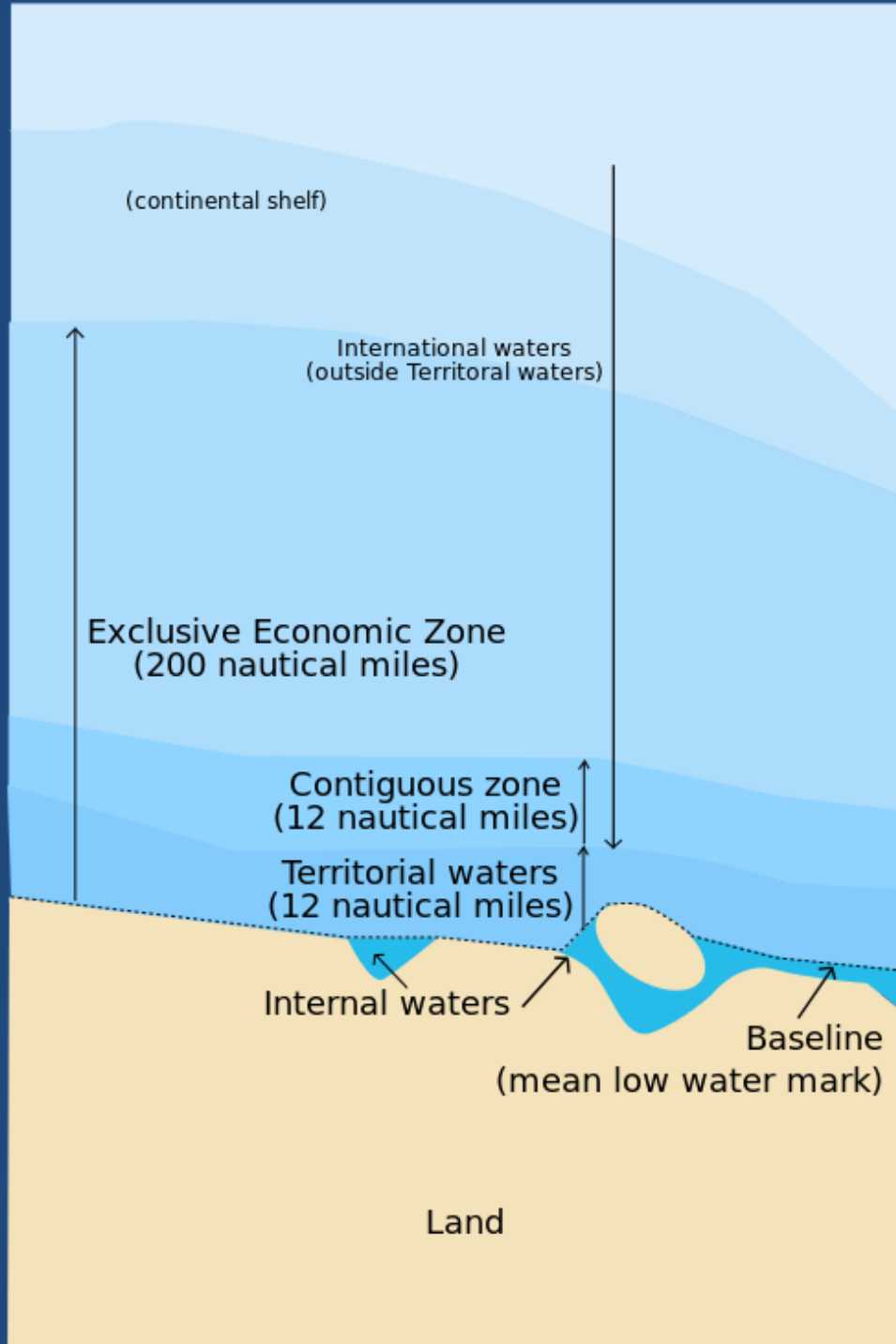
Capture fishing since 1960 has led to a decline in the abundance of several species, especially along the Chinese coast. This has pushed fishing vessels farther out and into disputed waters.

- Moderately or underfished
- Fully fished
- Depleted or overfished



2. United Nations Convention on the Law of the Sea (UNCLOS)

- **Constitution of the World's Oceans**
- Does not deal with sovereignty
- Maritime zones & features (next slide)
- Sovereign jurisdiction over resources
- Semi-enclosed Sea
 - Duty to Cooperate
 - Protect marine environment
- Provisional arrangements of a practical nature
- Dispute settlement



UNCLOS

Land dominates the sea

- Baselines
- Internal waters
- Territorial Sea
- Contiguous Zone
- Exclusive Economic Zone (EEZ)
- Continental Shelf
- High Seas
- *International waters*

UNCLOS INFOGRAPHIC

ROCKS OR REEFS

Reefs are maritime features that are mostly below water but have rocky protrusions above water during high tide. A rock is defined as a maritime feature that cannot sustain human habitation or economic life on its own. These features are entitled to only a 12 nm territorial sea but no Exclusive Economic Zone.

LOW TIDE ELEVATION

They are submerged rocks and reefs that are not visible above water. This type of maritime feature is not entitled to any territorial sea or EEZ.

SHOAL

The shoal is a submerged coral reef with a rocky protrusion that is three meters above the water during high tide.

ISLAND

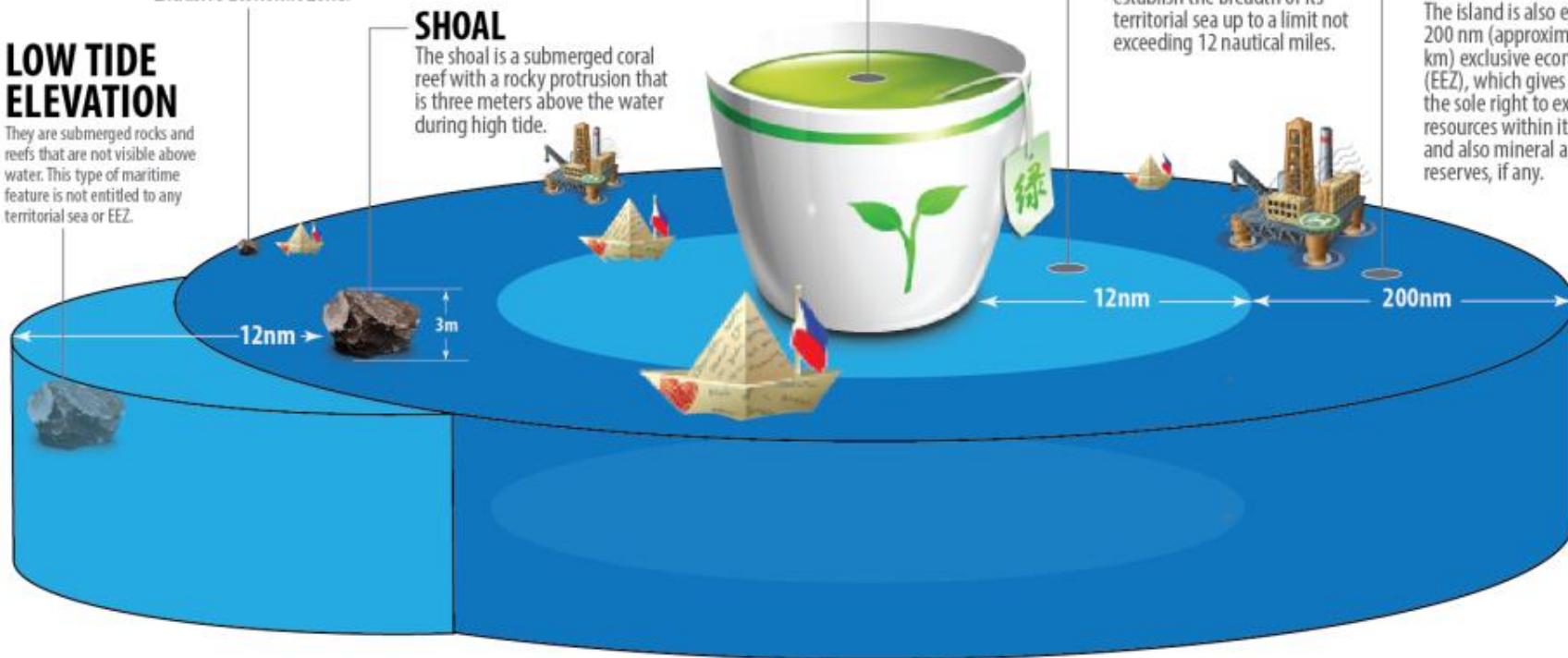
A naturally formed area of land, surrounded by water and above water at high tide.

TERRITORIAL SEA

Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles.

EXCLUSIVE ECONOMIC ZONE

The island is also entitled to a 200 nm (approximately 370 km) exclusive economic zone (EEZ), which gives the country the sole right to exploit the resources within it such as fish and also mineral and oil reserves, if any.



UNCLOS INFOGRAPHIC by SAMGALOPE 2014, WWW.SAMGALOPE.COM

ROCK ART by Anton Gerasimenko, <http://www.iconarchive.com/show/harry-potter-icons-by-anton-gerasimenko.html>

OIL RIG by http://www.iconexperience.com/v_collection/icons/?icon=oil_platform

TEA CUP by Mira Works http://www.iconexperience.com/v_collection/icons/?icon=oil_platform

PAPER BOAT by Ikonka.com

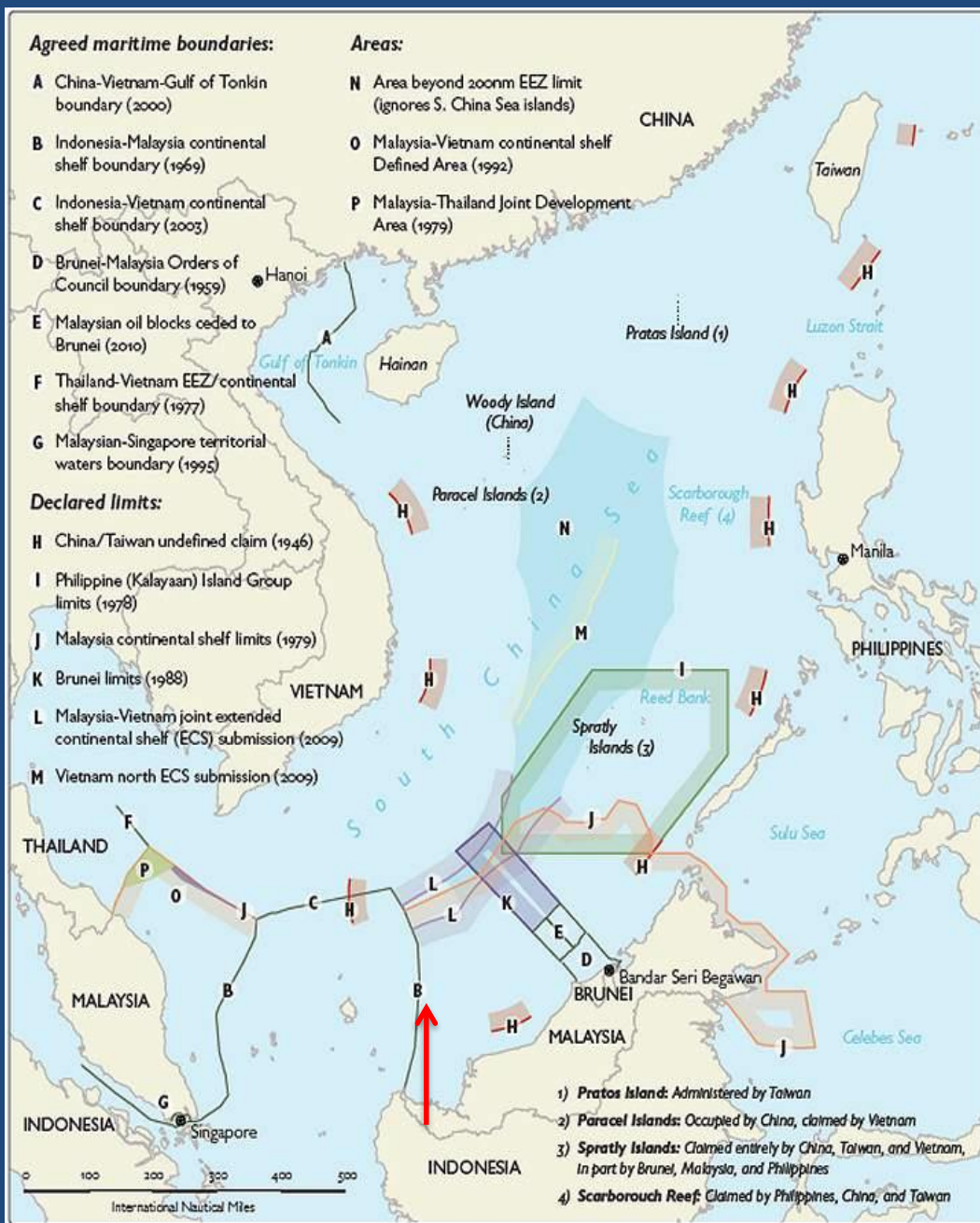


Figure 1: Sovereignty Claims in the South China Sea.

Claimants:

- China
- Taiwan
- Vietnam
- Philippines
- Malaysia
- Brunei
- [Indonesia]



China's 9-dash line

- Historic rights
- Four *sha*
 - Pratas IIs.
 - Paracel IIs.
 - Spratly IIs.
- and
- Macclesfield Bank

Declaration on Conduct of Parties in the South China Sea (DOC) 2002

- 5. The Parties undertake to **exercise self-restraint** in the **conduct of activities that would complicate or escalate disputes and affect peace and stability including, among others**, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in a constructive manner.

Cooperative Activities Under the DOC

- a. marine environmental protection;
- b. marine scientific research;
- c. safety of navigation and communication at sea;
- d. search and rescue operation; and
- e. combating transnational crime, including but not limited to trafficking in illicit drugs, piracy and armed robbery at sea, and illegal traffic in arms.

Declaration on Conduct of Parties in the South China Sea (DOC)

- 10. The Parties concerned reaffirm that the adoption of a **code of conduct** in the South China Sea would further promote peace and stability in the region and agree to work, on the basis of consensus, towards the eventual attainment of this objective.

3. Award by the Arbitral Tribunal July 12, 2016



Appointed by the President of the International Tribunal on the Law of the Sea (ITLOS) from a panel nominated by state parties to UNCLOS

UNCLOS provides provisions when one of the parties declines to participate

Philippines Claim Against China, January 2013

- China has made excessive maritime claims
- Determine legal status of islands, rocks and low tide elevations and submerged banks occupied by China
- China is interfering with Philippines' lawful rights within and beyond its EEZ and continental shelf
- **Declare 9-dash line illegal in international law**

Scarborough Shoal (Rock)



Panatag (Scarborough) Shoal

Philippines Claims Against China Entitlements

Low Tide Elevations

- Mischief Reef
- Subi Reef
- Gaven Reef
- Hughes Reef (+ McKennan Reef)
- Second Thomas Shoal

Italics = Rocks

- *Johnson South Reef*
- *Cuarteron Reef*
- *Fiery Cross Reef*
- *Scarborough Shoal*
- Chinese activities in the Philippines' EEZ

UNCLOS Compulsory Dispute Procedures – Binding Decisions

- All state parties to UNCLOS are free to choose one or more of four means to settle disputes:
 - International Tribunal for the Law of the Sea (ITLOS), Hamburg
 - International Court of Justice, The Hague
 - Arbitral Tribunal
 - Special Arbitral Tribunal
- Where the parties have not designated the means for dispute settlement = **Arbitral Tribunal**

Arbitral Tribunal

- Does it have jurisdiction?
- Does the Philippines' claim have legal merit?
- Tribunal can hear a case even if one party refuses to attend
- Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines

Arbitral Tribunal Award

- "DECLARES that, as between the Philippines and China, China's claims to historic rights, or other sovereign rights or jurisdiction, with respect to the maritime areas of the South China Sea encompassed by the relevant part of the 'nine-dash line' **are contrary to the Convention and without lawful effect** to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under the Convention; and further DECLARES that the **Convention superseded any historic rights**, or other sovereign rights or jurisdiction, in excess of the limits imposed therein."

Findings of the Arbitral Tribunal: The Philippines v China

1. UNCLOS comprehensively allocates rights in the maritime domain
2. None of the land features in the Spratlys is an island
3. China in breach of flag state obligations related to International Regulations for Preventing Collisions at Sea (COLREGS)
4. China failed to protect marine environment
5. China aggravated and extended the dispute

Second Thomas Shoal (LTE)



Status of Features in the Spratlys

Rocks

- Cuarteron Reef
- Fiery Cross Reef
- Gaven Reef (North)
- Johnson Reef
- McKennan Reef
- Scarborough Shoal

Low Tide Elevations*

- Gaven Reef (South)
- Hughes Reef
- **Mischief Reef**
- Second Thomas Shoal
- **Subi Reef**

*Not subject to appropriation

Johnson South Reef (Rock)

MABINI REEF (25 FEBRUARY 14)



MABINI REEF (28 FEBRUARY 2013)



MABINI REEF (11 MARCH 14)



MABINI REEF (13 MARCH 2012)



Total Reclaimed Area: Approx 10 Hectares
Aviation: Approx 3,000 meters long airstrip
Port Facility: 5 Jetties
Distance to Palawan: 266 NM
Distance to China: 545 NM



3 kms



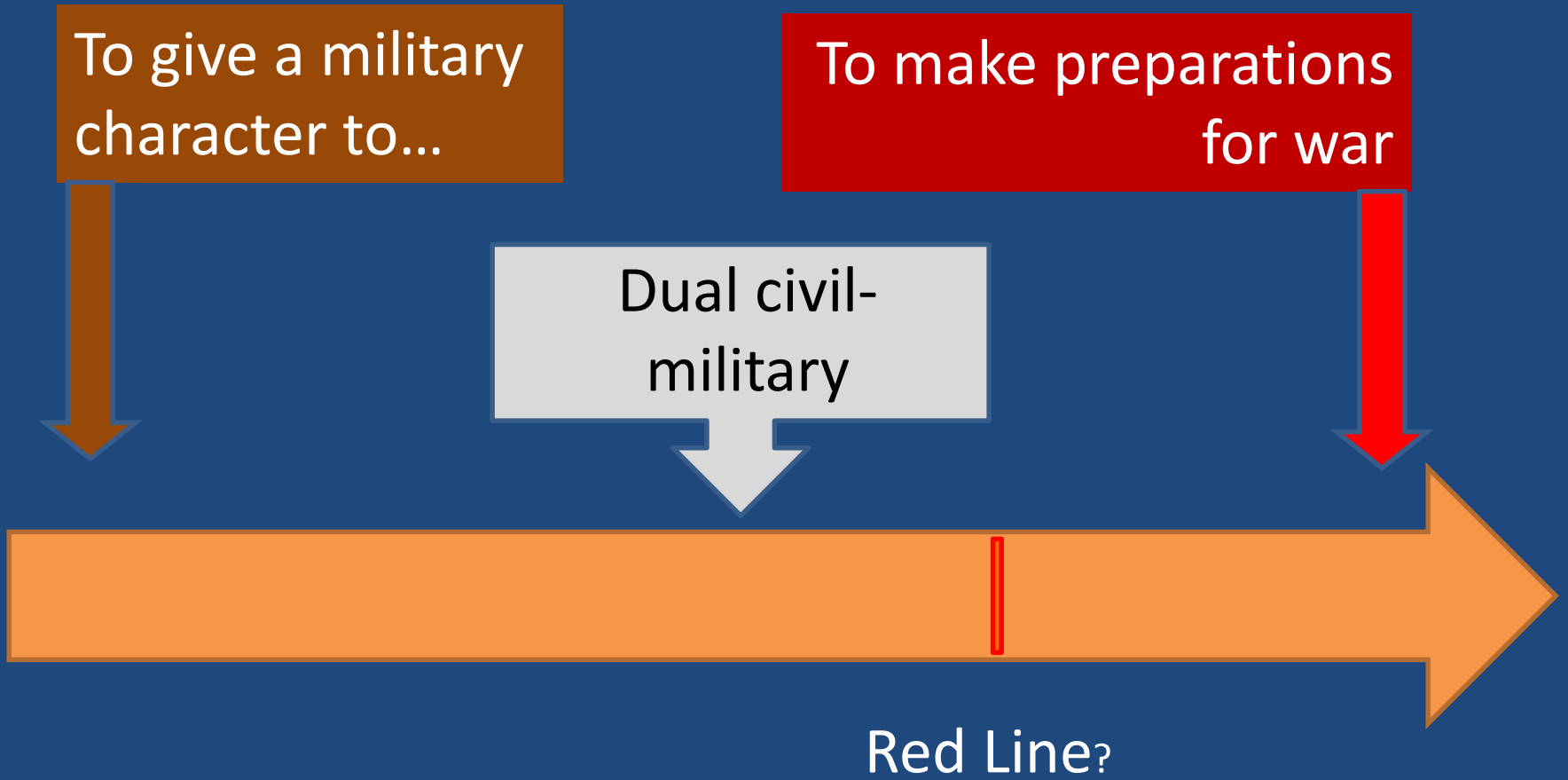
**KAGITINGAN (Fiery Cross) REEF
(PHOTO TAKEN: 07 May 2015)**

Annex VII

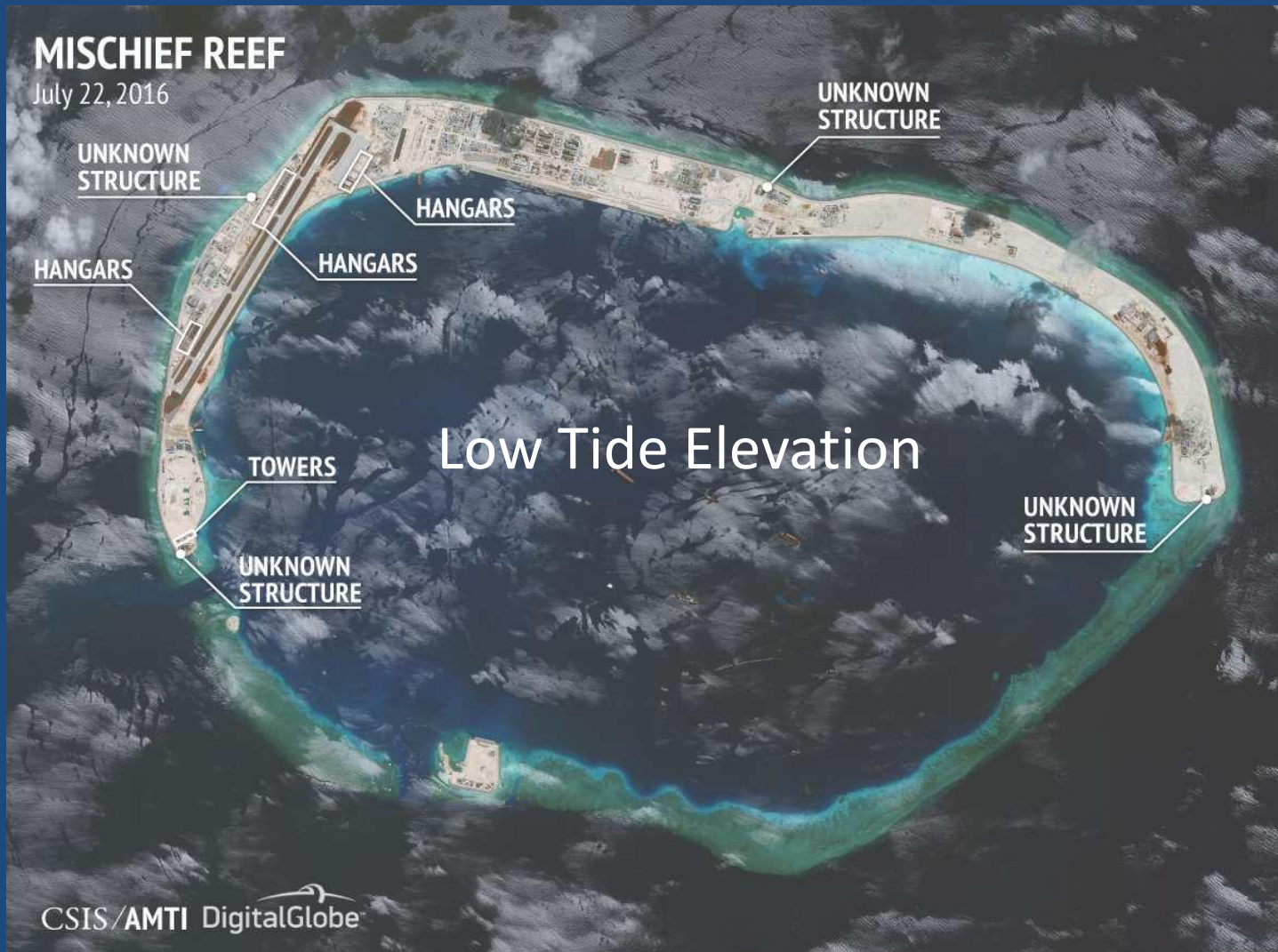
Article 11 Finality of Award

- The award shall be **final and without appeal**, unless the parties to the dispute have agreed in advance to an appellate procedure. **It shall be complied with by the parties to the dispute.***
- *China and the Philippines

4. China's Assertiveness and Militarization of Artificial Islands

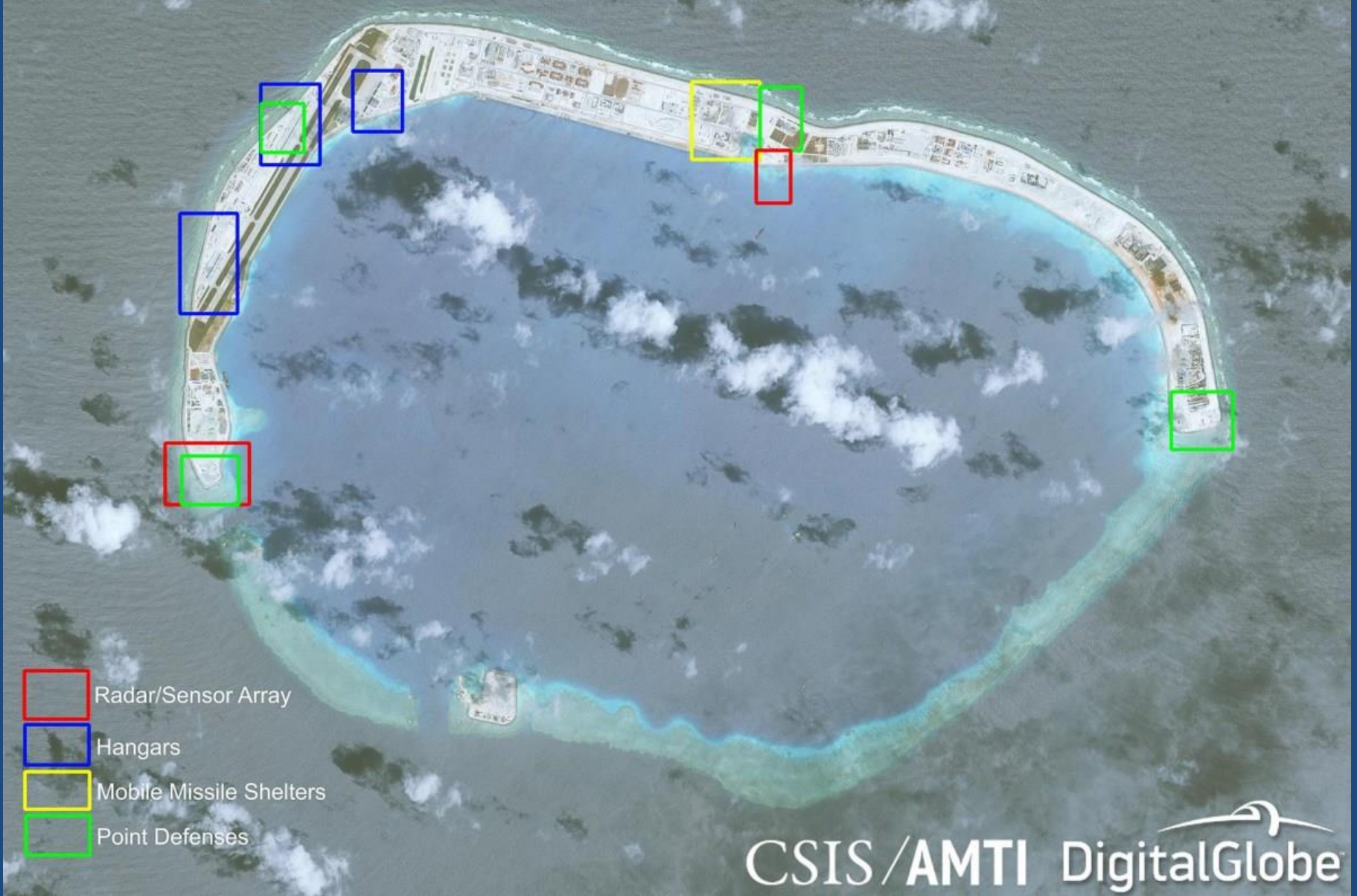


Mischief Reef July 2016



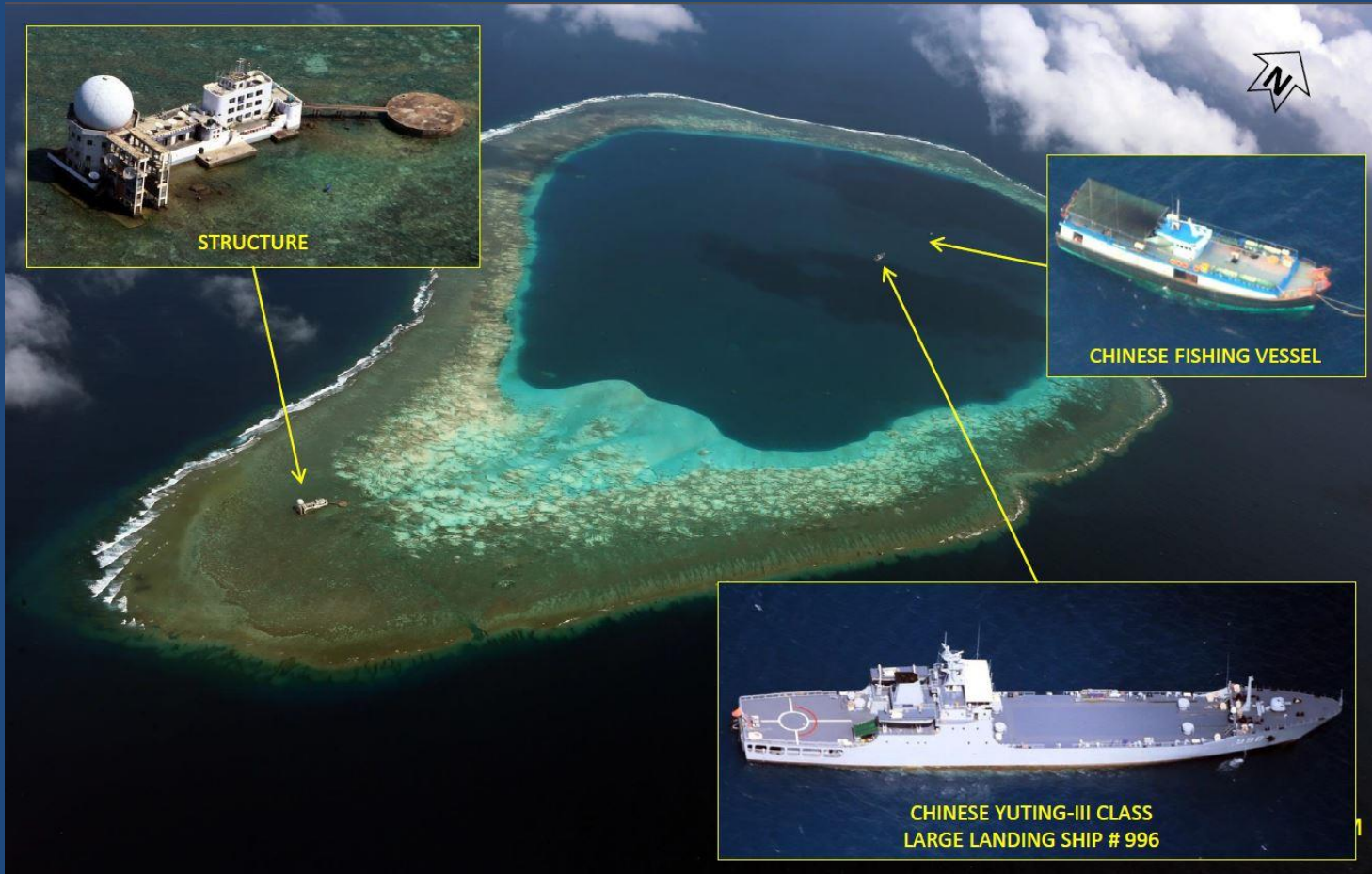
Mischief Reef

March 11, 2017



-  Radar/Sensor Array
-  Hangars
-  Mobile Missile Shelters
-  Point Defenses

Subi Reef (LTE)



Subi Reef

March 14, 2017

-  Radar/Sensor Array
-  Hangars
-  Mobile Missile Shelters
-  Point Defenses



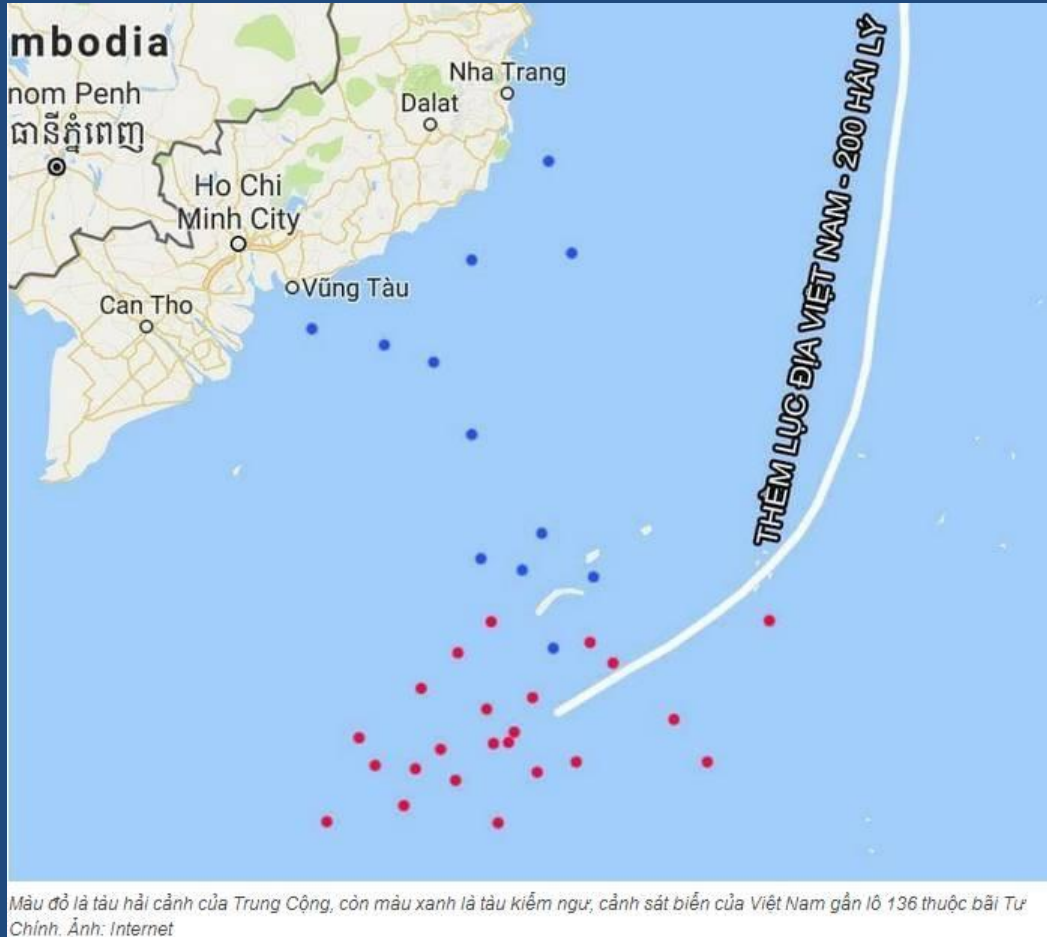
Fiery Cross Reef

March 9, 2017

-  Radar/Sensor Array
-  Hangars
-  Mobile Missile Shelters
-  Point Defenses



Repsol Exploration & China 2017



- Block 136-03 Repsol of Spain
- **Blue dots** Vietnamese Fishing Surveillance and Coast Guard vessels
- **Red dots** Chinese vessels
- **“operations have been suspended,”** Miguel Martinez San Martin, Repsol s.A. – CFO, July 27., 2017

5. China-ASEAN Consultations on the Code of Conduct in the South China Sea

Framework Code of Conduct May 2017

- One and a quarter page document
 - Dot points
- 1. Preambular provisions
- 2. General provisions
 - Objectives
 - Principles
- 3. Final Clauses

6. U.S. Freedom of Navigation Operational Patrols

- Assert freedom of navigation and overflight rights and freedoms worldwide under UNCLOS
- No acquiescence to unilateral acts
- Highlight UNCLOS navigation provisions to protect maritime rights worldwide
- Triple track – diplomatic representations, operational assertions and bi- & multi-lateral consultations

7. Conclusion

- UNCLOS as the Constitution for the World's Oceans
 - Implications of non-compliance
 - Indonesia and *Laut Natuna Utara*
 - International case law
 - High seas
 - Islands, rocks and low-tide elevations elsewhere

Conclusion

- Unresolved issues for the Code of Conduct
 - ASEAN-China Consultations
 - ASEAN unity or ten individual states?
 - Prerequisite full implement of the DOC
 - Geographic scope
 - Legally binding
 - Enforcement
 - ASEAN Unity and Consensus
 - Oil Exploration by Philippines and Vietnam

Conclusion

- Impact of Great Power rivalry on maritime disputes in the South China Sea
 - Trump's US – Northeast Asia First?
 - Freedom of Navigation Operational Patrols-FONOP
 - Naval Presence & Continuous Bomber patrols
 - Solution or source of provocation?
- Japan, India and Australia
 - High seas freedoms
- China – further militarization? ADIZ?

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