ARBITRATION UNDER ANNEX VII OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

REPUBLIC OF THE PHILIPPINES

v.

PEOPLE'S REPUBLIC OF CHINA

MEMORIAL OF THE PHILIPPINES

VOLUME I

30 MARCH 2014

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CHAPTER 1

INTRODUCTION AND OVERVIEW

1.1 The Republic of the Philippines (the "Philippines") initiated these proceedings against the People's Republic of China ("China" or the "PRC") on 22 January 2013 when it presented China with a Notification and Statement of Claim under Article 287 and Annex VII of the 1982 United Nations Convention on the Law of the Sea ("UNCLOS" or the "Convention").[1] In its Notification and Statement of Claim, the Philippines appointed Judge Rüdiger Wolfrum as arbitrator pursuant to Article 3(b) of Annex VII.

1.2 In response, on 19 February 2013, China presented a *Note Verbale* to the Philippines Department of Foreign Affairs rejecting and returning the Notification and Statement of Claim.[2] China reiterated its position that "it does not accept the arbitration initiated by the Philippines" in a *Note Verbale* addressed to the Permanent Court of Arbitration on 29 July 2013.[3]

1.3 On 22 March 2013, acting in accordance with Article 3(c) and 3(e) of Annex VII of the Convention, the President of the International Tribunal for the Law of the Sea ("ITLOS") appointed Judge Stanislaw Pawlak as arbitrator. In accordance with Article 3(d) and 3(e) of Annex VII, the President of ITLOS further appointed Judge Jean-Pierre Cot and Professor Alfred Soons as arbitrators, and Ambassador Christopher Pinto as arbitrator and President of the Tribunal on 24 April 2013. Ambassador Pinto subsequently withdrew from the Tribunal, and on 21 June 2013, the President of ITLOS appointed Judge Thomas A. Mensah to replace him.

1.4 On 27 August 2013, the Tribunal adopted Procedural Order No. 1 to which the Tribunal's Rules of Procedure are appended. Paragraph 2 of Procedural Order No. 1 fixed 30 March 2014 as the date for the filing of the Memorial by the Philippines.

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[1] Notification and Statement of Claim of the Republic of the Philippines (22 Jan. 2013). Memorial of the Republic of the Philippines ("MP"), Vol. III, Annex 1.

[2] *Note Verbale* from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (13) PG-039 (19 Feb. 2013), p. 1. MP, Vol. III, Annex 3.

[3] *Note Verbale* from the Embassy of the People's Republic of China in The Hague to the Permanent Court of Arbitration, No. (013)-117 (29 July 2013), p. 1. MP, Vol. III, Annex 4.

1.5 On 28 February 2014, the Philippines sought leave to amend its Statement of Claim to include one additional maritime feature in the South China Sea beyond those identified in its initial Statement of Claim.[4] By letter dated 11 March 2014, the Tribunal granted the Philippines' request pursuant to Article 19 of the Rules of Procedure.

1.6 This Memorial is submitted in accordance with the relevant provisions of Procedural Order No. 1 and the Rules of Procedure.

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1.7 The case brought by the Philippines against China seeks to obtain declarations from the Tribunal in respect of three inter-related matters; namely that:

1. China is not entitled to exercise "historic rights" over the waters, seabed and subsoil beyond the limits of its entitlements under the Convention in the areas encompassed within its so-called "nine-dash line";

2. Various maritime features relied on by China as a basis upon which to assert its claims in the South China Sea are not islands that generate entitlement to an exclusive economic zone ("EEZ") or continental shelf, but rather are "rocks" within the meaning of UNCLOS Article 121(3), or are low-tide elevations or submerged banks incapable of generating such entitlements; and

3. China has unlawfully interfered with the exercise of the Philippines' sovereign rights and freedoms under UNCLOS and other rules of international law not incompatible with the Convention.

These issues relate exclusively to the interpretation or application of UNCLOS, in respect of matters over which China has not availed itself of the optional exceptions provided in Article 298 of the Convention.

1.8 The Philippines was compelled to bring these proceedings in view of China's increasingly firm assertion and exercise of what it calls "historic rights" within the maritime areas encompassed by the nine-dash line. Those areas are depicted in the map appended to

[4] Amended Notification and Statement of Claim of the Republic of the Philippines (28 Feb. 2014). MP, Vol. III, Annex 5.

two *Notes Verbales* submitted to the Secretary General of the United Nations on 7 May 2009 (a reproduction of which appears as **Figure 1.1** following page 4).

1.9 The nine-dash line embraces over two million km^2 of maritime space, more than 60% of the totality of the South China Sea, one of the largest and most important semi-enclosed seas in the world, that is abutted by no less than seven coastal States.[5] China's assertion of these purported "historic rights", and its recent efforts to enforce them, have unlawfully interfered with the enjoyment and exercise by the Philippines of its rights under UNCLOS.[6]

1.10 As States Parties to the 1982 Convention, both the Philippines and China agreed to be bound by its provisions, including those concerning the entitlements of coastal States set forth in Articles 56, 57, 76, 77 and 121, among others.[7] It is noteworthy that, at the time it became a party to the Convention in June 1996, China claimed only "sovereign rights and jurisdiction over an exclusive economic zone of 200 M and a continental shelf".[8]

1.11 Just two years later, however, it abruptly changed position. In June 1998, it enacted its Exclusive Economic Zone and Continental Shelf Act, Article 14 of which provides: "The provisions of this Act shall not affect the historical rights of the People's Republic of China".[9] China's novel assertion of sovereign historic rights over areas encompassed by the nine-dash line, but beyond the limits of its entitlements under the Convention, is manifestly contrary to UNCLOS.

1.12 China's claim to "historic rights" is also unexplained. It has nowhere articulated the basis for its maritime claim beyond the limits of its entitlements under the Convention but within the nine-dash line. It does no more than assert that the claim has been "consistently held by the Chinese Government, and widely known by the international community".[10]

1.13 The Philippines disagrees. Moreover, there is no provision of UNCLOS which allows China to claim "historic rights" of the kind it now asserts, including exclusive rights to the

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[5] *See infra* paras. 2.2-2.6; Figure 2.3 (in Volume II only).

[6] *See infra* Chapter 6.

[7] The Philippines ratified UNCLOS on 8 May 1984; China on 7 June 1996.

[8] *See infra* paras. 3.16 & 4.27.

[9] People's Republic of China, *Exclusive Economic Zone and Continental Shelf Act* (26 June 1998), Art. 14. MP, Vol. V, Annex 107.

[10] *See infra* para. 4.36.

living and non-living resources in areas that lie within 200 M of the territory of the Philippines but outside any possible entitlement of China under the Convention. The Convention also does not recognise "historic rights" in regard to the resources of another coastal State's EEZ, or in the seabed or subsoil of its continental shelf.

1.14 Even if China might once have possessed the "historic rights" it now seeks to assert (*quod non*), it disabled itself from claiming, exercising or enforcing such rights when it became a party to the Convention in 1996. UNCLOS establishes a comprehensive regime.[11] It exhaustively defines maritime zones. Its drafters took great care to set out the potential entitlements that coastal States can – and cannot – claim, including from islands, rocks and other maritime features. China's claim to more than the Convention allows is, in short, pre-empted by UNCLOS.

1.15 The Philippines wishes to make clear that it does not seek to challenge any rights that China is entitled to exercise under the 1982 Convention. It does, however, invoke the provisions of UNCLOS to ensure that China's claims do not extend beyond the limits established by the Convention. The Philippines also invokes the provisions of the Convention to protect its own rights under UNCLOS, including its right to the peaceful and compulsory settlement of this dispute in accordance with Part XV.

1.16 In addition to seeking a declaration concerning China's assertion of "historic rights", the Philippines also seeks a determination from the Tribunal as to the status and maritime entitlements (if any) of nine maritime features located in the South China Sea; namely: Scarborough Shoal, Mischief Reef, McKennan Reef, Gaven Reef, Subi Reef, Second Thomas Shoal, Johnson Reef, Cuarteron Reef and Fiery Cross Reef. For the avoidance of all doubt, the Philippines does *not* seek any determination by the Tribunal as to any question of sovereignty over islands, rocks or any other maritime features. The Tribunal is not invited, directly or indirectly, to adjudicate on the competing sovereignty claims to any of the features at issue (or any others).

1.17 China has failed to recognise that none of the maritime features listed are properly considered "true" islands within the meaning of Article 121, paragraphs 1 and 2, of the Convention. Some are "rocks" within the meaning of Article 121, paragraph 3, because they

[11] *See* U.N. Conference on the Law of the Sea III, Plenary, *185th Meeting*, U.N. Doc. A/CONF.62/PV.185 (26 Jan. 1983), para. 47. MP, Vol. XI, Annex LA-116 (UNCLOS is a "comprehensive constitution for the oceans").

MAP ATTACHED TO CHINA'S NOTES VERBALES
Nos. CML/17/2009 & CML/18/2009
(7 May 2009)

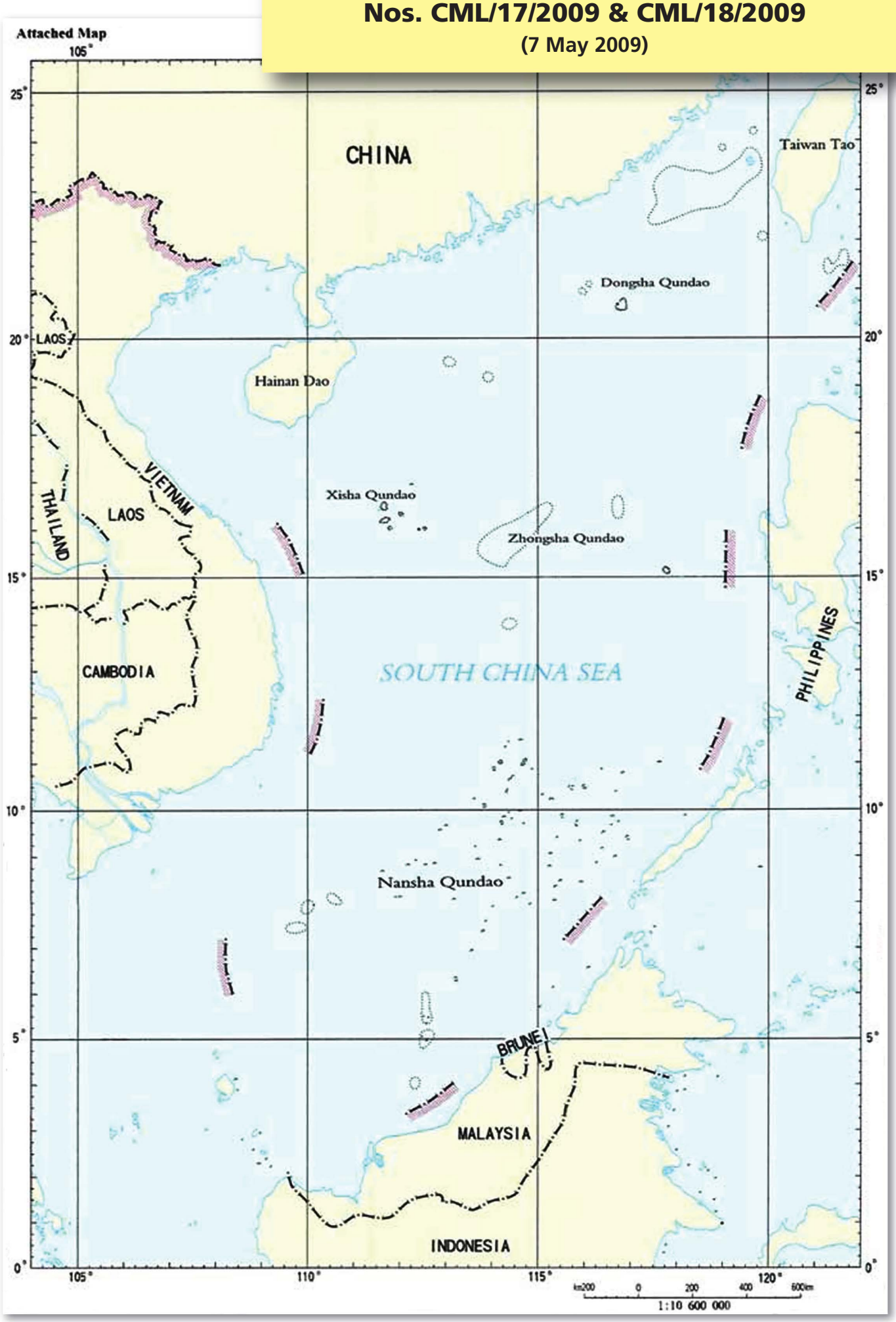

Figure 1.1

are very small and can neither sustain human habitation nor an economic life of their own. As such, they do not generate entitlement to an EEZ or continental shelf. The remainder are low-tide elevations or submerged banks that do not generate maritime entitlements of any kind. The Philippines is also concerned that China has developed and is continuing to develop installations on a number of these features – for example on Mischief Reef – that are intended to affect a change in their character, status and maritime entitlements.

1.18 The position adopted by China in the South China Sea is not only inconsistent with the Convention, it is also inconsistent with the position China itself has taken in other areas. In response to Japan's 2008 Submission to the Commission on the Limits of the Continental Shelf ("CLCS"), for example, China strongly and repeatedly protested Japan's effort to claim a continental shelf, including an outer continental shelf, from Oki-no-Tori Shima, a small collection of tiny outcroppings in the Pacific Ocean. In so doing, China confirmed the correct position that under Article 121(3) insignificant features cannot generate entitlement to a continental shelf.[12] As China rightly observed in its 6 February 2009 *Note Verbale* to the U.N. Secretary General protesting Japan's Submission: "All States Parties shall implement the Convention in its entirety and ensure the integrity of the Convention".[13]

1.19 The Philippines does not express any view on the nature of Oki-no-Tori. Yet, it is apparent that China has adopted an inconsistent approach in relation to maritime features in the South China Sea that are indistinguishable from Oki-no-Tori, and plainly fall within the definition of "rocks" under the Convention. This is the case in relation to Scarborough Shoal, and Johnson, Cuarteron and Fiery Cross Reefs, among other features.[14]

1.20 China has not only asserted claims in regard to so-called "historic rights" beyond its entitlements under UNCLOS, and beyond the entitlements of any insular features, it has also sought to enforce these exaggerated claims, including in areas within the 200 M EEZ and continental shelf of the Philippines. In so doing, it has violated the sovereign rights and jurisdiction of the Philippines, both by exploiting the resources in these areas and preventing the Philippines from exploiting them. China's actions have also despoiled the marine

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[12] *See infra* paras. 5.30-5.31.

[13] *Note Verbale* from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/2/2009 (6 Feb. 2009), p. 1. MP, Vol. VI, Annex 189.

[14] *See infra* Chapter 5, Sections I.B & II.B.

environment of the Philippines and interfered with and endangered navigation by Philippine vessels. All of these actions constitute violations of UNCLOS and related rules of international law.

1.21 China's consent to be bound by UNCLOS, including the dispute settlement provisions of Part XV, is not in any way vitiated by its decision not to participate in these proceedings. The Philippines regrets that China has chosen, until this point at least, not to appear before this Tribunal. China's absence, however, does not mean that the Tribunal is precluded from moving forward with this case. Indeed, Article 25 of the Rules of Procedure specifically contemplates the possibility that China will not participate. It provides *inter alia*:

> 1. Pursuant to Article 9 of Annex VII to the Convention, if one of the Parties to the dispute does not appear before the Arbitral Tribunal or fails to defend its case, the other Party may request the Arbitral Tribunal to continue the proceedings and to make its award. Absence of a Party or failure of a Party to defend its case shall not constitute a bar to the proceedings.

For the avoidance of any doubt, the Philippines here requests that these proceedings continue.

1.22 In this regard, the Philippines notes "certain points of principle" concerning non-appearance expressed by the International Court of Justice ("ICJ") in 1986:

> A State which decides not to appear must accept the consequences of its decision, the first of which is that the case will continue without its participation; the State which has chosen not to appear remains a party to the case, and is bound by the eventual judgment. . . .[15]

Precisely the same position was stated by ITLOS in its recent Order on provisional measures in the *Arctic Sunrise* case.[16]

1.23 China's non-appearance also does not mean that the Tribunal has no basis on which to form a view as to China's positions on the matters before it. Since these proceedings were initiated, China has communicated certain observations to the Tribunal, and the views of those associated with the Government of China are also available to the Tribunal. The Philippines notes, in particular, that the serving judge from China on ITLOS has expressed

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[15] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 24, para. 28. MP, Vol. XI, Annex LA-15.

[16] *Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation), Provisional Measures, Order of 22 November 2013*, ITLOS Reports 2013, para. 52. MP, Vol. XI, Annex LA-45.

views on certain aspects of the issues raised in these proceedings, to which reference is made at appropriate points in this Memorial. There is also an academic literature that includes the views of individuals closely associated with the Chinese authorities.

1.24 Nevertheless, the Philippines recognises that China's non-appearance does impose a special burden on the Tribunal, which "must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law".[17] The Philippines wishes to assist the Tribunal as far as possible, and to that end has formulated its arguments in the Memorial with this in mind, seeking to take into account the arguments that China might have raised if it had elected to appear.

1.25 The Philippines recognises too that, in accordance with Article 25, paragraph 2 of the Rules of Procedure, the Tribunal may wish to raise certain matters *proprio motu*. It stands ready to assist the Tribunal by responding to any requests to furnish additional information, or submit further arguments, as the Tribunal considers most helpful.

1.26 Lastly, the Philippines notes that these proceedings raise issues that will be of interest to other States, including other coastal States in the South China Sea. In preparing the Statement of Claim, the Amended Statement of Claim and this Memorial, the Philippines has taken care to ensure that it does not put the Tribunal in the position of having to express any views, or come to any conclusions, that might impair the interests or rights of a third State. The Philippines has taken account of the claims to sovereignty of all relevant States, and presented a case that does not require any such claims to be addressed, either directly or indirectly.

1.27 Notwithstanding the limited contours of the dispute that has been submitted, the Tribunal will be aware that other States in the South China Sea have opposed and protested China's claims over the waters, seabed and subsoil within the nine-dash line, including Vietnam, Indonesia and Malaysia.[18] Like the Philippines, these and other States recognise that China's claims have no basis under UNCLOS.

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[17] Rules of Procedure, para. 25(1).

[18] *See infra* para. 4.9.

I. REASONS FOR THE INSTITUTION OF THESE PROCEEDINGS

1.28 The Philippines brought these proceedings to resolve its legal dispute with China relating to the Parties' respective rights and entitlements in the South China Sea, including with respect to China's claim to "historic rights" beyond the limits of its entitlements under UNCLOS within the area encompassed by the nine-dash line. China's exaggerated maritime claims and its attempts to enforce them have violated the Philippines' rights under the Convention. The *Note Verbale* accompanying the Philippine Notification and Statement of Claim explained:

> The Government of the Philippines has initiated these arbitral proceedings in furtherance of the friendly relations with China, mindful of its obligation under Article 279 of UNCLOS to seek a peaceful and durable resolution of the dispute in the West Philippine Sea by the means indicated in Article 33(1) of the Charter of the United Nations.[19]

1.29 Over the course of the past 20 years, China has seized physical control of maritime features in the South China Sea that fall within the EEZ and continental shelf of the Philippines. It has also constructed installations upon them and acted in a manner calculated to methodically consolidate control over huge portions of the South China Sea, including its seabed and subsoil.[20]

1.30 The dispute between the Parties concerning their maritime entitlements in the South China Sea escalated significantly following the official espousal of the nine-dash line claim to the United Nations in 2009. In April 2012, Chinese vessels dislodged Filipino fishermen from Scarborough Shoal, an area around which they had historically fished without protest from China. After dislodging the Philippine presence, China erected a physical barrier around the entrance to the shoal and has generally prevented Philippine vessels from navigating anywhere in the vicinity.

1.31 China has also obstructed Philippine oil and gas exploration activities in areas indisputably within the EEZ and continental shelf of the Philippines, including at Reed Bank and elsewhere. It has not only repeatedly protested the legitimate activities of the Philippines, it has also directly approached private companies investing in the oil and gas industry in the

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[19] *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 13-0211 (22 Jan. 2013). MP, Vol. III, Annex 2.

[20] *See infra* Chapter 6, Section III.

Philippines to dissuade them from carrying out exploration activities within the area encompassed by the nine-dash line.[21]

1.32 China's growing assertiveness has continued even following the presentation of the Philippines' original Statement of Claim. As detailed in the Amended Statement of Claim submitted on 28 February 2014 and the accompanying cover letter, China has adopted a new-found firmness in respect of the long-standing Philippine presence on Second Thomas Shoal, an underwater feature just some 100 M from the Philippines coast over which China now asserts "sovereignty". It has even threatened to dislodge the Philippine presence from the shoal.

1.33 Against the backdrop of these increasing tensions, the Philippines reluctantly came to the conclusion that all possibility of bilateral negotiation had been exhausted, as had multilateral efforts under the auspices of the Association of Southeast Asian Nations ("ASEAN"). With no other practical alternative available to it, the Philippines turned to arbitration under Part XV of UNCLOS not only to protect its own rights but also to preserve the integrity of the Convention as a whole.

1.34 In the view of the Philippines, the compulsory dispute settlement mechanisms of UNCLOS constitute an essential vehicle for maintaining the international legal order, and for protecting States Parties against abuse by other States. The Philippines strongly believes that after the failure of bilateral and regional negotiations, the Tribunal's decision will not only serve to resolve the disputes that have been presented in this case, but also to facilitate an eventual negotiated settlement of other issues not presented.

II. STRUCTURE OF THE MEMORIAL

1.35 The Memorial of the Philippines consists of eleven volumes. Volume I comprises the main text of the Memorial, together with a selection of illustrative maps and figures. Volumes II-XI contain supporting materials. Volume II contains figures, maps and nautical charts;

[21] *See infra* paras. 3.45-3.50, 6.16-6.28.

Volumes III-X contain documentary exhibits, expert reports and witness affidavits; and Volume XI contains legal authorities (in electronic copy only).[22]

1.36 The main text of the Memorial, Volume I, consists of seven Chapters, including this Introduction, followed by the Philippines' Submissions.

1.37 **Chapter 2** provides the geographic setting, including the coastal lengths of the seven States abutting the South China Sea and their respective percentages of the total South China Sea coastline. The five distinct groups of insular features located in the South China Sea are described; they are divided into a Northern Sector (the Pratas Islands, Paracel Islands, Macclesfield Bank and Scarborough Shoal) and a Southern Sector (the Spratly Islands).

1.38 As will be shown, the South China Sea is of great economic and environmental importance. The majority of the world's merchant ships and oil tankers pass through its shipping lanes every year, carrying a quarter of global trade. The South China Sea is also home to numerous threatened and endangered species; it contains more than 7% of the world's coral reefs and is the source of important commercial fisheries stocks for all seven coastal States. The rich historical background of the South China Sea is also described, including its economic and political life, and the significant and diverse roles played by the peoples and polities of Southeast Asia.

1.39 **Chapter 3** sets out the history of the dispute, including the maritime legislation of the Philippines and China, and the extent of their respective maritime claims. It explains how the Parties' differences with regard to putative "historic rights" and the entitlements of maritime features have given rise to disputes between them. As set out in this Chapter, the maritime disputes between the Philippines and China can be divided into two distinct stages. During the initial period, from 1995 to 2009, the dispute focused on the nature and entitlements under UNCLOS of features in the South China Sea, including especially but not limited to Mischief Reef and Scarborough Shoal. They also related to the Parties' fishing rights near those features.

[22] Included among the Annexes are a number of documents marked "secret" or "confidential." Their use as evidence in these proceedings has been authorized by the appropriate authorities of the Government of the Philippines.

1.40 The second phase of the disputes was catalysed by China's assertion of claims within the nine-dash line depicted on the map attached to its May 2009 *Notes Verbales* to the U.N. Secretary General. China has subsequently sought to consolidate control over maritime spaces within the nine-dash line but beyond the limits of its entitlements under the Convention. It has sought to actively prevent the Philippines from carrying out lawful activities within that area, including fishing and oil and gas activities.

1.41 The Chapter also shows that both Parties have recognised the existence of maritime disputes, and sets out their unsuccessful efforts to resolve them both bilaterally, and to manage them through multilateral procedures under the auspices of ASEAN.

1.42 **Chapter 4** addresses China's claim to "historic rights" over the waters, seabed and subsoil encompassed by the nine-dash line beyond the limits of its entitlements under UNCLOS. It begins by describing China's assertion of its claim with respect to the area encompassed by the nine-dash line, demonstrates how that claim has evolved over time, and shows that China has recently become increasingly forceful in stating and enforcing it.

1.43 The Chapter then sets out the law applicable to China's claim, in particular, the provisions of the 1982 Convention that regulate coastal States' potential entitlements to maritime space, and shows that UNCLOS leaves no room for claims to "historic rights". With respect to the EEZ, the Chapter shows that except to the very limited extent specifically recognized in Article 62(3),[23] claims to "historic rights" in the EEZ of other States were necessarily extinguished by the Convention – as the use of the term *exclusive* economic zone itself implies. In fact, the issue of whether or not such "historic rights" would survive the adoption of the Convention was specifically raised and rejected during the negotiations. With respect to the continental shelf, the Chapter shows that the very idea of "historic rights" is incompatible with the regime of the continental shelf, which, from the beginning, has afforded the coastal State the exclusive right to exploit the resources of the seabed and subsoil, and rejected the idea that other States may obtain rights in the seabed or subsoil by occupation or use.

1.44 Finally, Chapter 4 applies the law to the facts and demonstrates that China's claim fails in light of its accession to the Convention in 1996 and the Convention's preclusion of

[23] Article 62(3) refers to, in part, "the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks".

such "historic rights" claims. In any event, even if States Parties could make claims of "historic rights" in areas beyond the limits of their entitlements under the Convention (which they cannot), China's claim would still fail because it cannot satisfy the requirements for such a claim under general international law.

1.45 **Chapter 5** demonstrates that China's claim to maritime spaces on the basis of insular features that lie within the area encompassed by the nine-dash line unlawfully exceeds the entitlements provided for in UNCLOS. The Chapter considers these features separately in the Northern and Southern Sectors of the South China Sea. In the Northern Sector, it shows that Scarborough Shoal, an uninhabited and uninhabitable underwater feature 124 M off the coast of Luzon, with only six small protrusions above water at high tide, is a "rock" under Article 121(3) that generates entitlement neither to an EEZ nor to a continental shelf.

1.46 In the Southern Sector, where the Spratly Islands are situated, Chapter 5 demonstrates that Mischief Reef, Second Thomas Shoal, McKennan Reef, Gaven Reef and Subi Reef are low-tide elevations, and therefore do not qualify as islands within the meaning of Article 121(1) of the Convention. Except for McKennan Reef and Gaven Reef, which are the only two of the five that are located within 12 M of another feature that is above water at high tide, these features are incapable of appropriation under international law and do not give rise to any maritime entitlement of their own, regardless of which State may have sovereign rights over them. Moreover, Mischief Reef and Second Thomas Shoal are situated within 200 M of Palawan. Accordingly, they form part of the EEZ and continental shelf of the Philippines under Article 76 of UNCLOS.

1.47 The Chapter goes on to address high-tide features in the Southern Sector, with special emphasis on Johnson Reef, Cuarteron Reef and Fiery Cross Reef (all of which China presently occupies and controls), and shows that all such features are properly characterized as "rocks" within the meaning of Article 121(3) because they can sustain neither human habitation nor economic life of their own. Even the largest features in the Spratlys – including Itu Aba, Thitu and West York, the last two of which are occupied by the Philippines – are very small and incapable of sustaining human habitation or economic life. Thus, contrary to the view espoused by China, none of these features generates entitlement to an EEZ or a continental shelf.

1.48 Finally, Chapter 5 also explains why the Tribunal is not precluded from determining the nature and entitlements of maritime features in the Southern Sector even though another State that is not a party to this dispute – Vietnam – claims sovereignty over some of them. The determination of the nature and entitlements of the features in question does not require the Tribunal to pass judgment on the lawfulness of any of Vietnam's actions or claims; nor would Vietnam be bound by the Tribunal's interpretation or application of the Convention. It is therefore not an indispensable third party.

1.49 **Chapter 6** addresses the ways in which China has, by its actions, violated its obligations under UNCLOS, including its obligation to respect the sovereign rights and jurisdiction of the Philippines. It begins by describing how China has interfered with the Philippines' right to explore for or exploit the living and non-living resources of its EEZ and continental shelf. China has not only directly acted to impede exploration for non-living resources in the continental shelf by the Philippines, it has, by purporting to extend its regulatory jurisdiction over all maritime areas encompassed by the nine-dash line, created an atmosphere of tension and uncertainty throughout the region that has materially prejudiced the Philippines. China has also unlawfully fished in the Philippines' EEZ at Second Thomas Shoal and Mischief Reef, and prevented Filipino fishermen from conducting their traditional fishing in and around those features, as well as at Scarborough Shoal.

1.50 The Chapter then sets out the ways in which China has breached its obligations under the Convention to protect and preserve the marine environment by tolerating, if not encouraging, environmentally destructive activities by its fishermen at Scarborough Shoal and Second Thomas Shoal. Further, China's construction of artificial islands at Mischief Reef violates its obligations under UNCLOS in multiple respects. Not only do its activities violate the provisions of the Convention relating to artificial islands and other such installations, they also breach its obligations to protect and preserve the marine environment, and constitute unlawful acts of attempted appropriation. Chapter 6 shows that China has also breached its obligations under UNCLOS by operating its law enforcement vessels in a highly dangerous and provocative manner that has posed a direct threat to Philippine navigation. Finally, Chapter 6 shows that, after these proceedings commenced, China took *de facto* control of Second Thomas Shoal, located within the Philippines' EEZ and continental shelf, threatened to forcibly expel the longstanding Philippine presence there, physically blocked the

Philippines from resupplying its personnel by sea and exacerbated the disputes between the Parties, all in violation of its obligations under the Convention.

1.51 **Chapter 7** sets out the basis for the jurisdiction of the Tribunal, and shows that the Tribunal's power to decide the case is manifest. All of the issues presented by the Philippines' Amended Statement of Claim – China's claims to "historic rights" within all the areas encompassed by the nine-dash line, the maritime entitlements of the insular features at issue in these proceedings, and China's interferences with the Philippines' rights and jurisdiction under UNCLOS – relate directly and exclusively to the interpretation or application of UNCLOS. They have also been the subject of the requisite exchange of views between the Parties. Contrary to the statements by China (both officially and in the writings of its supporters), nothing in the 2002 ASEAN Declaration on the Conduct of the Parties in the South China Sea (the "2002 DOC") divests the Tribunal of jurisdiction. The 2002 DOC is merely a non-binding political declaration that does not purport to derogate from the dispute resolution provisions of Part XV.

1.52 The Chapter also shows that none of the limitations to jurisdiction set forth in Article 297 of the Convention or the exceptions in Article 298 prevent the Tribunal from exercising jurisdiction. The Article 297 limitations apply only to disputes relating to the *exercise* of certain sovereign rights in the undisputed EEZ of the coastal State, not to disputes concerning the predicate question of the *existence* of those rights in the first place. Since this case presents only the latter category of issues, Article 297 imposes no limitations on the Tribunal's jurisdiction. Moreover, the Philippines does not make any claims regarding China's exercise of rights in China's own EEZ. Its claims relate only to China's purported exercise of rights in the EEZ and continental shelf of the Philippines.

1.53 Finally, Chapter 7 shows that none of the optional exceptions set forth in UNCLOS Article 298 are of any consequence to the jurisdiction of the Tribunal. This case does not concern the interpretation or application of Articles 15, 74 or 83 relating to sea boundary delimitations, or to any historic bays or titles. To the contrary, only issues of *entitlement* to – not the *delimitation* of – maritime space are presented. The case law from both ITLOS and the ICJ make it emphatically clear that issues of entitlement and delimitation are distinct and may not be conflated. Nor does this dispute concern excluded military or law enforcement activities. None of the Philippines' claims challenges Chinese military activities. None of the challenged law enforcement activities took place in China's EEZ, only in areas claimed by

the Philippines as part of its EEZ and continental shelf; hence none of them are excluded from the Tribunal's jurisdiction under Article 298.

1.54 The Tribunal will observe that the Memorial addresses the Philippines' claims on the merits (in Chapters 4, 5 and 6) before it establishes the Tribunal's jurisdiction to rule on those claims (in Chapter 7). The Philippines has chosen this order of presentation so that the Tribunal can benefit from a thorough understanding of the Philippines' specific claims in this proceeding whilst considering whether it has jurisdiction over them.

1.55 Volume I of the Memorial concludes by setting out the Philippines' Submissions.

CHAPTER 2

THE GEOGRAPHICAL AND HISTORICAL CONTEXT

I. THE GEOGRAPHY OF THE SOUTH CHINA SEA

2.1 The South China Sea is a semi-enclosed sea located on the western edge of the Pacific Ocean. It is depicted in **Figure 2.1** (following page 18).

2.2 Encompassing nearly 3.5 million square kilometres, the South China Sea is abutted by the coasts of seven States. Starting in the north and proceeding clockwise, the Sea is bounded by the southern coast of China (1,428 km), including the islands of Hainan and Taiwan.[24] To the south, the Sea is then enclosed by the main islands of the Philippines, first the Batan Islands (21 km) and then the Babuyan Islands (20 km). Directly to the south lies the largest island in the Philippines, Luzon, 555 km of which front the South China Sea, and the island of Mindoro, 95 km of which face the Sea. Further to the south, the South China Sea is enclosed by a series of Philippine islands arranged in a northeast to southwest direction – Busuanga, Culion, Linapacan, and Palawan – which collectively have 537 km of coastline on the Sea, dividing it from the Sulu Sea lying to the southeast.

2.3 Proceeding southwest, the South China Sea is then enclosed by the island of Borneo, the third largest island in the world, fronted by the coasts of Malaysia (884 km) and Brunei (123 km), not counting disputed territory.[25] In its southern extremity, the South China Sea is bounded by the entrance to the Java Sea and by several Indonesian islands off the coast of Sumatra (797 km).

2.4 Turning northward, the South China Sea abuts the coast of Singapore (50 km) and the eastern entrance to the Malacca Strait. It then follows Malaysia's Malay Peninsula for 624 km until meeting the Gulf of Thailand, the mouth of which commences at the southern extremity of Vietnam.

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[24] The Philippines "fully understands and respects the position of the Chinese Government that there is but one China and that Taiwan is an integral part of Chinese territory". Government of the Republic of the Philippines and Government of the People's Republic of China, *Joint Communiqué* (9 June 1975). MP, Vol. VI, Annex 174.

[25] The northeast portion of Borneo is claimed both by Malaysia, which considers it part of its state of Sabah, and the Philippines. Approximately 91 km of coastline fronting the South China Sea is part of this disputed territory.

2.5 Finally, the South China Sea is enclosed on its west by the coast of Vietnam (1,268 km), until it meets the Gulf of Tonkin in the north.[26]

2.6 **Figure 2.3** (in Volume II only) sets out the lengths of the littoral States' coastlines facing the South China Sea, as well as their respective percentages of the total South China Sea coastline.

2.7 There are hundreds of tiny islets, rocks and reefs located in the South China Sea. They fall into five distinct groups, which may usefully be divided into a Northern Sector and a Southern Sector. In the Northern Sector are the Pratas Islands, the Paracel Islands, Macclesfield Bank, and Scarborough Shoal. Their locations are depicted in **Figure 2.4** (following page 18). Of these features, the only one whose adjacent waters are claimed by both Parties to this dispute is Scarborough Shoal, which is addressed in detail in Chapter 5.

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[26] The International Hydrographic Organization provides the following technical description of the limits of the South China Sea:

> On the South.
>
> The Eastern and Southern limits of Singapore and Malacca Straits (46) as far West as Tanjong Kedabu (1°06'N, 102°58'E) down the East coast of Sumatra to Lucipara Point (3°14'S, 106°05'E) thence to Tanjong Nanka, the Southwest extremity of Banka Island, through this island to Tanjong Berikat the Eastern point (2°34'S, 106°51'E), on to Tanjong Djemang (2°36'S, 107°37'E) in Billiton, along the North coast of this island to Tanjong Boeroeng Mandi (2°46'S, 108°16'E) and thence a line to Tanjong Sambar (3°00'S, 110°19'E) the Southwest extreme of Borneo.
>
> On the East.
>
> From Tanjog Sambar through the West coast of Borneo to Tanjong Sampanmangio, the North point, thence a line to West points of Balabac and Secam Reefs, on to the West point of Bancalan Island and to Cape Buliluyan, the Southwest point of Palawan, through this island to Cabuli Point, the Northern point thereof, thence to the Northwest point of Busuanga and to Cape Calavite in the island of Mindoro, to the Northwest point of Lubang Island and to Point Fuego (14°08'N) in Luzon Island, through this island to Cape Engano, the Northeast point of Luzon, along a line joining this cape with the East point of Balingtang Island (20°N) and to the East point of Y'Ami Island (21°05'N) thence to Garan Bi, the Southern point of Taiwan (Formosa), through this island to Santyo (25°N) its North Eastern point.
>
> On the North.
>
> From Fuki Kaku the North point of Formosa to Kiushan Tao (Turnabout Island) on the South point of Haitan Tao (25°25'N) and thence Westward on the parallel of 25°24' North to the coast of Fukien.
>
> On the West.
>
> The Mainland, the Southern limit of the Gulf of Thailand (47) and the East coast of the Malay Peninsula.

International Hydrographic Organization, *Limits of Oceans and Seas*, Special Publication No. 23 (3rd ed. 1953), pp. 30-31. MP, Vol. VII, Annex 229. *See also* **Figure 2.2** (in Volume II only).


THE SOUTH CHINA SEA
Mercator Projection
Datum: WGS-84
(Scale accurate at 10°N)
0 100 200 300 400 500
Nautical Miles
0 200 400 600 800 1,000
Kilometers
Prepared by: International Mapping
100°E
110°E
120°E
20°N
10°N
0°
CHINA
Taiwan
Pratas I.
LAOS
Gulf of Tonkin
Hainan
THAILAND
Paracel Islands
West Philippine Sea
Luzon
Scarborough Shoal
CAMBODIA
Mindoro
VIETNAM
SOUTH CHINA SEA
Spratly Islands
THE PHILIPPINES
Gulf of Thailand
Palawan
Sulu Sea
Disputed Territory
BRUNEI
MALAYSIA
INDONESIA
MALAYSIA
Celebes Sea
SINGAPORE
INDONESIA
INDIAN OCEAN

Figure 2.1

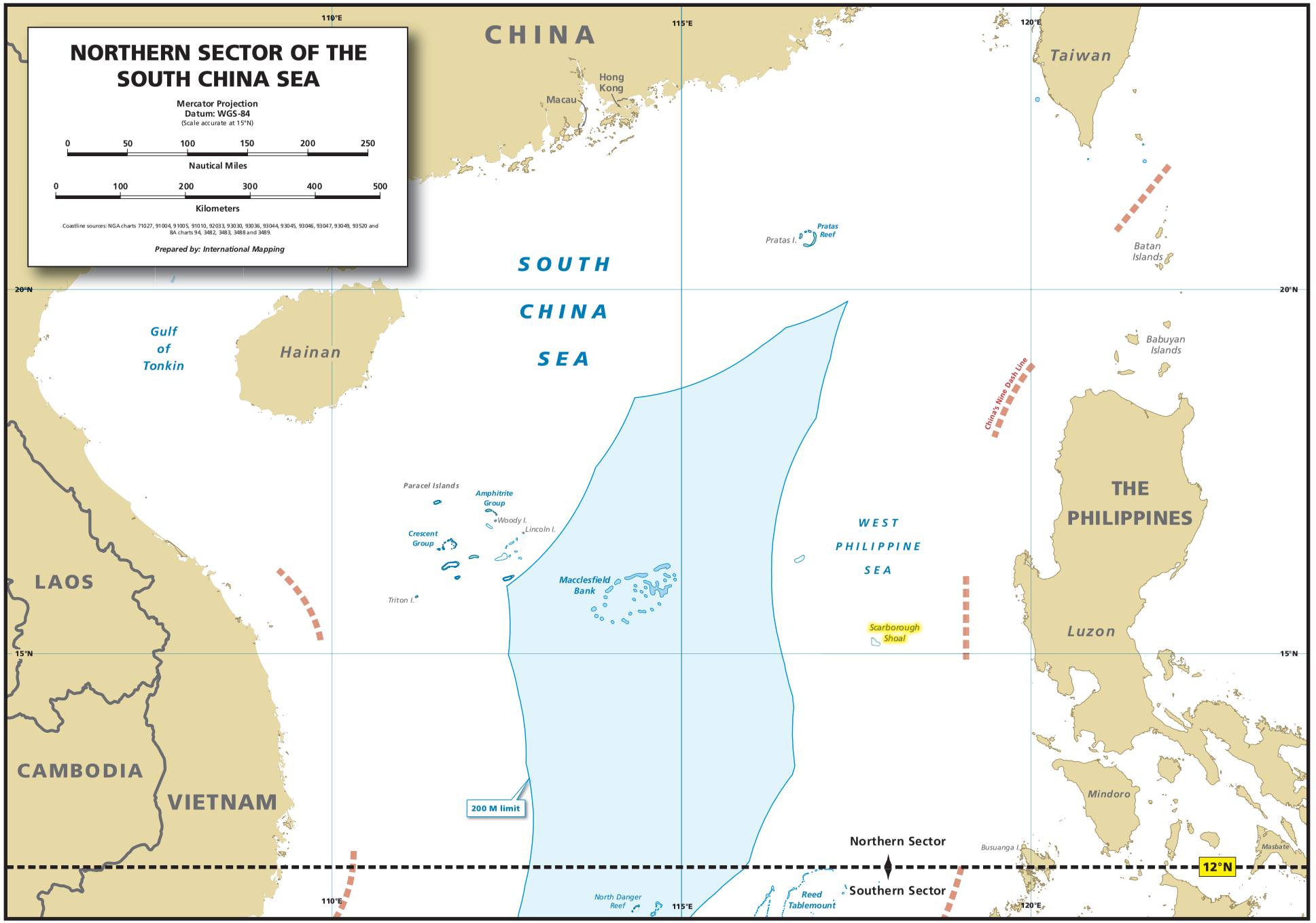
NORTHERN SECTOR OF THE SOUTH CHINA SEA
Mercator Projection
Datum: WGS-84
(Scale accurate at 15°N)
0 50 100 150 200 250
Nautical Miles
0 100 200 300 400 500
Kilometers
Coastline sources: NGA charts 71027, 91004, 91005, 91010, 92033, 93030, 93036, 93044, 93045, 93046, 93047, 93049, 93520 and BA charts 94, 3482, 3483, 3488 and 3489.
Prepared by: International Mapping
110°E
115°E
120°E
20°N
15°N
CHINA
Hong Kong
Macau
Taiwan
Pratas I.
Pratas Reef
Batan Islands
SOUTH CHINA SEA
Gulf of Tonkin
Hainan
Babuyan Islands
China's Nine Dash Line
Paracel Islands
Amphitrite Group
Woody I.
Lincoln I.
Crescent Group
Triton I.
Macclesfield Bank
WEST PHILIPPINE SEA
THE PHILIPPINES
Luzon
Scarborough Shoal
LAOS
CAMBODIA
VIETNAM
200 M limit
Mindoro
Busuanga I.
Masbate
Northern Sector
Southern Sector
12°N
North Danger Reef
Reed Tablemount

Figure 2.4

The other features in the Northern Sector are briefly described below only for background purposes.

2.8 The **Pratas Islands**, known in China as the Dongsha Islands (东沙群岛), consist of three small features forming an atoll located approximately 437 M to the southwest of the southern tip of Taiwan, at 20º42'N, 116º43'E.[27] The total land area of the Pratas Islands is just 1.5 km^2. China is the only State that claims them. They are administered as a national park.[28]

2.9 To the southwest, the **Paracel Islands**, known in China as the Xisha Islands (西沙群岛), are "a group of small islands and reefs . . . about one-third of the way from central Vietnam to the northern Philippines".[29] Collectively, they cover approximately eight km^2.[30] The object of competing claims by China and Vietnam, the Paracel Islands are occupied by China.[31] The largest of the Paracels, Woody Island, covers less than 3 km^2.

2.10 85 M to the south of the Paracels is **Macclesfield Bank**, known in China as the Zhongsha Islands (中沙群島). It is a submerged elliptical-shaped atoll 140 km long and 61 km wide[32] located at 16º18'N, 114º12'E.[33] Notwithstanding China's reference to it as the Zhongsha "Islands", no part of Macclesfield Bank is above water. It is claimed by China.

2.11 Approximately 170 M to the east of Macclesfield Bank, and 300 M southeast of the Paracels, lies **Scarborough Shoal**, a feature known in the Philippines as Bajo de Masinloc or Panatag Shoal, and in China as Huangyan Dao (黄岩岛). Located at approximately 15˚09'46"N, 117˚45'41"E, approximately 118 M from the Philippine coast at Luzon, it is a

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[27] Chang-feng Dai, "Dong-sha Atoll in the South China Sea: Past, Present and Future", *Islands of the World VIII International Conference* (1-7 Nov. 2004). MP, Vol. IX, Annex 277.

[28] John W. McManus, "Toward Establishing a Spratly Islands International Marine Peace Park: Ecological Importance and Supportive Collaborative Activities with an Emphasis on the Role of Taiwan", *Ocean Development & International Law*, Vol. 41 (2010), pp. 270-280. MP, Vol. IX, Annex 289.

[29] United States Central Intelligence Agency, "Paracel Islands", *CIA World Factbook* (2013). MP, Vol. VII, Annex 237.

[30] *Id.*

[31] Ishaan Tharoor, "China and Vietnam: Clashing Over an Island Archipelago", *Time* (14 Jan. 2010). MP, Vol. X, Annex 314.

[32] Z. Liu, et. al., "Sedimentology" in *The South China Sea: Paleoceanography and Sedimentology* (P. Wang and Q. Li, eds., 2009), pp. 171, 234. MP, Vol. IX, Annex 288.

[33] Geological Society of America, *Atoll Area, Depth and Rainfall* (2001). MP, Vol. VIII, Annex 271.

submerged reef that at six locations protrudes slightly above sea level at high tide.[34] Sovereignty over the feature is disputed between the Philippines and China. This arbitration does not address that issue. It is concerned only with nature of the feature and the maritime entitlement that it generates under Article 121 of UNCLOS.

2.12 The largest group of maritime features in the South China Sea lies in the Southern Sector and is known internationally as the **Spratly Islands** and in China as the Nansha Islands (南沙群島). They include over 600 reefs, islets, shoals, and rocky protrusions, most lying between 7 and 12 degrees North latitude, and 112 and 116 degrees East longitude.[35] Studies show that, with few exceptions, the Spratly features are either permanently submerged, or submerged at high tide.[36] Historically, the Spratly Islands were known as the "Dangerous Ground" due to the numerous nautical obstacles they presented, mostly invisible to sailors.[37] They are scattered over an area of approximately 240,000 km^2, but their collective land territory above water at high tide covers no more than eight km^2.[38] By way of comparison, the Bois de Boulogne is just over eight km^2.

2.13 In this arbitration, the Philippines does not seek any view from the Tribunal as to sovereignty over any of these features. Rather, it seeks a determination under Articles 13 and 121 of UNCLOS of the nature and maritime entitlements of the eight features occupied or controlled by the PRC, which are known in English as: Mischief Reef, Second Thomas Shoal, McKennan Reef,[39] Gaven Reef, Subi Reef, Johnson Reef, Cuarteron Reef and Fiery

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[34] United Kingdom Hydrographic Office, *Admiralty Sailing Directions: China Sea Pilot (NP31)*, Vol. 2 (10th ed., 2012) (UKHO, *China Sea Pilot*), p. 68. MP, Vol. VII, Annex 235.

[35] C. S. Hutchinson and V.R. Vijayan, "What are the Spratly Islands?", *Journal of Asian Earth Science*, Vol. 39 (2010), p. 371. MP, Vol. IX, Annex 295.

[36] D. Hancox and V. Prescott, "A Geographical Description of the Spratly Islands and an Account of Hydrographic Surveys Amongst Those Islands", *IBRU Maritime Briefing*, Vol. 1, No. 6 (1995). MP, Vol. VIII, Annex 256.

[37] The Spratly Islands are described in the Philippine Coast Pilot as "an extensive shoal area marked Dangerous Ground on chart and separated from mainland Palawan by the deep Palawan Passage". Philippine National Mapping and Resource Information Agency, *Philippine Coast Pilot* (6th ed., 1995) (Philippine NAMRIA, *Philippine Coast Pilot*), pp. 16-68. MP, Vol. VII, Annex 230.

[38] Clive Schofield, "Dangerous Ground: A geopolitical overview of the South China Sea" in *Security and International Politics in the South China Sea: Towards a co-operative management regime* (S. W. Bateman and R. Emmers eds., 2009), pp. 7, 9. MP, Vol. IX, Annex 283.

[39] McKennan Reef consists of two closely-linked low-tide elevations, separated by 0.76 M, which rise above Union Tablemount, a raised portion of the seabed. The Philippines has historically regarded them as a single feature under the name Chigua Reef, the international name for which is McKennan Reef. Other States call the easternmost of the two elevations Hughes Reef. It is that part of the feature that is presently occupied by China, and is addressed later in this Memorial. *See especially* Chapter 5 at paras. 5.66-5.67.

Cross Reef. These features are described in detail in Chapter 5. For completeness, a list of other occupied Spratly features showing their geographic coordinates and occupants is provided in Volume IV, Annex 97.[40] The location of these eight features in the Southern Sector is depicted in **Figure 2.5** (following page 22).

II. SIGNIFICANCE OF THE SOUTH CHINA SEA

2.14 The South China Sea is traversed by a number of important shipping lanes. It "affords the shortest route between the Indian Ocean and Northeast Asia".[41] The majority of the world's oil tankers and merchant ships pass through the South China Sea every year,[42] as does a quarter of the world's trade, including 70% of Japan's energy needs and 65% of China's.[43]

2.15 The coastal States of the South China Sea make extensive use of its abundant fisheries, including flying fish, tuna, billfish, mackerel, shark, shrimp, reef fish, herring, sardine and anchovy.[44] The Sea has been described as "one of the most important and abundant commercial fisheries in the world".[45] The already-high per capita consumption of fish in China and Southeast Asia is on the rise.[46] Both the United Nations Food and Agriculture Organization and the United Nations Environment Programme have observed

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[40] *List of Occupied Spratly Features: Geographic Coordinates, Claimants and Occupants*. MP, Vol. IV, Annex 97.

[41] Anthony James Gregor, *In the Shadow of Giants: The Major Powers and the Security of Southeast Asia* (1989), p. 11. MP, Vol. VII, Annex 250.

[42] J. S. Wang, et. al., "Safety assessment of shipping routes in the South China Sea based on the fuzzy analytic hierarchy process", *Safety Science*, Vol. 62 (Feb. 2014), p. 46. MP, Vol. X, Annex 311.

[43] Clive Schofield, "Dangerous Ground: A geopolitical overview of the South China Sea" in *Security and International Politics in the South China Sea: Towards a co-operative management regime* (S. W. Bateman and R. Emmers eds., 2009), pp. 7, 18. MP, Vol. IX, Annex 283.

[44] S. Heileman, "South China Sea", *Large Marine Ecosystems of the World*, Brief No. 36 (2009), p. 3. MP, Vol. IX, Annex 286.

[45] Pakjuta Khemakorn, *Sustainable Management of Pelagic Fisheries in the South China Sea Region* (2006), p. 9. MP, Vol. IX, Annex 279.

[46] *See* U.N. Food and Agriculture Organization, Fisheries and Aquaculture Department, *The State of World Fisheries and Aquaculture 2012* (2012), pp. 84-85. MP, Vol. IX, Annex 302; U.N. Food and Agriculture Organization, Fisheries and Aquaculture Department, *The State of World Fisheries and Aquaculture 2010* (2010), pp. 65-66. MP, Vol. IX, Annex 294; U.N. Food and Agriculture Organization, Fisheries and Aquaculture Department, *The State of World Fisheries and Aquaculture 2008* (2008), p. 154. MP, Vol. IX, Annex 281.

that the South China Sea fisheries are fully exploited,[47] and the U.S. National Oceanic and Atmospheric Administration considers the area to be at risk of "severe overexploitation".[48]

2.16 Beyond its commercial fisheries, the South China Sea contains about 7% of the world's coral reefs.[49] Known as the "rainforests of the sea" due to their high levels of biodiversity, these reefs perform essential ecological services, including prevention of erosion; dissipating wave energy; serving as spawning, nursery, breeding and feeding areas for many different species; and functioning as the ocean's nitrogen fixers and carbon dioxide sinks.[50] The Southern Sector, in particular, boasts the "highest diversity of reef-building corals in the world".[51] These reefs "serve as a pool of larvae for fishes and other marine organisms that recruit to depleted fringing reefs and coastal habitants of the South China Sea".[52] The South China Sea is thus widely recognised as "a global centre of marine shallow-water, tropical biodiversity".[53]

2.17 Excessive bycatch, however, has degraded the ecosystem, which is further threatened by illegal and irresponsible fishing practices – such as the use of dynamite and cyanide – and the harvesting of endangered species, including rare corals, sea turtles, giant clams and sharks.[54] As described in Chapter 6, it has been a frequent practice of Chinese fishermen to employ these practices and to harvest these species in waters within 200 M of the Philippines' coastal baselines.

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[47] Liana Talaue-McManus, *Transboundary Diagnostic Analysis for the South China Sea*, EAS/RCU Technical Report Series No. 14, United Nations Environment Programme (2000), p. 40. MP, Vol. VIII, Annex 266; U.N. Food and Agriculture Organization, Fisheries and Aquaculture Department, *The State of World Fisheries and Aquaculture 2012* (2012), p. 59. MP, Vol. IX, Annex 302.

[48] S. Heileman, "South China Sea", *Large Marine Ecosystems of the World*, Brief No. 36 (2009), p. 5. MP, Vol. IX, Annex 286.

[49] *Id.*, p. 1.

[50] F. Moberg and C. Folke, "Ecological goods and services of coral reef ecosystems", *Ecological Economics*, Vol. 29, No. 2 (1999), pp. 220-222. MP, Vol. VIII, Annex 262.

[51] J.P. Chen, et. al., "Checklist of Reef Fishes from Taiping Island (Itu Aba Island), Spratly Islands, South China Sea", *Pacific Science*, Vol. 51, No. 2 (1997), p. 144. MP, Vol. VIII, Annex 259.

[52] C.F. Dai and T.Y. Fan, "Coral Fauna of Taiping Island (Itu Aba Island) in the Spratlys of the South China Sea", *Atoll Research Bulletin*, No. 436 (1996), p. 9. MP, Vol. VIII, Annex 258.

[53] S. Heileman, "South China Sea", *Large Marine Ecosystems of the World*, Brief No. 36 (2009), p. 1. MP, Vol. IX, Annex 286. *See also* Liana Talaue-McManus, *Transboundary Diagnostic Analysis for the South China Sea*, EAS/RCU Technical Report Series No. 14, United Nations Environment Programme (2000), p. 24. MP, Vol. VIII, Annex 266; Pakjuta Khemakorn, *Sustainable Management of Pelagic Fisheries in the South China Sea Region* (2006), p. 18. MP, Vol. IX, Annex 279.

[54] S. Heileman, "South China Sea", *Large Marine Ecosystems of the World*, Brief No. 36 (2009), p. 7. MP, Vol. IX, Annex 286.

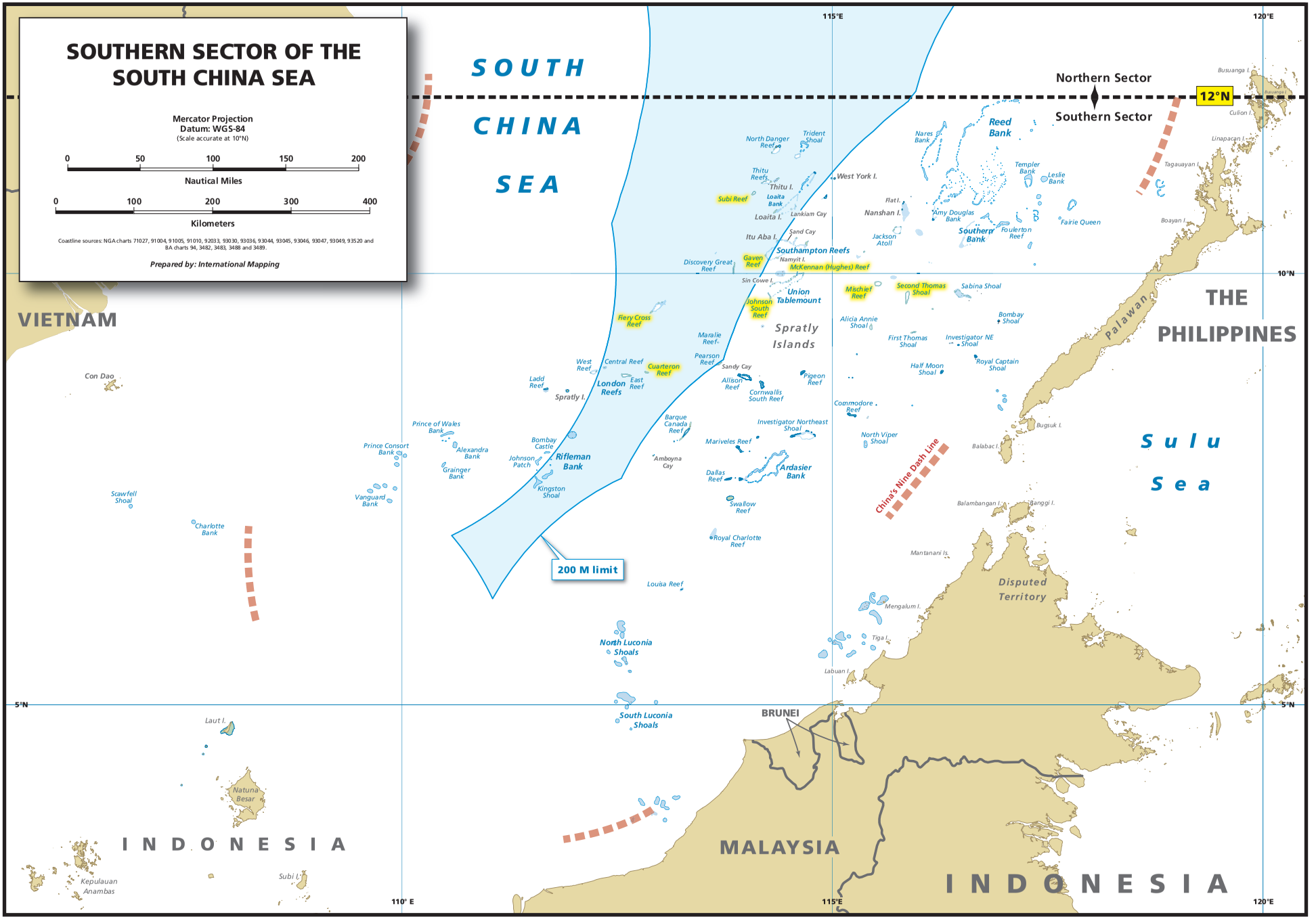
SOUTHERN SECTOR OF THE SOUTH CHINA SEA
Mercator Projection
Datum: WGS-84
(Scale accurate at 10°N)
0 50 100 150 200
Nautical Miles
0 100 200 300 400
Kilometers
Coastline sources: NGA charts 71027, 91004, 91005, 91010, 92033, 93030, 93036, 93044, 93045, 93046, 93047, 93049, 93520 and BA charts 94, 3482, 3483, 3488 and 3489.
Prepared by: International Mapping
SOUTH CHINA SEA
Northern Sector
Southern Sector
12°N
115°E
120°E
10°N
5°N
110° E
VIETNAM
THE PHILIPPINES
INDONESIA
MALAYSIA
BRUNEI
Spratly Islands
Reed Bank
Union Tablemount
Southampton Reefs
Sulu Sea
Palawan
Disputed Territory
200 M limit
China's Nine Dash Line
North Danger Reef
Trident Shoal
West York I.
Thitu Reefs
Thitu I.
Subi Reef
Loaita Bank
Loaita I.
Lankiam Cay
Nares Bank
Templer Bank
Leslie Bank
Flat I.
Nanshan I.
Amy Douglas Bank
Southern Bank
Fairie Queen
Jackson Atoll
Sand Cay
Itu Aba I.
Namyit I.
Gaven Reef
Discovery Great Reef
McKennan (Hughes) Reef
Sin Cowe I.
Mischief Reef
Second Thomas Shoal
Sabina Shoal
Johnson South Reef
Fiery Cross Reef
Alicia Annie Shoal
Bombay Shoal
First Thomas Shoal
Investigator NE Shoal
Maralie Reef
Pearson Reef
Sandy Cay
Half Moon Shoal
Royal Captain Shoal
West Reef
Central Reef
Cuarteron Reef
Ladd Reef
Spratly I.
London Reefs
East Reef
Allison Reef
Cornwallis South Reef
Pigeon Reef
Commodore Reef
Barque Canada Reef
Investigator Northeast Shoal
North Viper Shoal
Mariveles Reef
Bugsuk I.
Balabac I.
Prince of Wales Bank
Alexandra Bank
Prince Consort Bank
Bombay Castle
Johnson Patch
Rifleman Bank
Amboyna Cay
Grainger Bank
Kingston Shoal
Dallas Reef
Ardasier Bank
Swallow Reef
Royal Charlotte Reef
Scawfell Shoal
Vanguard Bank
Charlotte Bank
Con Dao
Louisa Reef
Mantanani Is.
Balambangan I.
Banggi I.
Mengalum I.
Tiga I.
Labuan I.
North Luconia Shoals
South Luconia Shoals
Laut I.
Natuna Besar
Kepulauan Anambas
Subi I.
Busuanga I.
Culion I.
Linapacan I.
Tagauayan I.
Boayan I.

Figure 2.5

III. THE SOUTH CHINA SEA IN HISTORY

2.18 The South China Sea, which on China's official maps is referred to as the *Nan Hai* (南海) or "South Sea",[55] earned its international name as a result of early European interest in the body of water as a trading route between Europe and China or the "Spice Islands" of Southeast Asia. Although China played a significant role in the early history and economic life of the Sea, many other polities played equally important roles. The Sea has always been important to many States and peoples.

A. Early History

2.19 Strategically located between the rich markets of China and India, the South China Sea has served for millennia as a vital navigation route for the diverse peoples of Southeast Asia. As a leading scholar of early Southeast Asia relates, "[f]rom roughly 1000 CE until the eighteenth century, all world trade was more or less governed by the ebb and flow of spices in and out of Southeast Asia".[56]

2.20 The South China Sea was used extensively by the Malay peoples who settled in and occupied the lands that today constitute Malaysia, Indonesia, Brunei and the Philippines:

> From before the historic period, they knew how to ride the monsoons . . . . They sailed thousands of miles from their homes, navigating by means of swell and wave patterns, cloud formations, winds, birds, and sea life. This sophisticated and complex knowledge was passed orally from generation to generation. They measured their people by 'boatloads'. . . . They were the nomads of the Southern Ocean . . . . They were prime movers in the links created between larger centres, as well as potential impediments to those links once they were created.[57]

2.21 Other peoples played equally important roles in the South China Sea's early economic life. Between the 2nd and 7th centuries C.E., Funan, an independent, Indian-influenced polity centred around its capital in present-day Vietnam (and including parts of present-day

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[55] *See, e.g.*, China Cartographic Publishing House, Map of the People's Republic of China (Jan. 2013). Figure 4.4 (following page 74).

[56] Kenneth R. Hall, *A History of Early Southeast Asia: Maritime Trade and Societal Development, 100-1500* (2011), p. 3. MP, Vol. IX, Annex 297.

[57] *Id.*, pp. 4-5. *See also* Lynda Norene Shaffer, *Maritime Southeast Asia to 1500* (1996), p. 11. MP, Vol. VIII, Annex 257 ("by some point in the first millennium B.C.E. the Malay peoples were already intrepid sailors, traveling long distances".).

Cambodia, Thailand and Myanmar) was a major trading power that made extensive use of the Sea.[58]

2.22 So too did the Cham people, who settled along the southeastern coast of Vietnam. Beginning in the middle of the 1st millennium C.E.,[59] they became active participants in South China Sea-based trade. During the height of their kingdom, known as Champa, which lasted to 1500, they were involved in much of the shipping between China and the rest of the world.[60] As one historian has observed, Champa was "heavily involved in the trade, tribute, and voyages of pilgrimage moving to and from China", and "[m]ost of this shipping was manned by Austronesian-speakers".[61] Not "until the twelfth century did Chinese take a significant role themselves in trade".[62]

2.23 During the pre-modern period, the peoples of the Philippines made use of the South China Sea as well. They were organised into socio-political units called *barangays*, a term that, reflecting their maritime orientation, "referred to the seagoing vessels on which a family or clan travelled" within the Philippine archipelago.[63] At that time, "Philippine trade and tribute . . . appear[s] to have reached China via Champa";[64] that is, by shipping goods across the South China Sea to the coast of present-day Vietnam for onward-shipment to China. Later, direct commercial routes between the Philippines and China were established.[65] A Chinese

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[58] Lynda Norene Shaffer, *Maritime Southeast Asia to 1500* (1996), p. 22. MP, Vol. VIII, Annex 257. *See also* Kenneth R. Hall, *A History of Early Southeast Asia: Maritime Trade and Societal Development, 100-1500* (2011), pp. 47-77. MP, Vol. IX, Annex 297.

[59] *See* Kenneth R. Hall, *A History of Early Southeast Asia: Maritime Trade and Societal Development, 100-1500* (2011), p. 179. MP, Vol. IX, Annex 297; Anthony Reid, *Charting the Shape of Early Modern Southeast Asia* (2000), p. 43. MP, Vol. VIII, Annex 265.

[60] Anthony Reid, *Charting the Shape of Early Modern Southeast Asia* (2000), pp. 43-44. MP, Vol. VIII, Annex 265. Access to Chinese ports, however, was not free; rather, the Chinese would authorise trade with ports based upon their payment of tribute to the Chinese rulers. *See, e.g.*, Kenneth R. Hall, *Maritime Trade and State Development in Early Southeast Asia* (1985), p. 43. MP, Vol. VII, Annex 247; Kenneth R. Hall, *A History of Early Southeast Asia: Maritime Trade and Societal Development, 100-1500* (2011), p. 45. MP, Vol. IX, Annex 297.

[61] Anthony Reid, *Charting the Shape of Early Modern Southeast Asia* (2000), p. 44. MP, Vol. VIII, Annex 265.

[62] *Id.*

[63] Luis H. Francia, *A History of the Philippines: From Indios Bravos to Filipinos* (2010), p. 32. MP, Vol. IX, Annex 291.

[64] Anthony Reid, *Charting the Shape of Early Modern Southeast Asia* (2000), p. 47. MP, Vol. VIII, Annex 265. *See also* Kenneth R. Hall, *A History of Early Southeast Asia: Maritime Trade and Societal Development, 100-1500* (2011), p. 242. MP, Vol. IX, Annex 297.

[65] Kenneth R. Hall, *A History of Early Southeast Asia: Maritime Trade and Societal Development, 100-1500* (2011), p. 332. MP, Vol. IX, Annex 297. *See also* Victor Lieberman, *Strange Parallels: Southeast Asia in Global Context, c. 800-1830*, Vol. 2 (2009), p. 776. MP, Vol. IX, Annex 287.

book published in 1322 recognised that Filipinos were plying the waters of the South China Sea for trading purposes as early as 982 A.D.[66] Trade between Luzon, the main island of the Philippine archipelago, and Fujian in southern China, was said to be flourishing by the 13th century.[67]

2.24 Like the other littoral States, China was also an active participant in pre-modern uses of the South China Sea, including trade. A Chinese astronomer is reported to have surveyed the northern part of the Sea in 1279.[68] The famous voyages of the Chinese imperial admiral Zheng He, which occurred between 1405 and 1433,[69] apparently hugged the western edge of the South China Sea while en route to more distant lands: the "[s]hips avoided the central area and sailed along inhabited coasts" to circumvent the Sea's "reefs and rocks".[70] China did not then consider the "reefs and rocks" of the South China Sea to be part of China proper: official maps produced by the Qing (1644-1912) dynasties placed the southernmost border of China at Hainan Island.[71] The famous 17th century Qing dynasty maps, prepared by Jesuit missionaries, who served as advisers to the Kangxi Emperor, also showed that China reached no farther south than Hainan.[72]

2.25 During the early Ming Dynasty in the mid-15th century, private trading by Chinese was outlawed.[73] This heralded a general suppression of Chinese maritime activities. In 1474,

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[66] *See Documentary Sources of Philippine History*, Vol. 1 (Gregorio F. Zaide, ed., 1990), pp. 1-2. MP, Vol. VII, Annex 251.

[67] Anthony Reid, *Charting the Shape of Early Modern Southeast Asia* (2000), p. 47. MP, Vol. VIII, Annex 265.

[68] Embassy of the People's Republic of China in the Republic of the Philippines, *China's Sovereignty over the Huangyan Island is Indisputable* (15 May 2012). MP, Vol. V, Annex 119; "China's Indisputable Sovereignty Over the Xisha and Nansha Islands", *Beijing Review*, No. 7 (18 Feb. 1980), pp. 16-17. MP, Vol. V, Annex 104 (demonstrating that the astronomer did not venture south of the Paracel Islands).

[69] *See* Martin Stuart-Fox, *A Short History of China and Southeast Asia: Tribute, Trade and Influence* (2003), p. 82. MP, Vol. IX, Annex 276.

[70] Stein Tønnesson, "An International History of the dispute in the South China Sea", *East Asian Institute Working Paper Series*, No. 71 (16 Mar. 2001), p. 5. MP, Vol. VIII, Annex 273. *See also* Brantly Womack, "The Spratlys From Dangerous Ground to Apple of Discord", *Contemporary Southeast Asia*, Vol. 33, No. 3 (Dec. 2011), pp. 370, 373. MP, Vol. IX, Annex 300.

[71] *See* Laura Hostetler, "Early Modern Mapping at the Qing Court: Survey Maps from the Kangxi, Yongzheng, and Qianlong Reign Periods" in *Chinese History in Geographical Perspective* (Y. Du and J. Kyong-McClain, eds., 2013), p. 18, fig. 1.5. MP, Vol. X, Annex 308.

[72] Cordell D.K. Yell, "Traditional Chinese Cartography and the Myth of Westernization" in *The History of Cartography*, Vol. 2, Book 2 (J.B. Harley and D. Woodward, eds. 1994), pp. 180-185. MP, Vol. VII, Annex 253.

[73] *See* Martin Stuart-Fox, *A Short History of China and Southeast Asia: Tribute, Trade and Influence* (2003), pp. 75-77. MP, Vol. IX, Annex 276.

the Ming naval fleet was reduced to 140 vessels. In 1500, China made it a capital offense to build a two-masted vessel; and in 1525, coastal officials were ordered to destroy all such remaining ships. In 1551, the Chinese defined venturing out to sea in a multiple-masted ship as an act of treason.[74] Later Chinese rulers also banned voyages in the South China Sea: for example, a 1717 Qing Dynasty ban "stipulated clearly that merchant ships 'cannot go to South Ocean, places like Luzon and Java'".[75]

B. The Colonial Era

2.26 Although China legalised private trade in 1567, and made efforts to re-establish itself as a maritime power,[76] it never achieved supremacy in the South China Sea. After 1511, when the Portuguese captured Malacca at the western entrance to the South China Sea, European powers began to penetrate Southeast Asia and to make more extensive use of the Sea. In 1572, Spain declared a colony in the Philippines.[77] In 1596, the Dutch arrived in Indonesia, and, in 1602, granted a trade monopoly to the Dutch East India Company.[78] The British arrived on the Malay Peninsula in 1786.[79] France established a protectorate in Vietnam in 1884.[80]

2.27 The Portuguese presence manifested itself in entities associated with the *Estado da India*,[81] a catch-all term for Portugal's South and Southeast Asian colonial holdings, the jurisdiction of which "extended at one time or another from Sofala and Hormuz in the west to Ternate and Macao in the east".[82] The Portuguese participation in trading along the "coastal

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[74] Marwyn S. Samuels, *Contest for the South China Sea* (1982), p. 31. MP, Vol. VII, Annex 246.

[75] Zheng Yangwen, *China on the Sea: How the Maritime World Shaped Modern China* (2012), pp. 211-212. MP, Vol. IX, Annex 303.

[76] Martin Stuart-Fox, *A Short History of China and Southeast Asia: Tribute, Trade and Influence* (2003), p. 99. MP, Vol. IX, Annex 276.

[77] Luis H. Francia, *A History of the Philippines: From Indios Bravos to Filipinos* (2010), p. 59. MP, Vol. IX, Annex 291.

[78] Martin Stuart-Fox, *A Short History of China and Southeast Asia: Tribute, Trade and Influence* (2003), p. 103. MP, Vol. IX, Annex 276.

[79] C.D. Cowan, "Early Penang and the Rise of Singapore, 1805-1832" in *Southeast Asia: Colonial History*, Vol. 2 (Paul H. Kratoska, ed. 2001), p. 227. MP, Vol. VIII, Annex 269.

[80] Treaty between France and Annam ("Patenote Treaty"), 6 June 1884, Art. 1(2). MP, Vol. XI, Annex LA-68.

[81] *See* George Bryan Souza, *The Survival of Empire: Portuguese Trade and Society in China and the South China Sea, 1630-1754* (1986), p. 18. MP, Vol. VII, Annex 248.

[82] John Villiers, "The Estado da India in Southeast Asia" in *South East Asia: Colonial History*, Vol. 1 (Paul H. Kratoska, ed. 2001), p. 151. MP, Vol. VIII, Annex 272.

littoral of Asia" had the effect of connecting the "different zones of Asian sea trade" at the time.[83] The Chinese permitted the Portuguese to establish a settlement at Macao, which served as a significant port for European trading throughout the colonial period.[84] At the same time, Portuguese colonial authorities implemented the "*cartaz* system, whereby every Asian trading vessel had to purchase a pass or *cartaz* from Portuguese authorities, in return for which it qualified for Portuguese protection".[85] They justified this system by declaring "[t]he whole of the maritime area of the Estado da India . . . to be *mare clausum* by right of *quasi possessio* by the Portuguese crown".[86] Thus, intentionally or not, China's claim to all the waters within the nine-dash line mirrors Portugal's grandiose pretension.

2.28 After the Spanish arrived in the Philippines, they established a colony over which the crown exerted a significant degree of control. One consequence of this was the implementation of a regime of mercantile trade in which access to Philippine ports was tightly controlled and required a license from the colonial government;[87] vessels that had travelled a well-established trade route found themselves dependent upon the grant of such licenses.[88] By the 1600s, Manila had become an important commercial centre for trade of silver from Mexico for goods from China and Japan.[89] During the same period, Spain took steps to assert its jurisdiction over the waters adjacent to the Philippines, and to effectively combat piracy.[90] After Spain extended its control to the island of Palawan in 1753, Spanish expeditions patrolled the adjacent waters to ensure the safety of the island.[91] Spanish cartographers mapped the waters around Palawan with significant levels of detail.[92]

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[83] Arun Das Gupta, "The Maritime Trade of Indonesia: 1500-1800" in *South East Asia: Colonial History* Vol. 1 (Paul H. Kratoska, ed. 2001), pp. 91, 104. MP, Vol. VIII, Annex 268.

[84] *See* Paul Arthur van Dyke, *Canton Trade: Life and Enterprise on the China Coast, 1700-1845* (2005), pp. 143-145. MP, Vol. IX, Annex 278.

[85] John Villiers, "The Estado da India in Southeast Asia" in *South East Asia: Colonial History*, Vol. 1 (Paul H. Kratoska, ed. 2001), p. 156. MP, Vol. VIII, Annex 272.

[86] *Id.*, p. 156.

[87] Antonio Remiro Brotóns, *Spain in the Philippines (16th - 19th Centuries)* (19 Mar. 2014), p. 9. MP, Vol. VII, Annex 238.

[88] *Id.*, pp. 9-10.

[89] *Id.*, p. 10.

[90] *Id.*, p. 11.

[91] *Id.*, pp. 13-14.

[92] *See id.*, pp. 22-23.

2.29 Unlike the Spanish and Portuguese, the Dutch government outsourced its colonial activities in Asia to a chartered company, the *Vereenigde Oost-Indische Compagnie* (Dutch East India Company, or VOC).[93] The VOC's primary interests in the South China Sea were the trading opportunities along its coasts and the maritime routes it provided. During the 17th and 18th centuries, the Dutch maintained a base in Taiwan that served as a node in a dynamic shipping network linking ports around the coast of the South China Sea.[94] During the first half of the 17th century, the South China Sea routes of the VOC accounted for a significant portion of intra-Asian shipping.[95] Due to the closed nature of European commerce with China, however, the Dutch had to find innovative ways to break into the market. To that end, the VOC captured and looted Chinese ships carrying goods to Spanish and Portuguese trading posts, engineered a blockade of Macao and attacked other locations along the Chinese coast.[96] Later in the colonial period, when the Chinese became eager to trade with the Dutch, the VOC restricted the ports that the Chinese could utilise,[97] demonstrating the extent to which the VOC was able to control trade routes.

2.30 The British employed a model similar to the Dutch, in that they also carried out their shipping and trading activities in the South China Sea through a charter company, the British East India Company (EIC). The EIC established a base on the west coast of the Malay Peninsula, in Penang, in 1786.[98] From there, and later from Singapore, after 1819,[99] it engaged in commerce with China,[100] primarily trading silver for silk, porcelain, and tea.[101] Additionally, "captains of the EIC . . . went into private business, working to link up"

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[93] *See* Elsbeth Locher-Scholten, "Dutch Expansion in the Indonesian Archipelago Around 1900 and the Imperialism Debate" in *Southeast Asia: Colonial History*, Vol. 2 (Paul H. Kratoska, ed. 2001), p. 107. MP, Vol. VIII, Annex 270.

[94] *See* Robert Parthesius, *Dutch Ships in Tropical Waters: The Development of the Dutch East India Company (VOC) Shipping Network in Asia 1595-1660* (2010), pp. 158-159. MP, Vol. IX, Annex 292.

[95] *Id.*, p. 49.

[96] *Id.*, pp. 39-43, 158.

[97] *Id.*, pp. 53-54.

[98] C.D. Cowan, "Early Penang and the Rise of Singapore, 1805-1832" in *Southeast Asia: Colonial History*, Vol. 2 (Paul H. Kratoska, ed. 2001), p. 227. MP, Vol. VIII, Annex 269.

[99] *See* Martin Stuart-Fox, *A Short History of China and Southeast Asia: Tribute, Trade and Influence* (2003), p. 117. MP, Vol. IX, Annex 276.

[100] C.D. Cowan, "Early Penang and the Rise of Singapore, 1805-1832" in *Southeast Asia: Colonial History*, Vol. 2 (Paul H. Kratoska, ed. 2001), p. 235. MP, Vol. VIII, Annex 269.

[101] Francois Gipouloux, *The Asian Mediterranean: Port Cities and Trading Networks in China, Japan and Southeast Asia, 13th-21st Century* (2011), p. 133. MP, Vol. IX, Annex 296.

markets in the Philippines, Indonesia and China.[102] In part due to the importance of this network, the British sought to protect navigation in the South China Sea by identifying the many hazards to mariners.[103] The South China Sea was known as a "'labyrinth of detached shoals'",[104] and the Southern Sector in particular was considered "Dangerous Ground". As a result, seaborne traffic was at great risk.[105] To increase the Sea's potential as a trade route, European hydrographers commenced surveying in the late 1700s,[106] and the first detailed surveys were conducted in 1862. In 1888, the U.K. published a chart comprehensively showing the principal reefs in the Spratly Islands.[107] Since then, the British Admiralty has continued to chart the area, publishing new or revised charts in 1922, 1924, 1925, 1939, 1953, 1954, 1985, and 2002.[108]

2.31 Prior to the French entry into Vietnam, an independent Vietnamese polity had already been active in the South China Sea, especially the Paracel Islands. In the 18th century, for example, the Vietnamese rulers founded a company to "harvest the produce of the sea and gather booty from shipwrecks" in that area.[109] In the 19th century, they sent an annual naval detachment to survey the Paracels and Spratlys; occasionally, this detachment placed markers memorializing the visits or as sovereignty markers.[110] Vietnamese authorities collected taxes

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[102] *Id.*, p. 135.

[103] Hunt Janin, *The India-China Opium Trade in the Nineteenth Century* (1999), p. 160. MP, Vol. VIII, Annex 263.

[104] D. Hancox and V. Prescott, *Secret Hydrographic Surveys in the Spratly Islands* (1999), p. 1. MP, Vol. VIII, Annex 261.

[105] Mark J. Valencia, "The Spratly Islands: Dangerous ground in the South China Sea", *The Pacific Review*, Vol. 1, No. 4 (1988), p. 438. MP, Vol. VII, Annex 249.

[106] D. Hancox and V. Prescott, *Secret Hydrographic Surveys in the Spratly Islands* (1999), p. 22. MP, Vol. VIII, Annex 261.

[107] D. Hancox and V. Prescott, "A Geographical Description of the Spratly Islands and an Account of Hydrographic Surveys Amongst Those Islands", *IBRU Maritime Briefing*, Vol. 1, No. 6 (1995), p. 35. MP, Vol. VIII, Annex 256.

[108] *See Id.*, pp. 39, 43, 46; D. Hancox and V. Prescott, *Secret Hydrographic Surveys in the Spratly Islands* (1999), p. 161. MP, Vol. VIII, Annex 261; United Kingdom Hydrographic Office, Chart No. 3483: Mindoro Strait to Luconia Shoals and Selat Makasar (22 Aug. 2002). MP, Vol. II, Annex NC1.

[109] Monique Chemillier-Gendreau, *Sovereignty over the Paracel and Spratly Islands* (2000), p. 66. MP, Vol. VIII, Annex 267.

[110] Hong Thao Nguyen, "Vietnam's Position on the Sovereignty over the Paracels & the Spratlys: Its Maritime Claims", *Journal of East Asia & International Law*, Vol. 5, No. 1 (2012), pp. 176, 181. MP, Vol. IX, Annex 301.

from visitors to the Paracels, took measures to protect Vietnamese fishermen, and provided assistance to foreign vessels in distress.[111]

2.32 When France established a protectorate over Vietnam in 1884, taking charge of external relations,[112] it inherited the legacy of these activities. The French colonial authorities extended their power over the Paracels by formally incorporating them into local administrative units, granting licenses for private exploitation of the islands, and sending scientific and naval missions.[113] There is evidence that, at the beginning of the 20th century, the French navy policed the maritime area around the Paracels.[114] By that time, all of French Indochina was deeply engaged in trade with other coastal States: its "principal markets were southern China (including imports to Hong Kong), which was the first outlet for Cochinchinese rice; the Dutch East Indies, which imported rice and exported gasoline to Indochina; Singapore, a market for fish, tin, and Indochinese rubber, which from there was sent on to the United States, Japan, and France; the Philippines, a market for Cambodian livestock and Cochinchinese rice; and Japan, which purchased rice, . . . coal and rubber".[115]

2.33 After the Spanish-American War in 1898, the United States became the colonial power in the Philippines.[116] It too engaged in various activities in the South China Sea. The American colonial administration in the Philippines undertook various measures to promote navigation safety[117] and maintained a coast guard.[118] The Americans also regulated trade and

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[111] *Id.*, pp. 180, 182.

[112] Treaty between France and Annam ("Patenote Treaty"), 6 June 1884, Art. 1(2). MP, Vol. XI, Annex LA-68.

[113] Hong Thao Nguyen, "Vietnam's Position on the Sovereignty over the Paracels & the Spratlys: Its Maritime Claims", *Journal of East Asia & International Law*, Vol. 5, No. 1 (2012), p. 185. MP, Vol. IX, Annex 301.

[114] *Note Verbale* from the Legation of the Republic of China in Paris to the Ministry of Foreign Affairs of France (29 Sept. 1932), *reprinted in* Monique Chemillier-Gendreau, *Sovereignty over the Paracel and Spratly Islands* (2000), p. 104. MP, Vol. VI, Annex 171.

[115] P. Brocheux and D. Hémery, *Indochina: An Ambiguous Colonization, 1858-1954* (2009), pp. 176-177. MP, Vol. IX, Annex 285.

[116] *See* Treaty of Peace Between the United States and the Kingdom of Spain ("Treaty of Paris") (10 Dec. 1898), entered into force 11 Apr. 1899, Art. III. MP, Vol. XI, Annex LA-69. Two years later, the United States and Spain concluded another treaty to "remove any ground of misunderstanding" arising from the interpretation of the Treaty of Paris. Treaty Between the United States of America and the Kingdom of Spain for the Cession to the United States of Any and All Islands of the Philippine Archipelago Lying Outside of the Lines Described in Article III of the Treaty of Peace of December 10, 1898 ("Treaty of Washington") (7 Nov. 1900). MP, Vol. XI, Annex LA-70.

[117] United States, Bureau of Insular Affairs, "What Has Been Done in the Philippines: A Record of Practical Accomplishments under Civil Government" (1904), p. 36. MP, Vol. VI, Annex 158. *See also Erlanger & Galinger v. The Swedish East Asiatic Co., (Ltd.) Et Al., & the "Oelwerke Teutonia" and New Zealand*

passenger traffic between Philippine ports and others on the South China Sea.[119] In 1935 and 1937, the United States surveyed the South China Sea, in order to "establish a safe east-west route through the Dangerous Ground".[120]

2.34 In the 1920s, Japan developed projects aimed at harvesting guano on some of the Spratly Islands.[121] It also surveyed the area to find a submarine base. France did the same.[122] Britain, too, conducted a series of surveys between 1931[123] and 1938[124] to identify shipping routes and a "safe concealed fleet anchorage".[125] In 1930, France claimed to take "formal possession . . . of Spratly Island 'and the islets dependent on it'",[126] notwithstanding a prior British claim to two of the islands (Spratly Island and Amboyna Cay). Britain did not protest, although Japan did.[127] In 1933, France despatched a warship to the features[128] and narrowed its claim to six features within the group.[129] France reiterated its claim in 1937, and, the

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Insurance Co. (Ltd.), Supreme Court of the Philippines, Judgment, G.R. No. L-10051 (9 Mar. 1916). MP, Vol. III, Annex 6.

[118] United States, Bureau of Insular Affairs, "What Has Been Done in the Philippines: A Record of Practical Accomplishments under Civil Government" (1904), p. 36. MP, Vol. VI, Annex 158.

[119] *See* John Foreman, *The Philippine Islands: A Political, Geographical, Ethnographical, Social and Commercial History of the Philippine Archipelago* (3d ed. 1906), p. 627. MP, Vol. VII, Annex 243.

[120] D. Hancox and V. Prescott, *Secret Hydrographic Surveys in the Spratly Islands* (1999), p. 186. MP, Vol. VIII, Annex 261.

[121] Stein Tønnesson, "An International History of the dispute in the South China Sea", *East Asian Institute Working Paper Series*, No. 71 (16 Mar. 2001), p. 6. MP, Vol. VIII, Annex 273.

[122] D. Hancox and V. Prescott, *Secret Hydrographic Surveys in the Spratly Islands* (1999), p. 185. MP, Vol. VIII, Annex 261.

[123] *Id.*, p. 59.

[124] *Id.*, p. 115.

[125] *Id.*, pp. 184-185.

[126] Stein Tønnesson, "The South China Sea in the Age of European Decline", *Modern Asian Studies*, Vol. 40, No. 1 (Feb. 2006), pp. 1, 5. MP, Vol. IX, Annex 280.

[127] *Id.*, pp. 1, 6.

[128] *Note Verbale* from the Embassy of Japan in Washington to the United States Department of State (31 Mar. 1939), in *Papers relating to the Foreign Relations of the United States, Japan: 1931-1941*, Vol. 2 (1943), p. 279. MP, Vol. VI, Annex 172.

[129] Republic of France, Ministry of Foreign Affairs, "Notice relating to the occupation of certain islands by French naval units", *Official Journal of the French Republic* (26 July 1933), at 7837. MP, Vol. VI, Annex 159.

following year, despatched "men and materials" to those features.[130] It also maintained garrisons on Woody Island and Pattle Island in the Paracels.[131]

2.35 As part of its imperial strategy in Southeast Asia, Japan seized the Pratas in 1937;[132] Spratly Island in 1938;[133] Woody Island and Lincoln Island in the Paracels in January and April 1939, respectively;[134] and Hainan Island in February 1939.[135] In March 1939, Japan proclaimed sovereignty over all the features of the South China Sea,[136] which it named the "Sinnan Islands".[137] The United States protested Japan's claim, asserting that "the Japanese Government has heretofore exercised no acts which may properly be regarded as establishing a basis for claim to sovereignty. . . ".[138] France and Britain also protested Japan's actions.[139] During World War II, the Japanese Navy controlled the South China Sea.[140] However, by

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[130] *Note Verbale* from the Embassy of Japan in Washington to the United States Department of State (31 Mar. 1939), in *Papers relating to the Foreign Relations of the United States, Japan: 1931-1941*, Vol. 2 (1943), p. 279. MP, Vol. VI, Annex 172.

[131] Stein Tønnesson, "The South China Sea in the Age of European Decline", *Modern Asian Studies*, Vol. 40, No. 1 (Feb. 2006), p. 12. MP, Vol. IX, Annex 280.

[132] *Id.*, p. 9.

[133] *Id.*, p. 10.

[134] *Id.*, p. 11.

[135] D. Hancox and V. Prescott, *Secret Hydrographic Surveys in the Spratly Islands* (1999), p. 117. MP, Vol. VIII, Annex 261. *See also* Daniel George Edward Hall, *A History of Southeast Asia* (1964), p. 769. MP, Vol. VII, Annex 245.

[136] G. Till, "The South China Sea Dispute: An International History" in *Security and International Politics in the South China Sea: Towards a Co-operative Management Regime* (S. Bateman and R. Emmers, eds., 2009), pp. 26, 29. MP, Vol. IX, Annex 284.

[137] *Note Verbale* from the Embassy of Japan in Washington to the United States Department of State (31 Mar. 1939), in *Papers relating to the Foreign Relations of the United States, Japan: 1931-1941*, Vol. 2 (1943). MP, Vol. VI, Annex 172; *Note Verbale* from the Secretary of State of the United States to the Ambassador of Japan to the United States (17 May 1939), in *Papers relating to the Foreign Relations of the United States, Japan: 1931-1941*, Vol. 2 (1943). MP, Vol. VI, Annex 173; United States Department of State, "Extension of Japanese Penetration into Southern Asia and South Pacific Territories" in *Papers relating to the Foreign Relations of the United States, Japan: 1931-1941*, Vol. 2 (1943). MP, Vol. VI, Annex 160.

[138] *Note Verbale* from the Secretary of State of the United States to the Ambassador of Japan to the United States (17 May 1939), in *Papers relating to the Foreign Relations of the United States, Japan: 1931-1941*, Vol. 2 (1943), p. 280. MP, Vol. VI, Annex 173.

[139] Stein Tønnesson, "The South China Sea in the Age of European Decline", *Modern Asian Studies*, Vol. 40, No. 1 (Feb. 2006), p. 13. MP, Vol. IX, Annex 280.

[140] Stein Tønnesson, "An International History of the dispute in the South China Sea", *East Asian Institute Working Paper Series*, No. 71 (16 Mar. 2001), p. 8. MP, Vol. VIII, Annex 273.

January 1945, the U.S. Navy was able to use it as a staging ground for its landing in the Philippines.[141]

C. The Post-war Period and the Assertion of Competing Claims

2.36 By the Treaty of San Francisco in 1951, which formally concluded the war in the Pacific, Japan expressly renounced its territorial claims in the South China Sea. It did so in the following terms: "Japan renounces all right, title and claim to the Spratly Islands and to the Paracel Islands".[142] The Treaty did not specify any State in whose favour Japan renounced its sovereignty.[143] During the Peace Conference, the Soviet Union's proposal that China gain the Paracels and Spratlys was overwhelmingly rejected by the other Treaty parties.[144]

2.37 Even before the treaty was signed, several coastal States asserted claims over the South China Sea Islands. In July 1946, Philippine Vice President Quirino "stated at a press conference that the Philippines would claim the island group west of Palawan [that is, the Spratlys] as essential to its security".[145] The following year, a Philippine fishing executive began sending fishing boats to the Spratlys and made plans to exploit the area's economic potential.[146] The Philippines also reasserted its claim over Scarborough Shoal.[147]

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[141] Justin Corfield, "South China Sea" in *Seas and Waterways of the World: An Encyclopedia of History, Uses, and Issues*, Vol. 1 (J. Zumerchik and S. L. Danver, eds., 2010), pp. 245, 247. MP, Vol. IX, Annex 290.

[142] Treaty of Peace with Japan ("Treaty of San Francisco"), 136 U.N.T.S. 45 (8 Sept. 1951), entered into force 28 Apr. 1952, Art. 2(f). MP, Vol. XI, Annex LA-72.

[143] The Sino-Japanese peace treaty of 29 April 1952 likewise noted that "under Article 2 of the Treaty of Peace which Japan signed at the city of San Francisco on 8 September 1951 (hereinafter referred to as the San Francisco Treaty), Japan has renounced all right, title, and claim to Taiwan (Formosa) and Penghu (the Pescadores) as well as the Spratley Islands and the Paracel Islands". Treaty of Peace between the Republic of China and Japan ("Treaty of Taipei"), 138 U.N.T.S. 3 (28 Apr. 1952), entered into force 5 Aug. 1952, Art. 2. MP, Vol. XI, Annex LA-73. An exchange of letters between France and Japan confirmed that Article 2 of the Treaty of Tapei "should not be construed as having any special significance or meaning other than that implied by Article 2, paragraph (f), of the Treaty of San Francisco". Stein Tønnesson, "The South China Sea in the Age of European Decline", *Modern Asian Studies*, Vol. 40, No. 1 (Feb. 2006), p. 43. MP, Vol. IX, Annex 280.

[144] *See Record of Proceedings of the Conference for the Conclusion and Signature of the Treaty of Peace With Japan, San Francisco, CA, September 4-8, 1951* (1951), pp. 119-122, 282-293. MP, Vol. X, Annex 332.

[145] Stein Tønnesson, "The South China Sea in the Age of European Decline", *Modern Asian Studies*, Vol. 40, No. 1 (Feb. 2006), p. 21. MP, Vol. IX, Annex 280.

[146] Rodolfo Severino, *Where in the World is the Philippines?: Debating its National Territory* (2011), p. 67. MP, Vol. IX, Annex 298.

[147] *Id.*, pp. 72-73.

2.38 In 1948, China, then governed by the Kuomintang, published an official map portraying, for the first time, a dashed line encompassing most of the South China Sea; the original map had eleven dashes.[148] At the time, the line merely indicated the islands over which China claimed sovereignty; it did not then purport to assert sovereignty or sovereign rights to all the waters within it.[149]

2.39 Vietnam reasserted sovereignty over some of the features in both the Paracels and the Spratlys in 1956.[150] Malaysia claimed a number of features in the Spratlys in 1979.[151]

2.40 In regard to the waters of the South China Sea, following World War II the coastal States resumed their normal navigational, fishing and other commercial activities. Vessels from the Philippines fished in the Sea, primarily within 200 M of the main Philippine islands, including at Scarborough Shoal and in the Spratlys. Fishing vessels from Vietnam (both before and after independence from France) concentrated their efforts off the Vietnamese coast and in the Paracel Islands,[152] as well as the Spratlys.[153] Vessels from Malaysia (before and after independence from the United Kingdom) also fished in the Spratlys.[154] China, too, resumed its navigational and fishing activities in areas of the South China Sea, both inshore and on the high seas.

2.41 By the 1970s, in addition to fishing, the coastal States had begun to encourage offshore oil and gas development in the seabed of the South China Sea, within 200 M of their coasts.[155] As discussed in Chapter 4, after 2009, China began to offer foreign participation in

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[148] *See* Z. Gao and B.B. Jia, "The Nine-Dash Line in the South China Sea: History, Status, and Implications", *American Journal of International Law*, Vol. 107, No. 1 (2013), p. 102. MP, Vol. X, Annex 307.

[149] *See id.*, pp. 102-105.

[150] Hong Thao Nguyen, "Vietnam's Position on the Sovereignty over the Paracels & the Spratlys: Its Maritime Claims", *Journal of East Asia & International Law*, Vol. 5, No. 1 (2012), pp. 188-189. MP, Vol. IX, Annex 301.

[151] A. Salleh, et. al., "Malaysia's policy towards its 1963-2008 territorial disputes", *Journal of Law and Conflict Resolution*, Vol. 1, No. 5 (2009), p. 112. MP, Vol. IX, Annex 282.

[152] *See* Ha Anh Tuan, "The Tragedy of Vietnamese Fishermen: The Forgotten Faces of Territorial Disputes in the South China Sea", *Asia Journal of Global Studies*, Vol. 5, No. 2 (2012-2013), pp. 100-101. MP, Vol. IX, Annex 305.

[153] *See* Nguyen Dang Thang, "Fisheries Co-operation in the South China Sea and the (Ir)relevance of the Sovereignty Question", *Asian Journal of International Law*, Vol. 2, No. 1 (2011), p. 63. MP, Vol. IX, Annex 299.

[154] *See id.*

[155] *See, e.g.*, Simon Hall, "Vietnam to Push Ahead With Offshore Exploration", *Wall Street Journal* (4 Apr. 2013). MP, Vol. X, Annex 329; Petronas, *Media Release: Petronas Awards Two Deepwater Blocks* (17 Jan.

designated oil blocks located within 200 M of Vietnam's coast and more than 200 M from any Chinese coast, on the ground that it alone had sovereign rights to the resources, living as well as non-living, within its nine-dash line. China also objected to all oil and gas exploration, and sought to control navigation and fishing, by other coastal States, including the Philippines, within the dashed line. The origin and history of the dispute that this policy engendered between China and the Philippines, and which are the subjects of this arbitration, are discussed in Chapter 3.

2.42 The point of departure for that discussion, as the historical record demonstrates, is that, despite its international name, the South China Sea has never been, in practice, a "Chinese" sea. To be sure, China, as a coastal State with a long coastline and ancient maritime history, has had an important presence and interest in these waters, but only on an equal footing with the other coastal States, or their colonial or pre-colonial predecessors, including the Philippines, Vietnam, Malaysia and Indonesia. Because of the rich and longstanding diversity of the South China Sea's users – for navigation, fishing, trade, exploration, surveying and charting, amongst other activities – neither China nor any other coastal State can justifiably maintain that history accords it a predominant role or rights superior to those of any of the other coastal States.

2013). MP, Vol. X, Annex 338; "PH to offer oil contracts despite China warnings", *ABS-CBN News* (15 July 2012). MP, Vol. X, Annex 319.

CHAPTER 3

HISTORY OF THE DISPUTES

3.1 This Chapter sets forth the history of the maritime disputes between the Parties. It is divided into five sections. Sections I and II describe the maritime legislation and claims of the Philippines and China, respectively. Section III explains how these claims gave rise to disputes between the Parties, and sets forth the Parties' efforts to resolve their disputes bilaterally. Section IV describes the Parties' efforts, pending resolution of their disputes, to manage those disputes via multilateral procedures under the auspices of ASEAN. Section V then discusses the Philippines' resort to third-party adjudication to settle its disputes with China, after unsuccessful bilateral and multilateral efforts.

I. THE PHILIPPINES' MARITIME LEGISLATION AND CLAIMS

3.2 The Philippines made its first continental shelf claim in 1949, three years after gaining independence from the United States. Republic Act No. 387 established that:

> All natural deposits or occurrences of petroleum or natural gas in public and/or private lands in the Philippines, whether found in, on or under the surface of dry lands, creeks, rivers, lakes, or other submerged lands within the territorial waters or on the continental shelf, or its analogue in an archipelago, seaward from the shores of the Philippines which are not within the territories of other countries, belong to the State, inalienably and imprescriptibly.[156]

3.3 In 1961, the Philippines enacted a law that claimed a territorial sea and defined its baselines. Pursuant to Republic Act No. 3046, the Philippines claimed as territorial sea "all the waters beyond the outermost islands of the archipelago but within the limits of the boundaries" set forth in the 1898 Treaty of Paris between the United States and Spain, the

[156] Republic of the Philippines, *Republic Act No. 387, An Act to Promote the Exploration, Development, Exploitation, and Utilization of the Petroleum Resources of the Philippines; to Encourage the Conservation of such Petroleum Resources; to Authorize the Secretary of Agriculture and Natural Resources to Create an Administration Unit and a Technical Board in the Bureau of Mines; to Appropriate Funds Therefor; and for Other Purposes* (18 June 1949), Art. 3. MP, Vol. III, Annex 7.

1900 Treaty of Washington between the United States and Spain, and the 1930 Treaty between the United States and the United Kingdom.[157]

3.4 Republic Act. No. 3046 also drew straight baselines joining the outermost points of the archipelago, and defined all waters between the island shorelines up to and within the baselines as internal waters. This law was later amended by Republic Act No. 5446 of 1968, which corrected typographical errors made in defining the baselines.[158] A map showing these baselines is provided as **Figure 3.1** (in Volume II only).

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[157] Republic of the Philippines, *Republic Act No. 3046, An Act to Define the Baselines of the Territorial Sea of the Philippines* (17 June 1961). MP, Vol. III, Annex 9. Article III of the Treaty of Paris, ceding the Philippines from Spain to the United States defined the Philippines' territorial boundaries as follows:

> A line running from west to east along or near the twentieth parallel of north latitude, and through the middle of the navigable channel of Bachi, from the one hundred and eighteenth (118th) to the one hundred and twenty-seventh (127th) degree meridian of longitude east of Greenwich, thence along the one hundred and twenty seventh (127th) degree meridian of longitude east of Greenwich to the parallel of four degrees and forty five minutes (4°45') north latitude, thence along the parallel of four degrees and forty five minutes (4°45') north latitude to its intersection with the meridian of longitude one hundred and nineteen degrees and thirty five minutes (119°35') east of Greenwich, thence along the meridian of longitude one hundred and nineteen degrees and thirty five minutes (119°35') east of Greenwich to the parallel of latitude seven degrees and forty minutes (7°40') north, thence along the parallel of latitude of seven degrees and forty minutes (7°40') north to its intersection with the one hundred and sixteenth (116th) degree meridian of longitude east of Greenwich, thence by a direct line to the intersection of the tenth (10th) degree parallel of north latitude with the one hundred and eighteenth (118th) degree meridian of longitude east of Greenwich, and thence along the one hundred and eighteenth (118th) degree meridian of longitude east of Greenwich to the point of beginning.

Treaty of Peace Between the United States and the Kingdom of Spain ("Treaty of Paris") (10 Dec. 1898), entered into force 11 Apr. 1899, Art. III. MP, Vol. XI, Annex LA-69. Two years later, Spain and the United States concluded the Treaty of Washington, which modified the boundaries of the Philippines that had been established by the Treaty of Paris:

> Spain relinquishes to the United States all title and claim of title, which she may have had at the time of the conclusion of the Treaty of Peace of Paris, to any and all islands belonging to the Philippine Archipelago, lying outside the lines described in Article III of that Treaty and particularly to the islands of Cagayan Sulú and Sibutú and their dependencies, and agrees that all such islands shall be comprehended in the cession of the Archipelago as fully as if they had been expressly included within those lines.

Treaty Between the United States of America and the Kingdom of Spain for the Cession to the United States of Any and All Islands of the Philippine Archipelago Lying Outside of the Lines Described in Article III of the Treaty of Peace of December 10, 1898 ("Treaty of Washington") (7 Nov. 1900), Sole Art. MP, Vol. XI, Annex LA-70. The Philippines' territorial boundaries were further clarified in the Treaty of 2 January 1930 between the United States and the United Kingdom, which set out the boundary between the Philippine archipelago and the State of North Borneo (then a British protectorate). Convention Between the United States and Great Britain, Boundaries: Philippines and North Borneo (2 Jan. 1930), entered into force 13 December 1932. MP, Vol. XI, Annex LA-71.

[158] Republic of the Philippines, *Republic Act No. 5446, An Act to Amend Section One of Republic Act Numbered Thirty Hundred and Forty-Six, Entitled "An Act to Define the Baselines of the Territorial Sea of the Philippines"* (18 Sept. 1968). MP, Vol. III, Annex 11.

3.5 In 1968, by Presidential Proclamation No. 370, the Philippines formally declared its jurisdiction over its continental shelf.[159] This stated that:

> all the mineral and other natural resources in the sea bed and subsoil of the continental shelf adjacent to the Philippines, but outside the area of its territorial sea to where the depth of the superjacent waters admits of the exploitation of such resources, including living organisms belonging to sedentary species, appertain to the Philippines and are subject to its exclusive jurisdiction and control for purposes of exploration and exploitation. In any case where the continental shelf is shared with an adjacent state, the boundary shall be determined by the Philippines and that state in accordance with legal and equitable principles. The character of the waters above these submarine areas as high seas and that of the airspace above those waters, is not affected by this proclamation.[160]

3.6 Five years later, the Philippines described its jurisdiction and rights over maritime areas in its 1973 Constitution.[161] The First Article of the Constitution provided that:

> The national territory comprises the Philippine archipelago, with all the islands and waters embraced therein, and all the other territories belonging to the Philippines by historic or legal title, including the territorial sea, the air space, the subsoil, the sea-bed, the insular shelves, and the submarine areas over which the Philippines has sovereignty or jurisdiction. The waters around, between, and connecting the islands of the archipelago, irrespective of their breadth and dimensions, form part of the internal waters of the Philippines.[162]

3.7 In 1978, the Philippines claimed a 200 M EEZ, through Presidential Decree No. 1599.[163] A map showing this claim is provided as **Figure 3.2** (in Volume II only). The rights, jurisdiction and duties claimed by the Philippines in its EEZ conformed to those provided in the negotiating text that was still being considered at the Third U.N. Conference on the Law of the Sea.[164]

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[159] Republic of the Philippines, *Presidential Proclamation No. 370, Declaring as Subject to the Jurisdiction and Control of the Republic of the Philippines all Mineral and other Natural Resources in the Continental Shelf* (20 Mar. 1968). MP, Vol. III, Annex 10.

[160] *Id*.

[161] Republic of the Philippines, *Constitution of the Republic of the Philippines* (17 Jan. 1973). MP, Vol. III, Annex 12.

[162] *Id.*, Art. 1, Section 1.

[163] Republic of the Philippines, *Presidential Decree No. 1599, Establishing an Exclusive Economic Zone and for Other Purposes* (11 June 1978). MP, Vol. III, Annex 13.

[164] *Id.*, Section 2, claiming the following rights:

3.8 The Philippines signed UNCLOS the day it was opened for signature (10 December 1982) and was one of the first States to submit its instrument of ratification (8 May 1984). Upon signing the Convention, the Philippines included a declaration that stated, *inter alia*, that its signature "shall not in any manner impair or prejudice the sovereign rights of the Republic of the Philippines under and arising from the Constitution of the Philippines", nor "affect the sovereign rights of the Republic of the Philippines as successor of the United States of America, under and arising out of the Treaty of Paris between Spain and the United States of America of 10 December 1898, and the Treaty of Washington between the United States of America and Great Britain of 2 January 1930".[165]

3.9 Several countries protested the Philippines' declaration on the basis that it constituted a reservation prohibited under Article 309 of the Convention. Australia, for example, complained that the Philippines' declaration violated UNCLOS by according its domestic legislation and bilateral treaties primacy over its obligations under the Convention.[166] In response, the Philippines informed Australia and the States Parties to the Convention that it intended "to harmonize its domestic legislation with the provisions of the Convention" and would "abide by the provisions of the said Convention".[167]

> A. Sovereign rights for the purpose of exploration and exploitation, conservation and management of the natural resources whether living or non-living, both renewable and non-renewable, of the seabed, including the subsoil and the superjacent waters, and with regard to other activities for the economic exploitation and exploration of the resources of the zone, such as the production of energy from the water, currents and winds;
>
> B. Exclusive rights and jurisdiction with respect to the establishment and utilization of artificial islands, off-shore terminals, installations and structures, the preservation of the marine environment, including the prevention and control of pollution, and scientific research;
>
> C. Such other rights as are recognized by international law or State practice.

Id.

[165] Republic of the Philippines, "Philippines' Understanding Made Upon Signature" (10 Dec. 1982), *Multilateral Treaties Deposited with the Secretary-General*, Vol. 3, Part 1, Chapters 12-29, and Part 2, U.N. Doc. ST/LEG/SER.E/26 (1 Apr. 2009), p. 464, paras. 1-2. MP, Vol. XI, Annex LA-67.

[166] Australia's Objection to the Declaration of the Republic of the Philippines upon Signature of the United Nations Convention on the Law of the Sea (3 Aug. 1988), *Multilateral Treaties Deposited with the Secretary-General*, Vol. 3, Part 1, Chapters 12-29, and Part 2, U.N. Doc. ST/LEG/SER.E/26 (1 Apr. 2009), p. 472. MP, Vol. XI, Annex LA-67.

[167] Declaration of the Republic of the Philippines in response to Australia's Objection to the Declaration of the Philippines upon Signature of the United Nations Convention on the Law of the Sea (26 Oct. 1988), *Multilateral Treaties Deposited with the Secretary-General*, Vol. 3, Part 1, Chapters 12-29, and Part 2, U.N. Doc. ST/LEG/SER.E/26 (1 Apr. 2009), p. 484. MP, Vol. XI, Annex LA-67.

3.10 Various domestic constraints delayed the enactment of a law bringing Philippine national legislation into conformity with UNCLOS until March 2009.[168] At that time, pursuant to Republic Act No. 9522, the Philippines began to harmonize its domestic law with UNCLOS towards the full abandonment of its excessive maritime claim (territorial sea and internal water), beginning with the conversion of its previous straight baselines into archipelagic baselines in conformity with Articles 46 and 47 of the Convention.[169] In addition, the legislation provided that the maritime zones of the Kalayaan Island Group and Scarborough Shoal would be "consistent with Article 121 of the United Nations Convention on the Law of the Sea".[170] A map identifying the Philippines' maritime claims following this legislation is provided as **Figure 3.3** (in Volume II only).

3.11 Shortly after its enactment, Republic Act No. 9522 was challenged before the Philippine Supreme Court on the ground that the law unconstitutionally changed the maritime jurisdiction of the Philippines as originally established under the Treaty of Paris and preserved in the Philippines' Constitution.[171] In a decision handed down in 2011, the Philippine Supreme Court confirmed the constitutionality of Republic Act. No. 9522.[172] It held that the Philippines had no alternative but to adopt the maritime claims reflected in the Act because this was "in conformity with UNCLOS III".[173] One of the members of the Court, Justice Antonio Carpio, later explained:

> Every state that ratified UNCLOS bound itself to fulfill its treaty obligations in good faith, and thus align its domestic laws with UNCLOS. In adopting its 2009 Baselines Law, the Philippines scrupulously followed UNCLOS. As *ponente* of the Supreme Court decision that unanimously affirmed the constitutionality of the Baselines Law, I stated that the strict observance by the Philippines of UNCLOS in enacting the Baselines Law

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[168] Congressional attempts to reform Philippine domestic laws were made as early as 1987. See, for example, Senate Bill No. 206 and House Bill No. 16085, both presented that year. Republic of the Philippines, Senate, *S. No. 206, An Act to Define the Archipelagic Baselines of the Philippines* (1987). MP, Vol. III, Annex 15; Republic of the Philippines, House of Representatives, *House Bill No. 16085, An Act to Define the Archipelagic Baselines of the Philippines* (1987). MP, Vol. III, Annex 14.

[169] Republic of the Philippines, *Republic Act No. 9522, An Act to Amend Certain Provisions of Republic Act No. 3046, as amended by Republic Act No. 5446, to Define the Archipelagic Baseline of the Philippines and for Other Purposes* (10 Mar. 2009). MP, Vol. III, Annex 60.

[170] *Id.*, Section 2.

[171] *Magallona v. Ermita*, Supreme Court of the Philippines, Judgment, G.R. No. 187167 (16 July 2011). MP, Vol. IV, Annex 74.

[172] *Id.*

[173] *Id.*

> 'manifests the Philippine State's responsible observance of its *pacta sunt servanda* obligation under UNCLOS'.[174]

3.12 Thus, since 2009, the Philippines' archipelagic baselines, including its 200 M EEZ measured from those baselines, have conformed fully with UNCLOS. On 8 April 2009, the Philippines made a partial submission to the Commission on the Limits of the Continental Shelf ("CLCS") pursuant to UNCLOS Article 76(8). That submission was in respect of the Benham Rise Region to the east of Luzon. On 12 April 2012, the CLCS indicated its agreement and recommended that "the Philippines proceed to establish the outer limits of the continental shelf beyond 200 M accordingly".[175] The Philippines has yet to define the limits of its continental shelf to the west of the archipelago.

II. CHINA'S MARITIME LEGISLATION AND CLAIMS

3.13 Following the Geneva Conference on the Law of the Sea in September 1958, China issued a declaration claiming a 12 M territorial sea measured from straight baselines in regard to its mainland, coastal islands (including Hainan) and:

> Taiwan and its surrounding islands, the Penghu Islands, the Dongsha [Pratas] Islands, and Xisha [Paracel] Islands, the Zhongsha Islands [Macclesfield Bank], the Nansha [Spratly] Islands, and all other islands belonging to China which are separated from the mainland. . . by the high seas.[176]

3.14 China had made no formal maritime claims before its 1958 declaration.[177] Official Chinese maps published between 1948 and 1958 included a dashed, u-shaped line encompassing most of the South China Sea. When it was adopted, and for many years

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[174] Antonio Carpio, "The Rule of Law in the West Philippine Dispute", Speech, Graduate School of Law of the Pamantasan ng Lungsod ng Maynila (18 May 2013) pp. 4-5. MP, Vol. X, Annex 339.

[175] United Nations, Commission on the Limits of the Continental Shelf, *Recommendations of the Commission on the Limits of the Continental Shelf in Regard to the Submission Made by the Philippines in Respect of the Benham Rise Region on 8 April 2009*, U.N. Doc. CLCS/74 (30 Apr. 2012), para. 54. MP, Vol. VII, Annex 226. The Philippines made some minor technical refinements during the submission process.

[176] People's Republic of China, *Declaration of the Government of the People's Republic of China on China's Territorial Sea* (4 Sept. 1958), in *Collection of the Sea Laws and Regulations of the People's Republic of China* (3rd ed. 2001), Arts. 1, 2. MP, Vol. V, Annex 103.

[177] Jeanette Greenfield, *China's Practice in the Law of the Sea* (1992), p. 16. MP, Vol. VII, Annex 252; Michael Yahuda, "China's New Assertiveness in the South China Sea", *Journal of Contemporary China*, Vol. 22, No. 81 (1 May 2013), p. 450. MP, Vol. X, Annex 309. The 1958 Declaration is the earliest entry in the Collection of the Sea Laws and Regulations of the People's Republic of China. People's Republic of China, *Declaration of the Government of the People's Republic of China on China's Territorial Sea* (4 Sept. 1958), in *Collection of the Sea Laws and Regulations of the People's Republic of China* (3rd ed. 2001), pp. 5-10. MP, Vol. V, Annex 103.

subsequently, this line was understood as indicating the limits of a claim to sovereignty over the insular features within that area, not a claim to rights over all the waters within the line.[178] Indeed, China's 1958 territorial sea declaration stated expressly that "high seas" separated the islands it claimed in the South China Sea from its mainland and coastal islands.[179]

3.15 China reaffirmed the 1958 territorial sea claim in 1992, by the enactment of a law on the Territorial Sea and Contiguous Zone.[180] The 1992 law defined China's "territorial land" as "the mainland and its offshore islands, Taiwan and the various affiliated islands including Diaoyu Island, Penghu Islands, Dongsha Islands, Xisha Islands, Nansha (Spratly) Islands and other islands that belong to the People's Republic of China".[181] It proclaimed a 12 M territorial sea and a 12 M contiguous zone. At the time China claimed no more extensive maritime entitlements in relation to these features.

3.16 On 7 June 1996, China ratified UNCLOS. On that occasion, it issued a declaration claiming "sovereign rights and jurisdiction over an exclusive economic zone of 200 nautical miles and the continental shelf".[182]

3.17 In 1998, China enacted a law affirming its claim to an EEZ and continental shelf.[183] The Law on the Exclusive Economic Zone and the Continental Shelf proclaimed that China's EEZ "is an area beyond and adjacent to the territorial sea of the People's Republic of China

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[178] *See e.g.* Zhiguo Gao, "The South China Sea: From Conflict to Cooperation?" *Ocean Development and International Law*, Vol. 25, No. 3 (1994), pp. 345-359. MP, Vol. VII, Annex 255. *See also infra* Chapter 4, Section I.B.

[179] Declaration of the Government of the People's Republic of China on China's Territorial Sea (4 September 1958), Art. 1 ("The breadth of the territorial sea of the People's Republic of China shall be twelve nautical miles. This provision applies to all territories of the People's Republic of China, including the Chinese mainland and its coastal islands, as well as Taiwan and its surrounding islands, the Penghu Islands . . . and all other islands belonging to China which are separated from the mainland and its coastal islands by the *high seas*". (emphasis added)).

[180] People's Republic of China, *Law on the Territorial Sea and the Contiguous Zone* (25 Feb. 1992), Arts. 2-4. MP, Vol. V, Annex 105.

[181] *Id.*, Art. 2.

[182] People's Republic of China, "Chinese Declaration Upon Ratification" (7 June 1996), *Multilateral Treaties Deposited with the Secretary-General*, Vol. 3, Part 1, Chapters 12-29, and Part 2, U.N. Doc. ST/LEG/SER.E/26 (1 Apr. 2009), p. 450, para. 1. MP, Vol. XI, Annex LA-67.

[183] People's Republic of China, *Exclusive Economic Zone and Continental Shelf Act* (26 June 1998). MP, Vol. V, Annex 107.

extending to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured".[184] The 1998 law defined China's continental shelf as:

> the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.[185]

3.18 The 1998 Law also provided, in Article 14, that: "The provisions of this Act shall not affect *the historical rights* of the People's Republic of China".[186] The law offered no explanation as to the nature of the "historical rights" China claimed, or any specific area of land or sea where they were claimed.

3.19 On 7 May 2009, China submitted two *Notes Verbales* to the Secretary General of the United Nations. One was in response to the joint submission of Malaysia and Vietnam to the CLCS, the other to a separate submission of Vietnam, in which those States provided information on their continental shelf beyond 200 M. China's substantively identical *Notes Verbales* included a map with a dashed line not dissimilar to the one that had appeared on its official maps since 1948, enclosing most of the South China Sea. They also declared that China has "indisputable sovereignty over the islands of 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*)".[187] The only difference between the 2009 map and earlier versions was that it had nine dashes instead of eleven; two dashes in the Gulf of Tonkin were eliminated, while the other dashes remained the same. The nine-dash line map attached to China's *Notes Verbales* is reproduced in Chapter I as Figure 1.1 (following page 4).

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[184] *Id.*, Art. 2.

[185] *Id.*

[186] *Id.*, Art. 14 (emphasis added).

[187] *Note Verbale* from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/17/2009 (7 May 2009). MP, Vol. VI, Annex 191; *Note Verbale* from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/18/2009 (7 May 2009). MP, Vol. VI, Annex 192.

3.20 Since 2009, China has actively sought to enforce the "sovereign rights and jurisdiction" it newly claimed over the waters enclosed by the nine-dash line.[188] In particular, it has sought to assert these alleged rights with regard to fishing and petroleum development within the nine-dash line, including in areas within 200 M of the Philippines' coast.[189]

3.21 The extent to which China's nine-dash line encroaches into the EEZ and continental shelf of the Philippines is shown in **Figure 3.4** (following page 46).

III. THE PARTIES' DISPUTES AND THEIR EFFORTS TO RESOLVE THEM BILATERALLY

3.22 The maritime disputes between the Philippines and China have developed over two stages. In an initial phase, from early 1995 to early 2009, the disputes focused on the differences between the Parties regarding the nature and maritime entitlements under UNCLOS of a number of features in the South China Sea, including Mischief Reef and Scarborough Shoal. They also involved the Parties' fishing rights in and around those areas. This period was characterized by the Parties' efforts to resolve their maritime disputes by way of bilateral exchanges.

3.23 The disputes entered a second stage after May 2009, when China began asserting its maritime claims in the South China Sea on the basis of its alleged "historical rights" to the waters, seabed and subsoil within the nine-dash line, which the Philippines (among other States) protested as contrary to UNCLOS. Since then, China has sought to prevent the Philippines from conducting certain activities within the nine-dash line, including within the Philippines' EEZ and continental shelf. The Parties' differences regarding their rights and obligations under UNCLOS have become intractable.

A. Initial Phase of the Disputes: Status and Entitlements of Features in the South China Sea

3.24 The Philippines and China have long claimed some of the same maritime features in the South China Sea. There exist at least two distinguishable disputes in regard to these

[188] *Note Verbale* from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/17/2009 (7 May 2009). MP, Vol. VI, Annex 191; *Note Verbale* from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/18/2009 (7 May 2009). MP, Vol. VI, Annex 192.

[189] *See infra* Chapter 6, Section I.

features. The first, which the Philippines has *not* brought before this Tribunal, is a dispute over which State enjoys sovereignty over insular features. Specifically, both the Philippines and China claim sovereignty over Scarborough Shoal (in the Northern Sector) and a number of the same insular features that form the Spratly Islands (in the Southern Sector).

3.25 The second dispute, which the Philippines *has* brought before the Tribunal, concerns the nature and maritime entitlements of Scarborough Shoal and eight of the disputed Spratly features. Specifically, the Philippines asks the Tribunal to decide whether (i) these features are "islands" under Article 121(1) of the Convention; if so (ii) whether they are "rocks" under Article 121(3); and (iii) what maritime entitlements, if any, they are entitled to generate in accordance with the Convention.

3.26 The Philippines and China expressly recognized the existence of their maritime dispute concerning the maritime entitlements of the features in the Spratly Islands as early as August 1995, in the aftermath of China's seizure of Mischief Reef. Mischief Reef is a circular, coral, low-tide elevation within the Spratlys, located approximately 126 M from the Philippine island of Palawan, and more than 600 M from the closest point on China's Hainan Island.[190] Other than Filipino fishermen who would periodically take temporary shelter on the reef, it had been unoccupied for as long as anyone can remember. The Philippines considers Mischief Reef to be a low-tide elevation that forms part of its EEZ and continental shelf. Nonetheless, in January 1995, China began building on it a number of simple structures on stilts, marked with the Chinese flag. China also sought to prevent Filipino fishermen from approaching the reef without its consent.[191]

3.27 During the first Philippines-China bilateral consultation on the South China Sea in August 1995, Assistant Foreign Minister Wang Yingfan of China informed the Undersecretary of Foreign Affairs of the Philippines, Rodolfo Severino, that the structures it had begun to build were merely facilities to shelter Chinese fishermen from the wind. He denied that China was constructing any other facilities on Mischief Reef: "It is nothing serious for the Chinese side to construct some windsheltering facilities for peaceful purposes.

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[190] *See infra* Chapter 5, Section III.A.

[191] Government of the Republic of the Philippines and Government of the People's Republic of China, *Agreed Minutes on the First Philippines-China Bilateral Consultations on the South China Sea Issue* (10 Aug. 1995), p. 1. MP, Vol. VI, Annex 180; Government of the Republic of the Philippines, *Transcript of Proceedings Republic of the Philippines-People's Republic of China Bilateral Talks* (10 Aug. 1995), p. 1. MP, Vol. VI, Annex 181.

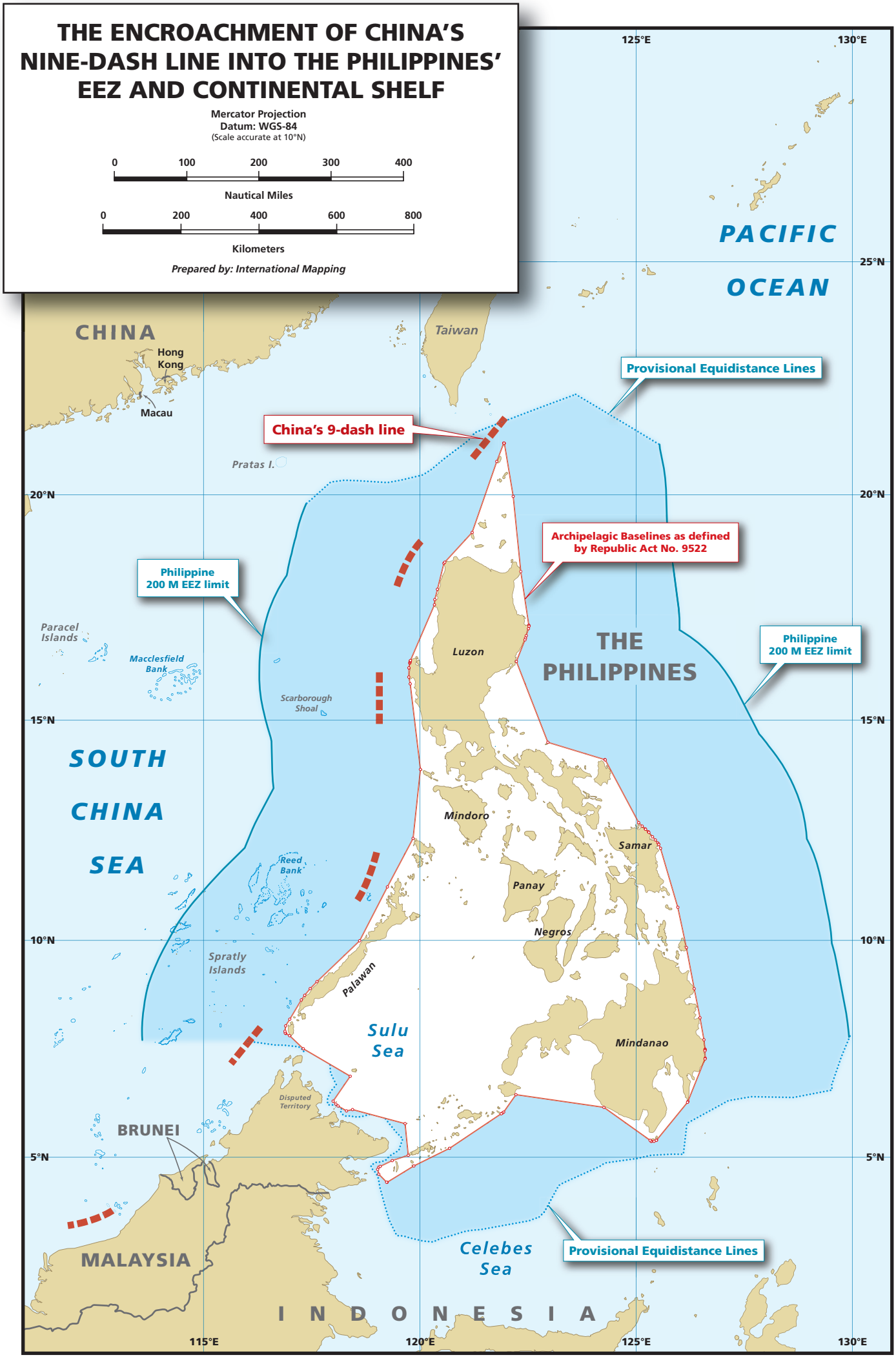
THE ENCROACHMENT OF CHINA'S NINE-DASH LINE INTO THE PHILIPPINES' EEZ AND CONTINENTAL SHELF
Mercator Projection
Datum: WGS-84
(Scale accurate at 10°N)
0 100 200 300 400
Nautical Miles
0 200 400 600 800
Kilometers
Prepared by: International Mapping
125°E
130°E
PACIFIC OCEAN
25°N
CHINA
Hong Kong
Macau
Taiwan
Provisional Equidistance Lines
China's 9-dash line
Pratas I.
20°N
Archipelagic Baselines as defined by Republic Act No. 9522
Philippine 200 M EEZ limit
Paracel Islands
Macclesfield Bank
Luzon
THE PHILIPPINES
Philippine 200 M EEZ limit
Scarborough Shoal
15°N
SOUTH CHINA SEA
Mindoro
Samar
Reed Bank
Panay
Negros
10°N
Spratly Islands
Palawan
Sulu Sea
Mindanao
Disputed Territory
BRUNEI
5°N
Celebes Sea
Provisional Equidistance Lines
MALAYSIA
INDONESIA
115°E
120°E
125°E
130°E

Figure 3.4

Some people just exaggerated this and they said that the Chinese side is constructing a military facility. This does not square with the fact [sic]".[192] Despite these assurances, China gradually transformed the simple structures on Mischief Reef into permanent installations, and instructed its law enforcement vessels to patrol the reef.[193]

3.28 Vice Minister Wang and Undersecretary Severino agreed that although the dispute over Mischief Reef and other Spratly features was partially a territorial one, it also involved differences regarding the extent of maritime jurisdiction that these features could generate, and which could be resolved through UNCLOS. Specifically, Vice Minister Wang stated:

> The dispute between China and the Philippines in the Nansha [Spratly] is basically a territorial dispute although it includes to some extent the maritime jurisdiction issue. UNCLOS is mainly a convention concerning the delimitation of maritime jurisdiction areas.
>
> So I think that the legal experts from both of our countries share the view that we cannot rely solely on UNCLOS to fundamentally settle the dispute between us. However, s*ome issues in our dispute can be settled in accordance with UNCLOS.*[194]

3.29 In response, Undersecretary Severino observed that it would be helpful for China to clarify its views on the maritime regimes that it believed the disputed features within the South China Sea generated:

> We are interested in the relationship of UNCLOS with the Chinese claim because we would also like to know the kinds of legal regimes that you consider to be applicable to the SCS islands. When you talk, for example of adjacent waters, it would be helpful to us to know the extent of this adjacent waters and the kinds of regimes you consider to prevail in this adjacent waters without prejudice, of course, to the conflicting claims.[195]

3.30 Vice Minister Wang responded by indicating that China was not yet prepared to declare its position in this regard:

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[192] Government of the Republic of the Philippines and Government of the People's Republic of China, *Agreed Minutes on the First Philippines-China Bilateral Consultations on the South China Sea Issue* (10 Aug. 1995), p. 1. MP, Vol. VI, Annex 180; Government of the Republic of the Philippines, *Transcript of Proceedings Republic of the Philippines-People's Republic of China Bilateral Talks* (10 Aug. 1995), p. 1. MP, Vol. VI, Annex 181.

[193] *See infra* Chapter 5, Section III.A.1.

[194] Government of the Republic of the Philippines, *Transcript of Proceedings Republic of the Philippines-People's Republic of China Bilateral Talks* (10 Aug. 1995), p. 3. MP, Vol. VI, Annex 181 (emphasis added).

[195] *Id.*

> I also agree that at some point, the legal experts of our two countries should have discussions from the legal perspective as what you have said just now. On the side of China, we would have to continue to study and do some work in coordination. You may also have known that at present, China has not announced the baseline of its territorial sea, or announced its 200 NM of EEZ or continental shelf. The extent of these we are still considering.[196]

3.31 The Parties addressed the maritime entitlements of the South China Sea features in relation to the 200 M EEZ declared by the Philippines at numerous subsequent bilateral meetings. In May 1997, for example, Undersecretary of Foreign Affairs Severino and China's Vice Minister for Foreign Affairs, Tang Jiaxuan, agreed to "approach the disputes on the basis of international law, including the United Nations Convention on the Law of the Sea, particularly its provisions on the maritime regimes like the exclusive economic zone".[197]

3.32 On that occasion, the Parties also specifically addressed their dispute regarding the status of Scarborough Shoal, located 118 M from the coast of Luzon and 325 M from the closest other island claimed by China, (Woody Island in the Paracels).[198] An information bulletin published by the Philippines' Department of Foreign Affairs on 28 May 1997 summarized the views that Undersecretary Severino and Vice Minister Wang exchanged:

> The talks covered the dispute over Scarborough Shoal . . . . Severino asserted that Scarborough is a mere shoal that lies within the Philippines' 200-nautical mile exclusive economic zone. Shoals, he pointed out, cannot be claimed as territory under international law. Even if Scarborough could be claimed, he said, the Philippines would have the right to it, since Manila has exercised jurisdiction over the shoal, enforcing Philippine law against smuggling and illegal fishing, constructing a lighthouse many years ago, and using the shoal as target practice for air force pilots.
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> On the other hand, China claims Scarborough Shoal on the ground that parts of it are above water, and therefore can be claimed as islands, it is part of Macclesfield Bank, which it claims as Chinese territory, Beijing has re-

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[196] *Id.*, p. 4. China provided the baselines for its territorial sea adjacent to the mainland and the Paracel Islands in May 1996. It has not provided baselines for the Spratly Islands or Scarborough Shoal. The Declaration ends with the proviso that China "will announce the remaining baselines of the territorial sea of the People's Republic of China at another time". United Nations, Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea, "China: Submission in Compliance with the Deposit Obligations Pursuant to the United Nations Convention on the Law of the Sea (UNCLOS)", *Maritime Space: Maritime Zones and Maritime Delimitation Website* (last updated 24 Dec. 2012). MP, Vol. XI, Annex LA-84; *Memorandum* from the Ambassador of the Republic of the Philippines in Beijing, Romualdo A. Ong, to Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-246-96 (16 May 1996). MP, Vol. III, Annex 24.

[197] Department of Foreign Affairs of the Republic of the Philippines, *Press Release No. 69: RP, PRC To Convene Working Group for Talks on South China Sea* (28 May 1997), p. 2. MP, Vol. III, Annex 26.

[198] *See infra* Chapter 5, Section II.A.

> named it three times, and foreign amateur radio lobbyists have asked China for permission to use the shoal.[199]

3.33 The Parties proceeded to address the nature and maritime entitlements of the South China Sea features in bilateral meetings in July 1998, and again, committed to resolving them in accordance with UNCLOS. A joint communiqué issued by the Philippines' Secretary of Foreign Affairs, Domingo Siazon, and China's Foreign Minister, Tang Jiaxuan, following the bilateral consultation stated: "The two sides exchanged views on the question of the South China Sea and reaffirmed their commitment that the relevant disputes shall be settled peacefully in accordance with the established principles of international law, including the United Nations Convention on the Law of the Sea".[200] The record of proceedings of the bilateral consultation provides further details on the views expressed by the Parties. Secretary Siazon drew attention to the two aspects of the dispute and their peaceful resolution:

> On the outstanding issues between China and the Philippines particularly on the South China Sea, on overlapping claims of sovereignty over islands, and overlapping claims of maritime jurisdiction which involve Exclusive Economic Zones, and here I wish to refer, in particular, to Mischief Reef or what you call Meijijao and as Minister Tang said, we hope that this will be resolved peacefully and that we may be able to find solutions to these outstanding issues, taking into account, of course, the importance of maintaining very good relations between our two countries.[201]

3.34 Secretary Siazon also raised the Philippines' concern that the 1998 Law on the Exclusive Economic Zone and the Continental Shelf, which China had promulgated shortly before the bilateral meeting,[202] would exacerbate the Parties' maritime dispute.[203] In response, Chinese Foreign Minister Tang again expressed China's commitment to UNCLOS and its belief that the maritime dispute between the Parties could be resolved in accordance with the Convention:

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[199] Department of Foreign Affairs of the Republic of the Philippines, *Press Release No. 69: RP, PRC To Convene Working Group for Talks on South China Sea* (28 May 1997), p. 2. MP, Vol. III, Annex 26.

[200] Government of the Republic of the Philippines and Government of the People's Republic of China, *Joint Press Communiqué: Philippines-China Foreign Ministry Consultations* (29-31 July 1998), para. 4. MP, Vol. VI, Annex 183.

[201] Department of Foreign Affairs of the Republic of the Philippines, *Record of Proceedings: 10th Philippines-China Foreign Ministry Consultations* (30 July 1998). MP, Vol. VI, Annex 184.

[202] People's Republic of China, *Exclusive Economic Zone and Continental Shelf Act* (26 June 1998), Art. 2. MP, Vol. V, Annex 107.

[203] Department of Foreign Affairs of the Republic of the Philippines, *Record of Proceedings: 10th Philippines-China Foreign Ministry Consultations* (30 July 1998). MP, Vol. VI, Annex 184.

> And in our view, the law China has promulgated on the exclusive economic zones and continental shelves conforms to the provisions of the UN Convention on the Law of the Sea**,** particularly we refer to the principles concerning the delimitation of the exclusive economic zones and continental shelves that the Chinese Government is ready to follow the regulations in this regard and properly settle the issue concerning the overlapping claims of maritime jurisdiction between China and our neighboring countries through friendly negotiations and friendly talks.[204]

3.35 In 2004, President Gloria Macapagal-Arroyo and President Hu Jintao discussed the existence of the Parties' maritime disputes, and expressed hope to resolve them in accordance with UNCLOS:

> The two sides reaffirmed their commitment to the peace and stability in the South China Sea and their readiness to continue discussions to study cooperative activities like joint development pending the comprehensive and final settlement of territorial disputes and overlapping maritime claims in the area. They agreed to promote peaceful settlement of disputes in accordance with universally-recognized principles of international law, including the 1982 United Nations Convention on the Law of the Sea.[205]

3.36 Despite the Parties' numerous bilateral exchanges and efforts to reach agreement, their disputes over the South China Sea features and their maritime entitlements have never been resolved. In April 2011, China went so far as to assert that:

> under the relevant provisions of the 1982 United Nations Convention on the Law of the Sea, as well as the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone (1992) and the Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China (1998), *China's Nansha [Spratly] Islands are fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf*.[206]

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[204] *Id.*

[205] Government of the Republic of the Philippines and Government of the People's Republic of China, *Joint Press Statement on the State Visit of H.E. President Gloria Macapagal-Arroyo to the People's Republic of China, 1-3 Sept. 2004* (3 Sept. 2004), p. 4. MP, Vol. VI, Annex 188.

[206] *Note Verbale* from the Permanent Mission of the People's Republic of China to the Secretary-General of the United Nations, No. CML/8/2011 (14 Apr. 2011) (italics omitted) (emphasis added). MP, Vol. VI, Annex 201. China made this claim in the context of responding to the Philippines' *Note Verbale* of 5 April 2011 protesting the legality of China's nine-dash line. *See also Memorandum* from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-070-2014-S (7 Mar. 2014), para. 4. MP, Vol. IV, Annex 98 (reporting on a meeting between Minister Evangeline Jimenez-Ducrocq of the Philippines Embassy in Beijing and the Representative Xiao Jiangguo of the Department of Boundary and Ocean Affairs of the Chinese Ministry of Foreign Affairs in which Mr. Xiao stated: "we claim territorial sea, EEZ, and continental shelf from the Nansha Islands, and any overlapping claims we can engage in delimitation".).

3.37 The Philippines has informed China of its position that none of the Spratly features is capable of generating entitlement to an EEZ or continental shelf, and that most of them, like Mischief Reef, are at best low-tide elevations that generate no maritime zones at all.[207] The Philippines has also made clear its view that China is incorrect in its assertions that Scarborough Shoal is entitled to more than a 12 M territorial sea.[208]

3.38 In addition to their dispute concerning the nature and entitlements of the contested features within the South China Sea, the Philippines and China have long held differences of opinion as to their respective fishing rights there. While the Philippines asserts fishing rights and jurisdiction within its EEZ on the basis of UNCLOS, China has claimed, since 1992, the right to fish within the Philippines' EEZ based on traditional fishing practices of Chinese fishermen.[209]

3.39 The Parties addressed their fishing rights dispute in their first bilateral consultation on the South China Sea. Vice Minister Wang acknowledged the existence of a dispute between the Philippines' claims of sovereign rights in its EEZ and China's claim of traditional fishing rights. He stated:

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[207] *See e.g. Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 110885 (4 Apr. 2011). MP, Vol. VI, Annex 199 (stating that "even while the Republic of the Philippines has sovereignty and jurisdiction over the KIG, the Reed Bank where GSEC 101 is situated does not form part of the 'adjacent waters', specifically the 12 M territorial waters of any relevant geological feature in the KIG either under customary international law or the United Nations Convention on the Law of the Sea".); *Note Verbale* from the Department of Foreign Affairs of the Philippines to the Embassy of the People's Republic of China in Manila, No. 14-0711 (11 Mar. 2014). MP, Vol. VI, Annex 221 (in which the Philippines states that "the Philippines observes that there are no insular features claimed by China in the South China Sea capable of generating any potential entitlement in the area where Ayungin is located".).

[208] *See e.g.* Foreign Ministry of the People's Republic of China, *Chinese Foreign Ministry Statement Regarding Huangyandao* (22 May 1997). MP, Vol. V, Annex 106 (stating that the dispute between the Parties concerning Scarborough is one of "overlapping of EEZ's among concerned countries" and that the "scope of the EEZ's of the Philippines and China should be resolved through negotiations based on the principles and regulations of international laws".); Department of Foreign Affairs of the Republic of the Philippines, *Record of Proceedings: 10th Philippines-China Foreign Ministry Consultations* (30 July 1998). MP, Vol. VI, Annex 184 (noting that Chinese Foreign Minister Tang Jiaxuan informed Philippines Secretary of Foreign Affairs Domingo Siazon that "Huangyan Dao [Scarborough Shoal] is not a sand bank but rather an island".); Department of Foreign Affairs of the Republic of the Philippines, *Notes on the 18th Philippines-China Foreign Ministry Consultations* (19 Oct. 2012), para. 52. MP, Vol. IV, Annex 85 (noting that Philippines Undersecretary Basilio referred to Scarborough Shoal as "rocks" during his conversation with Vice Foreign Minister Fu Ying).

[209] *Memorandum* for the Assistant Secretary, Office of Asian and Pacific Affairs, Department of Foreign Affairs, Republic of the Philippines (23 Mar. 1992). MP, Vol. III, Annex 16 (noting that Mr. Lin Guozhang, First Secretary and Consul-General of the Chinese Embassy in Manila informed the Philippines' Office of Asian and Pacific Affairs that Chinese fishermen who were apprehended by the Philippine Armed Forces near Pagasa Island in the Spratlys were "carrying out their traditional . . . fishing activities".).

> I would like to say something about the fishing dispute among us. The Philippine side detained 62 Chinese fishermen and they are not yet released. And such things happened more than once in the past. The Philippines side says that the Chinese fishermen entered the 200 mile EEZ of the Philippines and we said that Chinese fishermen were conducting legal fishing activities in their traditional fishing ground. Obviously there is a dispute here among us and this should be settled properly.[210]

3.40 The Parties addressed their dispute concerning fishing rights, without resolving it, in the course of more than twenty bilateral meetings and communications.[211] This dispute

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[210] Government of the Republic of the Philippines, *Transcript of Proceedings Republic of the Philippines-People's Republic of China Bilateral Talks* (10 Aug. 1995), p. 7. MP, Vol. VI, Annex 181.

[211] *See e.g. Memorandum* for the Assistant Secretary, Office of Asian and Pacific Affairs, Department of Foreign Affairs, Republic of the Philippines (23 Mar. 1992). MP, Vol. III, Annex 16; *Summary of Proceedings: Philippine-China Bilateral Consultations* (20-22 Mar. 1995), paras. 33, 39, 43. MP, Vol. VI, Annex 177; Republic of the Philippines, Department of Foreign Affairs, *Record of Courtesy Call on Chinese Vice Premier and Foreign Minister Qian Qichen* (21 Mar. 1995). MP, Vol. VI, Annex 176; *Memorandum* from Erlinda F. Basilio, Acting Assistant Secretary, Office of Asian and Pacific Affairs, Department of Foreign Affairs, Republic of the Philippines, to the Secretary of Foreign Affairs of the Republic of the Philippines (29 Mar. 1995), para. 1.1. MP, Vol. III, Annex 19 (reporting on the meeting between the Deputy Chief of Mission of the Chinese Embassy and the Philippines' Acting Assistant Secretary, Office of Asian and Pacific Affairs); *Memorandum* from Lauro L. Baja, Jr., Assistant Secretary, Office of Asian and Pacific Affairs, Department of Foreign Affairs, Republic of the Philippines, to the Secretary of Foreign Affairs of the Republic of the Philippines (7 Apr. 1995). MP, Vol. III, Annex 20 (reporting on the meeting between the Chinese Embassy Charge d'Affaires and the Assistant Secretary, Office of Asian and Pacific Affairs); *Memorandum* from the Ambassador of the Republic of the Philippines in Beijing to the Undersecretary of Foreign Affairs of the Republic of the Philippines (10 Apr. 1995), pp. 2, 5. MP, Vol. III, Annex 21; *Memorandum* from the Secretary of Foreign Affairs of the Republic of the Philippines to the President of the Republic of the Philippines (31 July 1995), pp. 2, 3. MP, Vol. III, Annex 23 (reporting on the meeting between Chinese Vice-Premier and Foreign Minister and Philippines Secretary of Foreign Affairs); Department of Foreign Affairs of the Republic of the Philippines, *Transcript of Proceedings: RP-PRC Bilateral Talks* (9 Aug. 1995), pp. 2, 5, 6. MP, Vol. VI, Annex 179; Government of the Republic of the Philippines, *Transcript of Proceedings Republic of the Philippines-People's Republic of China Bilateral Talks* (10 Aug. 1995), pp. 2, 7, 9. MP, Vol. VI, Annex 181; *Note Verbale* from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. PG(98)-46 (16 Mar. 1998). MP, Vol. VI, Annex 182; *Memorandum* from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-85-98-S (4 Dec. 1998). MP, Vol. III, Annex 37 (reporting on the meeting between Chinese Ministry of Foreign Affairs Deputy Director General and Philippine Ambassador in Beijing); Department of Foreign Affairs of the Republic of the Philippines, *Record of Proceedings: 10th Philippines-China Foreign Ministry Consultations* (30 July 1998). MP, Vol. VI, Annex 184 (reporting on the meeting between the Philippines Foreign Affairs Secretary and the Chinese Foreign Minister); *Memorandum* from Undersecretary of Foreign Affairs to the Republic of the Philippines to the Secretary of Foreign Affairs of the Republic of the Philippines (27 Oct. 1999). MP, Vol. III, Annex 39 (reporting on a Foreign Ministry Consultations between the Philippines and China); *Memorandum* from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-24-2000-S (14 Mar. 2000), p. 1. MP, Vol. III, Annex 40 (reporting on a meeting between the Parties' Ambassadors); *Memorandum* from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-06-2001-S (13 Feb. 2001). MP, Vol. III, Annex 44 (reporting on a meeting between officials of the Philippines Embassy and the Chinese Ministry of Foreign Affairs); *Memorandum* from Willy C. Gaa, Assistant Secretary of Foreign Affairs, Republic of the Philippines to Secretary of Foreign Affairs, Republic of the Philippines (14 Feb. 2001), p. 1. MP, Vol. III, Annex 45 (reporting on a meeting between the Philippines Assistant Secretary and a Political Counselor in the Chinese Embassy); *Memorandum* from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-09-2001-S (17 Mar. 2001), p. 1. MP, Vol. III, Annex 47 (reporting

covered Chinese fishing in waters claimed by the Philippines, both in the Spratlys and at Scarborough Shoal.

B. Second Phase of the Disputes: China's Nine-Dash Line

3.41 The Parties' disputes entered a new phase after China publicly asserted, in May 2009, a claim of sovereignty and sovereign rights over all the waters, seabed and subsoil encompassed by its nine-dash line. This claim purported to extend to vast areas of EEZ and continental shelf within 200 M of the Philippines. The Philippines objected strongly to China's claims, which it challenged during various bilateral consultations addressed to the Parties' maritime disputes. For example, on 6 December 2010, Mr. Henry Bensurto, the Philippines' Secretary-General of the Commission on Maritime and Ocean Affairs Secretariat in the Philippines' Department of Foreign Affairs, complained to the Deputy Chief of Mission of the Chinese Embassy in Manila, Bai Tian, that the nine-dash line "impinges on territorial and maritime zones of the Philippines".[212]

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on a meeting between the Philippine Ambassador and the Chinese Vice Foreign Minister); *Memorandum* from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-61-2005-S (28 Oct. 2005). MP, Vol. III, Annex 56 (reporting on a meeting between the Chinese Vice Foreign Minister and the Philippines Ambassador in Beijing); *Memorandum* from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-064-2011-S (21 June 2011). MP, Vol. IV, Annex 72 (reporting on a meeting between the Charge d'Affaires of the Philippines Embassy in Beijing and the Deputy Director General of the Asian Department in the Chinese Ministry of Foreign Affairs); *Memorandum* from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-121-2011-S (2 Dec. 2011). MP, Vol. IV, Annex 75 (reporting on a meeting between the Charge d'Affaires of the Philippines Embassy in Beijing and the Deputy Director General of the Asian Department in the Chinese Ministry of Foreign Affairs); *Memorandum* from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-080-2012-S (24 May 2012). MP, Vol. IV, Annex 81 (reporting on a meeting between the Charge d'Affaires of the Philippines Embassy in Beijing and the Deputy Director General of the Asian Department in the Chinese Ministry of Foreign Affairs); *Memorandum* from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-110-2012-S (26 July 2012). MP, Vol. IV, Annex 84 (reporting on a meeting between the Philippines Ambassador in Beijing and officials of the Boundaries and Ocean Affairs Department in the Chinese Ministry of Foreign Affairs); Department of Foreign Affairs of the Republic of the Philippines, *Notes on the 18th Philippines-China Foreign Ministry Consultations* (19 Oct. 2012). MP, Vol. IV, Annex 85.

[212] *Memorandum* from Secretary General, Commission on Maritime and Ocean Affairs Secretariat, Department of Foreign Affairs of the Republic of the Philippines to the Secretary of Foreign Affairs of the Republic of the Philippines (7 Dec. 2010), p. 1. MP, Vol. IV, Annex 66. *See also Memorandum* from Secretary General, Commission on Maritime and Ocean Affairs Secretariat, Department of Foreign Affairs of the Republic of the Philippines to the Secretary of Foreign Affairs of the Republic of the Philippines (28 Mar. 2011), p. 3. MP, Vol. IV, Annex 71 (noting that Mr. Bensurto informed Ambassador Ning Fukui, Director General of the Ocean and Boundary Affairs Department of the Chinese Ministry of Foreign Affairs that the nine-dash line conflicted with the Philippines' maritime jurisdiction in the South China Sea); *Memorandum* from Gilberto G.B. Aseuque & Henry B. Bensurto, Jr., Department of Foreign Affairs of the Republic of the Philippines, to the Secretary of

3.42 Following these bilateral exchanges, the Philippines formally objected to China's diplomatic note to the United Nations Secretary General in April 2011. The note stated that China's claim "as reflected in the so-called 9-dash line map":

> . . . would have no basis under international law, specifically UNCLOS. With respect to these areas, sovereignty and jurisdiction or sovereign rights, as the case may be, necessarily appertain or belong to the appropriate coastal or archipelagic state – the Philippines – to which these bodies of waters as well as seabed and subsoil are appurtenant, either in the nature of Territorial Sea, or 200 M Exclusive Economic Zone (EEZ), or Continental Shelf (CS) in accordance with Articles 3, 4, 55, 57, and 76 of UNCLOS. [213]

3.43 In response, China sent a note restating its claim that:

> 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. China's sovereignty and related rights and jurisdiction in the South China Sea are supported by abundant historical and legal evidence.[214]

3.44 This note reflected an apparent change in China's position. Not only did China begin asserting an expanded maritime claim for sovereignty, sovereign rights and exclusive jurisdiction over all the waters, seabed and subsoil within the nine-dash line, but it did so on the basis of "historical" evidence. Contrary to the Philippines' position, China insisted that "[t]he UN Convention on the Law of the Sea . . . does not restrain or deny a country's right which is formed in history and abidingly upheld".[215]

Foreign Affairs of the Republic of the Philippines (23 Mar. 2012), p. 2. MP, Vol. IV, Annex 76 (noting that Mr. Bensurto, Mr. Deng Zhongzhua, Director General of the Department of Boundary and Ocean Affairs of the Chinese Foreign Ministry, and Mr. Yang Li, the Deputy Director General in the same department, debated the legality of China's maritime claim on the basis of "historical" rights. Mr. Bensurto is reported to have "demonstrated why and how China's alleged 'historical' claim could neither have legitimacy nor validity under international law -- be it customary or conventional international law, specifically UNCLOS".).

[213] *Note Verbale* from the Permanent Mission of the Republic of the Philippines to the United Nations to the Secretary-General of the United Nations, No. 000228 (5 Apr. 2011), p. 3. MP, Vol. VI, Annex 200.

[214] *Note Verbale* from the Permanent Mission of the People's Republic of China to the Secretary-General of the United Nations, No. CML/8/2011 (14 Apr. 2011). MP, Vol. VI, Annex 201.

[215] Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Jiang Yu's Regular Press Conference on September 15, 2011* (16 Sept. 2011). MP, Vol. V, Annex 113. *See also Memorandum* from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-064-2011-S (21 June 2011), p. 6. MP, Vol. IV, Annex 72 (noting that China claimed that its "9-dash line claim and map is based on the 1948 declaration by the Koumintang government. UNCLOS also has a provision that *historic rights* cannot be denied and should be respected. UNCLOS is there, and the parties can use any clause that is useful to support its claim . . . . China understands that the Philippine claim is based on its 200 mile EEZ. China hopes, however, that its *historic rights* in the SCS be respected by the Philippines" (emphasis added).).

3.45 Since its espousal in 2009 of the position that its maritime entitlements in the South China Sea include all the waters, seabed and subsoil within the nine-dash line, China has sought to consolidate its control of the maritime area encompassed by the line. Among other acts, China has prevented the Philippines from carrying out oil and gas development projects, and from fishing in the vicinity of Scarborough Shoal and in parts of the Spratlys. The Philippines, for its part, has objected to this conduct repeatedly, on the ground that it has violated the Philippines' rights under UNCLOS in regard to fishing and oil and gas development in the waters and seabed included within its 200 M EEZ and continental shelf.

3.46 On 22 February 2010, for example, China protested the Philippines' conversion of a Geophysical Survey and Exploration Contract it had granted in June 2002 into a Petroleum Service Contract.[216] The area covered by the contracts is near Reed (Recto) Bank, a submerged feature that forms part of the continental shelf of the Philippines.[217]

3.47 On 2 March 2011, two Chinese Marine Surveillance (CMS) ships approached a survey ship commissioned by the Philippine Department of Energy to conduct seismic surveys within the area covered by the Reed Bank Petroleum Service Contract. The survey ship was forced to stop its operations as a result of the Chinese vessels' harassment and repeated aggressive maneuvering towards it.[218] The Chargé d'Affaires at the Chinese

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[216] *Note Verbale* from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (10)PG-047 (22 Feb. 2010). MP, Vol. VI, Annex 195. Under the terms of the 2002 agreement, the geophysical survey and exploration contract would be converted into a full-fledged petroleum service contract once the company had fulfilled its survey and exploration activities. Department of Energy of the Republic of the Philippines and Sterling Energy Ltd., *Geophysical Survey and Exploration Contract and Service Contract* (13 June 2002). MP, Vol. X, Annex 334. China did not protest the Philippines' grant of the 2002 geophysical survey and exploration contract to Sterling Energy Ltd.

[217] *See Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 110885 (4 Apr. 2011). MP, Vol. VI, Annex 199.

[218] *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 110526 (2 Mar. 2011). MP, Vol. VI, Annex 198. China Marine Surveillance (CMS) was a law enforcement agency operating under the jurisdiction of China State Oceanic Administration, an agency of the Ministry of Land and Resources. *See* People's Republic of China, Ministry of Land and Resources, *Organizational Chart*. MP, Vol. V, Annex 129; People's Republic of China, Ministry of Land and Resources, China State Oceanic Administration, *Organizational Chart*. MP, Vol. V, Annex 130. It was tasked with enforcing, *inter alia*, the Marine Environment Protection Law, the Law on the Administration of the Use of Sea Areas, and other relevant laws and regulations. The main functions of CMS were to conduct surveillance in the waters under China's jurisdiction and investigate violations of China's maritime rights and interests, illegal uses of the sea, and damage to the marine environment and resources. *See* People's Republic of China, China State Oceanic Administration, *China Marine Surveillance* (1 Dec. 2012). MP, Vol. V, Annex 122. A CMS vessel is identifiable by the symbols "中国海监" (China Marine Surveillance) painted on its bow. People's Republic of China, Marine Safety Administration, *Rules on the Management of China Marine Surveillance's Vessels Number and Logo* (2000), Art. 10. MP, Vol. V, Annex 109. The functions and responsibilities of CMS were consolidated into a newly-established agency, the China Coast Guard, under the

Embassy in Manila, Mr. Bai Tian, acknowledged that the CMS vessels had intended to "dissuade the Forum vessel from further work" in order to "safeguard its sovereignty and sovereign rights as a result of the unilateral action from the Philippine side".[219]

3.48 The Philippines responded by explaining to China that the Philippines' oil and gas exploration activities at Reed Bank were a lawful exercise of its sovereign rights under UNCLOS, and that moreover, China had no basis under UNCLOS to claim any maritime entitlements or right to the resources in that area, because Reed Bank is a completely submerged bank that forms part of the Philippines' EEZ and continental shelf, and is not within 12 M of any insular feature in the Spratly Islands whose sovereignty is claimed by China.[220] Thus, the Philippines explained that it was entitled to exercise sovereign rights over Reed Bank pursuant to Articles 56 and 77 of UNCLOS.[221]

3.49 Notwithstanding this exchange of views, China has continued to obstruct the Philippines' oil and gas exploration activities at Reed Bank. It has also warned other coastal

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jurisdiction of the China State Oceanic Administration, effective 22 July 2013. *See* People's Republic of China, *Plan on Organizational Reform and Functional Changes* (14 Mar. 2013). MP, Vol. V, Annex 126; Tu Chonghang, "China Coast Guard Begins Operations, Bureau Chief Meng Hongwei Will Continue to Serve as Vice Minister of Public Security", *Beijing News* (23 Jul. 2013). MP, Vol. X, Annex 326.

[219] *Memorandum* from Acting Assistant Secretary of the Department of Foreign Affairs of the Republic of the Philippines to the Secretary of Foreign Affairs (10 Mar. 2011), p. 1. MP, Vol. IV, Annex 70. Mr. Bai Tian's reference to "the Forum vessel" was to the survey vessel of the Philippine licensee, Forum Energy.

[220] *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 110885 (4 Apr. 2011). MP, Vol. VI, Annex 199. Specifically, the Philippines stated:

> FIRST, the Republic of the Philippines has sovereignty and jurisdiction over the Kalayaan Island Group (KIG);
>
> SECOND, even while the Republic of the Philippines has sovereignty and jurisdiction over the KIG, the Reed Bank where GSEC 101 is situated does not form part of the 'adjacent waters', specifically the 12 M territorial waters of any relevant geological feature in the KIG either under customary international law or the United Nations Convention on the Law of the Sea (UNCLOS);
>
> THIRD, Reed Bank is not an island, a rock, or a low tide elevation. Rather, Reed Bank is a completely submerged bank that is part of the continental margin of Palawan. Accordingly, Reed Bank, which is about 85 M from the nearest coast of Palawan and about 595 M from the coast of Hainan, forms part of the 200 M continental shelf of the Philippine archipelago under UNCLOS . . . .

[221] *Id.*

States in the region not to pursue such activities in the "waters under China's jurisdiction" without its permission.[222]

3.50 In July 2011, the Embassy of China in Manila protested the decision of the Philippines' Department of Energy to offer 15 petroleum blocks to local and international companies for exploration and development. Two of these, AREA 3 and AREA 4, are near Reed Bank. China claimed that it "has indisputable sovereignty, sovereign rights and jurisdiction over the islands in South China Sea including Nansha [Spratly] Islands and its adjacent waters. The action of the Philippine Government has seriously infringed on China's sovereignty and sovereign rights . . .".[223] China has also warned the Philippines that its oil exploration activities at Reed Bank would be unsuccessful because "China is firmly determined to safeguard its sovereignty, and will take all possible measures to solve such problems when necessary".[224]

3.51 China's increasingly expansive and confrontational stance since May 2009 has not only affected oil and gas development by the Philippines, it has also affected fishing by Filipinos near Scarborough Shoal. Although it is a disputed feature, it had long been subject to Philippine fisheries jurisdiction, as attested by the significant number of Philippine arrests of Chinese fishermen caught harvesting endangered species between 1995 and 2012.[225] In

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[222] *See e.g*. Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Jiang Yu's Regular Press Conference on September 15, 2011* (16 Sept. 2011). MP, Vol. V, Annex 113; Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on September 19, 2011* (20 Sept. 2011). MP, Vol. V, Annex 112.

[223] *Note Verbale* from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (11)PG-202 (7 July 2011). MP, Vol. VI, Annex 202.

[224] "Philippines Must Learn Self-Restraint in South China Sea Disputes," *People's Daily* (1 Mar. 2012), p. 2. MP, Vol. V, Annex 115.

[225] *See e.g. Memorandum* from Assistant Secretary of the Department of Foreign Affairs, Republic of the Philippines to the Secretary of Foreign Affairs of the Republic of the Philippines (23 Mar. 1998). MP, Vol. III, Annex 29 (discussing arrest of 51 Chinese fishermen illegally fishing near Scarborough Shoal); *Letter* from Vice Admiral, Armed Forces of the Philippines, to Secretary of National Defense of the Republic of the Philippines (27 May 2000). MP, Vol. III, Annex 42 (discussing apprehension of one of three Chinese fishing vessels found illegally poaching near Scarborough Shoal in April 2000); *Memorandum* from Acting Secretary of Foreign Affairs of the Republic of the Philippines to the President of the Republic of the Philippines (5 Feb. 2001). MP, Vol. III, Annex 43 (discussing illegal fishing of sharks, eels, turtles and corals by the apprehended fishermen); *Memorandum* from Josue L. Villa, Embassy of the Republic of the Philippines in Beijing, to the Secretary of Foreign Affairs of the Republic of the Philippines (19 Aug. 2002), p. 30. MP, Vol. III, Annex 51 (noting that the Philippine Navy apprehended three Chinese vessels carrying 56 crewmembers and endangered species near Scarborough in February 2002, as well as two Chinese fishing vessels carrying 30 crewmembers and endangered species in March 2002); *Letter* from George T. Uy, Rear Admiral, Armed Forces of the Philippines, to Assistant Secretary, Office of Asia and Pacific Affairs, Department of Foreign Affairs of the Republic of the Philippines (2006). MP, Vol. III, Annex 57 (discussing apprehension of four Chinese fishing vessels found illegally poaching near Scarborough Shoal in December 2005).

April 2012, however, while Philippine law enforcement vessels were attempting to arrest Chinese vessels engaged in the same unlawful activity, Chinese government vessels interfered for the first time, preventing the arrest.[226] In response, the Philippines informed China of its "grave concern over the repeated intrusions by Chinese vessels into the Philippine territorial waters in clear violation of Philippine sovereignty and maritime jurisdiction".[227] A few days later, a Chinese vessel and a Chinese aircraft harassed a Philippine vessel engaged in marine archaeological research at Scarborough Shoal and ordered it to leave the area.[228]

3.52 The Philippines then sent China a *Note Verbale* asking it to "respect the Philippines' sovereignty and sovereign rights under international law including UNCLOS", or else to "bring the matter before an appropriate third-party adjudication body under international law, specifically, the International Tribunal on the Law of the Sea (ITLOS) with respect to the rights and obligations of the two countries in the Philippines' EEZ under international law, specifically UNCLOS".[229]

3.53 China rejected the Philippines' proposal.[230] Instead, it sought to consolidate its hold on Scarborough Shoal by deploying and anchoring Chinese vessels in such manner as to form an effective physical barrier to prevent Philippine vessels from entering the area,[231] and threatening Philippine Search and Rescue vessels there by making "provocative and extremely dangerous maneuvers" against them.[232] By 21 May 2012, the area surrounding Scarborough Shoal was occupied by numerous Chinese vessels, including "5 Chinese Government vessels (CMS-71, CMS-84, FLEC-301, FLEC-303 and FLEC 310), and 16

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[226] *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 12-0894 (11 Apr. 2012). MP, Vol. VI, Annex 205.

[227] *Id.*

[228] *Note Verbale* from the Department of Foreign Affairs of the Philippines to the Embassy of the People's Republic of China in Manila, No. 12-1030 (15 Apr. 2012). MP, Vol. VI, Annex 206.

[229] *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 12-1137 (26 Apr. 2012). MP, Vol. VI, Annex 207.

[230] *Note Verbale* from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Philippines, No. (12) PG-206 (29 Apr. 2012). MP, Vol. VI, Annex 208.

[231] *Memorandum* from Commander, Naval Forces Northern Luzon, Philippine Navy, to the Flag Officer in Command, Philippine Navy, No. CNFNL Rad Msg Cite NFCC-0612-001 (2 June 2012), paras. 3-7. MP, Vol. IV, Annex 83.

[232] *Note Verbale* from the Department of Foreign Affairs of the Philippines to the Embassy of the People's Republic of China in Manila, No. 12-1222 (30 Apr. 2012). MP, Vol. VI, Annex 209.

Chinese fishing boats, 10 of which are inside the shoal while 6 are outside. In addition, there are 56 utility boats, 27 of which were inside and 29 were outside the shoal". [233]

3.54 In May 2012, China warned the Philippines not to send any of its vessels to Scarborough Shoal. [234] Since then, China has exercised control over the feature and has prohibited Philippine government vessels from coming anywhere near it, while only intermittently allowing Philippine fishing vessels to fish in restricted areas.[235]

3.55 China's promulgation of regulations that purport to allow it to exercise greater administrative control over the waters it claims within the nine-dash line has also exacerbated the Parties' maritime disputes. In March 2012, China formally included the area encompassed by the nine-dash line within the scope of its Regulations on Marine Observation and Forecast. [236] The Philippines protested this action on the ground that "extending those regulations to areas outside [China's] jurisdiction and well within the territories and jurisdiction of other countries, including the Philippines, is unacceptable and non-recognizable under international law".[237]

3.56 In November 2012, China began imprinting images of the nine-dash line in the pages of its passports.[238] The Philippines' objected:

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[233] *Note Verbale* from the Department of Foreign Affairs of the Philippines to the Embassies of ASEAN Member States in Manila, No. 12-1372 (21 May 2012). MP, Vol. VI, Annex 210. FLEC 310 belongs to the Fisheries and Law Enforcement Command (FLEC), which was, until 2013, a national-level law enforcement agency operating under the jurisdiction of the Ministry of Agriculture. People's Republic of China, Ministry of Agriculture, Fishery Command Center, *Regulations on Fishery Administrative Enforcement and Supervision* (2009), Art. 2. MP, Vol. V, Annex 110. It was tasked with enforcing, inter alia, the Fisheries Law and other related laws and regulations. A FLEC vessel is identifiable by the symbols "中国渔政" (China Fishery) painted on its white bow. People's Republic of China, *Regulation on the Management of the Fishery Administrative Enforcement Vessels* (2000), Art. 8. MP, Vol. V, Annex 108. The functions and responsibilities of FLEC were consolidated into a newly-established agency, the China Coast Guard, under the jurisdiction of the China State Oceanic Administration, effective 22 July 2013. *See supra* note 218.

[234] *Note Verbale* from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (12) PG-239 (25 May 2012). MP, Vol. VI, Annex 211.

[235] Jerry E. Esplanada, "No Coast Guard Vessels near Panatag Shoal, Says Spokesman", *Philippine Daily Inquirer* (3 Mar. 2014). MP, Vol. X, Annex 330. *See also infra* Chapter 6, Section I.B.

[236] *Note Verbale* from the Department of Foreign Affairs of the Republic of Philippines to the Embassy of People's Republic of China in Manila, No. 12-1453 (31 May 2012). MP, Vol. VI, Annex 212.

[237] *Id*.

[238] *See e.g*. Michael Moore, "China's Neighbors Protest its Passport Map Grab", *The Telegraph* (22 Nov. 2012). MP, Vol. X, Annex 321; Peter Ford, "China's Passport Propaganda Baffles Experts", *Christian Science Monitor* (27 Nov. 2012). MP, Vol. X, Annex 322.

> The Philippines strongly protests the inclusion of the nine-dash lines in the e-passport as such image covers an area that is clearly part of the Philippine territory and maritime domain. The Philippines does not accept the validity of the nine-dash lines that amount to an excessive declaration of maritime space in violation of international law.[239]

3.57 In December 2012, China revised the "Hainan Provincial Regulation on the Control of Coastal Border Security" to require foreign vessels to seek permission before entering "China's waters" within the South China Sea. The regulations also authorized China's law enforcement vessels to board, inspect, detain, expel or confiscate foreign ships that have entered the waters "illegally" or are conducting "illegal activities" there.[240] The Philippines has repeatedly requested clarification as to whether the regulations will be applied to the entire area within the nine-dash line or to a more limited area. It has received no response from China.[241]

3.58 The Philippines reiterated its opposition to China's maritime claims in January 2013, in response to China's publication of a new national map that identified a dashed line in the South China Sea as China's "national boundary".[242] In a diplomatic note to China, the Philippines stated that it "strongly objects to the indication that the nine-dash lines are China's national boundaries in the West Philippine Sea/South China Sea",[243] and emphasized that the dashed line "has no basis under international law, in particular the 1982 United

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[239] *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 12-3331 (21 Nov. 2012). MP, Vol. VI, Annex 214.

[240] People's Republic of China, Hainan Province, *Hainan Provincial Regulation on the Control of Coastal Border Security* (31 Dec. 2012). MP, Vol. V, Annex 123. Under Article 31 of the Regulation, "illegal activities" include: (1) "illegally stop[ing] or anchor[ing]", or "tak[ing] provocative acts" when travelling through territorial waters administered by Hainan province; (2) entering or exiting without inspection or permit; (3) "illegally boar[ding] . . . islands" under the administration of Hainan Province; (4) damaging coastal defense, production or living facilities on the islands administered by Hainan; (5) carrying out propaganda activities that infringe on state sovereignty or state security; and (6) acts that violate the laws for "the control of coastal border security".

[241] *Note Verbale* from the Department of Foreign Affairs of the Republic of Philippines to the Embassy of the People's Republic of China in Manila, No. 12-3391 (30 Nov. 2012). MP, Vol. VI, Annex 215; *Note Verbale* from the Department of Foreign Affairs of the Republic of Philippines to the Embassy of the People's Republic of China in Manila, No. 13-0011 (2 Jan. 2013). MP, Vol. VI, Annex 216.

[242] This map is depicted in Chapter 4 as Figure 4.4 (following page 74).

[243] *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 13-1878 (7 June 2013). MP, Vol. VI, Annex 218.

Nations Convention on the Law of the Sea" and "encroaches on the sovereign rights and jurisdiction of the Philippines within the latter's maritime entitlements under UNCLOS".[244]

3.59 In April 2013, after these arbitral proceedings were commenced, China's increasingly bold assertion of its claim to all the waters within the dashed line extended the Parties' dispute to Second Thomas Shoal. This is a submerged feature that lies 22 M east of Mischief Reef and 104 M from Palawan. Since 1999, following China's seizure of Mischief Reef, the Philippines had maintained a peaceful and continuous presence at the shoal by deploying a small detachment of sailors and marines to the *BRP Sierra Madre*, an old naval ship that had been run aground there.[245] On 11 April 2013, the Chinese Foreign Ministry summoned the Philippine Ambassador to Beijing, the first of three diplomatic demarches insisting that the Philippines remove its presence from the shoal, or China would remove it forcibly. China insisted it "would not allow" that presence to continue.[246]

3.60 Subsequent to these encounters, the Philippines learned of the presence of at least three Chinese government vessels in the vicinity of Second Thomas Shoal. To the knowledge of the Philippines, no such vessels had ever deployed to the shoal before. Two of the vessels were reported to be operated by China Marine Surveillance and the third was a Chinese navy missile frigate, Type 053H1G (Jianghu-V Class).[247]

3.61 In response to these events, the Philippines sent China a *Note Verbale* dated 9 May 2013 in which it stated, *inter alia*, that Second Thomas Shoal constitutes part of the Philippines' continental shelf and that China's conduct with regard to it contravened UNCLOS:

> Under well established principles of international law, the Ayungin Shoal [the Philippine name for Second Thomas Shoal] is an integral part of the seabed in the West Philippine Sea (WPS). The Ayungin Shoal is located

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[244] *Id.*

[245] *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 13-1585 (9 May 2013). MP, Vol. VI, Annex 217.

[246] *Memorandum* from the Secretary of Foreign Affairs of the Republic of the Philippines to the President of the Republic of the Philippines (23 Apr. 2013). MP, Vol. IV, Annex 93; *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 13-1585 (9 May 2013). MP, Vol. VI, Annex 217; *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 13-1882 (10 June 2013). MP, Vol. VI, Annex 219.

[247] "Type 053 *Jianghu*-class frigates", *GlobalSecurity.org*. MP, Vol. X, Annex 341.

> 105.77 nautical miles from the basepoints in Palawan Province and constitutes part of the 200 nautical mile Philippine continental shelf as provided under Article 76 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS).
>
> In accordance with Article 77 of UNCLOS, only the Philippines has sovereign rights over the continental shelf in the area where Ayungin Shoal is located. No other State is lawfully entitled to assert sovereignty or sovereign rights over said area. Moreover, the Philippines has long maintained a peaceful, continuous and effective presence at the Ayungin Shoal.
>
> The Philippines notes that under UNCLOS, State Parties are obliged to 'refrain from any threat or use of force against the territorial integrity or political independence of any State,' or conduct any activities that are in 'any manner inconsistent with the principles of international law embodied in the UN Charter.' In this context, the Philippines protests the provocative and illegal presence of the following Chinese vessels in the vicinity of Ayungin Shoal: . . . .
>
> The Philippines calls on China to respect the sovereign rights and jurisdiction of the Philippines over its continental shelf including the maritime area around the Ayungin Shoal.[248]

3.62 China did not formally respond to the Philippines. Instead, it continued to deploy CMS and other vessels to Second Thomas Shoal, although in reduced numbers. Then on 9 March 2014, three weeks before the Philippines' submission of its Memorial in this arbitration, China blocked the Philippines from approaching the shoal. On that occasion, two Chinese Coast Guard vessels chased away two civilian vessels chartered by the Philippine Navy that were on their way to Second Thomas Shoal to deliver food, water, and other essential supplies to the Philippine personnel stationed there and to conduct a rotation of personnel.[249] Once the Chinese vessels were 1,000 yards from the Philippine vessels, they employed sirens, megaphones and a digital signboard to instruct the Philippines vessels to leave the area or "bear full responsibility of the consequences".[250] In response, the Philippine vessels retreated and were unable to fulfill their mission.

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[248] *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 13-1585 (9 May 2013). MP, Vol. VI, Annex 217.

[249] *Note Verbale* from the Department of Foreign Affairs of the Philippines to the Embassy of the People's Republic of China in Manila, No. 14-0711 (11 Mar. 2014). MP, Vol. VI, Annex 221.

[250] *Letter* from the Virgilio A. Hernandez, Major General, Armed Forces of the Philippines, to the Secretary of Foreign Affairs, Department of Foreign Affairs of Republic of the Philippines (10 Mar. 2014). MP, Vol. IV, Annex 99.

3.63 China sought to justify its conduct by claiming that the Philippine vessels were "loaded with construction materials".[251] The Philippines rejected this accusation in a *Note Verbale* to China dated 11 March 2014, in which it stated:

> Ayungin [Second Thomas Shoal] is part of the continental shelf of the Philippines. It is, therefore, entitled to exercise sovereign rights and jurisdiction in the area without the permission of other States. Nevertheless, in the interests of easing tensions, the Philippines wishes to make it perfectly clear that its chartered vessels were not carrying construction materials. To the contrary, they were merely delivering essential supplies to the Philippine personnel stationed there and to conduct rotation of personnel.[252]

3.64 The Philippines also informed China that its actions constitute:

> a clear and urgent threat to the rights and interests of the Philippines under the 1982 United Nations Convention on the Law of the Sea (the 'UNCLOS'), which are currently the subject of arbitration under Annex VII of UNCLOS. In accordance with Articles 76 and 77 of UNCLOS, only the Philippines has sovereign rights over the continental shelf in the area where Ayungin Shoal is located. No other State is lawfully entitled to assert sovereign rights . . . over said area. In this respect, the Philippines observes that there are no insular features claimed by China in the South China Sea capable of generating any potential entitlement in the area where Ayungin [Second Thomas] Shoal is located.[253]

3.65 China responded by rejecting the Philippines' protest and insisting that Second Thomas Shoal is "part of the Nansha [Spratly] islands and China has indisputable sovereignty over the Nansha islands and their adjacent waters".[254]

3.66 The Philippines was able to provide food to its personnel stationed at Second Thomas Shoal through airdrops on 10 and 15 March 2014. However, it still has not been able to rotate the personnel on the *Sierra Madre*, and it is uncertain, at best, whether China will continue to interdict efforts to supply and rotate the Philippine personnel by sea.

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[251] "China expels Philippine vessels from Ren'ai Reef", *Xinhua* (10 Mar. 2014). MP, Vol. X, Annex 331; *Memorandum* from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-075-2014-S (11 Mar. 2014). MP, Vol. IV, Annex 102.

[252] *Note Verbale* from the Department of Foreign Affairs of the Philippines to the Embassy of the People's Republic of China in Manila, No. 14-0711 (11 Mar. 2014), p. 1. MP, Vol. VI, Annex 221.

[253] *Id.*, p. 2.

[254] *Memorandum* from Assistant Secretary, Asian and Pacific Affairs, Department of Foreign Affairs of the Republic of the Philippines, to Secretary of Foreign Affairs of the Republic of the Philippines (11 Mar. 2014). MP, Vol. IV, Annex 101.

3.67 China's strategy at Second Thomas Shoal and other features within the South China Sea has been explained by one of its senior military officials, Major General Zhang Zhaozhong. In a May 2013 interview broadcast on Chinese television, he stated that China was employing a "cabbage strategy" at Second Thomas Shoal, a technique it had used successfully in taking over two other features in the South China Sea that had been subject to the Philippines' jurisdiction: Mischief Reef and Scarborough Shoal.[255] Pursuant to the "cabbage strategy", China would "seal and control" a maritime feature by surrounding it with fishing administration vessels, marine surveillance ships and navy warships until the feature is "wrapped layer by layer like a cabbage".[256] Major General Zhang continued:

> We should do more such things in the future. For those small islands, only a few troopers are able to station on each of them, but there is no food or even drinking water there. If we carry out the 'cabbage' strategy, you will not be able to send food and drinking water onto the islands. Without the supply for one or two weeks, the troopers stationed there will leave the islands on their own. Once they have left, they will never be able to come back.[257]

IV. MULTILATERAL NEGOTIATIONS THROUGH ASEAN

3.68 In addition to the bilateral exchanges described in Section III above, the Philippines has sought to manage its unresolved maritime disputes with China through ASEAN. These efforts, which have extended for more than two decades, have also failed to facilitate any kind of resolution between the Parties.

3.69 The ASEAN Member States, with the full endorsement of the Philippines, first adopted a common stance on the South China Sea territorial and maritime disputes at their 25th Ministerial Meeting in Manila in July 1992. At that time, China had just awarded an oil concession in the Vanguard Bank area, which is located in Vietnam's continental shelf and had committed to protecting the concessionaire with its full naval force, if needed.[258] As reflected in the joint communiqué it issued on that occasion, ASEAN recognized that "any adverse development in the South China Sea directly affects the peace and security in the

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[255] *See supra* paras. 3.26-3.27; 3.51-3.54.

[256] "China Boasts of Strategy to 'Recover' Islands Occupied by Philippines", *China Daily Mail* (28 May 2013). MP, Vol. X, Annex 325.

[257] *Id*.

[258] Nicholas D. Kristof, "China Signs U.S. Oil Deal for Disputed Waters", *New York Times* (18 June 1992). MP, Vol. X, Annex 312.

region", and proposed the establishment of a "code of international conduct" for the area, which would commit the ASEAN Member States and China to avoid provocations and resolve all disputes peacefully, in accordance with international law.[259]

3.70 Twenty-two years after the idea of a code of conduct was first voiced, and after numerous joint statements, working groups, plans of action and drafts, ASEAN and China still have not been able to agree on a binding code of conduct.[260] In 2002, they managed only to issue a "Declaration on the Conduct of the Parties in the South China Sea" in which they committed to work toward the "eventual" establishment of a code of conduct in the South Sea.[261] That goal has thus far proven impossible to achieve due to a lack of consensus on key

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[259] Association of Southeast Asian Nations, *Joint Communiqué: 25th ASEAN Ministerial Meeting* (22 July 1992), para. 17. MP, Vol. V, Annex 132.

[260] *See e.g. id.*, para. 17; Association of Southeast Asian Nations, *Joint Communiqué: 29th ASEAN Ministerial Meeting* (21 July 1996), para. 11. MP, Vol. V, Annex 133; Association of Southeast Asian Nations, *Hanoi Plan of Action* (15 Dec. 1998), paras. 7.13-7.16. MP, Vol. V, Annex 134; Association of Southeast Asian Nations, *Joint Communiqué: 32nd ASEAN Ministerial Meeting* (24 July 1999), para. 39. MP, Vol. V, Annex 135; Association of Southeast Asian Nations, *Chairman's Statement: 6th Meeting of the ASEAN Regional Forum* (26 July 1999), para. 11. MP, Vol. V, Annex 136; Association of Southeast Asian Nations, *Chairman's Press Statement: 3rd Informal Summit* (28 Nov. 1999). MP, Vol. V, Annex 137; Association of Southeast Asian Nations, *Joint Communiqué: 33rd ASEAN Ministerial Meeting* (25 July 2000), paras. 24-25. MP, Vol. V, Annex 138; Association of Southeast Asian Nations, *Chairman's Statement: 7th Meeting of the ASEAN Regional Forum* (27 July 2000), para. 19. MP, Vol. V, Annex 139; Association of Southeast Asian Nations, *Joint Communiqué: 34th ASEAN Ministerial Meeting* (24 July 2001), para. 20. MP, Vol. V, Annex 140; Association of Southeast Asian Nations, *Chairman's Statement: 8th Meeting of the ASEAN Regional Forum* (25 July 2001), para. 16. MP, Vol. V, Annex 141; Association of Southeast Asian Nations, *Joint Communiqué: 35th ASEAN Ministerial Meeting* (30 July 2002), para. 40. MP, Vol. V, Annex 142; Association of Southeast Asian Nations, *Chairman's Statement: 9th Meeting of the ASEAN Regional Forum* (31 July 2002), para. 20. MP, Vol. V, Annex 143; Association of Southeast Asian Nations, *Declaration on the Conduct of Parties in South China Sea* (4 Nov. 2002), para. 10. MP, Vol. V, Annex 144; Association of Southeast Asian Nations, *Joint Communiqué: 36th ASEAN Ministerial Meeting* (17 June 2003), para. 26. MP, Vol. V, Annex 145; Association of Southeast Asian Nations, *Joint Communiqué: 37th ASEAN Ministerial Meeting* (30 June 2004), para. 22. MP, Vol. V, Annex 146; Association of Southeast Asian Nations, *Chairman's Statement: 11th Meeting of the ASEAN Regional Forum* (2 July 2004), para. 14. MP, Vol. V, Annex 147; Association of Southeast Asian Nations, *Plan of Action to Implement the Joint Declaration on ASEAN-China Strategic Partnership for Peace and Prosperity* (29 Nov. 2004), paras. 1, 5, 6. MP, Vol. V, Annex 148; Association of Southeast Asian Nations, *Joint Communiqué: 38th ASEAN Ministerial Meeting* (26 July 2005), paras. 13-15. MP, Vol. V, Annex 149; Association of Southeast Asian Nations, *Report of the ASEAN-China Eminent Persons Group* (29 Oct. 2005). MP, Vol. V, Annex 150; Association of Southeast Asian Nations, *Chairman's Statement: 9th ASEAN-China Summit* (12 Dec. 2005), para. 10. MP, Vol. V, Annex 151; Association of Southeast Asian Nations, *Joint Communiqué: 39th ASEAN Ministerial Meeting* (25 July 2006), paras. 27-28. MP, Vol. V, Annex 152; Association of Southeast Asian Nations, *Joint Communiqué: 40th ASEAN Ministerial Meeting* (30 July 2007), paras. 30-31. MP, Vol. V, Annex 153; Association of Southeast Asian Nations, *Joint Communiqué: 41st ASEAN Ministerial Meeting* (21 July 2008), paras. 20-21. MP, Vol. V, Annex 154; Association of Southeast Asian Nations, *Joint Communiqué: 42nd ASEAN Foreign Ministerial Meeting* (20 July 2009), paras. 20-21. MP, Vol. V, Annex 155; Association of Southeast Asian Nations, *Joint Communiqué: 43rd ASEAN Foreign Ministers Meeting* (20 July 2010), paras. 28-29. MP, Vol. V, Annex 156; Association of Southeast Asian Nations, *Joint Communiqué: 44th ASEAN Foreign Ministers Meeting* (19 July 2011), paras. 22-26. MP, Vol. V, Annex 157.

[261] Association of Southeast Asian Nations, *Declaration on the Conduct of Parties in South China Sea* (4 Nov. 2002). MP, Vol. V, Annex 144. Other than reaffirming the objective of establishing a code of conduct, the 2002 Declaration also espoused and elaborated upon the three ideals expressed in their other statements: the

issues, including: the geographical scope of the code of conduct; restrictions on construction on occupied and unoccupied features; military activities in waters adjacent to the Spratly Islands; and the treatment of fishermen found in disputed waters.[262]

3.71 The Philippines recognizes that an agreed code of conduct might reduce tensions between various States by helping them to manage their disputes pending their resolution. The purpose of such a code would be to promote peace and stability by establishing how the South China Sea claimants should conduct themselves pending the peaceful resolution of their disputes, not to resolve the disputes themselves. China itself has insisted that ASEAN cannot be used to resolve any territorial or maritime disputes concerning the South China Sea.[263] It has adopted a policy of only engaging in bilateral negotiation of South China Sea disputes, refusing to negotiate solutions multilaterally.[264]

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resolution of the territorial and jurisdictional disputes by peaceful means in accordance with UNCLOS and other universally-recognized principles of international law; the exercise of self-restraint in the South China Sea; and the undertaking of confidence-building and cooperative activities in the South China Sea.

[262] Carlyle Thayer, *ASEAN and China Consultations on a Code of Conduct in the South China Sea: Prospects and Obstacles*, presented to the International Conference on Security and Cooperation in the South China Sea, Russian Academy of Sciences (18 Oct. 2013), p. 3. MP, Vol. X, Annex 310.

[263] Carlyle Thayer, *ASEAN and China Consultations on a Code of Conduct in the South China Sea: Prospects and Obstacles*, presented to the International Conference on Security and Cooperation in the South China Sea, Russian Academy of Sciences (18 Oct. 2013), p. 4. MP, Vol. X, Annex 310 (stating that China insisted then, as it does now, that the parties directly concerned could only resolve sovereignty and maritime jurisdictional disputes bilaterally); *Memorandum* from the Embassy of the Philippines in Beijing to Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-0691-2009 (8 Sept. 2009), p. 1. MP, Vol. IV, Annex 61 (stating "China is firmly opposed to putting the SCS issue in the agenda of the ASEAN summit and in the China-ASEAN leaders meeting".); *Memorandum* from the Embassy of the Philippines in Beijing to Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-137-2009-S (14 Oct. 2009), p. 1. MP, Vol. IV, Annex 62 (stating that China believes the South China Sea is "an issue of concern only between China and some ASEAN countries, and not between China and ASEAN as an entity" and that "China believes the SCS issue should be resolved through peaceful dialogue and meaningful negotiation but only 'among countries directly involved'".).

[264] *Id. See also, Record of Discussion: 17th Philippines-China Foreign Ministry Consultations* (14 Jan. 2012), paras. 148, 150(d), 155. MP, Vol. VI, Annex 204 (China's Assistant Foreign Minister Liu Zhenmin informed the Philippines' Undersecretary of Foreign Affairs Erlinda Basilio that China believes "the proposals that the Philippines made previously are not realistic or feasible whether it is about to refer the matter to any international mechanism or to hold an multilateral negotiations among claimant states . . . . Because it is our long-standing position that the dispute in the South China Sea should be properly resolved among parties directly involved through peaceful negotiations". Undersecretary Basilio responded: "As enunciated by our Foreign Minister when he met with Foreign Minister Yang Jiechi, they agreed then to keep the matter to rest, to put the matter to rest because obviously, the Chinese position is diametrically opposed to the Philippine position. You are for bilateral discussion. We have embarked on a path that uses the law, the UN Convention on the Law of the Sea as the basis for working out the problems that we face in the West Philippine Sea. We believe in a multilateral approach because there are other competing claims there and they are members of the Association of Southeast Asian Nations . . .".); *Memorandum* from Assistant Secretary, Asian & Pacific Affairs, Department of Foreign Affairs of the Republic of the Philippines, to Secretary of Foreign Affairs of the Republic of the Philippines (7 Feb. 2011), paras. 2-3. MP, Vol. IV, Annex 68 (noting that Deputy Director General Li Xianliang of the Chinese Department of Boundary and Ocean Affairs "[r]eiterated China's position .

3.72 According to the text of the 2002 Declaration, the ASEAN Member States and China undertook to "resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea".[265] Thus, in the event ASEAN Member States and China are unable to resolve their disputes through friendly consultations or negotiations, the Declaration encourages recourse to UNCLOS, including the dispute resolution procedures available under Part XV.

V. COMMENCEMENT OF THE ARBITRATION

3.73 By 2013, despite years of exchanging views, the Philippines and China had made little progress in resolving their disputes over maritime claims and entitlements in the South China Sea. In particular, the dispute over China's claimed "historical rights" to the waters, seabed and soil within the nine-dash line, as well as the disputes over the entitlements claimed in respect of Scarborough Shoal and the insular and other features of the Spratly Islands, had proved incapable of resolution. So did the dispute over fishing rights in waters adjacent to these features, and more generally within 200 M of the Philippines' coast.

3.74 The failure of bilateral and multilateral efforts to achieve resolution of any of their disputes, coupled with China's increasingly bold and expansive assertions of its "sovereign rights", including its deployment of naval and law enforcement vessels and personnel to consolidate those "rights" and present the Philippines (among other States) with a *fait accompli*, persuaded the Philippines that the dispute resolution provisions of UNCLOS offered the only viable recourse available to it to achieve a peaceful solution based on international law.

3.75 Accordingly, on 22 January 2013 the Philippines invoked its rights under Section 2 of Part XV of the Convention to seek a peaceful and durable resolution of these disputes and

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. . [that] [t]he SCS issue . . . be handled through bilateral negotiations". He stressed that "[i]f disputes are discussed through multilateral channels, [they] will damage the good bilateral relations between the two countries and affect [the emotional sentiment of the two peoples]". He added that their negative impact on the settlement of the disputes will also "affect peace and stability in the [South China sea]").

[265] Association of Southeast Asian Nations, *Declaration on the Conduct of Parties in South China Sea* (4 Nov. 2002), para. 4. MP, Vol. V, Annex 144.

formally initiated these proceedings by presenting the Chinese Ambassador in Manila with a *Note Verbale* along with its Notification and Statement of Claim.[266]

3.76 On 19 February 2013, China "reject[ed] and return[ed]" the Notification and Statement of Claim, along with the accompanying *Note Verbale*. China stated that the "core" of the dispute is a series "territorial disputes over some islands and reefs of the Nansha [Spratly] Islands", to which it reiterated its claim of "indisputable sovereignty". It also stated that the Philippines' decision to initiate arbitral proceedings contravened the 2002 Declaration on the Conduct of the Parties in the South China Sea.[267] Since then, China has refused to participate in these proceedings.

3.77 The Tribunal was constituted on 21 June 2013, in accordance with Article 3 of Annex VII of UNCLOS.

3.78 On 27 August 2013, the Tribunal issued Procedural Order No. 1, promulgating the Rules of Procedure.[268] The Philippines was directed to submit a Memorial by 30 March 2014 "fully address[ing] all issues including matters relating to jurisdiction, admissibility, and the merits of the dispute".[269] On 28 February 2014, the Philippines sought leave of the Tribunal, pursuant to Article 19 of the Rules of Procedure, to amend its original Statement of Claim, in light of China's assertion of control over Second Thomas Shoal after these arbitral proceedings were commenced, by adding a claim inviting the Tribunal to determine the status and maritime entitlements, if any, of this feature under Articles 13 and 121 of the Convention. On 11 March 2014, the Philippines was advised that its request for leave to amend the Statement of Claim[270] was granted.

3.79 In the Chapters that follow, the Philippines presents its case on the merits (Chapters 4, 5 and 6), and on jurisdiction (Chapter 7).

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[266] *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 13-0211 (22 Jan. 2013). MP, Vol. III, Annex 2; Notification and Statement of Claim of the Republic of the Philippines (22 Jan. 2013). MP, Vol. III, Annex 1.

[267] *Note Verbale* from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (13) PG-039 (19 Feb. 2013). MP, Vol. III, Annex 3.

[268] Procedural Order No. 1, § 1.1 (27 Aug. 2013).

[269] *Id*., § 2.1.1.

[270] *See* Amended Notification and Statement of Claim of the Republic of the Philippines (28 Feb. 2014). MP, Vol. III, Annex 5.

CHAPTER 4

CHINA'S CLAIM OF "HISTORIC RIGHTS" TO MARITIME AREAS BEYOND ITS ENTITLEMENTS UNDER UNCLOS

4.1 This Chapter addresses China's claim of "historic rights" over the waters, seabed and subsoil of the South China Sea beyond the maritime areas to which it is entitled under the 1982 Convention. The Chapter is divided into three sections. Section I describes China's maritime claim. It is divided into subsections A and B. Subsection A relates the circumstances of China's assertion of "sovereign rights" over all of the waters, seabed and subsoil encompassed by its so-called "nine-dash line", based on alleged "historic rights" to these maritime areas. Subsection B discusses the origin and evolution of China's "historic rights" claim.

4.2 Section II considers the lawfulness of China's "historic rights" claim. It, too, is divided into two subsections. Subsection A demonstrates that the Parties' dispute is governed by UNCLOS, especially Articles 56, 57, 62, 76, 77 and 121; and that China's claim of "historic rights" in maritime areas beyond the limits of its entitlements under these provisions is incompatible with them. Subsection B sets out the relevant rules of general international law, which are in all material respects identical to those of the Convention, and demonstrates that China's claim is also incompatible with general international law.

4.3 Section III sets forth the conclusions to be drawn from this analysis: that China's claim of "historic rights" to the waters, seabed and subsoil beyond its entitlements under UNCLOS – including in areas where the Philippines alone has such entitlements – is contrary to the Convention and general international law; and that its attempts to exercise such "rights" in the Philippines' EEZ and continental shelf are unlawful.

I. CHINA'S MARITIME CLAIM

4.4 China claims "sovereign rights and jurisdiction" over the waters, seabed and subsoil of the South China Sea far beyond the breadth of its entitlements under UNCLOS. In its public statements and diplomatic correspondence, China has defended its claims in these far-removed maritime areas not on the basis of any express entitlement under the Convention, but based on what it calls its "historic rights" to these areas. According to China, its "historic rights", which are said to pre-date and exist apart from the Convention, entitle it alone to

exercise "sovereign rights" in these areas, including the exclusive right to exploit living and non-living resources, and to prevent exploitation by other coastal States, even in areas within 200 M of their coasts.

A. China's Claim of "Historic Rights" Beyond Its Entitlements under UNCLOS

4.5 As related in Chapter 3, China first publicly asserted its claim to sovereign rights to waters, seabed and subsoil of the South China Sea beyond its entitlements under UNCLOS in two diplomatic notes to the U.N. Secretary General dated 7 May 2009, which were later distributed at China's request to all parties to UNCLOS and all U.N. Member States. In those notes, China objected to the joint submission by Malaysia and Vietnam to the CLCS, and to the separate submission of Vietnam, on the ground that the shelf limits submitted by Malaysia and Vietnam included areas where only China has sovereign rights.

4.6 As stated in China's two notes: "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*)".[271] China's map attached to the notes is shown in Chapter 1 at Figure 1.1 (following page 4). It depicts a dashed line composed of nine segments encompassing most of the waters of the South China Sea. It follows the directions of the coasts of the Philippines, Malaysia, Brunei, Indonesia and Vietnam in close proximity to them.

4.7 **Figure 4.1** (following page 70) below shows how far beyond China's potential entitlements under UNCLOS its claims based on the nine-dash line extend. In the Northern Sector, the area within 200 M of China's mainland coast (including Hainan Island and Taiwan) is depicted in light pink, and the area beyond 200 M but within the nine-dash line in dark pink. The nine-dash line encompasses large areas beyond China's entitlements under UNCLOS but within 200 M of the Philippines; moving clockwise from China's mainland, the second and third dashes are only 42 M and 39 M from the coast of Luzon.

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[271] *Note Verbale* from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/17/2009 (7 May 2009). MP, Vol. VI, Annex 191 (emphasis added); *Note Verbale* from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/18/2009 (7 May 2009). MP, Vol. VI, Annex 192 (emphasis added). CML/17/2009 responds to the joint submission of Malaysia and Vietnam to the CLCS. CML/18/2009, of the same date and whose text is substantially the same, responds to the individual submission of Vietnam to the CLCS.

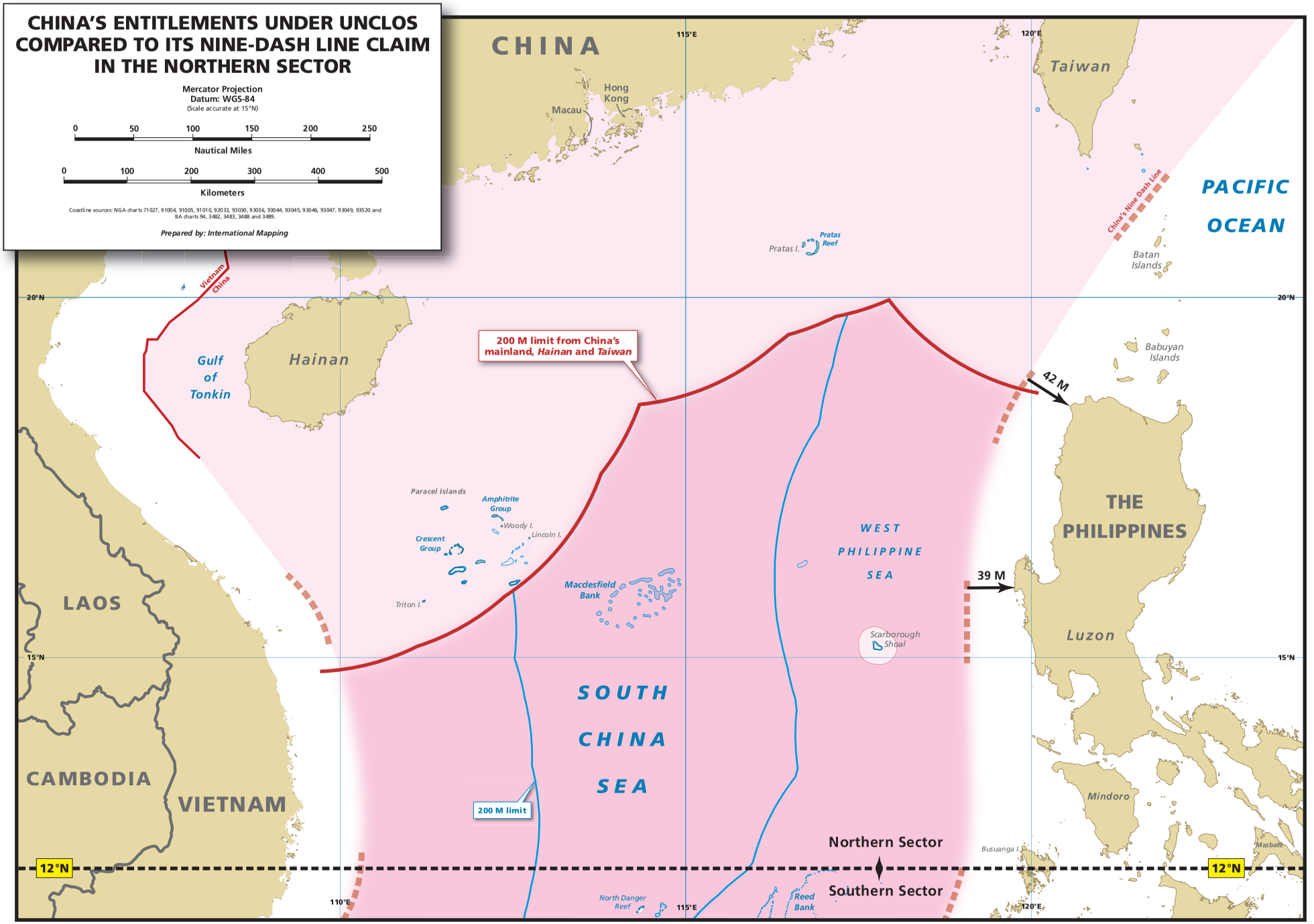
CHINA'S ENTITLEMENTS UNDER UNCLOS COMPARED TO ITS NINE-DASH LINE CLAIM IN THE NORTHERN SECTOR
Mercator Projection
Datum: WGS-84
(Scale accurate at 15°N)
0 50 100 150 200 250
Nautical Miles
0 100 200 300 400 500
Kilometers
Coastline sources: NGA charts 71027, 91004, 91005, 91010, 92033, 93030, 93036, 93044, 93045, 93046, 93047, 93049, 93520 and BA charts 94, 3482, 3483, 3488 and 3489.
Prepared by: International Mapping
CHINA
Hong Kong
Macau
Taiwan
PACIFIC OCEAN
China's Nine Dash Line
Pratas I.
Pratas Reef
Batan Islands
Vietnam
China
20°N
Gulf of Tonkin
Hainan
200 M limit from China's mainland, Hainan and Taiwan
42 M
Babuyan Islands
Paracel Islands
Amphitrite Group
Woody I.
Lincoln I.
Crescent Group
Triton I.
Macclesfield Bank
WEST PHILIPPINE SEA
THE PHILIPPINES
39 M
LAOS
Scarborough Shoal
Luzon
15°N
SOUTH CHINA SEA
CAMBODIA
VIETNAM
200 M limit
Mindoro
Northern Sector
Busuanga I.
Masbate
12°N
Southern Sector
110°E
North Danger Reef
115°E
Reed Bank
120°E

Figure 4.1

4.8 In the Southern Sector, **Figure 4.2** (following page 72) shows the area within 12 M of all the Spratly features, parts of which are above water at high tide, in light pink, and the area beyond 12 M from them but within the nine-dash line in dark pink. As demonstrated in Chapter 5, none of the eight insular features occupied or controlled by China in the Southern Sector, or any other Spratly feature, generates a maritime entitlement under UNCLOS greater than 12 M. Thus, even if, *quod non*, China were sovereign over all of these features, the entitlements generated by them would fall far short of the nine-dash line. In this Sector, the fourth and fifth dashes are beyond 12 M from any insular feature in the Spratlys, and only within 34 M and 36 M of the coast of Palawan, respectively.

4.9 Not surprisingly, China's *Notes Verbales* (and the novel and unjustifiable claims they purported to make) were met with strong reactions by the other States with coasts on the South China Sea. The Philippines, observing that China's *Notes Verbales* touched "not only on the sovereignty of the islands *per se* and *'the adjacent waters'* in the South China Sea, but also on the other *'relevant waters as well as the seabed and subsoil thereof'* as indicated in the map attached", stated that China's claims "have no basis under international law, specifically UNCLOS".[272] Vietnam protested that "China's claim over the islands and adjacent waters in the Eastern Sea (South China Sea) as manifested in the map . . . has no legal, historical or factual basis, therefore is null and void".[273] Indonesia also rejected the Chinese map, emphasizing that, in the absence of a "clear explanation as to [its] legal basis, the method of drawing, and the status of those separated dotted-lines", the "so called 'nine-dotted-lines map' . . . clearly lacks international legal basis and is tantamount to upset the UNCLOS 1982".[274] Malaysia opposed China's claims by insisting that its joint submission with Vietnam "conform[s] to the pertinent provisions of UNCLOS 1982".[275]

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[272] *Note Verbale* from the Permanent Mission of the Republic of the Philippines to the United Nations to the Secretary-General of the United Nations, No. 000228 (5 Apr. 2011), p. 1. MP, Vol. VI, Annex 200 (emphasis in original).

[273] *Note Verbale* from the Permanent Mission of the Socialist Republic of Vietnam to the United Nations to the Secretary-General of the United Nations, No. 86/HC-2009 (8 May 2009). MP, Vol. VI, Annex 193.

[274] *Note Verbale* from the Permanent Mission of the Republic of Indonesia to the United Nations to the Secretary-General of the United Nations, No. 480/POL-703/VII/10 (8 July 2010), pp. 1-2. MP, Vol. VI, Annex 197.

[275] *Note Verbale* from the Permanent Mission of Malaysia to the United Nations to the Secretary-General of the United Nations, No. HA 24/09 (20 May 2009), p. 1. MP, Vol. VI, Annex 194. The United States has taken a similar position. Citing "an incremental effort by China to assert control over the area contained in the so-called 'nine-dash line', despite the objections of its neighbors", the United States stated that under international law "all maritime claims must be derived from land features and otherwise comport with the international law of the

4.10 China responded to these objections in a *Note Verbale* dated 14 April 2011, in which it reiterated its "sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof", adding that its claim is "supported by abundant historical and legal evidence".[276] Since then, China has continued to press its claim of sovereign rights to the limits depicted on the nine-dash line map.

4.11 In 2012, China's state-owned China National Offshore Oil Corporation (CNOOC) published a map entitled "Locations for Part of Open Blocks in Waters under Jurisdiction of the People's Republic of China Available for Foreign Cooperation in the Year of 2012". As is evident from the map, shown in **Figure 4.3** (following page 72), the nine "open blocks" are bounded in the west by the nine-dash line. The coordinates provided by CNOOC confirm that all are at least partially within 200 M of Vietnam's coast, and most are beyond 200 M from any land feature over which China claims sovereignty.[277] The formal notification issued on 22 June 2012 stated: "Now, nine blocks covering an area of 160124.38 km^2 are available for exploration and development cooperation between China National Offshore Oil Corporation ('CNOOC') and foreign companies . . . . Please refer the locations of blocks to the attached map".[278]

4.12 In August 2012, the Deputy Director of China's National Institute for South China Sea Studies, Liu Feng, explained that China claims sovereign rights, including rights to oil and gas extraction and to fishing, in "'all the waters within the nine-dash line'".[279]

4.13 In the same year, China formally included the area encompassed by the nine-dash line within the scope of its Regulations on Marine Observation and Forecast.[280] The Philippines

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sea . . . . [C]laims in the South China Sea that are not derived from land features are fundamentally flawed . . . . Any use of the 'nine-dash line' by China to claim maritime rights not based on claimed land features would be inconsistent with international law". United States, House Committee on Foreign Affairs, Subcommittee on Asia and the Pacific, "Testimony of Daniel Russel, Assistant Secretary of State Bureau of East Asian and Pacific Affairs at the U.S. Department of State" (5 Feb. 2014). MP, Vol. VI, Annex 170.

[276] *Note Verbale* from the Permanent Mission of the People's Republic of China to the Secretary-General of the United Nations, No. CML/8/2011 (14 Apr. 2011), p. 1. MP, Vol. VI, Annex 201.

[277] China National Offshore Oil Corporation, *Press Release: Notification of Part of Open Blocks in Waters under Jurisdiction of the People's Republic of China Available for Foreign Cooperation in the Year of 2012* (23 June 2012), p. 5. MP, Vol. V, Annex 121.

[278] *Id.*, p. 2.

[279] Jane Perlez, "China Asserts Sea Claim with Politics and Ships", *New York Times* (11 Aug. 2012), p. 3. MP, Vol. X, Annex 320.

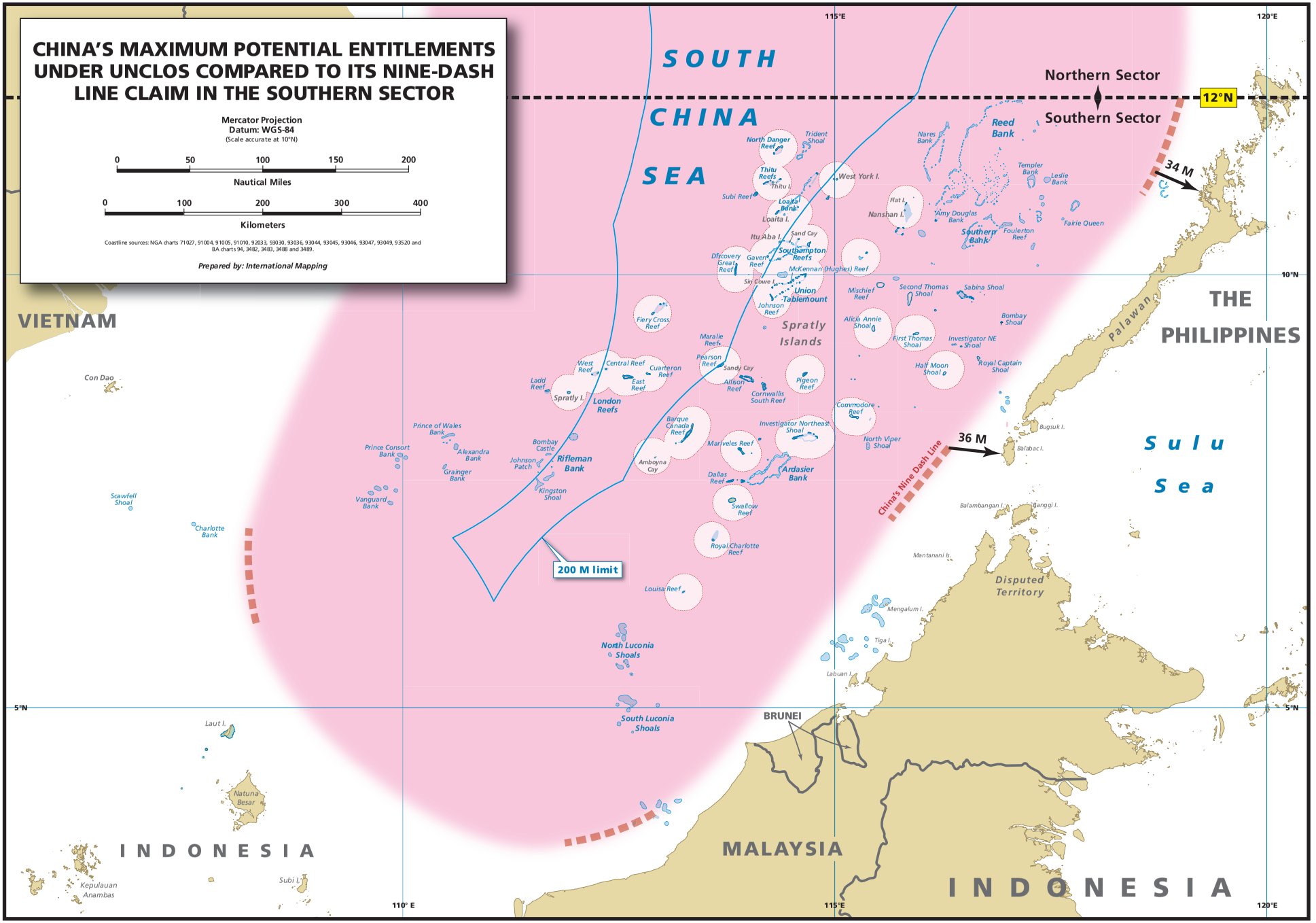
CHINA'S MAXIMUM POTENTIAL ENTITLEMENTS UNDER UNCLOS COMPARED TO ITS NINE-DASH LINE CLAIM IN THE SOUTHERN SECTOR
Mercator Projection
Datum: WGS-84
(Scale accurate at 10°N)
0 50 100 150 200
Nautical Miles
0 100 200 300 400
Kilometers
Coastline sources: NGA charts 71027, 91004, 91005, 91010, 92033, 93030, 93036, 93044, 93045, 93046, 93047, 93049, 93520 and BA charts 94, 3482, 3483, 3488 and 3489.
Prepared by: International Mapping
SOUTH CHINA SEA
Northern Sector
Southern Sector
12°N
115°E
120°E
10°N
5°N
110° E
VIETNAM
THE PHILIPPINES
INDONESIA
MALAYSIA
BRUNEI
Spratly Islands
Reed Bank
North Danger Reef
Trident Shoal
Thitu Reefs
Thitu I.
West York I.
Nares Bank
Templer Bank
Leslie Bank
Subi Reef
Loaita Bank
Loaita I.
Flat I.
Nanshan I.
Amy Douglas Bank
Southern Bank
Foulerton Reef
Fairie Queen
Itu Aba I.
Sand Cay
Southampton Reefs
Discovery Great Reef
Gaven Reef
McKennan (Hughes) Reef
Sin Cowe I.
Union Tablemount
Johnson Reef
Mischief Reef
Second Thomas Shoal
Sabina Shoal
Alicia Annie Shoal
Bombay Shoal
First Thomas Shoal
Investigator NE Shoal
Royal Captain Shoal
Half Moon Shoal
Fiery Cross Reef
Maralie Reef
Pearson Reef
Sandy Cay
Allison Reef
Cornwallis South Reef
Pigeon Reef
West Reef
Central Reef
Cuarteron Reef
East Reef
Ladd Reef
Spratly I.
London Reefs
Commodore Reef
Investigator Northeast Shoal
North Viper Shoal
Barque Canada Reef
Mariveles Reef
Ardasier Bank
Dallas Reef
Amboyna Cay
Rifleman Bank
Bombay Castle
Johnson Patch
Kingston Shoal
Swallow Reef
Royal Charlotte Reef
Louisa Reef
200 M limit
34 M
36 M
China's Nine Dash Line
Palawan
Sulu Sea
Bugsuk I.
Balabac I.
Balambangan I.
Banggi I.
Mantanani Is.
Disputed Territory
Mengalum I.
Tiga I.
Labuan I.
North Luconia Shoals
South Luconia Shoals
Con Dao
Prince of Wales Bank
Prince Consort Bank
Alexandra Bank
Grainger Bank
Vanguard Bank
Scawfell Shoal
Charlotte Bank
Laut I.
Natuna Besar
Kepulauan Anambas
Subi I.

Figure 4.2

REPRODUCTION OF CNOOC MAP ENTITLED:

"LOCATIONS FOR PART OF OPEN BLOCKS IN WATERS UNDER JURISDICTION OF THE PEOPLE'S REPUBLIC OF CHINA AVAILABLE FOR FOREIGN COOPERATION IN THE YEAR OF 2012"

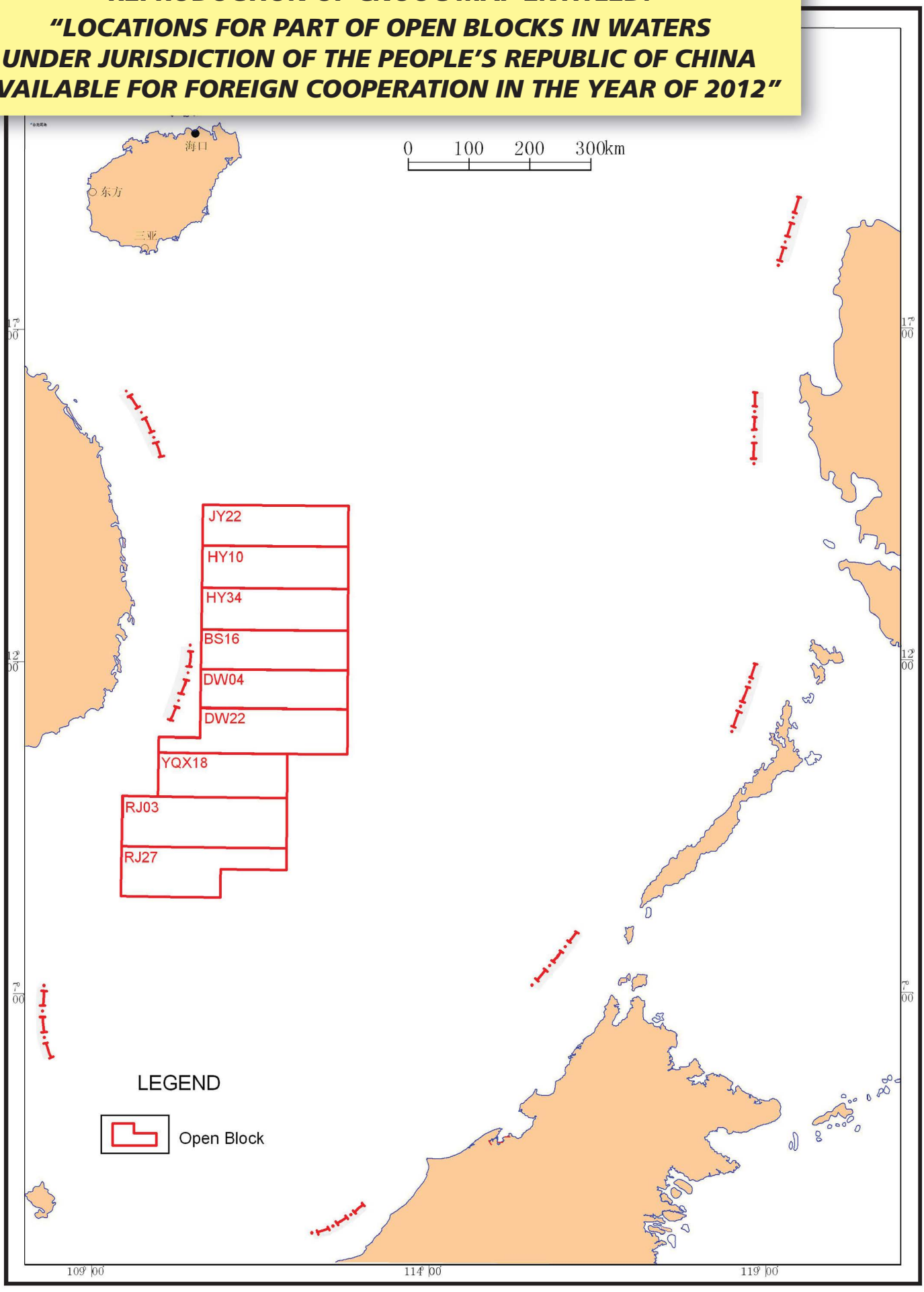

Figure 4.3

protested this action on the ground that "extending those regulations to areas outside [China's] jurisdiction and well within the territories and jurisdiction of other countries, including the Philippines, is unacceptable and non-recognizable under international law".[281] China responded: "[i]t is completely within China's sovereignty . . . to take any legislative, executive and public-service actions, including maritime observation and forecast, on the islands in the South China Sea and the adjacent waters".[282]

4.14 China then imprinted the image of the nine-dash line in the pages of its e-passports.[283] The Philippines again protested: "The Philippines strongly protests the inclusion of the nine-dash lines in the e-passport as such image covers an area that is clearly part of the Philippine territory and maritime domain. The Philippines does not accept the validity of the nine-dash lines that amount to an excessive declaration of maritime space in violation of international law".[284]

4.15 In December 2012, China revised the "Coast Border Security Regulations" for Hainan Province, to require consent by the provincial authorities for entry by any foreign vessel into any waters in the South China Sea under Chinese jurisdiction.[285] Vietnam formally protested these regulations as "infring[ing] upon the sovereignty, sovereign rights and national jurisdiction of Viet Nam in the East Sea [South China Sea]", adding that "Viet Nam resolutely opposes and demands China immediately cancel those wrongful activities".[286] For its part, the Philippines requested clarification of China's new regulations, in particular in

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[280] People's Republic of China, *Regulations Governing Marine Observation and Forecast* (1 Mar. 2012). MP, Vol. V, Annex 116.

[281] *Note Verbale* from the Department of Foreign Affairs of the Republic of Philippines to the Embassy of People's Republic of China in Manila, No. 12-1453 (31 May 2012), p. 1. MP, Vol. VI, Annex 212.

[282] *Note Verbale* from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (12)PG-251 (12 June 2012), p. 1. MP, Vol. VI, Annex 213.

[283] People's Republic of China, *Page from People's Republic of China Passport* (2012). MP, Vol. V, Annex 114.

[284] *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 12-3331 (21 Nov. 2012). MP, Vol. VI, Annex 214.

[285] People's Republic of China, Hainan Province, *Hainan Provincial Regulation on the Control of Coastal Border Security* (31 Dec. 2012). MP, Vol. V, Annex 123. This matter is discussed in greater detail *infra* paras. 6.33-6.35.

[286] Ministry of Foreign Affairs of the Socialist Republic of Vietnam, *Remarks by Foreign Ministry Spokesman Luong Thanh Nghi on January 14, 2013* (14 Jan. 2013). MP, Vol. VI, Annex 168 (emphasis omitted).

regard to whether they are intended to apply within the entire area covered by the nine-dash line.[287] China has not formally responded to the Philippines' request.

4.16 However, China effectively provided the requested clarification in December 2012, when it deployed the *Haixun 21*, a vessel described by the state-owned Chinese press as the "most advanced and well-equipped maritime law enforcement patrol vessel" of the China Maritime Safety Administration,[288] to "enable the maritime surveillance to *fully cover* the coastal areas, coastal waters and *the South China Sea waters* of *nearly 2 million square nautical miles* [sic] within the jurisdiction of Hainan Province".[289] That area is equivalent to the entire area encompassed by the nine-dash line (1,940,000 km^2).

4.17 In January 2013, China issued a slightly amended version of the nine-dash line map, which included a tenth dash east of Taiwan. The January 2013 map, shown in **Figure 4.4** (following page 74), depicts the ten dashes as marking China's "national boundary".[290] The map's legend states that "China's border on this map is based on the 'Geographical Map of the People's Republic of China' (1:4000 000) published by [China Cartographic Publishing House] in 1989. The administrative district information is as at November 2012". The Philippines protested this map by way of a *Note Verbale* dated 7 June 2013.[291] It reiterated its position that the dashed line has no basis under UNCLOS, and encroaches on the sovereign rights and jurisdiction of the Philippines within the latter's maritime entitlements under the Convention.[292] China responded by diplomatic note from its Embassy in Manila, which, after stating that China "does not accept the content" of the Philippines' note, asserted: "The Chinese side hereby reiterates that China enjoys indisputable sovereignty over the Nansha [Spratly] Islands and their adjacent waters".[293]

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[287] *Note Verbale* from the Department of Foreign Affairs of the Republic of Philippines to the Embassy of the People's Republic of China in Manila, No. 13-0011 (2 Jan. 2013). MP, Vol. VI, Annex 216.

[288] "'Haixun 21' Formally Commissioned under Hainan Maritime Bureau Today, Serving Hainan Jurisdiction", *Maritime News* (27 Dec. 2012), p. 2. MP, Vol. X, Annex 323.

[289] *Id.*, p. 1.

[290] China Cartographic Publishing House, *Map of the People's Republic of China* (Jan. 2013). MP, Vol. II, Figure 4.4.

[291] *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 13-1878 (7 June 2013). MP, Vol. VI, Annex 218.

[292] *Id.*

[293] *Note Verbale* from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (13)PG-173 (21 June 2013). MP, Vol. VI, Annex 220.

"MAP OF THE PEOPLE'S REPUBLIC OF CHINA"

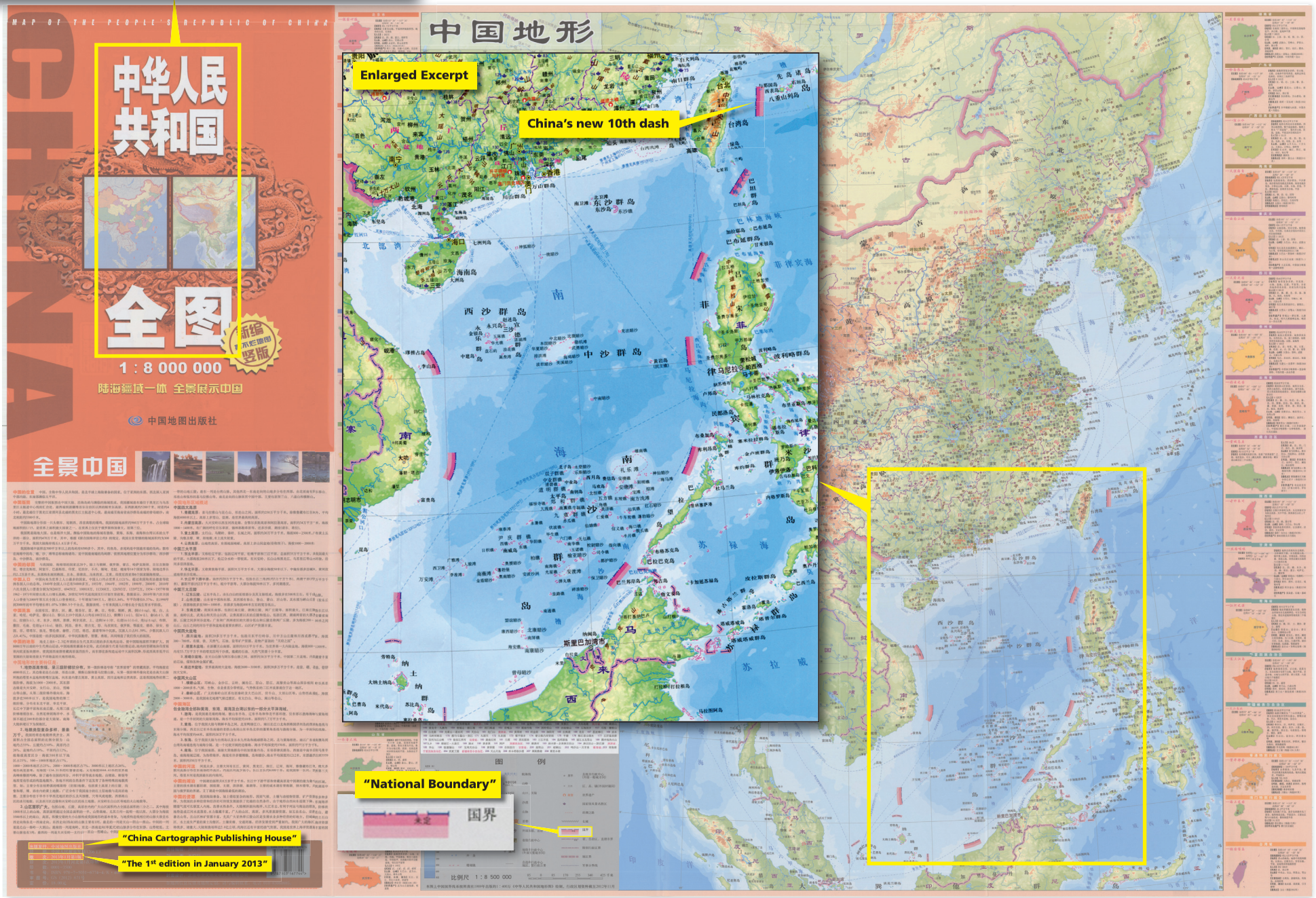

Figure 4.4

4.18 In a 2013 article which he co-authored in English with Professor Jia Bing Bing of Tsinghua University School of Law, Judge Gao Zhiguo, one of China's most authoritative scholars on the law of the sea, described the dashed line as reflecting China's claim that its maritime rights extend beyond those conferred by UNCLOS, based on Article 14 of China's Act of 26 June 1998 on the Exclusive Economic Zone and the Continental Shelf, which states: "The provisions of this Act shall not affect the historical rights of the People's Republic of China".[294] According to Judge Gao: "*In addition to these rights conferred by UNCLOS*, China can assert *historic rights* within the nine-dash line – under Article 14 of its 1998 law on the EEZ and the continental shelf – in respect of fishing, navigation, and exploration and exploitation of resources".[295] He explained in this respect that the line has "three meanings":

> First, it represents the title to the island groups that it encloses. In other words, within the nine-dash line in the South China Sea, China has sovereignty over the islands and other insular features, and has sovereignty, sovereign rights, and jurisdiction – in accordance with UNCLOS – over the waters and seabed and subsoil adjacent to those islands and insular features. *Second, it preserves Chinese historic rights in fishing, navigation, and such other marine activities as oil and gas development in the waters and on the continental shelf surrounded by the line*. Third, it is likely to allow for such residual functionality as to serve as potential maritime delimitation lines.[296]

4.19 Insofar as the dashed line purports to describe an area within which China has sovereignty over "islands" (as defined in Article 121, paragraph 1, of UNCLOS), the Philippines takes no position in these proceedings, in recognition of the limits the Convention imposes on the Arbitral Tribunal's jurisdiction.

4.20 What the Philippines *does* challenge, is China's assertion and exercise of so-called "historic rights", which are said to be "*[i]n addition to* these rights conferred by UNCLOS . . . within the nine-dash line – under Article 14 of its 1998 law on the EEZ and the continental shelf – in respect of fishing, navigation, and exploration and exploitation of resources".[297] As shown above, since 2009 China has repeatedly invoked its alleged "historic rights" within the

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[294] People's Republic of China, *Exclusive Economic Zone and Continental Shelf Act* (26 June 1998), Art. 14. MP, Vol. V, Annex 107.

[295] Z. Gao and B.B. Jia, "The Nine-Dash Line in the South China Sea: History, Status, and Implications", *American Journal of International Law*, Vol. 107, No. 1 (2013), pp. 109-110. MP, Vol. X, Annex 307 (emphasis added).

[296] *Id.*, pp. 123-124 (emphasis added).

[297] *Id.*, pp. 109-110 (emphasis added).

nine-dash line to assert claims to maritime areas beyond its entitlements under UNCLOS, and to interfere with and prevent the exercise by the Philippines of its rights to fish and explore for oil and gas in its 200 M EEZ and continental shelf where, under the Convention, only the Philippines is entitled to exploit the living and non-living resources.

B. The Origin and Evolution of China's Claim of "Historic Rights" Beyond Its UNCLOS Entitlements

4.21 Notwithstanding its assertion of "*historic* rights", China's claim in respect of all the waters, seabed and subsoil within the nine-dash line is of recent vintage. Chinese legal scholars and historians claim to have traced the origin of the claim back no farther than 1947.[298] However, as shown below, the reality is that China's claim dates back only to 1998.

4.22 As related in Chapter 2, Chinese maps from the Qing dynasty (through the beginning of the 20th century) placed the southernmost border of China at Hainan Island.[299] They reflect no claim that the South China Sea islands formed part of Chinese territory. As late as 1932, China acknowledged that its claims in the South China Sea extended no farther south than the Paracel Islands. In a *Note Verbale* dated 29 September 1932, the Chinese Legation in France advised the French Ministry of Foreign Affairs that "[t]he Si-Chao-Chuin-Tao Islands, also known as Tsi-Cheou-Yang and called the Paracel Islands in the foreign tongue . . . lie 145 nautical miles from Hainan Island, and form *the southernmost part of Chinese territory*".[300]

4.23 The first official Chinese map encompassing the islands and adjacent waters of the South China Sea as far south as the Spratly Islands had eleven dashes,[301] and is reported as

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[298] *See, e.g.*, Wu Shicun, *Solving Disputes for Regional Cooperation and Development in the South China Sea: A Chinese Perspective* (2013), pp. 15-38. MP, Vol. IX, Annex 306; Jianming Shen, "International Law Rules and Historical Evidences Supporting China's Title to the South China Sea Islands", *Hastings International & Comparative Law Review*, Vol. 21, No. 1 (1997-1998). MP, Vol. VIII, Annex 260; Jianming Shen, "China's Sovereignty over the South China Sea Islands: A Historical Perspective", *Chinese Journal of International Law*, Vol. 1, No. 1 (2002). MP, Vol. VIII, Annex 274.

[299] Laura Hostetler, "Early Modern Mapping at the Qing Court: Survey Maps from the Kangxi, Yongzheng, and Qianlong Reign Periods" in *Chinese History in Geographical Perspective* (Y. Du and J. Kyong-McClain, eds., 2013). MP, Vol. X, Annex 308.

[300] *Note Verbale* from the Legation of the Republic of China in Paris to the Ministry of Foreign Affairs of France (29 Sept. 1932), *reprinted in* Monique Chemillier-Gendreau, *Sovereignty over the Paracel and Spratly Islands* (2000), p. 1. MP, Vol. VI, Annex 171 (emphasis added).

[301] During the 1960s, two segments in the Gulf of Tonkin were removed from the map and the line henceforth had nine segments. E. Franckx and M. Benatar, "Dots and Lines in the South China Sea: Insights from the Law

having been introduced in a 1947 atlas that was circulated internally within the Chinese Nationalist Government.[302] In February 1948, that Government published an atlas of national administrative districts through the Commerce Press, Beijing, which included the 1947 map.[303] That map, which is captioned "Map Showng the Location of the Various Islands in the South Sea", is reproduced as **Figure 4.5** (following page 78).

4.24 Significantly, according to Judge Gao and Professor Jia, "[t]he underlying reason for the eleven-dash line was presumably to reaffirm and reiterate China's sovereignty over the island groups in the South China Sea at the beginning of a new, postwar era",[304] after the defeat of Japan, which had seized them from France and other colonial powers during World War II. The eleven-dash line made its appearance at the time the San Francisco Treaty with Japan was being negotiated, and China was staking its claim to the Paracel and Spratly Islands (a claim that the Allies rejected in the final version of the Treaty).[305] Thus, as initially conceived, the line represented an assertion of China's sovereignty only over the islands located within it, and not a claim of sovereign rights or jurisdiction over an extensive area of sea, seabed and subsoil. It was, in other words, intended as a line of allocation, not a claim over the sea. Indeed, it could not have been understood otherwise. It was only in September 1945 that President Truman, on behalf of the United States, asserted the first claim by any State to a "continental shelf" consisting of the seabed and subsoil that naturally extended

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of Map Evidence", *Asian Journal of International Law*, Vol. 2, No. 1 (Jan. 2012), p. 91. MP, Vol. IX, Annex 304.

[302] Zou Keyuan, "The Chinese Traditional Maritime Boundary Line in the South China Sea and Its Legal Consequences for the Resolution of the Dispute over the Spratly Islands", *International Journal of Marine and Coastal Law*, Vol. 14, No. 27 (1999), p. 33. MP, Vol. VIII, Annex 264; L. Jinming and L. Dexia, "The Dotted Line on the Chinese Map of the South China Sea: A Note", *Ocean Development & International Law*, Vol. 34, No. 3-4 (2003), pp. 288-290. MP, Vol. VIII, Annex 275.

[303] Z. Gao and B.B. Jia, "The Nine-Dash Line in the South China Sea: History, Status, and Implications", *American Journal of International Law*, Vol. 107, No. 1 (2013), p. 103. MP, Vol. X, Annex 307.

[304] *Id.*, p. 103. *See also* Zou Keyuan, "The Chinese Traditional Maritime Boundary Line in the South China Sea and Its Legal Consequences for the Resolution of the Dispute over the Spratly Islands", *International Journal of Marine and Coastal Law*, Vol. 14, No. 27 (1999), p. 34. MP, Vol. VIII, Annex 264 ("each extension of the line from the north to the south was a reaction to the challenges or encroachments made by foreign intruders to the Chinese claims of sovereignty and jurisdiction of the islands in the South China Sea".).

[305] *See Record of Proceedings of the Conference for the Conclusion and Signature of the Treaty of Peace With Japan, San Francisco, CA, September 4-8, 1951* (1951), pp. 119-122, 282-293. MP, Vol. X, Annex 332.

from its continental landmass beyond the territorial waters close to shore. Some States followed suit with similar proclamations.[306] Notably, China was not one of them.

4.25 Official Chinese Government maps published between 1950 and 1956 continued to depict the dashed line from the 1947 map – reduced from eleven to ten dashes, but otherwise unchanged – without explanation of the status of the waters or seabed encompassed by the line.[307] Some clarification was provided, however, in September 1958, when China issued its Declaration on the Territorial Sea, in which it proclaimed a territorial sea of 12 M extending from all Chinese coasts "including the Chinese mainland and its coastal islands, as well as Taiwan and its surrounding islands, the Penghu Islands . . . and all other islands belonging to China which are separated from the mainland and its coastal islands by the high seas".[308] The islands "separated . . . by the high seas" specifically identified in the text include the Tungsha (Prata) Islands, the Xisha (Paracel) Islands, the Zhongsha Islands (Macclesfied Bank), and the Nansha (Spratly) Islands.[309] Thus, as of 1958, eleven years after the first appearance of its dashed line, China claimed sovereignty only over the islands encompassed within the line. In regard to maritime jurisdiction, it claimed no more than a 12 M territorial sea, including for all those islands. Significantly, it expressly recognized that the South China Sea islands were "separated from the mainland and coastal islands *by the high seas*".[310]

4.26 In 1992, China's Law on the Territorial Sea and Contiguous Zone reaffirmed its 12 M territorial sea adjacent to its mainland coast, offshore islands and South China Sea islands. The 1992 law added a claim to a 12 M contiguous zone extending from China's territorial sea

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[306] *See* Suzette V. Suarez, *The Outer Limits of the Continental Shelf: Legal Aspects of their Establishment* (2008), pp. 28-29. MP, Vol. XI, Annex LA-157.

[307] *See* China Cartographic Publishing House, *Hanging Map of the People's Republic of China* (1950). MP, Vol. II, Annex M1; Ya Guang Yu De Xue She, *Large Map of the People's Republic of China* (1951). MP, Vol. II, Annex M2; Ya Guang Yu De Xue She, *Large Map of the People's Republic of China* (1952). MP, Vol. II, Annex M3; China Cartographic Publishing House, *Hanging Map of the People's Republic of China* (1956). MP, Vol. II, Annex M4. These are official Chinese maps published between 1950 and 1956.

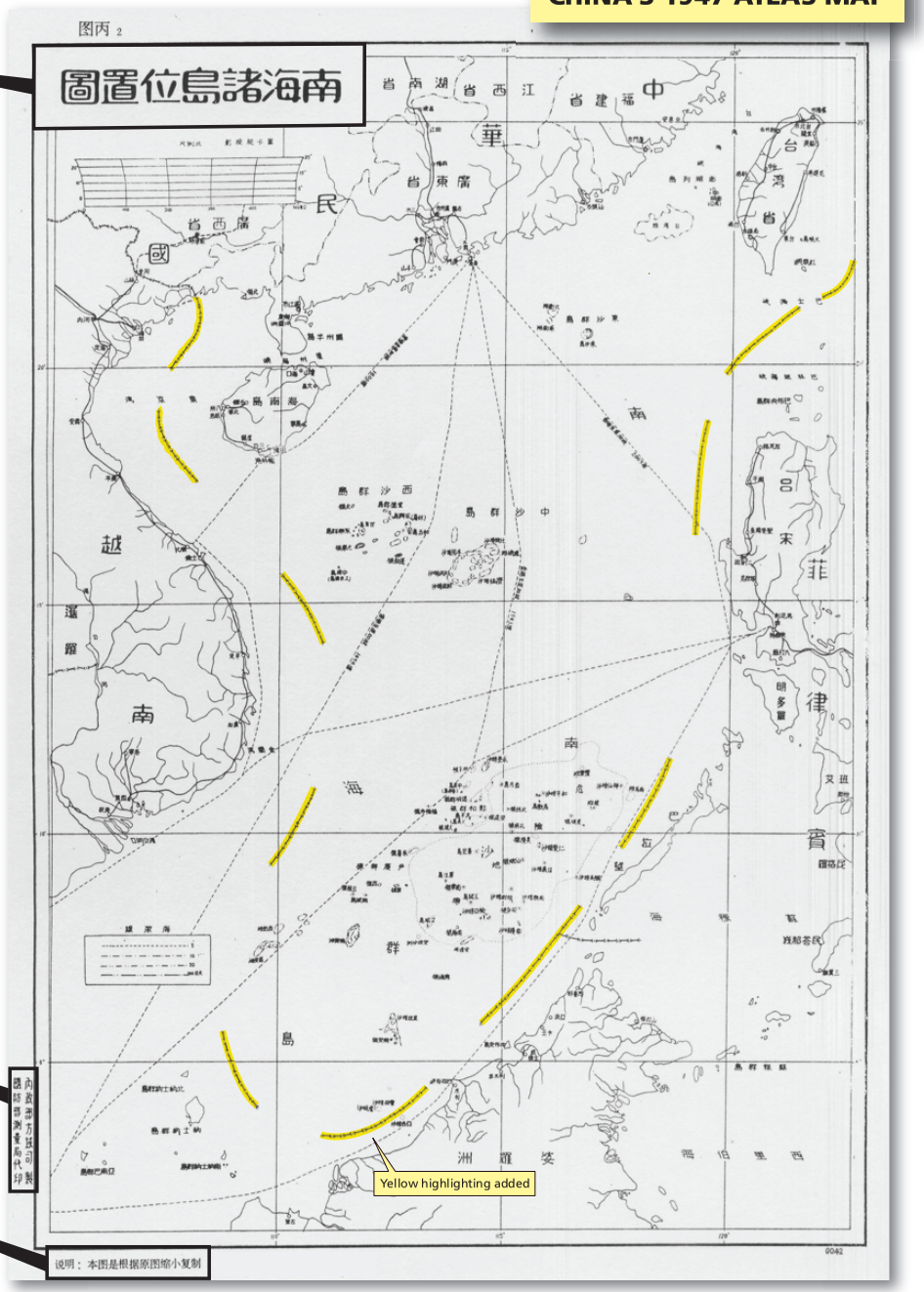
[308] People's Republic of China, *Declaration of the Government of the People's Republic of China on China's Territorial Sea* (4 Sept. 1958), in *Collection of the Sea Laws and Regulations of the People's Republic of China* (3rd ed. 2001), para. 1. MP, Vol. V, Annex 103 "The declaration was approved by the Standing Committee of the People's Congress on September 4, 1958, thus making it part of Chinese law". Z. Gao and B.B. Jia, "The Nine-Dash Line in the South China Sea: History, Status, and Implications", *American Journal of International Law*, Vol. 107, No. 1 (2013), p.104 n. 38. MP, Vol. X, Annex 307. The Chinese word used in the Declaration for "high seas", 公海 (*gong hai*), is the same used in UNCLOS for "high seas".

[309] People's Republic of China, *Declaration of the Government of the People's Republic of China on China's Territorial Sea* (4 Sept. 1958), in *Collection of the Sea Laws and Regulations of the People's Republic of China* (3rd ed. 2001), para. 4. MP, Vol. V, Annex 103.

[310] *Id.*, para. 1 (emphasis added).

CHINA'S 1947 ATLAS MAP

"MAP SHOWING THE LOCATION OF THE VARIOUS ISLANDS IN THE SOUTH SEA"
(NANHAI ZHU DAO WEI ZHI TU)



"Prepared by the Boundary Department of the Ministry of Interior. Printed by the Survey Bureau of the Ministry of National Defense."

"This map is reproduced based on the original map with reduced size."

Figure 4.5

limits. Thus, even though the dashed line continued to appear on China's official maps between 1958 and 1992, the 1992 law, like the 1958 law, asserted no claims to the rest of the waters or seabed within the line.[311] This was the conclusion that Judge Gao reached in an article he published in 1994, two years before China ratified UNCLOS. Judge Gao explained that: "China has never claimed the entire water column of the South China Sea, but only the islands and their surrounding waters within the line. Thus, the boundary line on the Chinese map is merely a line that delineates ownership of islands rather than a maritime boundary in the conventional sense".[312]

4.27 When China ratified UNCLOS in June 1996, it seized the occasion to publicly claim, for the first time, "sovereign rights and jurisdiction over an exclusive economic zone of 200 nautical miles and the continental shelf".[313] There was no indication then either that China had asserted, or intended to assert, any claims in respect of the waters, seabed or subsoil beyond its entitlements under UNCLOS.

4.28 The first indication otherwise came two years after China acceded to UNCLOS, in 1998, when China adopted its Act on the Exclusive Economic Zone and the Continental Shelf. In the Act, China proclaimed, in conformity with UNCLOS, an exclusive economic zone and continental shelf. However, as mentioned previously, in addition to these claims under the 1982 Convention, Article 14 of the Act stated that its provisions "shall not affect the historical rights of the People's Republic of China".[314] This is the first time that such a

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[311] *See* China Cartographic Publishing House, *Map of the People's Republic of China* (1971). MP, Vol. II, Annex M5; China Cartographic Publishing House, *Map of the People's Republic of China* (Jan. 1973). MP, Vol. II, Annex M6; China Cartographic Publishing House, *Map of the People's Republic of China* (May 1973). MP, Vol. II, Annex M7; China Cartographic Publishing House, *Map of the People's Republic of China* (May 1978). MP, Vol. II, Annex M8; China Cartographic Publishing House, *Map of the People's Republic of China* (1980). MP, Vol. II, Annex M9; China Cartographic Publishing House, *Map of the People's Republic of China* (June 1981). MP, Vol. II, Annex M10; China Cartographic Publishing House, *Map of the People's Republic of China* (June 1982). MP, Vol. II, Annex M11; China Cartographic Publishing House, *Map of the People's Republic of China* (June 1984). MP, Vol. II, Annex M12; China Cartographic Publishing House, *Map of the People's Republic of China* (Mar. 1987). MP, Vol. II, Annex M13; China Cartographic Publishing House, *Map of the People's Republic of China* (Aug. 1988). MP, Vol. II, Annex M14; SinoMaps Press, *Map of the People's Republic of China* (1990), MP, Vol. II, Annex M15; China Cartographic Publishing House, *Map of the People's Republic of China* (June 1992). MP, Vol. II, Annex M16.

[312] Zhiguo Gao, "The South China Sea: From Conflict to Cooperation?", *Ocean Development and International Law*, Vol. 25, No. 3 (1994), p. 346. MP, Vol. VII, Annex 255.

[313] United Nations, Secretary-General, *Multilateral Treaties Deposited with the Secretary-General*, Vol. 3, Part 1, Chapters 12-29, and Part 2, U.N. Doc. ST/LEG/SER.E/26 (1 Apr. 2009), para. 1. MP, Vol. XI, Annex LA-67.

[314] People's Republic of China, *Exclusive Economic Zone and Continental Shelf Act* (26 June 1998), Art. 14. MP, Vol. V, Annex 107.

claim to "historical rights" was made, and no explanation, justification, authority or evidence were provided. Neither Article 14 nor any other provision specified what the claimed "historical rights" were, or where they existed. Nor did the Act, or the Chinese Government, explain the basis on which its purported "historical rights" were claimed. What is clear is that China claimed "historical rights" as distinguished from "historic title". The Chinese text asserts China's 历史性权利 ("*li shi xing quan li*"), which corresponds to legal rights short of title. The Chinese word for title, by contrast, is 历史性所有权 ("*li shi xing suo you quan*"), which is the same word that appears in Article 15 of the Chinese text of UNCLOS as the counterpart of the English word "title".[315]

4.29 Soon after the enactment of the 1998 law, Chinese legal experts began explaining that the "historic rights" China sought to preserve were those within the dashed line, beyond the areas covered by its entitlements under UNCLOS. For example, Professor Zou Keyuan wrote in a 2000 article entitled *Maritime Legislation of Mainland China and Taiwan: Developments, Comparison, Implications, and Potential Challenges for the United States*: "The legal definition and implications of [the dashed line] are still controversial, but generally the line is regarded as indicating the ownership of islands within the line, *although the wording 'historic rights' may imply more than this*".[316] This view was shared by Professors Li Jinming and Li Dexia, who wrote that "[t]he [1998] Law does not [] interpret the precise meaning of the phrase 'historic rights,' but we can imagine that it is related to the historic rights of the region within the dotted line of the South China Sea".[317]

4.30 Professor Zou Keyuan elaborated in a 2001 article entitled *Historic Rights in International Law and in China's Practice* in which he wrote that Article 14 of China's 1998 Act "can be interpreted to mean that certain sea areas to which China's historical rights are claimed go beyond the 200 nautical mile limit". According to Professor Zou, China's claim is one of "'historic rights with tempered sovereignty'",[318] which include sovereign rights

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[315] *See* People's Republic of China, *Exclusive Economic Zone and Continental Shelf Act* (26 June 1998), Art. 14 (Chinese version). MP, Vol. V, Annex 107.

[316] Y. Song and Z. Keyuan, "Maritime Legislation of Mainland China and Taiwan: Developments, Comparison, Implications, and Potential Challenges for the United States", *Ocean Development and International Law*, Vol. 31, No. 4 (2000), p. 318. MP, Vol. XI, Annex LA-143 (emphasis added).

[317] L. Jinming and L. Dexia, "The Dotted Line on the Chinese Map of the South China Sea: A Note", *Ocean Development & International Law*, Vol. 34, No. 3-4 (2003), p. 293. MP, Vol. VIII, Annex 275.

[318] Zou Keyuan, "Historic Rights in International Law and in China's Practice", *Ocean Development & International Law*, Vol. 32, No. 2 (2001), pp. 160, 161. MP, Vol. XI, Annex LA-144.

beyond China's 200 M EEZ and continental shelf that are "exclusive for the purpose of development of natural resources in the areas" but are short of complete sovereignty. [319]

4.31 In 2002, China conducted marine scientific research across a swath of the South China Sea, including off the northwest coast of Luzon. Significantly, as reflected in its diplomatic correspondence, it requested permission from the Philippines to carry out its activities in what it called "the Exclusive Economic Zone of the Republic of the Philippines" *only* on the Philippine side of the dashed line.[320] **Figure 4.6** (following page 82) shows the locations for which the permission of the Philippines was requested by China, and that China requested no permission to operate on "its" side of the dashed line, even though much of that maritime space, too, was located within the Philippines' EEZ.

4.32 However, it was not until its notes addressed to the U.N. Secretary General in May 2009 that, for the first time, China officially invoked the dashed line (whose dashes were reduced from ten to nine) to depict the breadth of its alleged "sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof".[321] In the diplomatic exchanges that followed, China insisted on its historically-based sovereign rights in these areas. In a 21 June 2011 demarche to the Philippine Embassy in Beijing, General Hong Liang, Deputy Director of the Asia Department of China's Ministry of Foreign Affairs, asserted that, while the Philippines has rights under UNCLOS, "China also has '*historical rights*' which are acknowledged under UNCLOS. *Historical rights* cannot be denied and must be respected".[322] General Hong Liang further elaborated: "China's 9-dash line claim and map is based on the 1948 declaration by the Kuomintang government. UNCLOS also has a provision that *historic rights* cannot be denied and should be respected. UNCLOS is there, and the parties can use any clause that is useful to support its claim . . . . China understands

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[319] *Id.*, p. 160.

[320] *Note Verbale* from the Ministry of Foreign Affairs of the People's Republic of China to the Embassy of the Republic of the Philippines in Beijing, No. (2002) Bu Ya Zi No. 3 (8 Jan. 2002), p. 1. MP, Vol. VI, Annex 187.

[321] *Note Verbale* from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/17/2009 (7 May 2009). MP, Vol. VI, Annex 191; *Note Verbale* from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/18/2009 (7 May 2009). MP, Vol. VI, Annex 192.

[322] *Memorandum* from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-064-2011-S (21 June 2011), para. 8. MP, Vol. IV, Annex 72 (emphasis added).

that the Philippine claim is based on its 200 mile EEZ. China hopes, however, that its *historic rights* in the SCS be respected by the Philippines".[323]

4.33 The following month, China dispatched a note to the Philippines protesting the Philippines' offering of petroleum blocks to local and international companies for exploration and development. China wrote that: "Among the aforesaid blocks, AREA 3 and AREA 4 are situated in the waters of which China has historic titles including sovereign rights and jurisdiction".[324] As shown in **Figure 4.7** (in Volume II only), these areas, located at Reed Bank approximately 65 M from the Philippine coast at Palawan, are within the nine-dash line. China's reliance on its alleged "historic" rights, as distinguished from its entitlements under the 1982 Convention, within the area encompassed by the line was made even clearer shortly thereafter in a 15 September 2011 statement by the Chinese Foreign Ministry that UNCLOS "does not restrain or deny a country's *right* which is *formed in history* and abidingly upheld".[325]

4.34 Events between 1998 and 2012, including these official Chinese statements, caused Judge Gao to change his view on the purpose of the dashed line. Where, in 1994, he had described it as merely indicative of the islands and other insular features over which China claimed sovereignty, not an assertion of rights in respect of the entire water column or seabed within the line, he wrote in 2013, as indicated above, that the nine-dash line, in *addition* to asserting sovereignty over islands and maritime jurisdiction in accordance with UNCLOS: "preserves Chinese *historic rights* in fishing, navigation, and such other marine activities as oil and gas development in the waters and on the continental shelf surrounded by the line".[326]

4.35 On 8 February 2014, China's reliance on its purported "historic rights" to navigation and exclusive access to the living and non-living resources in the maritime area encompassed by the dashed line, beyond its entitlements under UNCLOS, was confirmed in an official

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[323] *Id.*, p. 6 (emphasis added).

[324] *Note Verbale* from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (11)PG-202 (6 July 2011), p. 1. MP, Vol. VI, Annex 202.

[325] *See* Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Jiang Yu's Regular Press Conference on September 15, 2011* (16 Sept. 2011), p. 2. MP, Vol. V, Annex 113 (emphasis added).

[326] Z. Gao and B.B. Jia, "The Nine-Dash Line in the South China Sea: History, Status, and Implications", *American Journal of International Law*, Vol. 107, No. 1 (2013), p. 124. MP, Vol. X, Annex 307 (emphasis added).

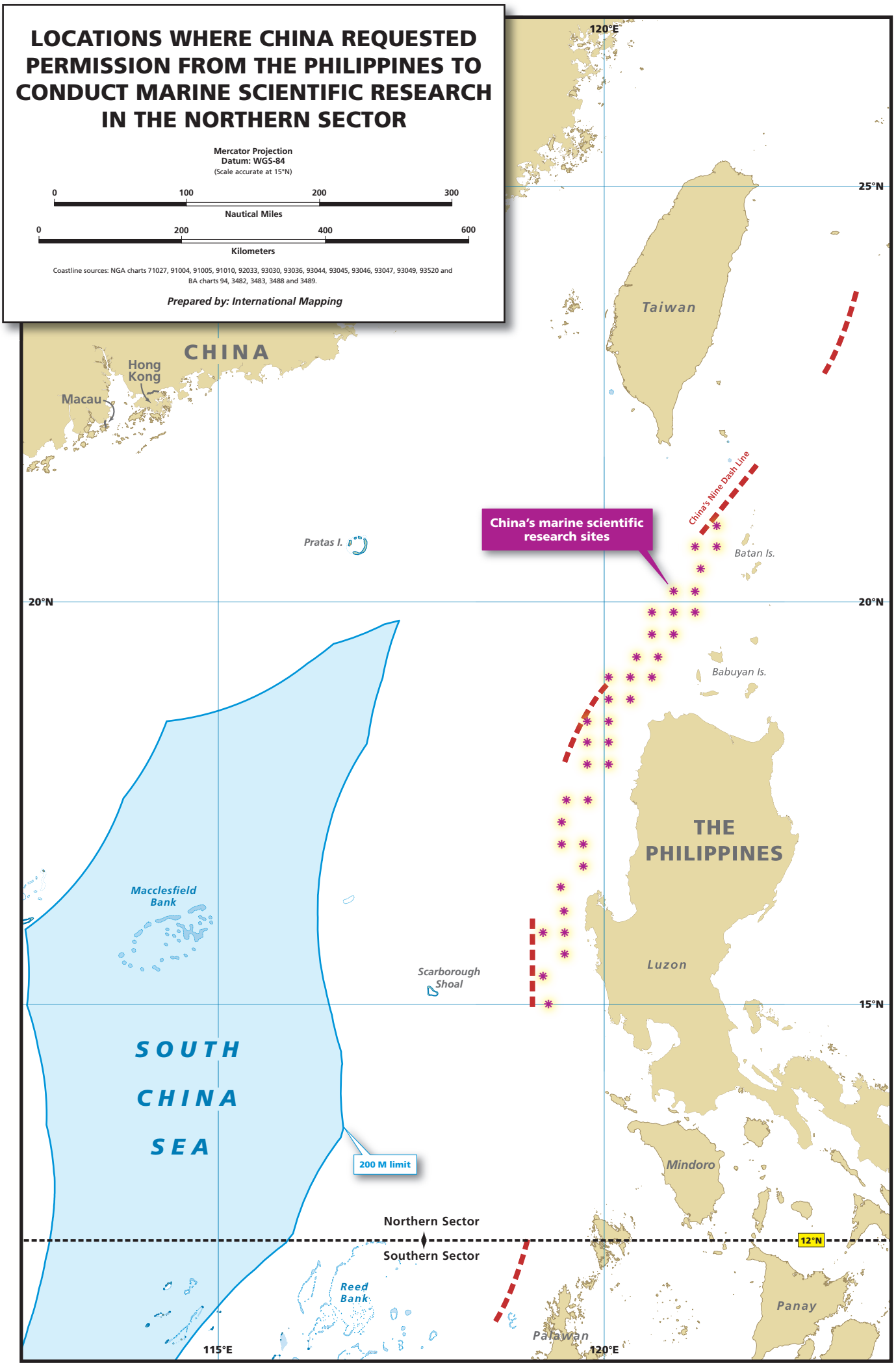
LOCATIONS WHERE CHINA REQUESTED PERMISSION FROM THE PHILIPPINES TO CONDUCT MARINE SCIENTIFIC RESEARCH IN THE NORTHERN SECTOR
Mercator Projection
Datum: WGS-84
(Scale accurate at 15°N)
0
100
200
300
Nautical Miles
0
200
400
600
Kilometers
Coastline sources: NGA charts 71027, 91004, 91005, 91010, 92033, 93030, 93036, 93044, 93045, 93046, 93047, 93049, 93520 and BA charts 94, 3482, 3483, 3488 and 3489.
Prepared by: International Mapping
120°E
25°N
20°N
15°N
12°N
115°E
120°E
CHINA
Hong Kong
Macau
Taiwan
China's Nine Dash Line
China's marine scientific research sites
Pratas I.
Batan Is.
Babuyan Is.
THE PHILIPPINES
Luzon
Macclesfield Bank
Scarborough Shoal
SOUTH CHINA SEA
200 M limit
Mindoro
Northern Sector
Southern Sector
Reed Bank
Panay
Palawan

Figure 4.6

statement by the spokesperson for the Chinese Ministry of Foreign Affairs, Mr. Hong Lei. Responding to testimony by the United States' Assistant Secretary of State for East Asian and Pacific Affairs that China's dashed line claim is unlawful under UNCLOS, Mr. Hong's official statement declared: "China's maritime rights and interests in the South China Sea were formed historically and are protected by international law".[327]

4.36 It is the Philippines' submission that there is no legal basis for China's assertion or exercise of "historic rights" beyond the limits of its entitlements under UNCLOS. Although China's diplomatic notes and other statements since May 2009 claim sovereign rights and jurisdiction over maritime areas that lie beyond those limits, they provide no indication of the legal basis of the claim, other than that it has been "consistently held by the Chinese Government, and is widely known by the international community".[328] Instead of offering a justification or defence of the claim, China has chosen only to repeat it, with increasing boldness, and to rely on it as justification for preventing use of the waters and access to the resources within the dashed line by the Philippines.

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[327] Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Hong Lei's Statement Regarding Comments by an Official of the United States Department of State on the South China Sea* (8 Feb. 2014). MP, Vol. V, Annex 131. Following is the full text of the exchange, in English translation:

> Q: On February 5, United States Assistant Secretary Russel stated in a testimony before Congress that the Chinese maritime claims based on the "nine-dash line" were inconsistent with principles of international law, and urged that the Chinese position should be clarified or adjusted. How does China respond to this?
>
> A. The Chinese maritime rights and interests in the South China Sea were formed historically and are protected by international law. China has remained committed to resolving maritime disputes with the countries involved through negotiation and consultation. Meanwhile, China attaches great importance to maintaining peace and stability in the South China Sea jointly with the Association of Southeast Asian Nations through implementing the *Declaration on the Conduct of Parties in the South China Sea*. As described above, the Chinese position is clear and consistent. Making-up issues and exaggeration of tensions would not help to maintain peace and stability in the Southeast Asian region. The comments made by certain officials in the congressional testimony are not constructive. We urge the United States to take a rational and fair attitude and play a constructive role toward the peace, stability, prosperity and development of the region, not the other way around.

[328] *Note Verbale* from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/17/2009 (7 May 2009). MP, Vol. VI, Annex 191; *Note Verbale* from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/18/2009 (7 May 2009). MP, Vol. VI, Annex 192.

II. THE UNLAWFULNESS OF CHINA'S CLAIM

4.37 Pursuant to Article 293, paragraph 1 of UNCLOS: "A court or tribunal having jurisdiction under this section shall apply *this Convention* and other rules of international law *not incompatible with this Convention*". The Preamble affirms "that matters *not regulated* by this Convention continue to be governed by the rules and principles of general international law". Since the maritime entitlements of all States Parties, including China and the Philippines, are comprehensively regulated by the Convention, especially Articles 56, 57, 62, 76, 77 and 121, they constitute the rules of law applicable to this dispute.

A. The Incompatibility of China's Claims with UNCLOS

1. The Applicable Provisions of the Convention

4.38 Articles 56 and 57 of UNCLOS define the nature and breadth of a coastal State's entitlement to an EEZ. Under Article 56, the coastal State has, *inter alia*, "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil . . .". Article 57 provides that the breadth of the EEZ "shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured".

4.39 Articles 76 and 77 define the coastal State's entitlement to a continental shelf, over which it exercises "sovereign rights for the purpose of exploring it and exploiting its natural resources". (Article 77.) The continental shelf is defined as "the seabed and subsoil of the submarine areas that extend beyond the territorial sea throughout the natural prolongation of its land territory to the outer edge of its continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance". (Article 76.)

4.40 Pursuant to Article 76(8) and Annex II, China has made a submission to the CLCS in respect of the continental shelf beyond 200 M in the East China Sea. It has not made a submission in respect of the South China Sea; nor has it asserted an entitlement to the continental margin beyond 200 M in the South China Sea in its challenges to the submissions of Malaysia and Vietnam.

4.41 Article 121 provides that islands, defined as naturally formed areas of land above water at high tide, generate the same entitlements to a territorial sea, EEZ and continental shelf as other land territory. Article 121(3) provides that certain islands, namely "rocks" that "cannot sustain human habitation or economic life of their own", generate no EEZ or continental shelf entitlements. Thus, features that are not naturally formed, or are below water at high tide, can generate no maritime entitlements.

4.42 UNCLOS provides for no other entitlements of coastal States to sovereignty or sovereign rights beyond their territorial seas. The limits the Convention places on sovereignty and sovereign rights are clearly established, widely accepted and reflect rules of general international law.[329] Beyond those limits, no State may enjoy sovereignty or sovereign rights in the sea, seabed or subsoil. No State may lawfully claim any such entitlements unless they are justified under the Convention.

4.43 These principles resulted from decades of dedicated international effort to achieve global agreement on a comprehensive legal order governing the world's oceans and seas, including the rules establishing the extent and nature of the maritime rights and jurisdictions of individual States. The modern effort dates to the 1930 Hague Codification Conference, and was picked up after World War II by the International Law Commission, whose 1956 draft articles formed the basis for the four Conventions on the Law of the Sea adopted at the 1958 Geneva Conference. The 1958 Conventions represented an important step forward in shifting the basis for rights over the sea and seabed from unilateral claims to multilateral agreement. One of their main achievements was the express prohibition of claims of sovereignty over the high seas. As set forth in the Convention on the High Seas, Article 2: "The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty".[330]

4.44 The Convention on the Continental Shelf, Article 2, provided not for "sovereignty" but only for "sovereign rights" in the continental shelf "for the purposes of exploring it and

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[329] *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Merits, Judgment, I.C.J. Reports 2012, paras. 118, 139, 174, 177, 182. MP, Vol. XI, Annex LA-35; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, I.C.J. Reports 2001, p. 91, paras. 167, 185, 195, 201. MP, Vol. XI, Annex LA-26.

[330] Convention on the High Seas of (29 Apr. 1958), 450 U.N.T.S. 82, entered into force 30 Sept. 1962, pp. 11, 82. MP, Vol. XI, Annex LA-75.

exploiting its resources", and vested those rights exclusively in the coastal State.[331] The Convention expressly rejected "occupation, effective or notional" as a basis for any rights in the continental shelf, and provided that even "if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State".[332] Only the Convention on the Territorial Sea and the Contiguous Zone recognized a State's right to exercise "sovereignty" over any maritime area, but this was limited to internal waters and "a belt of sea adjacent to its coast, described as the territorial sea".[333]

4.45 Although they achieved significant progress toward the goal of a universally accepted, comprehensive legal order for the world's oceans and seas, the 1958 Conventions fell short of the mark. In 1960, an unsuccessful effort was made at the "UNCLOS II" negotiations in Geneva to achieve consensus on issues left unresolved in 1958, including the breadth of the territorial sea, and the recognition and breadth of "exclusive fisheries zones" demanded by some coastal States.

4.46 In the aftermath of these failed negotiations, developing and newly independent States that prioritized economic development and control over natural resources, including ocean resources, fuelled the proliferation of varying and more extensive claims of sovereign rights over the sea and seabed, up to and even beyond 200 M from the coast. The persistence of such claims, and opposition thereto, posed challenges to navigation, fishing and other forms of commerce, and threatened to disrupt peaceful relations. As reflected in the Preamble to UNCLOS, "developments since the United Nations Conferences on the Law of the Sea held at Geneva in 1958 and 1960 have accentuated the need for a new and generally acceptable Convention on the law of the sea".[334] The objective of the new Convention, which followed many years of preparatory work by a broadly based United Nations committee and then nine years of formal meetings of the Third U.N. Conference on the Law of the Sea, was to achieve an agreement that would "settle, in a spirit of mutual understanding, *all issues relating to the law of the sea* . . . as an important contribution to the maintenance of peace, justice and

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[331] Convention on the Continental Shelf, 499 U.N.T.S. 312 (29 Apr. 1958), entered into force 10 June 1964, Art. 2. MP, Vol. XI, Annex LA-74.

[332] *Id.*, Art. 2(2).

[333] Convention on the Territorial Sea and Contiguous Zone, 516 U.N.T.S. 205 (29 Apr. 1958), entered into force 10 Sept. 1964, Art. 1(1). MP, Vol. XI, Annex LA-76.

[334] UNCLOS, Preamble, p. 25.

progress for all the peoples of the world".[335] The 1982 Convention was intended to establish "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".[336] In the words of Ambassador Tommy Koh, President of the Third United Nations Conference on the Law of the Sea, at the final session at Montego Bay in December 1982, the Conference achieved its "fundamental objective of producing a *comprehensive constitution for the oceans* which will stand the test of time".[337]

4.47 Among the most important innovations of the new Convention was the concept of an exclusive economic zone. This was the solution adopted to harmonize the conflicting positions of States that sought to maximize national jurisdiction, especially in regard to exclusive access to fish and other resources, and those that wanted to minimize it and protect traditional freedoms of the high seas, especially in regard to navigation and communications. The achievement of a consensus on this solution was one of the most significant accomplishments of the negotiating process: all coastal States would have exclusive entitlements to the living and non-living resources, but not sovereignty, within a 200 M EEZ.

4.48 What made agreement so challenging was the reluctance of many States, especially those with large, ocean-going fishing fleets, to recognize the "exclusive" rights of coastal States to fish (and decide who else fished) in waters where fishing had historically been open to all States without limitation. Some States took the position that the new Convention should preserve their historic fishing rights in waters that constituted part of a coastal State's newly-created EEZ. For example, Japan and the Soviet Union advocated against granting coastal States exclusive rights under the new EEZ regime, and instead proposed that coastal States should enjoy only preferential rights, which would entitle them to an allocation of resources subject to "duly [taking] into account . . . the interests of traditionally established fisheries of

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[335] *Id*. (emphasis added).

[336] *Id*. (emphasis added).

[337] U.N. Conference on the Law of the Sea, *185th Meeting*, U.N. Doc. A/CONF.62/PV.185 (26 Jan. 1983), para. 47. MP, Vol. XI, Annex LA-116 (emphasis added).

other States".[338] Australia and New Zealand proposed to grant historic fishing rights to States that "carried on fishing in the fishery resources zone on a substantial scale for a period of [ten] years", even if the zone fell within the EEZ of another State.[339] Malta and Zaire proposed that historic fishing rights should be preserved in the EEZ.[340] The United States proposed that a State's historic fishing rights should be preserved initially, but phased out over time.[341]

4.49 At the other end of the spectrum, many more States objected vociferously to the preservation of historic fishing rights in the waters adjacent to their coasts.[342] In some cases, these "rights" had been exercised at their expense, due to their former colonial status or lack of means to exploit or protect the resources of their own coastal waters. Their position ultimately prevailed. There was widespread support for it at the 1974 Caracas Session.[343] The Main Trends Working Paper produced that year recognized *exclusive* sovereign rights and jurisdiction of a coastal State over the natural resources in its 200 M EEZ,[344] and this principle was subsequently embodied in Article 56 of the 1982 Convention.

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[338] Japan, *Proposals for a régime of fisheries on the high seas*, U.N. Doc. A/AC.138/SC.II/L.12 (1972). MP, Vol. XI, Annex LA-93; USSR, *Draft article on fishing (basic provisions and explanatory note)*, U.N. Doc. A/AC.138/SC.II/L.6 (1972). MP, Vol. XI, Annex LA-94.

[339] Australia and New Zealand, *Working Paper: Principles for a Fisheries Regime*, U.N. Doc. A/AC.138/SC.II/L.ll (1972), p. 186. MP, Vol. XI, Annex LA-92.

[340] Leonardo Bernard, "The Effect of Historic Fishing Rights In Maritime Boundaries Delimitation", Law of the Sea Institute Conference Papers, *Securing the Ocean for the Next Generation* (Harry N. Scheiber, ed., May 2012). MP, Vol. XI, Annex LA-168.

[341] Canada and the United States jointly offered two proposals that would have established a transition period during which distant-fishing nations, whose traditional fishing rights were to be eliminated, could adjust their fishing activities to the new jurisdictional order. Canada and the United States of America, *Proposal*, U.N. Doc. A/CONF.19/C.1/L.10 (8 Apr. 1960). MP, Vol. XI, Annex LA-88.

[342] *See e.g., Declaration of Latin American States on the Law of the Sea* (8 Aug. 1970). MP, Vol. XI, Annex LA-91; *Montevideo Declaration on the Law of the Sea* (8 May 1970), in *American Journal of International Law*, Vol. 64, No. 5 (1970). MP, Vol. XI, Annex LA-90; *Declaration of Santo Domingo*, U.N. Doc. A/AC.138/80 (7 June 1972). MP, Vol. XI, Annex LA-95; *Conclusions in the General Report of the African States Regional Seminar on the Law of the Sea, Yaoundé, 20-30 June 1972*, U.N. Doc. A/AC.138/79 (20 July 1972). MP, Vol. XI, Annex LA-96.

[343] J. Stevenson and B. Oxman, "The Third United Nations Convention on the Law of the Sea: The 1974 Caracas Session", *American Journal of International Law*, Vol. 69, No. 1 (1975), p. 2. MP, Vol. XI, Annex LA-122.

[344] U.N. Conference on the Law of the Sea III, "Working Paper of the Second Committee: Main Trends", U.N. Doc. A/CONF.62/L.8/Rev. 1, Annex II, Appendix I (1974), p. 120. MP, Vol. XI, Annex LA-98.

4.50 The Convention thus supersedes any historic rights of fishing in waters subsumed within another State's EEZ.[345] Instead, it vests coastal States with the exclusive right to establish allowable catch limits in their EEZ's (Article 61, paragraph 1), and to establish their own harvesting capacities (article 62, paragraph 2). Only where the coastal State does not have the capacity to harvest the resources up to the allowable limit (which it has set) must it reach agreement with other States giving them access to the surplus (Article 62, paragraph 2) under the terms and conditions established by the coastal State (Article 62, paragraph 4). And only in this circumstance is a coastal State obligated to take into account, among other listed factors, "the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks" (Article 62, paragraph 3). To recognize any other "historic rights" under general international law in regard to fishing in another State's EEZ would be incompatible with these provisions of the Convention.[346]

4.51 The legal regime of the EEZ differs from that of the territorial sea. Part II of UNCLOS (on the Territorial Sea and the Contiguous Zone) expressly provides in Article 2(3): "The sovereignty over the territorial sea is exercised subject to this Convention *and to other rules of international law*". There is no comparable provision in Part V (on the EEZ) or in Part VI (on the Continental Shelf). In those maritime zones, UNCLOS provides a comprehensive regulatory scheme. There is no carve-out making other rules of general international law applicable. This distinction was recognized as far back as the commentary on the 1958 Conventions. The study prepared by the U.N. Secretariat, at the request of the International Law Commission, entitled *Juridical Regime of Historic Waters, including Historic Bays*, concluded, in reference to the 1958 Conventions, that a claim of "historic

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[345] Barbara Kwiatkowska, *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (1989), p. xxv. MP, Vol. XI, Annex LA-131 ("[T]he concept of the EEZ implies a complete substitution for the long-standing freedom of fishing beyond the territorial sea and the *laissez-faire* system of open access to the high seas fisheries by the coastal state's sovereign rights and control over all living resources of the vast areas within the 200 mile zone".).

[346] Leonardo Bernard, "The Effect of Historic Fishing Rights In Maritime Boundaries Delimitation", Law of the Sea Institute Conference Papers, *Securing the Ocean for the Next Generation* (Harry N. Scheiber, ed., May 2012), pp. 7-8. MP, Vol. XI, Annex LA-168 ("It is clear from the discussions undertaken during the negotiation of the EEZ provisions in the LOS Convention that any claims of historic/traditional fishing rights made by non-coastal States are not compatible with the concept of EEZ".). *See also* J. Stevenson and B. Oxman, "The Third United Nations Convention on the Law of the Sea: The 1974 Caracas Session", *American Journal of International Law*, Vol. 69, No. 1 (1975), pp. 16-18. MP, Vol. XI, Annex LA-122 (The authors observe that during the 1974 Caracas Session, there was widespread support for coastal States' sovereign and exclusive rights for the purpose of exploration and exploitation of living resources within the 200 M economic zone.).

rights" under the rules of general international law is superseded by a subsequent treaty provision, which conflicts with it and does not expressly preserve it:

> [I]f the provisions of an article should be found to conflict with an historic title to a maritime area, and no clause is included in the article safeguarding the historic title, the provisions of the article must prevail as between the parties to the Convention. *This seems to follow a contrario from the fact that articles 7 and 12 have express clauses reserving historic rights; articles without such a clause must be considered not to admit an exception in favour of such rights.*[347]

4.52 The reference was to Articles 7 and 12 of the 1958 Convention on the Territorial Sea and Contiguous Zone, which are the equivalents of Articles 10 and 15, respectively, of the 1982 Convention. Unlike these provisions of Part II of UNCLOS, none of the Articles in Part V or Part VI preserves claims of "historic rights" under general international law in regard to the waters, seabed or subsoil of the EEZ or continental shelf. To the contrary, the Articles in Parts V and VI reject any such rights in either of these zones, by providing that the coastal State alone has exclusive sovereign rights to exploit the living and non-living resources. Thus, in the U.N. study's words, they "must be considered not to admit an exception in favour of such rights".[348] Accordingly, except to the limited extent to which "habitual" fishing practices in the EEZ must be taken into account by the coastal State in allocating surplus capacity (as per Article 62, paragraph 3), the Convention, by its text, precludes any claim of "historic rights" in the EEZ.[349]

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[347] United Nations, Secretary General, *Juridical Regime of Historic Waters, Including Historic Bays*, U.N. Doc No. A/CN.4/143 (9 Mar. 1962), para. 75. MP, Vol. XI, Annex LA-89 (emphasis added).

[348] *Id*.

[349] This is further confirmed by Article 59, which provides:

> *Basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the exclusive economic zone*
>
> In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

A contrario, where the rights of a coastal State in its EEZ are expressly stipulated in the Convention, including its sovereign right to exclusive enjoyment of the resources in that zone, the Convention leaves no room for "historic rights" of other States, under the rules of general international law or considerations of equity.

4.53 In regard to the regime for the continental shelf set forth in Part VI, there was no effort by States to preserve for themselves any "traditional" or "historic rights" to the resources of the seabed or subsoil. Unlike the EEZ, the continental shelf was not newly-minted by the 1982 Convention. It was already agreed in the 1958 Convention on the Continental Shelf as a zone over which the coastal State alone would have sovereign rights to exploit the natural resources. Rights in the seabed or subsoil based on occupation or use were expressly rejected in that Convention. In short, there were no recognized "historic rights" in regard to the resources of the seabed or subsoil under general international law, and thus no efforts to perpetuate them under UNCLOS. Article 77 makes this perfectly clear: the coastal State has exclusive sovereign rights over the resources of its continental shelf.

4.54 Thus, the text and negotiating history of UNCLOS firmly establish that, under the Convention, coastal States have exclusive rights to the living and non-living resources in their EEZs and continental shelves, such that no other State may enjoy "historic rights" under the rules of general international law or otherwise to the resources in those maritime areas.

2. The Case Law

4.55 Most of the cases on "historic rights" to maritime areas predate UNCLOS and apply the rules of general international law. The jurisprudence indicates the elements that would have to be proved to sustain a claim of "historic rights", in the event general international law were to apply post-1982 Convention, as, for example, in regard to fishing rights claimed in another State's territorial sea. The cases make clear that there is no basis for China's claim of "historic rights" in the EEZ or continental shelf of the Philippines, or any other State.

4.56 In the *Anglo-Norwegian Fisheries Case*, the United Kingdom challenged Norway's 4 M fisheries zone, which Norway measured from straight baselines connecting the outermost points of the *skjaersgaard* which fringes the Norwegian coast. While both parties agreed on the breadth of the zone, they disputed "from what base-line this breadth [was] to be [measured]".[350] The Court considered whether "historic rights" were implicated, but in the end upheld Norway's straight baselines on the ground that there was no rule of customary international law prohibiting them. In so doing, it found that: (1) "the Norwegian authorities

[350] *Anglo-Norwegian Fisheries (United Kingdom v. Norway)*, Judgment, I.C.J. Reports 1951, p. 128. MP, Vol. XI, Annex LA-2.

applied their system of delimitation consistently and uninterruptedly from 1869 until the time when the dispute arose";[351] and (2) that "[t]he general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact. For a period of more than sixty years the United Kingdom Government . . . in no way contested it".[352] Thus:

> The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom.[353]

4.57 In his discussion of the case (in 1953), Sir Gerald Fitzmaurice referred approvingly to the separate opinion of Judge Alvarez that, although a State "might determine the extent of its territorial waters", this was subject to the condition "that it does not infringe rights acquired by other States".[354] Thus, although Norway's claim to 4 M of territorial waters was deemed valid, it would be subject to any historic fishing rights that the U.K. might have acquired in the area:

> [I]f the fishing vessels of a given country have been accustomed from time immemorial, or over a long period, to fish in a certain area, on the basis of the area being high seas and common to all, it may be said that their country has through them (and although they are private vessels having no specific authority) acquired a vested interest that the fisheries of that area should remain available to its fishing vessels (of course on a non-exclusive basis)—so that if another country asserts a claim to that area as *territorial waters*, which is found to be valid or comes to be recognized, this can only be subject to the acquired rights of fishery in question, which must continue to be respected.[355]

4.58 Writing in 1953, Fitzmaurice could only have been referring to historic rights in the *territorial* waters of another State. These rights could have been acquired as a result of practices conducted "from time immemorial", or at least "over a long period", and would be "non-exclusive;" that is, they could not derogate from the coastal State's right to fish in its own territorial waters.

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[351] *Id.*, p. 138.

[352] *Id.*, p. 138.

[353] *Id.*, p. 138.

[354] Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice", *British Yearbook of International Law*, Vol. 30 (1953), p. 51. MP, Vol. XI, Annex LA-120.

[355] *Id.*, p. 51 (emphasis added).

4.59 The ICJ more directly addressed the subject of historic fishing rights in the *Fisheries Jurisdiction Cases (United Kingdom v. Iceland; Federal Republic of Germany v. Iceland).* In 1971, Iceland extended its exclusive fisheries zone to 50 M, a measure that was opposed by the United Kingdom and Germany on the grounds that, in the case of the U.K., for example, "its vessels have been fishing in Icelandic waters for centuries", and "Iceland has for its part admitted the existence of the Applicant's historic and special interests in the fishing in the disputed waters".[356] The case was decided before the consensus on a 200 M exclusive economic zone was achieved during the negotiation of UNCLOS. In these uncertain circumstances, the Court upheld Iceland's fisheries zone, but observed that within the zone Iceland's rights should be "preferential", rather than exclusive:

> Due recognition must be given to the rights of both Parties, namely the rights of the United Kingdom to fish in the waters in dispute, and the preferential rights of Iceland. Neither right is an absolute one: the preferential rights of a coastal State are limited according to the extent of its special dependence on the fisheries and by its obligation to take account of the rights of other States and the needs of conservation . . . .[357]

4.60 The next case in which historic rights were raised was *Tunisia v. Libya.* Tunisia argued that it had "historic rights" to exploit the fisheries off its coasts, based on the antiquity and continuity of its fishing activities and the tacit acceptance or acquiescence by other States, such that delimitation of the continental shelf boundary with Libya "must not encroach at any point upon the area within which Tunisia possesses such historic rights".[358] Libya argued, to the contrary, that the historic fishing practices of one State cannot prevail over the inherent and *ab initio* rights of another State in respect of its natural prolongation. Since neither State was a party to the 1958 Convention on the Continental Shelf, the Court decided the case under general international law, observing that:

> It is clearly the case that, basically, the notion of historic rights or waters and that of the continental shelf are governed by distinct legal régimes *in customary international law*. The first régime is based on acquisition and

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[356] *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment, I.C.J. Reports 1974, paras. 63, 65. MP, Vol. XI, Annex LA-8.

[357] *Id.*, para. 71.

[358] *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, para. 98. MP, Vol. XI, Annex LA-10.

> occupation, while the second is based on the existence of rights '*ipso facto* and *ab initio*'.[359]

4.61 The Court found it unnecessary to decide which of the two regimes prevailed, because the method of delimitation it deemed appropriate (for other reasons) did not encroach on Tunisia's alleged historic rights.[360] In *dicta*, the Court commented that, under the draft of the 1982 Convention which it had reviewed, questions concerning "historic bays" and "historic titles" continued to be governed by general international law:

> In this connection, it may be recalled that . . . the draft convention of the Third Conference on the Law of the Sea [does not] contain . . . detailed provisions on the 'régime' of historic waters: there is neither a definition of the concept nor an elaboration of the juridical régime of 'historic waters' or 'historic bays'. There are, however, references to 'historic bays' or 'historic titles' or historic reasons in a way amounting to a reservation to the rules set forth therein. It seems clear that the matter continues to be governed by general international law which does not provide for a single 'régime' for 'historic waters' or 'historic bays', but only for a particular régime for each of the concrete, recognized cases of 'historic waters' or 'historic bays'.[361]

4.62 Thus, just as the U.N. Secretariat concluded in respect of Articles 7 and 12 of the 1958 Territorial Sea Convention, the ICJ observed that the references in Articles 10 and 15 of Part II of the 1982 Convention to "historic bays" and "historic titles" amounted to a "reservation to the rules set forth therein", allowing general international law to continue to govern the interpretation or application of those provisions. The Court's comment is not inconsistent with the Secretariat's reasoning that, in other parts of the Convention, where there is no similar "reservation to the rules", "historic rights" are not preserved and the Convention supersedes prior rules of general international law.

4.63 The ICJ made this clear in the *Gulf of Maine case (Canada v. United States).* Although the case was decided before the 1982 Convention had come into force, a Chamber of the Court took special note of the Convention's provisions on the exclusive economic zone and continental shelf, and attributed to them the status of general international law: "[C]ertain provisions of the Convention, concerning the continental shelf and the exclusive economic zone, which may, in fact, be relevant to the present case, were adopted without any

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[359] *Id.*, para. 100 (emphasis omitted).

[360] *Id.*, para. 105.

[361] *Id.*, para. 100.

objections. The United States, in particular, in 1983 . . . proclaimed an economic zone on the basis of Part V of the 1982 Convention. This proclamation was accompanied by a statement by the President to the effect that in that respect the Convention generally confirmed existing rules of international law".[362] The Chamber thus regarded the Convention's provisions on the EEZ and continental shelf "as consonant at present with general international law",[363] and proceeded to reject the United States' claim that its historic fishing rights in waters adjacent to Canada's coast should prevail over Canada's establishment of a 200 M exclusive fisheries zone. The Chamber found that the fishing rights previously enjoyed by U.S. fishermen when these waters were regarded as high seas did not survive Canada's lawful establishment of its exclusive fisheries zone, which gave it a "legal monopoly" over the area, despite "the antiquity or continuity of [the U.S.] fishing activities". It explained:

> Until very recently . . . these expanses were part of the high seas and as such freely open to the fishermen not only of the United States and Canada but also of other countries, and they were indeed fished by very many nationals of the latter . . . . But after the coastal States had set up exclusive 200-mile fishery zones, the situation radically altered. *Third States and their nationals found themselves deprived of any right of access to the sea areas within those zones and of any position of advantage they might have been able to achieve within them.* As for the United States, any mere factual predominance which it had been able to secure in the area was transformed into a situation of legal monopoly to the extent that the localities in question became legally part of its own exclusive fishery zone. Conversely, to the extent that they had become part of the exclusive fishery zone of the neighbouring State, no reliance could any longer be placed on that predominance.[364]

4.64 *Gulf of Maine* is the only case thus far in which the ICJ has addressed the incompatibility of historic fishing rights with the regime of the exclusive economic zone established by the 1982 Convention. The only subsequent case to deal with historic fishing rights was *Qatar v. Bahrain*, which involved Bahrain's claim of historic pearl fishing rights in the territorial sea. The Court found that Bahrain had failed to establish the existence of any such rights:

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[362] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, Judgment, I.C.J. Reports 1984, para. 94. MP, Vol. XI, Annex LA-12.

[363] *Id*.

[364] *Id.*, para. 235 (emphasis added).

> The Court first takes note of the fact that the pearling industry effectively ceased to exist a considerable time ago . . . . Moreover, even if it were taken as established that pearling had been carried out by a group of fishermen from one State only, this activity seems in any event never to have led to the recognition of an exclusive quasi-territorial right to the fishing grounds themselves or to the superjacent waters.[365]

4.65 Since the 1982 Convention became effective, only one case has upheld a State's historic fishing rights in the maritime zones of another State. That case is the *Eritrea/Yemen* arbitration. The circumstances were unique. The parties agreed to a two-stage arbitration. In the first stage, they asked the tribunal to determine which State had sovereignty over disputed islands in the Red Sea based on "historic titles", that is, under general international law.[366] In that stage, the tribunal awarded certain islands to Yemen, but, based on its concern that this would have a devastating impact on the livelihoods of Eritrean fishermen who had anchored at the islands and fished in their adjacent waters "since times immemorial", it ruled that: "Yemen shall ensure that the traditional fishing regime of free access and enjoyment for the fishermen of both Eritrea and Yemen shall be preserved for the benefit of the lives and livelihoods of this poor and industrious order of men".[367]

4.66 In the second stage of the arbitration, the parties asked the tribunal for an award delimiting the maritime boundary, "taking into account the opinion that it will have formed on questions of territorial sovereignty, the United Nations Convention on the Law of the Sea, and any other pertinent factor".[368] Thus, by express agreement of the parties, the tribunal was empowered to go outside the terms of UNCLOS itself in delimiting the maritime boundary, and specifically to take into account the award in the first stage and other "pertinent" factors.

4.67 Under these rules, in the second award, the tribunal took into account "the historic . . . tradition of joint use of the islands' waters by fishermen from both sides of the Red Sea" whose activities "were carried out for centuries without any need to obtain any authorizations from the rulers on either the Asian or the African side of the Red Sea and in the absence of restrictions or regulations exercised by public authorities".[369] Relying on these "pertinent

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[365] *Qatar v. Bahrain*, para. 236. MP, Vol. XI, Annex LA-26.

[366] *Eritrea v. Yemen*, First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute), Award (9 Oct. 1998), para. 114. MP, Vol. XI, Annex LA-48.

[367] *Id.*, para. 526.

[368] *Id.*, para. 7.

[369] *Id.*, paras. 118, 127.

factors", as agreed by the parties, the tribunal found that they included "all important elements capable of creating certain 'historic rights' which . . . provide a sufficient legal basis for maintaining certain aspects of a *res communis* that has existed for centuries for the benefit of the populations on both sides of the Red Sea".[370] This "*res communis*":

> is not qualified by the maritime zones specified under the United Nations Convention on the Law of the Sea, the law chosen by the Parties to be applicable to this task in this Second Stage of the Arbitration. The traditional fishing regime operates throughout those waters beyond the territorial waters of each of the Parties, and also in their territorial waters and ports . . . .[371]

4.68 Ancient and continuous fishing activities tolerated by rulers on both sides of the Red Sea, the severe consequences of cutting off access to traditional fishing grounds, and, particularly, the parties' agreement that the tribunal take these factors into account may explain the award; and explain why it stands in contrast with the ICJ Chamber's decision in *Gulf of Maine* and the text of UNCLOS, insofar as it perpetuates a historic fishing regime "beyond the territorial waters of each of the Parties", that is, into their EEZs. As stipulated in Article 31 of the Vienna Convention on the Law of Treaties, where the 1982 Convention is unconditionally the applicable law, as it is here, it must be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose".[372] The ordinary meaning of Article 56 is clear and unambiguous. The coastal State has "*sovereign rights* for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil . . .". These rights, in the *exclusive* economic zone, are necessarily exclusive to the coastal State. Article 62, paragraphs 2 and 3, governs the extent to which the coastal State may be obligated to take into account, in allocating any excess fishing capacity that it has determined to exist in its EEZ, the interests of other States.

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[370] *Id.*, para. 126.

[371] *Eritrea v. Yemen*, Second Stage of the Proceedings (Maritime Delimitation), Award (17 Dec. 1999), paras. 109-110. MP, Vol. XI, Annex LA-49.

[372] Vienna Convention on the Law of Treaties (23 May 1969), 1155 U.N.T.S. 332, entered into force 27 Jan. 1980, Art. 31. MP, Vol. XI, Annex LA-77.

Any claim of historic fishing rights beyond these limited terms would be incompatible with the Convention.[373]

4.69 The *Eritrea/Yemen* award was distinguished, and not followed, by the arbitral tribunal in *Barbados v. Trinidad and Tobago*. Applying UNCLOS, it declined to uphold Barbados' request that it be granted a right of fishing access to the undisputed EEZ of Trinidad and Tobago based on the traditional practices of its fishermen. The Tribunal found that lacked jurisdiction to consider Barbados' claim based, in part, on Article 297(3)(a) of the Convention.[374] The tribunal distinguished the case before it, where its jurisdiction was founded solely on UNCLOS, from *Eritrea/Yemen II*, on the ground that the parties in that case had given the tribunal powers to consider their historic rights; long-standing traditional fishing rights of Eritrean fishermen were not extinguished even though the waters in question

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[373] The question of whether, under UNCLOS, historic rights can exist in another State's EEZ is fundamentally different from whether, in delimiting a maritime boundary between two States with overlapping EEZ entitlements, historic fishing practices can be taken into account as a "relevant circumstance". In *Gulf of Maine*, the ICJ Chamber refused to treat the parties' historic fishing practices as a relevant circumstance, because the economic consequences of depriving them of access to their traditional fishing grounds would not be "catastrophic". *Canada v. United States*, para. 237. MP, Vol. XI, Annex LA-12. The arbitral tribunal in *Barbados v. Trinidad and Tobago* applied the same standard; it found that the consequences of denying Barbados access to its allegedly traditional fishing areas in waters claimed by Trinidad as its EEZ would not be "catastrophic" and therefore were not relevant to the delimitation. *Barbados/Trinidad and Tobago*, Award, UNCLOS Annex VII Tribunal (11 Apr. 2006), para. 267. MP, Vol. XI, Annex LA-54. But in the *Jan Mayen Case (Norway v. Denmark)*, the ICJ noted, as one factor justifying its delimitation of the parties' overlapping EEZ entitlements, that it would preserve Greenland's access to its traditional capelin fishing grounds. *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, I.C.J. Reports 1993, p. 38. MP, Vol. XI, Annex LA-20. The tribunal in *Barbados/Trinidad and Tobago* distinguished the *Jan Mayen* judgment, finding it:

> most exceptional in having determined the line of delimitation in connection with the fisheries conducted by the parties in dispute . . . . Determining an international maritime boundary between two States on the basis of traditional fishing on the high seas by nationals of one of those States is altogether exceptional. Support for such a principle in customary and conventional international law is largely lacking. Support is most notably found in speculations of the late eminent jurist, Sir Gerald Fitzmaurice, and in the singular circumstances of the judgment of the International Court of Justice in the *Jan Mayen* case (I.C.J. Reports 1993, p. 38). That is insufficient to establish a rule of international law.

Barbados/Trinidad and Tobago, paras. 241, 269. MP, Vol. XI, Annex LA-54.

[374] The present case raises no analogous issue. To the contrary, the question before this Tribunal is whether China's claim to "historic rights" survives its adherence to the Convention and can trump the Philippines' entitlement to an EEZ and continental shelf. In *Barbados/Trinidad and Tobago*, at the request of both parties the arbitral tribunal expressed its views on the question of Barbadian fishing in the Trinidadian EEZ, finding that the applicable provision of UNCLOS was Article 63(1) because the stocks at issue – flying fish – occurred within the EEZs of both States; hence, in accordance with the terms of that Article, and the undertakings of both States regarding their willingness to negotiate a bilateral agreement, the tribunal urged them "to agree upon the measures necessary to co-ordinate and ensure the conservation and development of such stocks without prejudice to the other provisions of this Part". *Barbados/Trinidad and Tobago*, para. 286. MP, Vol. XI, Annex LA-54.

ultimately fell within the jurisdiction of Yemen.[375] Another difference between the two cases was the antiquity of the practice. In *Barbados/Trinidad and Tobago,* the evidence showed that Barbadian fishing in the Trinidadian EEZ dated back only to the late 1970s, which prompted the tribunal to observe: "[S]hort years are not sufficient to give rise to a tradition".[376]

3. Application of the Law to the Present Case

4.70 As shown above, UNCLOS governs the determination of the maritime entitlements of the Parties, and the Convention alone governs their entitlements beyond the territorial sea. It gives sovereign rights over fishing and oil and gas development *exclusively* to the coastal State within whose exclusive economic zone (Article 56) and continental shelf (Article 77) these resources exist. China's claim of "historic rights" in areas beyond its own entitlements under the Convention, and within 200 M of the Philippines in areas where only the Philippines has entitlements, is therefore doubly transgressive: it violates UNCLOS insofar as its claims rights beyond those that the Convention authorizes, and it infringes on the rights the Convention gives to the Philippines. It is therefore incompatible with the Convention, and not opposable to any other State. Thus, even if China could establish the existence of "historic rights" under general international law (which it cannot, as shown below),[377] its claim that these rights exist within the EEZ or continental shelf of the Philippines would have no basis. Its claim under general international law would be pre-empted by the contrary provisions of UNCLOS.

4.71 This is the conclusion reached, *inter alia*, by two leading commentators, Professor Robert Beckman of the National University of Singapore, and Professor Pierre-Marie Dupuy of the Graduate Institute of Geneva, in articles published in the same edition of the *American Journal of International Law* as the article authored by Judge Gao and Professor Jia. Professor Beckman emphasized that when "States become parties to UNCLOS, they agree

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[375] *Eritrea v. Yemen II*, paras. 109-110. MP, Vol. XI, Annex LA-49.

[376] *Barbados/Trinidad and Tobago*, para. 266. MP, Vol. XI, Annex LA-54.

[377] *See infra* paras. 4.81-4.93.

that the sovereign right to explore and exploit the natural resources in and under the oceans off their coasts and islands will be governed by the provisions in UNCLOS".[378] As a result:

> when China ratified UNCLOS in 1996, it gave up whatever historic rights it had to the natural resources in areas that are now the EEZ or continental shelf of other States. China's legal relations with other Parties to UNCLOS are now governed by UNCLOS.[379]

4.72 Professor Dupuy similarly concluded that:

> the understanding that China bases its maritime claim on historic rights is equivalent to the assumption that the principles of UNCLOS should not apply. [However,] UNCLOS does not recognize historic rights as a basis for claiming sovereignty over waters. This difficulty is a serious one since China has now been a party to UNCLOS for over fifteen years. China would therefore have to justify the non-applicability of UNCLOS to defining the limits of its sovereignty over the South China Sea.[380]

4.73 China's expansive claim not only ignores UNCLOS, but several centuries of international law in regard to the law of the sea. Since the triumph of Grotius' thesis of *mare liberum*, international law has rejected vast claims over distant parts of the seas and oceans, such as China now makes with respect to most of the South China Sea. Historically, these claims, like China's, sought to control the sea and its resources, to the exclusion of other States.[381] The fate of these efforts often followed the trajectory of the imperial ambitions that prompted them. The principle of freedom of the seas emerged in response to them. This entailed the rejection of all claims, past and future, to control the use of the seas by other States beyond the immediate vicinity of the coast.[382] As a result, the rules regarding acquisition of sovereignty over land territory, notably those concerning effective occupation,

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[378] Robert Beckman, "China, UNCLOS and the South China Sea", Asian Society of International Law Third Biennial Conference (27-28 Aug. 2011), para. 17. MP, Vol. XI, Annex LA-163.

[379] *Id.*, para. 35.

[380] F. Dupuy and P. Dupuy, "A Legal Analysis of China's Historic Rights Claim in the South China Sea", *American Journal of International Law*, Vol. 107, No. 1 (Jan. 2013), p. 138. MP, Vol. XI, Annex LA-171.

[381] David Anderson, "The Development of the Modern Law of the Sea" in *Modern Law of the Sea: Selected Essays* (2008), pp. 3-6. MP, Vol. XI, Annex LA-156.

[382] "The Portuguese claim as their own the whole expanse of the sea which separates two parts of the world so far distant the one from the other, that in all the preceding centuries neither one has so much as heard of the other. Indeed, if we take into account the share of the Spaniards, whose claim is the same as that of the Portuguese, only a little less than the whole ocean is found to be subject to two nations, while all the rest of the peoples in the world are restricted to the narrow bounds of the northern seas. Nature was greatly deceived if when she spread the sea around all peoples she believed that it would also be adequate for the use of them all". Hugo Grotius, *Mare Liberum* (1609) (J. B. Scott ed., 1916), pp. 37-38. MP, Vol. XI, Annex LA-119.

did not apply at sea. The sea, its seabed and its subsoil, and its natural resources were not subject to appropriation by the State that first subjects them to effective occupation. Thus, in the ensuing period there have been only two possibilities with respect to sovereignty and sovereign rights at sea. Either an area is not subject to any claims of sovereignty or sovereign rights, or only the coastal State may make such claims with respect to areas off its coast as the Convention permits. UNCLOS rests on this foundation. This includes the fundamental principle that, with respect to maritime sovereignty and sovereign rights, the land dominates the sea.[383]

4.74 China's claim flies in the face of this venerable principle by asserting rights to vast areas of sea not based on any continental or insular territory over which it is sovereign, but based on alleged historical usage or occupation. The evidence shows that China first asserted its "historic rights" claim in the South China Sea in 1998, two years *after* it became a party to UNCLOS. It did so without offering any support – whether by way of evidence or practice or otherwise – to its claim to "historic rights". China's enactment of national legislation at that time officially claiming, for the first time, "historic rights" in "addition to"[384] its rights and obligations under the Convention it had ratified two years earlier, was itself a violation of the Convention, as well as its obligation under general international law to comply with the provisions of the Convention in good faith.[385] China's adherence to the Convention was

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[383] Noting "the close dependence of the territorial sea upon the land domain", the International Court of Justice held in 1951 that "[i]t is the land which confers upon the coastal State a right to the waters off its coasts". *United Kingdom v. Norway*, p. 133. MP, Vol. XI, Annex LA-2. In its recent decision in the *Nicaragua v. Colombia* case, the Court stated:

> It is well established that "[t]he title of a State to the continental shelf and to the exclusive economic zone is based on the principle that the land dominates the sea through the projection of the coasts or the coastal fronts" (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 89, para. 77). As the Court stated in the *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* cases, "the land is the legal source of the power which a State may exercise over territorial extensions to seaward" (*Judgment, I.C.J. Reports 1969*, p. 51, para. 96). Similarly, in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, the Court observed that "the coast of the territory of the State is the decisive factor for title to submarine areas adjacent to it" (*Judgment, I.C.J. Reports 1982*, p. 61, para. 73).

Nicaragua v. Colombia, para. 140. MP, Vol. XI, Annex LA-35.

[384] Z. Gao and B.B. Jia, "The Nine-Dash Line in the South China Sea: History, Status, and Implications", *American Journal of International Law*, Vol. 107, No. 1 (2013), p. 99. MP, Vol. X, Annex 307.

[385] Vienna Convention on the Law of Treaties (23 May 1969), 1155 U.N.T.S. 332, entered into force 27 Jan. 1980, Art. 26. MP, Vol. XI, Annex LA-77 ("Every treaty in force is binding upon the parties and it must be observed by them in good faith".).

subject to "no reservations or exceptions",[386] unless "expressly permitted by other Articles of this Convention".[387] No provision in the Convention permits a party to maintain "historic rights", or *any* rights claimed under general international law for that matter,[388] that contravene the express stipulations of the Convention. Only "matters *not regulated* by this Convention" continue to be governed by the rules and principles of general international law.[389] Questions of maritime entitlements and sovereign rights are expressly and comprehensively regulated by the Convention. Accordingly, China became obligated by the Convention to bring its national laws into conformity with it, not to enact new ones contradicting it. As the Permanent Court of International Justice held in *Exchange of Greek and Turkish Populations:* "[A] State which has contracted valid international obligations is

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[386] UNCLOS, Article 309 provides:

> *Reservations and exceptions*
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> No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention.

[387] *Id.*

[388] For example, Article 311 provides that the Convention prevails over the 1958 Geneva Conventions, and preserves other agreements *only* if they are compatible with the Convention and do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under the Convention. It provides:

> *Relation to other conventions and international agreements*
>
> 1. This Convention shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958.
>
> 2. This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.
>
> 3. Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principle embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.
>
> 4. States Parties intending to conclude an agreement referred to in paragraph 3 shall notify the other States Parties through the depositary of this Convention of their intention to conclude the agreement and of the modification or suspension for which it provides.
>
> 5. This article does not affect international agreements expressly permitted or preserved by other articles of this Convention.
>
> 6. States Parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in article 136 and that they shall not be party to any agreement in derogation thereof.

[389] UNCLOS, Preamble.

bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken".[390]

4.75 However, by Article 14 of its 1998 Act, as well as the more recent legislation discussed at paragraphs 4.13 and 4.14 above, China has done the opposite; it has incorporated into its national legislation provisions that directly contradict its obligations under the 1982 Convention. China, of course, cannot rely on its domestic legislation to evade or circumvent its obligations under the Convention. The Vienna Convention on the Law of Treaties, Article 27, is explicit on this point: a State "may not invoke the provisions of its internal law as justification for its failure to perform a treaty".[391]

4.76 It was well understood at the time UNCLOS was negotiated that there were national laws in existence that asserted claims incompatible with the Convention's terms. They included sovereignty claims extending well beyond 12 miles and up to 200 miles or more. Some of these claims were of long duration.[392] Nevertheless, States that had made such claims were obligated to, and most did, adjust their laws and regulations to conform to the rules set forth in the Convention.[393]

4.77 The Philippines itself was one of those States. Historically, it had regarded "the limitation of its territorial sea as referring to those waters within the recognized treaty limits [of the 1898 Treaty of Paris], and for this reason it takes the view that the breadth of the territorial sea may extend beyond twelve miles".[394] That was before UNCLOS. In particular,

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[390] *Exchange of Greek and Turkish Populations*, Advisory Opinion, *1925, P.C.I.J.* Series B, No. 10, p. 20. MP, Vol. XI, Annex LA-58.

[391] Vienna Convention on the Law of Treaties (23 May 1969), 1155 U.N.T.S. 332, entered into force 27 Jan. 1980, Art. 27. MP, Vol. XI, Annex LA-77.

[392] For example, on 11 October 1946 Argentina claimed sovereignty over the seabed and subsoil of the continental shelf and the superjacent waters, styled the epicontinental sea. Republic of Argentina, *Declaration of the President Concerning the Industrial Utilization of the Resources of the Continental Shelf and the Coastal Seas* (11 Oct. 1946). MP, Vol. VI, Annex 161. On 23 June 1947, Chile declared sovereignty over an unspecified area of sea and seabed adjacent to its coast, and in that connection claimed protection and control over the sea to a distance of two hundred nautical miles from the Chilean coast. Republic of Chile, *Official Declaration by the President of Chile Concerning Continental Shelf* (25 June 1947). MP, Vol. VI, Annex 162. Peru followed suit on 1 August 1947. Republic of Peru, *Supreme Decree No. 781, Concerning Submerged Continental or Insular Shelf* (1 Aug. 1947). MP, Vol. VI, Annex 163.

[393] *See* Hugo Caminos, "Harmonization of Pre-Existing 200-Mile Claims in the Latin American Region with the United Nations Convention on the Law of the Sea and Its Exclusive Economic Zone", *University of Miami Inter-American Law Review*, Vol. 30, No. 9 (1998), pp. 13, 19-21. MP, Vol. XI, Annex LA-138.

[394] *Note Verbale* from the Permanent Mission of the Republic of the Philippines to the United Nations (20 Jan. 1956), *reprinted in* International Law Commission, *Comments by Governments on the Provisional Articles Concerning the Regime of the High Seas and the Draft Articles on the Regime of the Territorial Sea adopted by*

that was before the Convention's elaboration of a new comprehensive regime for the law of the sea that was intended to accommodate the interests of coastal and archipelagic states with new regimes and limits for the exclusive economic zone, the continental shelf and archipelagic waters. In 2009 (ironically, the same year China first publicly espoused the nine-dash line and claimed sovereign rights and jurisdiction beyond the limits set by UNCLOS), the Philippines enacted a statute to bring its maritime claims into conformity with the Convention. The statute was challenged in the Supreme Court of the Philippines on the grounds, *inter alia*, that it was incompatible with (i) the historic limits of Philippine territorial waters that extended well beyond 12 M from the Philippine archipelago to the limits of a rectangular polygon as described in Article 3 of the Treaty of Paris of 10 December 1898; and (ii) the treatment of waters within the Philippine archipelago as internal waters rather than archipelagic waters as set forth in the Convention.[395]

4.78 The Philippine Government vigorously defended the statute and the need to bring its laws and practices into compliance with UNCLOS.[396] That position was upheld by the Philippine Supreme Court in its decision of 16 July 2011. The Court stated:

> UNCLOS III . . . is a multilateral treaty regulating, among others, sea-use rights over maritime zones (i.e., the territorial waters [12 nautical miles from the baselines], contiguous zone [24 nautical miles from the baselines], exclusive economic zone [200 nautical miles from the baselines]), and continental shelves that UNCLOS III delimits. UNCLOS III was the culmination of decades-long negotiations among United Nations members to codify norms regulating the conduct of States in the world's oceans and submarine areas, recognizing coastal and archipelagic States' graduated authority over a limited span of waters and submarine lands along their coasts . . . . [The 2009 statute] manifests the Philippine State's responsible observance of its *pacta sunt servanda* obligation under UNCLOS III.[397]

4.79 The experience of the Philippines is not unlike that of other coastal States which, prior to UNCLOS, made varying claims that extended beyond the traditional limits of coastal State

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the International Law Commission at its Seventh Session, U.N. Doc. A/CN.4/99 (1956), p. 70. MP, Vol. XI, Annex LA-87.

[395] *See Magallona v. Ermita*, Supreme Court of the Philippines, Judgment, G.R. No. 187167 (16 July 2011), p. 4. MP, Vol. IV, Annex 74.

[396] *Magallona v. Ermita*, Supreme Court of the Philippines, Comments of the Respondents on the Petition, G.R. No. 187167 (16 July 2011), paras. 2.04-2.05, 2.08-2.09. MP, Vol. IV, Annex 73. *See also id.*, para. 2.13 ("[t]he need [] to amend R.A. 3046, as amended, to conform to the requirements of the LOSC is evident and was immediate".).

[397] *Magallona v. Ermita*, Supreme Court of the Philippines, Judgment, G.R. No. 187167 (16 July 2011), pp. 7, 12. MP, Vol. IV, Annex 74.

authority permitted by international law. The point of UNCLOS was to put an end to all that. The need to bring national laws and claims into conformity with the Convention was clearly understood to be the import of the prohibition on reservations in Article 309.[398] Article 310 attempted to facilitate that process by expressly permitting States to make declarations or statements for the purpose of harmonizing their laws and regulations with the provisions of the Convention.[399] That harmonization, however, works only in one direction. There is no question of harmonizing the Convention with national claims. To the contrary, Article 310 makes clear that declarations and statements must not purport to exclude or modify the legal effect of the provisions of the Convention in their application to that State. The prohibition on reservations stands. Compliance is required. Indeed, global compliance with the rules of the Convention regarding claims of sovereign rights and jurisdiction at sea was perhaps the most basic object and purpose of the Convention. The widespread ratification of the Convention, and the acceptance of its rules as part of general international law even by nonparties, attest to this.

4.80 It follows that, in respect of the regimes for the exclusive economic zone and the continental shelf, where there is no express inclusion of the rules of general international law, no parallel customary law regime, historic or otherwise, survives the Convention or derogates from its provisions. The Convention determines entitlement to maritime sovereignty, sovereign rights, and jurisdiction in specific maritime zones. Claiming such rights with different names and pedigrees is incompatible with the provisions of UNCLOS and the duty of the States Parties to implement its provisions in good faith. Accordingly, China's "historic rights" claim fails, as it must, because it is incompatible with UNCLOS.

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[398] *See supra* note 386, for the full text of Article 309. Since there are no provisions in the Convention expressly permitting reservations, the effect of Article 309 is to prohibit all reservations. Insofar as Article 309 refers to exceptions, there is only one article that expressly permits exceptions, namely Article 298 regarding the jurisdiction of courts and tribunals under Part XV. It is discussed *infra* at paragraphs 7.112-7.157.

[399] Article 310 provides:

> *Declarations and statements*
>
> Article 309 does not preclude a State, when signing, ratifying or acceding to this Convention, from making declarations or statements, however phrased or named, with a view, inter alia, to the harmonization of its laws and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State.

B. The Incompatibility of China's Claim with General International Law

4.81 China's accession to UNCLOS signified its unqualified consent not only to the provisions of the Convention *qua* treaty law, but also its acceptance of a new regime of general international law. As previously described, in 1984, even before the Convention was in force, the ICJ Chamber in the *Gulf of Maine Case,* noting that "the consensus reached on large portions of the instrument and . . . that certain provisions of the Convention, concerning the continental shelf and the exclusive economic zone . . . were adopted without any objections", determined that these provisions may be regarded "as consonant at present with general international law".[400] Since then the Court has consistently found the substantive rules of the international law of the sea to be the same as those set forth in the Convention.[401]

4.82 In the absence of express derogation by the States concerned by way of treaty or a special custom, the only exception to the *erga omnes* binding force of general international law is the principle of persistent objector, whereby a State may exempt itself from the application of a new customary rule by persistent and clear objection during the norm's formation.[402] Not only did China abstain from objecting to the crystallization of the new customary law of the sea brought about by the negotiation and adoption of the Convention, it was an active participant in the negotiating process and raised no opposition to any of the provisions governing maritime entitlements or jurisdiction. Indeed, China was *not* one of the States that sought to preserve historic fishing rights. During the negotiations, it registered no opposition to the States that insisted on coastal States having sovereign and *exclusive* rights to the resources in their exclusive economic zones.

4.83 Thus, China's "historic rights" claim fails not only because it is incompatible with UNCLOS, but also because it is unsustainable under general international law as it now

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[400] *Canada v. United States,* p. 246, para. 94. MP, Vol. XI, Annex LA-12.

[401] *See, e.g., Qatar v. Bahrain,* p. 91, para. 167, *et seq.* MP, Vol. XI, Annex LA-26 (affirming that Articles 74 and 83 of UNCLOS codify customary principles of maritime delimitation).

Nicaragua v. Colombia, para. 139. MP, Vol. XI, Annex LA-35 (affirming that Article 121 of UNCLOS constitutes customary international law on the legal definition of islands and rocks, and the maritime entitlements thereof).

[402] *United Kingdom v. Norway*, p. 131. MP, Vol. XI, Annex LA-2.

exists, following the international consensus that was reached leading to the adoption of, and reflected in, the 1982 Convention.[403]

4.84 But even under pre-Convention legal standards, China would have no valid claim of "historic rights" anywhere beyond its UNCLOS entitlements, let alone within the Philippines' EEZ. It has offered into the public record no evidence of activity that could possibly support such a claim. "Historic rights" do not exist just because a State claims them. The requirements are well-established and uncontroversial, as repeatedly articulated in the case law reviewed above: (1) long and continuous exercise of the claimed right, and (2) toleration by other States, including the coastal State whose "sovereign" rights would no longer be exclusive. Thus, even under pre-Convention general international law, historic fishing rights could be found to exist only in territorial waters where they had been exercised continuously "since times immemorial",[404] or at least over a long period, in a notorious manner, and "with the general toleration of the international community" or, at least, "the prolonged abstention" of the affected State.[405]

4.85 Even in cases where these requirements are met, and historic fishing rights in another State's territorial waters are acquired in conformity with general international law, they are necessarily "non-exclusive"; that is, the coastal State cannot be excluded from fishing in its own waters.[406] In *Eritrea v. Yemen*, for example, the arbitral tribunal emphasized that Eritrea's fishing rights were non-exclusive, and that while Yemen was required to respect them, it continued to enjoy sovereignty in its territorial sea and sovereign rights in its EEZ, including the right to fish in those waters.[407] Moreover, the "traditional regime of fishing"

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[403] Nuno Marques Antunes, *Towards the Conceptualization of Maritime Delimitation: Legal and Technical Aspects of a Political Process* (2003), p. 37. MP, Vol. XI, Annex LA-152 ("With the advent of the LOSC, however, the territorial sea entitlement was extended up to 12M; and the existence of a historic title beyond that limit became *very unlikely*. With regard to other maritime areas – as the EEZ or the continental shelf, the existence of a historic title is *difficult to conceive in practice*. Inasmuch as the juridical validity of any claims would have to be assessed in the light of the general theory of historic title (notably *longa possessio*), their existence becomes highly improbable. These are relatively recent claims; a sufficiently long possession over those areas is at least problematical, and the requisite of acquiescence or recognition by the international community as a whole *could not yet have been met*".) (emphasis added).

[404] *Eritrea v. Yemen I*, para. 127. MP, Vol. XI, Annex LA-48; *Eritrea v. Yemen II*, para. 95. MP, Vol. XI, Annex LA-49.

[405] *United Kingdom v. Norway*, p. 138. MP, Vol. XI, Annex LA-2.

[406] Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice", *British Yearbook of International Law*, Vol. 30 (1953), p. 30. MP, Vol. XI, Annex LA-120.

[407] *Eritrea v. Yemen II*, paras. 101-106. MP, Vol. XI, Annex LA-49; Fitzmaurice, too, opined that any historic rights found to exist in another State's waters would "of course" be "non-exclusive". Gerald Fitzmaurice, "The

that the tribunal found to have survived UNCLOS included only artisanal fishing, and did "not extend to large-scale commercial or industrial fishing".[408]

4.86 Finally, the concept of "historic rights" applies, if and when it does, only to fishing rights, since there is no authority under general international law for recognition of any "historic rights" in regard to the non-living resources of the seabed or subsoil. Individual State claims to a continental shelf as a natural extension of the mainland originated only with the Truman Proclamation of 1945. This was followed by thirteen years of emulation by other States, until the rules were codified in the 1958 Convention on the Continental Shelf, which gave exclusive rights in the seabed and subsoil to the coastal State, and expressly rejected the possibility of sovereignty or sovereign rights over the seabed or subsoil based on historic use or occupation. The door to any general international law claim of "historic rights" in the continental shelf was further sealed shut by Articles 76 and 77 of UNCLOS.

4.87 Applying these standards to the present case, it is apparent that, to sustain a claim to historic fishing rights, China would have to show that its fisherman exercised these "rights" in a particular place since antiquity, or at least over a very long period of time, on a continuous basis, and with the tolerance, acceptance or acquiescence of the affected State. It is, naturally, China's burden to produce evidence sufficient to satisfy these criteria. China has never presented any such evidence in support of the claims it has asserted, either publicly or in diplomatic correspondence with the Philippines. Its decision to abstain from these proceedings does not assist the Arbitral Tribunal in this regard.

4.88 What the historical record shows is that, although Chinese navigators were active in the South China Sea prior to the middle of the 15th Century, China paid very little attention to this area for nearly half a millennium – from approximately 1450 A.D. to the end of World War II.[409] During those five centuries, the South China Sea, its islands and its principal fishing grounds were dominated principally by European colonial powers – especially Spain, but also Portugal, France, the Netherlands and the United Kingdom – and by the colonial peoples whom they ruled, including Filipinos, Vietnamese and Malays.[410] In the Northern

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Law and Procedure of the International Court of Justice", *British Yearbook of International Law*, Vol. 30 (1953), p. 51. MP, Vol. XI, Annex LA-120.

[408] *Eritrea v. Yemen II*, para. 106. MP, Vol. XI, Annex LA-49.

[409] *See supra*, paras. 2.24-2.25.

[410] *See supra*, paras. 2.26-2.35.

Sector, Scarborough Shoal has long been a principal fishing area, because of its shallow waters and coral reefs which attract many species of fish. It is much nearer to the Philippines than to any other State. Fishermen from Luzon have fished there for centuries.[411] Chinese fishermen, principally from Hainan Island, have also fished at Scarborough Shoal.[412] But all of the fishing by Philippine and Chinese fishermen at Scarborough Shoal – from which six tiny, uninhabitable rocks are the only parts of the feature that protrude above water at high tide – is done within 12 M of the feature, that is, within its territorial sea. Thus, fishing at Scarborough Shoal does not constitute fishing on the high seas, or in the EEZ of any coastal State. It cannot, therefore, give rise to any "historic rights" in another State's (such as the Philippines') EEZ.

4.89 Apart from the fishing activities at Scarborough Shoal, Chinese fishermen have not had a practice of fishing in Philippine-claimed waters in the Northern Sector of the South China Sea, within 200 M of the Philippine coast, either traditionally or in recent times; this is a fact known to the Philippines, because it regularly patrols its waters in this area and has rarely, if ever, encountered Chinese fishing activities.[413] Nor has the Philippines ever, expressly or tacitly, recognized a right of Chinese fishermen to fish in its EEZ. Thus, in the Northern Sector, China cannot claim any "historic rights" to fish in the Philippines' EEZ, even under pre-UNCLOS rules of general international law.

4.90 In the Southern Sector of the South China Sea, fishermen from several States – including the Philippines, China and Vietnam – have long fished in the shallow waters and along the coral reefs of various features in the Spratlys. Most of the fishing by Chinese and Vietnamese fishermen has historically taken place in parts of the Spratlys that are beyond 200 M from Palawan. Significant Chinese fishing activity within the Philippines' EEZ is a relatively recent occurrence, dating back to the mid-1990s, after China seized and occupied Mischief Reef, a low tide elevation approximately 126 M off the coast of Palawan, initially explaining to the Philippines that it intended to construct huts for its fishermen on top of the feature.[414] The Philippines has objected to the Chinese presence and activities at Mischief

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[411] *See infra* para. 6.41.

[412] *See supra*, para. 3.51.

[413] Affidavit of Asis G. Perez, Director, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines (26 Mar. 2014). MP, Vol. VII, Annex 241.

[414] *See supra* note 225.

Reef, as it has to the more recent Chinese activities at Second Thomas Shoal, some 18 M to the east. It has never acquiesced in any Chinese fishing rights at these features or anywhere else in its EEZ.

4.91 Thus, there is no factual basis for China to claim historic fishing rights in waters beyond the limits of its UNCLOS entitlements, including the hypothetical entitlements it might have under the Convention if it were sovereign over all disputed insular features in the Southern Sector. Chinese fishermen have not traditionally fished in the waters beyond these claimed entitlements, let alone since "antiquity" or "times immemorial". Nor is there any evidence of acceptance or acquiescence in respect of China's claims in these waters by the Philippines.

4.92 But there is another even more fundamental defect in China's claim. Despite the appellation it has given them, what China now claims are not "historic rights" in any sense cognizable under general international law, past or present. What China claims under the guise of "historic rights" are actually – by China's own express characterization of them – "*sovereign* rights", that is, *exclusive* rights to *all* the resources, not only fishing resources, in the waters, seabed and subsoil of the South China Sea encompassed by its nine-dash line. Even prior to UNCLOS, there were no such "historic rights" under international law. Historic fishing rights were always *non-exclusive.* And no "historic rights" were ever recognized in regard to the non-living resources of the seabed and subsoil, let alone *exclusive* "historic rights". China's claim, therefore, is as unique as it is unlawful.

4.93 It is also dangerous. The South China Sea is one of the largest and most important semi-enclosed seas in the world. Ultimately what is at stake with respect to China's assertions of "historic" rights to exclusive enjoyment of the resources of most of the South China Sea, including its seabed and subsoil, is whether UNCLOS is what it was intended to be: the basic constitutive instrument with respect to all the seas and oceans of the world that admits of no assertion of rights incompatible with it. To accept a concept of "historic rights" running in parallel with, and in derogation of, the Convention in the South China Sea would be to lay the foundation for the unravelling of the Convention, and with it, the enfeeblement, if not demise, of the legal order that it constitutes.

III. CONCLUSIONS

4.94 Based on the foregoing, it is evident that China has no "historic rights" under UNCLOS or general international law in respect of the waters, seabed or subsoil of the South China Sea located beyond its entitlements under the Convention. In particular, it has no such rights within any part of the EEZ or the continental shelf of the Philippines. In the Northern Sector, as shown in Figure 4.1 (following page 70), there are more than 92,000 M^2 of Philippine EEZ that lie beyond any entitlements China may claim under UNCLOS, but are nevertheless within China's nine-dash line. In the Southern Sector, there are more than 55,000 M^2 of Philippine EEZ within the nine-dash line and beyond any UNCLOS-based entitlements that China could claim, even if, *quod non*, it were sovereign over all of the Spratly features. In these areas, China never acquired "historic rights" under general international law, and even if it had, they did not survive its accession to UNCLOS. China therefore may not fish in waters outside its own territorial sea or EEZ that are within the EEZ of the Philippines, except as the Philippines might allow under Article 62, paragraph 3. China certainly may not prevent or interfere with fishing activities by the Philippines in those waters; by doing so, as shown in Chapter 6, China violates its obligations and the rights of the Philippines under Part V of the Convention.

4.95 Nor may China prevent or interfere with oil and gas exploration or extraction by the Philippines in areas beyond China's continental shelf entitlements under UNCLOS, but within those of the Philippines. China cannot claim "historic rights" beyond its own UNCLOS-based entitlements in the Philippines' continental shelf. "Historic rights" have never been recognized under general international law in regard to exploitation of resources from the seabed or subsoil. Like the 1958 Convention on the Continental Shelf, the 1982 Convention unambiguously provides in Article 77 that the sovereign rights of the coastal State with respect to the continental shelf "are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State". China's claim of "sovereign rights" in all areas bounded by the nine-dash line directly contradicts the rules regarding entitlement to the continental shelf set forth in Articles 76, 77 and 121. By claiming "sovereign rights" over the oil and gas resources out to the limits of its dashed line, and by preventing the Philippines from accessing the resources of its continental shelf in this area, as

shown in Chapter 6, China acts in direct violation of its obligations, and the rights of the Philippines, under Part VI of the Convention.

4.96 Accordingly, the Philippines submits that the following conclusions can be drawn:

1. China's maritime entitlements in the South China Sea, like those of the Philippines, are defined and limited by UNCLOS; neither State enjoys any entitlements to the waters, seabed or subsoil of the South China Sea except as provided in the Convention.

2. UNCLOS supersedes and nullifies any "historic rights" that may have existed prior to the Convention, in areas that fall beyond a coastal State's entitlements under the Convention, and within the 200 M EEZ and continental shelf of another coastal State, and where, pursuant to the Convention, only that coastal State enjoys sovereign rights to exploit the living and non-living resources.

3. Under general international law, even if it were to apply, the rules are the same: China's entitlements, including those in respect of the maritime areas in which it has sovereign rights, are limited by UNCLOS, and China cannot lawfully claim "historic rights" beyond the limits of those entitlements, or in the EEZs or continental shelves of other States.

4. Even under the rules of general international law that predated the Convention, China cannot demonstrate that it ever acquired "historic rights" in maritime areas beyond its present-day UNCLOS entitlements, because there is no evidence of China's longstanding or continuous fishing activity, and no evidence that any other State recognized or acquiesced in China's fishing "rights", in the areas claimed by the Philippines as part of its EEZ.

5. There is no basis for China to assert "exclusive" fishing rights beyond its UNCLOS entitlements; under general international law, historic fishing rights, where they existed, were always non-exclusive.

6. Nor can China lawfully claim "historic rights" of any kind in regard to the seabed, subsoil or their resources, because such rights never existed under

general international law, and are precluded by Part VI of the 1982 Convention.

CHAPTER 5

CHINA'S CLAIM TO AREAS OF THE SOUTH CHINA SEA BEYOND THE ENTITLEMENTS OF MARITIME FEATURES

5.1 This Chapter addresses the nature and maritime entitlements of maritime features in the South China Sea that are claimed by both China and the Philippines, but occupied or controlled by the PRC, and that are the subjects of the disputes that have been put before the Tribunal. Specifically, the Chapter considers: (i) whether these features are to be treated as low-tide elevations, islands or rocks in accordance with Articles 13 and 121 of UNCLOS; and (ii) what maritime entitlements, if any, each feature generates in accordance with those Articles. In regard to each of them, the Philippines seeks a determination from the Tribunal as to its nature and entitlements under the Convention. In particular, the Philippines requests a finding that none of the features generates entitlement to an EEZ or a continental shelf, as China claims for them. This determination is without prejudice to the question of sovereignty, an issue that is not before the Tribunal.

5.2 The Chapter is divided into three sections. Section I addresses the Northern Sector of the South China Sea, where the only insular feature claimed by both Parties is Scarborough Shoal. It shows that this feature is permanently below water, except for six small protrusions that are above sea level at high tide, and which are properly classified as "rocks" under Article 121(3) that do not generate entitlement to an EEZ or a continental shelf.

5.3 Section II is addressed to the Southern Sector, and particularly the eight insular features and low-tide elevations in the Spratly Islands that are claimed by both Parties but which are occupied or controlled by the PRC. It shows that three of these features – Second Thomas Shoal, Mischief Reef and Subi Reef – are low-tide elevations under Article 13, which are part of the seabed and subsoil, are not subject to appropriation and do not generate any maritime entitlement, even to a territorial sea. It also shows that two features, McKennan Reef[415] and Gaven Reef, are also low-tide elevations but because they are situated within 12 M of small, high-tide features they may each serve as a base point for the measurement of the high-tide feature's territorial sea. Section II further demonstrates that the other three features

[415] As previously noted, *see supra* note 39, McKennan Reef is one of two closely-linked low-tide elevations that protrude above a submerged feature known as Union Tablemount. The Philippines refers to both elevations as McKennan Reef. Other States, including China, treat them as separate features: McKennan Reef and Hughes Reef.

– Johnson Reef, Cuarteron Reef and Fiery Cross Reef – are "rocks" that do not generate entitlement to an EEZ or a continental shelf under Article 121(3). Lastly, Section II concludes by showing that even the largest of the features in the Southern Sector – Itu Aba (occupied by Taiwan), Thitu (occupied by the Philippines) and West York (also occupied by the Philippines) – likewise do not generate entitlement to an EEZ or a continental shelf.

5.4 Section III demonstrates that the Tribunal is fully competent to determine the nature and entitlements of the features in the Southern Sector, notwithstanding the absence from these proceedings of Vietnam, which claims some of them. Vietnam is not an "indispensable third party" under the applicable law.

I. THE NORTHERN SECTOR: SCARBOROUGH SHOAL

A. Location and Description

5.5 Scarborough Shoal is a coral reef located approximately 118 M due west of Luzon. It is called Huangyan Dao (黄岩岛) by China. It is situated 460 M from the nearest point on China's Hainan Island and 325 M from the nearest other island claimed by China (Woody Island in the Paracels).[416] Scarborough Shoal covers approximately 132 km^2, virtually all of which is permanently submerged. At high tide, the reef protrudes above water at just six points. These are known as Rock A, Rock B, Rock C, Rock D, Rock E and Rock F. Their locations are shown in a satellite photograph of Scarborough Shoal that appears at **Figure 5.1** (following page 116).

5.6 Rock A, located at 15°06'13.1147"N, 117°49'05.49"E, is an oval rock measuring 1.83 m x 0.91 m and rising 1 m above water at high tide.[417]

5.7 Rock B, or South Rock, located at 15°06'16.011"N, 117°48'05.177"E, is a triangular rock the three sides of which measure 1.3 m x 1.3 m x 1.84 m. It is 1.2 m above water at high tide.[418]

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[416] It is located at 15˚09'-46N 117˚45'-41E. United Kingdom Hydrographic Office (hereinafter "UKHO"), *Admiralty Sailing Directions: China Sea Pilot (NP31)*, Vol. 2 (10th ed., 2012), p. 68. MP, Vol. VII, Annex 235.

[417] Philippines National Mapping and Resource Information Authority, *Descriptive Report on Scarborough Reef* (1997), p. 2. MP, Vol. III, Annex 27.

[418] *Id.*; UKHO, *China Sea Pilot*, p. 68. MP, Vol. VII, Annex 235.

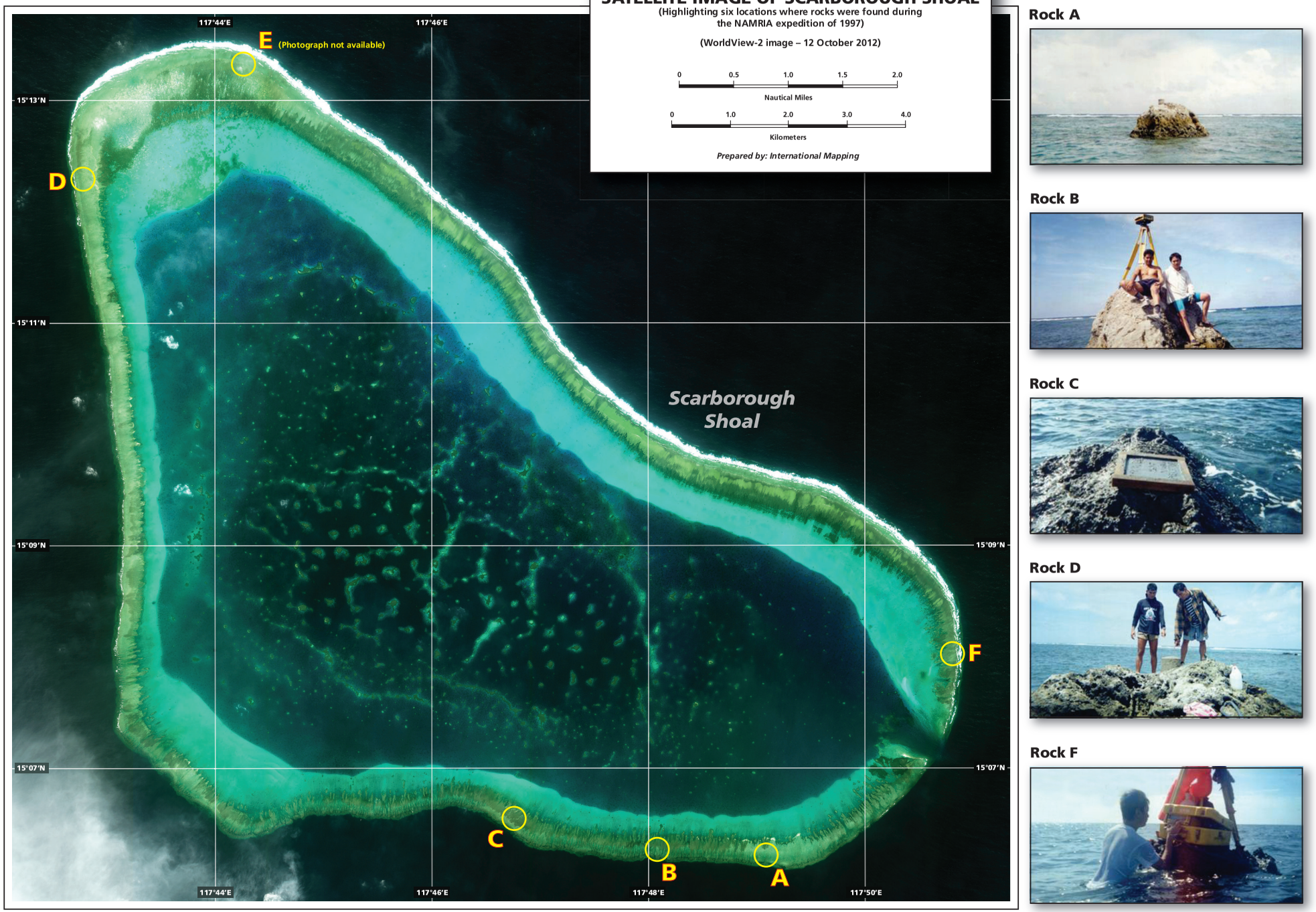
SATELLITE IMAGE OF SCARBOROUGH SHOAL
(Highlighting six locations where rocks were found during the NAMRIA expedition of 1997)
(WorldView-2 image – 12 October 2012)
0 0.5 1.0 1.5 2.0
Nautical Miles
0 1.0 2.0 3.0 4.0
Kilometers
Prepared by: International Mapping
Scarborough Shoal
E (Photograph not available)
D
F
C
B
A
117°44'E
117°46'E
117°48'E
117°50'E
15°13'N
15°11'N
15°09'N
15°07'N
Rock A
Rock B
Rock C
Rock D
Rock F

Figure 5.1

5.8 Rock C, located at 15°06'32.85"N, 117°46'45.724"E, is an elliptical rock measuring 1.52 m x 0.9 m and rising 0.4 m above water at high tide.[419]

5.9 Rock D, located at 15º12'17.542"N, 117º42'46.86"E, measures 2.6 m^2 and is 0.3 m above water at high tide.[420]

5.10 Rock E, located at 15º13'18.95"N, 117º44'17.003"E, is a square rock each side of which measures 0.9 m; at high tide it rises approximately 0.4 m above water.[421]

5.11 Rock F, located 15º08'01.93"N, 117º50'48.62"E, is a circular rock 0.76 m in diameter; it rises 0.4 m above water at high tide.[422]

5.12 In addition to being miniscule in size, these coral features are completely barren. They are devoid of fresh water, soil, flora and fauna. They are not habitable.

B. Nature and Entitlements of Scarborough Shoal Under UNCLOS

5.13 Article 121 of UNCLOS provides:

> 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, maritime zones 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.

5.14 The words "[e]xcept as provided for in paragraph 3…", which introduce paragraph 2, make clear that paragraph 3 creates an exception to the general rule that "islands, regardless of their size … enjoy the same status, and therefore generate the same maritime rights, as other land territory."[423]

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[419] Philippine NAMRIA, *Descriptive Report of Scarborough Reef*, p. 2. MP, Vol. III, Annex 27.

[420] *Id.*, p. 3.

[421] *Id.*

[422] *Id.*

[423] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, I.C.J. Reports 2001, p. 61, para. 185. MP, Vol. XI, Annex LA-26.

5.15 The purpose of this exception is illuminated by the drafting history of Article 121(3).

1. History of Article 121(3)

5.16 As related in Chapter 4[424], there was broad support among coastal States at the Third U.N. Conference on the Law of the Sea for new and greatly expanded maritime entitlements beyond the territorial sea. This caused concern, however, because it could have meant that rocks, islets and small islands would generate full entitlements to an EEZ and a continental shelf extending to 200 M, and in some cases a continental shelf of even greater breadth.[425] Even the tiniest insular feature could have generated entitlement to a very large amount of ocean space of up to 413,015 km^2, where it can project 200 M in all directions). It is therefore not surprising that there was widespread opposition to giving such exaggerated effects to small islands. The Ambassador of Malta, Arvid Pardo, expressed the prevailing sentiment when he observed: "If a 200 mile limit of jurisdiction could be founded on the possession of uninhabited, remote or very small islands, the effectiveness of international administration of ocean space beyond national jurisdiction would be gravely impaired".[426] Concerted efforts were made to assure that the final text of the Convention did not produce such a result.

5.17 Thus, at various stages in the negotiations, numerous States took the position that insignificant maritime features should not be entitled to significant maritime areas. This was reflected in a variety of proposals. Colombia, for example, proposed: "Islands without a life of their own, without a permanent and settled population, that are closer to the coastline of another State than to the coastline of the State to which they belong, and located at a distance less than double the breadth of the territorial sea of that State will not have an exclusive economic zone or continental shelf".[427]

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[424] *See supra* paras. 4.47-4.54.

[425] As reflected in the *Virginia Commentary* (referring to the treatment of the issue in the United Nations Sea-Bed Committee between 1971 and 1973): "[t]he diversity of islands, and the question of their status and the criteria to be applied in determining that status, were important and contentious issues in the light of their importance in the delineation of maritime space." *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 3 (M. Nordquist, et. al., eds., 2002), para. VIII.4. MP, Vol. XI, Annex LA-146.

[426] *Russia v. Australia*, Declaration of Judge Vukas, para 10. MP, Vol. XI, Annex LA-40.

[427] *Virginia Commentary*, Vol. 3, para. 121.7. MP, Vol. XI, Annex LA-146. Libya's proposal reflected similar concerns and read: "3. Small islands and rocks, wherever they may be, which cannot sustain human habitation or economic life of their own shall have no . . . exclusive economic zone, nor continental shelf." *Id.*

5.18 Romania suggested that only islands, and not low-tide elevations, islets or small uninhabited islands without economic life and situated outside the territorial sea, should be taken into consideration in delimiting ocean space between neighbouring States.[428] Romania also proposed to distinguish islands from "islets" and "islands similar to an islet" on the basis of size (less than 1 km^2).[429] According to a further proposal by that State, the concept of "island[s] similar to an islet" would cover any island "which is not or cannot be inhabited (permanently) or which does not or cannot have its own economic life."[430]

5.19 In a similar vein, Malta proposed that States should not be able to claim jurisdiction over maritime spaces by virtue of sovereignty or control over *islets*. It defined an "islet" as a "naturally formed area of land, less than one square kilometer in area, surrounded by water, which is above water at high tide".[431] Turkey proposed that only islands with a surface area of at least one tenth that of the State to which they belonged would qualify for an EEZ and a continental shelf.[432] Turkey's draft proposed: "Rocks . . . shall have no marine space of their own".[433]

5.20 A group of fourteen African States proposed to subject the entitlements of all islands (not only rocks or islets) to a variety of conditions. The proposal stated:

> Maritime spaces of islands shall be determined according to equitable principles taking into account all relevant factors and circumstances, including *inter alia:*
>
> the size of the islands;
>
> the population or the absence thereof;
>
> their contiguity to the principal territory;

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[428] Romania, *Draft articles on delimitation of marine and ocean space between adjacent and opposite neighboring States and various aspects involved*, U.N. Doc. A/CONF.62/C.2/L.18 (23 July 1974), Art. 2, paras. 2-5, III Official Records 195. MP, Vol. XI, Annex LA-100.

[429] Romania, *Draft articles on definition of and regime applicable to islets and islands similar to islets*, U.N. Doc. A/CONF. 62/C.2/L.53 (12 Aug. 1974), Articles 1 and 2, III Official Records 228. MP, Vol. XI, Annex LA-101.

[430] *Id*., Art. 1, para. 2.

[431] United Nations, Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea: Régime of Islands: Legislative History of Part VIII (Article 121) of the United Nations Convention on the Law of the Sea, Part 8* (1988), p. 7. MP, Vol. XI, Annex LA-118.

[432] Turkey, *Draft articles on the regime of islands*, U.N. Doc. A/CONF.62/C.2/L.55 (13 Aug. 1974), Official Records, vol. III, p. 230, Art. 3, para. 2. MP, Vol. XI, Annex LA-102.

[433] *Id*., Art. 3, para. 4.

whether or not they are situated on the continental shelf of another territory;

their geological and geomorphological structure and configuration.[434]

5.21 Trinidad and Tobago expressed the view that "it would be most undesirable if an uninhabited mid-ocean rock could create entitlement to a surrounding 200-mile exclusive economic zone".[435] Dominica agreed that "[t]o give 'rocks' a competence to establish an exclusive economic zone would create a disturbing precedent. . . ."[436] Both States supported the inclusion in the Convention of the provision that ultimately became Article 121(3). "Without such provision", Denmark stated, "tiny and barren islands, looked upon in the past as mere obstacles to navigation, would miraculously become the golden keys to vast maritime zones. That would indeed be an unwarranted and unacceptable consequence of the new law of the sea".[437]

5.22 As a result of the efforts of these and other States, the text of Article 121(3) emerged. The text in its final form first appeared in 1975[438] and remained unchanged in the revised negotiating texts of 1976, 1977, 1979 and the 1980 Draft Convention.[439] Its inclusion in the Convention was widely supported.[440] Proposals to delete it by Japan, the United Kingdom and

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[434] U.N. Doc. A/AC.138/SC.II/L.40 and Corr. 1-3, reproduced in III Sea-Bed Committee Report, 28 General Assembly Official Records (1973), Supp. No 21, at 87, 89 (Algeria, Cameroon, Ghana, Ivory Coast, Kenya, Liberia, Madagascar, Mauritius, Senegal, Sierra Leone, Somalia, Sudan, Tunisia, Tanzania). MP, Vol. XI, Annex LA-97.

[435] United Nations, Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea: Régime of Islands: Legislative History of Part VIII (Article 121) of the United Nations Convention on the Law of the Sea, Part 8* (1988), p. 107. MP, Vol. XI, Annex LA-118.

[436] U.N. Conference on the Law of the Sea III, Plenary, *140th Meeting*, U.N. Doc. A/CONF.62/SR.140 (27 Aug. 1980), p.77, para. 29. MP, Vol. XI, Annex LA-113.

[437] United Nations, Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea: Régime of Islands: Legislative History of Part VIII (Article 121) of the United Nations Convention on the Law of the Sea, Part 8* (1988), p. 107. MP, Vol. XI, Annex LA-118.

[438] The *texte unique de negotiation (officieux)*, elaborated by the Presidents of the Conference, contained Article 132, which corresponded to the present Article 121. U.N. Conference on the Law of the Sea III, *Informal Single Negotiating Text*, U.N. Doc. A/CONF. 62/WP.8 (7 May 1975), p. 170. MP, Vol. XI, Annex LA-105.

[439] U.N. Conference on the Law of the Sea III, *Revised Single Negotiating Text*, U.N. Doc. A/CONF. 62/WP.8/Rev.1 (6 May 1976). MP, Vol. XI, Annex LA-107; U.N. Conference on the Law of the Sea III, *Informal Composite Negotiating Text*, U.N. Doc. A/CONF.62/WP.10 (15 July 1977). MP, Vol. XI, Annex LA-108; U.N. Conference on the Law of the Sea III, *Informal Composite Negotiating Text, Revision 1*, U.N. Doc. A/CONF.62/WP.10/REV1 (28 Apr. 1979). MP, Vol. XI, Annex LA-110; U.N. Conference on the Law of the Sea III, *Informal Composite Negotiating Text, Revision 3* U.N. Doc. A/CONF.62/WP.10/REV3 (22 Sept. 1980). MP, Vol. XI, Annex LA-114.

[440] *See* Yann-huei Song, "The Application of Article 121 of the Law of the Sea Convention to the Selected Geographical Features Situated in the Pacific Ocean", *Chinese Journal of International Law*, Vol. 9, No. 4 (2010), pp. 674-679. MP, Vol. XI, Annex LA-160.

a few other delegations were not accepted.[441] The "exception established" for small and remote insular features was thus "incorporated into the Convention with a view to preventing a further substantial limitation of the area of the Common Heritage of Mankind".[442]

5.23 Article 121(3) is now considered part of an indivisible regime governing the legal status and entitlement of islands under customary international law as well as the Convention.[443] As the ICJ explained in *Nicaragua v. Colombia*:

> [T]he entitlement to maritime rights accorded to an island by [Article 121(2)] is expressly limited by reference to the provisions of [Article 121(3)]. By denying an exclusive economic zone and a continental shelf to rocks which cannot sustain human habitation or economic life of their own, paragraph 3 provides an essential link between the long-established principle that "islands, regardless of their size, . . . enjoy the same status, and therefore generate the same maritime rights, as other land territory" and the more extensive maritime entitlements recognized in UNCLOS and which the Court has found to have become part of customary international law. The Court therefore considers that the legal régime of islands set out in UNCLOS Article 121 *forms an indivisible régime*, all of which has the status of customary international law.[444]

5.24 There can be no question that the rules reflected in Article 121(3) are binding on China and the Philippines.

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[441] The U.K. modified its position upon its accession to UNCLOS in 1997, and applied the limitation of Article 121(3) to Rockall. *See infra* para. 5.28.

[442] B. Kwiatkowska and A. H.A. Soons, "Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of their Own", *Netherlands Yearbook of International Law*, Vol. 21 (1990), p. 144. MP, Vol. XI, Annex LA-132. *See also* Jonathan Charney, "Rocks that Cannot Sustain Human Habitation", *American Journal of International Law*, Vol. 93, No. 4 (1999), p. 866 ("[T]he primary purpose of Article 121(3) was to ensure that insignificant features, particularly those far from areas claimed by other states, could not generate broad zones of national jurisdiction in the middle of the ocean."). MP, Vol. XI, Annex LA-142.

[443] During the UNCLOS negotiations, Colombia stated that Article 121 constitutes a package: "Article 121 defines what is an island and the difference between islands and rocks. Islands have a right to a territorial sea, a continental shelf and an exclusive economic zone. Rocks are entitled only to a territorial sea since they cannot sustain human habitation or economic life of their own. This is logical. It is a 'package' which results from the view that these maritime spaces have been granted to benefit the inhabitants, with an economic concept. Any other interpretation would distort the concept." United Nations, Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea: Régime of Islands: Legislative History of Part VIII (Article 121) of the United Nations Convention on the Law of the Sea, Part 8* (1988), p. 111. MP, Vol. XI, Annex LA-118.

[444] *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Merits, Judgment, I.C.J. Reports 2012, para. 139. MP, Vol. XI, Annex LA-35.

2. Interpretation of Article 121(3)

5.25 Under Article 121(3): "Rocks which cannot sustain [1] human habitation or [2] economic life of their own shall have no exclusive economic zone or continental shelf". It follows that, in addition to their small size, two conditions distinguish "rocks" that are not entitled to an EEZ and continental shelf from "true islands" that enjoy such entitlements: *first*, the capacity to sustain human habitation and, *second*, the capacity to sustain economic life of their own.

5.26 Article 121(3) does not define the term "rocks". There is no reason to believe that the geology or geomorphology of the feature is relevant; neither bears on the object and purpose of the provision. The size of the area uncovered at high tide is, however, relevant. Like the text itself, the *travaux préparatoires* and expert commentary suggest that only small insular features are contemplated, whatever their makeup. At the same time, since the text expressly requires a determination of the capacity of the insular feature to sustain human habitation and an economic life of its own, it is equally clear that size alone is not determinative. In that light, and taking account of the negotiating history, it would be reasonable to conclude that an insular feature whose area above high tide is less than one km^2 could be regarded as sufficiently small to create a presumption that it is not genuinely able to sustain human habitation and economic life of its own. Evidence to the contrary would have to be adduced to show that the feature in question should be entitled to generate an EEZ and continental shelf.

5.27 In *Nicaragua v. Colombia*, the ICJ interpreted and applied Article 121 in respect of Quitasueño, which, like Scarborough Shoal, is an underwater reef with only small protrusions above sea level located in a semi-enclosed sea a substantial distance from the coast of the State to which it pertains (Colombia). The Court found that "all of the features at Quitasueño are minuscule and, even on the Grenoble Tide Model, are only just above water at high tide".[445] Only one such feature – QS 32 – was convincingly proven to be above water at high tide. It is shown below in **Figure 5.2**. The Court stated:

> It has not been suggested by either Party that QS 32 is anything other than a rock which is incapable of sustaining human habitation or economic life of its own under Article 121, paragraph 3, of UNCLOS, so this feature

[445] *Nicaragua v. Colombia*, para. 36. MP, Vol. XI, Annex LA-35.

generates no entitlement to a continental shelf or exclusive economic zone.[446]

Figure 5.2

5.28 Two applications of Article 121(3) in State practice underscore the point that tiny insular features that are like Scarborough Shoal, incapable of sustaining human habitation or economic life generate no entitlement to an EEZ or continental shelf. The first concerns the United Kingdom's treatment of Rockall, a barren feature in the North Atlantic Ocean, depicted in **Figure 5.3** (in Volume II only). It has a circumference of 61 metres and a total area of 624 m^2, including a promontory that rises 21 metres above sea level. The U.K., which had declared a 200 M fishing zone around Rockall, was one of the States that most strongly opposed inclusion of Article 121(3) in the Convention, arguing that there was "no reason to discriminate between different forms of territory for the purposes of maritime zones".[447] Following its accession to the Convention, however, the U.K. adjusted its position and claimed only a 12 M territorial sea around Rockall, on the basis that it is uninhabitable and –

[446] *Id.*, para. 183.

[447] United Nations, Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea: Régime of Islands: Legislative History of Part VIII (Article 121) of the United Nations Convention on the Law of the Sea, Part 8* (1988), p. 105. MP, Vol. XI, Annex LA-118.

notwithstanding extensive fishing activities in its surrounding waters – incapable of sustaining economic life of its own.[448]

5.29 Another important example from State practice, which is of direct relevance to these proceedings, concerns Oki-no-Tori Shima, a tiny feature in the Pacific Ocean, 940 M from the coast of Japan, whose natural condition was significantly altered by Japan. The photograph appearing as **Figure 5.4** (in Volume II only) shows the concrete encasement that Japan constructed around the natural feature, which is the small circular figure in the centre.

5.30 In 2010, China protested Japan's submission to the CLCS in which it claimed a continental shelf beyond 200 M generated from Oki-no-Tori Shima. China stated: "It is to be noted that the so-called Oki-no-Tori Shima Island is in fact a rock as referred to in Article 121(3) of the Convention .... Available scientific data fully reveals that the rock of Oki-no-Tori, on its natural conditions, obviously cannot sustain human habitation or economic life of its own, and therefore shall have no exclusive economic zone or continental shelf." [449]

5.31 By a further note to the CLCS in 2011, China set out its views on Oki-no-Tori Shima and Article 121(3) as follows:

> The Chinese Government consistently maintains that the rock Oki-no-Tori, on its natural conditions, obviously cannot sustain human habitation or economic life of its own. According to Article 121(3) of [UNCLOS], the rock Oki-no-Tori shall have no exclusive economic zone or continental shelf. . . . The application of Article 121(3) of the Convention relates to the extent of the International Seabed Area as the common heritage of mankind, relates to the overall interests of the international community, and is an important legal issue of general nature. To claim continental shelf from the rock Oki-no-Tori will seriously encroach upon the Area as the common heritage of mankind. If the Commission makes recommendations on the part of Japan's submission in relation to the rock Oki-no-Tori before

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[448] United Kingdom, House of Commons, Hansard, *Written Answers* Col. 397 (21 July 1997), MP, Vol. VI, Annex 166: "Rockall is not a valid base point for [fishery] limits under article 121(3) of the convention." *See* Robin Churchill, "United Kingdom Accession to the UNCLOS", *International Journal of Marine and Coastal Law*, Vol. 13, No. 2 (1998), pp. 271-273. MP, Vol. XI, Annex LA-139. Ireland, Denmark and Iceland had protested the proclamation of a fishery zone around the feature. *Id.*, p. 272.

[449] *Note Verbale* from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/2/2009 (6 Feb. 2009). MP, Vol. VI, Annex 189. *See also* Japan, *Submission to the United Nations Commission on the Limits of the Continental Shelf* (27 Dec. 2013). MP, Vol. VII, Annex 228; Yann-huei Song, "The Application of Article 121 of the Law of the Sea Convention to the Selected Geographical Features Situated in the Pacific Ocean", *Chinese Journal of International Law*, Vol. 9, No. 4 (2010), pp. 668-674. MP, Vol. XI, Annex LA-160.

> its legal status has been made clear . . . it would have adverse impact in the maintenance of an equal and reasonable order for oceans.[450]

5.32 The Republic of Korea took the same position as China. In its protest to the CLCS, it maintained that Oki-no-Tori Shima is "a rock under Article 121 (paragraph 3) of the Convention . . . not entitled to any continental shelf extending to or beyond 200 nautical miles".[451]

5.33 In light of the communications from China and Korea, and Japan's response, the CLCS concluded that "it would not be in a position to take action on the parts of the [subcommission's] recommendations relating to [the areas off Oki-no-Tori Shima] until such time as the matters referred to in the communications . . . had been resolved".[452]

5.34 China's own practice thus confirms its explicit recognition of the application of Article 121(3), and the meaning attached to it as understood by the Philippines.

3. Capacity To Sustain Human Habitation

5.35 No international court or tribunal has yet found it necessary to explain what is meant by the words "cannot sustain human habitation".

5.36 Nevertheless, the negotiating history of Article 121(3) and related commentary provide considerable guidance in interpreting this language. The text adopted on 28 April 1975 by the informal group on islands stated expressly that in order to be entitled to an EEZ and continental shelf, an island should be able to sustain population *on a permanent basis*. The group recalled the position of the Turkish delegation, stating that "military or police installations are not sufficient for generating exclusive economic zones."[453] According to former ITLOS Judge David Anderson: "The introduction on to a small feature, such as a rock or a sand spit, of an official or military presence, serviced from outside, does not establish

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[450] *Note Verbale* from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/59/2011 (3 Aug. 2011). MP, Vol. VI, Annex 203.

[451] *See Note Verbale* from the Permanent Mission of the Republic of Korea to the United Nations to the Secretary-General of the United Nations (27 Feb. 2009). MP, Vol. VI, Annex 190.

[452] United Nations, Commission on the Limits of the Continental Shelf, *Progress of Work in the Commission on the Limits of the Contiential Shelf: Statement by the Chairperson* U.N. Doc. CLCS/74 (30 Apr. 2012), p. 5, para. 19. MP, Vol. VII, Annex 227.

[453] United Nations, Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea: Régime of Islands: Legislative History of Part VIII (Article 121) of the United Nations Convention on the Law of the Sea, Part 8* (1988), pp. 44-45. MP, Vol. XI, Annex LA-118.

that the feature is capable of sustaining human habitation or has an economic life of its own".[454] Thus, Article 121(3) speaks of human habitation in its normal sense: a stable community of human beings that is sustainable across time.[455] It is not enough that a State can keep a few people alive on an island by installing them there (for example, to support a claim of sovereignty) and providing the essentials of life from the mainland. As the negotiating history and the commentary make clear, the island itself must be capable of "*sustain*[*ing*] human habitation".

5.37 The ordinary meaning of the term "sustain," as applied to land or a place, is defined as:

> To provide or be the source of the food, drink, etc., necessary to keep (a person) alive and healthy;
>
> To support or maintain life by providing food, drink, and other necessities.[456]

It follows that for an insular feature to generate an EEZ and continental shelf, it must be capable of providing the food, fresh water and living space that are essential to keep a community of human beings alive.

5.38 This understanding is supported by the other official texts of Article 121(3). In the Chinese text, the words "cannot sustain human life" are translated as "不能维持人类居住", where "维持" ("*wei chi*"), means "to maintain or keep"; and "居住" ("*ju zhu*"), means "to dwell or to live".

5.39 The French version of the provision has the same effect. The clause " *[l]es rochers qui ne se prêtent pas à l'habitation humaine ou à une vie économique propre*" means "the rocks that are not fit for human habitation or economic life of their own." A feature is "not fit for human habitation" if it cannot supply the basic necessities for human survival. It does not

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[454] David Anderson, "Islands and Rocks in the Modern Law of the Sea" in *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 2 (M. Nordquist, et. al., eds., 2002), p. 313. MP, Vol. XI, Annex LA-149.

[455] Robert Kolb, "The Interpretation of Article 121, Paragraph 3 of the United Nations Convention on the law of the Sea: Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own", *French Yearbook of International Law*, Vol. 40 (1994), pp. 903, 906. MP, Vol. XI, Annex LA-136; J.M Van Dyke and R.A. Brooks, "Uninhabited Islands: Their Impact on the Ownership of the Oceans' Resources", *Ocean Development and International Law*, Vol. 12, No. 3-4 (1983), p. 288. MP, Vol. XI, Annex LA-124.

[456] *Shorter Oxford English Dictionary*, Vol. 2 (5th ed., 2002), MP, Vol. X, Annex 333.

suddenly become "fit for human habitation" when a small settlement is installed there and supported entirely from outside.

5.40 In the Spanish text, the words "cannot sustain human life" are expressed as "*no aptas para mantener habitación humana*." Consistent with the Chinese text, the verb *mantener* means to "maintain or keep".

5.41 In the Russian text, the words "cannot sustain human life" are expressed as "*не пригодны для поддержания жизни человека*", which translates as "unfit for human life".

5.42 The grammatical context further indicates that the feature itself must be capable of sustaining human life in order to avoid classification as a "rock" under Article 121(3). Notably, the verb "sustain" is qualified by the modal word "cannot", connoting the incapacity of the subject of the sentence – "rocks" – to support human habitation. Put another way, the subject of the sentence – "rocks" – refers to the feature itself, which must be capable of sustaining human life in order to generate an EEZ and a continental shelf. It does not change the character of the feature, or qualify it for an EEZ or a continental shelf, if it can be made to serve as the locus of a small human settlement that is artificially sustained from another feature, or from the mainland.

5.43 This understanding of Article 121(3) is consistent with the relevant commentary. As Professor G. Xue summarizes, "[i]nternational law experts universally believe that an island [to be habitable] must: sustain and maintain fresh water, be able to grow vegetation that can sustain human habitation, produce some material that can be used for human shelter, and be able to sustain a human community".[457] Indeed, "food, fresh water and living space constitute the very fundamental criteria for human habitation on an island. With these three criteria, the island many be considered as being able to sustain human habitation. . .".[458]

5.44 Two cases involving small and uninhabited islets support this conclusion, even though Article 121(3) as such was not applied in those cases. In both instances, the barren and inhospitable nature of these insular features resulted in their being ignored – that is, given no effect – in the delimitation of maritime boundaries. In the *Libya/Malta* case, the ICJ refused

[457] G. Xue, "How Much Can a Rock Get? A Reflection from the Okinotorishima Rocks", in *The Law of the Sea Convention: U.S. Accession and Globalization* (M. Nordquist, et. al., eds., 2012), p. 356. MP, Vol. XI, Annex LA-166.

[458] *Id.*

to give any effect to Filfla, a small Maltese feature, depicted below at **Figure 5.5** (in Volume II only), because it was an "uninhabited rock":

> In this case, the equitableness of an equidistance line depends on whether the precaution is taken of eliminating the disproportionate effect of certain "islets, rocks and minor coastal projections", to use the language of the Court in its 1969 Judgment . . . . The Court thus finds it equitable not to take account of Filfla in the calculation of the provisional median line between Malta and Libya.[459]

5.45 In *Eritrea/Yemen*, the arbitral tribunal refused to give any effect to Yemen's Jabal al-Tayr or the Zubayr Islands because

> their barren and inhospitable nature and their position well out to sea, which have already been described in the Award on Sovereignty, mean that they should not be taken into consideration in computing the boundary line between Yemen and Eritrea.[460]

By contrast, Eritrean islands that were capable of sustaining a stable human population and economic life were given full effect in determining the EEZ and continental shelf.[461]

5.46 These decisions limiting the ability of insular features not naturally inhabited to generate extended maritime zones reflect the underlying rationale of Article 121(3). As Van Dyke and Brook explain: "The key factor must be whether the island can in fact support a stable population".[462] This is because "it does not serve the central purposes of the Treaty to grant ocean space to barren atolls that have only slight links to some distant nation".[463] The reference to a "distant nation" serves to emphasize that Article 121 is not concerned with the baseline rules applicable to features immediately off the coast of a State. The features involved in this case are at considerable distances from the main coasts of both Parties, as well as the other States bordering the South China Sea.

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[459] *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, Merits, Judgment, I.C.J. Reports 1985, para. 64. MP, Vol. XI, Annex LA-14.

[460] *Eritrea v. Yemen*, Second Stage of the Proceedings (Maritime Delimitation), Award (17 Dec. 1999), p. 45, para. 147. MP, Vol. XI, Annex LA-49.

[461] *See id.*, paras. 154-159.

[462] J.M Van Dyke and R.A. Brooks, "Uninhabited Islands: Their Impact on the Ownership of the Oceans' Resources", *Ocean Development and International Law*, Vol. 12, No. 3-4 (1983), p. 286.

[463] *Id*. The commentators further elaborate: "Islands should not generate ocean space if they are claimed by some distant absentee landlord who now desires the island primarily because of the ocean resources around the island. Islands should generate ocean space if stable communities of people live on the island and use the surrounding ocean areas."

5.47 It may be true that human beings can survive in the unlikeliest of places. Saint Simeon Stylites is said to have spent 37 years sitting on a small pillar in the Syrian Desert, sustenance being provided regularly by his admirers. This does not mean that the *pillar* on which he sat was capable of sustaining human habitation.

5.48 It follows that for an insular feature not to be a "rock" within the meaning of Article 121(3), its natural conditions must make it capable, by itself, of providing the elements required to sustain, that is, to keep alive, a stable community of human beings. Small, barren and uninhabited features like Quitasueño, Rockall, Filfla, Jabal al-Tayr and Zubayr plainly lack such conditions. The same is true of Scarborough Shoal. None of its six protruding surfaces has fresh water, food or the capacity to grow it, or any vegetation whatsoever. None of the six even has sufficient living space to support a human population. No one has ever attempted to live on any of these small surfaces. No stable, ongoing human habitation is possible.

4. Capacity To Sustain Economic Life

5.49 In order to "sustain economic life", a feature would have to have conditions that permit the development and maintenance of economic activities. This presupposes more than the existence of natural resources in the adjacent waters. As Judge Jesus has observed, Article 121(3) requires that a feature must have the capacity to develop its own sources of production, distribution or exchange in a way that it can justify and sustain the existence and development of stable human habitation.[464]

5.50 To avoid classification as a "rock", the conditions supportive of economic life cannot be artificially created or injected from outside. This clearly follows from the qualification that rocks are features that are not capable of sustaining economic life "of their own". This formulation requires self-sufficiency. This is confirmed by the other official texts of Article 121(3). The word "其本身" ("*qi ben shen*") in the Chinese text emphasises "the feature

[464] Jose Luis Jesus, "Rocks, New-born Islands, Sea Level Rise, and Maritime Space" in *Negotiating for Peace* (Jochen A. Frowein, et. al., eds., 2003), pp. 587-592. MP, Vol. XI, Annex LA-151; G. Xue, "How Much Can a Rock Get? A Reflection from the Okinotorishima Rocks", in *The Law of the Sea Convention: U.S. Accession and Globalization* (M. Nordquist, et. al., eds., 2012), p. 356. MP, Vol. XI, Annex LA-166; Robert Kolb, "The Interpretation of Article 121, Paragraph 3 of the United Nations Convention on the law of the Sea: Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own", *French Yearbook of International Law*, Vol. 40 (1994), pp. 907-908. MP, Vol. XI, Annex LA-136.

itself", in the sense that the feature *by itself* must be capable of providing economic resources to maintain alive a group of human beings.

5.51 In the French text, the words "*ne se prêtent pas . . . à une vie économique propre*" translate as "not fit for . . . an economic life of its own". Thus, the French version also confirms that Article 121(3) requires that the feature itself would have to be fit for economic life.

5.52 In the Spanish text, the terms "*no aptas para mantener . . . vida económica*" are followed by the term "*propia*", which means "own", thus also confirming that the feature must have its own capacity to sustain economic life.

5.53 In the Russian text, the words "cannot sustain . . . economic life of their own" are expressed as "*не пригодны . . .* для *самостоятельной* хозяйственной деятельности", which translates as "unfit for/incapable of *self-sustaining* economic activity".

5.54 This interpretation is supported by distinguished commentators. Representative in this regard is Sir Derek Bowett, who observed in his monograph on "*The Legal Regime of Islands in International Law*": "The phrase 'of their own' means that a State cannot avoid a rock being denied both an EEZ and a shelf by injecting an artificial economic life, based on resources from its other land territory".[465]

5.55 In a similar vein, Judge Vukas, in his separate opinion in the *Volga* case (*Russia v. Australia)*, explained that the reason for giving exclusive rights to the coastal States was to protect the economic interests of the coastal communities that depended on the resources of the sea, and thus to promote their economic development and enable them to feed themselves.[466] This rationale does not apply to uninhabited islands, because they have no coastal fishing communities that require such assistance.[467]

5.56 Thus for an insular feature *not* to be a rock within the meaning of Article 121(3), and for it to generate entitlements to an EEZ and a continental shelf, its natural conditions must make it capable of supporting the development and maintenance of at least some level of

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[465] D. W. Bowett, *The Legal Regime of Islands in International Law* (1979), p. 34. MP, Vol. XI, Annex LA-123.

[466] *See Russia v. Australia*, Declaration of Judge Vukas, paras. 3-5. MP, Vol. XI, Annex LA-40.

[467] *Id.*, para. 6.

economic activity sufficient to support the presence of a stable human population. No such conditions are found on Scarborough Shoal. The protruding features there provide none of the elements necessary for economic life. They are indisputably "rocks" within the meaning of Article 121(3) and, as such, they do not generate entitlements to an EEZ or a continental shelf.

II. THE SOUTHERN SECTOR: THE SPRATLYS

5.57 There are over 750 features in the Spratly Islands, the vast majority of which are permanently submerged reefs, shoals and banks. All of the Spratly insular features are claimed by China and Vietnam. Forty are also claimed by the Philippines. The Philippines has neither made nor recognized claims that any of these features generates entitlement to an EEZ or continental shelf. The Philippines understands, further, that neither Malaysia nor Vietnam asserts or recognizes entitlements to an EEZ or continental shelf based on any of the features in the Spratlys.[468] Because it is both infeasible and unnecessary for the Tribunal to determine the nature of so many features in these proceedings, the Philippines has reduced the number to a more manageable eight by asking the Tribunal to rule on the status and entitlements, if any, only of those that are occupied or controlled by the PRC. By determining the nature and entitlements of these features, and by establishing the criteria for making these determinations, the Tribunal will assist the Parties (and other coastal States in the region) in reaching agreement as to the entitlements of other features of a similar nature.

5.58 The features that the Philippines has placed in issue in the Southern Sector consist of five which the Philippines considers low-tide elevations and three that are "rocks" under Article 121(3). In respect of the five low-tide elevations, the Philippines submits that all are part of the seabed and subsoil and therefore not subject to appropriation; and that none generates entitlement to an adjacent maritime zone – not even a territorial sea. The three rocks are each entitled to a territorial sea, but not an EEZ or a continental shelf. China, in contrast, claims that the features in the Spratly Islands generate entitlement to the full suite of maritime zones. In its 14 April 2011 *Note Verbale* to the Secretary General of the United Nations, for example, it stated:

[468] *See infra* para. 5.135.

> [U]nder the relevant provisions of the 1982 Convention on the Law of the Sea, as well as the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone (1992) and the Law on the Exclusive Economic Zone and Continental Shelf of the People's Republic of China (1998), China's Nansha [Spratly] Islands is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf.[469]

This view was reaffirmed on 7 March 2014, in a demarche by the Chinese Foreign Ministry to the Philippine Ambassador in Beijing: China "claim[s] territorial sea, EEZ, and continental shelf from the Nansha Islands".[470]

A. Low Tide Elevations

1. Location and Description

5.59 The five low-tide elevations in the Southern Sector are Second Thomas Shoal, Mischief Reef, McKennan Reef, Gaven Reef, and Subi Reef. They are shown in Figure 2.5 (following page 22).

5.60 **Second Thomas Shoal,** known in the Philippines as Ayungin Shoal and in China as Ren'ai Jiao (仁爱礁), is a reef located at 9°45'30"N, 115°50'30"E, 104 M from the nearest point on Palawan and 614 M off the coast of China's Hainan Island. It is 55 M from Nanshan, the nearest high-tide feature in the Spratlys that is claimed by China. Second Thomas Shoal is completely submerged at high tide; its eastern and western rims have drying patches, but only at low tide.[471] The feature is described as a low-tide elevation in Chinese Chart No. 10019, produced by the Navigation Guarantee Department of China's Navy Headquarters.[472]

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[469] *Note Verbale* from the Permanent Mission of the People's Republic of China to the Secretary-General of the United Nations, No. CML/8/2011 (14 Apr. 2011), p. 2. MP, Vol. VI, Annex 201 (italics in original).

[470] *Memorandum* from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-070-2014-S (7 Mar. 2014), para. 4. MP, Vol. IV, Annex 98. *See also Memorandum* from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-071-2014-S (10 Mar. 2014), para. 2. MP, Vol. IV, Annex 100.

[471] United States National Geospatial-Intelligence Agency, *Pub. 161 Sailing Directions (Enroute), South China Sea and the Gulf of Thailand* (13th ed., 2011), p. 11. MP, Vol. VII, Annex 233.

[472] Navigation Guarantee Department of the Chinese Navy Headquarters, Chart No. 10019 (Huangyan Dao (Minzhu Jiao) to Balabac Strait). Navigation Guarantee Department of the Chinese Navy Headquarters, *China Sailing Directions: South China Sea (A103)* (2011), p. 172. MP, Vol. VII, Annex 232.

5.61 Two images of Second Thomas Shoal from a multi-band satellite photograph[473] taken in 1994 are reproduced as **Figure 5.6** (in Volume II only). The upper image is in Band 1 (blue-green), corresponding to shorter wavelength light (0.45-0.52 μm) that penetrates water better than other bands. In this image, the underwater structure of Second Thomas Shoal is visible. The lower image is in Band 4 (near infrared), corresponding to longer wavelengths (0.76-0.90 μm) that are almost entirely absorbed by water. As a result, only features above water are visible in Band 4. The Band 4 image makes clear that there are no features above water at Second Thomas Shoal.

5.62 In April 2013, China sent at least four vessels, including navy vessels, CMS vessels and fishing vessels to seize control of Second Thomas Shoal. It also made several demarches to the Philippines insisting that the Philippines remove its presence from the feature – in the form of a naval vessel (the *BRP Sierra Madre* which had been ran aground there since 1999) – or face the consequences. The Philippines refused to do so, and has continued its practice of supplying and rotating its personnel aboard the vessel at regular intervals, despite the Chinese threat. In the meantime, China has restricted the activities of Filipino fishermen in the vicinity of Second Thomas Shoal, and prevented them from approaching the shoal itself. While the number of Chinese vessels was reduced after June 2013, a significant number returned in February 2014, and have remained at the shoal through the submission of this Memorial denying access by Philippine vessels. These events are discussed in Chapter 3.[474] **Figure 5.7** (following page 134) is a satellite photograph showing the location of the *BRP Sierra Madre* at Second Thomas Shoal.

5.63 **Mischief Reef,** known in the Philippines as Panganiban Reef and in China as Meiji Jiao (美济礁), is a coral atoll located at 9°55'N, 115°32'E, 126 M from the nearest point on Palawan and 596 M from the nearest point on Hainan Island. It is more than 50 M from Nanshan Island, the nearest high-tide feature claimed by China. According to the U.S. National Geospatial-Intelligence Agency, Mischief Reef is a low tide elevation which is "awash . . . [with] several drying rocks".[475] The Navigation Guarantee Department of the

[473] Multi-band imagery is multispectral, meaning that it is collected from several parts of the electromagnetic spectrum (the entire range of light radiation), from gamma rays to radio waves, including X-rays, microwaves, and visible light.

[474] *See supra* paras. 3.62-3.66.

[475] US NGIA, *South China Sea Sailing Directions*, p. 11. MP, Vol. VII, Annex 233.

Chinese Navy agrees that Mischief Reef "is exposed during low tide and is submerged during high tide".[476]

5.64 Two images of Mischief Reef from a multi-band satellite photograph taken in 1994 are reproduced as **Figure 5.8** (in Volume II only). The upper image is in Band 1, which penetrates water. As in the case of Second Thomas Shoal, the underwater contours of Mischief Reef are again evident. In the Band 4 (non-water penetrating) image below, however, there was no evidence of any above-water feature(s) at the time the photograph was taken.

5.65 In 1995, China seized Mischief Reef, over the protest of the Philippines, and began building structures on top of submerged portions of the feature at four different locations. At first, China explained to the Philippines that the structures were rudimentary shelters for fishermen. However, after 1998 China constructed more sophisticated facilities on top of the reef. These facilities include, at present, a number of buildings built on concrete platforms, quays, a greenhouse, and various weather and communications instruments.[477] Their locations are shown in the satellite photographs in **Figure 5.9** (following page 134). China refuses to allow Philippine vessels to approach Mischief Reef, or to fish in its vicinity.

5.66 **McKennan Reef,** known in the Philippines as Chigua Reef and in China as Ximen Jiao (西门礁), is located at 9°53'N, 114°27'E, 182 M from the nearest point on Palawan and 567 M from the nearest point on Hainan. It is 7 M from Sin Cowe, the nearest high-tide feature, which is a very small "rock" occupied by Vietnam. The charts produced by the Philippines, China, the United Kingdom, the United States and Japan all depict this feature as a low-tide elevation.[478]

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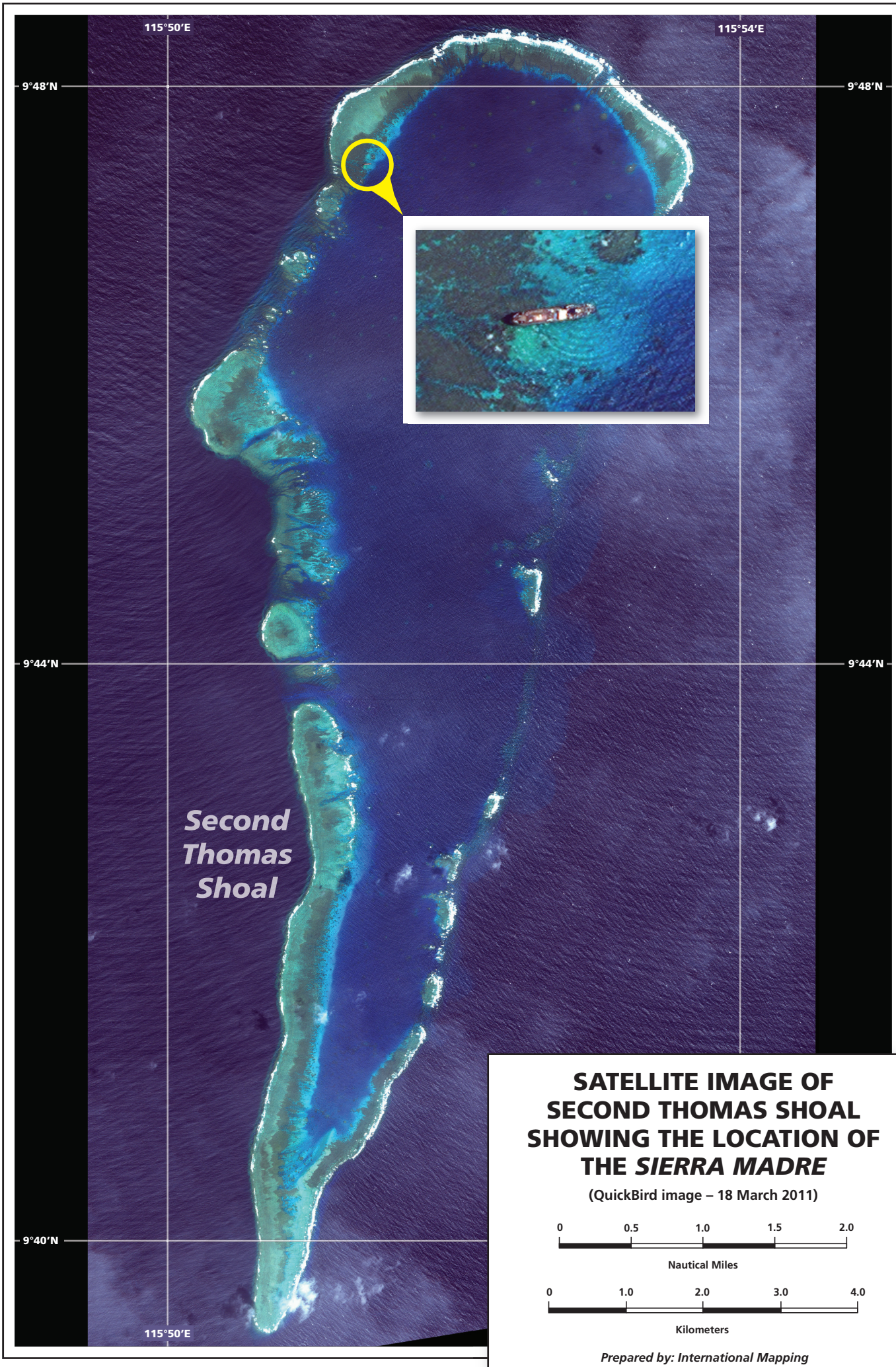
[476] Chinese Navy NGD, *South China Sea Sailing Directions*, p. 179. MP, Vol. VII, Annex 232.

[477] *See infra* Chapter 6, Section III.A; Figures 6.9 and 6.10.

[478] *See* Philippine National Mapping and Resource Information Authority, Chart No. 4723A (Philippines: Kalayaan Island Group and Recto Bank including Bajo de Masinloc) (Feb. 2010). MP, Vol. II, Annex NC5; Japan Coast Guard, Chart No. W1677 (Southern Part of Philippine Islands and Adjacent Seas) (2008). MP, Vol. II, Annex NC4; Navigation Guarantee Department of the Chinese Navy Headquarters, Chart No. 104 (South China Sea) (2006). MP, Vol. II, Annex NC2; Navigation Guarantee Department of the Chinese Navy Headquarters, Chart No. 10019 (Huangyan Dao (Minzhu Jiao) to Balabac Strait) (2006). MP, Vol. II, Annex NC3; United States Defense Mapping Agency, Chart No. 93044 (Yongshu Jiao to Yongdeng Ansha) (2d ed., May 1984). MP, Vol. II, Annex NC6; United Kingdom Hydrographic Office, Chart No. 3483 (Mindoro Strait to Luconia Shoals and Selat Makasar) (2002). MP, Vol. II, Annex NC1. For guidance in reading the nautical charts, *see* Navigation Guarantee Department of the Chinese Navy Headquarters, *Symbols identifying direction used on Chinese charts* (2006), p. 3. MP, Vol. VII, Annex 231; United States National Geospatial-Intelligence



SATELLITE IMAGE OF SECOND THOMAS SHOAL SHOWING THE LOCATION OF THE *SIERRA MADRE*

(QuickBird image – 18 March 2011)

0 0.5 1.0 1.5 2.0

Nautical Miles

0 1.0 2.0 3.0 4.0

Kilometers

Prepared by: International Mapping

Figure 5.7

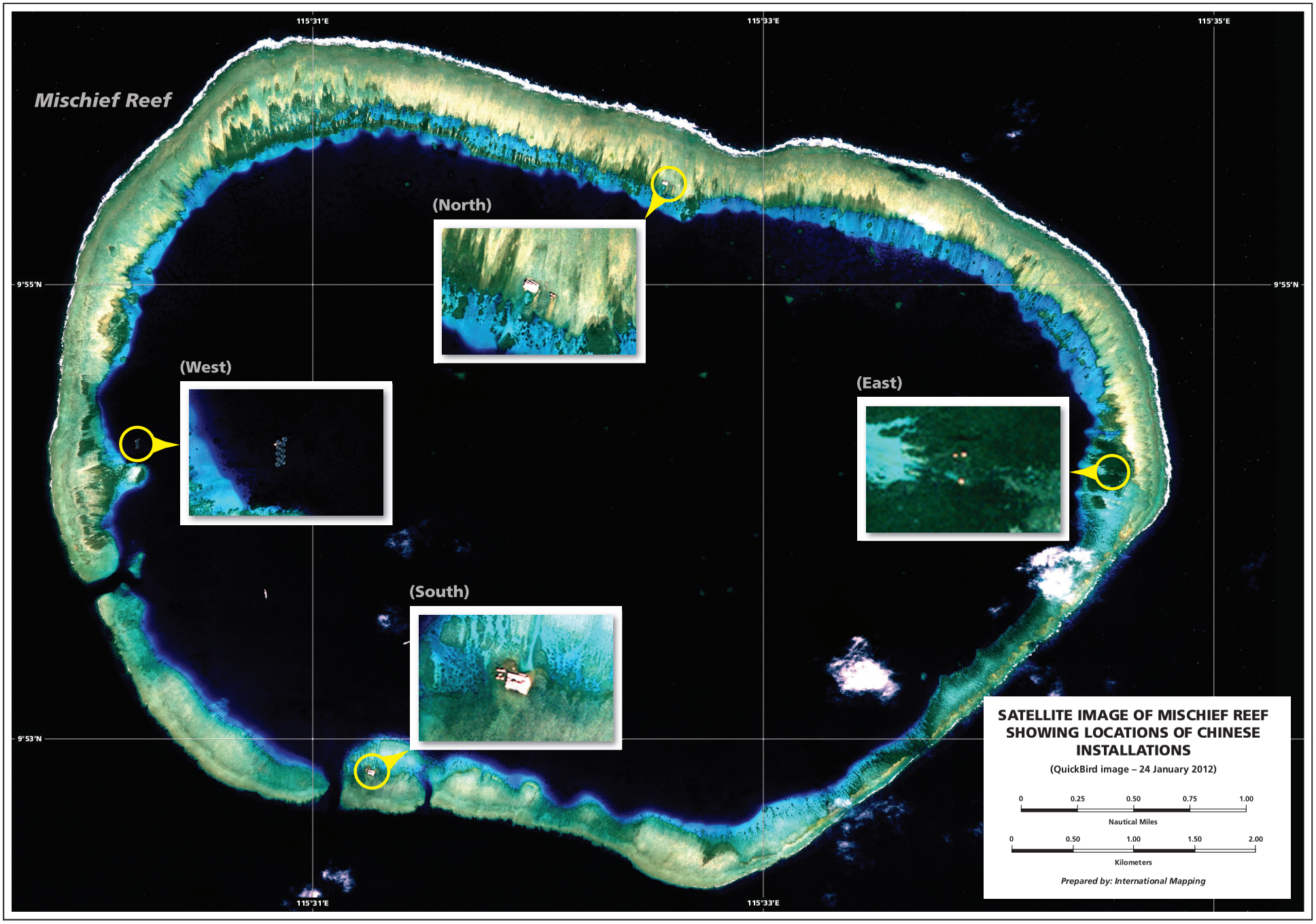

Mischief Reef
115°31'E
115°33'E
115°35'E
9°55'N
9°53'N
(North)
(West)
(East)
(South)
SATELLITE IMAGE OF MISCHIEF REEF SHOWING LOCATIONS OF CHINESE INSTALLATIONS
(QuickBird image – 24 January 2012)
0 0.25 0.50 0.75 1.00
Nautical Miles
0 0.50 1.00 1.50 2.00
Kilometers
Prepared by: International Mapping

Figure 5.9

5.67 China seized McKennan Reef in 1988, then constructed, and has continued to maintain, artificial structures on top of the part of this feature that other States, including China, refer to as Hughes Reef. Hughes Reef, whose Chinese name is Dongmen Jiao (东门礁), is located 181 M from Palawan, 567 from Hainan, and 9 M from Sin Cowe. The charts produced by the Philippines, China, the United Kingdom, the United States and Japan all depict this feature as a low-tide elevation.[479]

5.68 **Figure 5.10** (in Volume II only) consists of two images from a multi-band satellite photograph of McKennan Reef (including Hughes Reef) taken in 1994. Here again, the Band 1 image on top shows the submerged, shallow-water coral formations of McKennan Reef, while the Band 4 image below makes clear that there were no above-water elements at the reef before China began its construction activities.

5.69 The structures China has built on it include a helipad and a three-story concrete building equipped with various communications hardware.[480] A satellite photograph showing the locations of China's construction is produced as **Figure 5.11** (following page 136). China refuses to allow Philippine vessels to approach McKennan/Hughes Reef.

5.70 **Gaven Reef,** known in China as Nanxun Jiao (南薰礁), is located at 10°13'N, 114°12'E, 200 M from the nearest point on Palawan and 544 M from the nearest point in China. It is approximately 6 M from Namyit, the nearest high-tide feature, which is another very small "rock" occupied by Vietnam. At high tide Gaven Reef is completely

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Agency, *U.S. Chart No. 1: Symbols, Abbreviations and Terms used on Paper and Electronic Navigational Charts* (12th ed., April 2013). MP, Vol. VII, Annex 236.

[479] *See* Philippines, Chart No. 4723A. MP, Vol. II, Annex NC5; Japan, Chart No. W1677. MP, Vol. II, Annex NC4; China, Chart No. 104. MP, Vol. II, Annex NC2; China, Chart No. 10019. MP, Vol. II, Annex NC3; United States Defense Mapping Agency, Chart No. 93044 (Yongshu Jiao to Yongdeng Ansha) (2d ed., May 1984). MP, Vol. II, Annex NC6; UKHO, Chart No. 3483. MP, Vol. II, Annex NC1. For guidance in reading the nautical charts, *see* Navigation Guarantee Department of the Chinese Navy Headquarters, *Symbols identifying direction used on Chinese charts* (2006), p. 3. MP, Vol. VII, Annex 231; United States National Geospatial-Intelligence Agency, *U.S. Chart No. 1: Symbols, Abbreviations and Terms used on Paper and Electronic Navigational Charts* (12th ed., April 2013). MP, Vol. VII, Annex 236.

[480] Armed Forces of the Philippines, *Matrix of Events: Chigua (Kennan) Reef* (2013). MP, Vol. IV, Annex 86.

submerged.[481] China's Sailing Directions depict Gaven Reef as low-tide elevation, stating: "During high tide, these reef rocks are all submerged by seawater".[482]

5.71 **Figure 5.12** (in Volume II only) consists of images from a multi-band satellite photograph of Gaven Reef that was taken in 1994. While the Band 1 image captures the contours of Gaven Reef below the water's surface, the Band 4 image once again contains no evidence of any features that are above water (although, unlike the Band 4 images depicted above, there are breakers visible on the western rim of the reef).

5.72 Beginning in 1988, China has constructed artificial structures on Gaven Reef, including two octagonal buildings, a three-story concrete building, two rectangular buildings and a helipad. The concrete platform is equipped with various communication devices.[483] The location of China's construction is shown in the satellite photograph appearing at **Figure 5.13** (following page 136). China prohibits Philippine vessels from approaching the feature.

5.73 **Subi Reef,** known in the Philippines as Zamora Reef and in China as Zhubi Jiao (渚碧礁), is located at 10°54'N, 114°06'E, 232 M from the nearest point on Palawan and 502 M from the nearest point in China. It is more than 12 M from Thitu, the nearest high-tide feature claimed (but not occupied or controlled) by China. The reef dries at low-tide[484] but is covered by water at high tide.[485]

5.74 Two images of Subi Reef from a multi-band satellite photograph taken in 1994 are reproduced as **Figure 5.14** (in Volume II only). As in the case of all the other features addressed above, the upper (Band 1) image reveals the under-water outlines of the feature, while the lower (Band 4) image makes clear that there were no above-water features at Subi Reef, at least until China began its construction activities there.

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[481] Philippine National Mapping and Resource Information Agency, *Philippine Coast Pilot* (6th ed., 1995), pp. 16-73. MP, Vol. VII, Annex 230.

[482] Chinese Navy NGD, *South China Sea Sailing Directions*, p. 177. MP, Vol. VII, Annex 232; US NGIA, *South China Sea Sailing Directions*, p. 9. MP, Vol. VII, Annex 233; Philippine NAMRIA, *Philippine Coast Pilot*, p. 16-73. MP, Vol. VII, Annex 230.

[483] Armed Forces of the Philippines, *Matrix of Events: Gaven (Burgos)* (2013). MP, Vol. IV, Annex 89.

[484] Philippine NAMRIA, *Philippine Coast Pilot*, p. 16-74. MP, Vol. VII, Annex 230; US NGIA, *South China Sea Sailing Directions*, p. 9. MP, Vol. VII, Annex 233; Japan Coast Guard, *Document No. 204: South China Sea and Malacca Strait Pilot* (Mar. 2011), p. 25. MP, Vol. VII, Annex 234; UKHO, *China Sea Pilot*, p. 66. MP, Vol. VII, Annex 235.

[485] UKHO, *China Sea Pilot*, p. 66. MP, Vol. VII, Annex 235.

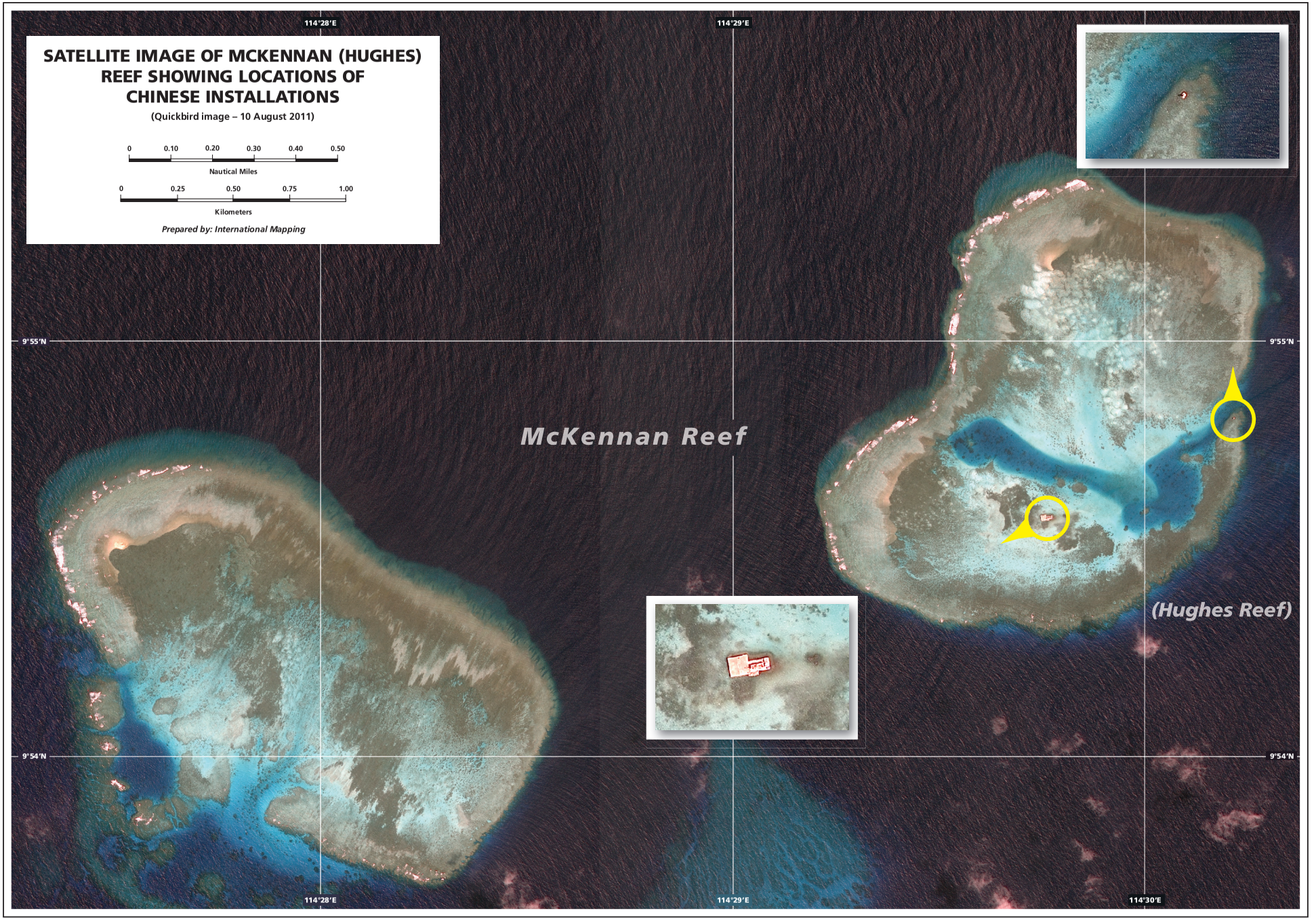
SATELLITE IMAGE OF MCKENNAN (HUGHES) REEF SHOWING LOCATIONS OF CHINESE INSTALLATIONS
(Quickbird image – 10 August 2011)
0 0.10 0.20 0.30 0.40 0.50
Nautical Miles
0 0.25 0.50 0.75 1.00
Kilometers
Prepared by: International Mapping
114°28′E
114°29′E
114°30′E
9°55′N
9°54′N
McKennan Reef
(Hughes Reef)

Figure 5.11

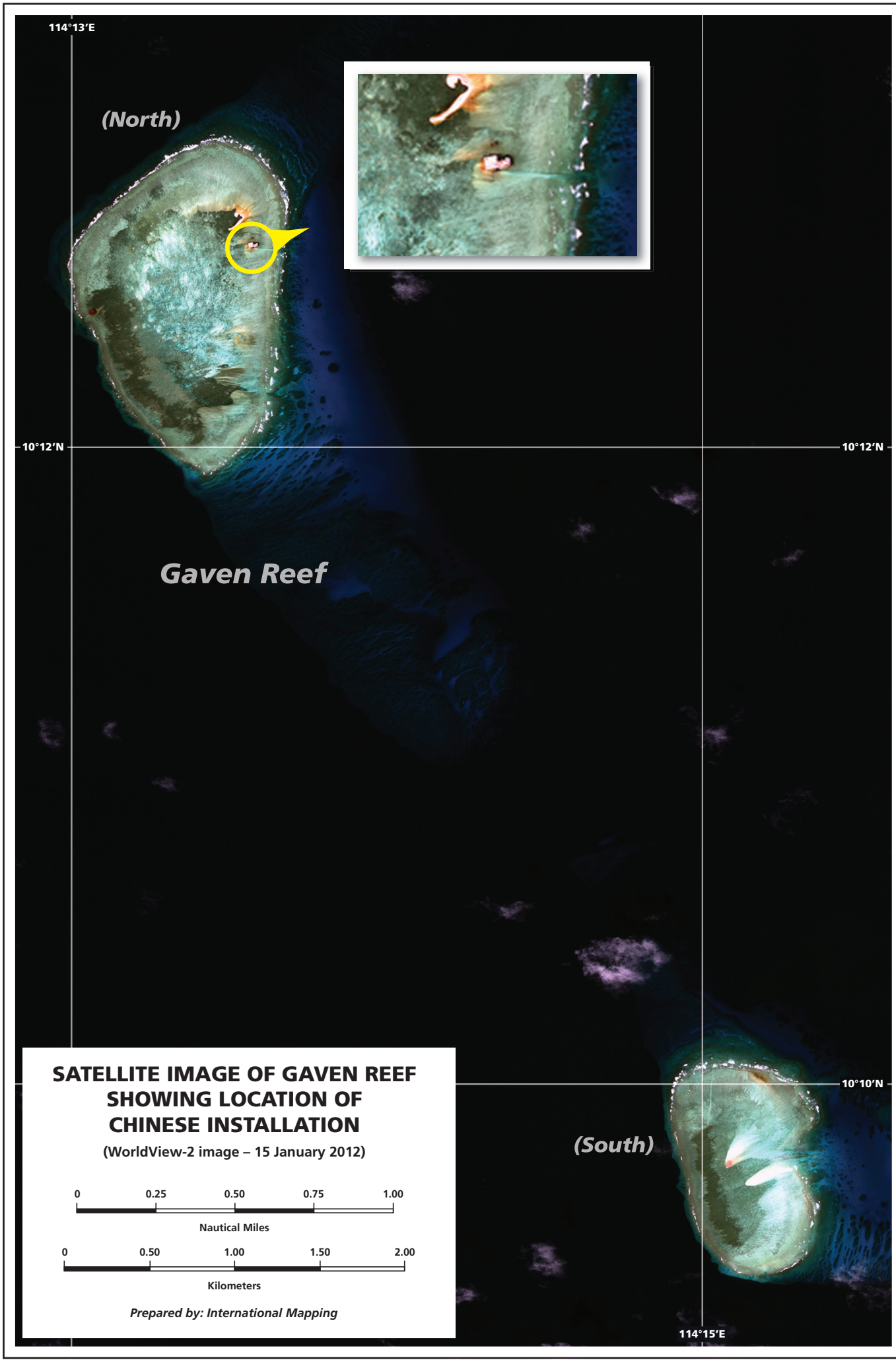
114°13′E
(North)
10°12′N
10°12′N
Gaven Reef
10°10′N
(South)
114°15′E
SATELLITE IMAGE OF GAVEN REEF
SHOWING LOCATION OF
CHINESE INSTALLATION
(WorldView-2 image – 15 January 2012)
0
0.25
0.50
0.75
1.00
Nautical Miles
0
0.50
1.00
1.50
2.00
Kilometers
Prepared by: International Mapping

Figure 5.13

5.75 Starting in 1989, China has built artificial structures on the reef, which presently include two three-story concrete buildings, one two-story concrete building and a helipad.[486] The location of China's construction is shown in the satellite photograph included as **Figure 5.15** (following page 138).

5.76 In sum, all five of these features are low-tide elevations. On four of the five (all except Second Thomas Shoal), China has constructed facilities that stand out above sea level at high tide. But there is no naturally occurring part of any of these features that remains above water at high tide. All but McKennan Reef and Gaven Reef are located more than 12 M from any other feature that is above water at high tide.

2. Applicable Law

5.77 UNCLOS distinguishes between low-tide elevations and islands, and it establishes distinct legal regimes governing these features. The legal regime of low-tide elevations is set out in Article 13, which provides:

> 1. A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on the elevation may be used as a baseline for measuring the breadth of the territorial sea.
>
> 2. Where a low-tide elevation is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island it has no territorial sea of its own.

5.78 This definition complements Article 121(1), which defines "an island" as "a naturally formed area of land, surrounded by water at high tide".[487] An island thus has two elements: *first*, a feature must be a naturally formed area of land surrounded by water and, *second*, it must be above water at high tide.

5.79 The first requirement, common to both Article 13(1) and Article 121(1), is that a feature must be a "naturally formed area of land". This requires that the feature is formed by natural processes without human intervention. It follows that a low-tide elevation artificially

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[486] Armed Forces of the Philippines, *Matrix of Events: Subi (Zamora)* (2013). MP, Vol. IV, Annex 91.

[487] UNCLOS, Art. 121(1).

built up with concrete or other materials such that those structures are above water at high tide does not constitute a naturally formed island.[488] "[T]he facts of geography", the ICJ Chamber observed in the *Gulf of Maine Case*, "are not the product of human action", but "the result of natural phenomena, so that they can only be taken as they are".[489] China itself emphasized the requirement of natural formation in its notes to the CLCS regarding Oki-no-Tori Shima, discussed above.[490]

5.80 The requirement of natural formation is reinforced by Article 60(8):

> Artificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.[491]

5.81 Far from supporting an independent maritime claim, artificial islands, installations and structures are subject to the regime applicable to the area in which they are found. Thus, Article 60(1) provides that the coastal State has the "exclusive right to construct and to authorize and regulate the construction, operation and use of" all artificial islands and virtually all installations and structures in its EEZ. Article 80 applies the same rule to the continental shelf.

5.82 The second requirement for a feature to be an island is that it must be above water at high tide. This excludes low-tide elevations. Thus, if a naturally formed feature is submerged at high tide and reveals itself only at low tide, then it is not an island but a low-tide elevation. As shown above, that is the case in regard to Second Thomas Shoal, Mischief Reef, McKennan Reef, Gaven Reef and Subi Reef. Even China's own nautical charts and sailing directions show these features as low-tide elevations.[492]

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[488] At most, they may become *artificial* islands or installations within the meaning of Article 68 of the Convention, but they can generate no entitlements to a territorial sea, exclusive economic zone or continental shelf.

[489] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, Judgment, I.C.J. Reports 1984, para. 37. MP, Vol. XI, Annex LA-12.

[490] *See supra* paras. 5.30-5.31.

[491] This rule is incorporated by reference in Article 80, essentially repeated in Articles 147(2)(e) and 259, and reflected in Article 11.

[492] Navigation Guarantee Department of the Chinese Navy Headquarters, Chart No. 104 (South China Sea) (2006). MP, Vol. II, Annex NC2; Navigation Guarantee Department of the Chinese Navy Headquarters, Chart No. 10019 (Huangyan Dao (Minzhu Jiao) to Balabac Strait) (2006). MP, Vol. II, Annex NC3; Navigation Guarantee Department of the Chinese Navy Headquarters, *Symbols identifying direction used on Chinese charts*

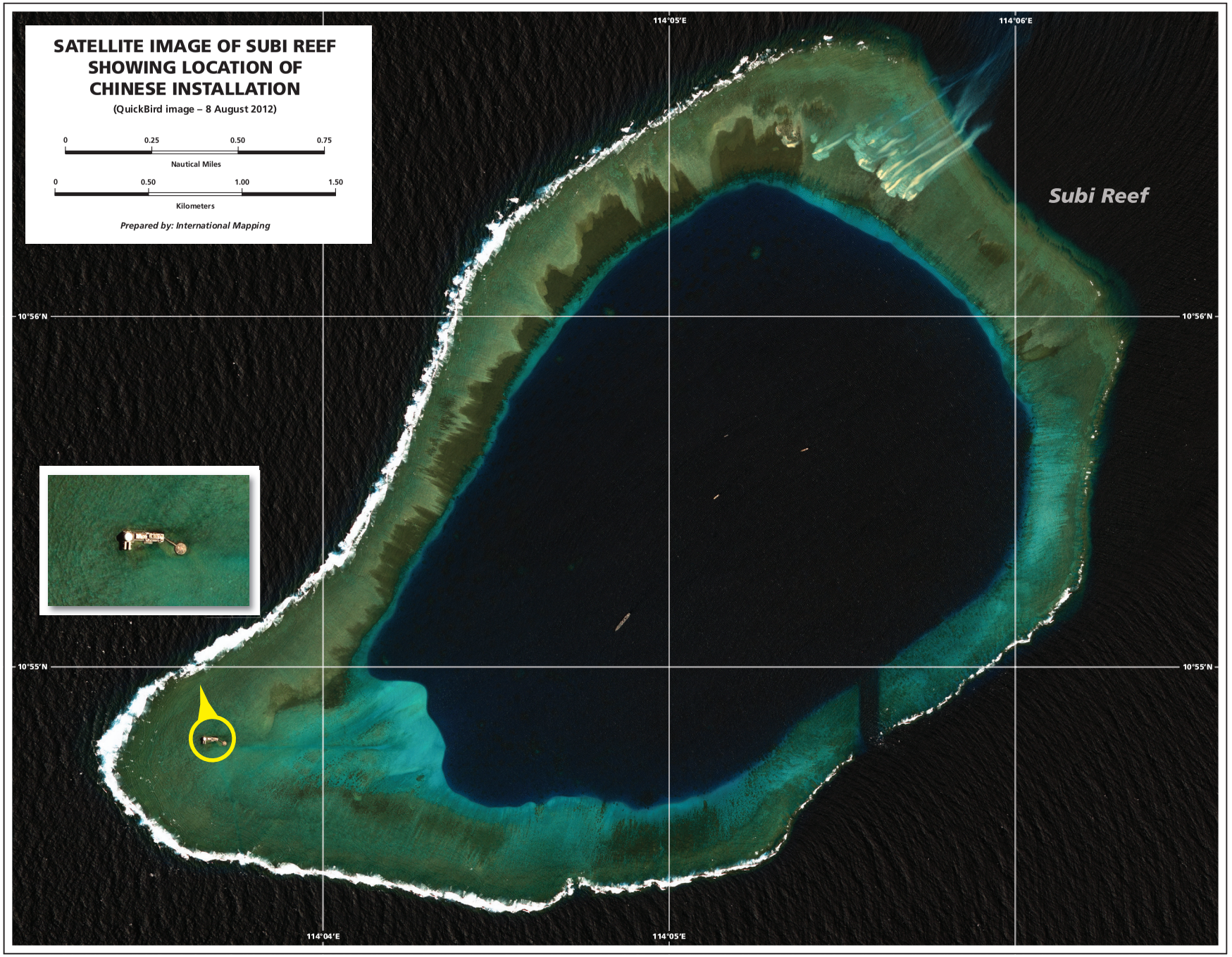
SATELLITE IMAGE OF SUBI REEF
SHOWING LOCATION OF
CHINESE INSTALLATION
(QuickBird image – 8 August 2012)
0
0.25
0.50
0.75
Nautical Miles
0
0.50
1.00
1.50
Kilometers
Prepared by: International Mapping
Subi Reef
114°05'E
114°06'E
10°56'N
10°55'N
114°04'E
114°05'E

Figure 5.15

5.83 The distinction between a low-tide elevation and an island translates into "the difference in effects which the law of the sea attributes to islands and low-tide elevations".[493] This difference, as the ICJ has made clear in *Qatar/Bahrain*, "is considerable" in at least two respects.[494]

5.84 *First*, a low-tide elevation "does not generate the same rights as islands or other territory".[495] Article 13(2) expressly provides that low-tide elevations situated entirely outside the territorial sea of the mainland or an island are entitled to no territorial sea of their own.[496] If a low-tide elevation cannot autonomously generate a territorial sea, *a fortiori* it cannot generate an EEZ or continental shelf.

5.85 At most, low-tide elevations under Article 13(1) can serve as base points for measuring the breadth of the territorial sea when they are within 12 M of the mainland or an island.[497] While a low-tide elevation which is situated within the limits of the territorial sea may be used for the determination of its breadth, this is not the case for a low-tide elevation which is situated less than 12 M from that low-tide elevation, but is beyond the limits of the territorial sea. The law of the sea "does not in these circumstances allow application of the so-called 'leap-frogging' method".[498]

5.86 *Second*, low-tide elevations are not *terra firma* "in the same sense as islands" and thus cannot be "fully assimilated with islands or other land territory" in regard to "the acquisition of sovereignty".[499] This means that low-tide elevations cannot be appropriated, as the ICJ made clear in *Nicaragua v. Colombia*, holding:

> It is well established in international law that islands, however small, are capable of appropriation. [. . .] By contrast, low-tide elevations cannot be

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(2006), p. 3. MP, Vol. VII, Annex 231; *see generally* Chinese Navy NGD, *South China Sea Sailing Directions*. MP, Vol. VII, Annex 232.

[493] *Qatar v. Bahrain*, para. 206. MP, Vol. XI, Annex LA-26.

[494] *Id.*

[495] *Id.*, para. 207.

[496] *Id.*

[497] *Id.*; *Nicaragua v. Colombia*, paras. 182-183. MP, Vol. XI, Annex LA-35; D. W. Bowett, *The Legal Regime of Islands in International Law* (1979), pp. 9-14. MP, Vol. XI, Annex LA-123; R. R. Churchill and A. V. Lowe, *The Law of the Sea* (3rd ed. 1988), pp. 48-49. MP, Vol. XI, Annex LA-130.

[498] *Qatar v. Bahrain*, para. 207. MP, Vol. XI, Annex LA-26.

[499] *Id.*, para. 206.

> appropriated, although 'a coastal State has sovereignty over low-tide elevations which are situated within its territorial sea, since it has sovereignty over the territorial sea itself.'[500]

5.87 It follows that Second Thomas Shoal, Mischief Reef and Subi Reef (i) do not generate entitlements to a territorial sea, an EEZ or a continental shelf; and (ii) are not capable of appropriation, either by occupation or otherwise. Rather, depending on location, they either form part of the continental shelf of the coastal State in whose continental shelf they lie, or part of the seabed beyond national jurisdiction. McKennan Reef and Gaven Reef fall into a different category. Although both are low-tide elevations, each lies within 12 M of a high-tide feature. Thus, they are subject to appropriation by whichever State is ultimately determined to have sovereignty over the high-tide features, and can be used as base points in measuring the breadth of the territorial sea of those features.

B. High-Tide Features Occupied by the PRC

5.88 The three features at issue in this case that are partially above water at high-tide are Johnson Reef, Cuarteron Reef and Fiery Reef.

5.89 **Johnson Reef**, known in the Philippines as Mabini Reef and in China as Chigua Jiao (赤瓜礁), is a reef composed of brown volcanic rock with white coral.[501] It is located at 9˚42'63"N, 114˚16'44"E, approximately 92 M due west of Second Thomas Shoal and approximately 25 M due south of Gaven Reef.[502] Johnson Reef lies 188 M from the nearest point on Palawan, and 567 M from the nearest point on Hainan Island. According to the Navigation Guarantee Department of the Chinese Navy, the reef is submerged at high tide, and therefore is not even a rock but a low-tide elevation.[503] The US NGIA describes it as having a number of protruding rocks: "[t]he largest rock on the reef is about 1.2m high. Several other rocks show above the water on the SE part of the reef; the remainder of the reef is reportedly covered".[504]

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[500] *Nicaragua v. Colombia*, para. 26. MP, Vol. XI, Annex LA-35 (citations omitted); *see also Qatar v. Bahrain*, p. 102, paras. 204, 206. MP, Vol. XI, Annex LA-26.

[501] US NGIA, *South China Sea Sailing Directions*, p. 11. MP, Vol. VII, Annex 233.

[502] UKHO, *China Sea Pilot*, p. 63. MP, Vol. VII, Annex 235.

[503] Chinese Navy NGD, *South China Sea Sailing Directions*, p. 178. MP, Vol. VII, Annex 232.

[504] US NGIA, *South China Sea Sailing Directions*, p. 11. MP, Vol. VII, Annex 233.

5.90 Beginning in 1988,[505] China has constructed and maintained structures on top of the reef, including three buildings and various telecommunications and weather monitoring equipment.[506] The Chinese government personnel deployed to this feature are supplied from outside. There has been no other human habitation or economic life. The satellite photograph appearing as **Figure 5.16** (in Volume II only) depicts the Chinese installation at Johnson Reef.

5.91 **Cuarteron Reef**, known in the Philippines as Calderon Reef and in China as Huayang Jiao (华阳礁), is a reef located in the southwestern part of the Spratly Islands at 8˚52'19"N, 112˚50'61"E.[507] It is 248 M from the nearest point on Palawan, and 585 M from the nearest point on Hainan. The Chinese Navy's Navigation Guarantee Department identifies Cuarteron Reef as being submerged at high tide, but protruding at spring tide and low tide.[508] Other sailing directions note that the northern edge of the reef has at least one rock protruding approximately 1 to 2 meters above sea level at high tide.[509]

5.92 Since 1988, China has built structures on the reef, which now include four concrete buildings and a helipad on a concrete platform.[510] The only human habitation this reef has known consists of Chinese government personnel who have been stationed there. The feature has no economic life of its own. A satellite photograph and depiction of the Chinese installation at Cuarteron Reef are shown in **Figure 5.17** (in Volume II only).

5.93 **Fiery Cross Reef**, known in the Philippines as Kagitingan Reef and in China as Yongshu Jiao (永暑礁), is a reef located approximately 40 M due north of Cuarteron Reef, at 9˚37'40"N, 112˚5860"E.[511] It is 257 M from the nearest point on Palawan, and 547 M from Hainan. Sailing directions produced by the governments of the Philippines, China, the United

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[505] Armed Forces of the Philippines, *Matrix of Events: Johnson (Mabini) Reef* (2013). MP, Vol. IV, Annex 90.

[506] *Id*. *See also* Armed Forces of the Philippines, *Chronological Development of Artificial Structures on Features*, p. 10. MP, Vol. IV, Annex 96.

[507] UKHO, *China Sea Pilot*, p. 65. MP, Vol. VII, Annex 235.

[508] Chinese Navy NGD, *South China Sea Sailing Directions*, p. 178. MP, Vol. VII, Annex 232.

[509] Philippine NAMRIA, *Philippine Coast Pilot*, pp. 16-72. MP, Vol. VII, Annex 230; US NGIA, *South China Sea Sailing Directions*, p. 13. MP, Vol. VII, Annex 233; Japan Coast Guard, *Document No. 204: South China Sea and Malacca Strait Pilot* (Mar. 2011), p. 26. MP, Vol. VII, Annex 234; UKHO, *China Sea Pilot*, p. 65. MP, Vol. VII, Annex 235.

[510] Armed Forces of the Philippines, *Matrix of Events: Cuarteron (Calderon) Reef* (2013). MP, Vol. IV, Annex 87.

[511] UKHO, *China Sea Pilot*, p. 65. MP, Vol. VII, Annex 235.

States and the United Kingdom agree that, with the exception of a small rock on the southwest edge of the reef, the entire reef is covered at high tide.[512] During high tide, no more than 2 square meters are exposed above sea level.[513]

5.94 Beginning in 1988,[514] China has developed an extensive artificial installation on the reef. Currently, it has six single-story buildings, three two-story buildings and one three-story building. China has also constructed two lighthouses, a helipad and a pier.[515] Other than the Chinese government personnel who have been stationed at the reef, there is no human habitation and there is no economic life. **Figure 5.18** (in Volume II only) depicts the Chinese installation at Fiery Cross Reef.

5.95 Like Scarborough Shoal, Johnson, Cuarteron, and Fiery Cross Reefs are small, barren protrusions barely rising above sea level that have no fresh water, no food or the capacity to grow it, no vegetation and no living space to support human habitation. They are also incapable of sustaining an economic life of their own. Like Scarborough Shoal, they are therefore also "rocks" within the meaning of Article 121(3) not entitled to either an EEZ or continental shelf.

C. Other High-Tide Features in the Southern Sector

5.96 Even the largest features in the Southern Sector are very small and incapable of sustaining human habitation or economic life of their own. The Philippines did not identify any of these features in its Amended Statement of Claim because they are not occupied or controlled by the PRC. Yet, the fact that none of the features in the Spratlys – not even the largest among them – is capable of generating entitlement to an EEZ or a continental shelf underscores the Philippines' assertions about the eight features that *are* the subjects of the its claims. **Itu Aba**, known in the Philippines as Ligao and in China as Taiping Dao (太平岛), is the "largest" feature in the Southern Sector. Nevertheless, it is no more than a very small

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[512] US NGIA, *South China Sea Sailing Directions*, p. 13. MP, Vol. VII, Annex 233; UKHO, *China Sea Pilot*, p. 65. MP, Vol. VII, Annex 235; Philippine NAMRIA, *Philippine Coast Pilot*, pp. 16-72. MP, Vol. VII, Annex 230; Chinese Navy NGD, *South China Sea Sailing Directions*, p. 178. MP, Vol. VII, Annex 232.

[513] Chinese Navy NGD, *South China Sea Sailing Directions*, p. 178. MP, Vol. VII, Annex 232.

[514] Armed Forces of the Philippines, *Matrix of Events: Fiery Cross (Kagitingan) Reef* (2013). MP, Vol. IV, Annex 88.

[515] Armed Forces of the Philippines, *Chronological Development of Artificial Structures on Features*, p. 15. MP, Vol. IV, Annex 96.

"atoll consisting of a tropical reef covered with sandy coral and shell"[516] that covers a mere 0.43 km^2.[517] Located at 10º22'30"N, 114º22'E, it is 201 M from the nearest basepoint on Palawan, and 540 NM from the nearest point on Hainan Island. A satellite photograph of Itu Aba taken in 2006 before recent improvements were made is reproduced below as **Figure 5.19** (following page 144).

5.97 Since 1946, Itu Aba has been occupied by the authorities in Taiwan who have deployed military and Coast Guard personnel to the feature.[518] There is no permanent civilian population. The feature reportedly has "two shallow wells" of water[519] but, because these naturally occurring wells contain chloride salts, the "underground water is salty and unusable for drinking".[520] To compensate, Taiwan constructed a water catchment, reservoirs and other facilities in 1992. Those measures proved insufficient, however, and in 1993 Taiwan installed two desalination stations. Although Itu Aba is partially covered by scrub brush and trees,[521] its soil is poor and no meaningful amount of agricultural produce is cultivated on the feature.[522] A military supply ship services the feature twice a year, and a civil merchantman brings general goods every 20 days.[523] Since there are many surrounding reefs and the water is shallow, supply vessels are unable to dock at Itu Aba itself. Provisions are unloaded by raft and taken to shore from an anchorage about 1.2 M away.[524] Taiwan has constructed a 1,150 meter-long runway on the feature, mainly for military and civil defence aircraft.[525]

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[516] T-C Huang, et. al., "The Flora of Taipingtao (Aba Itu Island)", *Taiwania*, Vol. 39, No. 1-2, p. 1 (1994). MP, Vol. VII, Annex 254.

[517] Armed Forces of the Philippines, *Photo Interpretation Report Number 10-43 (Itu Aba Island (ROC))* (31 Aug. 2010), p. 3. MP, Vol. IV, Annex 65.

[518] Shelley Shan, "Itu Aba Reconstruction to Start Next Year: Official", *Taipei Times* (6 Nov. 2013). MP, Vol. X, Annex 328.

[519] UKHO, *China Sea Pilot*, p. 65. MP, Vol. VII, Annex 235.

[520] T-C Huang, et. al., "The Flora of Taipingtao (Aba Itu Island)", *Taiwania*, Vol. 39, No. 1-2 (1994),. MP, Vol. VII, Annex 254.

[521] US NGIA, *South China Sea Sailing Directions*, p. 9. MP, Vol. VII, Annex 233.

[522] *See* Xiao Ao Jiang Hu Hu, "The Pearl of the South China Sea: Taiping Island", *360doc.com* (9 Jan. 2013). MP, Vol. X, Annex 337.

[523] *Id*.

[524] *Id.*

[525] "Itu Aba Island Wharf to Bolster Nation's Defense", *Taipei Times* (31 Aug. 2013). MP, Vol. X, Annex 327.

5.98 **Thitu**, known in the Philippines as Pagasa and in China as Zhongye Dao (中业岛), is equivalent to Itu Abu in size and natural conditions. It too covers 0.4 km^2,[526] is "overgrown with grass and scrub brush"[527] and has a palm grove.[528] At 4 meters above sea level, it is slightly higher than Itu Aba (at 2.6 m). Thitu is located at 11º3'10"N, 114º17'E, 228 M from Palawan and 502 M from Hainan. A satellite photograph of the island is reproduced below as **Figure 5.20** (following page 144).

5.99 Since 1970, Thitu has been occupied by the Philippines, which claims only a 12 M territorial sea from it. The Philippines considers the feature a "rock" governed by Article 121(3). The feature has a "well[] with brackish but drinkable water",[529] which must be filtered for safe consumption. The local population on Thitu, transplanted there and maintained by the Philippine government since 2001, keeps a few animals and grows some vegetables, which is possible only because soil is continually brought from Palawan.[530] The amount of food produced is not enough to sustain even this small community, and supplies are shipped from the mainland by a naval vessel once a month.[531] The Philippines maintains military and civilian administrative personnel on Thitu, also supplied from outside. There is gravel airstrip that was partially built on top of a submerged reef adjacent to the feature.[532]

5.100 **West York**, known in the Philippines as Likas and in China as Xiyue Dao (西月岛), is another small atoll that, at 0.21 km^2, is approximately half the size of Itu Aba and Thitu. It rises 3 meters above sea level (slightly higher than Itu Aba)[533] andis located at 11°04'5"N, 115°1'24"E, 196 M from Palawan and 523 M from Hainan. A satellite photograph of the feature is reproduced below as **Figure 5.21** (following page 144).

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[526] Chinese Navy NGD, *South China Sea Sailing Directions*, p. 176. MP, Vol. VII, Annex 232.

[527] US NGIA, *South China Sea Sailing Directions*, p. 9. MP, Vol. VII, Annex 233.

[528] UKHO, *China Sea Pilot*, p. 66. MP, Vol. VII, Annex 235; Chinese Navy NGD, *South China Sea Sailing Directions*, p. 176. MP, Vol. VII, Annex 232.

[529] Philippine NAMRIA, *Philippine Coast Pilot*, pp. 16-74. MP, Vol. VII, Annex 230. *See also* US NGIA, *South China Sea Sailing Directions*, p. 9. MP, Vol. VII, Annex 233.

[530] Republic of the Philippines, Municipality of Kalayaan, *The Comprehensive Development Plan 2010-2016* (5 Apr. 2013), pp. 6-7. MP, Vol. IV, Annex 92.

[531] *Id.*

[532] Jim Gomez, "On Disputed Spratly Isle, Boredom is Main Concern", *Yahoo! News* (21 Jul. 2011). MP, Vol. X, Annex 316.

[533] Chinese Navy NGD, *South China Sea Sailing Directions*, p. 176. MP, Vol. VII, Annex 232.


SATELLITE IMAGE OF ITU ABA
(Google Earth - 16 February 2006)
0
0.25
0.50
Nautical Miles
0
0.25
0.50
0.75
1.00
Kilometers
Prepared by: International Mapping
114°22′E
10°23′N
10°23′N
10°22′N
10°22′N
114°22′E

Figure 5.19


SATELLITE IMAGE OF THITU
(QuickBird image – 24 August 2008)
0
0.25
0.50
Nautical Miles
0
0.25
0.50
0.75
1.00
Kilometers
Prepared by: International Mapping
114°17'E
11°04'N
11°03'N
11°03'N
114°17'E

Figure 5.20


SATELLITE IMAGE OF WEST YORK
(QuickBird image – 11 April 2011)
0
0.25
0.50
Nautical Miles
0
0.25
0.50
0.75
1.00
Kilometers
Prepared by: International Mapping
11°06'N
11°05'N
115°02'E

Figure 5.21

5.101 West York is occupied by the Philippines. The Philippines considers also considers it to be a "rock" unable to sustain human habitation or economic life. There is no potable water. The high salinity of the ground water retards the growth of introduced plants, making agriculture impossible. There is no civilian population. The Philippines maintains only a small observation post on it manned with a few soldiers supplied from outside.[534]

5.102 Itu Aba, Thitu and West York differ from Scarborough Shoal, Johnson Reef, Cuarteron Reef and Fiery Cross Reef in terms of their area, natural conditions and small population. But these differences are too minor to elevate such small, insignificant and remote features to the status of true islands that, based on their own natural elements and without material support from the mainland, can sustain both human habitation and economic life of their own. None is capable of doing so.

5.103 Article 121(3) makes clear that no EEZ or continental shelf can be claimed around rocks "which cannot sustain human habitation or economic life of their own." Both conditions – the capacity to sustain human habitation and the capacity to sustain an economic life of its own – must be met for an insular feature to be an island capable of generating entitlement to an EEZ and continental shelf. Neither alone is sufficient. Logic requires that the two conditions be understood conjunctively, because they are inextricably intertwined. It is difficult to conceive of an economic life without habitation. Economic life is the expression of human habitation; without human habitation, there cannot be an economic life.[535]

5.104 Itu Aba, Thitu and West York do not have natural conditions sufficient to sustain human habitation and economic life. They were uninhabited when the various coastal States of the South China Sea began seizing them to support claims of sovereignty over their "land territory" and adjacent waters. None of the three features has naturally occurring potable water, except for the small amount of brackish water at Thitu. None has natural conditions

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[534] Armed Forces of the Philippines, *Photo Interpretation Report Number 10-37 (West York Island/Likas (RP))* (30 Aug. 2010). MP, Vol. IV, Annex 64.

[535] *See* J.M. Van Dyke, et. al., "The Exclusive Economic Zones of the Northwestern Hawaiian Islands. When Do Uninhabited Islands Generate an EEZ?", *San Diego Law Review*, Vol. 25 (1988), p. 437. MP, Vol. XI, Annex LA-129; B. Kwiatkowska and A. H.A. Soons, "Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of their Own", *Netherlands Yearbook of International Law*, Vol. 21 (1990), p. 365. MP, Vol. XI, Annex LA-132; Robert Kolb, "The Interpretation of Article 121, Paragraph 3 of the United Nations Convention on the law of the Sea: Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own", *French Yearbook of International Law*, Vol. 40 (1994), pp. 907-908. MP, Vol. XI, Annex LA-136.

suitable for agriculture. None has soil suitable to grow vegetation or raise livestock to support a human community.

5.105 The two largest of the three (Itu Aba and Thitu) are barely 0.4 km^2 in total area; West York is half that size. The small human communities on Itu Aba and Thitu could not exist but for the necessities of life delivered regularly from outside. Itu Aba is linked to Taiwan by an umbilical cord that systematically delivers food and fuel. Without this outside support, Itu Aba would be incapable of supporting that population. The same is true of Thitu, except that the umbilical cord is tied to the Philippines. Without outside support, Thitu is, like Itu Aba, incapable of sustaining the habitation of even the small community that the Philippines maintains there.

5.106 The presence of military and coast guard personnel, whatever the duration of their official rotation, does not amount to sustained "human habitation"; nor does it signify that a feature is capable of supporting human habitation. As discussed above, the introduction on to a small feature of "an official or military presence, serviced from outside, does not establish that the feature is capable of sustaining human habitation or has an economic life of its own".[536] Such personnel are not permanent inhabitants of the island; they have been ordered to the feature by their governments solely to support and defend a sovereignty claim. Neither the military nor the civilian personnel on Itu Aba or Thitu are engaged in activities of production, distribution or exchange in a manner than can sustain the existence and development of stable human habitation.[537]

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[536] David Anderson, "Islands and Rocks in the Modern Law of the Sea" in *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 2 (M. Nordquist, et. al., eds., 2002), p. 313. MP, Vol. XI, Annex LA-149. The text adopted on 28 April 1975 by the informal group on islands stated that in order to be entitled to continental shelf and EEZ, an island should be able to sustain population on a permanent basis. Renate Platzöder, *Third United Nations Conference on the Law of the Sea: Documents*, Vol. IV (1987), p. 222. MP, Vol. XI, Annex LA-117. The group also recalled the position of the Turkish delegation, stating that "military or police installations are not sufficient for generating exclusive economic zones." United Nations, Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea: Régime of Islands: Legislative History of Part VIII (Article 121) of the United Nations Convention on the Law of the Sea, Part 8* (1988), pp. 44-45. MP, Vol. XI, Annex LA-118.

[537] *See* Jose Luis Jesus, "Rocks, New-born Islands, Sea Level Rise, and Maritime Space" in *Negotiating for Peace* (Jochen A. Frowein, et. al., eds., 2003), pp. 587-592. MP, Vol. XI, Annex LA-151; G. Xue, "How Much Can a Rock Get? A Reflection from the Okinotorishima Rocks", in *The Law of the Sea Convention: U.S. Accession and Globalization* (M. Nordquist, et. al., eds., 2012), p. 356. MP, Vol. XI, Annex LA-166; Robert Kolb, "The Interpretation of Article 121, Paragraph 3 of the United Nations Convention on the law of the Sea: Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own", *French Yearbook of International Law*, Vol. 40 (1994), pp. 907-908. MP, Vol. XI, Annex LA-136.

5.107 These features are therefore similar to Serpents' Island in the *Black Sea Case* and to Serrana Cay in *Nicaragua v. Colombia.* In those cases, the ICJ declined to decide whether small and inhospitable insular features were governed by Article 121(3), but limited their effect to a 12 M territorial sea in any event. Bearing in mind that issues of delimitation are not before this Tribunal, it is nevertheless useful to consider the nature and characteristics of these features.

5.108 Serpents' Island was characterized by Romania as an Article 121(3) "rock" because: (i) "it is devoid of natural water sources and virtually devoid of soil, vegetation and fauna"; (ii) "human survival on the island is dependent on supplies, especially of water, from elsewhere"; (iii) "the natural conditions there do not support the development of economic activities"; and (iv) residents on the island were military and border guard personnel installed there to perform governmental activities, including maintaining a lighthouse, and other than performance of these official functions, there were no economic activities.[538] An aerial photograph of Serpents' Island is shown below at **Figure 5.22.**

Figure 5.22

[538] *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Merits, Judgment, I.C.J. Reports 2009, p. 61, para. 180. MP, Vol. XI, Annex LA-33.

5.109 Although the ICJ found it unnecessary to decide whether Article 121(3) applied, it enclaved the feature within a 12 M territorial sea on the side facing Ukraine's boundary with Romania.[539] Itu Aba, Thitu and West York fall into the same category.

5.110 They are also similar to the small insular features addressed in *Nicaragua v. Colombia*: Serrana, Alburquerque, Roncador, and the East-Southeast cays. Serrana is a long atoll some 28 km in length and 22 km wide, featuring several groups of cays, nine of which remain above water at high tide. The largest one, Serrana Cay, is some 1 km in length and has an average width of 400 m. Its total area (0.4 km^2) is thus equivalent to Itu Aba and Thitu. It is covered by grass and stunted brushwood, 10 m in height. There is a 6 m wide well for the water supply of visiting fishermen and the Colombian marines who use Serrana Cay as a base to control drug trafficking and illegal fishing. There is also a heliport as well as a lighthouse operated by the Colombian Navy. An aerial photograph of Serrana Cay is shown at **Figure 5.23** below.

Figure 5.23

[539] *Id.*, para. 188. *See* Jon M. Van Dyke, "Romania v. Ukraine Decision and Its Effect on East Asian Maritime Delimitations", *Ocean and Coastal Law Journal*, Vol. 15, No. 2 (2010). MP, Vol. XI, Annex LA-159.

5.111 Another of the cays on Serrana, East Cay, is 3 metres above sea level, about 80 metres long and 40 metres wide, and has the same general characteristics as Serrana Cay. It is also used as shelter and base of activities by Colombian fishermen.[540]

5.112 The ICJ gave the cays at Serrana the same treatment it gave to Quitasueño; that is, no more than a 12 M territorial sea. The Court found it unnecessary to decide whether to apply Article 121(3) but held that Serrana's "small size, remoteness and other characteristics mean that, in any event, the achievement of an equitable result requires that the boundary line follow the outer limit of the territorial sea around the island". The Court thus drew the boundary along a 12 M envelope of arcs measured from Serrana Cay and the other cays in its vicinity.[541] The same solution was applied to Alburquerque,[542] Roncador,[543] and the East-Southeast cays,[544] which are similar to the largest features of the Spratly Islands in terms of size, natural conditions, and incapacity to support sustainable human habitation and economic activity.

5.113 To be sure, the present case is not about delimitation of maritime boundaries, like the *Black Sea* case and *Nicaragua v. Colombia.* In this case, the Philippines asks the Tribunal only to determine the nature and entitlements of insular features under UNCLOS. But the circumstances that the Court took into account in determining that Serpents' Island and Serrana Cay (among other features) should be enclaved or partially enclaved within 12 M zones – that is, that none of these features should have an EEZ or a continental shelf – are

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[540] *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Merits, Counter Memorial of the Republic of Colombia (11 Nov. 2008), paras. 2.22-2.24. MP, Vol. XI, Annex LA-32.

[541] *Nicaragua v. Colombia*, para. 238. MP, Vol. XI, Annex LA-35.

[542] Alburquerque is an atoll with a diameter of about 8 km, including the reef terrace. Two of the cays on Alburquerque, North Cay and South Cay, are about two meters above sea level, and have exuberant vegetation mainly made up of coconut trees, some rubber trees and low bushes. There is a Colombian Marine Infantry detachment stationed there. Small weather and radio stations are also located there, as well as a lighthouse on North Cay operated by the Colombian Navy. *Nicaragua v. Colombia*, Counter-Memorial of Colombia, paras. 2.15-2.17. MP, Vol. XI, Annex LA-32.

[543] Roncador Cay is some 550 metres long and 300 metres wide. It has elevations that are approximately five metres above sea level. On the cay, there is a detachment of the Colombian Marine Infantry, as well as a communication system and a heliport. The vegetation is composed of bushes, thickets and palm trees. There is a lighthouse operated by the Colombian Navy. *Id.*, para. 2.21.

[544] The East-Southeast Cays are located on an atoll extending over some 13 km. On the East Cays, there are coconut trees and low bushes. Fishermen use it as a shelter, and it is visited by tourists. On one of the West Cays, there is a detachment of the Colombian Marine Infantry in charge of controlling fishing in the area and aiding in the control of illicit drug-trafficking. There are shelters for fishermen, a heliport, small weather and radio stations and a lighthouse operated by the Colombian Navy. There is also a well that provides water for the marines. *Id.*, para. 2.18-2.20.

those that also determine whether an insular feature is a "rock" under Article 121(3) or a more significant island entitled to the same treatment as a continental mainland under Article 121(2). The ICJ did not have to declare these features "rocks" because it was able to achieve the same result by means of the delimitations it effected. That is not an option available to this Tribunal, which cannot delimit maritime boundaries.

5.114 In the view of the Philippines, the application of Article 121 to the features in the Southern Sector results in none of them generating an entitlement to an EEZ or a continental shelf. This is the position that the Philippines has consistently maintained, including in respect of all the features it alone has occupied or controlled. It is also the position of Vietnam and Malaysia.[545] Only China claims that the Spratly Islands generate entitlement to a 200 M EEZ and continental shelf.[546] The Philippines respectfully submits that China is wrong, and that the eight Spratly features that China occupies or controls are either "rocks" or low-tide elevations. Even the two largest features in the Spratlys – Itu Aba and Thitu – are "rocks". There is no feature in the Southern Sector capable of sustaining human habitation or economic life of its own. Therefore, none of them generates entitlement to an EEZ or a continental shelf under UNCLOS.

III. VIETNAM IS NOT INDISPENSABLE TO THESE PROCEEDINGS

5.115 This Section considers whether a determination by the Tribunal of the nature and entitlements of the eight Spratly features which China occupies or controls might impermissibly affect the legal rights of Vietnam (which claims some of the same features). It demonstrates that Vietnam's legal rights will *not* be affected by any such determination, and that, consequently, there is no reason for the Tribunal to decline jurisdiction over this part of the case.

5.116 It is important to recall what this case is *not* about, and what rights are therefore *not* in issue. *First*, it is not about sovereignty over islands or rocks or any other area. The

[545] *See infra* para. 5.135.

[546] This was explicitly stated as recently as 7 March 2014, when a representative from the Department of Boundary and Ocean Affairs of the Chinese Foreign Ministry told Philippine diplomats in Beijing that China "claim[s] territorial sea, EEZ, and continental shelf from the Nansha Islands." *Memorandum* from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-070-2014-S (7 Mar. 2014), para. 4. MP, Vol. IV, Annex 98. *See also Memorandum* from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-071-2014-S (10 Mar. 2014). MP, Vol. IV, Annex 100.

Philippines is not inviting the Tribunal directly or indirectly to adjudicate on the competing claims to sovereignty over any of the Spratly Islands or other features in the South China Sea. To that extent, any claim to territorial sovereignty maintained by Vietnam will remain unaffected by the Tribunal's Award.

5.117 *Second*, the case is not about delimitation of maritime boundaries. The overlapping claims of all three States to an EEZ and continental shelf, in places where their respective entitlements do, in fact, overlap are not in issue, and the Tribunal is not asked to delimit a maritime boundary between the Parties, or between either of the Parties and Vietnam. To be sure, the Philippines is asking the Tribunal to interpret and apply Articles 13 and 121 of the Convention in regard to eight insular features in the Spratlys, including some that are claimed by Vietnam, but it is not necessary for that purpose to delimit a maritime boundary.

5.118 The essential question is, therefore, whether the interpretation and application of Articles 13 and 121 in the context of this case will require the Tribunal to adjudicate on the rights of an absent third State without its consent. The Philippines believes that the Tribunal is not called upon to adjudicate on the rights of Vietnam or any other absent State. In short, Vietnam is not a necessary third party, and its rights will not be affected, whatever Award the Tribunal may ultimately render.

A. Vietnam Is Not a Necessary Third Party

5.119 The necessary third party doctrine precludes a court or tribunal from exercising its jurisdiction to resolve a dispute between the parties if doing so would require it to pass judgment upon the rights of a third State not party to the dispute.[547] Professor Rosenne summarises the rationale for the principle in the following terms: "the consensual basis of the Court's jurisdiction may deprive it of jurisdiction if it concludes that the real subject matter of the dispute is the legal position of a third state which is not a party to the proceedings".[548]

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[547] S. Rosenne and Y. Ronen, *The Law and Practice of the International Court, 1920-2005*, Vol. II (4th ed. 2006), p. 539. MP, Vol. XI, Annex LA-155; Paolo Palchetti, "Opening the International Court of Justice to Third States: Intervention and Beyond", *Max Planck Yearbook of United Nations Law*, Vol. 6 (2002), pp. 139-181, 145. MP, Vol. XI, Annex LA-150; Alexander Orakhelashvili, "The Competence of the International Court of Justice and the Doctrine of the Indispensable Party: from Monetary Gold to East Timor and Beyond", *Journal of International Dispute Settlement*, Vol. 2, No. 2 (2011), *pp. 373-374*. MP, Vol. XI, Annex LA-162*;* Institute of International Law, *Judicial and Arbitral Settlement of International Disputes Involving More Than Two States* (1999). MP, Vol. XI, Annex LA-141.

[548] S. Rosenne and Y. Ronen, *The Law and Practice of the International Court, 1920-2005*, Vol. II (4th ed. 2006), p. 539. MP, Vol. XI, Annex LA-155.

Professor Crawford explains that the rationale is "'elementary due process' in preventing the Court from passing judgment on the legal position of non-parties in their absence and without their consent".[549]

5.120 Commentators and judges have also pointed out, however, that the consent of parties to a legitimately constituted case should not lightly be overridden by the interests of absent parties.[550] To do so in effect gives the absent State a veto over the proceedings. Professor Rosenne thus notes that the ICJ "has been very careful to keep this discretion within clearly identifiable limits".[551] After reviewing the cases and the literature, Professor Chinkin concludes: "While the Court will attempt to narrow the issues in a multilateral dispute to the rights and obligations of the parties before it, it recognizes that it should seek 'to give the fullest decision in the circumstances of each case',[552] compatible with the principles of consent and third party rights".[553]

5.121 The necessary third party principle is rooted in the *Monetary Gold Removed from Rome in 1943* case.[554] In that case, the ICJ decided that it could not exercise jurisdiction over Italy's claim for gold that belonged to Albania because doing so would require it to "adjudicate upon the international responsibility of Albania without her consent",[555] which 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".[556] The Court held that it could not exercise jurisdiction in the case because

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[549] James Crawford, *State Responsibility: The General Part* (2013), p. 657. MP, Vol. XI, Annex LA-170.

[550] *Id.*; Christine Chinkin, *Third Parties in International Law* (1993), p. 202. MP, Vol. XI, Annex LA-133; *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Dissenting Opinion of Judge Schwebel, I.C.J. Reports 1992, p. 335. MP, Vol. XI, Annex LA-18.

[551] S. Rosenne and Y. Ronen, *The Law and Practice of the International Court, 1920-2005*, Vol. II (4th ed. 2006), p. 544. MP, Vol. XI, Annex LA-155.

[552] *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, Application by Italy for Permission to Intervene, Judgment, I.C.J. Reports 1984, p. 25, para. 40. MP, Vol. XI, Annex LA-11.

[553] Christine Chinkin, *Third Parties in International Law* (1993), p. 207. MP, Vol. XI, Annex LA-133.

[554] *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland, and United States of America)*, Preliminary Question, Judgment, I.C.J. Reports 1954, p. 32. MP, Vol. XI, Annex LA-3.

[555] *Id.*

[556] *Id.*

"Albania's legal interests would not only be affected by a decision, but *would form the very subject-matter of the decision*".[557]

5.122 The necessary third party doctrine, or "the *Monetary Gold* principle," has been invoked before the ICJ on various occasions since 1954. But the jurisprudence shows it to be (a) an exceptional rule often distinguished but rarely applied in practice, and (b) a narrow principle confined to a very limited category of cases.

1. An Exceptional Rule

5.123 The *Monetary Gold* case stands out as one of "exceptional singularity".[558] Professor Crawford suggests that the case was wrongly decided, because Italy, which brought the case, had no property in the gold, nor any other right to retain it, and should not have been allowed "at the same time [to] affirm and deny jurisdiction over its own claim".[559] The case has subsequently been followed only once by the ICJ.

5.124 In the *East Timor* case, Portugal complained that Australia had breached East Timor's right to self-determination by concluding a treaty with Indonesia for the exploitation of the continental shelf between East Timor and Australia.[560] In response, Australia argued that the case was not admissible because a decision on the merits would require the Court to determine the legality of the Indonesian occupation of East Timor, in Indonesia's absence. The Court agreed. It held that a decision on Portugal's contention that Australia violated its obligations with respect to East Timor in concluding the treaty would require the Court to rule upon the lawfulness of Indonesia's occupation of East Timor.[561] The Court emphasized that a decision on the merits would "run directly counter to the 'well-established principle of international law' … that the Court can only exercise jurisdiction over a State with its

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[557] *Id.* (emphasis added).

[558] *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*, Fixing of Time Limits, Order, Separate Opinion of Judge Schwebel, I.C.J. Reports 1989, p. 140. MP, Vol. XI, Annex LA-17.

[559] James Crawford, *State Responsibility: The General Part* (2013), p. 656. MP, Vol. XI, Annex LA-170.

[560] *See generally Portugal v. Australia*. MP, Vol. XI, Annex LA-22.

[561] *Id.*, pp. 104-105, paras. 32-35.

consent" because Indonesia's rights and obligations would constitute the "*very subject-matter*" of its judgment.[562]

5.125 The *Monetary Gold* principle has also been followed once in arbitral proceedings. An arbitral tribunal applied it *propio motu* in *Larsen v. the Hawaiian Kingdom*.[563] In that case, a resident of Hawaii sought redress from "the Hawaiian Kingdom" for its failure to protect him from the United States and the State of Hawaii. The parties, who had agreed to submit their dispute to arbitration by the PCA, hoped that the tribunal would address the question of the international legal status of Hawaii.[564] Both parties initially argued that the *Monetary Gold* principle should be confined to ICJ proceedings. The tribunal rejected that argument, stating that international arbitral tribunals "operate[ ]within the general confines of public international law and, like the International Court, cannot exercise jurisdiction over a State which is not a party to its proceedings".[565]

5.126 The tribunal ultimately decided that it was precluded from addressing the merits because the United States, which was absent, was an indispensable party. Relying on *Monetary Gold*, the tribunal explained that the legal interests of the United States would form "*the very subject-matter*" of a decision on the merits because it could not rule on the lawfulness of the conduct of the respondent, the Kingdom of Hawaii, without necessarily evaluating the lawfulness of the conduct of the United States.[566] It emphasized that "[t]he principle of consent in international law would be violated if this Tribunal were to make a decision at the core of which was *a determination of the legality or illegality of the conduct of a non-party*".[567]

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[562] *Id.*, p. 105, para. 34 (emphasis added).

[563] *Larsen v. Hawaiian Kingdom*, Arbitral Award, Permanent Court of Arbitration (5 Feb. 2001), para. 11.16. MP, Vol. XI, Annex LA-52.

[564] D. Bederman and K. Hilbert, "Lance Paul Larsen v. the Hawaiian Kingdom", *Hawaiian Journal of Law and Politics*, Vol. 1 (2004), p. 82. MP, Vol. XI, Annex LA-153.

[565] *Larsen v. Hawaiian Kingdom*, para. 11.17. MP, Vol. XI, Annex LA-52.

[566] *Id.*, paras. 11.20, 11.21, 11.23.

[567] *Id.*, para 11.20 (emphasis added).

2. A Narrow Principle

5.127 Since the *East Timor* case, the Court has consistently reiterated that it is not prevented from adjudicating when a judgment on the merits affects the legal interests of a non-party.[568] In *Nicaragua v. United States*, the ICJ indicated that the circumstances of the *Monetary Gold* case "probably represent the limit of the power of the Court to refuse to exercise its jurisdiction."[569] In every other case since *East Timor*, the ICJ has found that the third State's legal interests do not form the "very subject-matter" of a decision on the merits and has declined to apply the *Monetary Gold* principle. As the examples that follow show, the Court has found that the protection of a third State's legal interests, accorded by Article 62 (on third State intervention) and Article 59 (limiting the binding force of a decision to the parties of that case) of the ICJ Statute, is generally sufficient where the legal interests are merely "affected" by a decision on the merits, but do not form its "very subject-matter".[570]

5.128 In *Nicaragua v. United States* itself, for example, the United States was particularly concerned about the absence of Honduras, since Honduras had allegedly allowed its territory to be used for the use of force against Nicaragua that was at issue in the case, as well as the absence of other States whose rights to take measures to protect themselves would allegedly be affected by the Court's decision.[571] The Court found no reason to conclude that the legal interests of the absent third States would form the "very-subject-matter" of a decision on the merits.[572] It also noted that its decision on the merits would, in accordance with Article 59 of the Statute, have binding force for the parties only and that any allegedly affected absent

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[568] *Frontier Dispute (Burkina Faso v. Republic of Mali)*, Merits, Judgment, I.C.J. Reports 1986, p. 579. MP, Vol. XI, Annex LA-16; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 311-312. MP, Vol. XI, Annex LA-25; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, pp. 237-238. MP, Vol. XI, Annex LA-29.

[569] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 431, para. 88. MP, Vol. XI, Annex LA-13.

[570] Comparable to the ICJ Statute's Article 59, Article 296(2) of UNCLOS provides: "Any such decision shall have no binding force except between the parties and in respect of that particular dispute." *See Statute of the International Court of Justice* (26 June 1945). MP, Vol. XI, Annex LA-173.

[571] *Nicaragua v. United States*, Jurisdiction, p. 430, para. 86. MP, Vol. XI, Annex LA-13.

[572] *Id.*, p. 431, para. 88.

State was "free to institute separate proceedings, or to employ the procedure of intervention".[573]

5.129 In the *Frontier Dispute* case, Mali argued that an ICJ Chamber could not determine the boundary between Mali and Burkina Faso as far as the end point specified in the Special Agreement between the two States because such a determination would impinge upon the rights of an absent third State, Niger.[574] The Chamber disagreed. Since Niger's legal interests did not form the "very subject-matter" of a decision delimiting the boundary between the two parties, there was no reason for the Chamber to limit the scope of its jurisdiction.[575] In such a situation, Niger's rights were sufficiently "safeguarded by the operation of Article 59 of the Statute".[576]

5.130 The ICJ came to the same conclusion when Nigeria objected to the *Military and Land and Maritime Boundary between Cameroon and Nigeria* proceeding on the basis that Chad, a third State that shared a tripoint with the two parties, was absent.[577]

5.131 Notably, no international court or tribunal has ever applied the *Monetary Gold* principle in maritime boundary cases where the claims of third States are potentially affected.[578]

5.132 In *Certain Phosphate Lands in Nauru*, Australia argued that the ICJ could not exercise jurisdiction over claims regarding the administration of Nauru during the period when Nauru had been a United Nations trust territory because any decision would necessarily affect the rights of New Zealand and the United Kingdom, who had jointly administered the Nauru trusteeship with Australia but were not parties to the proceedings.[579] The Court

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[573] *Id.*

[574] *Burkina Faso v. Mali*. MP, Vol. XI, Annex LA-16.

[575] *Id.*, p. 579, para. 49.

[576] *Id.*, p. 577, para. 46.

[577] *Cameroon v. Nigeria: Equatorial Guinea intervening*, Preliminary Objections, p. 311, para. 79. MP, Vol. XI, Annex LA-25.

[578] *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012*, ITLOS Reports 2012, p. 105, para. 352. MP, Vol. XI, Annex LA-43; *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya),* Judgment, I.C.J. Reports 1982, pp. 93-94, para. 133. MP, Vol. XI, Annex LA-10. It is true however that in both cases the court refrained from indicating a boundary in areas claimed by a third state.

[579] *Nauru v. Australia,* Dissenting Opinion of Judge Schwebel. MP, Vol. XI, Annex LA-18.

disagreed. It held that the rights of the United Kingdom and New Zealand would not form the "very subject-matter" of any judgment the Court might give, even though Australia's responsibility "might well have implications for the legal situation" of the two absent States.[580] The Court also pointed out the protection available to the United Kingdom and New Zealand through Articles 59 and 62 of the ICJ Statute.[581]

5.133 The circumstances of the present case are quite different from any of those in which the *Monetary Gold* principle was applied. Notably, the three cases that were dismissed (*Monetary Gold*, *East Timor* and *Larsen v. Hawaiian Kingdom*) all concerned the responsibility of an absent State for breach of an international obligation. In the *East Timor* case, the Court's judgment sets out the problem very clearly:

> The Court has carefully considered the argument advanced by Portugal which seeks to separate Australia's behaviour from that of Indonesia. However, in the view of the Court, Australia's behaviour cannot be assessed without first entering into the question why it is that Indonesia could not lawfully have concluded the 1989 Treaty, while Portugal allegedly could have done so; the very subject-matter of the Court's decision would necessarily be a determination whether, having regard to the circumstances in which Indonesia entered and remained in East Timor, it could or could not have acquired the power to enter into treaties on behalf of East Timor relating to the resources of its continental shelf. The Court could not make such a determination in the absence of the consent of Indonesia.[582]

In short, the Court could not rule on the claims made by Portugal against Australia without necessarily also ruling on the legality of Indonesia's conduct in concluding the treaty with Australia. Similarly, the *Larsen v. Hawaiian Kingdom* tribunal found: "The principle of consent in international law would be violated if this Tribunal were to make a decision at the core of which was a determination of the legality or illegality of the conduct of a non-party".[583]

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[580] *Id.*, p. 331. Notably, four judges (President Sir Robert Jennings, and Judges Oda, Ago and Schwebel) dissented on this part of the judgment, believing that any decision on Australia's liability would require the adjudication of the obligations and responsibility of the U.K. and New Zealand.

[581] *Id.*, pp. 330-331.

[582] *East Timor (Portugal v. Australia)*, Merits, Judgment, I.C.J. Reports 1995, para. 28. MP, Vol. XI, Annex LA-22.

[583] *Larsen v. Hawaiian Kingdom*, p. 34, para. 11.20. MP, Vol. XI, Annex LA-52.

5.134 Unlike the latter cases, the present case does not require the Tribunal to pass judgment on the lawfulness of any actions or conduct of Vietnam. Rather, it would simply require the Tribunal to interpret and apply various provisions of a multilateral treaty to which Vietnam, the Philippines and China are all parties. Ordinarily, States parties to a treaty have a right to intervene in judicial proceedings when the interpretation or application of the treaty is in question.[584] But in no case has the ICJ ever declined jurisdiction to interpret or apply a treaty on the ground that the consent of other non-intervening parties was essential. Any interpretation adopted by a court or arbitral tribunal would not be binding on States that choose not to intervene. Those other States would remain free to adhere to different interpretations if they so wish. Vietnam would not be bound by any interpretation or application of UNCLOS made by the Tribunal; nor would the Award constitute *res judicata* in a dispute between different parties.[585] Whatever the decision of the Tribunal with respect to the entitlement generated by the eight Spratly insular features at issue in this case, Vietnam remains free to seek a different interpretation should it disagree with the Tribunal's interpretation.

5.135 In fact, however, Vietnam has made clear that it agrees with the Philippines' position in this arbitration; namely, that none of the contested features in the South China Sea is capable of generating entitlement to an EEZ or continental shelf. This is reflected in Vietnam's joint submission with Malaysia to the CLCS of 6 May 2009 and Vietnam's individual submission to the CLCS of 7 May 2009.[586] In accordance with Article 76, paragraph 8, of UNCLOS, Vietnam and Malaysia made their submissions to the CLCS with the purpose of providing "information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured" in respect of certain parts of the South China Sea.[587] In those submissions, Vietnam and

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[584] Statute of the ICJ, Art. 63; 1982 UNCLOS, Annex VI, Art. 32.

[585] Article 296(2) of UNCLOS: "Any such decision shall have no binding force except between the parties and in respect of that particular dispute". *See also Burkina Faso v. Mali*, p. 579, para. 49. MP, Vol. XI, Annex LA-16 (noting that the "whole point" of Article 59 of the ICJ Statute (equivalent to Article 292 (2) of UNCLOS) is to ensure that a decision between two parties cannot be enforced on a third State.).

[586] Malaysia and the Socialist Republic of Vietnam, *Joint Submission to the Commission on the Limits of the Continental Shelf, in Respect of the Southern Part of the South China Sea* (6 May 2009). MP, Vol. VII, Annex 223; Socialist Republic of Vietnam, *Submission to the Commission on the Limits of the Continental Shelf, Partial Submission in Respect of Vietnam's Extended Continental Shelf: North Area (VNM-N)* (Apr. 2009). MP, Vol. VII, Annex 222.

[587] United Nations Commission on the Limits of the Continental Shelf, *Receipt of the Joint Submission made by Malaysia and the Socialist Republic of Viet Nam to the Commission on the Limits of the Continental Shelf*, U.N.

Malaysia measured their continental shelves from their mainland coastal baselines. By not measuring their continental shelves or EEZ's from any of the features they claim in the South China Sea, both States made clear that they do not believe these features are entitled to an EEZ or continental shelf.[588] Unlike China, neither Vietnam nor Malaysia has ever claimed more than a 12 M territorial sea for any of the insular features it claims in the South China Sea.

5.136 Vietnam might or might not choose to communicate with the Arbitral Tribunal directly in regard to its views on the maritime entitlements of the insular features at issue in this case. Whether it does so or not, the fundamental point is clear: its legal interests do not form "the very subject matter" of these proceedings. That, in itself, renders the *Monetary Gold* principle inapplicable and permits the Tribunal to exercise its jurisdiction with respect to the nature and maritime entitlements of the eight Spratly features at issue in this case.

5.137 For the foregoing reasons, the Philippines submits that:

1. Scarborough Shoal is a "rock" that generates neither an EEZ nor a continental shelf;

2. Second Thomas Shoal, Mischief Reef, and Subi Reef are low-tide elevations that do not generate a territorial sea, EEZ or continental shelf, and that are not capable of appropriation by occupation or otherwise;

3. McKennan Reef (including Hughes Reef) and Gaven Reef are low-tide elevations that do not generate an EEZ or a continental shelf but can serve as basepoints for the measurement of the territorial sea of a nearby high-tide feature;

4. Johnson Reef, Cuarteron Reef and Fiery Cross Reef are "rocks" that do not generate entitlement to an EEZ or a continental shelf; and

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Doc. CLCS.33.2009.LOS (7 May 2009). MP, Vol. VII, Annex 224; United Nations Commission on the Limits of the Continental Shelf, *Receipt of the Submission made by Socialist Republic of Viet Nam to the Commission on the Limits of the Continental Shelf*, U.N Doc. CLCS.37.2009.LOS (11 May 2009). MP, Vol. VII, Annex 225.

[588] The Philippines notes that it would not oppose a decision by the Tribunal to request Vietnam's opinion as to whether the disputed features in the South China Sea are capable of generating entitlement to an EEZ or a continental shelf.

5. The absence of Vietnam from these proceedings does not prevent the Arbitral Tribunal from determining the nature or entitlements of the particular maritime features in the Spratly Islands as to which the Philippines seeks such determinations.

CHAPTER 6

CHINA'S VIOLATIONS OF THE PHILIPPINES' RIGHTS UNDER UNCLOS

6.1 This Chapter addresses China's actions in the South China Sea that have violated its own obligations and the rights of the Philippines under UNCLOS. The Chapter is divided into five sections. Section I addresses China's interference with the Philippines' exercise of its sovereign rights with respect to the living and nonliving resources of its EEZ and continental shelf. Specifically, the Section details how China has interfered with the Philippines' exercise of its fishing rights in its EEZ, and the traditional livelihood of Filipino fishermen at Scarborough Shoal.

6.2 Section II addresses China's responsibility for environmental harm to the unique and vulnerable ecosystems at Scarborough Shoal and Second Thomas Shoal, in violation of its obligations under UNCLOS and the rights of the Philippines in this regard.

6.3 Section III describes how China's construction activities at Mischief Reef, which lies within the EEZ and continental shelf of the Philippines, violate the provisions of UNCLOS regarding the construction, operation and use of artificial islands, installations and structures, and the exclusive rights of the Philippines.

6.4 Section IV addresses China's violations of UNCLOS and the Convention on the International Regulations for Preventing Collisions at Sea, by the menacing conduct of its vessels toward Philippine vessels navigating in waters adjacent to Scarborough Shoal.

6.5 Finally, Section V describes China's unlawful conduct at Second Thomas Shoal since the commencement of these proceedings, including China's threat to forcibly remove the Philippine presence at the feature, and the interdiction of Philippine vessels attempting to bring desperately needed food, fresh water and medical supplies to its nationals who are stationed there.

I. CHINA'S INTERFERENCES WITH THE SOVEREIGN RIGHTS AND JURISDICTION OF THE PHILIPPINES, AND THE TRADITIONAL LIVELIHOOD OF FILIPINO FISHERMEN

A. China's Interferences with the Philippines' Sovereign Rights To Exploit the Living and Non-living Resources of Its EEZ and Continental Shelf

6.6 Under Articles 57 and 76 of UNCLOS, respectively, the Philippines is entitled to a 200 M EEZ measured from its archipelagic baselines and a continental shelf extending to at least that distance, except only to the extent that nearby features generate maritime entitlements that overlap with those of the Philippines. As demonstrated in Chapter 5, none of the maritime features relevant to this case, whether in the Northern or Southern Sector, generates entitlement to an EEZ or continental shelf. Accordingly, the waters, seabed and subsoil of the South China Sea within 200 M of the Philippine coast, but beyond 12 M from any high-tide feature within the South China Sea, constitute the EEZ and continental shelf of the Philippines. In those areas, it enjoys the sovereign rights and jurisdiction that UNCLOS affords.

6.7 The nature and scope of a coastal State's rights and jurisdiction in the continental shelf are set out in Article 77 of the Convention. Article 77(1) provides: "The coastal State exercises over the continental shelf sovereign rights for the purposes of exploring it and exploiting its natural resources". Such rights include "all rights necessary for and connected with the exploitation of the continental shelf . . . [including] jurisdiction in connection with the prevention and punishment of violations of the law".[589]

6.8 The coastal State's sovereign rights and jurisdiction in the continental shelf cover all the natural resources specified in Article 77(4):

> The natural resources referred to in [Part VI] consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the sea bed or are unable to move except in constant physical contact with the sea bed or the subsoil.

[589] International Law Commission, *Report of the International Law Commission Covering the Work of its Eighth Session*, U.N. Doc. A/3159 (4 July 1956), Art. 68 Commentary, para. 2. MP, Vol. XI, Annex LA-62.

6.9 Article 77(2) makes clear that sovereign rights to explore and exploit those resources are "exclusive in the sense that no State can undertake such activities without the coastal State's consent". Accordingly, it is for the coastal State to define the conditions under which exploration and exploitation of the shelf may be conducted.

6.10 Pursuant to Article 77(3), the coastal State's rights and jurisdiction in the continental shelf do not depend on occupation or proclamation but attach automatically to the coastal State; they are inherent. In the *North Sea Continental Shelf* cases, the ICJ expressly held:

> The rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist ipso facto and ab initio by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short there is here an inherent right.[590]

6.11 Article 56 sets out the coastal State's rights and jurisdiction in the EEZ. Article 56(1)(a) provides that in the EEZ, the coastal State has

> sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds[.]

6.12 In relation to natural resources, the coastal State has sovereign rights in the EEZ for two related purposes: (i) "exploring and exploiting" them; and (ii) "conserving and managing" them. This applies equally to the living and to the nonliving resources of the zone.[591]

6.13 As in the case of the continental shelf, the phrase "sovereign rights" covers "all rights necessary for and connected with the exploration and exploitation of the natural resources of

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[590] *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, Judgment, Dissenting Opinion of Judge Tanaka, I.C.J. Reports 1969, para. 19. MP, Vol. XI, Annex LA-5.

[591] The remainder of Part V deals primarily with the conservation and management of the living resources (management includes the concepts of "optimum utilization" (Articles 62 and 64) and "harvesting" (Articles 61, 62 and 67)). Part VI, on the other hand, deals primarily with the exploration and exploitation of the nonliving resources of the continental shelf (but including sedentary species), leaving unaffected the legal status of the superjacent waters and the air space above them, and is linked to Part V through Article 56, paragraph 3.

the exclusive economic zone".[592] They "include jurisdiction in connexion with the prevention and punishment of violations of the law".[593] In addition to conferring sovereign rights on the coastal state, UNCLOS makes those rights exclusive – as the use of the term "exclusive" economic zone itself makes clear.[594]

6.14 Because the sovereign rights and jurisdiction of the coastal State in both the continental shelf and EEZ are exclusive, no other State may interfere with their use or enjoyment. Yet, as described in the subsections that follow, China has done exactly that with respect to the sovereign rights and jurisdiction of the Philippines.

1. China's Interference with the Sovereign Rights of the Philippines over Its Non-living Resources

6.15 In Chapters 3 and 4 of this Memorial, the Philippines showed that since 2009 China has grown increasingly assertive in pressing its claim to "historic rights" over the all the waters, seabed and subsoil within the so-called "nine-dash line". This growing assertiveness has interfered with the efforts of the Philippines to enjoy and exercise its sovereign rights and jurisdiction with respect to the non-living resources of the seabed and subsoil near its coast.

6.16 In June 2002, the Philippine Department of Energy entered a Geophysical Survey and Exploration Contract ("GSEC") with Sterling Energy, a U.K.-based company, to explore for oil and gas deposits in the area known as "GSEC 101", located near Reed Bank, just over 75 M from the coast of Palawan. The location of GSEC 101 is depicted in **Figure 6.1** (in Volume II only). This area is widely considered among the most promising for oil and gas exploration in the Philippine EEZ/continental shelf.[595] China did not then object to the GSEC between the Philippines and Sterling Energy.

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[592] *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 2 (M. Nordquist, et. al., eds., 2002), para. 56.11(a). MP, Vol. XI, Annex LA-145, referring to International Law Commission, *Report of the International Law Commission Covering the Work of its Eighth Session*, U.N. Doc. A/3159 (4 July 1956), Art. 68 Commentary, para. 2. MP, Vol. XI, Annex LA-62.

[593] *Virginia Commentary*, Vol. 2, para. 56.11(a). MP, Vol. XI, Annex LA-145, referring to International Law Commission, *Report of the International Law Commission Covering the Work of its Eighth Session*, U.N. Doc. A/3159 (4 July 1956), Art. 68 Commentary, para. 2. MP, Vol. XI, Annex LA-62.

[594] *See* David Joseph Attard, *The Exclusive Economic Zone in International Law* (1987), p. 49. MP, Vol. XI, Annex LA-128 (observing that the combination of these terms "confirm[s] the primacy of the coastal State's rights over the EEZ resources".).

[595] *See* Forum Energy plc, "SC72 Recto Bank (Formerly GSEC101)". MP, Vol. X, Annex 342.

6.17 On 15 February 2010, the Philippines Department of Energy converted Sterling Energy's exploration contract into a Service Contract. As the company was preparing to conduct seismic surveys, China moved to block it. On 22 February 2010, the Embassy of China in the Philippines sent the Philippines Department of Foreign Affairs a diplomatic note expressing its "strong objection and indignation" concerning the conversion of GSEC 101 into a service contract, and asserting that the "so-called 'GSEC101' is situated in the waters of China's Nansha [Spratly] Islands".[596]

6.18 This effort to block the service contract was followed by another diplomatic note, dated 13 May 2010, in which China "re-emphasize[d]" its "indisputable sovereignty over the Nansha Islands and its adjacent waters". China asserted the grant of "the Service contract relating to the so-called 'GSEC101' licence" by the Philippines "has seriously infringed on China's sovereignty, sovereign rights and jurisdiction, and is therefore illegal and invalid".[597] In the same note, China also "urg[ed] the Philippine side to immediately withdraw the decision to award Service Contract relating to the so-called 'GSEC101' area".[598]

6.19 Similarly, China objected in a diplomatic note dated 6 July 2011 in regard to the Philippines' offering of exploration blocks in areas of the South China Sea claimed by China.[599]

6.20 The Philippines rejected China's attempts to interfere with the lawful exercise of its sovereign rights in the area of Reed Bank[600] and permitted Sterling Energy to move forward

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[596] *Note Verbale* from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (10)PG-047 (22 Feb. 2010), p. 1. MP, Vol. VI, Annex 195.

[597] *Note Verbale* from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (10) PG-137 (13 May 2010), p. 1. MP, Vol. VI, Annex 196. Similarly, China objected in a diplomatic note dated 6 July 2011 in regard to the Philippines' offering of exploration blocks in areas of the South China Sea claimed by China. *Note Verbale* from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (11)PG-202 (6 July 2011). MP, Vol. VI, Annex 202.

[598] *Note Verbale* from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (10) PG-137 (13 May 2010), p. 2. MP, Vol. VI, Annex 196.

[599] *Note Verbale* from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (11)PG-202 (6 July 2011). MP, Vol. VI, Annex 202.

[600] *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 110885 (4 Apr. 2011), p. 2. MP, Vol. VI, Annex 199 (the Philippines stated: "Articles 56 and 77 of UNCLOS provide that the coastal State exercises sovereign rights over its 200M Exclusive Economic Zone and 200M Continental Shelf. As such, the Philippines exercises exclusive sovereign rights over the Reed Bank. Therefore, the action of the Philippine Department of Energy is fully consistent with international law".).

with the conduct of a previously planned seismic survey. Accordingly, the Philippine Department of Energy commissioned the survey vessel MV *Veritas Voyager* to conduct 2- and 3-dimensional seismic surveys at Reed Bank near Palawan in fulfilment of the Service Contract. When the survey began, China's interference took tangible form. On 2 March 2011, two China Marine Surveillance vessels, CMS 71 and CMS 75, approached the MV *Veritas Voyager* and began shadowing it.[601] They then commenced overtly aggressive manoeuvres, moving at high speed directly towards the MV *Veritas Voyager* and abruptly stopping in front of it, generating a large wake.[602]

6.21 The captain of survey ship attempted to explain that his vessel was operating in the area pursuant to a license from the Philippines.[603] Undeterred, the Chinese ships demanded that the operation stop immediately. Asserting that the survey was taking place in maritime areas within China's jurisdiction, they compelled the MV *Veritas Voyager* to leave the area.[604]

6.22 The Philippines immediately protested China's actions, stating that "the aggressive actions of the Chinese vessels" constituted "a serious violation of Philippine sovereignty and maritime jurisdiction".[605] To date, the threat of further such incidents has prevented the Philippines from returning to the area to exercise the sovereign rights UNCLOS gives it. Neither the Philippine government nor private companies licensed by the Philippines has been willing to undertake the risk of confrontation with Chinese law enforcement vessels.

6.23 China has taken other steps to obstruct the Philippines' right to explore for and exploit the non-living resources of its EEZ and continental shelf.

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[601] Armed Forces of the Philippines, *Special Report: The Jackson Atoll and Reed Bank Incident in West Philippine Sea* (2011), p. 3. MP, Vol. IV, Annex 67.

[602] *Id.*; *Memorandum* from Nathaniel Y. Casem, Colonel, Philippine Navy, to Flag Officer in Command, Philippine Navy (Mar. 2011), p. 2. MP, Vol. IV, Annex 69.

[603] *Memorandum* from Nathaniel Y. Casem, Colonel, Philippine Navy, to Flag Officer in Command, Philippine Navy (Mar. 2011), p. 2. MP, Vol. IV, Annex 69.

[604] Armed Forces of the Philippines, *Special Report: The Jackson Atoll and Reed Bank Incident in West Philippine Sea* (2011), p. 4. MP, Vol. IV, Annex 67; *Memorandum* from Nathaniel Y. Casem, Colonel, Philippine Navy, to Flag Officer in Command, Philippine Navy (Mar. 2011), p. 2. MP, Vol. IV, Annex 69; *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 110526 (2 Mar. 2011). MP, Vol. VI, Annex 198 (lists the coordinates of the incident).

[605] *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 110526 (2 Mar. 2011). MP, Vol. VI, Annex 198.

6.24 On 24 March 2010 Nido Petroleum Philippines Pty, Ltd. publicly announced plans to commence exploratory surveys pursuant to Service Contract SC 58,[606] in an area adjacent to Palawan which "contains an extensive deepwater fairway with a number of large multi hundred million barrel structures".[607] The location of SC 58 is depicted in **Figure 6.2** (in Volume II only).

6.25 On 30 July 2010, the Deputy Chief of Mission from the Embassy of China in Manila, Mr. Bai Tian, called upon the Philippine Department of Foreign Affairs to protest these actions among others. According to a contemporaneous account of the meeting, Mr. Bai "asserted that Service Contract 54, 14, 58, 63, and other nearby service contracts are located 'deep within China's 9-dash line.' China considers the Philippines as violating and encroaching on China's sovereignty and sovereign rights in these areas".[608]

6.26 Shortly thereafter, on 2 August 2010, the Embassy of China in Manila requested a meeting directly with representatives of Nido. The meeting took place four days later, during which the First Secretary of the Chinese Embassy, Mr. Li Yongshen, "showed [Nido's representative a] copy of China's 9-dash line map and informed the latter that all areas within that map are being claimed by PRC, including those areas covered by Nido's existing service contracts with the Philippine Government".[609] Since the meeting, no further exploration in the area of SC 58 has been undertaken.

6.27 In a separate incident, in June 2011, the Philippines Department of Energy tendered 15 petroleum blocks for exploration and development.[610] Among them were AREA 3 and AREA 4, 65 M and 35 M M from the coast, respectively. The locations of AREA 3 and AREA 4 are depicted in **Figure 4.7** (in Volume II only). The tender elicited a swift protest

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[606] Department of Energy of the Republic of the Philippines and PNOC Exploration Corporation, *West Calamian Block Service Contract No. 58* (12 Jan. 2006). MP, Vol. X, Annex 335.

[607] *Letter* from Mr. Anthony P. Ferrer, Country Representative, Nido Petroleum, to the Office of the Undersecretary, Department of Energy of the Republic of Philippines (7 Oct. 2013), p. 1. MP, Vol. X, Annex 340.

[608] *Memorandum* from Rafael E. Seguis, Undersecretary for Special and Ocean Concerns, Department of Foreign Affairs, Republic of the Philippines, to the Secretary of Foreign Affairs of the Republic of the Philippines (30 July 2010), p. 1. MP, Vol. IV, Annex 63.

[609] *Letter* from Mr. Anthony P. Ferrer, Country Representative, Nido Petroleum, to the Office of the Undersecretary, Department of Energy of the Republic of Philippines (7 Oct. 2013), p. 1. MP, Vol. X, Annex 340.

[610] Deloitte LLP, "Fourth Philippine Energy Contracting Round (PECR 4) 2011" (2011), pp. 1-2. MP, Vol. X, Annex 336.

from China in which it "urge[d] the Philippine side to immediately withdraw the bidding offer for AREA 3 and AREA 4" and "refrain from any action that infringes on China's sovereignty and sovereign rights" in that area.[611]

6.28 By all these actions, China has directly interfered with the Philippines' enjoyment and exercise of its indisputable rights under UNCLOS.

2. China's Interference with the Sovereign Rights and Jurisdiction of the Philippines Over Living Resources

6.29 In addition to interfering with the sovereign rights and jurisdiction of the Philippines to explore for and exploit the non-living resources of its EEZ and continental shelf, China has also interfered with the Philippines' sovereign right and jurisdiction to exploit the living resources of its maritime zones. It has done so chiefly through the enactment of laws and regulations that purport to extend China's law enforcement jurisdiction, including over fishing resources, throughout the entire area encompassed by the nine-dash line. Although actual incidents have to date been rare, the effect of China's regulatory over-reach has been to create a cloud of uncertainty which has had a substantial chilling effect on the activities of Philippine fishermen.[612]

6.30 In May 2012, for example, China implemented a two and a half-month fishing ban that applied, in China's own words, "in most parts of the South China Sea".[613] According to the regulation, it applied to all areas north of the 12° N parallel of latitude and bounded in the northeast by two points connecting the southern tip of Taiwan to the Chinese mainland, including large expanses of sea within 200 M of the Philippine coast.[614] The areas encompassed by the ban are depicted in **Figure 6.3** (following page 168).

6.31 According to a Chinese government statement about the fishing ban:

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[611] *Note Verbale* from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (11)PG-202 (6 July 2011), p.1. MP, Vol. VI, Annex 202.

[612] *See* Affidavit of Asis G. Perez, Director, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines (26 Mar. 2014). MP, Vol. VII, Annex 241.

[613] "Fishing ban starts in South China Sea", *Xinhua* (17 May 2012). MP, Vol. X, Annex 318.

[614] People's Republic of China, Ministry of Agriculture, South China Sea Fishery Bureau, *Announcement on the 2012 Summer Ban on Marine Fishing in the South China Sea Maritime Space* (10 May 2012), Art. 1, nn.1-2. MP, Vol. V, Annex 118.

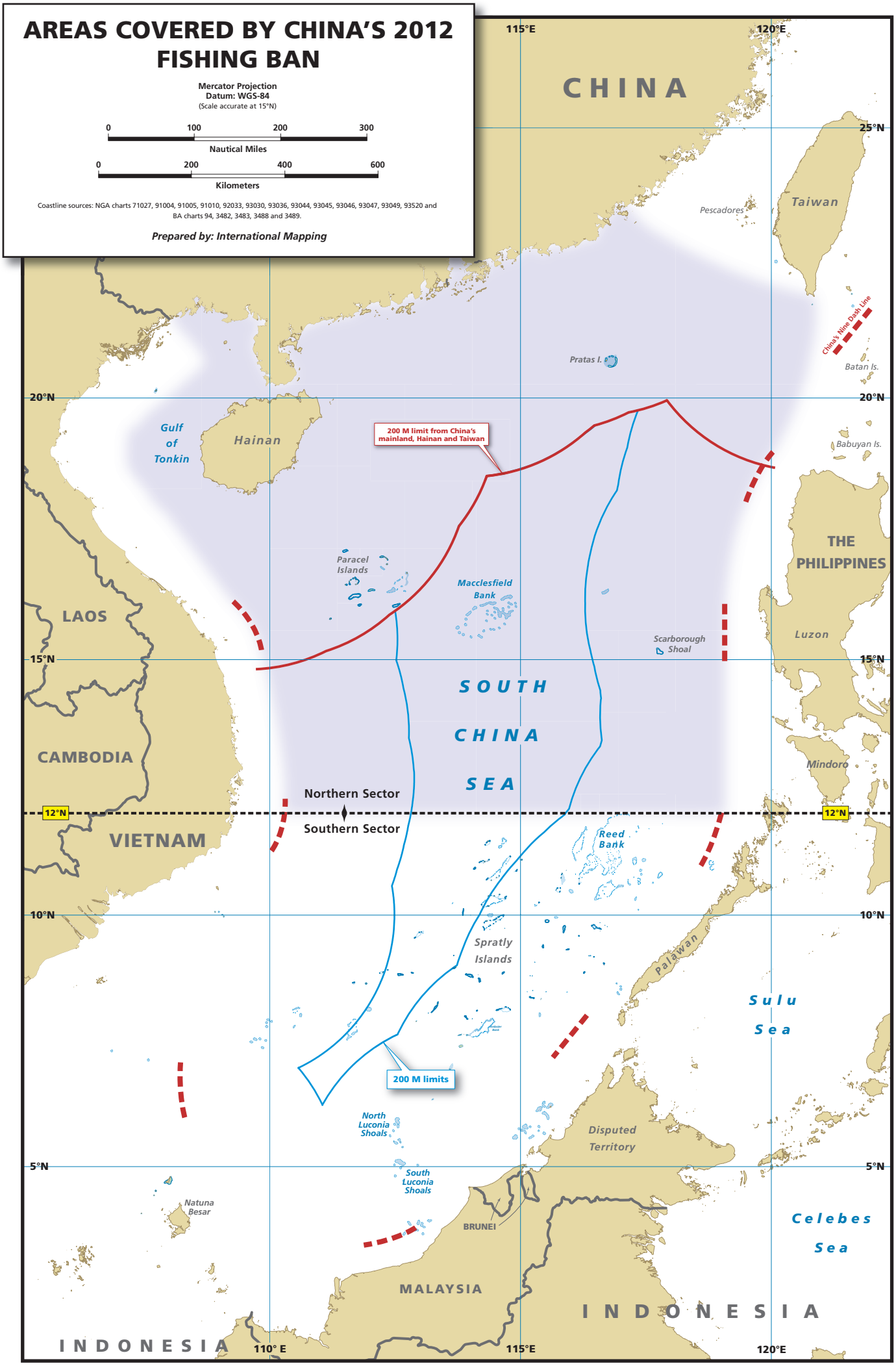
AREAS COVERED BY CHINA'S 2012 FISHING BAN
Mercator Projection
Datum: WGS-84
(Scale accurate at 15°N)
0 100 200 300
Nautical Miles
0 200 400 600
Kilometers
Coastline sources: NGA charts 71027, 91004, 91005, 91010, 92033, 93030, 93036, 93044, 93045, 93046, 93047, 93049, 93520 and BA charts 94, 3482, 3483, 3488 and 3489.
Prepared by: International Mapping
CHINA
Taiwan
Pescadores
Pratas I.
China's Nine Dash Line
Batan Is.
Babuyan Is.
Gulf of Tonkin
Hainan
200 M limit from China's mainland, Hainan and Taiwan
THE PHILIPPINES
Luzon
Paracel Islands
Macclesfield Bank
Scarborough Shoal
LAOS
CAMBODIA
VIETNAM
SOUTH CHINA SEA
Northern Sector
Southern Sector
Mindoro
Reed Bank
Spratly Islands
Palawan
Sulu Sea
200 M limits
North Luconia Shoals
South Luconia Shoals
Disputed Territory
Natuna Besar
BRUNEI
MALAYSIA
Celebes Sea
INDONESIA
INDONESIA
115°E
120°E
25°N
20°N
15°N
12°N
10°N
5°N
110° E

Figure 6.3

> Violators will face punishments such as fines, license revocations, confiscations and possible criminal charges, according to a statement issued by the fishery bureau under the MOA [Ministry of Agriculture].
>
> . . .
>
> The fishing ban is also applicable to foreign ships.
>
> A spokesman from the fishery bureau under the MOA said earlier this week that fishing activity conducted by foreign ships in banned areas will be seen as a "blatant encroachment on China's fishery resources.[615]

6.32 The Philippines promptly protested, stating: "Our position is that we do not recognize China's fishing ban, as portions of the ban encompass our Exclusive Economic Zone (EEZ)".[616] China rejected the Philippine position. According to an official spokesperson, Tong Xiaoling, China's ambassador to the ASEAN: "China has every right to defend its sovereignty and protect its fishery resources".[617]

6.33 Later the same year, in December 2012, China adopted further measures against "foreign" vessels operating in areas encompassed by the nine-dash line. As described in Chapters 3 and 4,[618] it revised its "Regulations for the Management of Coastal Border Security in Hainan Province" to require foreign vessels to seek permission before entering what it calls "China's waters" in the South China Sea. At the same time, the regulations authorized Chinese vessels to board, inspect, detain, expel or confiscate foreign ships that have entered the waters "illegally" or are conducting "illegal activities" there.[619]

6.34 As discussed, the Philippines has repeatedly requested clarification as to the scope of these regulations; in particular, whether they will be applied to all areas encompassed by the nine-dash line.[620] China has declined to provide the requested clarification – at least directly. It made its intent plain, however, the same month the regulations were announced when the

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[615] "Fishing ban starts in South China Sea", *Xinhua* (17 May 2012). MP, Vol. X, Annex 318.

[616] *Id*.

[617] "Fishing ban starts in South China Sea", *Xinhua* (17 May 2012). MP, Vol. X, Annex 318.

[618] *See supra* paras. 3.57, 4.15-4.16.

[619] People's Republic of China, Hainan Province, *Hainan Provincial Regulation on the Control of Coastal Border Security* (31 Dec. 2012), Art. 47. MP, Vol. V, Annex 123.

[620] *Note Verbale* from the Department of Foreign Affairs of the Republic of Philippines to the Embassy of the People's Republic of China in Manila, No. 12-3391 (30 Nov. 2012). MP, Vol. VI, Annex 215; *Note Verbale* from the Department of Foreign Affairs of the Republic of Philippines to the Embassy of the People's Republic of China in Manila, No. 13-0011 (2 Jan. 2013). MP, Vol. VI, Annex 216.

State-owned Chinese press reported that the newly launched China Maritime Safety Administration vessel, the *Haixun 21*, would "enable the maritime surveillance to fully cover the coastal areas, coastal waters and *the South China Sea waters* of *nearly 2 million square nautical miles* [sic] within the jurisdiction of Hainan Province"[621] (i.e., an area equivalent to that encompassed by the nine-dash line: 1.94 million km^2). A photograph of the vessel is reproduced below as **Figure 6.4.**

Figure 6.4

6.35 China's assertion of jurisdiction, including over fishing and other vessels, has contributed to an environment of insecurity not just in the Philippines, but among all coastal States in the South China Sea. In response to the issuance of Hainan's coastal border security regulations, among other Chinese actions, Vietnam publicly stated:

> Those activities seriously infringe upon the sovereignty, sovereign rights and national jurisdiction of Viet Nam in the East Sea and over Hoang Sa [Paracel] and Truong Sa [Spratly] archipelagos and further complicate the situation in the East Sea. They also run counter to the spirit of the Declaration on Conduct of the Parties in the South China Sea (DOC) and are not conducive to peace and stability in the region as well as to the Viet Nam - China relations.

[621] "'Haixun 21' Formally Commissioned under Hainan Maritime Bureau Today, Serving Hainan Jurisdiction", *Maritime News* (27 Dec. 2012), p. 1. MP, Vol. X, Annex 323 (emphasis added).

> Viet Nam resolutely opposes and demands China immediately cancel those wrongful activities.[622]

6.36 In addition, since 1995, when China seized and began occupying Mischief Reef, just 126 M off the coast of Palawan, it has prevented Philippines vessels from fishing there. In contrast, Chinese fishing vessels under China's protection have fished freely in the adjacent waters, even though they are part of the Philippines EEZ. After April 2012, when, as discussed in Chapter 3,[623] China seized and took control of Scarborough Shoal, it has restricted the access of Filipino fishermen to that feature, while allowing Chinese vessels to fish freely. And after China took *de facto* control of Second Thomas Shoal in May 2013, it began interfering with Philippine fishing activities in the area, while allowing fishing by Chinese vessels, notwithstanding that Second Thomas Shoal is part of the Philippines' EEZ.

6.37 China's steadily escalating boldness has both facilitated access by Chinese fishermen to Philippine waters, and has had an *in terrorem* effect on Philippine fishermen who are profoundly unsettled about whether China will intercept or seize the modest vessels on which their livelihoods depend, or otherwise prevent them from accessing the areas within 200 M of the Philippine coast where they have traditionally fished.[624]

6.38 China's conduct in all these respects has plainly interfered with the sovereign rights of the Philippines to exploit the living resources of its EEZ.

B. China's Interference with the Traditional Livelihood of Filipino Fishermen at Scarborough Shoal

6.39 In addition to unlawfully infringing the exclusive sovereign rights appertaining to the Philippines under UNCLOS, China has also violated the Convention by depriving Filipino fishermen of their traditional livelihood at Scarborough Shoal since 2012.

6.40 Before proceeding, and for the avoidance of any doubt, the Philippines wishes to make clear that it does not here make a claim to "historic rights" that were, as described in Chapter 4, superseded by UNCLOS. To the contrary, the Philippines here argues that: (i) the

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[622] Ministry of Foreign Affairs of the Socialist Republic of Vietnam, *Remarks by Foreign Ministry Spokesman Luong Thanh Nghi on January 14, 2013* (14 Jan. 2013). MP, Vol. VI, Annex 168.

[623] *See supra* paras. 3.51-3.54.

[624] *See* Affidavit of Asis G. Perez, Director, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines (26 Mar. 2014). MP, Vol. VII, Annex 241.

waters within 12 M of Scarborough Shoal are recognized by both States as territorial sea (and not part of either State's EEZ); (ii) Filipino fishermen have engaged in traditional fishing activities in these waters since ancient times; and (iii) in the particular circumstances of this case, and especially during the pendency of their dispute, China may not prevent Philippine nationals from continuing to carry out their traditional fishing activities in these waters.

6.41 As described in Section II of this Chapter, the waters in and around Scarborough Shoal are home to plentiful living resources. Precisely for this reason, the waters surrounding it have served as a traditional fishing ground since times immemorial. Traditional fishing by Filipino fishermen extends well back into the Spanish colonial era,[625] and has continued in the post-independence period. A 1953 book published by the Philippines' Bureau of Fisheries identifies Scarborough Shoal as a "principal fishing area" for Philippine reef fishing.[626] Another book published in 1960 by the Philippine Farmers' Journal underscores the importance of fishing at the shoal to Filipino fishermen.[627]

6.42 Despite the longstanding use of Scarborough Shoal as a traditional fishing ground by Filipino fishermen, China abruptly acted to prevent them from pursuing their livelihoods in the area in April and May 2012. As recounted in Chapter 3,[628] China has since that date exercised control over Scarborough and only intermittently allowed Filipino fishing vessels to approach the area. These acts violate China's obligations under the Convention.

6.43 Under Article 279 of UNCLOS, China and the Philippines are required to "settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3, of the Charter of the United Nations". Article 2, paragraph 3, of the U.N. Charter, in turn, requires the Parties to "settle their international disputes by peaceful means in such a manner that international peace and

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[625] *See* Antonio Remiro Brotóns, *Spain in the Philippines (16th - 19th Centuries)* (19 Mar. 2014), p. 16. MP, Vol. VII, Annex 238 (showing that the most important map of the Philippines produced in colonial times, the 1734 map by Pedro Murillo Velarde, included Scarborough Shoal (then Panacot) as part of the Philippines).

[626] Porfirio Manacop, "The Principal Marine Fisheries" in *Philippine Fisheries: A Handbook Prepared by the Technical Staff of the Bureau of Fisheries* (D.V. Villadolid, ed., 1953), p. 121. MP, Vol. III, Annex 8 ("The principal fishing areas include Stewart Banks, Scarborough Reef, Apo Reef, the areas around Fortune, Lubang, Marinduque, Polilio, Ticao, Burias, Masbate, Cuyo and Busuanga Islands".).

[627] Andres M. Mane, "Status, Problems and Prospects of the Philippine Fisheries Industry", *Philippine Farmers Journal*, Vol. 2, No. 4 (1960), p. 34. MP, Vol. VII, Annex 244 (stating that Scarborough Shoal is one the Philippines' "principal reef fishing banks".).

[628] *See supra* paras. 3.51-3.54.

security, and justice, are not endangered". The Philippines considers that China's obstruction of traditional fishing by Filipinos in and around Scarborough Shoal "endangers justice" within the meaning of the U.N. Charter, as incorporated into Article 279 of the Convention.

6.44 In this respect, it bears recalling that China first declared a territorial sea of 12 M in 1958. That declaration expressly included the Zhongsha Islands, of which China considers Scarborough Shoal to be a part.[629] Yet for more than 50 years thereafter, China did nothing to disturb the active and ongoing fishing by local Filipinos. Only in May 2012 did it summarily expel them. In the view of the Philippines, China's own long-standing practice in what it claims as territorial sea creates an obligation not to endanger justice by abruptly altering the status quo on which local artisanal fishing depends. This is particularly true given that Scarborough Shoal has no inhabitants and the Philippines is the only nearby coastal State. Under the circumstances, the threat to justice posed by China's sudden reversal of policy is plain.[630]

6.45 China's actions have also unlawfully endangered justice by exacerbating the dispute between it and the Philippines concerning their maritime rights and entitlements in the vicinity of Scarborough Shoal. This too is inconsistent with China's obligation (and the Philippines' right) under Article 279 to settle the dispute by peaceful means, a long-recognized corollary of which is the prohibition of any acts that might aggravate or extend the dispute. In the *Electricity Company of Sofia* case, the Permanent Court of International Justice ("PCIJ") long ago referred to:

> the principle universally accepted by international tribunals and likewise laid down in many conventions to which Bulgaria has been a party-to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute[.][631]

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[629] *See* Embassy of the People's Republic of China in the Republic of the Philippines, *Ten Questions Regarding Huangyan Island* (15 June 2012), p. 1. MP, Vol. V, Annex 120.

[630] *See North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, Judgment, I.C.J. Reports 1969, para. 88. MP, Vol. XI, Annex LA-4 ("Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable".); *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, para. 71. MP, Vol. XI, Annex LA-10 ("Equity as a legal concept is a direct emanation of the idea of justice".).

[631] *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Provisional Measures, Order, *1939, P.C.I.J.* Series A/B, No. 79 (5 Dec. 1939), p. 199. MP, Vol. XI, Annex LA-61.

6.46 Although the PCIJ's views were stated in connection with its decision on provisional measures, there is no reason to presume that the principle is not of universal application. To the contrary, the PCIJ itself referred to it as a "principle universally accepted".[632] Bedrock principles of good faith between States and, indeed, the very maintenance of the international legal order require that the States Parties to a dispute behave with restraint with a view to narrowing, not widening, the differences between them.[633] To do otherwise is to ignore the over-arching constraints of Article 300 with respect to the basic principles of good faith and abuse of rights. Rather than narrow the Parties' differences, China's abrupt eviction of Filipino fishermen from Scarborough Shoal has only made those differences worse, to the severe prejudice of the local fishermen whose livelihoods depend on access to their traditional fishing ground. The appropriate remedy for this violation is a return to the *status quo ante*.

6.47 In light of the foregoing, it is clear that China has interfered with the exclusive sovereign rights and jurisdiction of the Philippines under UNCLOS to explore for and exploit the living and non-living resources of its continental shelf and EEZ. It has also unlawfully interfered with traditional fishing by Philippine nationals at Scarborough Shoal in a manner that is inconsistent with its obligations under the Convention.

II. CHINA HAS BREACHED ITS OBLIGATIONS NOT TO HARM THE MARINE ENVIRONMENT

6.48 Chinese fishing vessels, operating under the protection of, and often in close coordination with, Chinese government vessels have routinely engaged in environmentally harmful fishing practices at Scarborough Shoal (in the Northern Sector) and Second Thomas Shoal (in the Southern Sector). These harmful activities have included using cyanide to fish; blasting rare corals with dynamite to make them easier to extract; and harvesting endangered or threatened marine species, including giant clams and sea turtles.

6.49 These practices are especially harmful to the unique, fragile and highly vulnerable ecosystems of Scarborough Shoal and Second Thomas Shoal. As described in the expert report of Professor Kent Carpenter, Ph.D., included in Volume VII as Annex 240, these two

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[632] *Id.*

[633] *See id.*

features, as well as the other features in the Spratly Islands, fall within the so-called "Coral Triangle", which has the greatest concentration of marine life on the planet.[634] The reefs are home to "an extreme diversity of coastal fishes and a high percentage of the living representatives of seagrasses, corals, giant clams, marine turtles and many other marine groups", as well as marine mammals and sea birds.[635] Many of these species are considered endangered according to the International Union of Conservation of Nature's Red List of Threatened Species.[636] The features are breeding grounds for the larvae of these marine species; they "serve as a means to replenish fisheries and reef life throughout the South China Sea".[637] The practices of Chinese fishing vessels, under the protection of the Chinese government, have caused significant harm to these critical and delicate ecosystems, and the marine life that they sustain.

A. Damage to the Environment at Scarborough Shoal

6.50 The events of April 2012 illustrate the environmentally destructive practices that Chinese fishing vessels, acting under China's protection, have carried out, despite the Philippines' best efforts to prevent them, including its repeated protests to China. Since its independence, the Philippines had continuously exercised fisheries jurisdiction at Scarborough Shoal. Since the 1980s, the Philippines had been particularly vigilant to protect against the poaching of endangered species.[638] In early April 2012, a large fleet of Chinese fishing vessels, accompanied by two Chinese government vessels, CMS 75 and CMS 84, arrived at the Shoal.[639] Also present was FLEC 310,[640] as was CMS 71.[641] According to

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[634] Kent E. Carpenter, Ph.D., *Eastern South China Sea Environmental Disturbances and Irresponsible Fishing Practices and their Effects on Coral Reefs and Fisheries* (22 Mar. 2014), pp. 4, 13. MP, Vol. VII, Annex 240.

[635] *Id.*, p. 5.

[636] *Id.*

[637] *Id.*, pp. 8-9.

[638] *See supra* note 225.

[639] *Memorandum* from Col. Nathaniel Y. Casem, Philippine Navy, to Chief of Staff, Armed Forces of the Philippines, No. N2E-0412-008 (11 Apr. 2012). MP, Vol. IV, Annex 77.

[640] *Memorandum* from Relly B. Garcia, FRPLEU/QRT Officer, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines, to Director, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines (2 May 2012), pp. 3, 5-7. MP, Vol. IV, Annex 80.

[641] *Id.*, p. 2.

Foreign Ministry spokesperson, China sent these vessels to Scarborough Shoal "to protect the safety and legitimate fishing activities of Chinese fishermen and fishing vessels".[642]

6.51 By 9 April 2012, there were at least eight fishing vessels at Scarborough Shoal operated by Chinese nationals from Hainan.[643] On 10 April 2012, Philippine Navy personnel attached to the BRP *Gregorio del Pilar*, which suspected the Chinese fishermen of illegal poaching, boarded the vessels to inspect their catch.[644] Boarding of vessels suspected of harvesting endangered or other prohibited species had been a routine operation for many decades.[645] Although China had never intervened to prevent Philippine government personnel from carrying out these operations in the past, they attempted to do so, for the first time, on 10 April 2012.[646] Nevertheless, the Philippine personnel were ultimately able to board.[647] The inspection revealed that two vessels were "filled with assorted corals and giant clams", while the other six vessels[648] were loaded with "assorted endangered species and . . . assorted corals".[649] A photograph taken by the boarding party showing one vessel's cache of giant clams is reproduced below as **Figure 6.5**.

[642] Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Liu Weimin's Regular Press Conference on April 12, 2012* (12 Apr. 2012). MP, Vol. V, Annex 117.

[643] *Memorandum* from Col. Nathaniel Y. Casem, Philippine Navy, to Chief of Staff, Armed Forces of the Philippines, No. N2E-0412-008 (11 Apr. 2012), pp. 3-4. MP, Vol. IV, Annex 77.

[644] *Id.*, p. 3.

[645] Affidavit of Asis G. Perez, Director, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines (26 Mar. 2014). MP, Vol. VII, Annex 241.

[646] *Memorandum* from Col. Nathaniel Y. Casem, Philippine Navy, to Chief of Staff, Armed Forces of the Philippines, No. N2E-0412-008 (11 Apr. 2012), p. 3. MP, Vol. IV, Annex 77.

[647] *Id.*, p. 4.

[648] These vessels bore the following bow numbers: 09099, 09022, 05668, 03059, 10161, 05176, 02096, and 05067. *Id.*, p. 3.

[649] *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 12-0894 (11 Apr. 2012), p. 2. MP, Vol. VI, Annex 205.

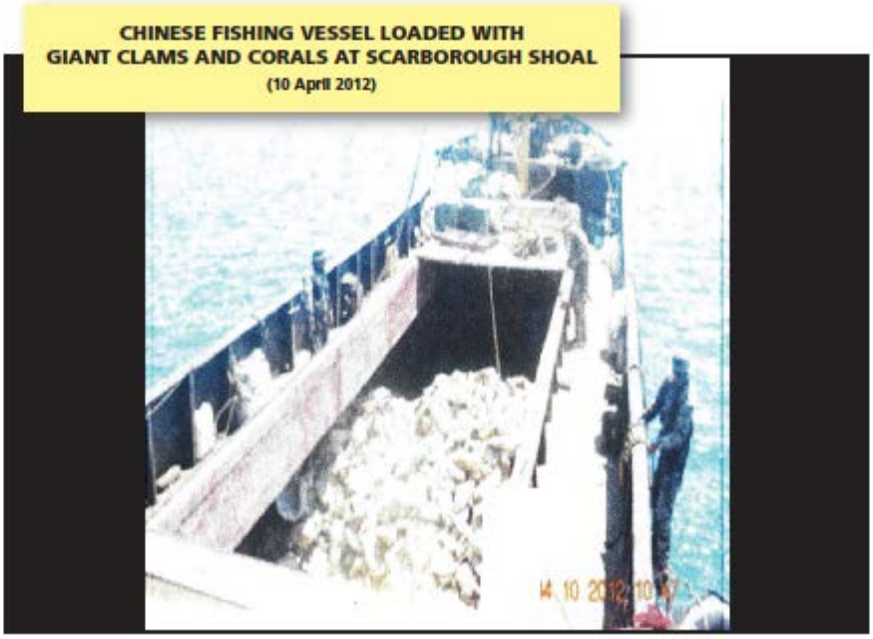

Figure 6.5

6.52 Later that month, a joint mission of the Philippine Coast Guard and the Philippine Bureau of Fisheries and Aquatic Resources ("BFAR") again observed Chinese fishing vessels at Scarborough Shoal, under the protection of Chinese government vessels.[650] Beginning on 19 April 2012, personnel aboard the BRP *Edsa II* observed a CMS aircraft monitoring Chinese fishing activity at Scarborough Shoal; the next day, two CMS vessels and the FLEC 310 were also observed in the Shoal.[651] On 21 April, the same personnel observed Chinese fishing vessels docking alongside the FLEC 310, an activity they considered to be "rather unusual" protocol for a fishing vessel.[652] The photograph below, **Figure 6.6**, depicts this activity.

[650] *Memorandum* from Relly B. Garcia, FRPLEU/QRT Officer, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines, to Director, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines (2 May 2012), pp. 1, 28. MP, Vol. IV, Annex 80.

[651] *Id.*, pp. 3-5.

[652] *Id.*, p. 6.

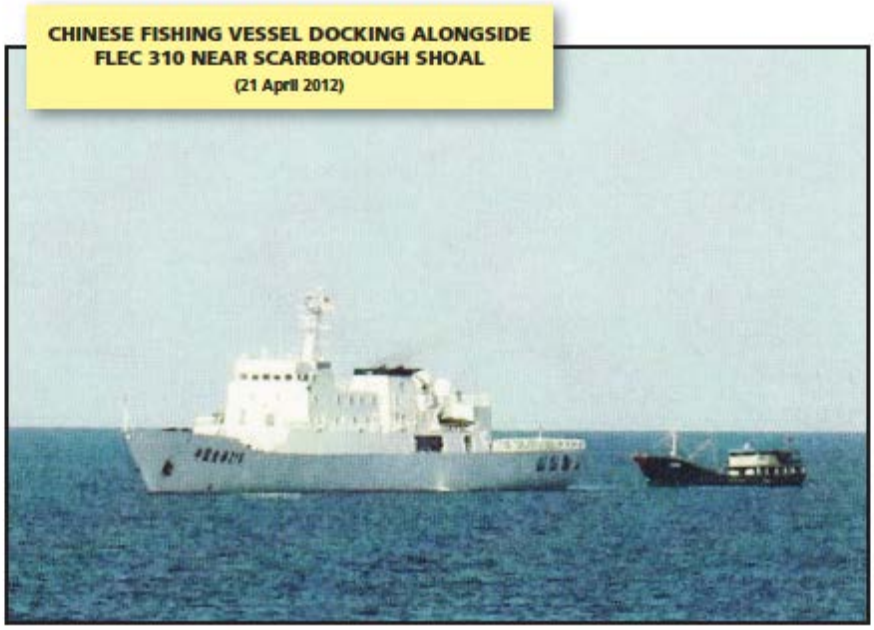

Figure 6.6

6.53 On 23 April 2012, personnel aboard the BRP *Pampanga* approached Chinese fishermen in the shallow water of the Shoal, and observed them "dredging/towing i[n] an area of the Shoal where corals are located".[653] The Philippine personnel also noted "what appears to be giant clam shells inside [fishing vessel bow number] 09022".[654] However, due to the presence of FLEC and CMS ships in the area, the Philippine authorities did not board the vessels or confront the fishermen engaged in the activity.[655]

6.54 On 26 April 2012, the BRP *Pampanga* again entered the Shoal, accompanied by the BFAR vessel MCS-3001.[656] Personnel were instructed "not to engage the Chinese",[657] who

[653] *Id.*, p. 14.

[654] *Id.*, p. 16.

[655] *Id.*, pp. 3, 5.

[656] *Memorandum* from Andres R. Menguito, FRPLEU/QRT Chief, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines, to Director, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines (2 May 2012), p. 1. MP, Vol. IV, Annex 79.

[657] *Memorandum* from Relly B. Garcia, FRPLEU/QRT Officer, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines, to Director, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines (2 May 2012), p. 17. MP, Vol. IV, Annex 80.

were being protected by two CMS vessels.[658] As they did on 23 April, the Philippine personnel approached Chinese fishermen working in the shallow waters of the Shoal. They observed "that after the Chinese fishermen operate in an area, the corals therein are taken and whats left are rubbles. Inside the Shoal, there are in fact several patches of what appears to be coral beds that are now bare, and where only coral rubbles are left".[659] They also observed "some of the fishermen . . . taking *taklobos* [giant clams] and corals".[660] A Chinese fishing vessel with bow number 09022 was observed departing the Shoal "fully loaded with what appears to be corals and giant clams".[661]

6.55 The events of April 2012 were unique only for the intervention of Chinese government vessels. But the environmentally destructive practices of the Chinese fishing vessels were a continuation of activities that had been carried on over many years, with China's full knowledge. Other incidents of their environmentally harmful conduct include:

- On 17 January 1998, Philippine authorities apprehended 22 Chinese fishermen on board Chinese-flagged fishing vessels 00372 and 00473 in possession of corals and sea turtles.[662] They were tried and found guilty of criminal offenses in a local court in Zambales, the Philippine province that exercises administrative jurisdiction over Scarborough Shoal.[663]

- On 14 January 2000, the Philippines sent a diplomatic protest to China complaining that, on 6 January, it had apprehended two Chinese vessels with

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[658] *Memorandum* from Andres R. Menguito, FRPLEU/QRT Chief, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines, to Director, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines (2 May 2012), p. 1. MP, Vol. IV, Annex 79.

[659] *Memorandum* from Relly B. Garcia, FRPLEU/QRT Officer, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines, to Director, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines (2 May 2012), p. 21. MP, Vol. IV, Annex 80.

[660] *Id.*, p. 24.

[661] *Id*. *See also Memorandum* from Andres R. Menguito, FRPLEU/QRT Chief, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines, to Director, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines (2 May 2012), p. 1. MP, Vol. IV, Annex 79.

[662] *Memorandum* from Assistant Secretary of the Department of Foreign Affairs, Republic of the Philippines, to the Secretary of Foreign Affairs of the Republic of the Philippines (23 Mar. 1998), p. 1. MP, Vol. III, Annex 29; *Memorandum* from Fact Finding Committee, National Police Commission, Republic of the Philippines, to Chairman and Members of the Regional Committee on Illegal Entrants for Region 1, Republic of the Philippines (28 Jan. 1998), p. 1. MP, Vol. III, Annex 28.

[663] *People of the Philippines v. Shin Ye Fen, et al.*, Criminal Case No. RTC 2357-I, Decision, Regional Trial Court, Third Judicial Region, Branch 69, Iba, Zambales, Philippines (29 Apr. 1998), p. 2. MP, Vol. III, Annex 30.

"corals on board, which, to all indications, would have been gathered from Scarborough Shoal". It further noted that "[t]his illegal activity disturbed the tranquility of the ecosystem and habitat of important species of marine life and, at the same time, caused irreparable damage to the marine environment of the area" in violation of, *inter alia*, the Convention on Biological Diversity. Consequentially, the Philippines requested that China "ensure that . . . Chinese fishermen do not again conduct fishing and other unauthorized activities" in Scarborough Shoal.[664]

- On 17 April 2000, a Philippine Naval Task Group conducting boarding and search operations in Scarborough Shoal caught three Chinese fishing vessels loaded with coral collected at the Shoal.[665]

- On 14 February 2001, the Philippines complained to China that, on 29 January, Philippine authorities had intercepted and boarded four Chinese vessels "engaged in illegal fishing of corals, and turtles".[666] The boarding party noted that one vessel "was seen engaged in shark and eel fishing", three vessels were "engaged in seaweed gathering", and the boats were loaded with "four live sharks, corals and turtles".[667]

- On 15 March 2001, the Philippine Navy confiscated giant clams from a Chinese fishing vessel.[668]

- On 10 February 2002, a Philippine Navy boarding party discovered giant clams, corals, and a live sea turtle aboard Chinese fishing vessels.[669]

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[664] *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 2000100 (14 Jan. 2000), p. 2. MP, Vol. VI, Annex 186.

[665] *Situation Report* from Col. Rodrigo C. Maclang, Philippine Navy, to Chief of Staff, Armed Forces of the Philippines, No. 004-18074 (18 Apr. 2000), p. 1. MP, Vol. III, Annex 41.

[666] *Memorandum* from Willy C. Gaa, Assistant Secretary of Foreign Affairs, Republic of the Philippines to Secretary of Foreign Affairs, Republic of the Philippines (14 Feb. 2001), p. 1. MP, Vol. III, Annex 45.

[667] Office of Asian and Pacific Affairs, Department of Foreign Affairs, Republic of the Philippines, *Apprehension of Four Chinese Fishing Vessels in the Scarborough Shoal* (23 Feb. 2001), pp. 2-3. MP, Vol. III, Annex 46.

[668] *Memorandum* from Josue L. Villa, Embassy of the Republic of the Philippines in Beijing, to the Secretary of Foreign Affairs of the Republic of the Philippines (21 May 2001), p. 10. MP, Vol. III, Annex 48.

- On 19 March 2002, two Chinese vessels with bow numbers 03016 and 03017 were apprehended carrying approximately three tons of corals and one sack of giant clamshells.[670]

- On 31 August 2002, Chinese vessels were caught with giant clams.[671]

- On 31 October 2004, Philippines authorities apprehended two Chinese fishing vessels loaded with giant clams and corals.[672]

- On 30 December 2005, crew from the Philippine Navy vessel BRP *Artemio Ricarte* boarded and inspected four Chinese fishing vessels, where they found 16 tons of giant clams.[673] They also confiscated fifteen tons of endangered coral species from the vessels.[674]

- On 8 April 2006, a boarding party found corals on a number of Chinese fishing vessels.[675]

6.56 The extraction of rare corals is very damaging to the marine environment. As described in greater detail in Professor Carpenter's report, the extraction of coral "reduces the structural complexity of reefs and affects the ability of the reef to support fishes and other animals". Because coral reefs serve as the structural foundation for an extremely complex ecosystem,[676] their extraction creates a ripple effect throughout the environment, endangering

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[669] *Memorandum* from Perfecto C. Pascual, Director, Naval Operation Center, Philippine Navy, to The Flag Officer in Command, Philippine Navy (11 Feb. 2002). MP, Vol. III, Annex 49.

[670] *Letter* from Victorino S. Hingco, Vice Admiral, Philippine Navy, to Antonio V. Rodriguez, Assistant Secretary, Office of Asia and Pacific Affairs, Department of Foreign Affairs, Republic of the Philippines (26 Mar. 2002), p. 1. MP, Vol. III, Annex 50.

[671] *Report* from CNS to Flag Officer in Command, Philippine Navy, File No. N2D-0802-401 (1 Sept. 2002), p. 1. MP, Vol. III, Annex 52.

[672] *Report* from Lt. Commander Angeles, Philippine Navy, to Flag Officer in Command, Philippine Navy, No. N2E-F-1104-012 (18 Nov. 2004), pp. 1, 10-15. MP, Vol. III, Annex 55.

[673] *Letter* from George T. Uy, Rear Admiral, Armed Forces of the Philippines, to Assistant Secretary, Office of Asia and Pacific Affairs, Department of Foreign Affairs of the Republic of the Philippines (2006), p. 1. MP, Vol. III, Annex 57.

[674] *Memorandum* from the Secretary of Foreign Affairs of the Republic of the Philippines to the President of the Republic of the Philippines (11 Jan. 2006), p. 1. MP, Vol. III, Annex 58.

[675] *Report* from Commanding Officer, NAVSOU-2, Philippine Navy, to Acting Commander, Naval Task Force 21, Philippine Navy, No. NTF21-0406-011/NTF21 OPLAN (BANTAY AMIANAN) 01-05 (9 Apr. 2006), p. 2. MP, Vol. III, Annex 59.

[676] Carpenter Report, pp. 5-6. MP, Vol. VII, Annex 240.

the vitality of populations of other marine species that depend on the reef as a habitat. Since small animals such as crabs, shrimp and damselfish are food sources for larger fishes, the destruction of their refuges "results in fewer larger fishes that can be supported on a reef".[677] Following such destructive practices, it "can take years or decades for similar numbers of corals to replenish a reef".[678]

6.57 The harvesting of giant clams, sea turtles and other endangered species compounds the environmental impact. Giant clams are "among the most endangered of all marine animals" as a result of overexploitation.[679] They are important elements of the coral reef's structure because "of their size and hard, persistent shells".[680] Moreover, the act of harvesting the clam entails "the crushing and destruction of surrounding corals",[681] which is destructive of the reef itself. Sea turtles are endangered species listed by the IUCN.[682] They are attractive to fishermen because they have high commercial value.[683] The harvesting of those species further diminishes their already limited numbers and seriously threatens the survival of the species.[684]

6.58 In addition to endangered species, many of the Chinese fishing vessels inspected or apprehended in the incidents described above were found to be in possession of dynamite or other explosives and explosive-related equipment, which they had already used (or were planning to use) in their fishing activities. On 10 March 1998, for example, Chinese nationals were apprehended in Scarborough Shoal with dynamite intended for illegal fishing, and brought to the Philippines for prosecution.[685] The vessels arrested on 15 March 2001 were

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[677] *Id.*, p. 14.

[678] *Id.*, p. 17.

[679] *Id.*, p. 19.

[680] *Id.*, p. 14.

[681] *Id.*, p. 15.

[682] *Id.*, pp. 11, 21.

[683] *Id.*, p. 20.

[684] *See id.*, pp. 20-21.

[685] *People of the Philippines v. Wuh Tsu Kai, et al*, Criminal Case No. RTC 2362-I, Decision, Regional Trial Court, Third Judicial Region, Branch 69, Iba, Zambales, Philippines (29 Apr. 1998), p. 1. MP, Vol. III, Annex 31; *People of the Philippines v. Zin Dao Guo, et al*, Criminal Case No. RTC 2363-I, Decision, Regional Trial Court, Third Judicial Region, Branch 69, Iba, Zambales, Philippines (29 Apr. 1998), p. 1. MP, Vol. III, Annex 32.

carrying blasting caps.[686] On 10 February 2002, Philippine authorities discovered explosives and blasting caps aboard three Chinese fishing vessels at Scarborough Shoal.[687]

6.59 The use of explosives in fishing at or near coral reefs can be particularly destructive of the surrounding ecosystem.[688] This is because the explosives pulverize coral, affecting the general structural integrity of the reef.[689] More importantly, the corals most vulnerable to being pulverized by explosion are the more delicate branching forms that are home to the smaller animals upon which larger animals depend.[690] This has a ripple effect on the entire ecosystem.[691]

6.60 A number of the vessels caught with dynamite were also caught with cyanide, which is used to stun and immobilize fish to facilitate gathering them with nets.[692] The vessels arrested on 15 March 2001 were carrying cyanide,[693] as were those arrested on 10 February 2002.[694] A group of fourteen Chinese fishermen on four different vessels rescued by the Philippine Navy during a storm on 31 August 2002 were also carrying cyanide, which they had used to catch fish.[695]

6.61 The use of cyanide in fishing is especially destructive of the surrounding ecosystem.[696] Exposure to cyanide itself results in the loss of coral cover,[697] affecting the vitality of all species that depend upon the reef. The inefficiency of cyanide fishing also exacerbates the problem. Because cyanide merely stuns a fish, fishermen tend to pound apart

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[686] *Memorandum* from Josue L. Villa, Embassy of the Republic of the Philippines in Beijing, to the Secretary of Foreign Affairs of the Republic of the Philippines (21 May 2001), p. 10. MP, Vol. III, Annex 48.

[687] *Memorandum* from Perfecto C. Pascual, Director, Naval Operation Center, Philippine Navy, to The Flag Officer in Command, Philippine Navy (11 Feb. 2002). MP, Vol. III, Annex 49.

[688] Carpenter Report, p. 15. MP, Vol. VII, Annex 240.

[689] *Id*.

[690] *Id*., pp. 14-15.

[691] *See id*., pp. 8-9, 17-18.

[692] *Id*., p. 15.

[693] *Memorandum* from Josue L. Villa, Embassy of the Republic of the Philippines in Beijing, to the Secretary of Foreign Affairs of the Republic of the Philippines (21 May 2001), p. 10. MP, Vol. III, Annex 48.

[694] *Memorandum* from Perfecto C. Pascual, Director, Naval Operation Center, Philippine Navy, to The Flag Officer in Command, Philippine Navy (11 Feb. 2002). MP, Vol. III, Annex 49.

[695] *Report* from CNS to Flag Officer in Command, Philippine Navy, File No. N2D-0802-401 (1 Sept. 2002), p. 1. MP, Vol. III, Annex 52.

[696] Carpenter Report, p. 15. MP, Vol. VII, Annex 240.

[697] *Id*.

and destroy corals to extract the fish, leading to additional destruction of the coral, with its resultant impacts on the ecosystem.

6.62 Despite repeated protests by the Philippines, China has not stopped its fishermen from engaging in these environmentally harmful practices. Instead, it has prevented the Philippines from stopping them. In May 2012, China warned the Philippines to discontinue sending its vessels to Scarborough Shoal or face the consequences.[698] In order to avoid confrontation, the Philippines has refrained from such action.[699] In the meantime, Chinese government vessels have continued to patrol the waters at Scarborough Shoal, providing cover for the activities of Chinese fisherman. This has prevented the Philippines from gathering further evidence of China's environmentally harmful practices over the past 22 months. Based on past practices, and in the absence of Philippine enforcement of its fisheries and environmental regulations, the Philippines is deeply concerned that the marine environment at Scarborough Shoal has suffered, and continues to suffer, serious degradation at China's hands.

B. Damage to the Environment at Second Thomas Shoal

6.63 In mid-May 2013, a large fleet of Chinese fishing vessels, accompanied by four Chinese state vessels, CMS 71, CMS 84, CMS 167 and PLAN 562,[700] arrived at Second Thomas Shoal.

6.64 On 11 May 2013, a Philippine marine air patrol photographed a Chinese fishing vessel loaded with giant clams and corals. The photograph is reproduced below as **Figure 6.7**. Five days later, on 16 May, Philippine personnel stationed aboard the *BRP Sierra Madre* (which was run aground at Second Thomas Shoal) observed "three dinghies . . . gathering corals and [giant] clams and dredging in the shoal".[701]

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[698] *See supra* para. 3.54.

[699] *See id*.

[700] Armed Forces of the Philippines, *Ayungin Shoal: Situation Update* (11 May 2013), p. 4. MP, Vol. IV, Annex 95. PLAN 562 is a vessel of the People's Liberation Army Navy.

[701] Armed Forces of the Philippines, *Near-occupation of Chinese vessels of Second Thomas (Ayungin) Shoal in the early weeks of May 2013* (May 2013), p. 3. MP, Vol. IV, Annex 94.

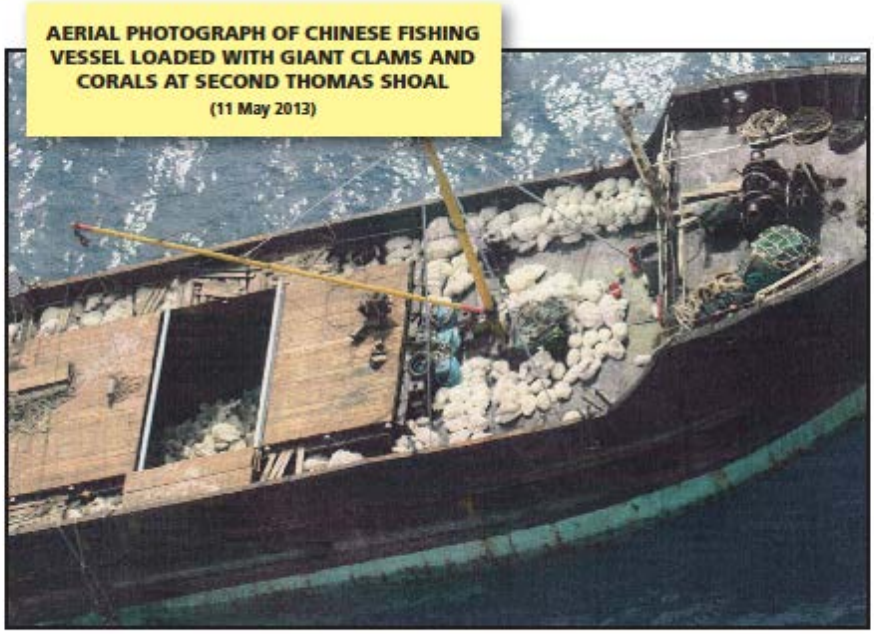

Figure 6.7

6.65 Since May 2013, Chinese government vessels have regularly patrolled the waters at Second Thomas Shoal, and permitted access by Chinese while restricting the activities of Filipino fishermen in the area. China not permitted Philippine government vessels to approach the Shoal itself, except for the purpose of resupplying the personnel stationed on the *BRP Sierra Madre*. (In March 2014, China stopped allowing Philippine vessels to conduct even these activities, as discussed in Section V of this Chapter.) Based on the practices observed and photographed by Philippine personnel in May 2013, the Philippines is concerned that Chinese fishermen, acting under China's protection, have continued to harvest giant clams, corals and other endangered species, and to engage in other illegal fishing practices harmful to the marine environment at Second Thomas Shoal.

C. China Has Violated Its International Obligations To Protect and Not Pollute the Marine Environment

1. China Has Violated Its Obligation To Protect and Preserve the Marine Environment

6.66 China's toleration of, and active support for, the environmentally harmful fishing practices employed by its nationals at Scarborough Shoal and Second Thomas Shoal

constitute breaches of its obligations under UNCLOS to protect and preserve the marine environment.

6.67 Article 192 of the Convention establishes a general obligation requiring States "to protect and preserve the marine environment". As ITLOS has ruled, "the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment".[702] Thus, China is under a general obligation to take measures to conserve living resources.

6.68 Article 192 requires States to take active measures to prevent harm to the environment. As the *Virginia Commentary* observes:

> The thrust of article 192 is not limited to the prevention of prospective damage to the marine environment but extends to the 'preservation of the marine environment'. Preservation would seem to require active measures to maintain, or improve, the present condition of the marine environment.[703]

6.69 According a report by the U.N. Secretary-General, "[o]ne of the primary objectives of the Convention is . . . the establishment of a legal order designed to promote . . . the conservation of living resources".[704] The report elaborates:

> The Convention accords the *highest priority* to the proper conservation and management of living resources not only in maritime areas under the national jurisdiction of States but also in maritime areas beyond national jurisdiction. Thus, in the exclusive economic zone and on the high seas, States are under an obligation to take conservation measures designed to maintain or restore the living resources at levels ensuring the maximum sustainable yield, as qualified by relevant environmental and economic factors.[705]

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[702] *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999*, ITLOS Reports 1999, para. 70. MP, Vol. XI, Annex LA-37.

[703] *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 4 (M. Nordquist, et. al., eds., 2002), para. 192.9. MP, Vol. XI, Annex LA-148 (emphasis added).

[704] United Nations, Secretary-General, *Protection and Preservation of the Marine Environment: Report of the Secretary-General*, U.N. Doc. A/44/461 (18 Sept. 1989), para. 10. MP, Vol. XI, Annex LA-64.

[705] *Id.*, para. 11.

6.70 The Secretary-General further observed that "the unique dispute settlement procedure" of the Convention "is of great potential value in . . . areas of environmental protection".[706]

6.71 The content of this obligation is further defined by the Stockholm Declaration,[707] adopted by the 1972 United Nations Conference on the Human Environment.[708] Principle 21 of the Stockholm Declaration declares that States have "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction". Accordingly, China is internationally responsible for the damage caused by actions of fishermen under its control at Scarborough Shoal and Second Thomas Shoal.

6.72 Agenda 21, adopted by the 1992 United Nations Conference on Environment and Development,[709] also offers guidance in interpreting the obligation under Article 192.[710] Principle 17 of Agenda 21 provides, with respect to "marine living resources under national jurisdiction", that it is "necessary" for States to, *inter alia*, "[m]aintain or restore populations of marine species at levels that can produce the maximum sustainable yield",[711] "[p]rotect and restore endangered marine species",[712] and "[p]reserve rare or fragile ecosystems, as well as habitats and other ecologically sensitive areas".[713] Although China's jurisdiction over Scarborough Shoal and Second Thomas Shoal is not accepted by the Philippines, to the extent it purports to exercise that jurisdiction, it must do so in accordance with these guidelines.

6.73 Notwithstanding its obligations under UNCLOS and compatible rules of international law, China failed to take any actions to prevent Chinese fishermen from harvesting

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[706] *Id.*, para. 20.

[707] P. Birnie, et. al., *International Law and the Environment* (3d ed., 2009), p. 387. MP, Vol. XI, Annex LA-158.

[708] U.N. Conference on the Human Environment, *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1 (16 June 1972). MP, Vol. XI, Annex LA-63.

[709] U.N. Conference on Environment and Development, *Agenda 21* (3-14 June 1992). MP, Vol. XI, Annex LA-65.

[710] *See* P. Birnie, et. al., *International Law and the Environment* (3d ed., 2009), p. 384 ("Agenda 21 . . . can be taken into account when interpreting or implementing the Convention".). MP, Vol. XI, Annex LA-158.

[711] U.N. Conference on Environment and Development, *Agenda 21* (3-14 June 1992), para. 17.74(b). MP, Vol. XI, Annex LA-65.

[712] *Id.*, para. 17.74(e).

[713] *Id.*, para. 17.74(f).

endangered species and coral at Scarborough Shoal or at Second Thomas Shoal. Indeed, it has affirmatively protected its fishermen engaged in such activities. In the most egregious example, in April 2012, as shown, while Philippine law enforcement vessels at Scarborough Shoal were observing Chinese fishermen engaging in destructive activities,[714] Chinese government vessels at the scene were only interested in preventing the Philippines from interfering with them, thus allowing them to continue unchecked. Indeed, the purpose of the CMS vessels' presence at Scarborough Shoal was, as stated by the Chinese Foreign Ministry, was "to protect" Chinese fishermen.[715] This could only be a reference to "protection" from Philippine law enforcement vessels seeking to enforce fisheries and environmental regulations, which was the only putative "threat" Chinese fishermen faced at Scarborough Shoal. With Philippine law enforcement vessels no longer able to deter them, Chinese fishermen have been free to continue destroying the coral reef at Scarborough Shoal and to deplete the population of giant clams and corals, among other endangered species. The failure of Chinese authorities to prevent destruction of the ecosystem under their watch constitutes a breach of China's obligation to protect and preserve the marine environment.

6.74 As described above, the environmental degradation at Second Thomas Shoal began in May 2013 with the arrival of a fleet of Chinese fishing vessels, under the protection of at least four government vessels. Previously, Chinese fishermen were not known to frequent the waters in the vicinity of Second Thomas Shoal. Since their arrival some 10 months ago, they have engaged in the same harmful practices as their counterparts at Scarborough Shoal, especially in regard to the illegal harvesting of giant clams, as evidenced by the aerial photograph taken from Philippine aircraft that conducted overflight missions.[716] There, too, China has violated its obligation under the Convention to protect the marine environment.

2. China Has Violated Its Obligation To Prevent Pollution of the Marine Environment

6.75 Article 194(1) obligates States to take actions to prevent pollution of the marine environment. It provides:

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[714] *See supra* paras. 6.50-6.54.

[715] Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Liu Weimin's Regular Press Conference on April 12, 2012* (12 Apr. 2012). MP, Vol. V, Annex 117.

[716] *See supra* para. 6.64.

> States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are *necessary to prevent, reduce and control pollution of the marine environment from any source*, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.

6.76 The Convention defines pollution as the "introduction by man, directly or indirectly, of substances or energy into the marine environment . . . which results or is likely to result in such deleterious effects as harm to living resources and marine life".[717]

6.77 Article 194(3) emphasizes that states are obliged to manage "all sources" of pollution, placing a special importance on "minimiz[ing] to the fullest possible extent . . . the release of toxic, harmful or noxious substances . . . by dumping".[718] Dumping is defined as the "deliberate disposal of wastes or other matter from vessels . . .".[719]

6.78 Article 194(5) further emphasizes that the obligations set out in Article 194 are heightened in areas of rare or fragile ecosystems and in places that provide habitats for vulnerable species.[720] It states:

> The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.

6.79 The Convention does not itself specify those substances the dumping of which is regulated by Article 194. However, there can be no doubt that it encompasses the use of highly toxic chemicals like cyanide. The International Convention for the Prevention of Pollution from Ships, for example, defines a harmful substance as "any substance which, if introduced into the sea, is liable to create hazards to human health, to harm living resources and marine life".[721] The London Convention on the Prevention of Marine Pollution by

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[717] UNCLOS, Art. 1(4).

[718] *Id.*, Art. 194(3)(a).

[719] *Id.*, Art. 1(5)(a)(i).

[720] *See* Jonathan I. Charney, "The Marine Environment and the 1982 United Nations Convention on the Law of the Sea", *International Lawyer*, Vol. 28 (1994), p. 896. MP, Vol. XI, Annex LA-135. *See also* United Nations, Secretary-General, *Protection and Preservation of the Marine Environment: Report of the Secretary-General*, U.N. Doc. A/44/461 (18 Sept. 1989), para. 71. MP, Vol. XI, Annex LA-64.

[721] International Convention for the Prevention of Pollution from Ships ("MARPOL"), 1340 U.N.T.S. 184 (2 Nov. 1973), entered into force 2 Oct. 1983, Art. 2(2). MP, Vol. XI, Annex LA-80. *See also United Nations*

Dumping of Wastes and Other Matter, which, according to the *Virginia Commentary*, guides the definition of "dumping" in UNCLOS,[722] specifically requires a prior special permit to dump cyanide.[723]

6.80 It follows that a State's failure to take measures to prevent the release of cyanide into the marine environment violates Article 194. Furthermore, when the dumping occurs in fragile ecosystems or habitats of endangered species, such as Scarborough Shoal and Second Thomas Shoal, and the State fails to take measures necessary to prevent the harmful activity, the State has violated Article 194(5).

6.81 The coral reef ecosystems in the waters around Scarborough Shoal and Second Thomas Shoal constitute rare or fragile ecosystems within the meaning of Article 194(5). They are being steadily degraded by China's tolerance of its nationals' destructive fishing practices.

3. China Has Violated the Convention on Biological Diversity

6.82 Article 293(1) of UNCLOS provides that the applicable law to proceedings under Part XV is the "Convention and other rules of international law not incompatible with this Convention". This includes treaty-based rules such as those found in the Convention on Biological Diversity ("CBD").[724] The Philippines and China are both States Parties to the CBD, and that Convention is plainly not incompatible with UNCLOS, within the meaning of Article 293.[725] Complementary environmental treaties are expressly contemplated by Article

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Convention on the Law of the Sea 1982: A Commentary, Vol. 4 (M. Nordquist, et. al., eds., 2002), para. 194.10(j). MP, Vol. XI, Annex LA-147.

[722] *Virginia Commentary*, Vol. 4, para. 210.11(a). MP, Vol. XI, Annex LA-147.

[723] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter ("London Convention"), 1046 U.N.T.S. 138 (29 Dec. 1972), entered into force 30 Aug. 1975, Art. 4(1)(b), Annex 2. MP, Vol. XI, Annex LA-79.

[724] P. Birnie, et. al., *International Law and the Environment* (3d ed., 2009), p. 716. MP, Vol. XI, Annex LA-158 (observing that sovereignty over the territorial sea is "subject to any requirements of the UNCLOS and other rules of international law, including any conservatory conventions to which that state is party and which by their terms apply within that area".).

[725] China ratified the Convention on Biological Diversity on 5 January 1993; the Philippines did so on 8 October 1993. Convention on Biological Diversity, *List of Parties*. MP, Vol. XI, Annex LA-86.

197[726] in furtherance of the basic obligation set forth in Article 192. Thus, both Parties are bound to comply with the CBD.

6.83 The CBD must be implemented "consistently with the rights and obligation of States under the law of the sea".[727] Consequentially, there is an "affirmative obligation to implement the Convention [on Biological Diversity] in accordance with and subject to the customary international law of the sea, including the law reflected in UNCLOS".[728] Furthermore, to the extent that Chinese activities cause serious damage or threat to biological diversity at Scarborough Shoal or Second Thomas Shoal, the CBD "affect[s] the rights and obligations" of China under UNCLOS.[729]

6.84 The CBD's jurisdictional scope is two-fold: it applies to both the area under the sovereignty of States and activities under their control. Article 4 reads:

> *Article 4. Jurisdictional Scope*
>
> Subject to the rights of other States, and except as otherwise expressly provided in this Convention, the provisions of this Convention apply, in relation to each Contracting Party:
>
> (a) In the case of components of biological diversity, in areas within the limits of its national jurisdiction; and
>
> (b) In the case of processes and activities, regardless of where their effects occur, carried out under its jurisdiction or control, within the area of its national jurisdiction or beyond the limits of national jurisdiction.[730]

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[726] Article 197 provides:

> *Article 197*
>
> *Cooperation on a global or regional basis*
>
> States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.

[727] Convention on Biological Diversity (hereinafter "CBD"), 1760 U.N.T.S. 79 (5 June 1992), entered into force 29 Dec. 1993, Art. 22(2). MP, Vol. XI, Annex LA-82.

[728] Melinda Chandler, "The Biodiversity Convention: Selected Issues of Interest to the International Lawyer", *Colorado Journal of International Environmental Law & Policy*, Vol. 4 (1993), p. 153. MP, Vol. XI, Annex LA-134.

[729] CBD, Art. 22(1). MP, Vol. XI, Annex LA-82.

[730] CBD, Art. 4. MP, Vol. XI, Annex LA-82.

6.85 It follows that China is responsible for fulfilling its obligations under the CBD at Scarborough Shoal and Second Thomas Shoal on either of two grounds: (i) because, under its claims of sovereignty over both shoals, the adjacent waters are within the limits of its national jurisdiction; or (ii) because, as the Philippines contends, it is "obligated to control the activities of its nationals" in areas beyond its sovereignty or maritime entitlements.[731] China's international responsibility for the activities of its fishermen at Scarborough Shoal after April 2012, and at Second Thomas Shoal after May 2013, when it assumed *de facto* control over these features, is especially manifest. The CBD places an obligation on States, "as far as possible and appropriate", to:

> Regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use.[732]

6.86 Within this context, "regulate or manage" "implies control of all activities, independent of location, which could affect the biological resources concerned, including direct use (such as hunting and harvesting) and indirect effects (e.g., pollution or tourism) on biological resources".[733] The types of activities which States may take to fulfil this obligation include "subjecting biological resource users [e.g., fishermen] to off-take or harvesting controls" and "controlling pollution".[734]

6.87 The CBD also requires that, in "all areas",[735] States Parties must, "as far as possible and appropriate":

> Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings.[736]

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[731] Melinda Chandler, "The Biodiversity Convention: Selected Issues of Interest to the International Lawyer", *Colorado Journal of International Environmental Law & Policy*, Vol. 4 (1993), p. 148. MP, Vol. XI, Annex LA-134.

[732] CBD, Art. 8(c). MP, Vol. XI, Annex LA-82.

[733] United Nations Environment Programme, Conference of the Parties to the Convention on Biological Diversity, *Approaches and Experiences Related to the Implementation of the Convention on Biological Diversity*, U.N. Doc. UNEP/CBD/COP/2/12 (14 Sept. 1995), para. 32. MP, Vol. XI, Annex LA-66.

[734] *Id.*, para. 34.

[735] *Id.*, para. 35. MP, Vol. XI, Annex LA-66 (italics in original).

[736] CBD, Art. 8(d). MP, Vol. XI, Annex LA-82.

6.88 Accordingly, State-sanctioned or encouraged activities that destroy ecosystems and natural habitats or which impede the maintenance of viable populations, are violations of the CBD.

6.89 China's toleration of its fishermen's environmentally harmful activities at Scarborough Shoal and Second Thomas Shoal, including its failure to prevent them from harvesting endangered species, or from using dynamite or cyanide to extract fish, clams or corals at these features, constitute violations of its obligations under the CBD.

III. CHINA HAS BREACHED ITS OBLIGATIONS UNDER UNCLOS BY CONSTRUCTING ARTIFICIAL ISLANDS, INSTALLATIONS AND STRUCTURES

6.90 China has constructed artificial islands, installations and structures on Mischief Reef, a low-tide elevation within the Philippines' EEZ and continental shelf. Mischief Reef is 126 M from the Philippine coast on Palawan, 596 M from the nearest point on China's Hainan Island, and 50 M from Nanshan, the nearest high-tide feature in the Spratlys over which China claims sovereignty. (Nanshan is occupied by the Philippines). Other than Palawan, Mischief Reef is not within 200 M of any feature that is capable of generating entitlement to an EEZ or a continental shelf.

6.91 Prior to China's construction activities, no part of Mischief Reef rose above sea level at high tide.[737] Satellite photographs of the feature, taken in 1994, are depicted in Figure 5.8 (in Volume II only). They show Mischief Reef in its natural state, before China significantly altered it. It was entirely submerged, with only small drying patches at low tide. Since then, as described below, China has built and maintained concrete platforms on top of a highly vulnerable coral ecosystem, and built various structures on top of the platforms.

A. Construction of Artificial Islands, Installations and Structures

6.92 Since January 1995, China – without obtaining the Philippines' authorization – has constructed artificial islands on top of Mischief Reef, beginning with the construction of clustered structures flying the Chinese flag at four sites on the reef.[738] These structures were

[737] *Id.*

[738] *Letter* from Alexander P. Pama, Captain, Philippine Navy, to Alicia C. Ramos, Assistant Secretary for Asian and Pacific Affairs, Department of Foreign Affairs, Republic of the Philippines (13 Nov. 2004), p. 2. MP, Vol. III, Annex 54.

"made of aluminum or fiberglass materials supported by steel bars with cemented bases. Each structure has a guardhouse . . . ".[739]

6.93 Shortly after the structures were built, they were reported to the Government of the Philippines by Filipino fishermen.[740] The Philippines promptly "expresse[d] its serious concern over . . . [t]he construction by the People's Republic of China of certain structures on [Mischief] Reef".[741] The Philippines also stated that Mischief Reef is "part of Philippine territory" and that the Chinese unilateral action to take possession of the feature "violates the spirit of the 1992 ASEAN Declaration on the South China Sea".[742] China responded by denying that it was "building a 'base' on 'Meijijiao [the Chinese name for Mischief Reef]'".[743] In public statements a month later, Chinese Vice Premier and Foreign Minister Qian Qichen stated: "Those are not military structures and they do not pose threat to any country".[744]

6.94 This position was reiterated by China's Vice Minister of Foreign Affairs, Tang Jiaxuan, during bilateral consultations that took place in Beijing in March 1995, in which he told his Philippine counterpart that the structures "are not military [structures], they are wind shelters and Chinese fishermen have long used Mischief [Reef] as wind shelter".[745] China maintained as much throughout the spring of 1995.[746]

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[739] Armed Forces of the Philippines, *Chronology of Events in the Kalayaan Island Group* (2004), p. 1. MP, Vol. III, Annex 53.

[740] *See Letter* from Alexander P. Pama, Captain, Philippine Navy, to Alicia C. Ramos, Assistant Secretary for Asian and Pacific Affairs, Department of Foreign Affairs, Republic of the Philippines (13 Nov. 2004), p. 2. MP, Vol. III, Annex 54; Armed Forces of the Philippines, *Chronology of Events in the Kalayaan Island Group* (2004). 1. MP, Vol. III, Annex 53.

[741] *Memorandum* from the Undersecretary of Foreign Affairs of the Republic of the Philippines to the Ambassador of the People's Republic of China in Manila (6 Feb. 1995), p. 2 MP, Vol. III, Annex 17.

[742] *Id.*

[743] *Id.*, p. 1.

[744] *Memorandum* from the Ambassador of the Republic of the Philippines in Beijing to the Undersecretary of Foreign Affairs of the Republic of the Philippines (10 Mar. 1995). MP, Vol. III, Annex 18.

[745] Government of the Republic of the Philippines and Government of the People's Republic of China, *Philippine-China Bilateral Consultations: Summary of Proceedings* (20-21 Mar. 1995), p. 7. MP, Vol. VI, Annex 175.

[746] *See, e.g., Memorandum* from the Ambassador of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-231-95 (20 Apr. 1995). MP, Vol. III, Annex 22 (quoting Chinese Foreign Ministry spokesperson); *Memorandum* from the Ambassador of the Republic of the Philippines in Beijing to the Undersecretary of Foreign Affairs of the Republic of the Philippines (10 Apr. 1995), p. 2. MP, Vol. III, Annex 21 (relaying statements of Chinese Assistant Minister of Foreign Affairs Wang Yingfan).

6.95 On 15 October 1998, China communicated to the Ambassador of the Philippines in Beijing its "plans to renovate and reinforce the structures it constructed on Mischief Reef back in 1995".[747] But China did more than that, however. Ignoring the Philippines' protest, it erected three-story buildings at two of the four construction sites.[748] A report produced by the Armed Forces of the Philippines described the construction activities as "massive", involving "[a]bout 100-150 personnel working on site laying foundations for rectangular structure".[749] In response, on 5 November 1998, the Philippines sent China a *Note Verbale* stating:

> [T]he Government of the Republic of the Philippines has received verified information regarding the repair, renovation, construction, reinforcement and fortification works presently being undertaken on the illegal structures in [Mischief] Reef by personnel on board [People's Republic of China] vessels escorted by [People's Republic of China] navy ships. The Government of the Republic of the Philippines strongly protests and manifests its objections to these activities. . . .
>
> . . .
>
> The Department of Foreign Affairs reiterates that the position of the Philippine Government on [Mischief] Reef, a geographic feature that is permanently submerged under water, has always been clear and consistent and this has been supported by the international community. . . .
>
> . . .
>
> The Department of Foreign Affairs conveys the demands of the Government of the Republic of the Philippines for the Government of the People's Republic of China to immediately cease and desist from doing further improvements over the illegal structures it has built in [Mischief] Reef and to dismantle any repair works, renovations, reinforcements, fortifications and/or improvements made therein. . . .[750]

6.96 On 6 and 9 November 1998, the Philippine Ambassador in Beijing, Romulo Ong, held meetings with the Deputy Director General of the Asia Department of the Chinese Ministry of Foreign Affairs, Hu Zhengyue. During these meetings, Deputy Director General Hu

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[747] *Memorandum* from Lauro L. Baja, Jr., Undersecretary for Policy, Department of Foreign Affairs, Republic of the Philippines to all Philippine Embassies (11 Nov. 1998), p. 1. MP, Vol. III, Annex 35.

[748] *Letter* from Alexander P. Pama, Captain, Philippine Navy, to Alicia C. Ramos, Assistant Secretary for Asian and Pacific Affairs, Department of Foreign Affairs, Republic of the Philippines (13 Nov. 2004), p. 2. MP, Vol. III, Annex 54.

[749] Armed Forces of the Philippines, *Chronological Development of Artificial Structures on Features*, p. 33. MP, Vol. IV, Annex 96.

[750] *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 983577 (5 Nov. 1998), pp. 1-2. MP, Vol. VI, Annex 185.

characterized the complained-of activities as "the work of local fishing authorities undertaking repair and renovation".[751] The Chinese Foreign Minister, Tang Jiaxuan, reaffirmed this statement in a conversation with the Philippine Secretary of Foreign Affairs Domingo L. Siazon, Jr. on 14 November, emphasizing that "there is no change in the civilian nature of the facilities".[752]

6.97 By February 1999, one of the sites at Mischief Reef had been augmented with a helicopter pad.[753] That site and another were equipped with new communications equipment and wharves.[754] Following this construction, China stated: "The new facilities are meant for civilian use and not for military purposes".[755] At a bilateral meeting the next month, the Chinese stated that the facilities "will remain for civilian purposes".[756]

6.98 Below at **Figure 6.8** are aerial photographs taken in 2003 of what by then had become artificial islands, located respectively at 9°55'27"N, 115°32'34" E(Site 1) and 9°52'51"N, 115°31'15"E (Site 2):

[751] *Memorandum* from Ambassador of the Republic of Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-77-98-S (9 Nov. 1998), p. 1. MP, Vol. III, Annex 34. *See also Memorandum* from Ambassador of the Republic of Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-76-98-S (6 Nov. 1998). MP, Vol. III, Annex 33.

[752] *Memorandum* from the Secretary of Foreign Affairs of the Republic of the Philippines to the President of the Republic of the Philippines (14 Nov. 1998), p. 1. MP, Vol. III, Annex 36.

[753] *Letter* from Alexander P. Pama, Captain, Philippine Navy, to Alicia C. Ramos, Assistant Secretary for Asian and Pacific Affairs, Department of Foreign Affairs, Republic of the Philippines (13 Nov. 2004), p. 2. MP, Vol. III, Annex 54.

[754] *Id.*

[755] *Memorandum* from Ambassador of the Republic of Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-18-99-S (15 Mar. 1999), p. 1. MP, Vol. III, Annex 38.

[756] Government of the Republic of the Philippines and Government of the People's Republic of China, *Joint Statement: Philippine-China Experts Group Meeting on Confidence Building Measures* (23 Mar. 1995), p. 2. MP, Vol. VI, Annex 178.

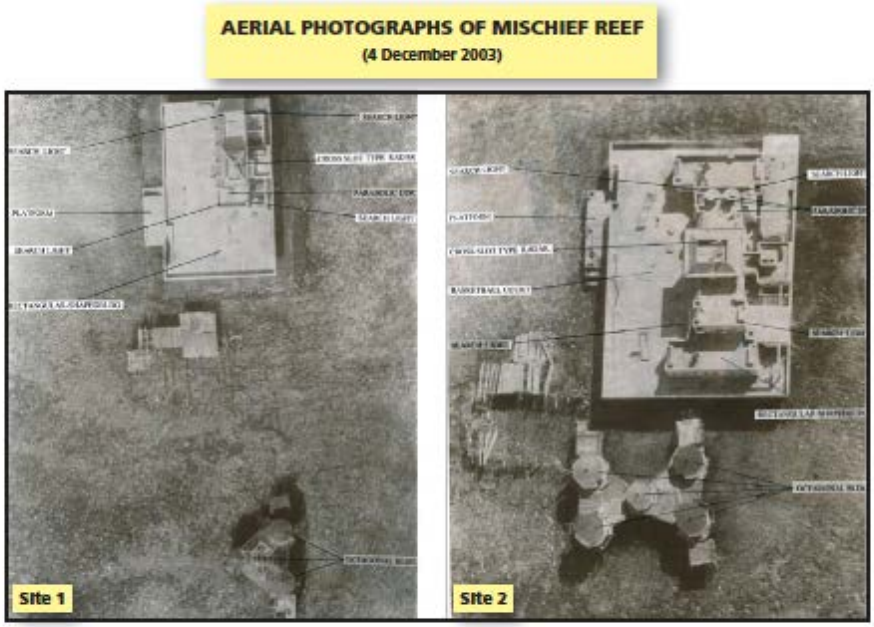

Figure 6.8

6.99 Between 2004 and 2012, China added telecommunications equipment to the structures at both sites.[757] Aerial photographs from 27 February 2013 are reproduced below as **Figure 6.9** and **Figure 6.10** (following page 198).

B. Violations of UNCLOS Articles 60 and 80

6.100 Under UNCLOS, the coastal State has the exclusive right to regulate the establishment and use of artificial islands, installations and structures within its EEZ. Article 56(1) provides:

> In the exclusive economic zone, the coastal State has:
>
> . . .
>
> (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
>
> (i) the establishment and use of artificial islands, installations and structures
> . . .

[757] Armed Forces of the Philippines, *Chronological Development of Artificial Structures on Features*, pp. 31-42. MP, Vol. IV, Annex 96.

6.101 Article 60 provides:

> *Article 60*
>
> *Artificial islands, installations and structures in the exclusive economic zone*
>
> 1. In the exclusive economic zone, the coastal State shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of:
>
> (a) artificial islands;
>
> (b) installations and structures for the purposes provided for in article 56 and other economic purposes;
>
> (c) installations and structures which may interfere with the exercise of the rights of the coastal State in the zone.
>
> 2. The coastal State shall have exclusive jurisdiction over such artificial islands, installations and structures, including jurisdiction with regard to customs, fiscal, health, safety and immigration laws and regulations.
>
> . . .

Article 80 provides that the provisions of Article 60 apply *mutatis mutandis* with respect to the continental shelf.

6.102 It is thus a violation of the Convention for a State other than a coastal State to construct an artificial island, installation or structure in the coastal State's EEZ or continental shelf absent the coastal State's consent. This is made clear in Article 60(1), which grants the coastal State the "*exclusive* right . . . to authorize and regulate the construction" of such structures.

6.103 Because Mischief Reef is located within 200 M of Palawan, and not within 200 M of any other feature claimed by China that is capable of generating an EEZ or a continental shelf, it falls within the Philippines' EEZ and continental shelf. As such, any other State seeking to build an artificial island, installation or structure on the feature must seek and receive authorization from the Philippines. China did neither. To the contrary, China acted in the face of the Philippines' protests that it refrain from these activities. Because China acted without the Philippines' authorization, it violated Articles 56(1)(b)(i), 60(1) and 80 of the Convention.

AERIAL PHOTOGRAPH OF SITE 1 AT MISCHIEF REEF
(27 February 2013)

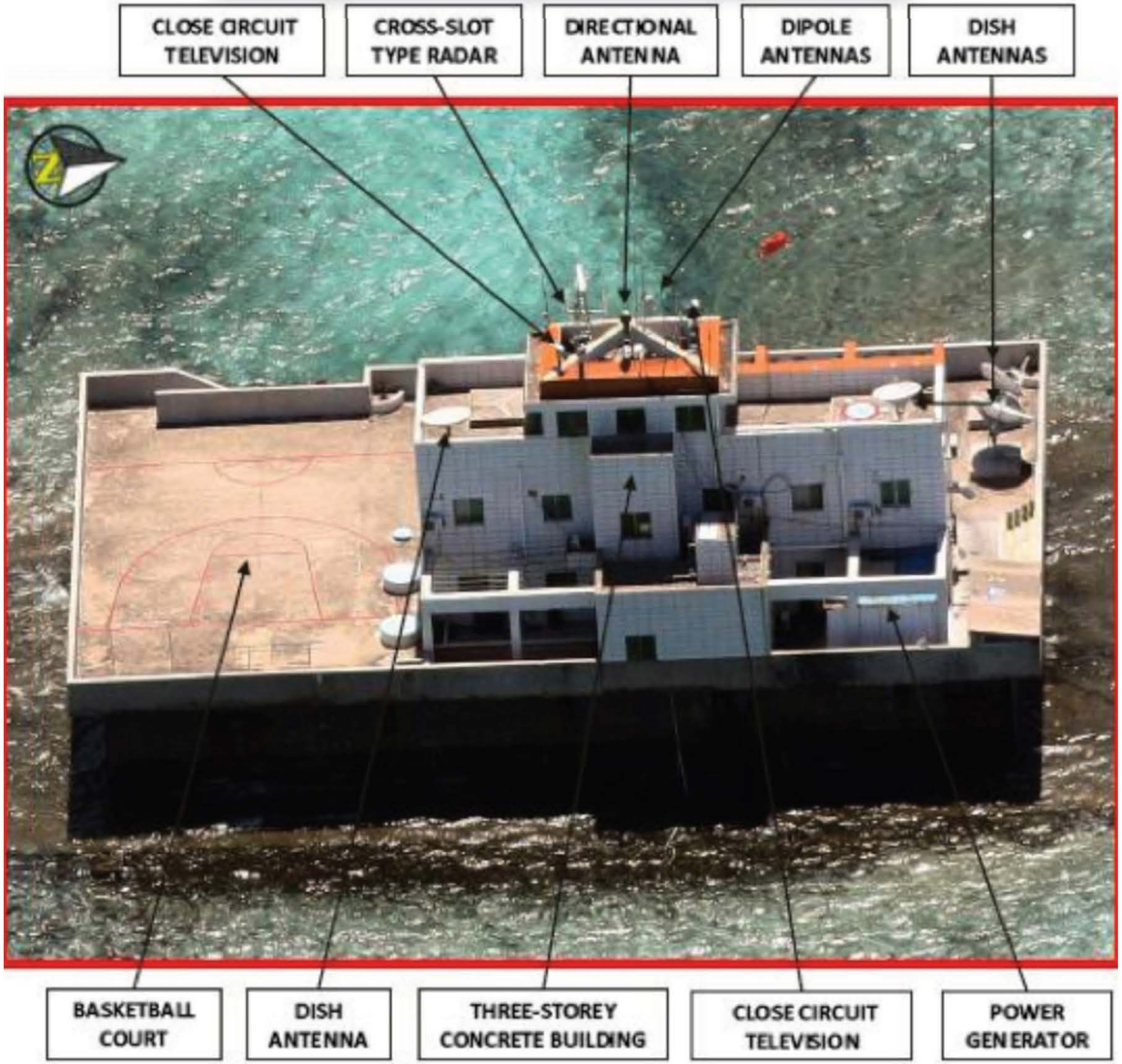

Figure 6.9

AERIAL PHOTOGRAPH OF SITE 2 AT MISCHIEF REEF
(27 February 2013)

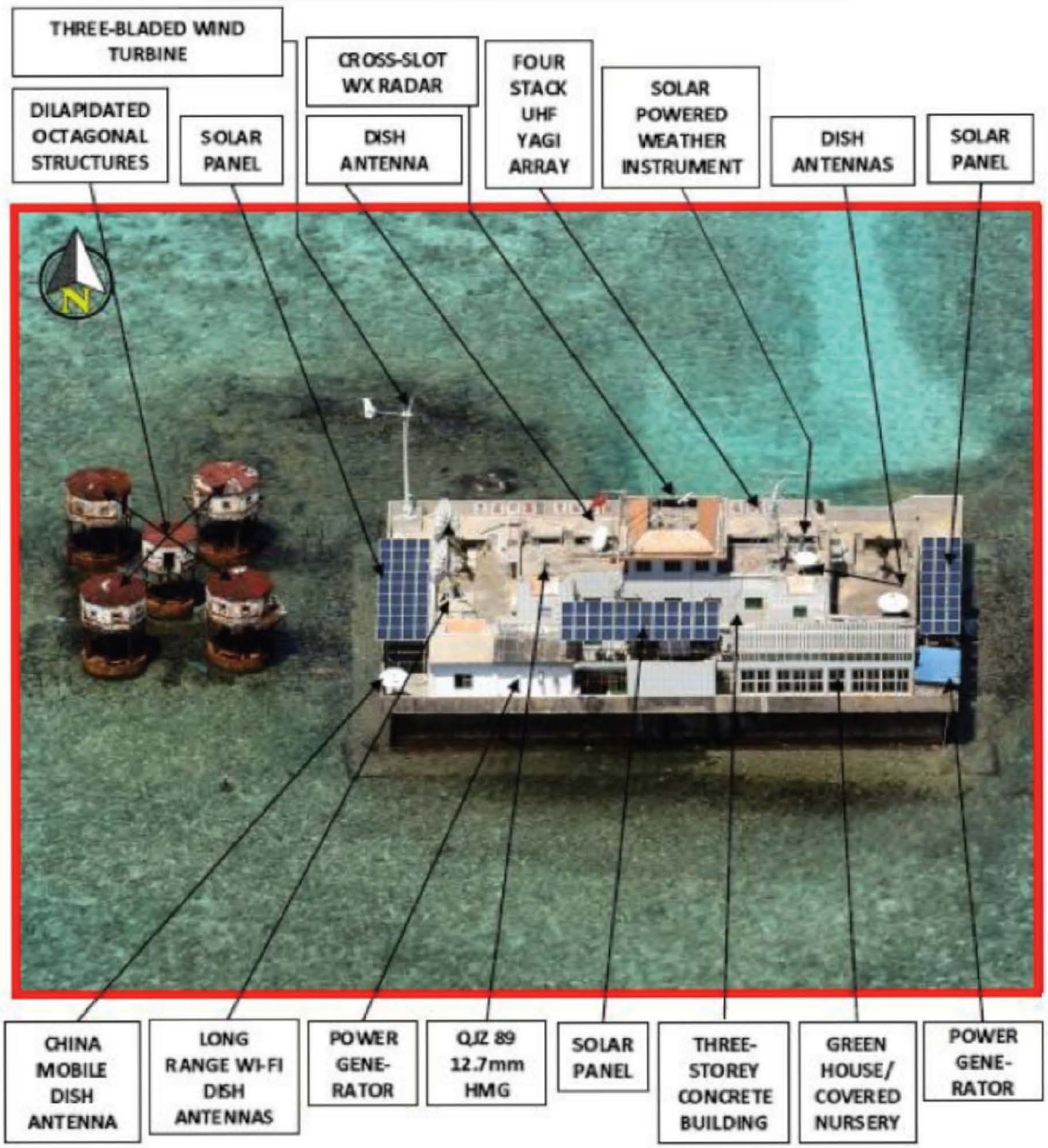

Figure 6.10

6.104 China's violation of the exclusive rights of the Philippines under Articles 60 and 80 is a continuing one. Philippine consent is required not only for the construction of artificial islands, installations and structures but for their operation and use. No such consent was requested from or granted by the Philippines.[758]

C. "Appropriation" of Mischief Reef

6.105 The construction of an artificial island, installation or structure in the EEZ of another State without its consent and under claim of title constitutes an unlawful act of appropriation. As explained above,[759] low-tide elevations cannot be "fully assimilated with islands or other land territory" from the viewpoint of "the acquisition of sovereignty".[760] While sovereignty over *islands* is determined by general international law applicable to the acquisition of land territory, the ICJ has drawn a distinction between islands and low-tide elevations. The Court has made clear that "low-tide elevation[s] cannot be appropriated"[761] under general international law, and that sovereignty and other rights in relation to them are determined by the law of the sea, namely by the maritime zone in which they are located. Thus, if they are within the territorial sea, then they are subject to the sovereignty of the State in whose territorial sea they are located.

6.106 In *Qatar v. Bahrain*, the Court held that Qatar had sovereignty over Fasht al-Dibl, a low-tide elevation, because it was located within Qatar's territorial sea.[762] Likewise, in *Malaysia/Singapore*, the status of South Ledge, a low-tide elevation, was held to depend on

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[758] Moreover, even where a State is permitted by the Convention to construct an artificial island, installation, or structure, it is required by UNCLOS to give due notice of any such construction. China, in failing to provide due notice to the Philippines of its activities at Mischief Reef, has violated Article 60(3), which provides:

> Due notice must be given of the construction of such artificial islands, installations or structures, and permanent means for giving warning of their presence must be maintained. Any installations or structures which are abandoned or disused shall be removed to ensure safety of navigation, taking into account any generally accepted international standards established in this regard by the competent international organization. Such removal shall also have due regard to fishing, the protection of the marine environment and the rights and duties of other States. Appropriate publicity shall be given to the depth, position and dimensions of any installations or structures not entirely removed.

[759] *See supra* para. 5.86.

[760] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, I.C.J. Reports 2001, para. 206. MP, Vol. XI, Annex LA-26.

[761] *Id.*, para. 200.

[762] *Id.*, paras. 204-206.

the outcome of the as-yet unresolved maritime delimitation under UNCLOS still to occur between Malaysia and Singapore.[763]

6.107 Here, Mischief Reef is subject to the sovereign rights of the Philippines, because it lies within its EEZ and continental shelf. By claiming "sovereignty" over this feature because it is encompassed by the nine-dash line, and by physically seizing it and constructing artificial islands, installations, and structures on top of it, China has unlawfully sought to appropriate it, in violation of the Philippines' rights as the coastal State under UNCLOS.

D. Environmental Violations

1. China's Construction of Artificial Islands, Installations and Structures Breaches Its Obligations To Protect and Preserve the Marine Environment

6.108 As discussed in the previous Section of this Chapter,[764] China has a general obligation under UNCLOS to protect and preserve the environment. The obligation under Article 192 makes it incumbent upon China to ensure that its activities do not result in harm to the marine environment. China is required to take active measures to maintain the present condition of the environment. Article 194(5) indicates that this includes measures necessary to protect rare and fragile ecosystems, such as the coral reefs in the South China Sea. The CBD, which applies to "activities . . . regardless of where their effects occur",[765] also obligates China to ensure the conservation and sustainable use of biological resources important for biological diversity.

6.109 As elaborated above,[766] the coral reefs of the South China Sea, including Mischief Reef, are fragile ecosystems, home to vulnerable species and important incubators of marine biodiversity.

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[763] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Merits, Judgment, I.C.J. Reports 2008, paras. 297-299. MP, Vol. XI, Annex LA-31 ("[T]he Court concludes that for the reasons explained above, sovereignty over South Ledge, as a low-tide elevation, belongs to the State in the territorial waters of which it is located".).

[764] *See supra* paras. 6.67-6.72.

[765] CBD, Art. 4(b). MP, Vol. XI, Annex LA-82.

[766] *See supra* para. 6.48.

6.110 The construction of artificial islands on the coral reef at Mischief Reef has inevitably harmed the fragile ecosystem there, and resulted in significant damage to the habitats of vulnerable species. First, the immediate and obvious effect of the construction of concrete structures on coral reefs is the reduction of the reef and displacement of organisms inhabiting it.[767] The harm caused by such a loss reverberates throughout the ecosystem due to the important role coral reefs play in maintaining the health and vitality of the marine environment.[768] Furthermore, the existence of such concrete structures increases the damage done to the reef by wave action and storms, further degrading the reef's structural integrity.[769] Second, human habitation on the artificial islands necessarily entails the disposal of waste into the surrounding environment. This pollution compounds existing environmental effects caused by the construction.[770] Additionally, the disposal of waste water promotes algal growth in the area surrounding the reef, leading to a "permanent shift from a coral-based community to an algal-based community that can have detrimental effects on fisheries and the environment".[771]

6.111 Consequentially, by its construction of artificial islands, installations and structures on these features China has breached its obligations under the Convention and the CBD to protect and preserve the marine environment and ensure its conservation.

2. China's Failure To Conduct an Environmental Impact Assessment Breaches Its Obligations under the Convention

6.112 Article 206 of UNCLOS requires a State to prepare an environmental impact assessment and communicate its results if the State reasonably believes that its actions will result in substantial harm to the marine environment. As the *Virginia Commentary* explains, Article 206 is "similar to the requirement[] . . . to prepare environmental impact statements in

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[767] Carpenter Report, p. 16. MP, Vol. VII, Annex 240.

[768] *See id.*, pp. 8-9, 17-18.

[769] *Id.*, p. 17.

[770] *Id.*, p. 16.

[771] *Id.*

respect of actions likely to affect the quality of the environment in a significant way".[772] It is "a particular application of the obligation" set out in Article 194(2),[773] which provides:

> States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.

6.113 China has failed to conduct environmental impact assessments and/or to communicate their results with respect to its construction activities on Mischief Reef. Its failure to do so violates its obligations under Articles 206 and 194 of the Convention.

IV. THE DANGEROUS AND UNLAWFUL CONDUCT OF CHINA'S VESSELS AT SCARBOROUGH SHOAL

6.114 China has operated vessels in a manner threatening to Philippine vessels in the vicinity of Scarborough Shoal, by engaging in highly dangerous manoeuvres that have caused serious risks of collision. The Chinese vessels belong to two government agencies, the Fisheries and Law Enforcement Command ("FLEC") and China Marine Surveillance ("CMS"), and have been operated with the apparent purpose of dissuading Philippine vessels from approaching the Shoal. China's conduct is inconsistent with the provisions of UNCLOS concerning safe navigation, including Articles 94 and 21, and with the relevant international regulations referred to therein, namely the Convention on the International Regulations for the Prevention of Collisions at Sea (COLREGS).[774]

A. The Conduct of Chinese Vessels at Scarborough Shoal

6.115 On 26 May 2012, at approximately 15:50 local time, a Philippines Bureau of Fisheries and Aquatic Resources vessel, the MCS 3008, began to traverse the territorial sea of

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[772] *Virginia Commentary*, Vol. 4, para. 206.1. MP, Vol. XI, Annex LA-147.

[773] *Id.*

[774] Convention on the International Regulations for Preventing Collisions at Sea (hereinafter "COLREGS"), 1050 U.N.T.S. 18 (20 Oct. 1972), entered into force 15 July 1977. MP, Vol. XI, Annex LA-78.

Scarborough Shoal to resupply a Philippine Coast Guard vessel, the BRP *Corregidor*.[775] The MCS 3008 is a small, 90 tonne-vessel, measuring 30 metres in length.

6.116 When she was approximately 7 M from Scarborough Shoal, the MCS 3008 was approached by a China Marine Surveillance vessel, the CMS 71.[776] At 1,111 tonnes and 74 metres,[777] the CMS 71 is significantly larger than the MCS 3008.

6.117 A contemporaneous Outgoing Dispatch prepared by personnel aboard the MCS 3008[778] records how the CMS 71 approached her. The Chinese vessel "increased speed" and, when "less than 100 meters" away, attempted to cross on the MSC 3008's port bow.[779] The MCS 3008 avoided colliding with the CMS 71 only by increasing its speed to 20 knots and "altering course to the starboard".[780] This last-second manoeuvre enabled the MSC 3008 to pass "through the rear of the CMS 71 in order to evade a possible impact".[781]

6.118 Immediately after her near ramming of the MCS 3008, the CMS 71 deployed behind the MCS 3008, and then moved to its starboard.[782] As described in the Outgoing Dispatch, after the MCS 3008 "evade[d] the first dangerous maneuver of CMS 71", the "same vessel immediately swinged to its starboard" and then "again attempted to cross starboard bow of this vessel".[783] Again, collision was avoided only because the MCS 3008 "immediately maneuvered hard port right away", allowing it to "pass[] through the rear" of the CMS 71.[784]

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[775] *Report* from Angelito A. Arunco, et. al., FRPLEU-QRT Officers, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines, to Director, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines (28 May 2012), p. 2, para. 1.a. MP, Vol. IV, Annex 82.

[776] *Id*.

[777] "Zhong Guo Hai Jian 71," *Marine Traffic*. MP, Vol. X, Annex 343.

[778] *Report* from Angelito A. Arunco, et. al., FRPLEU-QRT Officers, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines, to Director, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines (28 May 2012), p. 2. MP, Vol. IV, Annex 82.

[779] *Id.*, p. 2, para. 1.a.

[780] *Id*.

[781] *Id*.

[782] *Id.*, p. 2, para. 1.b.

[783] *Id*.

[784] *Id*.

6.119 The MCS 3008 was nearly hit a third time by another Chinese state vessel, the FLEC 303, operated by China's Fisheries and Law Enforcement Command.[785] The FLEC 303 is a 1,000 tonne vessel measuring 70 metres bow to stern.[786]

6.120 As the CMS 71 had just done, the FLEC 303 sped toward the MCS 3008.[787] The Outgoing Dispatch records that the FLEC 303 "steered towards our position" and "aim[ed] to cross" the MCS 3008's "starboard bow".[788] Again, a collision was avoided only because the MCS 3008 "reacted by increasing speed to 22 knots and swerving towards the rear of [the] FLEC 303".[789]

6.121 Nearly an hour after the first near-collision, still another Chinese vessel – the CMS 84 – also came close to colliding with the MCS 3008. The CMS 84 is a new 1,500 tonne vessel with a length of 88 metres, capable of carrying 50 personnel.[790] She chased the MCS 3008 until the latter approached the BRP *Corregidor* (the Philippine vessel that the MSC 3008 was attempting to resupply).[791] While the MCS 3008 was alongside the BRP *Corregidor*, the CMS 84 crossed her starboard side at less than 100 yards.[792]

6.122 Approximately fifteen minutes later, the CMS 84 again attempted to cross in front of the now-underway MCS 3008.[793] The Outgoing Dispatch reports that the "CMS 84 began to chase our vessel".[794] Anticipating that the CMS 84 intended "to cross through the bow", the

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[785] *Id.*, p. 3.

[786] S. Yang and Z. He, "Inauguration of South China Sea Corps of China Fisheries and Law Enforcement Command and the Delivery Ceremony of 'FLEC Vessel 303' Held in Guangzhou", *China Fisheries*, No. 1 (2001). MP, Vol. X, Annex 313.

[787] *Report* from Angelito A. Arunco, et. al., FRPLEU-QRT Officers, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines, to Director, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines (28 May 2012), p. 2, para. 1.c MP, Vol. IV, Annex 82.

[788] *Id*.

[789] *Id*.

[790] "'China Marine Surveillance 84' Vessel Joins the South China Sea Branch of the China Marine Surveillance", *Xinhua* (8 May 2011). MP, Vol. X, Annex 315.

[791] *Report* from Angelito A. Arunco, et. al., FRPLEU-QRT Officers, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines, to Director, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines (28 May 2012), p. 2, para. 1.d. MP, Vol. IV, Annex 82.

[792] *Id.*, p. 3, para. 1.e.

[793] *Id.*, p. 3, para. 1.g.

[794] *Id*.

MCS 3008 "increased speed which eventually caused the Chinese vessel to be left behind".[795] The two vessels missed colliding by just a "few yards".[796]

6.123 Chinese vessels continued to pursue the MCS 3008, when it navigated toward the basin of Scarborough Shoal. Three Chinese vessels – the FLEC 303, CMS 71 and FLEC 306[797] – approached the MCS 3008. When the FLEC 303 was approximately 50 yards away, it "immediately altered course as if crossing to [the MCS 3008's] starboard".[798] However, instead of sailing out of the path of the MCS 3008, when the FLEC 303 reached a position "dead ahead" of the MCS 3008, it "decreased speed and established" itself in a "blocking position".[799] Collision was avoided only because the MCS 3008 altered course, so that it "swerved towards the rear of the Chinese vessel", enabling it "to evade a possible impact".[800] When the second Chinese state vessel, the CMS 71, arrived, traveling "fast", it too nearly hit the MCS 3008, passing within approximately 70 yards on its port side.[801]

6.124 Still another risk of collision occurred when the MCS 3008 reached the basin of Scarborough Shoal. There, as reported in the Outgoing Dispatch, the FLEC 306 started "all engines back and *determined to ram our vessel*".[802] The MCS 3008 narrowly escaped being hit by speeding up and "immediately maneuver[ing] hard left".[803] This was "just enough to dodge" – by only approximately *10 metres* on its portside – the oncoming Chinese vessel.[804]

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[795] *Id*.

[796] *Id*.

[797] Like her sister ships, FLEC 306 is one of the more "advanced fishery law enforcement vessels that have been built up until now". Her tonnage is 400 tonnes and she measures 56 metres long. Liang Ganghua, "China's First Large Fishery Law Enforcement Vessel Permanently Stationed at the Xisha Islands Is Officially Placed Into Service", *Xinhua* (2 Sept. 2011). MP, Vol. X, Annex 317.

[798] *Report* from Angelito A. Arunco, et. al., FRPLEU-QRT Officers, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines, to Director, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines (28 May 2012), p. 3, para. 1.h. MP, Vol. IV, Annex 82.

[799] *Id*.

[800] *Id*.

[801] *Id*., p. 3, para. 1(i).

[802] *Id*., p. 4, para. 1(m).

[803] *Id*.

[804] *Id*.

The presence of a "shallow area" only 25 metres to the MCS 3008's starboard made the encounter especially hazardous.[805]

6.125 The hazards faced by the MCS 3008 that day are not isolated events. On 28 April 2012, another Chinese state vessel – the FLEC 310 – caused a similar risk of collision when it aggressively manoeuvred very near the Philippines' BRP *Pampanga*. The FLEC 310 is the most advanced ship in the FLEC's fleet, at 2,580 tonnes and 108 metres.[806] It is "equipped with an onboard Z-9A helicopter, a modernized surface broadband satellite communication system, a photoelectric tracer evidence collection system, a maritime ultraviolet imager and a color fish finder".[807] A photograph of her appears below as **Figure 6.11.**

Figure 6.11

6.126 According to a Philippine Coast Guard report produced the same day, at 09:00 local time, while the BRP *Pampanga* was stationary, the FLEC 310 approached her at 20 knots

[805] *Id*.

[806] People's Republic of China, Ministry of Agriculture, "More Powerful Equipment Added to Enforce Rights and Protect Fisheries" (9 Mar. 2010), p. 1. MP, Vol. V, Annex 111.

[807] *Id*.

from her port bow, veering away only when it was within 600 metres.[808] Fifteen minutes later, the FLEC 310 nearly collided with another Philippines vessel, the BRP *Edsa II*.[809] The Philippines Coast Guard report describes how the FLEC 310 passed from the "starboard quarter to the port side" of the BRP *Edsa II* at a distance of just 200 yards while traveling at over 20 knots.[810] The FLEC 310's high speed generated a two-metre wave in her wake, which "battered" two Philippine rubber boats that were in the water at the time.[811] These events are described by the Philippines Coast Guard report in the following terms:

> The bullying made by FLEC 310 speeding up and passing in front of [the BRP *Pampanga*] at a distance of about 600 yards and passing at the fantail of [the BRP *Edsa II*] at a fast speed generating big waves while rubber boats . . . are launched for transfer of personnel is a violation of the International Code of Conduct and placing at a hazardous/great risk the safety of the vessels and the personnel on board in such close call or near collision situations.[812]

6.127 In May 2012, China warned the Philippines to stop sending its vessels to Scarborough Shoal or face the consequences.[813] The attempts by Chinese vessels to ram or harass Philippine vessels approaching the Shoal demonstrated that China was prepared to back up its threat. As a consequence, in the interest of avoiding violence, the Philippines decided to refrain from sending its vessels to the Scarborough Shoal area, and instead to pursue peaceful means of resolving this dispute, including by means of these proceedings.

B. Applicable Law

1. The COLREGS

6.128 Article 94(3) of UNCLOS sets out the duties of a flag State. As stated in Article 94(3)(c), those duties include:

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[808] *Report* from Commanding Officer, SARV-003, Philippine Coast Guard, to Commander, Coast Guard District Northwestern Luzon, Philippine Coast Guard (28 Apr. 2012), paras. 5.46, 7.1. MP, Vol. IV, Annex 78.

[809] *Id.*, para. 5.46.

[810] *Id.*

[811] *Id.*

[812] *Id.*, para. 7.1.

[813] *Note Verbale* from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (12) PG-239 (25 May 2012), p. 2. MP, Vol. VI, Annex 211.

> Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, *inter alia*, to:
>
> . . .
>
> (c) the use of signals, the maintenance of communications and *the prevention of collisions.*

6.129 Article 94(5) clarifies the scope of these obligations. It provides:

> In taking the measures called for in paragraph[] 3 . . . each State is required to conform to *generally accepted international regulations*, procedures and practices and to take any steps which may be necessary to secure their observance.[814]

6.130 The reference to "generally accepted international regulations" is understood to include the COLREGS. According to the International Maritime Organization, which publishes the COLREGS and is recognized as an interpretative authority for UNCLOS:[815]

> The basic obligations imposed upon the flag State are contained in article 94 of UNCLOS which requires flag States to take measures to ensure safety at sea which conform to "generally accepted international regulations, procedures and practices" (article 94 (3), (4) and (5)). The following IMO conventions may, on account of their world-wide acceptance, be deemed to fulfill the requirement of general acceptance:
>
> . . .
>
> Convention on the International Regulations for Preventing Collisions at Sea, 1972 (COLREG 1972)[.][816]

6.131 Likewise, the "international regulations relating to the prevention of collisions at sea," referred to in Article 21(4) of UNCLOS, are generally recognized as the COLREGS.[817]

6.132 The COLREGS are rules of international law that are binding as between the Philippines and China. They were ratified by China on 7 January 1980, and entered into force with respect to China on 25 May 1980. The Philippines acceded to the COLREGS on 15

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[814] (Emphasis added.)

[815] *See* P. Birnie, et. al., *International Law and the Environment* (3d ed., 2009), p. 382. MP, Vol. XI, Annex LA-158.

[816] International Maritime Organization, *Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization*, Doc. No. LEG/MISC/3/Rev.1 (6 Jan. 2003), pp. 10-11. MP, Vol. XI, Annex LA-174.

[817] *See UNCLOS 1982 Commentary: Supplementary Documents* (M. Nordquist, et. al., eds. 2012), pp. 710, 775. MP, Vol. XI, Annex LA-165.

December 1981, and they entered into force with respect to the Philippines on 15 March 1982.[818]

6.133 The COLREGS are, by their terms, applicable to "all vessels upon the high seas and in all waters connected therewith navigable by seagoing vessels".[819] As the Supplement to the *Virginia Commentary* states: "Within the general framework established by the provisions of UNCLOS, COLREGS applies to the high seas, the EEZ, the territorial sea, archipelagic waters, straits used for international navigation and archipelagic sea lanes".[820] While Article 21(4) literally applies only to foreign ships in innocent passage, the failure of the coastal State itself to ensure that its vessels respect the COLREGS in its territorial sea would endanger navigation by foreign ships in the territorial sea, and as such would violate its duty under Article 24 not to hamper innocent passage as well as its duty to publicize dangers to navigation. Increasing the risk of collision also increases the risk of pollution in a manner inconsistent with its obligations both as a coastal State and as a flag State under Part XII of the Convention. Article 194(3)(b) specifically refers to "pollution from vessels, in particular measures for preventing accidents". Given the unquestioned need for uniformity if rules of the road are to work, respect for the COLREGS is an indispensable measure in this regard. Thus, no matter which Party is sovereign over Scarborough Shoal and its territorial sea – a question that is not before this Tribunal – both Parties are obligated to comply with the COLREGS.

2. The Obligations Set Out in the COLREGS

6.134 Rule 2 of the COLREGS sets out the general principle of responsibility for the prevention of collisions at sea. It provides:

> (a) Nothing in these Rules shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to comply with these Rules or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.
>
> (b) In construing and complying with these Rules due regard shall be had to all dangers of navigation and collision and to any special circumstances,

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[818] International Maritime Organization, *Status of Conventions* (10 Feb. 2014), p. 6. MP, Vol. XI, Annex LA-85.

[819] COLREGS, Rule 1(a). MP, Vol. XI, Annex LA-78.

[820] *UNCLOS 1982 Commentary: Supplementary Documents* (M. Nordquist, et. al., eds. 2012), p. 775. MP, Vol. XI, Annex LA-165.

> including the limitations of the vessels involved, which may make a departure from these Rules necessary to avoid immediate danger.[821]

6.135 Rule 6 of the COLREGS addresses the fundamental obligation of all vessels to proceed at a safe speed. It provides:

> *Safe speed*
>
> Every vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions. . . .[822]

6.136 The commentary on the COLREGS in *A Guide to the Collision Avoidance Rules: International Regulations for Preventing Collisions at Sea* makes clear that there is "no doubt" that proceeding at a "safe speed is a prerequisite in all conditions of visibility".[823] The determination of whether a speed is considered safe depends on the particular facts of the situation: "Every vessel is required to proceed at a speed which could be considered safe in the particular circumstances".[824]

6.137 Rule 7 sets out principles concerning risk of collision. Rule 7(a) provides: "Every vessel shall use all available means appropriate to the prevailing circumstances and conditions to determine if risk of collision exists. If there is any doubt such risk shall be deemed to exist".[825] Rule 8 establishes specific requirements regarding the actions vessels must take to avoid collisions, upon determining that a risk of collision exists.[826] It provides:

> *Action to avoid collision*
>
> Any action taken to avoid collision shall be taken in accordance with the Rules of this Part and shall, if the circumstances admit, be positive, made in ample time and with due regard to the observance of good seamanship.
>
> . . .

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[821] COLREGS, Rule 2. MP, Vol. XI, Annex LA-78.

[822] *Id.*, Rule 6. MP, Vol. XI, Annex LA-78.

[823] A.N. Cockcroft and J.N.F. Lameijer, *A Guide to the Collision Avoidance Rules: International Regulations for Preventing Collisions at Sea* (7th ed., 2011), p. 17. MP, Vol. XI, Annex LA-161.

[824] *Id.*, p. 18.

[825] COLREGS, Rule 7(a). MP, Vol. XI, Annex LA-78.

[826] *Id*. (Rule 7 provides the basic rule: "[e]very vessel shall use all available means appropriate to the prevailing circumstances and conditions to determine if risk of collision exists. *If there is any doubt such risk shall be deemed to exist*". (emphasis added)).

> Action taken to avoid collision with another vessel shall be such as to result in passing at a safe distance. The effectiveness of the action shall be carefully checked until the other vessel is finally past and clear.[827]

6.138 Thus, when a vessel determines that a risk exists, it must take action to avoid collision along the lines specified by Rule 8. It follows, therefore, that when a vessel takes an action that *increases* the risk of a collision, it breaches Rule 8.

6.139 Rule 15 establishes the rules governing a "crossing situation". It provides:

> *Crossing Situation*
>
> When two power-driven vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way and shall, if the circumstances of the case admit, avoid crossing ahead of the other vessel.[828]

The circumstance in which one vessel must avoid crossing ahead of the other "applies in a crossing situation in which there is 'risk of collision'".[829] When a vessel violates Rule 15, it implicitly assumes the role of a "give-way vessel",[830] the rules governing which are set out in Rule 16, which provides:

> *Action by give-way vessel*
>
> Every vessel which is directed to keep out of the way of another vessel shall, so far as possible, take early and substantial action to keep well clear.[831]

The action referred to "shall be such as to result in passing at a safe distance".[832]

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[827] *Id.*, Rule 8.

[828] *Id.*, Rule 15.

[829] A.N. Cockcroft and J.N.F. Lameijer, *A Guide to the Collision Avoidance Rules: International Regulations for Preventing Collisions at Sea* (7th ed., 2011), p. 77. MP, Vol. XI, Annex LA-161.

[830] Opinion of Craig H. Allen, Judson Falknor Professor of Law, University of Washington (19 Mar. 2014) (hereinafter "Allen Report"), pp. 4-5. MP, Vol. VII, Annex 239.

[831] COLREGS, Rule 16. MP, Vol. XI, Annex LA-78.

[832] A.N. Cockcroft and J.N.F. Lameijer, *A Guide to the Collision Avoidance Rules: International Regulations for Preventing Collisions at Sea* (7th ed., 2011), p. 78. MP, Vol. XI, Annex LA-161.

3. China Has Violated UNCLOS Article 94 and the COLREGS

6.140 The actions taken by the FLEC 310 on 28 April 2012, and by the FLEC 303, FLEC 306, CMS 71 and CMS 84 on 26 May 2012, violate Rules 2, 6, 7, 8, 15 and 16 of the COLREGS. Appended to the Memorial as Annex 239 (in Volume VII) is an expert report of Professor Craig H. Allen of the University of Washington (hereinafter "Allen Report"),[833] which analyses the conduct of the Chinese vessels and explains how they violated the COLREGS.

6.141 As quoted above, Rule 2 requires all seamen and vessels to engage in good seamanship. As explained by the Allen Report, "intentionally endangering another vessel through high speed closing or 'blocking' maneuvers constitutes a flagrant disregard of the tenants of good seamanship".[834] Yet, this is exactly what China's FLEC 310 did on 26 April 2012 and what its CMS 71 did on 26 May 2012. In so doing, they violated Rule 2(a) of the COLREGS.

6.142 Rule 6 requires that all vessels proceed at a safe speed at all times. During the 28 April 2012 incident, the FLEC 310 approached the BRP *Pampanga* at over 20 knots (over 10 metres per second), veering away at a distance of less than 600 metres.[835] Had the FLEC 310 continued on its course, it would have collided with the BRP *Pampanga* in less than a minute. In that context, 20+ knots is an unsafe speed. Similarly, during the 26 April incident, the FLEC 310 headed for the BRP *Pampanga* at the unsafe speed of 20 knots.[836] In that context, 20+ knots is an unsafe speed.[837]

6.143 Rule 7 specifies that, in cases of doubt, it must be presumed that a risk of collision exists. Therefore, the Chinese vessels were under an obligation to act as if the risk of collision – that their own manoeuvres created – existed.

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[833] Allen Report, pp. 4-6. MP, Vol. VII, Annex 239.

[834] *Id.*, p. 4.

[835] *Report* from Commanding Office, SARV-003, Philippine Coast Guard, to Commander, Coast Guard District Northwestern Luzon, Philippine Coast Guard (28 Apr. 2012), para. 5.46. MP, Vol. IV, Annex 78.

[836] *Id.*, para. 5.32.

[837] Allen Report, p. 4. MP, Vol. VII, Annex 239.

6.144 Rule 8 identifies the actions a vessel must take in response to a risk of collision. They were not taken by China's vessels. Instead, the Chinese vessels exacerbated, rather than mitigated, the risk. On 28 April 2012, for example, the manoeuvres of China's FLEC 310 to "close at high speed to within 200 yards" of the Philippines' *Edsa II* and within 600 yards of the Philippines' *Pampanga* constituted "fail[ure] to take positive action to avoid collision" as requited by Rule 8. On 26 May 2012, the actions of China's CMS 71 closely resembled those of its FLEC 310, and violated Rule 8 in the same way.[838] Thus, the Chinese vessels violated Rule 8, not only by failing to take actions to avoid collision but by taking actions that made collision substantially more likely.

6.145 China's vessels also violated Rules 15 and 16. On 26 May 2012, when the CMS 71 attempted to cross the bow of the MCS 3008 at a distance of 100 metres, it was the "give-way vessel" according to Rule 15.[839] The CMS 71 was thus under the obligation to "keep out of the way"[840] of the MCS 3008, which she did not do. Instead, she attempted to cross the MCS 3008's bow, in violation of Rule 16.[841]

6.146 In like manner, during the incident of 28 April 2012, the FLEC 310's approach toward Philippine vessels made it the "give-way vessel", requiring that it "so far as possible, take early and substantial action to keep well clear".[842] As explained in the Allen report, the FLEC 310's approaches to the Philippine vessels on those occasions were the very opposite of keeping well clear, and were therefore violations of Rule 16.[843]

6.147 Accordingly, China has breached the COLREGS and its obligations under Article 94 of UNCLOS by the dangerous manner in which its vessels conducted themselves at Scarborough Shoal in April and May 2012.

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[838] *Id.*, p. 5.

[839] *Id.*

[840] COLREGS, Rule 15. MP, Vol. XI, Annex LA-78.

[841] Allen Report, p. 5. MP, Vol. VII, Annex 239.

[842] COLREGS, Rule 16. MP, Vol. XI, Annex LA-78.

[843] Allen Report, p. 5. MP, Vol. VII, Annex 239.

V. CHINA'S UNLAWFUL CONDUCT AT SECOND THOMAS SHOAL SINCE THE COMMENCEMENT OF THESE PROCEEDINGS

6.148 Subsequent to the commencement of these proceedings, China has moved aggressively to challenge the long-standing presence of the Philippines at Second Thomas Shoal. The relevant facts are set out in detail in Chapter 3.[844] The Philippines will therefore not recount them in detail here except to remind the Tribunal that just three weeks ago, on 9 March 2014, two China Coast Guard vessels prevented two civilian Philippine vessels from conducting a routine rotation and resupply mission to Second Thomas Shoal.

6.149 China's aggressive actions at Second Thomas Shoal violate the sovereign rights and jurisdiction of the Philippines in multiple respects. As the Philippines observed in its 11 March 2014 *Note Verbale* to the Embassy of China in Manila:

> In accordance with Articles 76 and 77 of the UNCLOS, only the Philippines has sovereign rights over the continental shelf in the area where Ayungin Shoal is located. No other State is lawfully entitled to assert sovereign rights or jurisdiction over said area. In this respect, the Philippines observes that there are no insular features claimed by China in the South China Sea capable of generating any potential entitlement in the area where Ayungin [Second Thomas] Shoal is located.[845]

6.150 China therefore has no right to assert law enforcement or any other kind of jurisdiction in the vicinity of Second Thomas Shoal. Its interdiction of Philippine vessels navigating in the area violates the exclusive rights and jurisdiction appertaining to the Philippines under Articles 56 and 77 of the Convention.

6.151 China's actions also violate the right of the Philippines under Article 279 of the Convention to have this dispute settled peacefully in accordance with Article 2(3) of the U.N. Charter. As discussed above,[846] one critical and universally recognized corollary of the right to have disputes settled peacefully is the right not to have them aggravated or extended. Yet, that is precisely the effect China's actions in and around Second Thomas Shoal have had.

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[844] *See supra* paras. 3.59-3.66.

[845] *Note Verbale* from the Department of Foreign Affairs of the Philippines to the Embassy of the People's Republic of China in Manila, No. 140711 (11 Mar. 2014), p. 2. MP, Vol. VI, Annex 221.

[846] *See supra* paras. 6.43-6.46.

6.152 By unlawfully preventing a routine rotation and resupply mission of the sort that the Philippines has been conducting consistently since 1999, China has dramatically and dangerously altered the *status quo pendente lite*. It has, moreover, done so in a way that poses a direct and serious threat to the health and well-being of the Philippine personnel at Second Thomas Shoal, who are dependent on periodic resupply for the food and water they need to survive. China's behaviour is wholly inconsistent with that expected of a State Party to a pending international legal proceeding, whether or not that State has chosen to appear. If the obligation to settle disputes peacefully is to be fulfilled, China must desist from these unlawful activities.

* * *

6.153 For the reasons explained in the foregoing Sections of this Chapter, the Philippines submits that:

1. China has violated UNCLOS by interfering with the sovereign rights and jurisdiction of the Philippines in its continental shelf and EEZ, as well as traditional fishing by its nationals at Scarborough Shoal;

2. China has breached its obligations under the Convention to protect and preserve the marine environment by failing to prevent environmentally damaging activities by its fishermen at Scarborough Shoal and Second Thomas Shoal;

3. China's construction activities at Mischief Reef constitute unlawful acts in violation of the provisions of UNCLOS regarding artificial islands, installations and structures;

4. China's de facto seizure of Second Thomas Shoal, and its seizure of and construction activities at Mischief Reef constitute unlawful acts of attempted appropriation in violation of UNCLOS;

5. China's actions at Mischief Reef violate its duties to preserve and protect the marine environment under the Convention;

6. China has breached its obligations under UNCLOS by operating its law enforcement vessels in a highly dangerous manner causing serious risks of

collision to Philippine vessels navigating in the vicinity of Scarborough Shoal; and

7. China has breached its obligations and the rights of the Philippines under the Convention by threatening to forcibly remove the *BRP Sierra Madre* and its crew from Second Thomas Shoal, by interdicting Philippine vessels attempting to bring urgently needed food, fresh water and medical supplies, and by other hostile actions that have exacerbated the disputes between the Parties.

CHAPTER 7

THE TRIBUNAL'S JURISDICTION OVER THE CLAIMS OF THE PHILIPPINES

7.1 In the preceding chapters of this Memorial, the Philippines demonstrated the ways in which China's maritime claims and conduct violate the Philippines' rights under UNCLOS. This Chapter will show that the Tribunal has jurisdiction over the Philippines' claims in all respects.

7.2 Before turning to a detailed examination of the jurisdictional issues arising under Part XV of the Convention, two preliminary observations are warranted.

7.3 *First*, this is a case in which one Party – China – has made extensive claims to maritime rights and jurisdiction that have no basis in UNCLOS, an international instrument to which it freely adhered. After exhausting all possibility of negotiation, the other Party – the Philippines – has found it necessary to invoke the Convention's dispute settlement mechanisms to secure its own rights thereunder. In such circumstances, where there is no other viable means for securing redress, the availability of compulsory procedures involving binding decisions constitutes an essential mechanism for maintaining the international legal order.

7.4 This is true in at least three respects.

- Compulsory dispute settlement provides a critical bulwark against abuse. It reduces "political, economic, and military pressures by powerful states seeking to force [developing states] to give up rights guaranteed under the Convention".[847] It provides "an alternative option to expending military, political, or economic capital to protect maritime interests";[848]

- Compulsory dispute settlement also plays a vital role in maintaining the complex balance of interests that UNCLOS represents. When, as here, a convention

[847] Natalie Klein, *Dispute Settlement in the U.N. Convention on the Law of the Sea* (2005), p. 52. MP, Vol. XI, Annex LA-154.

[848] *Id.* (citing "Statement by Expert Panel: U.S. Policy on the Settlement of Disputes in the Law of the Sea", *American Journal of International Law*, Vol. 81, No. 2 (1987), p. 440. MP, Vol. XI, Annex LA-127).

constitutes a consensus package deal[849], the binding settlement of disputes is necessary to ensure authoritative and consistent guidance on its interpretation and application. It is "the pivot upon which the delicate equilibrium of the compromise must be balanced";[850] and

- Compulsory dispute settlement contributes to the prevention, or negotiated resolution, of disputes. As Sir Ian Sinclair explained in a related context: "What is important – what is indeed crucial – is that there should always be in the background, as a necessary check upon the making of unjustified claims, or upon the denial of justified claims, automatically available procedures for the settlement of disputes".[851]

7.5 The *second* preliminary observation is that by ratifying the Convention both the Philippines and China have consented to be bound by its terms, including the provisions of Part XV. This includes advance consent to the jurisdiction of a court or tribunal to which a dispute is properly submitted by either Party. China's decision not to appear in these proceedings does not, and cannot, vitiate that prior consent.

7.6 That said, China's non-appearance does impose on the Tribunal a duty to assess the issue of jurisdiction *propio motu*.[852] Article 9 of Annex VII specifically requires the Tribunal to "satisfy itself . . . that it has jurisdiction over the dispute".[853]

7.7 In the view of the Philippines, the jurisdictional issues in this case are straightforward. China's claim to "historic rights" to the waters, seabed and subsoil of the South China Sea beyond the limits of its entitlements under the 1982 Convention, its exaggerated claims

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[849] Thomas A. Mensah, "The Dispute Settlement Regime of the 1982 United Nations Convention on the Law of the Sea", *Max Planck Yearbook of International Law*, Vol. 2 (1998), pp. 307-08. MP, Vol. XI, Annex LA-140 (citing the statement of the first President of the Third United Nations Conference on the Law of the Sea that "effective dispute settlement would . . . guarantee that the substance and intention within the legislative language of the Convention will be interpreted consistently and equitably".).

[850] U.N. Conference on the Law of the Sea III, *Memorandum by the President of the Conference on document A/CONF.62/WP.9*, U.N. Doc. A/CONF.62/WP.9/ADD.1 (31 Mar. 1976), p. 122. MP, Vol. XI, Annex LA-106.

[851] Ian McTaggart Sinclair, *The Vienna Convention on the Law of Treaties* (2d ed. 1984), p. 235. MP, Vol. XI, Annex LA-125.

[852] *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment, I.C.J. Reports 1974, para. 6. MP, Vol. XI, Annex LA-8; *Aegean Sea Continental Shelf (Greece v. Turkey)*, Jurisdiction, Judgment, I.C.J. Reports 1978, para. 15. MP, Vol. XI, Annex LA-9.

[853] *See also* Art. 25 of the Rules of Procedure.

regarding the entitlements of the various insular and low-tide features at issue in this case, and its interferences with the Philippines' sovereign rights and jurisdiction under UNCLOS all give rise to disputes concerning the interpretation or application of the Convention that are plainly within the Tribunal's jurisdiction. As shown below, all jurisdictional requirements have been satisfied and none of the limitations or optional exceptions to jurisdiction stated in the Convention apply so as to preclude jurisdiction.

7.8 Nevertheless, the Philippines is mindful of the special burden China's non-appearance imposes. To assist the Tribunal, it will therefore go beyond the jurisdictional analysis customary for a Memorial in a case where both parties have appeared. In the remainder of this Chapter, the Philippines will make every effort to take account of, and respond to, the jurisdictional objections China might have raised had it decided to appear.[854] The Philippines will do so by reference to the official and other statements China has made questioning the Tribunal's jurisdiction over these disputes. In adopting this approach, the Philippines should in no way be deemed to accept the validity of any of China's views or claims.

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7.9 The balance of this Chapter is divided into three sections. Section I addresses the threshold requirements of Articles 286 and 288, and demonstrates that all aspects of the dispute raised in the Philippines' Amended Statement of Claim plainly concern the interpretation and application of the Convention. China's decision not to appear can have no effect on the Tribunal's jurisdiction. Section II then addresses Articles 281 and 283 of UNCLOS, and shows that (a) the 2002 ASEAN Declaration on the Conduct of the Parties in the South China Sea (the "2002 DOC" or "DOC") does not bar the exercise of jurisdiction by this Tribunal; and (b) the Philippines fulfilled the requirement to engage in an exchange of views with China. Finally, Section III addresses the limitations and exceptions to jurisdiction set forth in Articles 297 and 298, and makes clear that nothing in either Article affects the Tribunal's jurisdiction over the claims raised by the Philippines.

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[854] Hersch Lauterpacht, *The Development Of International Law By The International Court* (1958), pp. 255-256, n. 42. MP, Vol. XI, Annex LA-121 (In cases of non-appearance, the jurisdictional inquiry of international courts and tribunals "cannot properly be discharged by ignoring, possibly decisive, objections to the jurisdiction for the mere reason that the interested party has not put them forward".).

I. ARTICLES 286 AND 288

7.10 Articles 286 and 288(1) state the essential predicates to the Tribunal's jurisdiction. They provide:

> *Article 286*
>
> *Application of procedures under this section*
>
> Subject to section 3, any *dispute concerning the interpretation or application of this Convention* shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.[855]
>
> *Article 288*
>
> *Jurisdiction*
>
> 1. A court or tribunal referred to in article 287 shall have jurisdiction over any *dispute concerning the interpretation or application of this Convention* which is submitted to it in accordance with this Part.[856]

Taken together, the two articles stand for the proposition that the jurisdiction of the Tribunal depends on the existence of a dispute between the Philippines and China that concerns the interpretation or application of UNCLOS. As the preceding Chapters of this Memorial amply demonstrate, and as elaborated further immediately below, that is plainly the case here.

A. The Philippines' Statement of Claim Presents Disputes Concerning the Interpretation or Application of the Convention

7.11 It is well-settled that a dispute is "a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons".[857] Moreover, "[w]hether there exists an international dispute is a matter for objective determination".[858] In making that determination,

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[855] (Emphasis added.)

[856] (Emphasis added.)

[857] *Mavrommatis Palestine Concessions*, Judgments, *1924, P.C.I.J.* Series A, No. 2, p. 11. MP, Vol. XI, Annex LA-57.

[858] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, I.C.J. Reports 1950, p. 74. MP, Vol. XI, Annex LA-1; *East Timor (Portugal v. Australia)*, Merits, Judgment, I.C.J. Reports 1995, p. 100, para. 22. MP, Vol. XI, Annex LA-22; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 17 para. 22. MP, Vol. XI, Annex LA-24; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea*

a court or tribunal should consider "not only" the statement of claim and final submissions, but also "diplomatic exchanges, public statements and other pertinent evidence", as well as the conduct of the parties both prior to and after the commencement of legal proceedings.[859] Whether a dispute exists or not is a question of substance, not form.[860]

7.12 Before turning to an examination of the disputes the Philippines has submitted, it bears reiterating the issues that are *not* before the Tribunal. In particular, the Philippines does *not* seek a determination of which Party enjoys sovereignty over any of the insular features claimed by both. The Philippines has confined itself to raising claims that squarely require the interpretation or application of UNCLOS.

7.13 To the extent the Amended Statement of Claim raises issues involving features whose sovereignty is disputed, those issues concern only the existence and extent of the maritime entitlements those features generate – questions that are unrelated to who is sovereign over them. In this regard, the Tribunal is asked to determine:

- Whether certain maritime features are islands under Article 121(1), or instead are low-tide elevations under Article 13 that are part of the EEZ or continental shelf of a coastal State under Articles 57 or 76, and that do not themselves generate entitlement even to a territorial sea; and

- Whether certain maritime features that are above water at high tide are "rocks" which can sustain neither human habitation nor economic life of their own under Article 121(3), and accordingly do not generate entitlement to an EEZ or a continental shelf.

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intervening), Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 315, para. 87. MP, Vol. XI, Annex LA-25; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 40, para. 90. MP, Vol. XI, Annex LA-30. *See also Certain Property (Principality of Liechtenstein v. Federal Republic of Germany)*, Preliminary Objections, Judgment, I.C.J. Reports 2005, p. 18, para. 24. MP, Vol. XI, Annex LA-28; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011, para. 30. MP, Vol. XI, Annex LA-34.

[859] *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction, Judgment, I.C.J. Reports 1998, p. 432, para. 31. MP, Vol. XI, Annex LA-23; *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, paras. 29-31. MP, Vol. XI, Annex LA-7.

[860] *Georgia v. Russia*, para. 30. MP, Vol. XI, Annex LA-34.

7.14 This task involves the interpretation and application of Articles 13, 57, 76, 121 and related provisions of the Convention, including those regarding artificial islands, installations and structures. All of the determinations the Philippines asks the Tribunal to make can be made regardless of which State might ultimately be determined to have sovereignty over the disputed features.

7.15 The Philippines is also mindful of China's 2006 Declaration availing itself of the optional exceptions specified in Article 298. The Philippines has therefore confined its claims to those which are not excluded under that Article. This matter is addressed more fully in Section III of this Chapter.

7.16 The contours of the disputes concerning the interpretation or application of the Convention that the Philippines has submitted are straightforward. The essential claims of the Philippines are:

- China's assertion of so-called "historic rights" to the waters, seabed and subsoil beyond the limits of its entitlements under the Convention in the area encompassed by its nine-dash line is inconsistent with UNCLOS;

- China's claim to entitlements of 200 M and more from various rocks, low-tide elevations and submerged features in the South China Sea is also inconsistent with the Convention; and

- China's assertion of the foregoing claims, as well as its efforts to enforce them, have unlawfully interfered with the enjoyment and exercise by the Philippines of its sovereign rights and jurisdiction as a coastal State under the Convention, as well as its navigational rights and freedoms thereunder.

7.17 The foregoing Chapters of this Memorial make clear that these claims concern the interpretation or application of numerous provisions of the Convention, including those of Part II and Parts IV - IX regarding the nature and extent of the entitlements of the coastal State, and the rights and freedoms of all States. The diplomatic exchanges between the

Philippines and China detailed in Chapter 3 likewise make clear that there are legal disputes between the Parties over these same claims.[861]

7.18 It is noteworthy that China's statements questioning the Tribunal's jurisdiction have not sought to deny that there are disputes between it and the Philippines concerning the interpretation or application of the Convention. To the contrary, China's statements have been confined to suggesting that (a) jurisdiction is precluded by the 2002 DOC[862] (which it is not, as shown below in Section II); and (b) the disputes between the Parties are "essentially concerned" with maritime delimitation[863] (which they are not, as shown in Section III).

7.19 Jurisdiction in regard to the different claims that the Philippines has submitted to this Tribunal is addressed below in the order in which they are addressed in this Memorial.

1. China's Claim to "Historic Rights" within the Area Encompassed by the Nine-Dash Line

7.20 As detailed in Chapter 4, China has asserted a claim to "historic rights" with respect to the waters, seabed and subsoil within the areas encompassed by its nine-dash line.[864] This claim exceeds China's entitlements under Articles 56, 57, 76, 77 and 121 of the Convention, among others, and purports to derogate from the rights of the Philippines thereunder. China's claim is incompatible with these provisions of the Convention.

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[861] *See supra* Chapter 3, Section III.

[862] *See, e.g.*, *Note Verbale* from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (13) PG-039 (19 Feb. 2013), p. 1. MP, Vol. III, Annex 3 (stating that "[b]y initiating arbitration proceedings, the Philippines [] contravenes the principles and spirit of the Declaration on the Conduct of the Parties in the South China Sea []".).

[863] Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Hua Chunying's Remarks on the Philippines' Efforts in Pushing for the Establishment of the Arbitral Tribunal in Relation to the Disputes between China and the Philippines in the South China Sea* (26 Apr. 2013), p. 1. MP, Vol. V, Annex 127; *Note Verbale* from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (13) PG-039 (19 Feb. 2013), p. 1. MP, Vol. III, Annex 3 (stating that "[a]t the core of the disputes between China and the Philippines in the South China Sea are the territorial disputes over some islands and reefs of the Nansha Islands".).

[864] *See supra* Chapter 4, Section I.A.

7.21 For its part, the Philippines has been clear and consistent in opposing China's claim. In the view of the Philippines, the nature and extent of a coastal State's maritime entitlements are as set forth in the Convention.[865] In particular:

- Article 3 entitles a coastal State to establish a territorial sea up to a limit not exceeding 12 M;[866]

- Article 57 entitles a coastal State to establish an EEZ not extending beyond 200 M;[867]

- Article 76 entitles a coastal state to a continental shelf comprising the seabed and subsoil of the submarine areas that extend beyond the territorial sea throughout the natural prolongation of the State's land territory to the outer edge of the continental margin, or to a distance of 200 M where the outer edge of the continental margin extends to less than this distance;[868]

- Article 121 provides that islands entitled to maritime zones must be naturally occurring and above sea level at high tide, and that rocks which meet these criteria but cannot sustain human habitation or economic life of their own shall have no EEZ or continental shelf.[869]

7.22 As indicated by its official statements, its diplomatic communications, and its actions, China patently disagrees.[870] In the words of Chinese Foreign Ministry spokesperson, Jiang Yu, in 2011 China is of the view that UNCLOS "does not restrain or deny a country's right which is formed in history and abidingly upheld".[871] More recently, in February 2014, Chinese Foreign Ministry spokesperson, Hong Lei, stated that: "China's maritime rights in

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[865] *Note Verbale* from the Permanent Mission of the Republic of the Philippines to the United Nations to the Secretary-General of the United Nations, No. 000228 (5 Apr. 2011), p. 3. MP, Vol. VI, Annex 200.

[866] Article 3 of UNCLOS provides: "Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention".

[867] Article 57 of UNCLOS provides: "The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured".

[868] Art. 76.

[869] Art. 121(3).

[870] *See supra* Chapter 4, Section I.A.

[871] Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Jiang Yu's Regular Press Conference on September 15, 2011* (16 Sept. 2011). MP, Vol. V, Annex 113.

the South China Sea were formed by history and are protected by international law".[872] The disagreement between the Parties has given rise to a dispute concerning the interpretation and application of Articles 56, 57, 76, 77 and 121, among others.

7.23 The fact that the Convention makes no specific reference to "historic rights" of the kind China asserts does not mean that its claim does not concern the interpretation or application of the Convention. To the contrary, as detailed in Chapter 4, claims to "historic rights" like those China asserts – that is, in maritime areas that formerly were considered "high seas" but were subsumed within the EEZ or continental shelf of a coastal State – were specifically rejected by the drafters of UNCLOS and superseded by it. The question of whether or not China's claim is consistent with UNCLOS, therefore, requires the interpretation and application of the Convention, including but not limited to the specific articles mentioned above.

7.24 Accordingly, there is a dispute concerning the interpretation or application of the Convention with respect to China's claim to "historic rights" within the areas encompassed by the nine-dash line and beyond the limits of its entitlements under UNCLOS.

2. The Scope of China's Potential Entitlements in the Northern Sector

7.25 The Tribunal also has jurisdiction to determine the scope of China's potential maritime entitlements in the Northern Sector of the South China Sea. Here, the only high-tide feature claimed by China that is within 200 M of the nine-dash line is Scarborough Shoal. It

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[872] Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Hong Lei's Statement Regarding Comments by an Official of the United States Department of State on the South China Sea* (8 Feb. 2014), p. 1. MP, Vol. V, Annex 131. Following is the full text of Mr. Hong's statement, in English translation:

> The Chinese maritime rights and interests in the South China Sea were formed historically and are protected by international law. China has remained committed to resolving maritime disputes with the countries involved through negotiation and consultation. Meanwhile, China attaches great importance to maintaining peace and stability in the South China Sea jointly with the Association of Southeast Asian Nations through implementing the *Declaration on the Conduct of Parties in the South China Sea*. As described above, the Chinese position is clear and consistent. Making-up issues and exaggeration of tensions would not help to maintain peace and stability in the Southeast Asian region. The comments made by certain officials in the congressional testimony are not constructive. We urge the United States to take a rational and fair attitude and play a constructive role toward the peace, stability, prosperity and development of the region, not the other way around.

therefore affords the only possible basis for China's claim to sovereign rights and jurisdiction throughout this area.[873]

7.26 China is, moreover, purporting to actually exercise sovereign rights and jurisdiction in the area. This is demonstrated, *inter alia*, by Figure 4.6 (following page 82), which reflects China's request for permission to conduct marine scientific research in the EEZ of the Philippines. Notably, the specific sites for which China asked permission precisely trace the outer contours of the nine-dash line in the Northern Sector.

7.27 China's assertion of jurisdiction in the area up to the nine-dash line in the Northern Sector is also evident from its implementation of a fishing ban in 2012 in all areas of the South China Sea bounded by the 12°N parallel of latitude in the south, and the coasts of the Chinese mainland, Hainan and Taiwan in the north, as depicted in Figure 6.3 (following page 168).

7.28 As described in Chapter 5, however, the Philippines is of the view that Scarborough Shoal is a "rock" within the meaning of UNCLOS Article 121(3) and, as such, generates no entitlement to an EEZ or continental shelf.[874] It is therefore not a viable basis on which to claim any sovereign rights and jurisdiction out to the limits of the nine-dash line in the Northern Sector.

7.29 There is therefore plainly a dispute with respect to the nature and extent of China's potential entitlements in the Northern Sector that requires the interpretation and application of Article 121 of the Convention, a matter over which this Tribunal plainly has jurisdiction.

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[873] *See* Foreign Ministry of the People's Republic of China, *Chinese Foreign Ministry Statement Regarding Huangyandao* (22 May 1997). MP, Vol. V, Annex 106. *See also* Department of Foreign Affairs of the Republic of the Philippines, *Record of Proceedings: 10th Philippines-China Foreign Ministry Consultations* (30 July 1998), p. 23. MP, Vol. VI, Annex 184 (recording the following statements by then Chinese Foreign Minister Tang Jiaxuan: "Huangyan Dao is not a sand bank but rather an island".); *Memorandum* from Rodolfo C. Severino, Undersecretary, Department of Foreign Affairs of the Republic of the Philippines, to the President of the Republic of the Philippines (27 May 1997), p. 2. MP, Vol. III, Annex 25 (recording the Chinese position that "Scarborough shoal is part of the Zhongsha 'islands' (Macclesfield Bank) over which China has an indisputable claim based on historical and jurisprudential grounds".).

[874] *See supra* Chapter 5, Section II.B.

3. Nature and Entitlements of the Maritime Features in the Southern Sector (Spratly Islands)

7.30 The Tribunal also has jurisdiction to determine whether the other maritime features identified in the Philippines' Amended Statement of Claim are islands under Article 121 or low-tide elevations under Article 13; and whether they are capable of generating maritime entitlements, including to a territorial sea, EEZ and continental shelf. This question arises both directly and in respect of the question of whether China's claims to maritime areas within the nine-dash line unlawfully exceed its entitlements under the Convention.

7.31 The Philippines submits that under Article 121 none of the maritime features in the Southern Sector occupied or controlled by the PRC generates an entitlement beyond the territorial sea. Some (Johnson, Cuarteron and Fiery Cross Reefs) are "rocks" under Article 121(3) that generate no entitlement to an EEZ or continental shelf. The others (Mischief, McKennan, Gaven and Subi Reefs, and Second Thomas Shoal) are at most low-tide elevations that, pursuant to Article 13, do not even generate entitlement to a territorial sea.

7.32 China takes a different view. According to China's 14 April 2011 *Note Verbale* to the Secretary General of the United Nations, for example:

> [U]nder the relevant provisions of the *1982 Convention on the Law of the Sea, as well as the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone (1992) and the Law on the Exclusive Economic Zone and Continental Shelf of the People's Republic of China (1998)*, China's Nansha [Spratly] Islands is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf.[875]

7.33 The same view was reiterated on 10 March 2014 when, in response to the Philippines' protest about China's actions to prevent the resupply of the *BRP Sierra Madre* at Second Thomas Shoal, the Department of Boundary and Ocean Affairs of the Chinese Foreign Ministry advised the Ambassador of the Philippines in Beijing that "according to international law of the sea and also according to our domestic law, we claim territorial sea, EEZ, and continental shelf from the Nansha Islands".[876]

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[875] *Note Verbale* from the Permanent Mission of the People's Republic of China to the Secretary-General of the United Nations, No. CML/8/2011 (14 Apr. 2011), p. 2. MP, Vol. VI, Annex 201 (italics in original).

[876] *Memorandum* from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-071-2014-S (10 Mar. 2014). MP, Vol. IV, Annex 100. *See*

7.34 Like the dispute about the nature and maritime entitlements of Scarborough Shoal, the dispute about the maritime features in the Southern Sector plainly concerns the interpretation and application of the Convention, and is therefore subject to the jurisdiction of the Tribunal.

4. China's Interference with the Sovereign Rights and Jurisdiction of the Philippines, and Its Other Violations of Its Obligations under UNCLOS

7.35 In Chapter 6, the Philippines showed the various ways China has, by its conduct, interfered with the sovereign rights and jurisdiction of the Philippines, and otherwise violated its obligations under UNCLOS. The Philippines considers in particular that China's conduct violates the Convention in the following respects:

- China's interference with the efforts of the Philippines to explore for and exploit the living and non-living resources of its EEZ and continental shelf violate Articles 56 and 77;

- China's prevention of Filipino fishermen from conducting their traditional fishing at Scarborough Shoal breaches its obligation under Article 279 to settle the dispute between the parties peacefully in accordance with Article 2(3) of the U.N. Charter, as well as the related obligation not to aggravate or extend the dispute;

- China's toleration, encouragement of and failure to prevent environmentally destructive fishing practices at Scarborough Shoal and Second Thomas Shoal violate its duty under Articles 192 and 194 to protect and preserve the marine environment;

- China's construction of artificial islands, installations and structures at Mischief Reef breaches Articles 56, 60 and 80, as well as its obligations under Articles 192 and 194 to protect and preserve the marine environment;

- China's operation of its law enforcement vessels in a highly dangerous manner causing serious risk of collision with Philippine vessels navigating in the vicinity

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also Memorandum from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-070-2014-S (7 Mar. 2014), para. 4. MP, Vol. IV, Annex 98.

of Scarborough Shoal is inconsistent with Articles 94 and 21, and related rules of international law; and

- China's efforts to impede the rotation and resupply of Philippines personnel stationed at Second Thomas Shoal aboard the *BRP Sierra Madre* violate the Philippines' exclusive sovereign rights and jurisdiction in the EEZ and continental shelf under Article 56 and 77, as well as its right under Article 279 to have this dispute settled peacefully, and the related right not to have the dispute aggravated or extended.

7.36 China disagrees in all respects. As evidenced by its responses to the repeated protests of the Philippines concerning these activities, China justifies all this conduct as legitimate exercises of its sovereign rights and jurisdiction, including "historic rights", within all the areas of the South China Sea encompassed by the nine-dash line.[877] Accordingly, there is plainly "a conflict of legal views or of interests"[878] (i.e., a dispute) between the Parties over each of the aforementioned Chinese violations of the Convention.

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7.37 Accordingly, there are disputes between the Philippines and China concerning the interpretation or application of the Convention's provisions, including Articles 13, 21, 56, 57, 60, 76, 77, 80, 94, 121, 192, 194 and 279, in respect of all of the claims asserted by the Philippines in its Amended Statement of Claim and in this Memorial.

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[877] *See, e.g.*, *Note Verbale* from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (10) PG-137 (13 May 2010). MP, Vol. VI, Annex 196; *Note Verbale* from the Permanent Mission of the People's Republic of China to the Secretary-General of the United Nations, No. CML/8/2011 (14 Apr. 2011). MP, Vol. VI, Annex 201; *Note Verbale* from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (11)PG-202 (6 July 2011), MP, Vol. VI, Annex 202; *Note Verbale* from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (12) PG-239 (25 May 2012), p. 2. MP, Vol. VI, Annex 211; *Note Verbale* from the Department of Foreign Affairs of the Philippines to the Embassy of the People's Republic of China in Manila, No. 140711 (11 Mar. 2014). MP, Vol. VI, Annex 221; *Memorandum* from Assistant Secretary, Asian and Pacific Affairs, Department of Foreign Affairs of the Republic of the Philippines, to Secretary of Foreign Affairs of the Republic of the Philippines (11 Mar. 2014). MP, Vol. IV, Annex 101.

[878] *See Mavrommatis Palestine Concessions*, p. 11. MP, Vol. XI, Annex LA-57.

B. China's Non-Appearance Has No Effect on the Tribunal's Jurisdiction

7.38 China's failure to appear in these proceedings does not deprive the Tribunal of the jurisdiction with which it is otherwise vested. As noted, Article 288(1) states: "A court or tribunal referred to in article 287 shall have jurisdiction over *any* dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part".[879] By its plain terms, this means that the Tribunal, which was duly constituted in accordance with the relevant provisions of Annex VII, is vested with the competence to arbitrate "any dispute" concerning the interpretation or application of the Convention, except as may otherwise be specifically provided.[880]

7.39 This is true whether or not the respondent party chooses to appear. As ITLOS recently held in the *Arctic Sunrise* case, "the absence of a party or failure of a party to defend its case does not constitute a bar to the proceedings".[881] Indeed, the text of Annex VII specifically contemplates the possibility of non-appearance. Article 9 of the Annex states:

> If one of the parties to the dispute does not appear before the Arbitral Tribunal or fails to defend its case, the other Party may request the Arbitral Tribunal to continue the proceedings and to make its award.[882]

Since the Philippines has made such a request, there is no bar to the proceedings continuing. Moreover, China remains "a party to the proceedings . . . with the ensuing rights and obligations".[883]

7.40 Having made its choice, China must accept the consequences. As ITLOS stated in its Order on provisional measures in *Arctic Sunrise*:

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[879] (Emphasis added.)

[880] The Permanent Court of International Justice, interpreting a similarly formulated compromissory clause, held that a court or tribunal seised under such a provision may exercise jurisdiction over a "dispute . . . of any nature" because the clause's jurisdictional reach "is as comprehensive as possible". *Mavrommatis Palestine Concessions*, p. 11. MP, Vol. XI, Annex LA-57 (interpreting the following compromissory clause: "The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations".).

[881] *Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation), Provisional Measures, Order of 22 November 2013*, ITLOS Reports 2013, para. 48. MP, Vol. XI, Annex LA-45.

[882] Art. 25(1) of the Rule of Procedures replicates this language.

[883] *Netherlands v. Russia*, Provisional Measures, para. 51. MP, Vol. XI, Annex LA-45.

> A State which decides not to appear must accept the consequences of its decision, the first of which is that the case will continue without its participation; the State which has chosen not to appear remains a party to the case, and is bound by the eventual judgment in accordance with Article 59 of the Statute.[884]

7.41 Moreover, nothing prevents China from informally presenting information pertaining to relevant questions of fact or law, as other States that chose not to appear in international proceedings have done.[885] In *Arctic Sunrise*, for example, ITLOS noted that "the Russian Federation could have facilitated the task of the Tribunal by furnishing it with fuller information on questions of fact and of law".[886]

7.42 Indeed, if either Party is put at a disadvantage by China's decision not to participate, it is the Philippines. As ITLOS observed in *Arctic Sunrise*: "the Netherlands should not be put at a disadvantage because of the non-appearance of the Russian Federation in the proceedings".[887] Yet, that is exactly the situation China's decision not to appear has created. The Philippines is in the position of having to guess what China's arguments might be and formulate arguments for both States.

II. NOTHING IN SECTION 1 OF PART XV PRECLUDES JURISDICTION

7.43 Section 1 of Part XV sets forth certain general provisions bearing on the jurisdiction of a court or tribunal presented with a dispute pursuant to Article 286. Two of these provisions are pertinent to this case. The first is Article 281, which provides that the procedures stipulated in Part XV do not apply when the parties have agreed to settle their dispute by alternate means to the exclusion of any other procedure. The second is Article 283, which provides that prior to having recourse to compulsory procedures entailing binding decisions, the parties to a dispute shall engage in an exchange of views. As explained below, neither provision impairs the jurisdiction of this Tribunal.

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[884] *Id*., para. 52, quoting *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 24, para. 28. MP, Vol. XI, Annex LA-15.

[885] *See*, for a useful survey of relevant practice, H. W. A. Thirlway, *Non-Appearance Before The International Court Of Justice* (1985), p. 111. MP, Vol. XI, Annex LA-126.

[886] *Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation), Provisional Measures, Order of 22 November 2013*, ITLOS Reports 2013, para. 54. MP, Vol. XI, Annex LA-45.

[887] *Id*., para. 56.

A. Article 281 Does Not Affect the Tribunal's Jurisdiction

7.44 Article 281 is titled "Procedure where no settlement has been reached by the parties". It reads in pertinent part:

> 1. If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.

7.45 In its 19 February 2013 *Note Verbale* rejecting and returning the Philippines' Notification and Statement of Claim, China claimed:

> By initiating arbitration proceedings, the Philippines runs counter to the agreement between the two countries, and also contravenes the principles and spirit of the Declaration on the Conduct of the Parties in the South China Sea (DOC), and particularly "to resolve their territorial and jurisdictional disputes by peaceful means, . . . through friendly consultations and negotiations by sovereign states directly concerned".[888]

7.46 China has either formally or informally articulated the same view on other occasions. On 20 February 2013, for example, Foreign Ministry Spokesperson Hong Lei stated that the institution of these proceedings by the Philippines was inconsistent with the Parties' commitments on "comprehensive and earnest implementation of the DOC".[889]

7.47 In like manner, on 26 April 2013, Foreign Ministry Spokesperson Hua Chunying recalled the "commitment undertaken by all signatories [of the DOC], the Philippines included, . . . that disputes relating to territorial and maritime rights and interests be resolved through negotiations by sovereign states directly concerned therewith".[890] Mr. Hua restated

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[888] *Note Verbale* from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (13) PG-039 (19 Feb. 2013), p. 1. MP, Vol. III, Annex 3 (emphasis in the original).

[889] Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on February 20, 2013* (21 Feb. 2013). MP, Vol. V, Annex 125. *See also* Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on February 19, 2013* (20 Feb. 2013). MP, Vol. V, Annex 124 ("It is also the consensus reached by ASEAN countries and China in the Declaration on the Conduct of Parties in the South China Sea (DOC) to resolve disputes through negotiations between directly concerned sovereign states. The Philippines' note and its attached notice . . . violate the consensus".).

[890] Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Hua Chunying's Remarks on the Philippines' Efforts in Pushing for the Establishment of the Arbitral Tribunal in*

China's rejection of the Philippines' request for arbitration and called for the implementation of the 2002 DOC "in a comprehensive and serious manner".[891]

7.48 China's view that the institution of this arbitration "contravenes the principles and spirit of the Declaration on the Conduct of the Parties in the South China Sea (DOC)" appears to be grounded on Article 281. In other words, China seems to be arguing the 2002 DOC constitutes an agreement by the Parties to settle their disputes through friendly consultations and negotiations to the exclusion of any other means, including the Convention's dispute settlement mechanisms.

7.49 China is mistaken. The 2002 DOC poses no obstacle to the Tribunal's jurisdiction for four reasons. *First*, it is not a legally binding "agreement" within the meaning of Article 281. To the contrary, it is merely a political commitment insufficient to preclude recourse to alternative, legally-binding means of dispute settlement. *Second*, even assuming *arguendo* that the 2002 DOC was intended to be a binding agreement, no settlement has been reached through the means contemplated in it (i.e., consultations and negotiations). *Third*, the DOC does not exclude, either expressly or impliedly, recourse to the dispute settlement procedures of UNCLOS. *Fourth*, in any event, China cannot assert rights under the DOC due to its own flagrant violations of it.

1. The 2002 DOC Is a Non-Binding Political Instrument

7.50 The DOC was signed by ASEAN Member States and China in November 2002. It sets out four trust and confidence building measures,[892] and five voluntary cooperative activities.[893] Paragraph 4 provides:

> The Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized

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Relation to the Disputes between China and the Philippines in the South China Sea (26 Apr. 2013). MP, Vol. V, Annex 127.

[891] *Id.*

[892] Association of Southeast Asian Nations, *Declaration on the Conduct of Parties in South China Sea* (4 Nov. 2002), para. 5. MP, Vol. V, Annex 144.

[893] *Id.*, para. 6.

> principles of international law, including the 1982 UN Convention on the Law of the Sea.

It is this language that China seems to think constitutes a binding international agreement that, under Article 281, precludes recourse to other means of dispute resolution.

7.51 It is well-settled in international law that the status of an instrument as legally binding *vel non* is determined objectively, by reference to its content and the circumstances of its adoption.[894] Here, an examination of the language of the DOC viewed together with the circumstances of its conclusion, make clear that it was not intended to be legally binding. This conclusion is confirmed by the subsequent conduct of the signatory States.

7.52 The DOC notably does not use the term "agree" to describe any of the objectives the signatory States undertook to achieve. Following four preambular paragraphs, the DOC states that the States concerned "[h]ereby *declare* the following" goals (which include, *inter alia*, the exercise of self-restraint in the conduct of activities "that would complicate or escalate disputes in the South China Sea" and the adoption of a code of conduct in the South China Sea that would "further promote peace and stability in the region").[895] On its face, this is not the language of agreement.

7.53 When States enter a binding international agreement, they make that agreement plain. UNCLOS itself provides an instructive counterpoint. The last clause of the Convention's preamble states that the States Parties "[h]ave *agreed* as follows". Similarly, in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, the ICJ deemed a statement in diplomatic minutes of what had been "agreed" between the foreign ministers of the two States to be a crucial indicator of an agreement that created rights and obligations under international law.[896] *A contrario*, the absence of the term in the DOC evinces an intent *not* to enter an agreement creating legally binding obligations.

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[894] *Greece v. Turkey*, p. 39, para. 96. MP, Vol. XI, Annex LA-9; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994, p. 112, para. 27. MP, Vol. XI, Annex LA-21; *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012*, ITLOS Reports 2012, paras. 89, 93. MP, Vol. XI, Annex LA-43.

[895] *See* ASEAN Declaration of Conduct, paras. 5, 10. MP, Vol. V, Annex 144.

[896] *Qatar v. Bahrain*, Jurisdiction and Admissibility, para. 25. MP, Vol. XI, Annex LA-21. *See also Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Merits, Judgment, I.C.J. Reports 2002, pp. 410-412, para. 214, p. 429, para. 263. MP, Vol. XI, Annex LA-27.

7.54 Moreover, paragraph 4 of the DOC, on which China would rely, refers merely to the signatory States' existing obligations under "universally recognized principles of international law"; it creates no new obligations of its own. This too is inconsistent with the notion of a binding agreement and makes clear that the goal stated is merely aspirational.

7.55 In addition, the circumstances surrounding the DOC's adoption provide further evidence that it was not intended to be a legally binding instrument. The DOC was signed in 2002 as something of a stop-gap measure in light of the inability of the ASEAN States and China to achieve consensus on four major areas of disagreement:

(a) the geographic scope of a code of conduct;

(b) restrictions on construction on occupied and unoccupied features;

(c) military activities in the waters adjacent to the Spratly Islands; and

(d) whether or not fishermen found in disputed waters could be detained and arrested.[897]

As a former Secretary-General of ASEAN has written, these disagreements reduced the originally envisioned legally binding "code of conduct" to nothing more than a "political declaration".[898] After two years of difficult negotiation, a non-binding political instrument was considered the best possible outcome under the circumstances.

7.56 China itself has recognized the political nature of the 2002 DOC. During the 16th ASEAN-China Summit in October 2010, H.E. Li Keqiang, then Premier of China's State Council, stated that the DOC is "an important *political* agreement reached among China and ASEAN countries".[899]

7.57 The political and provisional nature of the DOC is further underscored by Point 10, in which the signatory States reaffirmed that the future "adoption of a code of conduct in the South China Sea would further promote peace and stability in the region and agree to work,

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[897] Carlyle Thayer, *ASEAN and China Consultations on a Code of Conduct in the South China Sea: Prospects and Obstacles*, presented to the International Conference on Security and Cooperation in the South China Sea, Russian Academy of Sciences (18 Oct. 2013), p. 3. MP, Vol. X, Annex 310.

[898] Rodolfo Severino, "ASEAN and the South China Sea", *Security Challenges*, Vol. 6, No. 2 (2010), p. 45. MP, Vol. IX, Annex 293.

[899] Ministry of Foreign Affairs of the People's Republic of China, *Remarks by H. E. Li Keqiang, Premier of the State Council of the People's Republic of China, at the 16th ASEAN-China Summit* (16 Oct. 2013), p. 2. MP, Vol. V, Annex 128 (emphasis added).

on the basis of consensus, towards the eventual attainment of this objective".[900] As described in Chapter 3, the ASEAN States and China have been trying without success ever since to agree on the contemplated binding code of conduct.[901] That fact highlights, *a contrario*, that the DOC reflects only non-binding political commitments.

7.58 The 2002 DOC therefore does not constitute a binding agreement to seek settlement of the dispute by peaceful means other than those specified in Section 2 of Part XV of UNCLOS.

2. No Settlement Has Been Reached Pursuant to the DOC

7.59 Even if, *quod non*, the DOC could be viewed as establishing a binding agreement under Article 281 to settle this dispute through "friendly consultations and negotiations", it does not bar the Philippines from resort to compulsory dispute resolution under Section 2 of Part XV of the Convention.

7.60 Article 281 does not preclude recourse to compulsory procedures entailing binding decisions when the agreed alternative procedures have not worked. According to the *Virginia Commentary*: "The agreement to allow parties to a dispute relating to the interpretation or application of the Law of the Sea Convention to resort to means of settlement outside of that Convention was based on the assumption that these other means would result in a settlement of the dispute".[902] "It was considered to be consistent with international jurisprudence that a party may submit a case to the procedures specified in Part XV whenever it [i.e., the Applicant State] considers that the procedure chosen by the parties is no longer likely to lead to a settlement".[903]

7.61 This reading follows from the plain text of Article 281. Recourse to the procedures specified in Section 2 of Part XV is permitted when "no settlement has been reached by recourse to" the alternate means agreed by the parties. This is essentially a question of fact

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[900] ASEAN Declaration of Conduct, para. 10. MP, Vol. V, Annex 144.

[901] *See supra* Chapter 3, Section IV. *See also* "China proposes talks on binding rules of conduct in the South China Sea", *Global Post* (5 May 2013). MP, Vol. X, Annex 324 (reporting statements by the Indonesian Foreign Minister M. Natalegawa and his Chinese counterpart Mr. Wang Yi).

[902] *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 5 (M. Nordquist, et. al., eds., 2002), para. 281.1. MP, Vol. XI, Annex LA-148.

[903] *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 5 (M. Nordquist, et. al., eds., 2002), para. 281.3. MP, Vol. XI, Annex LA-148.

amenable to only two possible answers: either a settlement has been reached or it has not. If it has, the dispute is, of course, over. If it has not, the initiating State is free to institute compulsory procedures under Section 2.

7.62 This reading is also consistent with the jurisprudence. In *Southern Bluefin Tuna*, ITLOS held: "[A] State Party is not obliged to pursue procedures under Part XV, section 1 of the Convention when it concludes that the possibilities of settlement have been exhausted".[904] In a like vein, it also stated that

> this provision [i.e., Article 16 of the Bluefin Tuna Convention] does not require the Parties to negotiate indefinitely while denying a Party the option of concluding, for purposes of both Article 281(1) and 283, that no settlement has been reached. To read Article 16 [of the Bluefin Tuna Convention] otherwise would be unreasonable.[905]

7.63 Here, despite the long-standing nature of the dispute and the numerous exchanges between the Parties discussed above,[906] it is evident that no settlement had been reached pursuant to the 2002 DOC. In the face of China's statements and actions in regard to the disputes identified in the Amended Statement of Claim, the Philippines was entirely justified in concluding that continued negotiation would be pointless,[907] and it is therefore within its rights to initiate this arbitration.

3. The DOC Does Not Exclude Recourse to Other Means of Dispute Settlement

7.64 Again assuming *arguendo* that the DOC constitutes a legally binding agreement within the meaning of Article 281(1), it plainly does not exclude recourse to the dispute

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[904] *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999*, ITLOS Reports 1999, para. 60. MP, Vol. XI, Annex LA-37; *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, Award on Jurisdiction and Admissibility, UNCLOS Annex VII Tribunal (4 Aug. 2000), para. 55. MP, Vol. XI, Annex LA-50; *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003*, ITLOS Reports 2003, para. 47. MP, Vol. XI, Annex LA-41.

[905] A. Zimmermann and J. Bäumler, "Navigating Through Narrow Jurisdictional Straits: The Philippines-PRC South China Sea Dispute and UNCLOS", *Law and Practice of International Courts and Tribunals*, Vol. 12, No. 3 (2013), p. 446. MP, Vol. XI, Annex LA-169.

[906] *See supra* Chapter 3, Section III.

[907] A. Zimmermann and J. Bäumler, "Navigating Through Narrow Jurisdictional Straits: The Philippines-PRC South China Sea Dispute and UNCLOS", *Law and Practice of International Courts and Tribunals*, Vol. 12, No. 3 (2013), p. 446. MP, Vol. XI, Annex LA-169 ("it is convincing, if not mandatory, to argue that the parties were not, at the time the request for arbitration under Annex VII was submitted by the Philippines, able to find a solution by way of negotiations and that the negotiations had indeed failed".).

settlement procedures of Section 2 of Part XV. For this reason, too, it does not bar the Tribunal's jurisdiction.

7.65 Under Article 281(1), the intent to exclude further procedures must be evident from the terms of the agreement. According to the *Virginia Commentary*:

> The last phrase of article 281, paragraph 1, envisages the possibility that the parties, in their agreement to resort to a particular procedure, may also *specify that this procedure shall be an exclusive one and that no other procedures (including those under Part XV) may be resorted to* even if the chosen procedure should not lead to a settlement.[908]

Here, the DOC specifies no such thing.

7.66 The requirement that the parties' agreement "does not exclude any further procedure" was at the heart of the jurisdictional debate in the *Southern Bluefin Tuna* case. At issue was whether Article 16 of the 1993 Convention for the Conservation of the Southern Bluefin Tuna ("CCSBT") constituted an agreement excluding dispute settlement procedures under Part XV. Article 16 of the CCSBT reads:

> 1. If any dispute arises between two or more of the Parties concerning the interpretation or implementation of this Convention, those Parties shall consult among themselves with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice.
>
> 2. Any dispute of this character not so resolved shall, with the consent in each case of all parties to the dispute, be referred for settlement to the International Court of Justice or to arbitration; but failure to reach agreement on reference to the International Court of Justice or to arbitration shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 above.
>
> 3. In cases where the dispute is referred to arbitration, the arbitral tribunal shall be constituted as provided in the Annex to this Convention. The Annex forms an integral part of this Convention.[909]

7.67 The Annex VII tribunal held that paragraph 2 of Article 16 of the CCSBT implicitly excluded recourse to Part XV. It stated:

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[908] *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 5 (M. Nordquist, et. al., eds., 2002), para. 281.5. MP, Vol. XI, Annex LA-148 (emphasis added).

[909] Convention for the Conservation of Southern Bluefin Tuna, 1819 U.N.T.S. 360 (10 May 1993), entered into force 20 May 1994, art. 16. MP, Vol. XI, Annex LA-81 (emphasis added).

> The effect of this express obligation to continue to seek resolution of the dispute by the listed means of Article 16(1) is not only to stress the consensual nature of any reference of a dispute to either judicial settlement or arbitration. *That express obligation equally imports, in the Tribunal's view, that the intent of Article 16 is to remove proceedings under that Article from the reach of the compulsory procedures of section 2 of Part XV of UNCLOS, that is, to exclude the application to a specific dispute of any procedure of dispute resolution that is not accepted by all parties to the dispute*. Article 16(3) reinforces that intent by specifying that, in cases where the dispute is referred to arbitration, the arbitral tribunal shall be constituted as provided for in an annex to the 1993 Convention, which is to say that arbitration contemplated by Article 16 is not compulsory arbitration under section 2 of Part XV of UNCLOS but rather autonomous and consensual arbitration provided for in that CCSBT annex.[910]

7.68 Notably, the Award of the arbitral tribunal in *Southern Bluefin Tuna* contradicted ITLOS's *prima facie* jurisdictional findings on provisional measures, which expressly endorsed the view that Article 16 of CCSBT did *not* exclude dispute resolution under Section 2 of Part XV.[911] The Award has, moreover, been much criticized,[912] above all by Judge Keith, the dissenting arbitrator. Judge Keith focused on the ordinary meaning of the terms of Article 281(1), concluding that the term "exclude" clearly requires specific "opting out" from the dispute settlement processes of Part 2 and not merely positive agreement to the other procedure by "opting in".[913] Judge Keith found support for this interpretation in the "presumption of the parallel and overlapping existence of procedures for the peaceful settlement of disputes appearing in international judicial practice and the general law of treaties, as stated for instance in article 30(3) of the Vienna Convention on the Law of

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[910] *Southern Bluefin Tuna Cases*, Jurisdiction and Admissibility, para. 57. MP, Vol. XI, Annex LA-50 (emphasis added). The tribunal found further support for its view in the fact that the wording of Article 16 "has its origins in the terms of Article XI of the Antarctic Treaty", whose provisions "are meant to exclude compulsory jurisdiction". *Id.*, para. 58.

[911] *Southern Bluefin Tuna Cases*, Provisional Measures, para. 55. MP, Vol. XI, Annex LA-37 ("*Considering* that, in the view of the Tribunal, the fact that the Convention of 1993 applies between the parties does not preclude recourse to the procedures in Part XV, section 2, of the Convention on the Law of the Sea".).

[912] Igor V. Karaman, *Dispute Resolution in the Law of the Sea* (2012), p. 260. MP, Vol. XI, Annex LA-167 ("With all due respect, [the Annex VII] tribunal's reasoning is hardly convincing. It is true that the parties developed a dispute settlement under Article 16 CCSBT. It is true that they did not settle the dispute by means provided for in that article. But it is also true that the above provision did not – expressly or otherwise – exclude any further procedures, Part XV LOSC being one of them. . . . Were the parties to expressly exclude the application of Part XV LOSC from Article 16 CCSBT, the Part XV LOSC jurisdiction would be lacking. But the parties did not do so. Moreover, there was no evidence that they ever wished to exclude the Part XV jurisdiction".). *See also id.*, p. 261 n.44 for references to the voluminous literature criticizing the award.

[913] *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, Award on Jurisdiction and Admissibility, Separate Opinion of Justice Sir Kenneth Keith, UNCLOS Annex VII Tribunal (4 Aug. 2000), para. 17. MP, Vol. XI, Annex LA-51.

Treaties";[914] other provisions of UNCLOS forming "context" for the interpretation of Article 281(1);[915] and the *travaux* of UNCLOS evidencing "the pivotal role compulsory and binding peaceful settlement procedures played and play in the preparation and scheme of UNCLOS".[916] Since Article 16 "does not say that disputes . . . *must not* be referred to any tribunal or other third party for settlement"[917] Judge Keith disagreed with the majority's conclusion that it barred jurisdiction.

7.69 Whatever the merits of the Annex VII tribunal's decision in *Southern Bluefin Tuna*, this is a very different case. Here, there is no evidence of any kind of an intention to exclude dispute settlement under Part XV of UNCLOS. Paragraph 4 of the 2002 DOC does not state that UNCLOS-related disputes must be resolved *only* through friendly consultations or negotiations. Nor does it state that they may not be referred to an arbitral tribunal constituted under Section 2 of Part XV. Nor is there any other language that is even arguably indicative of an implied exclusion akin to Article 16 of the CCSBT.

7.70 Article 344 of the Treaty on the Functioning of the European Union provides a useful counterpoint. It unequivocally confers exclusive jurisdiction[918] on the Court of Justice of the European Union over disputes concerning the interpretation or application of the European Union Treaties:

> Member States *undertake not to submit* a dispute concerning the interpretation or application of the Treaties to any method of settlement *other than those provided for therein*.[919]

The contrast with Paragraph 4 of the DOC is plain.

7.71 It is telling that in paragraph 1 of the DOC, the signatory States specifically "reaffirm their commitment to the purpose and principles of the 1982 U.N. Convention on the Law of the Sea". The purposes and principles include the commitment to dispute settlement under

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[914] *Id.*, para. 18.

[915] *Id.*, paras. 20-22.

[916] *Id.*, paras. 19, 23-29.

[917] *Id.*, para. 13 (emphasis in the original).

[918] *Commission of the European Communities v. Ireland (Mox Plant)*, Judgment, CJEU Case No. C-459/03 (30 May 2006), para. 123. MP, Vol. XI, Annex LA-55; *Commission of the European Communities v. Ireland (Mox Plant)*, Order No. 3 (24 Jun. 2003), UNCLOS Annex VII Tribunal, paras. 21-23. MP, Vol. XI, Annex LA-53.

[919] Consolidated Version of the Treaty on the Functioning of the European Union, Official Journal of the European Union, Vol. 55, p. 47 (2012), Art. 344. MP, Vol. XI, Annex LA-83 (emphasis added).

Part XV. Similarly, paragraph 4, on which China would rely, expresses the commitment "to resolve their territorial and jurisdictional disputes . . . in accordance with universally recognized principles of international law, *including the 1982 UN Convention on the Law of the Sea*".

7.72 It is telling too that the DOC does not specifically refer to the dispute settlement mechanisms of UNCLOS as being precluded in any way. If the States concerned had only invoked the substantive provisions of UNCLOS, they might have said so.[920] But they did not. To the contrary, the DOC refers broadly "to the purpose and principles of" the Convention, a central one of which is the peaceful settlement of disputes by the means provided in Part XV.[921] Thus, far from excluding recourse to the Convention's dispute settlement procedures, the DOC actually incorporates them.[922]

7.73 In sum, paragraph 4 of the 2002 DOC does not establish the agreement of the Parties to seek settlement of the dispute by a peaceful means to the exclusion of the Convention's dispute settlement provisions.

4. In Any Event, China Is Not Entitled To Invoke the DOC Due to Its Own Breaches

7.74 It is a general principle of law applicable in relations between States that "a party which disowns or does not fulfill its own obligations cannot be recognized as retaining the rights which it claims to derive from the relationship".[923] As Judge Anzilotti stated in his dissenting opinion in the *Diversion of Water from the Meuse* case, "the principle [] *inadimplenti non est adimplendum* [] is so just, so equitable, so universally recognized, that it

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[920] A. Zimmermann and J. Bäumler, "Navigating Through Narrow Jurisdictional Straits: The Philippines-PRC South China Sea Dispute and UNCLOS", *Law and Practice of International Courts and Tribunals*, Vol. 12, No. 3 (2013), p. 444. MP, Vol. XI, Annex LA-169.

[921] *Southern Bluefin Tuna Cases*, Jurisdiction and Admissibility, Separate Opinion of Justice Keith, paras. 19, 23-29. MP, Vol. XI, Annex LA-51.

[922] This is the conclusion reached by notable commentators. *See* A. Zimmermann and J. Bäumler, "Navigating Through Narrow Jurisdictional Straits: The Philippines-PRC South China Sea Dispute and UNCLOS", *Law and Practice of International Courts and Tribunals*, Vol. 12, No. 3 (2013), p. 444. MP, Vol. XI, Annex LA-169.

[923] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 46, para. 91. MP, Vol. XI, Annex LA-6. *See also Diversion of Water from the Meuse (Netherlands v. Belgium)*, Judgment, *1937, P.C.I.J.*, Series A/B, No. 70, Individual Opinion of Judge Hudson, p. 77. MP, Vol. XI, Annex LA-60 ("where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party".).

must be applied in international relations also. In any case, it is one of these 'general principles of law recognized by civilized nations' which the Court applies in virtue of Article 38 of its Statute".[924]

7.75 China's non-compliance with the DOC is perhaps most starkly demonstrated by its actions in and around Scarborough Shoal and Second Thomas Shoal, as recounted in Chapters 3 and 6.[925] As noted, at paragraph 4 of the DOC the signatory States undertake not to resort "to the threat or use of force". At paragraph 5, they further undertake "to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability" in the South China Sea. Yet, in flagrant violation of both undertakings, in 2012 China dislodged the Philippines from its long and continuous presence at Scarborough Shoal, including with threats of force. It has, in the process, eviscerated the traditional livelihood of Filipino fishermen dependent on the fishing grounds at that feature.

7.76 At Second Thomas Shoal, China deployed its vessels to take *de facto* possession of the feature for the first time in 2013, eleven years after the DOC was signed and in direct violation of its provisions on maintaining the *status quo*. China has maintained control over the feature and threatened to take measures to eliminate the longstanding Philippine presence, by forcibly removing the grounded *BRP Sierra Madre* and its crew. As this Memorial was being completed, China blocked Philippine vessels from bringing necessary supplies (including food and fresh water) to its personnel aboard the *BRP Sierra Madre.* China's conduct has complicated and escalated the disputes in the South China Sea, and imperilled the peace and stability of the region. Under the circumstances, in view of its flagrant violations of its undertakings under the DOC, China cannot now be heard to use the DOC to shield itself from the Tribunal's jurisdiction.

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7.77 That said, China's invocation of the DOC does serve a useful purpose. By its terms, Article 281 applies only when "the States Parties which are parties to *a dispute concerning the interpretation or application of this Convention* have agreed to seek settlement of the

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[924] *Diversion of Water from the Meuse (Netherlands v. Belgium)*, Judgment, *1937, P.C.I.J.*, Series A/B, No. 70, Dissenting Opinion of Judge Anzilotti, p. 50. MP, Vol. XI, Annex LA-59.

[925] *See supra* paras. 3.59-3.67; 6.148-152.

dispute by a peaceful means of their own choice".[926] In other words, it presupposes the existence of disputes concerning the interpretation or application of the Convention. China's attempt to avoid jurisdiction under Article 281 on the basis of the DOC thus stands as a frank admission that the issues raised in this case constitute just such disputes over which this Tribunal may exercise its jurisdiction.

B. The Philippines Has Exchanged Views with China

7.78 Article 283(1) of the Convention obligates States to exchange views prior to having recourse to the dispute settlement mechanisms outlined in Section 2 of Part XV. In particular, it provides:

> When a dispute arises between States Parties concerning the interpretation or application of this Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.

7.79 This is not an onerous burden. In a related context, the ICJ has held that "[n]egotiations do not of necessity always presuppose a more or less lengthy series of notes and dispatches; it may suffice that a discussion should have commenced, and this discussion may have been very short".[927] States themselves are "in the best position to judge as to political reasons which may prevent the settlement of a given dispute by diplomatic negotiations".[928]

7.80 With respect to Article 283, ITLOS held in the *Land Reclamation* case that a State need not "continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted".[929] The obligation to exchange views was thus satisfied even though Malaysia "abruptly broke off [two-day negotiations] by insisting on the immediate suspension of the reclamation works as a precondition for further talks" since "a

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[926] UNCLOS, Art. 281(1)

[927] *Mavrommatis Palestine Concessions*, p. 13. MP, Vol. XI, Annex LA-57.

[928] *Id.*, p. 15.

[929] *Malaysia v. Singapore*, Provisional Measures, para. 47. MP, Vol. XI, Annex LA-41; *The MOX Plant Case (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001*, ITLOS Reports 2001, para. 60. MP, Vol. XI, Annex LA-39; *Southern Bluefin Tuna Cases*, Provisional Measures, para. 60. MP, Vol. XI, Annex LA-37 ("[A] State Party is not *obliged to pursue procedures* under Part XV, section 1, of the Convention when it concludes that the possibilities of settlement have been exhausted".) (emphasis added).

further exchange of views could not be expected while the reclamation works were continuing".[930]

7.81 ITLOS adopted the same approach in the *M/V Louisa* case, holding that Article 283(1) was satisfied merely by Saint Vincent and the Grenadines informing Spain of its objection to the "detention of the ships the *M.V. Louisa* and its tender, the *Gemini III*", and the alleged failure to notify "the flag country of the arrest as required by Spanish and international law".[931]

7.82 In its recent Order on provisional measures in the *Arctic Sunrise* case, ITLOS reiterated that that "a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted".[932] The Tribunal held that Article 283(1) was satisfied because there had been an exchange of diplomatic notes and other official correspondence" between the Netherlands and the Russian Federation, and because, "according to the Netherlands, the dispute was discussed on a number of occasions between the respective Ministers of Foreign Affairs".[933]

7.83 This standard is easily satisfied here. As recounted in Chapter 3, the Philippines has over many years had extensive exchanges of views with China regarding its claims in these proceedings. The diplomatic record is voluminous and need not be restated at length. The Philippines largely incorporates by reference the discussion of the diplomatic exchanges presented in Chapter 3. For present purposes, the Philippines trusts that it will be sufficient to refer to a number of illustrative exchanges between the Parties concerning the various issues in dispute.

7.84 With respect to the issue of the nine-dash line, perhaps the most telling exchange was that occasioned by China's twin May 2009 *Notes Verbales* to the U.N. Secretary General objecting to the submissions of Vietnam and Malaysia to the CLCS. In its *Notes Verbales*,

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[930] *Malaysia v. Singapore*, Provisional Measures, para. 43. MP, Vol. XI, Annex LA-41.

[931] *The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain), Provisional Measures, Order of 23 December 2010*, ITLOS Reports 2010, para. 60. MP, Vol. XI, Annex LA-42.

[932] *Netherlands v. Russia*, Provisional Measures, para. 76. MP, Vol. XI, Annex LA-45 (referring to *Ireland v. United Kingdom*, Provisional Measures, p. 107, para. 60. MP, Vol. XI, Annex LA-39); *The "ARA Libertad" Case (Republic of Argentina v. Ghana), Provisional Measures, Order of 15 December 2012*, ITLOS Reports 2012, p. 16, para. 71. MP, Vol. XI, Annex LA-44.

[933] *Netherlands v. Russia*, Provisional Measures, paras. 73-74. MP, Vol. XI, Annex LA-45.

China asserted that it 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 [showing the nine-dash line])".[934]

7.85 China's notes elicited strong protests from a number of States, including the Philippines, which observed that

> since the adjacent waters of the relevant geographic features are definite and subject to legal and technical measurement, the claim as well by the People's Republic of China on the "*relevant waters as well as the seabed and subsoil thereof*" (as reflected in the so-called 9-dash line map . . .) outside of the aforementioned relevant geographic features in the [Spratly Islands] and their "adjacent waters" would have no basis under international law, specifically UNCLOS.[935]

7.86 China responded to the Philippine protest promptly, stating that the "contents of the *Note Verbale* No. 000228 of the Republic of the Philippines are totally unacceptable to the Chinese Government".[936] According to China, its "sovereignty and related rights and jurisdiction in the South China Sea are supported by abundant historical and legal evidence".[937]

7.87 The Philippines, of course, disagrees. It is precisely for that reason that it has sought the authoritative guidance of this Tribunal.

7.88 With respect to the issue of the nature of the Parties' respective maritime entitlements in the Northern Sector (Scarborough Shoal), China and the Philippines have exchanged views on multiple occasions over many years. According to a 1997 Chinese Foreign Ministry statement, the Parties' exchange of views specifically covered the question of the scope of their respective maritime jurisdictions and entitlements in the vicinity of Scarborough Shoal. While the Philippines considered that Scarborough was encompassed within its 200 M EEZ,

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[934] *Note Verbale* from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/17/2009 (7 May 2009), p. 1. MP, Vol. VI, Annex 191; *Note Verbale* from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/18/2009 (7 May 2009), p. 1. MP, Vol. VI, Annex 192.

[935] *Note Verbale* from the Permanent Mission of the Republic of the Philippines to the United Nations to the Secretary-General of the United Nations, No. 000228 (5 Apr. 2011), pp. 3-4. MP, Vol. VI, Annex 200 (emphasis in original).

[936] *Note Verbale* from the Permanent Mission of the People's Republic of China to the Secretary-General of the United Nations, No. CML/8/2011 (14 Apr. 2011), p. 1. MP, Vol. VI, Annex 201.

[937] *Id.*

the Chinese side made clear that it considered that Scarborough Shoal generates an EEZ of its own. China stated its position in the following terms: "According to international law, under a situation where there is an overlapping of EEZ's among concerned countries, the act of a country to unilaterally proclaim its 200 EEZ is null and void. The scope of the EEZ's of the Philippines and China should be resolved through negotiations based on principles and regulations of international laws".[938]

7.89 According to a 1997 Chinese Foreign Ministry statement, the Parties' exchange of views specifically covered the question of the scope of their respective maritime jurisdictions and entitlements in the vicinity of Scarborough Shoal. While the Philippines considered that Scarborough was encompassed within its 200 M EEZ, the Chinese side made clear that it considered that Scarborough Shoal generates an EEZ of its own. China stated its position in the following terms: "According to international law, under a situation where there is an overlapping of EEZ's among concerned countries, the act of a country to unilaterally proclaim its 200 EEZ is null and void. The scope of the EEZ's of the Philippines and China should be resolved through negotiations based on principles and regulations of international laws".[939]

7.90 With respect to the dispute over the scope of the Parties' respective maritime entitlements in the Southern Sector where the Spratly Islands are located, China and the Philippines have also repeatedly exchanged views. At virtually the same time as they were exchanging *Notes Verbales* about the compatibility of China's nine-dash line with UNCLOS, for example, China objected to the Philippines' issuance of a service contract covering the area of GSEC 101 at Reed Bank.[940] On 4 April 2011, the Philippines responded, making clear its view that none of the insular features in the Southern Sector is capable of generating entitlement to an EEZ or continental shelf (and thus reaching the area of Reed Bank).

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[938] Foreign Ministry of the People's Republic of China, *Chinese Foreign Ministry Statement Regarding Huangyandao* (22 May 1997), p. 2. MP, Vol. V, Annex 106. *See also* Department of Foreign Affairs of the Republic of the Philippines, *Record of Proceedings: 10th Philippines-China Foreign Ministry Consultations* (30 July 1998), p. 22. MP, Vol. VI, Annex 184 (in which China's Minister of Foreign Affairs, Mr. Tang Jiaxuan, states: "As for the question concerning the Huangyan Island, the two sides do have different positions and different claims in this regard, however, I shall not elaborate comprehensively today. For I talked for dozens of hours with Mr. Severino, now the Secretary General of ASEAN on the question, either here in Manila or in Beijing.").

[939] Foreign Ministry of the People's Republic of China, *Chinese Foreign Ministry Statement Regarding Huangyandao* (22 May 1997), p. 2. MP, Vol. V, Annex 106.

[940] *Note Verbale* from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (10)PG-047 (22 Feb. 2010), p. 1. MP, Vol. VI, Annex 195.

According to the *Note Verbale* sent to the Embassy of China in Manila, the Philippines stated, *inter alia*: "the Reed Bank where GSEC101 is situated does not form part of the 'adjacent waters,' specifically the 12 M territorial sea of any relevant geological feature in the [Spratly Islands] either under customary law or the United Nations Convention on the law of the Sea (UNCLOS)".[941]

7.91 Just 10 days later, China affirmed exactly the opposite view in its 14 April 2011 *Note Verbale* to the U.N. Secretary General responding to the Philippines' earlier protest concerning the nine-dash line:

> [U]nder the relevant provisions of the *1982 Convention on the Law of the Sea, as well as the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone (1992) and the Law on the Exclusive Economic Zone and Continental Shelf of the People's Republic of China (1998)*, China's Nansha [Spratly] Islands is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf.[942]

7.92 Finally, with respect to China's interferences with the sovereign rights and jurisdiction of the Philippines, as well as it other violations of UNCLOS, these too are issues on which the Parties have exchanged views. The relevant exchanges of views are evidenced, *inter alia*, by the following:

- In 2010 and 2011, the Parties exchanged multiple diplomatic notes over the decision by the Philippines to convert the geophysical survey and exploration contract covering a portion of Reed Bank into a service contract, and the Philippines' decision to begin seismic surveys;[943]

- The Philippines protested China's enactment of a fishing ban "in most parts of the South China Sea" in May 2012, which protest was met with the response that China "has every right to defend its sovereignty and protect its fishery resources";[944]

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[941] *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 110885 (4 Apr. 2011), pp. 1-2. MP, Vol. VI, Annex 199.

[942] *Note Verbale* from the Permanent Mission of the People's Republic of China to the Secretary-General of the United Nations, No. CML/8/2011 (14 Apr. 2011), p. 2. MP, Vol. VI, Annex 201 (italics in original).

[943] *See supra* paras. 6.16-6.22.

[944] *See supra* paras. 6.30-6.32.

- In April 2012, the Parties exchanged numerous diplomatic notes concerning China's efforts to exclude Filipino fishermen from the area of Scarborough Shoal;[945]

- As early as 2001, the Assistant Secretary of the Philippine Ministry of Foreign Affairs met with an official of the Chinese Embassy to express his concern, among other things, about illegal fishing of protected species by Chinese fishermen at Scarborough Shoal;[946]

- In 1998 and 1999, the Parties had numerous written and verbal exchanges about China's construction of artificial installations and structures at Mischief Reef;[947]

- In April 2012, the Philippines sent China a diplomatic note in which it expressed "grave concern over the provocative and extremely dangerous maneuvers committed by Chinese vessels against Philippine vessels" and requested that China "instruct its ships to observe the Convention on the International Regulations for Preventing Collision at Sea";[948] and

- Since China began acting with increased assertiveness in the vicinity of Second Thomas Shoal in May 2013, the Parties have exchanged numerous diplomatic notes on the issues posed by China's behaviour.[949]

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[945] *See supra* paras. 3.51-3.53.

[946] *Memorandum* from Willy C. Gaa, Assistant Secretary of Foreign Affairs, Republic of the Philippines to Secretary of Foreign Affairs, Republic of the Philippines (14 Feb. 2001), p. 1. MP, Vol. III, Annex 45. *See also Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 12-0894 (11 Apr. 2012), pp. 1-2. MP, Vol. VI, Annex 205 (expressing similar concerns).

[947] *See supra* para. 6.55.

[948] *Note Verbale* from the Department of Foreign Affairs of the Philippines to the Embassy of the People's Republic of China in Manila, No. 12-1222 (30 Apr. 2012), p. 1. MP, Vol. VI, Annex 209.

[949] *Memorandum* from the Secretary of Foreign Affairs of the Republic of the Philippines to the President of the Republic of the Philippines (23 Apr. 2013). MP, Vol. IV, Annex 93; *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 13-1585 (9 May 2013). MP, Vol. VI, Annex 217; *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 13-1882 (10 June 2013). MP, Vol. VI, Annex 219; *Note Verbale* from the Department of Foreign Affairs of the Philippines to the Embassy of the People's Republic of China in Manila, No. 140711 (11 Mar. 2014). MP, Vol. VI, Annex 221; *Memorandum* from Assistant Secretary, Asian and Pacific Affairs, Department of Foreign Affairs of the Republic of the Philippines, to Secretary of Foreign Affairs of the Republic of the Philippines (11 Mar. 2014). MP, Vol. IV, Annex 101; *Memorandum* for the Secretary of Foreign Affairs, Office of Asian and Pacific

7.93 The Philippines therefore readily meets the jurisdictional prerequisite stated in Article 281(1).

III. THE LIMITATIONS AND EXCEPTIONS STATED IN ARTICLES 297 AND 298 DO NOT APPLY TO THIS CASE

7.94 In the preceding sections of this Chapter, the Philippines showed that this Tribunal has jurisdiction over this case under Article 288, and that nothing in Section 1 of Part XV impairs that jurisdiction in any way. In this section, the Philippines will demonstrate that none of the limitations (Article 297) or optional exceptions (Article 298) to jurisdiction set out in Section 3 of Part XV has any effect on the Tribunal's jurisdiction either.

A. The Limitations in Article 297 Are Not Applicable

7.95 Article 297 sets forth certain "limitations" on a court or tribunal's jurisdiction. It states:

> *Article 297*
> *Limitations on applicability of section 2*
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> 1. Disputes concerning the interpretation or application of this Convention with regard to *the exercise* by a coastal State *of its sovereign rights or jurisdiction* provided for in this Convention shall be subject to the procedures provided for in section 2 in the following cases:
>
> (a) when it is alleged that a coastal State has acted in contravention of the provisions of this Convention in regard to the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, or in regard to other internationally lawful uses of the sea specified in article 58;
>
> (b) when it is alleged that a State in exercising the aforementioned freedoms, rights or uses has acted in contravention of this Convention or of laws or regulations adopted by the coastal State in conformity with this Convention and other rules of international law not incompatible with this Convention; or
>
> (c) when it is alleged that a coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the

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Affairs, Department of Foreign Affairs, Republic of the Philippines from the Philippines Embassy in Beijing, No. ZPE-075-2014-S (11 Mar. 2014). MP, Vol. IV, Annex 102.

> coastal State and which have been established by this Convention or through a competent international organization or diplomatic conference in accordance with this Convention.
>
> 2. (a) Disputes concerning the interpretation or application of the provisions of this Convention *with regard to marine scientific research* shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute arising out of:
>
> (i) the exercise by the coastal State of a right or discretion in accordance with article 246; or
>
> (ii) a decision by the coastal State to order suspension or cessation of a research project in accordance with article 253.
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> . . .
>
> 3. (a) Disputes concerning the interpretation or application of the provisions of this Convention *with regard to fisheries* shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.[950]

7.96 Although Article 297 is long, its content is clear. Paragraph 1 excludes from jurisdiction disputes concerning a coastal State's "exercise" of its sovereign rights and jurisdiction, except those listed in subparagraphs (a)-(c). Paragraph 2 provides that jurisdiction exists over disputes concerning marine scientific research, except to the extent specified in subparagraphs (a)(i) and (a)(ii). And paragraph 3 provides that jurisdiction exists over disputes concerning fisheries, except to the extent specified in the balance of the text following the introductory clause.

7.97 The purpose of Article 297 is also clear. It sets out the circumstances in which the coastal State's exercise of regulatory powers may – and may not – be challenged in compulsory proceedings.

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[950] (Emphases added.)

7.98 In all three of its paragraphs, Article 297 deals with disputes concerning the *exercise* of sovereign rights and jurisdiction. It does *not* deal with disputes concerning whether or not a coastal State *has* those rights and jurisdiction in the first place. Simply put, disputes concerning the *exercise* of certain rights are excluded; disputes concerning the *existence* of those same rights are not. According to former ITLOS Judge Tulio Treves, compulsory jurisdiction "appl[ies] to disputes concerning such sovereign rights and jurisdiction but not their exercise (*these would include disputes on the very existence of such sovereign rights and jurisdiction and on the spatial limits thereof*)".[951]

7.99 Accordingly, Article 297 does not preclude a challenge to a claim to sovereign rights and jurisdiction that exceeds the limits imposed by UNCLOS. It would not, for example, preclude a challenge to a claim of a 250 M EEZ; or to the assertion of sovereign rights beyond the maximum limits of the continental shelf set forth in Article 76. Claims of right do not suffice; unilateral interpretations of what the Convention permits do not suffice. Only once those rights are determined to exist does the question of their exercise – and thus Article 297 – become relevant.

7.100 This understanding follows not only from the plain text of Article 297; it is also confirmed by the structure of Section 3 of Part XV as a whole. If, for example, Article 297 were intended to exclude jurisdiction over disputes concerning the spatial limits of coastal States' rights, there would have been no need for the optional exception in Article 298 for disputes concerning the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations. Such disputes would necessarily be subsumed within the existing limitations of Article 297.

7.101 A narrow reading of Article 297 is also confirmed by cases in which jurisdiction was based on Section 2 of Part XV. In the *Guyana/Suriname* case, for example, Suriname argued that Guyana's claims related to Suriname's enforcement of its alleged sovereign rights with respect to non-living resources in disputed maritime areas fell outside the tribunal's jurisdiction by virtue of Article 297.[952] According to Suriname, only the disputes concerning a coastal State's exercise of sovereign rights that are specifically listed in Article 297 may be

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[951] Tullio Treves, "The Jurisdiction of the International Tribunal for the Law of the Sea", *Indian Journal of International Law*,Vol. 37, No. 3 (1997), p. 404. MP, Vol. XI, Annex LA-137 (emphasis added).

[952] *Guyana v. Suriname*, Merits, Award of the Arbitral Tribunal (17 Sept. 2007), paras. 411-416. MP, Vol. XI, Annex LA-56.

subject to compulsory dispute settlement. The Annex VII tribunal rejected Suriname's argument in summary fashion.[953]

7.102 In the *Barbados/Trinidad and Tobago* case, the arbitral tribunal distinguished between delimitation of a maritime boundary that affected jurisdiction over fisheries – with respect to which it had jurisdiction – and the exercise of the rights and duties of a party with respect to fishing within its own EEZ – as to which it could not exercise jurisdiction pursuant to paragraph 3 of Article 297.[954]

7.103 In ITLOS' Judgment on the merits in the *M.V. SAIGA (No. 2)* case, nothing in Article 297 prevented the Tribunal from declaring that the assertion of customs enforcement authority by Guinea impermissibly exceeded the limits permitted by the Convention.[955] Similarly, ITLOS also found that the manner in which the boarding party conducted itself was unlawful.[956]

7.104 Finally, in cases where there was no declaration under Article 298, neither ITLOS nor Annex VII arbitral tribunals have on grounds of Article 297 declined to exercise jurisdiction to delimit the respective maritime zones of the parties under Articles 15, 74 and 83.

1. Article 297, paragraph 1

7.105 It follows from the foregoing that nothing in paragraph 1 of Article 297 impairs the Tribunal's jurisdiction over this case. Article 297(1) concerns cases relating to "the exercise by the coastal State of its sovereign rights or jurisdiction provided for in this Convention". It is of no utility to China for two reasons. *First*, as discussed, the quoted text makes sense only if it is assumed that there is no dispute over the predicate question of whether or not the respondent State is entitled to exercise the sovereign rights or jurisdiction at issue in the first place. In this case, however, the dispute is very much over the *existence* of the sovereign rights and jurisdiction China claims in the South China Sea.

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[953] *Id*.

[954] *Barbados/Trinidad and Tobago*, Award, UNCLOS Annex VII Tribunal (11 Apr. 2006), paras. 217(iii), 276. MP, Vol. XI, Annex LA-54.

[955] *The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea), Judgment of 1 July 1999*, ITLOS Reports 1999, para. 136. MP, Vol. XI, Annex LA-36.

[956] *Id*., para. 159.

7.106 *Second* and relatedly, the implied limitation in Article 297(1) by its terms applies only to the exercise of sovereign rights and jurisdiction as "provided for in [the] Convention". Yet, as explained in Chapter 4, China's assertion of "historic rights" fails precisely because it is a claim to sovereign rights and jurisdiction beyond the limits provided for in the Convention. By claiming "historic rights" within the maritime areas bounded by the nine-dash line, China is exercising neither rights nor jurisdiction. Rather, it is asserting rights and jurisdiction the Convention does not give it. At the same time, it is denying other States, including the Philippines, rights and jurisdiction the Convention specifically gives them.

7.107 Moreover, nothing in Article 297(1) can shield China's actions that interfere with the Philippines' exercise of its sovereign rights and jurisdiction as a coastal State, or its exercise of navigational and related rights under the Convention. There is no sovereign right to deny the rights of another State under the Convention. To the contrary, the duty to have due regard to the rights of other States is the fundamental ordering principle of the law of the sea. It qualifies not only the rights and freedoms enjoyed by all States,[957] but the sovereign rights and jurisdiction of coastal States vis-à-vis such rights and freedoms[958] and vis-à-vis each other.[959]

2. Article 297, paragraphs 2 and 3

7.108 Paragraphs 2 and 3 of Article 297 similarly do not apply to any of the claims of the Philippines in this case.

7.109 Paragraph 2(a) provides that disputes "concerning the interpretation or application of the provisions of this Convention with regard to marine scientific research shall be settled in accordance with section 2 [of Part XV]", except only that "the coastal State shall not be obliged to accept the submission to such settlement of any dispute" arising out of the exercise of a coastal State's rights under Article 246 (concerning research in the EEZ or continental shelf) or Article 253 (concerning the suspension of research activities). Because the Philippines raises no claims relating to the exercise of rights under either Article 246 or 253, whether in China's EEZ, its continental shelf or anywhere else, paragraph 2(a) is irrelevant.

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[957] UNCLOS, Arts. 39(3)(a), 79(5), 87(2), 147, 194.

[958] UNLCOS, Arts. 24, 27(4), 56(2), 58(2), 60(3), 63(2), 64(1), 66, 78(2), 79(2), 142, 194, 234.

[959] UNCLOS, Arts. 63(1), 64(1), 66(4), 67(3), 194(2), 194, 210(5). *See also Bangladesh/Myanmar*, para. 475. MP, Vol. XI, Annex LA-43.

7.110 Paragraph 3(a) provides that disputes "concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2 [of Part XV]", except only that "the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the EEZ or their exercise". The Philippines makes no claims concerning China's sovereign rights with respect to the living resources in China's own EEZ. To the contrary, its claims relate only to maritime areas beyond the limits of China's EEZ, and to whether China is entitled to declare an EEZ in relation to certain low-tide elevations and small and remote insular features in the South China Sea. Paragraph 3(a) too is therefore irrelevant.

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7.111 Accordingly, the Philippines submits that no aspect of the dispute before this Tribunal is excluded from jurisdiction under Article 297.

B. The Optional Exceptions in Article 298 Are Also Inapplicable

7.112 In addition to the limitations set forth in Article 297, Article 298 permits certain optional exceptions to compulsory jurisdiction. Article 298(1) provides:

> 1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:
>
> > (a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, . . . ;
> >
> > (b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3;
> >
> > (c) disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council decides to remove

> the matter from its agenda or calls upon the parties to settle it by the means provided for in this Convention.

7.113 The Philippines has made no declaration under Article 298. China, however, has. On 25 August 2006, ten years after ratifying the Convention, China submitted the following declaration: "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".[960]

7.114 As stated in paragraph 7 of its Amended Notification and Statement of Claim, the Philippines has not sought to litigate any dispute that China has excluded from arbitral jurisdiction by virtue of if its declaration under Article 298. The Philippines' objective is to resolve legal differences regarding maritime rights and jurisdiction that have materially impaired relations between the Parties, and that are within the jurisdiction of this Tribunal. The Philippines anticipates that the resolution of these differences will facilitate the negotiated settlement of other issues that have not been submitted to the Tribunal.[961]

7.115 The irrelevance of China's Declaration under Article 298(1) is demonstrated in the sections that follow.[962] Two predicate points are warranted, however.

7.116 *First*, the optional exceptions in Article 298 are not self-judging; their mere invocation does not automatically oust a tribunal's jurisdiction. Rather, it falls to the Tribunal to determine their scope. Article 288(4) states: "In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal". This, of course, is merely a particular expression of the general rule that "[i]nternational

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[960] The text of the Chinese declaration is available in MP, Vol. XI, Annex LA-67. United Nations, Secretary-General, *Multilateral Treaties Deposited with the Secretary-General*, Vol. 3, Part 1, Chapters 12-29, and Part 2, U.N. Doc. ST/LEG/SER.E/26 (1 Apr. 2009), p. 450. MP, Vol. XI, Annex LA-67.

[961] A noted expert on Southeast Asia and the law of the sea has observed, "[I]f the States bordering the South China Sea comply in good faith with the applicable provisions of UNCLOS, then the maritime disputes will be clarified, and a framework will be established that will enable the claimants to set aside the sovereignty disputes over land territory and to cooperate in the areas of overlapping maritime claims". Robert Beckman, "U.N. Convention on the Law of the Sea and the Maritime Disputes in the South China Sea", *American Journal of International Law*, Vol. 107, No. 1 (2013), p. 143. MP, Vol. XI, Annex LA-172.

[962] Paragraph 1(c) of Article 298 permits an exception for "disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations". That exception is not even arguably relevant to this case. The dispute submitted to arbitration under Annex VII by the Philippines was not on the agenda of the Security Council at the time of submission. That remains the case now.

courts and tribunals have a sole right to decide on their jurisdiction (*Kompetenz-Kompetenz*/*la compétence de la compétence*)".[963]

7.117 *Second*, the exceptions set out in Article 298 are just that: exceptions. That is to say, they are departures from the general rule of compulsory dispute settlement provided for in Section 2 of Part XV. In keeping with the principle of treaty interpretation *exceptiones sunt strictissimae interpretationis*,[964] they must therefore be strictly construed.[965] This is particularly true given "the pivotal role compulsory and binding peaceful settlement procedures played and play in the preparation and scheme of UNCLOS".[966]

7.118 To give Article 298 an over-broad interpretation would be to create a new exception rather than interpret the existing one. It would also effectively constitute an impermissible derogation from Part XV. Article 309 of the Convention states emphatically: "No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention".[967] This provision is a critical element of the overall scheme of the Convention. The prohibition of reservations, unless *expressly* permitted, was deemed a necessary safeguard of the "package deal" the negotiators worked out.[968] In the words of Ambasador Koh in his statement concluding the Conference at Montego Bay: "Although the Convention consists of a series of compromises and many packages . . . they form an integral whole. *This is why the Convention does not provide for reservations*".[969]

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[963] *Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation), Provisional Measures, Order of 22 November 2013, Separate Opinion of Judges Wolfrum and Kelly*, ITLOS Reports 2013, para. 7. MP, Vol. XI, Annex LA-47.

[964] *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, Judgment, Dissenting Opinion of Judge Tanaka, I.C.J. Reports 1969, pp. 3, 186. MP, Vol. XI, Annex LA-5.

[965] A. Zimmermann and J. Bäumler, "Navigating Through Narrow Jurisdictional Straits: The Philippines-PRC South China Sea Dispute and UNCLOS", *Law and Practice of International Courts and Tribunals*, Vol. 12, No. 3 (2013), p. 459. MP, Vol. XI, Annex LA-169 ("a limited interpretation of the exclusionary effect of Article 298 paragraph 1 (a) (i) UNCLOS would rather be in line with the overall structure of Part XV of the Convention, compulsory third-party settlement being the rule and non-binding mechanisms being the exception".).

[966] *Southern Bluefin Tuna Cases*, Jurisdiction and Admissibility, Separate Opinion of Justice Keith, para. 19. MP, Vol. XI, Annex LA-51.

[967] (Emphasis added.)

[968] *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 5 (M. Nordquist, et. al., eds., 2002), paras. 309.4-309.9. MP, Vol. XI, Annex LA-148.

[969] U.N. Conference on the Law of the Sea III, Plenary, *Summary Records of the 185th Meeting*, U.N. Doc. A/CONF.62/PV.185 (26 Jan. 1983), para. 53. MP, Vol. XI, Annex LA-116 (cited in *United Nations Convention*

1. Article 298, paragraph 1(a)

7.119 Article 298, paragraph 1(a), permits a State to make a declaration excluding from arbitration or adjudication under Section 2 "disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles". As shown below, the references to sea boundary delimitation and to historic bays or titles are very much related. Nevertheless, they are most easily addressed separately in the order in which they appear.[970]

a. Disputes concerning the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations

7.120 The Philippines's Amended Statement of Claim does not present a dispute concerning the interpretation or application of Article 15, 74 or 83, let alone a dispute relating to sea boundary delimitation. The Tribunal is not called upon to express any view on those articles. The dispute the Philippines has submitted raises questions of *entitlement*, not the *delimitation* of those entitlements. Questions of entitlement do not arise under or entail the interpretation or application of Article 15, 74 or 83.

7.121 It is well-settled that entitlement and delimitation are different. In its Judgment in the *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, ITLOS observed that entitlement and delimitation are "distinct concepts".[971] Although they are related to the extent that "[d]elimitation presupposes an area of overlapping entitlements",[972] entitlement *per se* is logically prior to, and independent of, delimitation. Thus, in the *Bay of Bengal* case, the Tribunal concluded that before addressing the delimitation of the continental shelf under Article 83, it first had to

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on the Law of the Sea 1982: A Commentary, Vol. 5 (M. Nordquist, et. al., eds., 2002), para. 309.10. MP, Vol. XI, Annex LA-148).

[970] The view has been expressed by two eminent authorities that the "or" separating the reference to delimitation from the reference to "historic bays or title" may mean that only one or the other of the exceptions may be invoked, but not both. *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 5 (M. Nordquist, et. al., eds., 2002), para. 298.13. MP, Vol. XI, Annex LA-148. Since neither reference affects the submissions of the Philippines, there would appear to be no need to address that question in this case.

[971] *Bangladesh/Myanmar*, para. 398. MP, Vol. XI, Annex LA-43.

[972] *Id.*, para. 397.

assess whether Bangladesh and Myanmar had overlapping entitlements under Article 76.[973] That predicate question did not in any way entail the interpretation or application of Article 83.

7.122 In its 2012 Judgment in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, the ICJ applied the same analytical method that ITLOS had used in regard to the continental shelf in the Bay of Bengal; namely, analysing the question of entitlement first and then, as a separate question, addressing the delimitation of overlapping entitlements. Thus, in a lengthy analysis preceded by the heading "Entitlements Generated by Maritime Features", the Court analysed Colombia's various insular features by reference to Article 121.[974] It expressly declined at that stage of the analysis to consider whether an equitable delimitation would limit the islands' maritime zones to 12 M.[975] Only after completing its comprehensive analysis of entitlements did the Court then turn, in the subsequent sections of its Judgment, to the issue of delimitation.

7.123 Only questions of entitlement are presented in the present case. The issues before this Tribunal concern the provisions of UNCLOS regarding entitlement to sovereignty, sovereign rights and jurisdiction over the water, seabed and subsoil; in particular, Articles 2, 3, 13, 56, 57, 76, 77 and 121.[976]

7.124 The fact that questions of entitlement may, in certain cases, have implications for subsequent questions of delimitation is of no consequence to these proceedings. As noted, Article 309 of the Convention emphatically states: "No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention". The exception "expressly permitted" by Article 298(1)(a) is specific and it is narrowly drawn. Indeed, it is even more limited than disputes concerning the interpretation and application of

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[973] *Id.*, paras. 397-399. ITLOS also distinguished between different types of entitlements in determining where there were overlapping entitlements to be delimited. It declined to limit the 12-mile territorial sea of Bangladesh where it was not overlapped by the territorial sea of Myanmar. *Id.*, paras. 168-169. Similarly, "[i]n the area beyond Bangladesh's exclusive economic zone that is within the limits of Myanmar's exclusive economic zone, the maritime boundary delimits the Parties' rights with respect to the seabed and subsoil of the continental shelf but does not otherwise limit Myanmar's rights with respect to the exclusive economic zone, notably those with respect to the superjacent waters". *Id*., para. 474.

[974] *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Merits, Judgment, I.C.J. Reports 2012, paras. 167-183. MP, Vol. XI, Annex LA-35.

[975] *Id*., p. 63, para. 169.

[976] The ICJ has made clear that Article 121 is an entitlement provision, not a delimitation provision. *Id.*

Articles 15, 74 and 83 as a whole. It applies only to disputes concerning those Articles that also relate to sea boundary delimitations. Other disputes under the listed Articles – for instance, a dispute concerning a State's failure to enter into provisional arrangements of a practical nature under Article 74(3) – are thus not excluded even by a declaration under Article 298. In any event, the Philippines makes no claims under any provision of Article 15, 74 or 83 in this case.

7.125 Moreover, identifying the extent of the Parties' entitlements is of independent significance. China's assertion of sovereign "historic rights" within the area encompassed by the nine-dash line calls into question the Philippines' rights and freedoms under the Convention in a vast area immediately west of the Philippine archipelago. The Parties' differences over whether specific insular features generate maritime entitlements and, if so, to what extent have similar effects.

7.126 China's increasingly assertive claims have also aggravated and extended this dispute. It is apparent from years of exchanges that the Parties are unable to resolve their dispute relating to the nature of their entitlements by themselves. This significantly complicates efforts to achieve agreement not only on the overall resolution of their differences in the South China Sea, but even on ways to narrow or manage their disagreements.

b. Historic bays or titles

7.127 Paragraph (1)(a)(i) of Article 298 also refers to certain disputes "involving historic bays or titles". This dispute involves neither. Article 298(1)(a)(i) therefore does not bar the Tribunal's exercise of jurisdiction.

7.128 There is no claim that the South China Sea is a historic bay. It is distinctly not an indentation of any shoreline, let alone the shoreline of China. Moreover, whatever its provenance, the nine-dash line bears no resemblance to a bay closing line or any other baseline. Accordingly, in the paragraphs that follow, the Philippines will focus on the issue of "historic title" and show why China's claim of "historic rights" within the area encompassed by the nine-dash line is not covered by Article 298(1)(a)(i).

7.129 Article 298's reference to "historic titles" does not apply in the first instance because China is not claiming such title in the South China Sea. To the contrary, as discussed in

Chapter 4, what China asserts is a more limited bundle of "historic rights", short of sovereignty.[977] On the face of China's claim, Article 298(1)(a)(i) is therefore inapplicable.

7.130 In any event, the concept of "historic title" as used in Article 298 has a specific and limited meaning: it pertains only to near-shore areas of sea that are susceptible to a claim of sovereignty as such. The reference to historic title is linked to the reference to historic bays in the same clause and relates to similar areas. It has no application to vast areas of open ocean such as the South China Sea. It is precisely for this reason that the term "historic title" appears in the Convention only once outside Article 298; namely, in Article 15 as a circumstance warranting departure from the equidistance method in the delimitation of the territorial sea.[978]

7.131 The fact that "historic title" relates only to maritime areas close to the coast amenable to a claim of sovereignty was made clear by the U.N. Secretariat in its 1962 study on the *Juridical Regime of Historic Waters, Including Historic Bays*. In presenting its analysis, the Secretariat first observed: "Nobody would contest that there are cases in which a State has a valid historic title to certain waters *adjacent to its coasts* . . .".[979] In order to have a valid claim to historic title, however, the Secretariat also made clear that the exercise of sovereignty was required. Citing Bourquin's classic study on historic bays, the U.N. study states: "The historic title is for [Bourquin] 'a juridical consolidation by the effect of time', and such title is created by 'the peaceful and continuous exercise of sovereignty'".[980]

7.132 After a thorough review of the relevant doctrine and State practice, the U.N. study concludes:

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[977] There is "no evidence that China has enforced its domestic law in those waters as if they were part of internal waters". Z. Gao and B.B. Jia, "The Nine-Dash Line in the South China Sea: History, Status, and Implications", *American Journal of International Law*, Vol. 107, No. 1 (2013), p. 109. MP, Vol. X, Annex 307.

[978] Article 15 reads: "Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith".

[979] International Law Commission, *Juridical Regime of Historic Waters, Including Historic Bays*, U.N. Doc No. A/CN.4/143 (9 Mar. 1962), para. 33 (emphasis added). MP, Vol. XI, Annex LA-89.

[980] *Id.*, para. 51.

> A claim to "historic waters" is a claim by a State, based on an historic title, to a maritime area as part of its national domain; it is a claim to sovereignty over the area. The activities carried on by the State in the area or, in other words, the authority continuously exercised by the State in the area must be commensurate with the claim. The authority exercised must consequently be sovereignty, the State must have acted and act as the sovereign of the area.[981]

7.133 Viewed in historical context, this conclusion is unavoidable. When the regime of historic waters evolved, there were no maritime zones beyond the territorial sea. Accordingly, only two types of maritime space were amenable to a claim of "historic title": (a) those that could be assimilated to internal waters (e.g. historic bays); and (b) the territorial sea.[982] The Chinese term for "title" – 所有权 ("*suo you quan*") – in both Article 15 and Article 298 proves the point. Literally translated, it means the power of possession or ownership – in a word, sovereignty. By contrast, what China has claimed since 1998 are 历史性权利 ("*li shi xing quan li*"), which means "historic rights"; that is, rights that do not amount to title or sovereignty.

7.134 Because it was prepared in 1962, the U.N. study also dealt with the manner in which the traditional regime of historic waters, including historic title, coexisted with the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone. It conceived of three possible "hypotheses":

> (i) The historic title relates to maritime areas not dealt with by the Convention and the Convention has consequently no impact on the title;
>
> (ii) The historic title relates to areas dealt with by the Convention but is expressly reserved by the Convention. Also in this case the Convention has no impact on the title;
>
> (iii) The historic title is in conflict with a provision of the Convention and is not expressly reserved by the Convention. In that case, the historic title is superseded as between the parties to the Convention.[983]

The same reasoning applies *mutatis mutandi* to the 1982 Convention.

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[981] *Id.*, para. 87. *See also id.* para. 85 ("There can hardly be any doubt that the authority which a State must continuously exercise over a maritime area in order to be able to claim it validly as "historic waters" is sovereignty. An authority more limited in scope than sovereignty would not be sufficient to form a basis for a title to such waters".).

[982] *Id.*, paras. 160-167.

[983] *Id.*, para. 77.

7.135 To the extent a State might try to claim historic title beyond 12 M, such a claim would fall squarely within hypothesis (iii); i.e., it is in conflict with, and therefore superseded by, UNCLOS. In providing that "[e]very State has the right to establish the breadth of its territorial sea *up to a limit not exceeding* 12 nautical miles", Article 3 of the 1982 Convention makes it emphatically clear that no State may purport to extend its sovereignty beyond 12 M. And, as detailed in Chapter 4, the 1982 Convention leaves no room for any historic rights, let alone historic title, in the EEZ and continental shelf.[984] That is precisely why the only reference in the Convention to "historic title" outside Article 298 is in a provision relating to the regime of the territorial sea.

7.136 Accordingly, historic titles are preserved under UNCLOS only to the extent the Convention expressly reserves a role for them; i.e., as a circumstance relevant to the delimitation of the territorial sea. That is why the reference to "historic bays and titles" in Article 298(1)(a)(i) is linked to "disputes concerning the interpretation or application of articles 15, 74 and 83 regarding sea boundary delimitations". In point of fact, the negotiating history of UNCLOS shows that the reference to "historic bays or titles" was included with the special case of the Gulf of Fonseca specifically in mind. Even more particularly: the delimitation of the Gulf of Fonseca.[985]

7.137 During the first substantive session of the Third U.N. Conference on the Law of the Sea in 1974, the long-standing dispute between El Salvador and Honduras regarding the Gulf of Fonseca erupted in a pointed exchange between the two delegations about historic bays and the delimitation of the territorial sea.[986] The exchange engaged one of the most influential leaders of the Conference, Ambassador Reynaldo Galindo-Pohl of El Salvador.

7.138 Shortly afterwards, an informal dispute settlement group comprised of interested delegations began to meet on a regular basis to discuss the contents of the dispute settlement chapter of what would become UNCLOS. Ambassador Galindo-Pohl was co-chairman of the

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[984] *See supra* Chapter 4, Section II.A.

[985] But for the fact that three States succeeded to the single colonial State (Spain) that previously surrounded it, the Gulf of Fonseca would qualify as a juridical bay under UNCLOS Article 10. *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Merits, Judgment, I.C.J. Reports 1992, p. 241, para. 383. MP, Vol. XI, Annex LA-19.

[986] *Id.*, paras. 18-20 (statement by Honduras, Second Committee); U.N. Conference on the Law of the Sea III, Second Committee, *Summary Records of the 4th Meeting*, U.N. Doc. A/CONF.62/C.2/SR.4 (16 July 1974), paras. 1-3. MP, Vol. XI, Annex LA-99 (statement by El Salvador, Second Committee); *id.*, paras. 54-56 (statements exercising rights of reply by Honduras and El Salvador, Second Committee).

group.[987] In that capacity, he introduced a working paper in August 1974[988] that would form the basis for all subsequent negotiations on dispute settlement.[989] That working paper included alternative formulations of exceptions and reservations to dispute settlement jurisdiction, almost all of which referred to historic bays or title in close proximity to each other and to an exception for delimitation of the territorial sea.[990]

7.139 The final text of subparagraph (a) of Article 298(1) emerged at the ninth session of the Conference in 1980 from the work of Negotiating Group 7 (established in 1978).[991] The mandate of Negotiating Group 7 was specific; namely, "Delimitation of maritime boundaries between adjacent and opposite States and settlement of disputes thereon".[992] In that context, and with little discussion, it included the reference to historic bays or titles in the text concerning settlement of delimitation disputes. The history thus makes clear that the reference to "historic bays or titles" in Article 298(1)(a)(i) is linked to questions of delimitation. Thus, when Article 298(1)(a)(i) refers to "those involving historic bays or titles" the "those" being referred to are not disputes generally but rather disputes concerning delimitation.

7.140 The structure of Article 298, paragraph 1, as a whole confirms the link between the references in subparagraph (a)(i) to disputes concerning "sea boundary delimitations" and "those involving historic bays or title". Subparagraph (b) of Article 298(1), for instance,

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[987] Ambassador Reynaldo Galindo-Pohl would also serve as chair of the Second Committee of the Conference in 1975 at the time that the first Single Negotiating Text was issued. The drafts that he contributed formed the basis for Parts II to X of the Convention.

[988] Australia, et. al., *Working paper on the settlement of law of the sea disputes*, U.N. Doc. A/CONF.62/L.7 (27 Aug. 1974), pp. 85-93. MP, Vol. XI, Annex LA-103; U.N. Conference on the Law of the Sea III, Plenary, *Summary Records of the 51st Meeting*, U.N. Doc. A/CONF.62/SR.51 (29 Aug. 1974), p. 213. MP, Vol. XI, Annex LA-104.

[989] U.N. Conference on the Law of the Sea III, Plenary, *Summary Records of the 51st Meeting*, U.N. Doc. A/CONF.62/SR.51 (29 Aug. 1974), pp. 213-214. MP, Vol. XI, Annex LA-104 (Statement by El Salvador, Plenary, Aug. 29, 1974).

[990] Australia, et. al., *Working paper on the settlement of law of the sea disputes*, U.N. Doc. A/CONF.62/L.7 (27 Aug. 1974), p. 92. MP, Vol. XI, Annex LA-103.

[991] U.N. Conference on the Law of the Sea III, *Report of the Chairman of Negotiating Group 7*, U.N. Doc. A/CONF.62/L.47 (24 Mar. 1980), p. 78. MP, Vol. XI, Annex LA-111. *See* U.N. Conference on the Law of the Sea III, *Informal Composite Negotiating Text, Revision 2* U.N. Doc. A/CONF.62/WP.10/REV2 (11 Apr. 1980), Art. 298(1)(a). MP, Vol. XI, Annex LA-112; U.N. Conference on the Law of the Sea III, *Informal Composite Negotiating Text, Revision 3*U.N. Doc. A/CONF.62/WP.10/REV3 (22 Sept. 1980), Art. 298(1)(a). MP, Vol. XI, Annex LA-114.

[992] U.N. Conference on the Law of the Sea III, *Organization of Work: Decisions Taken by the Conference at its 90th Meeting on the Report of the General Committee*, U.N. Doc. No. A/CONF.62/62 (13 Apr. 1978), p. 8, para. 7. MP, Vol. XI, Annex LA-109.

refers to military activities and law enforcement activities. Although distinct, these activities are nevertheless related. Both may be carried out by government vessels and State aircraft, often the same vessels and aircraft. In a like vein, subparagraph (c) of Article 298(1) refers to only one exception. One would therefore not expect to find two wholly unrelated exceptions in a single subparagraph, especially one that emerged from a negotiating group whose objective was to craft an exception to jurisdiction for cases of maritime boundary delimitation.

7.141 For all these reasons, even if China were claiming "historic title" over the area encompassed by the nine-dash line – which is not what its legislation says – that fact would be without consequence to the question of the Tribunal's jurisdiction.

7.142 In this respect, the danger to the UNCLOS system posed by permitting a State Party to the Convention to avoid the jurisdiction of a court or tribunal otherwise properly convened under Section 2 of Part VX merely by labelling a maritime claim as one of "historic title" must be underscored. Such an interpretation would effectively constitute an open invitation to make unilateral claims incompatible with the Convention, while simultaneously skirting the compulsory jurisdiction created by Section 2. Worse still, the exception itself would preclude challenges to the legality of the claim on which it is founded.

7.143 It is difficult to imagine that such an open-ended exception to compulsory jurisdiction could have found its way into the Convention without debate. It is equally difficult to reconcile such an interpretation with the object and purpose not only of Part XV but of the Convention as a whole, the most fundamental object of which is to substitute a global multilateral agreement and institutions, including compulsory dispute settlement, for unilateral claims as the basis for the rights and duties of States with respect to the sea.

2. Article 298(1)(b)

7.144 In its 2006 Declaration, China also availed itself of the optional exception afforded by Article 298(1)(b) for "disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service" and "disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3".

7.145 Before examining the scope of this exception in detail, it bears emphasis at the outset that it is, on its face, inapplicable to the Philippines' claims. No matter how construed, the military and law enforcement exceptions do not and cannot apply to the Philippines claims that:

- China's entitlements in the South China Sea are those established by UNCLOS;
- China's claim to "historic rights" within the area encompassed by the nine-dash line but beyond the limits of its entitlements under the Convention is contrary to UNCLOS and invalid;
- Submerged features that are not above water at high-tide, including Second Thomas Shoal, Mischief Reef and Subi Reef, are part of the seabed and incapable of appropriation, and generate no maritime entitlements;
- Gaven Reef and McKennan Reef (including Hughes Reef) are low-tide elevations that generate no maritime entitlements of their own, and can serve only as basepoints for the measurement of the territorial sea of Namyit and Sin Cowe, respectively (both "rocks" occupied by Vietnam);
- Scarborough Shoal, and Johnson, Cuarteron and Fiery Cross Reefs are "rocks" under Article 121(3) of the Convention that do not generate entitlement to an EEZ or a continental shelf;
- China has unlawfully exploited the living resources within the EEZ of the Philippines;
- China has unlawfully deprived the Philippines of access to the living and non-living resources in its EEZ and continental shelf ;
- China has breached its obligation under UNCLOS not to interfere with traditional fishing by Filipino fishermen at Scarborough Shoal;
- China has violated its obligations under the Convention to protect and preserve the marine environment;

- China has breached its obligations and the rights of the Philippines by constructing artificial islands, installations and other structures in the EEZ of the Philippines without the authorization of the Philippines;

- China has breached its obligations under UNCLOS by operating its law enforcement vessels in a highly dangerous manner causing serious risks of collision to Philippine vessels in the vicinity of Scarborough Shoal; and

- China has breached its obligations under the Convention since the commencement of these proceedings by interdicting Philippine vessels in the vicinity of Second Thomas Shoal, preventing the Philippines from delivering urgently needed food, fresh water and medical supplies to its personnel stationed at the feature, and exacerbating the disputes between the Parties.

None of these claims raise issues involving military or law enforcement activities in any way. The Tribunal's jurisdiction over them is therefore unaffected by anything in Article 298(1)(b).

a. The "military activities" exception does not apply

7.146 The term "military activities" is not defined either in Article 298 or elsewhere in the Convention. The plain text of Article 298(a)(1)(b), however, makes it abundantly clear that military activities are distinct from law enforcement activities. The distinction is important. While all types of military activities may be excluded from jurisdiction, only certain types of law enforcement activities are; namely, those "in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3".

7.147 None of the activities undertaken by Chinese government vessels about which the Philippines complains in these proceedings are properly considered "military activities". None of these activities was carried out by a Chinese naval vessel. To the contrary, all activities challenged by the Philippines were conducted by law enforcement vessels of the China Coast Guard, China Marine Surveillance or the Fisheries and Law Enforcement Command engaged in non-excluded law enforcement activity.

7.148 The distinction between military activities and law enforcement activities can be made difficult by the fact that some acts, including the threat or use of force, are common to both. Moreover, the same government vessels and aircraft may be engaged in either activity. Many States, for example, use naval vessels and personnel for law enforcement purposes.[993] In such cases, a law enforcement operation, even when undertaken by a military vessel with military personnel, must still be regarded as a law enforcement activity. It is, in other words, the nature and purpose of the activity itself that determines whether it is to be categorized as "military" or "law enforcement", not the identity of the actor.[994]

7.149 The Convention itself provides guidance on distinguishing between military and law enforcement activities. Article 73, for example, treats activities with respect to unauthorized fishing as law enforcement activities. It addresses matters that are characteristic of law enforcement, such as prompt release on bond and penalties. This is confirmed by Article 292, which creates a special procedure for prompt release on bond that has been applied by ITLOS in numerous cases.[995]

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[993] A classic example of a State that makes a distinction at the national level is the United States. In 1789 it created a separate service that ultimately became the U.S. Coast Guard. In the aftermath of its civil war in the mid-19th century, the United States enacted a general statute prohibiting its military forces from engaging in law enforcement activities except as permitted by law. *See* United States, *Use of Army and Air Force as Posse Comitatus*, 18 U.S.C. Sec. 1385 (13 Sept. 1994). MP, Vol. VI, Annex 165 ("Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both".) The United States nevertheless authorizes its armed forces, among other things, to engage in "active participation in direct law-enforcement-type activities (e.g., search, seizure, and arrest) . . . for the primary purpose of furthering a . . . foreign affairs function of the United States, regardless of incidental benefits to civil authorities". United States, Department of Defense, *Instruction No. 3025.21: Defense Support of Civilian Law Enforcement Agencies*, Enclosure 3 (27 Feb. 2013), para. 1(b)(1). MP, Vol. VI, Annex 169. There is specific statutory authority for military participation in civilian law enforcement, among other things, for the purpose enforcing the basic statute that regulates fishing in the 200-mile zone off the coast of the United States, the Fishery Conservation and Management Act of 1976 (United States, *Enforcement*, 16 U.S.C. Sec. 1861(a), (12 Jan. 2007). MP, Vol. VI, Annex 167, and for protection of rights of persons who discovered small "guano" islands (United States, *Alaska Native Fund*, 43 U.S.C. Sec. 1605 (21 Apr. 1976). MP, Vol. VI, Annex 164.

[994] Natalie Klein, *Dispute Settlement in the U.N. Convention on the Law of the Sea* (2005), p. 312-313. MP, Vol. XI, Annex LA-154 ("It is difficult to assert that the right of hot pursuit and the right of visit are not law enforcement activities rather than military activities as both acts involve the enforcement of specific laws. *The mere fact that these rights are exercised by military . . . vessels does not justify a characterization of "military activities" for the purposes of Article 298*".) (emphasis added).

[995] In the *Grand Prince* case, France invoked its declaration under Article 298(1)(b) in respect of law enforcement activities in regard to the exercise of sovereign rights or jurisdiction under Article 297, paragraphs 2 and 3. *Grand Prince Case (Belize v. France), Application for Prompt Release, Judgment*, ITLOS Reports 2001, para. 60. MP, Vol. XI, Annex LA-38.

7.150 Similarly, Article 33 treats activities in respect of unlawful entry by private persons as law enforcement questions regarding prevention and punishment of violations of customs, fiscal, immigration, and sanitary laws and regulations. The same is true of paragraph 3 of Article 211 regarding conditions for entry to ports or internal waters or for a call at off-shore terminals. Moreover, the ICJ has observed that boarding, inspection, arrest and minimum use of force to secure compliance with fisheries laws and regulations "are all contained within the concept of enforcement of conservation and management measures".[996]

7.151 The specific actions of Chinese government vessels of which the Philippines complains in these proceedings are all characteristic of law enforcement activities. China's unlawful fishing activities in the Philippines' EEZ were carried under the protection of law enforcement vessels of the CMS and FLEC.[997] China's interferences with the Philippines' exercise of its sovereign right to exploit the living and non-living resources of its EEZ and continental shelf were also carried out by vessels of the CMS and FLEC.[998] China itself assured the Philippines that its construction of installations and structures at Mischief Reef were not military activities.[999] The interdiction of Philippine vessels at Scarborough Shoal and Second Thomas Shoal was carried out exclusively by CCG, CMS and FLEC vessels, as were the dangerous navigational manoeuvres that risked (and narrowly avoided) collision with Philippines vessels.[1000] All of these actions were undertaken purely by law enforcement vessels and therefore plainly fall outside the scope of the military activities exception.

7.152 The Article 298(1)(b) exception for "military activities" is therefore without consequence to the Tribunal's jurisdiction in this case.

b. The limited exception for certain "law enforcement activities" also does not apply

7.153 Only certain types of law enforcement activities may be excluded by a declaration under paragraph 1(b) of Article 298. In particular, only "law enforcement activities in regard

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[996] *Spain v. Canada*, p.432, para. 84. MP, Vol. XI, Annex LA-23.

[997] *See supra* Chapter 6, Section II.

[998] *See supra* Chapter 6, Section I.A.

[999] *See supra* Chapter 6, Section III.

[1000] *See supra* Chapter 6, Section IV.

to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3" may be.[1001]

7.154 As previously discussed,[1002] paragraphs 2 and 3 of Article 297 do not apply to any of the claims of the Philippines in this case. The Philippines makes no claims regarding China's exercise of its rights under Article 246 or 253 to regulate marine scientific research (paragraph 2) or the exercise of sovereign rights with respect to living resources in China's EEZ (paragraph 3). The claims of the Philippines relate only to the *existence* of these rights, not their *exercise*. Moreover, the Philippines' claims only concern areas where China has no entitlement to an EEZ or continental shelf. The law enforcement activities exception is therefore inapplicable to these proceedings.

3. Article 298, paragraph 1(c)

7.155 Article 2981(1)(c) also provides for an optional exception for "disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations[.]" By its 2006 Declaration, China availed itself also of this exception. That fact is, however, without consequence for the Tribunal's jurisdiction in this case. Neither before nor since the Philippines submitted its Notification and Statement of Claim in January 2013 has the U.N. Security Council exercised the functions assigned to it with respect to any aspect of this dispute. Article 298(1)(c) is therefore irrelevant.

7.156 Accordingly, nothing in Section 3 of Part XV impedes the Tribunal's consideration of the merits of this case in any respect.

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7.157 For the foregoing reasons, the Philippines submits that the Tribunal has jurisdiction in regard to all of the claims raised by the Philippines in its Amended Statement of Claim and in this Memorial, because:

[1001] *See Netherlands v. Russia*, Provisional Measures, para. 45. MP, Vol. XI, Annex LA-45. *See also Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation), Provisional Measures, Order of 22 November 2013, Separate Opinion of Judge Jesus*, ITLOS Reports 2013, p. 3, para. 5(c)(ii). MP, Vol. XI, Annex LA-46 ("While exceptions to the compulsory jurisdiction established in Section 2 of Part XV of the Convention concerning law-enforcement activities in regard to the exercise of sovereign rights and jurisdiction are allowed under article 298, paragraph 1(b), of the Convention, *such exceptions nonetheless can only be made in reference to two categories of disputes as clearly referred to in that subparagraph in fine*".)

[1002] *See supra* paras. 7.95-7.111.

1. All aspects of the disputes raised in the Philippines' Amended Statement of Claim concern the interpretation and application of UNCLOS;

2. China's decision not to appear has no effect on the Tribunal's jurisdiction;

3. The 2002 ASEAN Declaration on the Conduct of the Parties in the South China Sea does not bar the exercise of jurisdiction by this Tribunal;

4. The Philippines fulfilled the requirement to engage in an exchange of views with China;

5. The limitations to jurisdiction provided in Article 297 are inapplicable to the claims of the Philippines in this case; and

6. The optional exceptions to jurisdiction provided in Article 298 also do not apply to the claims of the Philippines.

SUBMISSIONS OF THE REPUBLIC OF THE PHILIPPINES

On the basis of the facts and law set forth in this Memorial, the Philippines respectfully requests the Tribunal to adjudge and declare that:

1) China's maritime entitlements in the South China Sea, like those of the Philippines, may not extend beyond those permitted by the United Nations Convention on the Law of the Sea ("UNCLOS" or the "Convention");

2) China's claims to sovereign rights and jurisdiction, and to "historic rights", with respect to the maritime areas of the South China Sea encompassed by the so-called "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 UNCLOS;

3) Scarborough Shoal generates no entitlement to an exclusive economic zone or continental shelf;

4) Mischief Reef, Second Thomas Shoal and Subi Reef are low-tide elevations that do not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, and are not features that are capable of appropriation by occupation or otherwise;

5) Mischief Reef and Second Thomas Shoal are part of the exclusive economic zone and continental shelf of the Philippines;

6) Gaven Reef and McKennan Reef (including Hughes Reef) are low-tide elevations that do not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, but their low-water line may be used to determine the baseline from which the breadth of the territorial sea of Namyit and Sin Cowe, respectively, is measured;

7) Johnson Reef, Cuarteron Reef and Fiery Cross Reef generate no entitlement to an exclusive economic zone or continental shelf;

8) China has unlawfully interfered with the enjoyment and exercise of the sovereign rights of the Philippines with respect to the living and non-living resources of its exclusive economic zone and continental shelf;

9) China has unlawfully failed to prevent its nationals and vessels from exploiting the living resources in the exclusive economic zone of the Philippines;

10) China has unlawfully prevented Philippine fishermen from pursuing their livelihoods by interfering with traditional fishing activities at Scarborough Shoal;

11) China has violated its obligations under the Convention to protect and preserve the marine environment at Scarborough Shoal and Second Thomas Shoal;

12) China's occupation of and construction activities on Mischief Reef

(a) violate the provisions of the Convention concerning artificial islands, installations and structures;
(b) violate China's duties to protect and preserve the marine environment under the Convention; and
(c) constitute unlawful acts of attempted appropriation in violation of the Convention;

13) China has breached its obligations under the Convention by operating its law enforcement vessels in a dangerous manner causing serious risk of collision to Philippine vessels navigating in the vicinity of Scarborough Shoal;

14) Since the commencement of this arbitration in January 2013, China has unlawfully aggravated and extended the dispute by, among other things:

(a) interfering with the Philippines' rights of navigation in the waters at, and adjacent to, Second Thomas Shoal;
(b) preventing the rotation and resupply of Philippine personnel stationed at Second Thomas Shoal; and
(c) endangering the health and well-being of Philippine personnel stationed at Second Thomas Shoal; and

15) China shall desist from further unlawful claims and activities.

30 March 2014

Solicitor General Francis H. Jardeleza

Agent of the Republic of the Philippines

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