

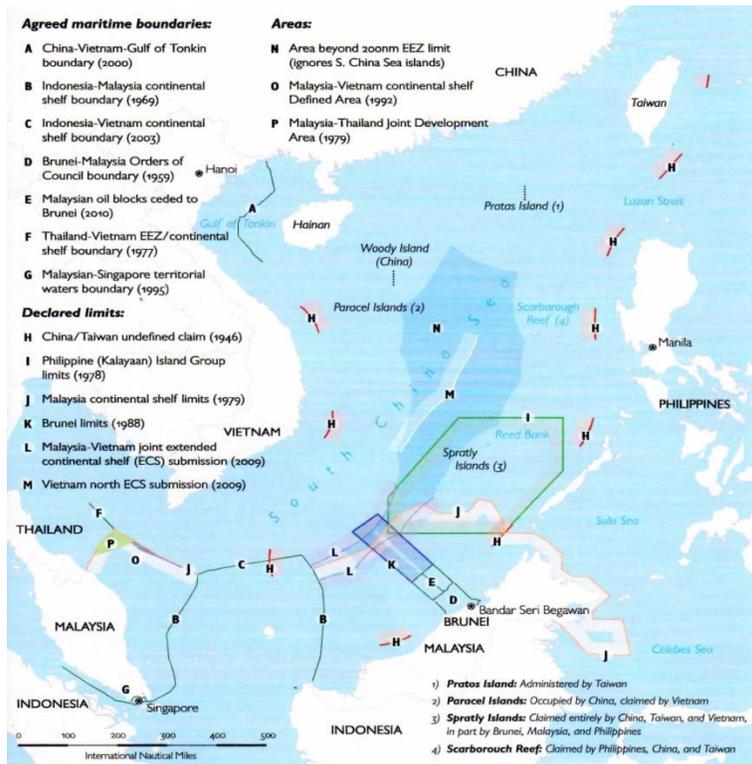
# A CNA Occasional Paper

## Philippine Claims in the South China Sea: A Legal Analysis

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*With a Foreword by CNA Senior Fellow Michael McDevitt*

August 2014





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A handwritten signature in black ink that reads 'Ken E. Gause'.

Ken E. Gause, Director  
International Affairs Group  
Center for Strategic Studies

## Foreword

This is the third of three legal analyses commissioned as part of a project entitled “U.S. Policy Options in the South China Sea.” Experienced U.S. international lawyers, such as Captain Mark Rosen, Judge Advocate General’s Corps, USN (ret.),<sup>1</sup> the author of this analysis, were asked to test the various legal arguments that Vietnam, China, Malaysia, Brunei, and the Philippines make in support of their claims, weigh them against the body of international case law associated with maritime disputes of this sort, and, if possible, reach a judgment on which country’s claim is superior.

Importantly, this analysis of Philippine claims to Scarborough Shoal and features in the Spratly archipelago was *not* undertaken as a prelude to a recommendation that the United States depart from its long-held position of not taking a position on competing sovereignty claims in the South China Sea. That is not the intent of the project; nor is it one of the recommendations.

The Philippine claims are of particular significance to U.S. policy-makers because of the United States – Philippine Mutual Defense Treaty of 1951 and how that might involve the United States and China in conflict resulting from disagreements between China and the Philippines over overlapping claims in the South China Sea. It is not that the treaty obligates Washington to take sides in the sovereignty question of Scarborough Shoal or in the Spratlys; it does not. In fact, U.S. policy has repeatedly pointed out that we take no position on sovereignty claims, which include those made by the Philippines on portions of the Spratly group *after* the Mutual Defense Treaty with the Philippines was signed on August 30, 1951.

This probably means that the United States would not become militarily involved if the Chinese seized a Philippine-claimed island, as they have essentially done in the case of Scarborough Shoal. But, if in the process of doing that, China were to attack a Philippine naval or coast guard vessel, shoot down a Philippine military aircraft, or kill or wound members of the Philippine armed forces, treaty language related to attacks on “its [the Philippines] armed forces, public vessels or aircraft in the Pacific” suggests that the treaty would apply.<sup>2</sup>

Because of this possibility, it is important that U.S. policy-makers have a clear understanding of the legal merits of Philippine claims. Accordingly, this foreword will cite at length the results of Captain Rosen’s analysis.

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<sup>1</sup> Mark Rosen is the Executive Legal Advisor to CNA and has authored numerous international and national security law studies for both the U.S. Government and private sector clients. Mr. Rosen’s particular expertise is in the maritime field including boundary and maritime disputes, piracy, marine law enforcement, and maritime confidence building measures. A retired Navy Captain (JAGC), Rosen served as the Ocean Policy Analyst and Legal Advisor to the Deputy Chief of Naval Operations for Plans, Policy, and Operation and as a Political Military Planner for the Joint Staff (J-5).

<sup>2</sup> Mutual Defense Treaty between the United States and the Republic of the Philippines, August 30, 1951, at [http://avalon.law.yale.edu/20th\\_century/phil001.asp](http://avalon.law.yale.edu/20th_century/phil001.asp).

## **Captain Rosen summarizes the situation as follows:**

The starting point for understanding the disputes between the Philippines and other claimants to features in the South China Sea is to recall the legal origins of the Philippine archipelago as well as international law concerning entitlement to maritime features.

The Republic of the Philippines was seen as an archipelago by its former colonial rulers – Spain and the United States. To the outside world, it consisted of a large “box” wherein both the waters and the features were considered part of the Philippines. Over time, the Philippines abandoned the “box” and modified its claims to conform to the 1982 UN Law of the Sea Convention. It did so in a number of enactments commencing in 1961 and ending in 2009. The 80 archipelagic baselines that form the modern-day Philippines are UNCLOS compliant.

The Philippines has asserted claims to Scarborough Shoal as well a collection of 50 [Spratly island] features which are known collectively as the Kalayaan island group (KIG). The Philippine claims to sovereignty over the features known as Scarborough Shoal and the KIG are independent of its archipelagic status both legally and historically.

Because Scarborough Shoal is a feature which exists above high tide, it is capable of [sovereign] appropriation under international law. Historical evidence surrounding this particular feature is unpersuasive: most mariners charted this feature only in order to caution vessels to remain well clear of it since it was a hazard to navigation. Similarly, the presence of itinerant fishermen from either China or the Philippines is legally insufficient to establish a legal presence. However, there is evidence that the Philippines and the U.S. Navy visited the feature, charted it, and exercised law enforcement jurisdiction over the features. That evidence is hardly a legal “slam dunk,” but the evidence supporting Philippine sovereignty appears stronger. The fact that it is 400 nautical miles closer to the Philippines than to China and well within the Philippine EEZ weighs in on this determination.

The KIG claim is much like the Chinese nine-dash-line claim which China (and the Republic of China) uses to justify its claims to features and waterspace. Using this methodology to claim territories in large areas of water is not, standing alone, likely to be regarded as legally sufficient to establish sovereignty over ocean territories. By contrast, the claim of Vietnam devolves from a legal annexation document issued by the French in 1933 that has specific coordinates and affects specific territories....The legal annexation by France was, at the time, a lawful method of territorial acquisition and its rights devolved to Vietnam. French activity prior to World War II supports their sovereign claims. The subsequent occupation of the [Spratly] territories named in the French annexation by armed forces from Japan, the ROC, and the Philippines was not lawful, because, since 1945, international law has no longer respected the forceful acquisition of territory from another state.

Itu Aba (Taiping), Thitu Island (Pagasa), Loaita (Kota), and possibly Northeast Cay (Parola) are small islands (high-tide features) which are derivative of the original French claims and are now being occupied by the ROC and Philippines, respectively. There is no evidence that France and later Vietnam abandoned their claims; indeed, there is evidence that from time to time the Vietnamese authorities took actions to reassert their sovereignty over these areas. In the period immediately following World War II, France/Vietnam seem to have acquiesced in the occupation of Itu Aba by the ROC and neither France nor, later, Vietnam took sufficient actions to protest continued occupation by the ROC. As a result, the ROC could make the case that it acquired title to Itu Aba by prescription [which is similar to the common law principle of adverse possession – open, visible, and continuous use with knowledge of the original owner]. As regards the four high-tide features listed above that are currently occupied by the Philippines, there is insufficient evidence that France/Vietnam abandoned their claims to these features. Put another way, even though upwards of 60 years have passed since these areas were militarily occupied by the Philippines, it does not change their status legally since Vietnam took a series of actions after World War II to reinforce the original French claims to these territories (although some questions of fact may exist regarding actions taken by Vietnam regarding the Northeast Cay). The political realities of uprooting Philippine citizens from these areas (especially Thitu) may be something different entirely.

West York Island (Likas), Nanshan Island (Lawak), Flat Island (Patag), and Lankiam Cay (Panata) are four very small islands in the KIG area which are currently being occupied by the Philippines. While Vietnam might argue that these small islands were covered by its original claim, they are not clearly identified in the original annexation document and there is little or no historical evidence to support continued activity to reassert sovereignty. Similarly, China has produced no evidence that it annexed and occupied these features. Absent evidence that Vietnam actively disputed sovereignty, the Philippines was legally justified in classifying the features as *terra nullius* when it occupied them in the late 1960s. Title in these four small islands should vest to the Philippines.

The high-tide elevations in the KIG that are currently occupied by Vietnam should presumptively remain in Vietnamese hands. As noted previously, even though China may have encompassed the Spratlys on maps prior to their occupation by Vietnam in the 1970s, China never took the next step and occupied the features through human contact or administrative actions. The same can be said about the KIG claim: the publication of the Philippine claim in 1978 took place well after most of these features were occupied by Vietnam. Thus, Vietnam was justified in classifying the features as *terra nullius* when it occupied them. Vietnamese claims to these high-tide elevations are not connected to the earlier claims by France; rather, they are made strictly on the basis of physical occupation after World War II.

The Philippines is entitled to a 200-nm EEZ and continental shelf [as measured from its archipelagic baselines]. That entitlement includes sovereignty over features which are classified as low-tide elevations, such as Reed Bank and Mischief Reef...Under international law, these features are not susceptible to

sovereignty or occupation. Chinese interference with the Philippines' use and management of its continental shelf resources is illegal. Other features within the KIG which are being illegally occupied by China and Taiwan include Subi Reef (Zhubi Reef), Zhongzhou Jio Reef, Gaven Reef, McKennan Reef, and Cornwallis South Reef....

The pending arbitration action by the Philippines versus China pursuant to Annex VII to the UNCLOS should have a salutary effect from a legal governance perspective since the arbitral panel is being presented with an opportunity to “codify” many of the legal principles discussed in this report. Even though China continues to boycott the activities of the arbitral panel, it does so at its peril....

The arbitral panel will hopefully play an important but small role in helping advance conflict resolution in the South China Sea. These disputes are likely to remain, because it is unlikely that any court would ever award a single country title to all of the disputed features in the South China Sea, and, thus, it is necessary to undertake a feature-by-feature examination of the positions of each country. Complicating this process are the resource implications of tiny islands such as Itu Aba, Thitu, and Spratly Island – each of which would generate huge maritime zones unless a court were given an opportunity to intervene and give the island less than full effect [as has happened in a few cases decided by the International Tribunal for Law of the Sea and the International Court of Justice]....

As regards the Philippines, these legal conclusions are reached:

- The Philippines has a superior claim to Scarborough Shoal.
- Reed Bank should be legally classified as a feature which is part of the Philippine continental shelf.
- The ubiquitous KIG claim by the Philippines carries little legal weight. It stands on the same footing as the nine-dashed-line claim. Also, it was made later than the claims of China, the ROC, and Vietnam.
- The Philippines has a superior claim to four specific high-tide elevations in the KIG based on a principle of first discovery and effective occupations – namely, West York, Nanshan Island, Flat Island, and Lankiam Cay.
- The Philippines is illegally occupying two small islands in the KIG that are the rightful property of Vietnam (based on the French annexation document): Thitu (Pagasa) Island and Loaita (Kota) Island. It is possible that Northeast Cay should be included on this list, but more evidence is needed.

## **A Proposal for Joint Development**

Importantly, beyond assessing Philippine claims, Rosen takes his analysis one step further to propose a scheme for joint development of resources in the Spratly island group that is based on legal precedent. He writes:

It would obviously be best if a joint development arrangement could be negotiated under the auspices of ASEAN or the United Nations; however, China would most assuredly exercise its constructive “veto” in both fora to block the establishment of a zone in what the Chinese consider to be their territorial waters. Therefore, borrowing from history, the Svalbard Treaty of 1925<sup>3</sup> provides a useful model for establishing a joint development zone. That treaty, which remains in force, vests Norway with sovereign rights over the Spitsbergen archipelago but grants rights to various states (including Russia, Italy, Japan, the Netherlands, and the United States) that were present on the Spitsbergen Islands when the treaty was concluded – i.e., rights to maintain their population centers and exploit the natural resources in their areas that they occupy.

Borrowing from the Svalbard Treaty, the terms of a multilateral joint development zone agreement between China, Taiwan, Vietnam, and the Philippines could include these notional terms:

- A non-claimant state would be designated as the administrator (or trustee) over the zone. Indonesia, given its stature in ASEAN, might be suited for doing this.
- All countries that have occupied high-tide features in the zone would be allowed to remain; however, they would replace all military occupiers with civilians. Military equipment would be removed.
- All structures built on fully submerged and low-tide elevations would be dismantled.
- The four parties would mutually agree to not assert territorial claims around any feature except that each occupier would have the right to establish 500-meter safety zones around each island/feature for safety of navigation purposes.
- The trustee would allow each of the four claimant states to fish anywhere in the disputed area and be the sole licensee of any fishing. Licensing would be based on current FAO standards to ensure sustainment of regional fishing stocks. Each one of the claimants would be entitled to 25 percent of the catch.
- Mining in the area would also follow the “25 percent” formula.
- Oil and gas prospecting would be licensed by the administrator on a strictly competitive basis. The “25 percent” formula would be applied to any royalties received.
- The administrator (Indonesia) would be the only state permitted to have permanently based military forces in the area, in order to enforce the terms of the agreement.

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<sup>3</sup> Available at <http://www.jus.uio.no/english/services/library/treaties/01/1-11/svalbard-treaty.xml>.

- The United States and EU would provide security guarantees to Indonesia in the event that any of its forces came under attack.
- The agreement would enter into force by agreement among three of the four countries and any outlier's share would be held in escrow by the administrator.

Law of the Sea purists might object in principle to the establishment of such a “zone,” which might encompass areas in which high seas freedoms – including the rights of navigation and overflight – exist. But, this proposal strictly deals with allocations of rights on land territories and in maritime zones (and resources) which are derivative of those territories. Also, since the primary purpose for establishing this zone is to uphold the regional cooperation obligations of states in UNCLOS Article 123, it would seem that this zone is fully UNCLOS compliant. Indeed, given the recent move by China to ban most fishing in much of the SCS – coupled with the significant stresses on the region's resources – there is little question that the factual predicate for invoking Article 123 in a serious way is present.

While certain aspects of this plan, such as dismantling structures built on submerged or low-tide elevations or totally demilitarizing currently occupied features, seem to be too difficult to achieve, that does not mean that the notion of using the Svalbard Treaty as a precedent for joint development is not a good idea – one worthy of further study.

Finally, it should be noted that Rosen's analysis of the Philippine claims assumes that Vietnam's Spratly claim is superior to China's regarding Itu Aba and a few other small islands/high-tide elevations. Determining whose claim is superior is not a cut-and-dried process. As one expert writes, “...the important point to note is that none of these sovereignty claims is especially compelling.”<sup>4</sup>

This judgment was influenced by the 1995 study by Daniel Dzurek, of the International Boundaries Research Unit, whose 66-page paper “The Spratly Islands Dispute: Who's on First?” was the first in-depth, third-party analysis of the Spratly sovereignty dispute.<sup>5</sup> Dzurek finds that the legal credibility of a claim depends on when the legal principle of *estoppel* is judged to be in effect. (This principle bars a party from asserting a claim if it is inconsistent with a position the party previously took – i.e., the party cannot change its mind.) This judgment is something a court would have to wrestle with.

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<sup>4</sup> Clive Schofield, “Dangerous Ground: a Geopolitical Overview of the South China Sea,” p. 11, in Sam Bateman and Ralf Emmers, eds., *Security and International Politics in the South China Sea: Towards a cooperative management regime*, Routledge Security in Asia Pacific Series, paper edition, 2012.

<sup>5</sup> Daniel J. Dzurek, “The Spratly Island Dispute: Who's on First?” Maritime Briefing Vol. 2, No. 1, International Boundaries Research Unit, Department of Geography, University of Durham, UK, 1996 Maritime Briefing, Vol. 2, No. 1, available at <http://www-ibru.dur.ac.uk>. Dzurek served in the U.S. State Department as Chief of the Spatial, Environmental, and Boundary Analysis Division in the office of the Geographer, and has published extensively on maritime boundary issues.

Ambivalence over whose claim is superior is shared by two other third-party analyses. One is by Dr. Marwyn S. Samuels, an American scholar, who wrote the first detailed study on the origins of the disputes between China, Vietnam, and the Philippines. A meticulous scholar, he used Vietnamese and Chinese sources. His *Contest for the South China Sea* holds up very well some 40 years later.<sup>6</sup> Samuels concluded that China's claim to the Spratlys was "highly questionable."<sup>7</sup> His judgments were partially echoed by Australian scholar Dr. Greg Austin, who has legal training. In his well-regarded *China's Ocean Frontier*, published in 1998,<sup>8</sup> Austin found that the legal complexity of the disputed Spratly claims meant that "PRC claims to the entire Spratly group are at least equal to any other."<sup>9</sup>

On the other hand, Raul "Pete" Pedrozo, a well-qualified international legal expert found, in an analysis done for this project, that Vietnam has the superior claim to the Spratlys.<sup>10</sup> His findings are supported by Professor Monique Chemillier-Gendreau in her work, *Sovereignty over the Paracel and Spratly Islands*. Professor Chemillier-Gendreau is a legal scholar and professor emeritus at Paris University-Diderot.<sup>11</sup>

In reviewing all of these works, it is clear to me that in the unlikely event these sovereignty claims are taken to the International Court of Justice for resolution, the process will be long and difficult. None of the claimants has what might be called an "open and shut" legal case. If Rosen is right that a court would likely go feature by feature as opposed to endorsing one large sector claim versus another, it will be a long and tedious process.

The reality on the ground is that China, Taiwan, Vietnam, Malaysia, and the Philippines all permanently occupy features in the Spratly group; some have done so for over 50 years. There are only four ways in which the dispute is likely to be resolved:

- All parties agree to undertake judicial arbitration.
- All parties agree to freeze in place, tabling the issue of ultimate sovereignty in favor of a cooperative regime for resource exploitation and management.
- Individual claimants reach an understanding with China, renouncing their sovereignty claims in return for economic preference.
- The most powerful party uses force to expel rival claimants.

Michael McDevitt  
Senior Fellow and Project Director

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<sup>6</sup> Marwyn S. Samuels, *Contest for the South China Sea* (Methuen, 1982).

<sup>7</sup> *Ibid.*, p. 68.

<sup>8</sup> Greg Austin, *China's Ocean Frontier: International Law, Military Force, and National Development* (Allen and Unwin, 1998).

<sup>9</sup> *Ibid.*, p. 161.

<sup>10</sup> Raul Pedrozo, *China versus Vietnam: An Analysis of the Competing Claims in the South China Sea*, a CNA occasional paper (2014).

<sup>11</sup> Monique Chemillier-Gendreau, *Sovereignty over the Paracel and Spratly Islands*, English translation (Springer, 2000).

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## Contents

Philippine Claims in the South China Sea: A Legal Analysis.....	1
I. Introduction .....	1
II. The Legal History of the Philippine Archipelago.....	3
III. Philippine Archipelagic Claims.....	5
IV. Extra-Archipelagic Claims to Territory and Waterspace: The Kalayaan Island Group and Scarborough Shoal .....	6
A. Scarborough Shoal .....	6
1. Scarborough Shoal: Features and Modern History.....	7
2. Nature of the Claim: Rock vs. Island .....	9
3. Chinese Claim to Sovereignty Over Scarborough Shoal.....	9
4. Philippine Claims to Sovereignty Over Scarborough Shoal .....	11
5. Analysis of the Positions of China and the Philippines .....	14
a. China .....	15
b. The Philippines .....	17
B. The Kalayaan Island Group (the Spratlys).....	18
1. The Legal Status of Philippine Claims to High-Tide Elevations and Islands Within the KIG That Are Currently Occupied by the Philippines.....	20
a. Overview: Vietnam vs. China vs. Philippines and the Spratlys .....	20
b. Itu Aba .....	23
c. Vietnamese vs. Chinese Claims in the KIG .....	24
d. Philippine Claims in the KIG.....	27
e. Philippines vs. Vietnam: Assessment of Claims to Features in the KIG.....	28
f. The Legal Status of Philippine Claims to High-Tide Elevations and Islands Within the KIG That Are Not Currently Occupied by the Philippines .....	31
g. The Legal Status of Occupied Low-Tide Elevations or Submerged Features Occupied by Other States Within the KIG (or Philippine Continental Shelf).....	32
h. Reed Tablemount/Reed Bank .....	36
V. The Philippine-Chinese Arbitration: Implications for the Future .....	38
A. Background on the Case.....	38
B. Effects of a Default Judgment .....	39
VI. The Case for Joint Development .....	41
VII. Summary of Findings.....	45
Appendix: Features Occupied in the KIG .....	49

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# Philippine Claims in the South China Sea: A Legal Analysis

Mark E. Rosen, JD, LL.M.

## I. Introduction

The Philippine islands are at the center of current maritime disputes in the South China Sea (SCS). The Philippines has had maritime disputes with a number of countries, including the United States. Now, legal and policy attention is focused on sovereignty disputes between the Philippines and principally China in four areas: Scarborough Shoal;<sup>1</sup> Second Thomas Shoal (the site of a beached former U.S. Navy LST);<sup>2</sup> Reed Bank (or Reed Tablemount);<sup>3</sup> and a variety of features in the Spratly island chain, in which the contestants also include Vietnam and the Republic of China (Taiwan). China's assertion of its nine-dashed-line claim to the South China Sea in its 2009 filing with the UN Commission on the Limits of the Continental Shelf (CLCS)<sup>4</sup> and its most recent actions<sup>5</sup> to exclude Philippine fishermen from the waters around Scarborough

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<sup>1</sup> Scarborough Shoal is an area of intense sensitivity because it is rich fishing area. Philippine fishermen have traditionally used it; however, now they are prevented from doing so because China has positioned rotating coast guard vessels around the Shoal to prevent entry. Also, physical barriers (fouling cables) may have been erected to prevent entry, but the facts are in dispute.

<sup>2</sup> According to Philippine officials, the LST was beached as blocking maneuver to prevent China from further occupying features near the Philippine coastline. Philippine legal and policy analysts advised that the LST was chosen because it is part of the Philippine armed forces. The assumption is that China will not directly attack a component of the Philippine armed forces because of the mutual defense provision in Article II of the 1951 Mutual Defense Treaty which commits the United States to defend the Philippines in the event of an attack on elements of the Philippine armed forces.

<sup>3</sup> This particular area is roughly 100 nm west of Palawan Island and was the site of past Philippine oil exploration efforts; also, a joint exploration agreement was made between the Philippine, Chinese, and Vietnamese oil companies in 2004. The Philippines has been involved in oil and gas exploration in the Reed Bank since the 1970s. The area has not been fully surveyed, but the Philippines has successfully exploited natural gas in waters between Palawan Island and Reed Bank. The Asian Center & Institute for Maritime Affairs and Law of the Sea (University of the Philippines), *The West Philippine Sea: The Territorial and Maritime Jurisdiction Disputes from a Filipino Perspective: A Primer*, July 15, 2013 at 14-18 [hereinafter *Philippine Claims Primer*], available at <http://philippinesintheworld.org/?q=node/2281>. Significant additional gas deposits have been reported. The U.S. Department of Energy USGS assessment is that there are between 0.8 and 5.4 (mean 2.5) billion barrels of oil and between 7.6 and 55.1 (mean 25.5) trillion cubic feet of natural gas. Evidence suggests that most of these resources are in the contested Reed Bank area. (DOE site accessed on December 26, 2013.) See also note 128 *infra*.

<sup>4</sup> The January 2013 submission by China was in opposition to a legal filing by Vietnam and Malaysia on May 6, 2009. Vietnam and Malaysia made a joint submission to the Commission on the Limits of the Continental Shelf in accordance with Article 76 of UNCLOS seeking to extend their continental shelves beyond their "standard" 200 nautical miles. The Chinese responded with a *note verbale* asserting "indisputable sovereignty over the islands in the South China Sea and its adjacent waters" and attached a map depicting a nine-dashed line (also known as the U-shaped line) as reference to its claims over most of the South China Sea. For an excellent (probably authoritative) discussion China's views on the nine-dashed-line claim, see: Zhiguo Gao & Bing Jia, *The Nine Dash Line in the South China Sea: History, Status, and Implications* 107 *Am. J. Int'l Law* 98 (2013) [hereinafter *Gao*].

<sup>5</sup> A. Romero, 18 *Chinese Maritime Ships Operating Within Philippine Territory*, PHILSTAR.COM, available at <http://www.philstar.com/headlines/2013/06/13/953584/18-chinese-maritime-ships-operating-within-philippine-territory> (accessed Dec. 26, 2013). The current standoff over Scarborough Shoal commenced in April 2012 when a Philippine naval vessel approached a group of Chinese fishing vessels near the shoal and boarded them for illegal fishing/harvesting. See the *Philippine Claims Primer*, *supra* note 3. The principal authors of the study are Aileen P. Baviera and Jay Batongbacal. Both were interviewed by the author in December 2013 in connection with this study.

Shoal<sup>6</sup> emboldened the Philippine government to seek assistance from an international arbitration tribunal. It remains unclear whether the Chinese government will ever make an appearance before the Tribunal, or what the precedential effect of an adverse “judgment” would be, but this arbitration is an important development in the overall question of how these disputes will be decided and what the applicable rule set will be. Indeed, in the face of increasing tensions between Vietnam and China concerning China’s oil and gas activities in the vicinity of the Paracel Islands, numerous press reports say that Vietnam is considering joining the Philippine arbitration or initiating action on its own.<sup>7</sup>

This paper will explore the legal and policy basis for the Philippines’ claims to features in the South China Sea with a focus on the areas listed above. Since the Philippines are geographically near most of the features in dispute, the task of examining the claims is complex: the claims are inextricably linked to the evolution of the Philippines as an archipelagic state pursuant to the 1982 UN Convention on the Law of the Sea (UNCLOS).<sup>8</sup> The paper will also examine the entitlements of the Philippines to submerged features as part of its continental shelf.

This analysis will first examine the historical boundaries of the Philippine archipelago and the recent actions by the Philippines to conform its archipelagic claims to UNCLOS. It then will address the legal and historic basis of the Philippines’ claims to features in the South China Sea. Some discussion of the historic basis for the Philippines’ claims and the way in which its current boundaries were established is essential, since some of the claims to features outside of the Archipelago are predicated upon the fact that particular features lie upon the Philippine continental shelf. The analysis will conclude with a discussion of the pending arbitration and a possible template for joint development.

The focus is on two basic claims by the Philippine government: first, the claim to the features known as Scarborough Shoal; and second, the claim to the Kalayaan island group (KIG). The KIG encompasses a variety of notable features in the Spratly island chain, including (English variants) Reed Bank, Mischief Reef, Itu Aba, Second Thomas Shoal, and Fiery Cross Reef. These two claims differ in terms of both history and legal predicate. The KIG claim is loosely based on principles of discovery and effective occupation. Part of the KIG claim includes Mischief Reef, which is now occupied by forces from China. The bulk of the KIG claim is due

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The author is grateful for the generous assistance which they provided in connection with the preparation of this study.

<sup>6</sup> On January 1, 2014, the government of China’s island province, Hainan, enacted new measures requiring all foreign ships to obtain approval from the Chinese government before entering “maritime areas” within Hainan’s claimed jurisdiction. Hainan claims to administer approximately 770,000 square miles of the South China Sea (SCS), including the contested Paracel Islands, Spratly Islands, Macclesfield Bank, and Scarborough Reef. The regulations are part of the Implementation Measures that Hainan’s legislature approved on November 29, 2013, to “better align” Hainan’s maritime enforcement activities with China’s national fisheries law. Foreign shipping can have their catches and equipment seized and/or be fined. This particular measure also falls on the heels of China’s declaration of a huge air defense identification zone (ADIZ) in the East China Sea which has upset a number of regional governments including Japan and South Korea, and this has led to speculation that a similar ADIZ will be established in the South China Sea. For background on the Hainan Province implementation measures, see Standing Committee of the People’s Congress of Hainan Province, November 29, 2013. OSC ID: CHR2013120668352964. Discussed further *infra* in notes 128 and 129 and accompanying text.

<sup>7</sup> See, e.g., Francisco & Mogato, Reuters (Manila Bureau), “Vietnam PM says Considering Legal Action Against China over Disputed Waters,” May 22, 2014, *available at* <http://www.reuters.com/article/2014/05/22/us-vietnam-china-idUSBREA4K1AK20140522> (accessed May 24, 2014).

<sup>8</sup> UN Convention on the Law of the Sea, *opened for signature* December 10, 1982, 1833 UNTS 396 [hereinafter UNCLOS], *available at* <http://www.un.org/Depts/los/index.htm>.

west of Palawan Province in the Southern Philippines; it has some rich fishing areas as well as hydrocarbon resources near Reed Bank,<sup>9</sup> which is in the eastern portion of the KIG claim. By contrast, the claim to Scarborough Shoal relies upon different historic facts. The Shoal is mostly submerged at high tide; some argue that it is thus part of the Philippine continental shelf and should be classified as a high-tide elevation and entitled to a 12-nm territorial sea. Regardless, the legal bases for these sovereignty claims will be examined. That analysis will be tempered, of course, by international law as it relates to the ability of states to appropriate wholly submerged, or low-tide elevations, as well the legal entitlements of states to rocks which appear at high tide. In doing so, it will take into consideration the countervailing arguments by Vietnam and China to sovereignty, in order to offer an objective assessment of which claims are superior.

## II. The Legal History of the Philippine Archipelago

The modern history of the Philippines can be traced to 1898, when, following the Spanish-American War, the Spanish government ceded to the United States the lands and waters of what is now the Philippines. Cession of these lands and waters was accomplished via the Treaty of Paris,<sup>10</sup> in which a large box (see figure 1) was drawn around the 7,107 islands that form the Philippine archipelago.<sup>11</sup> Then, in 1932, the Philippine Senate passed Act No. 4003, classifying all of the waters inside the Treaty Box as Philippine territorial waters for purposes of regulating fishing, law enforcement, defense, and resource development.

In 1933, the United States ceded all the lands it had received under the Treaty of Paris to the people of the Philippines; however, the United States retained residual authority as a protector of the Philippines until such time as the Philippine legislature established self-rule.<sup>12</sup> In 1946, the United States formally recognized Philippine independence, and all of those territories inside the Treaty Box were ceded to the modern day Republic of the Philippines (RP)<sup>13</sup> without protest by any other nations. Neither Scarborough Shoal nor the features now claimed by the Philippines as part of its Kalayaan Island Group (KIG) claim were inside of the original Treaty Box.

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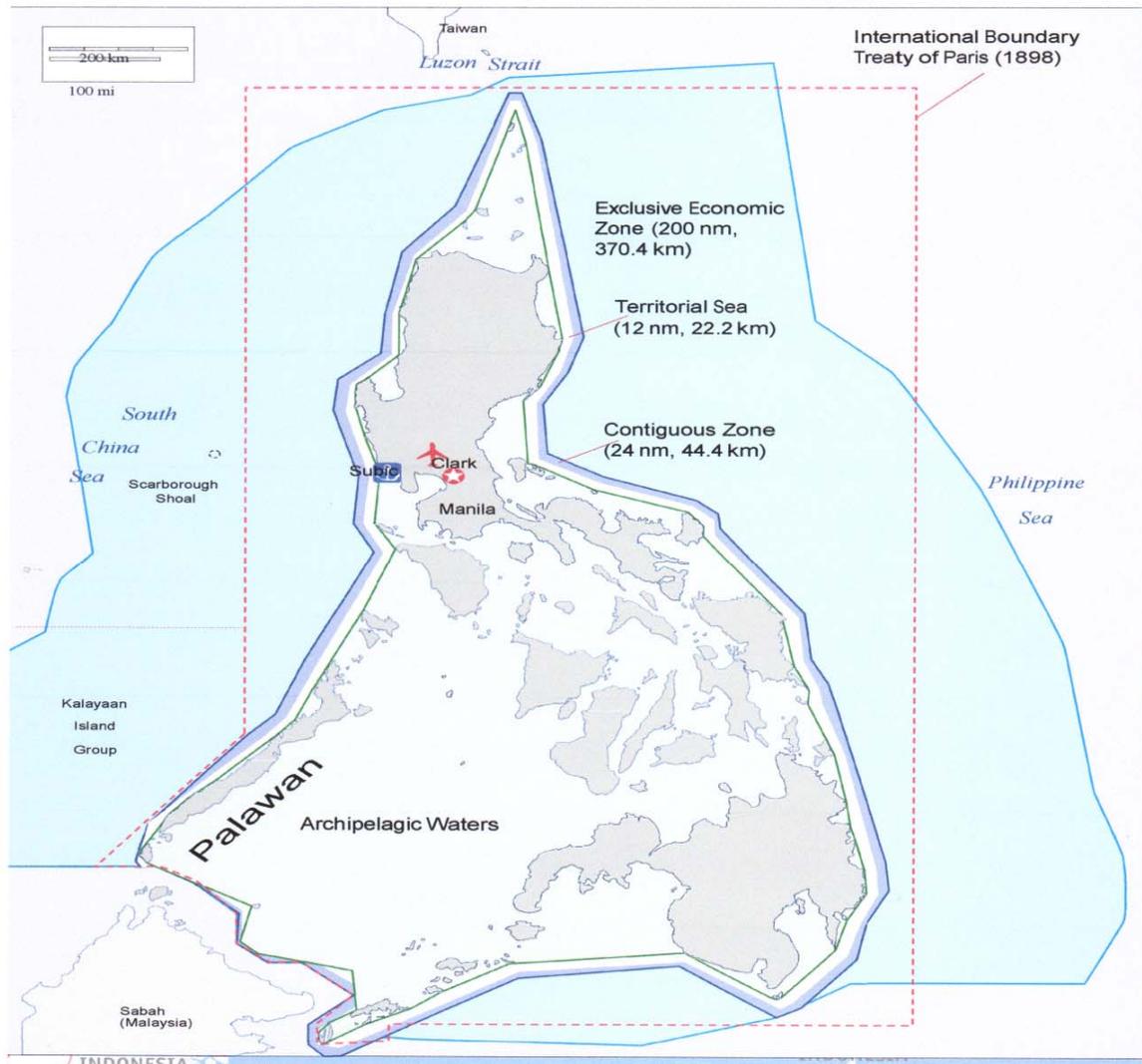
<sup>9</sup> Reed Bank is classified geologically as a tablemount (an isolated underwater volcanic mountain).

<sup>10</sup> The Treaty of Paris is technically one of three treaties that established the Philippine territorial boundaries: (1) Treaty of Paris, U.S.-Spain, December 10, 1898, T.S. No. 343; (2) Cession of Outlying Islands, U.S.-Spain, November 7, 1900, T.S. 345; and (3) Boundaries, Philippines and North Borneo, U.S.-U.K., January 2, 1930, T.S. No. 856. The so-called Treaty Box was supplemented by a 1900 additional treaty between the U.S. and Spain to include territories formerly occupied by Spain on the islands of Cagayan, Sulu, and Sibutu (immediately adjacent to Malaysia's Sabah Peninsula) and a 1930 agreement with the U.K. to deal with British protectorate territories in North Borneo (modern-day Malaysia).

<sup>11</sup> The total land area of the Philippines is approximately 300,000 sq km.

<sup>12</sup> Hare-Hawes Cutting Act (1933). Philippine National Territory Document No. 21:1 (1933). Section 5 of the Act ceded all properties to the Philippines except those retained by the United States as military reservations. (Copies of act on file with the author.)

<sup>13</sup> See Proclamation No. 2695 (President Harry S. Truman) of July 4, 1946, *available at* <http://www.presidency.ucsb.edu/ws/?pid=55813>.



**Figure 1. The Philippine archipelago. The “box” outlined by a broken red line represents the amounts ceded from Spain to the United States in 1898. Source: CNA Graphics.**

The documents effectuating the U.S. transfer of sovereignty in the 1930s did not address the status of the waters which were enclosed inside the Treaty Box or the legitimacy of Philippine Act No. 4003 which classified the enclosed waters as internal waters. In 1955, the Philippines notified the Secretary General of the United Nations that it regarded all waters inside of the Treaty Box to be territorial waters.<sup>14</sup> In subsequent legislation, the Government of the Philippines established, in Act No. 3046 of June 17, 1961, a series of 80 straight baselines,<sup>15</sup> which, as shown in figure 1, more closely framed the Philippine archipelago and effectively repeals the old Treaty Box claim. The position of the Philippine government in that legislation was that all waters inside the baselines were considered internal waters and all waters between the baselines and “Treaty Limits” were territorial seas. The United States and other states regarded this new claim as excessive because it would have the effect of closing off numerous

<sup>14</sup> H. Yorac, *The Philippine Claims to the Spratly Island Group*, 58 *Philippine Law Journal* 42, 43 (1983) [hereinafter Yorac]; L. B. Bautista, *The Philippine Treaty Limits and Territorial Waters Claim in International Law*, 5 *Social Science Diliman* (No. 1 and No. 2), pp. 111 and 197 (2009) [hereinafter Bautista].

<sup>15</sup> Discussed in U.S. Department of State, *Limits of the Seas, Philippines Straight Baselines*, No. 33 (1973).

international straits (Surigao, Sibutu, Balabac, and Mindora) and would deny the international community passage through recognized “internal” passages<sup>16</sup>.

### III. Philippine Archipelagic Claims

In 2009, the Philippine government enacted new legislation to amend its prior archipelagic baseline claims. That legislation (Republic Act No. 9522)<sup>17</sup> established archipelagic baselines similar to those shown in figure 1; however, some of the baselines were adjusted to conform to the technical requirements of Article 47 of the UNCLOS, which states that baselines cannot generally exceed 100 nautical miles in length. Preliminary analysis by the author and experts at the Department of State<sup>18</sup> confirms that the new baselines conform to UNCLOS. None of the baselines appear to depart in an appreciable amount from the direction of the islands, and the baseline segments meet the technical standards in terms of length.

The Philippines has still not formally clarified its position on passage through its archipelagic waters or formally repudiated the “internal waters” position which it took when it ratified the Law of the Sea Convention in 1982. However, the Philippines indicated in a *note verbal* that the regime of innocent passage applies in Philippine “internal” waters.<sup>19</sup> And, on October 26, 1988, multiple sources<sup>20</sup> confirmed that the Philippines had issued a clarifying statement to the Government of Australia (via the UN Secretary General) that it would respect archipelagic passage rights contained in UNCLOS:

The Philippine Government intends to harmonize its domestic legislation with the provisions of the Convention...the necessary steps are being taken...the Philippine government wishes to reassure the Australian Government and the States Parties to the Convention that the Philippines will abide by the provisions of said Convention....<sup>21</sup>

The Supreme Court of the Philippines also stated that the right of innocent passage is a matter of customary law and would apply in both Philippine territorial seas and archipelagic waters.<sup>22</sup> The court also recognized that archipelagic sea lanes passage was a necessary concession which archipelagic states made in exchange for being able to enclose their outermost islands, but fell short of describing how it would specifically apply in the case of the Philippines. The president

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<sup>16</sup> Department of the Navy, *Maritime Claims Reference Manual*, No. DoD 2005-1-M (2013) available at: [http://www.jag.navy.mil/organization/code\\_10\\_mcrm.htm](http://www.jag.navy.mil/organization/code_10_mcrm.htm).

<sup>17</sup> The text of Republic Act No. 9522 can be found at [http://www.lawphil.net/statutes/repacts/ra\\_9522\\_2009.html](http://www.lawphil.net/statutes/repacts/ra_9522_2009.html).

<sup>18</sup> U.S. Department of State, *Limits of the Seas, No. 142*, “Philippines: Archipelagic and Other Maritime Claims and Boundaries: Philippines,” Baumert and Melchoir, June 2014 (DRAFT). (Copy on file with the author.)

<sup>19</sup> The May 8, 1984, Declaration which the Philippines recorded with the United Nations Law of the Sea Office reads (Para 7): “The concept of archipelagic waters is similar to the concept of internal waters....” And (para 6): “the provisions on archipelagic passage through sea lanes do not nullify or impair the sovereign rights of the Philippines over the sea lanes.....to enact legislation to protect its sovereignty....” Robin Churchill & Vaughan Lowe, *The Law of the Sea* 107 (2d ed., Mellard Schill 1988).

<sup>20</sup> Bautista, *supra* note 16, at 117; J. Ashley Roach and Robert Smith, *Excessive Maritime Claims* 372 (3<sup>rd</sup> ed., Martinus Nijhoff 2012).

<sup>21</sup> UN Current Developments in State Practice, No. 11 at 98; 12 AUST Y.B. Int’l Law 385 (1992).

<sup>22</sup> G.R. Case No. 187167, August 16, 2011. *Decision en banc*. The case decided the constitutionality of Republic Act 9522, which established the system of archipelagic baselines. The court rejected the petitioner’s claims that the “Treaty Box” and associated enclosed waters were the correct boundaries of the Philippines. The court held that the Treaty Box described the territories which are part of the Republic of the Philippines but that the actual maritime boundaries would have to be drawn in accordance with the 1982 Law of the Sea Convention.

of the Philippines also made a tentative decision to coordinate the sea lanes' coordinates and regulations with those of the International Maritime Organization.<sup>23</sup>

The Philippines established a 200-nm continental shelf in 1994 as measured from the new archipelagic baselines. It also sought, consistent with Article 76, an extended continental shelf in the vicinity of the Benham Rise, which is an extinct volcanic rise off the eastern coast of the main island of Luzon. The Philippines' claim was made with the Commission on the Outer Limits of the Continental Shelf (CLCS) in 2009.<sup>24</sup> The Commission sided with the Philippines, agreeing that it was entitled to an extended continental shelf of 350 nautical miles in the Benham Rise region<sup>25</sup> and 200 nautical miles elsewhere. This extended continental shelf claim based on the Benham Rise is not in dispute.<sup>26</sup>

As we turn to the question of claims to waterspace and territory outside the Treaty Box, it is important to keep in mind that some of the Philippine claims to features (especially inside KIG) are predicated on the fact that the features are either low-tide elevations or submerged at all times. If it meets those criteria and is within 200 nautical miles of an approved Philippine baseline, then, as a matter of law, the feature is presumptively part of the Philippine continental shelf unless there is another continental shelf that can "compete" for it.

#### **IV. Extra-Archipelagic Claims to Territory and Waterspace: The Kalayaan Island Group and Scarborough Shoal**

##### **A. Scarborough Shoal**

The Republic of the Philippines has two basic external SCS claims: claims to the features known as Scarborough Shoal; and claims to the other features contained within the geometric area, which the Philippines asserts are part of the KIG (area in figure 2 framed by the broken red line and marked PD 1596). Although these two areas are depicted in figure 2, the discussion which immediately follows concerns only the Scarborough Shoal, which is claimed by the Philippines, the Republic of China (ROC, or Taiwan), and the People's Republic of China.

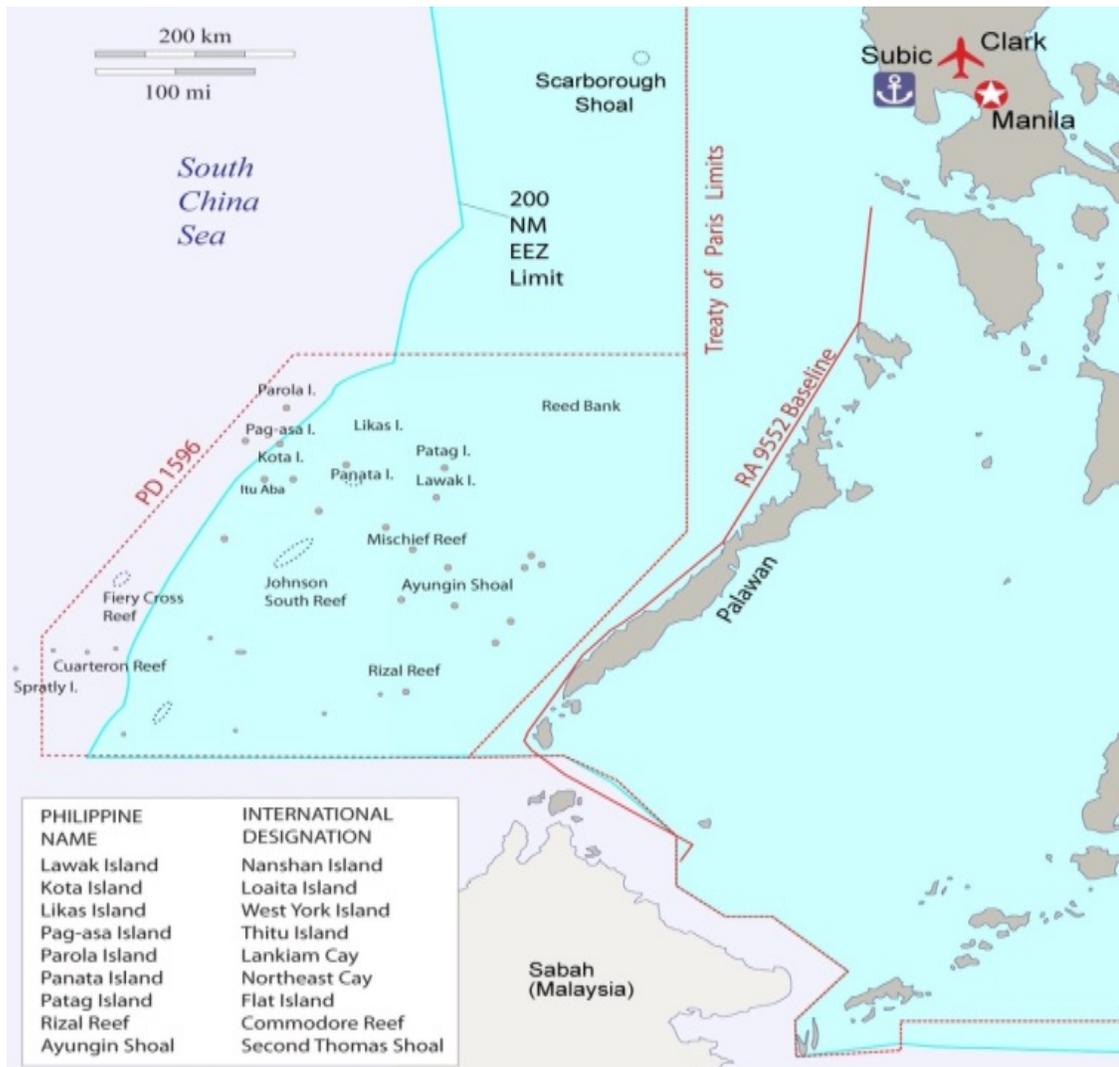
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<sup>23</sup> Meeting between the author and Philippine National Security Advisor Cesar P. Garcia and RADM Vicente M. Agdamag (Ret.) (deputy director general) on December 17, 2013 [hereinafter NSC meeting].

<sup>24</sup> <http://www.un.org/depts/los/clcs>.

<sup>25</sup> The additional continental shelf area is estimated as 135,000 sq km. See CLCS Document CLCS/74 of April 12, 2012, available at [http://www.un.org/Depts/los/clcs\\_new/commission\\_submissions.htm](http://www.un.org/Depts/los/clcs_new/commission_submissions.htm).

<sup>26</sup> K. Alave, *UN Approves PH Territorial Claim to Benham Rise*, Philippine Daily Inquirer (April 12, 2012), <http://newsinfo.inquirer.net/183779/un-approves-ph-territorial-claim-to-benham-rise>. For the report, see item 9 of CLCS/74: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/326/32/PDF/N1232632.pdf?OpenElement>.



**Figure 2. Depiction of Philippine Claims Outside of the Main Archipelago: Scarborough Shoal and Kalayaan Island Group. Source: CNA Graphics.**

### *1. Scarborough Shoal: Features and Modern History*

Scarborough Shoal is the largest atoll in the South China Sea. As shown in figure 3, the features form a triangle-shaped chain of reefs and rocks. This particular area has been a source of contention between the Philippines and China since 1997 because it is rich with fish, guano, sea turtles, sea cucumbers, and other types of living marine resources. There was a serious stand-off in April 2012 when a Filipino warship confronted eight Chinese fishing vessels that were harvesting marine resources in the Shoal.<sup>27</sup> China quickly dispatched two large maritime surveillance ships to block the Philippine ship from taking action. In the ensuing weeks, China sent a large number of vessels to establish a permanent presence around the shoal and may have installed some barriers which prevented access to the Shoal's lagoon. Eventually the Philippine vessels withdrew.

<sup>27</sup> See B. Glaser, *Trouble in the South China Sea*, Foreign Policy, Sept 17, 2012, available at [http://www.foreignpolicy.com/articles/2012/09/17/trouble\\_in\\_the\\_south\\_china\\_sea](http://www.foreignpolicy.com/articles/2012/09/17/trouble_in_the_south_china_sea).



**Figure 3. Landsat Image of Scarborough Shoal.**  
**Source: Google Earth.**

In retaliation for the Philippine actions, the Chinese imposed quarantine controls over the import of Philippine bananas into China and began stationing warships, and now coast guard vessels, in the area to prevent Philippine fishing vessels from entering the region. According to the Philippine Ministry of Foreign Affairs, Chinese fishing vessels are being given access to the disputed area. (See figure 4.) China has made it known that it will forcibly eject and/or arrest any future Philippine incursions into the area.<sup>28</sup> Aerial photos also show man-made concrete obstructions which tend to block the entrance

to the lagoon; however, there is conflicting evidence as to who put them there.

The Shoal is roughly 120 miles off the west coast of Luzon and is well inside the 200-nm claimed exclusive economic zone (EEZ) of the Philippines and the continental Shelf. The features are nearly 500NM from the nearest point on the physical coast of China. Scarborough Shoal, or Scarborough Reef, is also known as Huangyan Island (Chinese) Bajo de Masinloc or Panatag Shoal (Filipino). The name Scarborough was given to it by the East India Company after a tea trading ship wrecked on one of the rocks which Spanish cartographers called Maroona Shoal in 1748.<sup>29</sup> For this reason, the particular areas comprising modern day Scarborough Shoal was regarded by mariners as an area to be “avoided at all costs.” And, to the extent that surveys were conducted of the features the intent was to properly chart the features for safety of navigation purposes.<sup>30</sup>



**Figure 4. Chinese Ships at Anchor in Scarborough Shoal.** Source: Philippine MFA Press Release April 18, 2012.

The reef surrounds a lagoon of around 60 square miles. Many of the surrounding rocks protrude only a meter or so from the sea at low tide and are completely submerged during high tide. Since a shoal is a linear landform extending into a body

of water, Scarborough Shoal is not technically a true shoal; instead, it is a series of small islets.

The waters around the Shoal make it a productive fishing area. The area was charted by the U.S. Navy in three surveys – one in 1964 and two in 2005 – and contains numerous “cautions” of obstructions in the entrance to the lagoon and rocks. The lagoon is mostly uncharted.<sup>31</sup> Apart from the presence of fishing and law enforcement vessels from China recently, the area is

<sup>28</sup> NSC Meeting *supra* note 23. Ely Ratner, *Learning the Details of Scarborough Reef*, The National Interest, Nov 21, 2013, available at <http://nationalinterest.org/commentary/learning-the-lessons-scarborough-reef-9442>.

<sup>29</sup> François-Xavier Bonnet, *The Geopolitics of Scarborough Shoal*, IRASEC Discussion Papers #14, RESEARCH INSTITUTE ON CONTEMPORARY SOUTHEAST ASIA, Nov. 2012 [hereinafter Bonnet], available at [www.irasec.com](http://www.irasec.com).

<sup>30</sup> Bonnet, *id.* at 8.

<sup>31</sup> <http://www.oceangrafix.com/chart/zoom?chart=91004>.

unoccupied and not realistically capable of human habitation unless it takes place on artificial structures.

## *2. Nature of the Claim: Rock vs. Island*

According to the lead U.S. counsel in the pending arbitration between the Philippines and China, the Philippines considers all of the features that Scarborough Shoal comprises to be rocks, not islands, and has asked the arbitral panel to rule on that position.<sup>32</sup> The Philippine Ministry of Foreign Affairs similarly issued a statement on April 18, 2012, in which it asserted that

Bajo de Masinloc (Scarborough Shoal) is not an island...it is also not part of the Spratlys...[rather it is] .... a ring-shaped coral reef which has several rocks encircling a lagoon. About five of the rocks are above water at high tide. Of these rocks, some are about 3 meters high above water.<sup>33</sup>

By contrast, China takes the position that the features are known as Huangyan Island, are part of the Zhongsha Islands, and might be entitled to a full 200-nm EEZ entitlement. The so-called Zhongsha island chain comprises a number of features (most totally submerged at high tide), including Macclesfield Bank, Truro Shoal, Saint Espirit Shoal, and Dreyer Shoal.<sup>34</sup> Bonnet and others speculate that the Chinese objective is to link Huangyan Island with the other features, in order to form a mid-ocean archipelago,<sup>35</sup> much as they have enclosed the Paracel Islands and the Daiyou/Senkaku Islands with baselines. But, China has yet to promulgate any archipelagic baselines which link the Zhongsha island chain to Scarborough Shoal. It is worth noting that the baselines around the Paracels and Daiyou are not authorized by UNCLOS. Article 46 of the treaty is explicit in stating that the archipelagic regime is reserved for countries which “wholly consist” of islands and that claims to archipelagic status must meet a strict land-to-water ratio.<sup>36</sup> China is obviously not an archipelagic state.

## *3. Chinese Claim to Sovereignty Over Scarborough Shoal*

In general terms, China’s claim is based on the argument that it acquired sovereignty through discovery of unoccupied territory (*terra nullius*) and established (and maintained) a legal presence on the island before anyone else. A Chinese Ministry of Foreign Affairs official does a good job of summarizing the Chinese position in a response to an op-ed in the *Wall Street Journal*:

Hundreds of years of jurisdiction has consolidated China's sovereignty over the island. Historic and legal evidences are explicit, clear, complete and thorough, as proved by official documents, local chronicles and official maps throughout Chinese history. China's sovereignty over Huangyan Island has long been recognized and respected by the

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<sup>32</sup> Paul Reichler, presentation at CSIS on December 3, 2013, <https://csis.org/event/discussion-philippines-south-china-sea-arbitration-case>.

<sup>33</sup> <http://www.gov.ph/2012/04/18/philippine-position-on-bajo-de-masinloc-and-the-waters-within-its-vicinity/>.

<sup>34</sup> Han Zhenhua 韩振华, “The South Sea as Chinese National Territory in the Yuan-Era 'Measurement of the Four Seas' 元代《四海测验》中的中国疆宇之南海 (in Chinese),” *Research on the South China Sea 南海问题研究* 1979, <http://www.gavinmenzies.net/wp-content/uploads/2011/08/1421bobsinwangfulltextpdf.pdf>. See also Zou Keyuan, *The Law of the East Asia: Issues and Prospects*, pp. 64-65 (Routledge Studies on International Law 2005).

<sup>35</sup> Bonnet, *supra* note 29, at 5.

<sup>36</sup> A Zhongsha archipelagic claim would grossly fail the land-to-water ratio tests in UNCLOS Article 47. The maximum amount of waterspace to land is 9:1.

international community and had not been disputed by the Philippines. On the contrary, the Philippine claim over the island has never been recognized by any other country.

The claim that the Huangyan Island belongs to the Philippines because it's closer to the country is a result of ignorance of the international law. In fact, “geographical proximity” has long been dismissed by the international law and practiced as the principle of the solution of territory ownership. If countries can make territorial claims at will on the ground of “geographical proximity,” the world political map might be a complete mess.<sup>37</sup>

In support of this claim of first discovery and occupation, various Chinese scholars have offered their views of history. Judge Zhiguo Gao, who now serves on the International Tribunal for the Law of the Sea, wrote in the *American Journal of International Law*<sup>38</sup> that none of the Philippine theories of sovereignty effectively establish that the areas were *terra nullius* when they were annexed by the Philippines (discussed below) and that “China can show a consistent line of legislative and administrative acts in respect of the islands concerned.” Gao also asserts that China’s claim can be based on historic title as the principle is codified in the 1998 Permanent Court of Arbitration Decision in *Eritrea v. Yemen*.<sup>39</sup>

Gao’s theory of acquisition is generally consistent with the views of other Chinese authorities. The Xinhua news agency published an account by Fu Yu (Chinese National Academies of Science),<sup>40</sup> which said that in 1279 Chinese astronomer Guo Shoujing conducted a survey of the seas in and around China under a commission from Emperor Kublai Khan, and that Huangyan Island was chosen as the point for surveying the South China Sea – i.e., that the shoal was discovered by China during the Yuan Dynasty (1271-1368). Moving into the modern era, Gao states that in January 1935, the “Map Verification Committee of China” declared sovereignty over a number of islands, reefs and shoals, including Scarborough and later, in 1983, included it among the official maps of the Chinese government.<sup>41</sup>

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<sup>37</sup> Wall Street Journal. *Statement by Tang Rui, Spokesman of the Office of the Commissioner of the Ministry of Foreign Affairs of the People’s Republic of China (Hong Kong)*, June 26, 2012, available at <http://online.wsj.com/news/articles/SB10001424052702304870304577488713068832048>.

<sup>38</sup> Gao, *supra* note 4, at 87.

<sup>39</sup> *Eritrea v. Yemen, First Stage, Territorial Sovereignty and the Scope of the Dispute* (1998), 22 RIAA 268, para 239 [hereinafter *Eritrea v. Yemen*] available at [http://untreaty.un.org/cod/riaa/cases/vol\\_XXII/209-332.pdf](http://untreaty.un.org/cod/riaa/cases/vol_XXII/209-332.pdf). Yemen sought to base its title to the islands on “original, historic, or traditional Yemeni title.” Gao would have done well to read the opinion he cited more closely because the case was largely decided in favor of Eritrea. Indeed, proximity of certain features was a major factor in support of the Eritrean claim. The panel said this about historical title: “The Yemeni idea of a reversionary ancient title has been discussed earlier in this chapter and found unhelpful in regard to these islands” at para 487. It is true that the Court did look at claims assertions during the 19<sup>th</sup> and 20<sup>th</sup> centuries, but nothing before that was given much weight: “the Tribunal rejects the Yemen theory that all the islands in the group must in principle share a common destiny of sovereignty” at 491.

<sup>40</sup> Xinhua News Agency, *Basic Facts on China’s Sovereignty over the Huangyan Island*, Nov 15, 2012, available at <http://english.cri.cn/6826/2013/02/15/2941s748443.htm> (accessed Jan. 26, 2014).

<sup>41</sup> <http://ph.china-embassy.org/eng/xwfb/t922594.htm>. The Embassy describes these actions as follows: “In January 1935, a map verification committee of the Chinese government, which consisted of representatives from ministries and departments of internal affairs, foreign affairs, education and navy, declared sovereignty over 132 islands, reefs and shoals. Huangyan Island, with the name of Scarborough Shoal, was included as a part of Zhongsha Islands into Chinese territory. In October 1947, the Chinese government announced the new namelist of South China Sea islands, in which Scarborough Shoal was included and renamed Democratic Reef as a part of Zhongsha Islands. In 1983, China’s board on geographic names released a list of geographic names of some South China Sea islands, which decided to use Huangyan Island as the standard name of the island and Democratic Reef as an alternative name.”

In April 2012, the Chinese embassy in Manila issued a statement which repeated this theory of the claim – i.e., discovery in 1279 or thereabouts. Bonnet writes that this argument has been “used and re-used” and is in dispute even among Chinese historians.<sup>42</sup> He documents that administrative maps of Guangdong Province and the Island of Hainan (where one would assume that Scarborough Shoal would have been included) do not include either Scarborough Shoal or the Spratlys as part of China.<sup>43</sup> And, maps of Guangdong Province produced in the first part of the 20th century (based on a Chinese navy expedition in 1909 to eject Japanese squatters) depict only the Paracel Islands as part of China, not Scarborough Shoal or the Spratlys.

The next date which the Chinese use in their official statements is 1935. Thus, one can reasonably conclude that prior discovery without any evidence of occupation until, at best, 1935, makes the claim of historic title to be exceedingly weak. Furthermore, even if one were to move the date of discovery forward to 1935, when China allegedly annexed the territory, the only evidence of effective occupation consists of fishing activities and unspecified scientific expeditions into the region. There are no reports of human occupation or recurring presence, public works, installation of sovereignty steles, aids to navigations, surveys, detailed mapping, environmental protection, or other activities to develop or protect the features – apart from the current exclusionary policies (using law enforcement vessels) that commenced in 2012.

#### *4. Philippine Claims to Sovereignty Over Scarborough Shoal*

The features which make up Scarborough Shoal were never inside the so-called Treaty Box established in the Treaty of Paris, so the Philippine claim to sovereignty is predicated on other facts.<sup>44</sup> The official position of the Philippines is set forth in that country’s official gazette in a statement made on April 18, 2012. It is quite comprehensive and reprinted verbatim to aid analysis:

The basis of Philippine sovereignty and jurisdiction over the rock features of Bajo de Masinloc is not premised on the cession by Spain of the Philippine archipelago to the United States under the Treaty of Paris. The matter that the rock features of Bajo de Masinloc are not included, or within the limits of the Treaty of Paris as alleged by China, is therefore immaterial and of no consequence.

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<sup>42</sup> Bonnet, *supra* note 29, at 12. See also Zou Keyuan, *Scarborough Reef: A New Flashpoint in Sino-Philippine Relations*, IBRU Boundary and Security Bulletin, Summer 1999 [hereinafter IBRU bulletin], available at <https://www.dur.ac.uk/ibru/.../download/?id=149>.

<sup>43</sup> Bonnet, *supra* note 29, at 12-13.

<sup>44</sup> A point of view sometimes advanced is that the 1900 Treaty of Washington between the United States and Spain provided that any islands belonging to the Philippine archipelago and lying outside the “box” established in Article III of the Treaty of Paris were also ceded to the United States by Spain. The relevant language is as follows: “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 Sulu and Sibutu 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.” None of the above named islands are proximate to the Scarborough Shoal areas. The difficulty with this theory is that the cession documents from the United States to the Philippines never make reference to these territories or Scarborough Shoal. Another difficulty is that it is very unclear that Spain ever had substantial contacts with Scarborough Shoal (other than references on nautical charts), so there may not have been a clear intent to convey title of Scarborough Shoals. Since the Philippine Ministry of Foreign Affairs issued a statement in April 2012 that “the basis of Philippine sovereignty and jurisdiction over the rock features of Bajo de Masinloc is not premised on the cession by Spain of the Philippine Archipelago...” This particular point of view does not carry much legal weight. That Ministry Statement is discussed *infra* in this report.

Philippine sovereignty and jurisdiction over the rocks of Bajo de Masinloc is, likewise, not premised on proximity or the fact that the rocks are within its 200-nm EEZ or CS under the UN Convention on the Law of the Sea (UNCLOS). Although the Philippines necessarily exercise sovereign rights over its EEZ and CS, nonetheless, the reason why the rock features of Bajo de Masinloc are Philippine territories is anchored on other principles of public international law.

As decided in a number of cases by international courts or tribunals, most notably the Palmas Island Case, a modality for acquiring territorial ownership over a piece of real estate is effective exercise of jurisdiction. Indeed, in that particular case, sovereignty over the Palmas Island was adjudged in favor of the Netherlands on the basis of “effective exercise of jurisdiction,” although the said island may have been historically discovered by Spain and historically ceded to the U.S. in the Treaty of Paris.

In the case of Bajo de Masinloc, the Philippines have exercised both effective occupation and effective jurisdiction over Bajo de Masinloc since its independence.

The name Bajo de Masinloc (translated as “under Masinloc”) itself identifies the shoal as a particular political subdivision of the Philippine province of Zambales, known as Masinloc.

One of the earliest known and most accurate maps of the area, named Carta Hydrographical y Chorographica De Las Yslas Filipinas by Fr. Pedro Murillo Velarde, SJ, and published in 1734, included Bajo de Masinloc as part of Zambales.

The name Bajo de Masinloc was a name given to the shoal by the Spanish colonizers. In 1792, another map drawn by the Alejandro Malaspina expedition and published in 1808 in Madrid, Spain, also showed Bajo de Masinloc as part of Philippine territory. This map showed the route of the Malaspina expedition to and around the shoal. It was reproduced in the Atlas of the 1939 Philippine Census.

The Mapa General, Islas Filipinas, Observatorio de Manila, published in 1990 by the U.S. Coast and Geodetic Survey, also included Bajo de Masinloc as part of the Philippines.

Philippine flags have been erected on some of the islets of the shoal, including a flag raised on an 8.3-meter high flagpole in 1965 and another Philippine flag raised by Congressmen Roque Ablan and Jose Yap in 1997. In 1965, the Philippines also built and operated a small lighthouse in one of the islets in the shoal. In 1992, the Philippine Navy rehabilitated the lighthouse and reported it to the International Maritime Organization for publication in the List of Lights (currently, this lighthouse is not operational).

Bajo de Masinloc was also used as an impact range by Philippine and U.S. Naval Forces stationed in Subic Bay in Zambales for defense purposes. The Philippines Department of Environment and Natural Resources, together with the University of the Philippines, has also been conducting scientific, topographic, and marine studies in the shoal. Filipino fishermen have always considered it as their fishing grounds, owing to their proximity to the coastal towns and areas of Southwest Luzon.<sup>45</sup>

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<sup>45</sup> <http://www.gov.ph/2012/04/18/philippine-position-on-bajo-de-masinloc-and-the-waters-within-its-vicinity/>.

The Philippines' claim rises and falls on whether it has exercised effective occupation over the features. It cites inclusion in Spanish maps of 1734 and 1899,<sup>46</sup> hydrographic surveys in the area, erection of a flag, and maintenance of a lighthouse in the 1960s as evidence of government authority over the features. Western scholars also highlight that China failed to protest Spanish and British naval expeditions that surveyed and conducted rescue operations on Scarborough Shoal in the 1800s or an incident in 1913 when a U.S. Coast Guard cutter rescued a Swedish vessel that had run aground on the Shoal.<sup>47</sup>

Even though maritime features may only rate a 12-nm territorial sea (versus the full maritime zone accorded an island in Article 121 of UNCLOS), the International Court of Justice (ICJ) in *Nicaragua v. Colombia*<sup>48</sup> reaffirmed that features are capable of appropriation or claims of sovereignty provided that the features are above water at high tide. Parts of Scarborough Shoal are above water at high tide. In terms of the facts which support the Philippine claim of effective occupation, Bonnet and others<sup>49</sup> have chronicled that even though Scarborough was mostly ignored until 1997,<sup>50</sup> there was some activity by former colonial administrators of the Philippines – Spain and the United States – which undergirds the current Philippine claim.

Maps produced by Spanish cartographers produced in the 18<sup>th</sup> century show some shoals off the coast of Luzon at roughly the same latitude as Scarborough, but those maps give no indication of who had management control over the areas. Also, Hancox and Prescott document that the United States, the United Kingdom, and possibly Japan conducted surveys in the area for possible establishment of refueling or observation stations. In 1937, while the Philippines was under the territorial administration of the United States, Captain Thomas Maher, then director of the U.S. Coast and Geodetic Survey, entered into an exchange of letters between the U.S. high commissioner and the Department of State because there was confusion over whether the Scarborough Shoal area was part of the “Treaty Box” since the coordinates for Scarborough were nine miles outside the Treaty of Paris limits. According to Bonnet, Commonwealth President Quezon also intervened, saying that the Shoal belonged to the Philippines. The conclusion by then Secretary of State Hull was as follows:

Because of the absence of other claims, the shoal should be regarded as among the islands ceded to the United States by the American-Spanish Treaty of November 7, 1900...and in the absence of a superior claim...the Department of State would interpose no objection to the proposal by the Commonwealth Government to study the possibilities of the shoal as an aid to air and ocean navigation.<sup>51</sup>

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<sup>46</sup> Philippine Claims Primer, *supra* note 3, at pp. 4-5. The two Spanish maps are the “Murillio Velarde Map” of 1734 and The Mapa General, Islas Filipinas, Observatorio de Manila of 1899. Both depict the Shoal, although the 1734 chart only depicts features. Bonnet, *supra* note 29 at 12, also makes reference to a U.S. Coast and Geodetic Survey Map circa 1900, which includes the Scarborough Shoal as part of the territory ceded from Spain. It is named “Baju De Masinloc.” The author could not corroborate the Bonnet claim.

<sup>47</sup> Bonnet, *supra* note 29, at 8-9 and 14. R. Pedrozo, *China versus Vietnam: An Analysis of the Competing Claims in the South China Sea*, p. 37 CNA (2014) [hereinafter Pedrozo]. (Copy on file with the author.)

<sup>48</sup> *Territorial and Maritime Dispute between Nicaragua and Colombia*, ICJ 2012, para 251 [hereinafter *Nicaragua v. Colombia*], available at <http://www.icj-cij.org/docket/files/124/17164.pdf>.

<sup>49</sup> Philippine Claims Primer, *supra* note 3.

<sup>50</sup> IBRU bulletin, *supra* note 42, at 74.

<sup>51</sup> Memorandum of Cordell Hull, Secretary of State to Harry Woodring, Secretary of War, July 27, 1938, BIA 907.127 (copy available in Annex 2 of Bonnet, *supra* note 29). One must question why the current Philippine government does not wish to avail itself of this theory that Scarborough Shoal was part of the original grant from Spain to the United States. There is a difficulty with aligning oneself with that theory (i.e., that these properties were

After this flurry of activity in the late 1930s, the United States did not take any overt actions to assert the claim. But, in 1957, the Philippine government conducted an oceanographic survey of the area and, together with U.S. Navy forces based in Subic Bay in Zambales, used the area as an impact range for defense purposes. U.S. Navy charts also denote that U.S. Navy vessels conducted a survey in the area in 1964. An 8.3-meter-high flagpole flying a Philippine flag was raised in 1965. An iron tower that was to serve as a small lighthouse was also built and began operations that year.

In 1963 the Philippine Navy discovered that the Shoal was being used as a safe haven for smugglers from Macao. The Philippine Navy entered the area, arrested some of the offenders, and destroyed temporary structures that the criminals had built.<sup>52</sup> Thereafter, plans were put in place to establish regular patrols in order to ensure that smugglers did not reenter the area. Also, as indicated, in this same general timeframe the Philippine government erected a flag and a lighthouse.

In terms of legal declarations, Scarborough Reef (Bajo de Masinloc) is classified as part of the legal province of Zambales. It is also known as Panatag and Karbuero. In 2009 the Philippine legislature passed the Republic Act 9522, which assimilated Bajo de Masinloc and KIG into Philippine sovereignty and jurisdiction.

### *5. Analysis of the Positions of China and the Philippines*

As relates to Scarborough Shoal, it is important to recall that the general principle of international law is that the title to uninhabited features at sea must be established by one of three methods: cession (conveyance from one sovereign to another); prescription (peaceful occupation of another country's territory over a considerable period of time);<sup>53</sup> or occupation of territory that is not under the control of any other state (*terra nullius*). Since Scarborough is a feature which was roughly 9 nautical miles outside of the so-called "Treaty Box," the Philippines would have to make its case that the territory was occupied by Spain and United States when it was *terra nullius*, that the rights to the territory were ceded to the Philippines, and that the Philippines has effectively occupied it since then. The difficulty with that position is that the geographic coordinates in the Treaty of Paris are precise, and there is no question that Scarborough Shoal is outside of the "box." In modern property law, in which title is based on written records of title and precise locations, one cannot wish one's way into another geographic location in order to take advantage of a legal benefit. For this reason, it is prudent for the Philippines to predicate its claim on the generalized notion that these areas have been effectively occupied by Spain, the United States, and, more recently, the Philippines.

The difficulty for both China and the Philippines is that they are attempting to establish sovereignty over features which they have never physically inhabited—and which are not capable of being inhabited. Any efforts they have made regarding these features were simply to

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ceded from Spain to the United States and then, in turn, to the Philippines): the coordinates set forth in the Treaty of Paris are precise, and Scarborough Shoal is clearly outside of the "Treaty Box" limits.

<sup>52</sup> Bonnet, *supra* note 29, at 19.

<sup>53</sup> This is similar to the common law property principle of adverse possession. Georgia closely follows the English common law as regards property law concepts and, in particular, the concept of adverse possession. The Georgia Code states that in order for an owner to establish prescriptive title, it: (a) must be in the right of the possessor and not another; (2) must not have originated in fraud; (3) must be public, continuous, exclusive, uninterrupted and peaceable; and (4) must be accompanied by a claim of right. Ga Code Ann. §§44-5-461 (2010)

catalog them and record them on nautical charts, with the intent of keeping people away from the Shoal since the features constituted a serious hazard to navigation. Even though some jurists (as was the case in *Eritrea v. Yemen*)<sup>54</sup> might hold that Scarborough Shoal is too foreboding and remote to be capable of legal appropriation and occupation, it is likely that a court seized of this dispute, would classify the Shoal as a feature (high-tide elevation) capable of appropriation and assess the merits of both claimants using the same sort of analysis that would be employed if the features were physically occupied.

#### a. China

The Chinese claim has two possible pillars: legal annexation via the nine-dashed-line claim (circa 1947-1949),<sup>55</sup> and the continuous presence by fishermen to establish effective occupation.<sup>56</sup> Assuming for the moment that the annexation was lawful because the area was *terra nullius*, the question becomes whether China has done enough to support its claim that it has effectively occupied the territory. In regard to fishing, it is true that fishermen have regarded the area as a rich fishing area, harvesting fish and marine resources in the absence of a government license or a management scheme; however, that is hardly evidence of effective occupation. Indeed, many would characterize unlicensed activity as illegal. Also, borrowing briefly from the English common law, a component in the passage of title included the “Livery of Seisin,” which consisted of the hand-to-hand passage of a clod of soil or a twig from the seller to the buyer to symbolize the passage of title. This was legally followed by the Statute of Frauds, which required all transactions conveying title in property to be formalized and particularized in a very formal written instrument. The Livery of Seisin ritual would certainly not apply to the conveyance of title to an atoll; however, lawyers schooled in the common law tradition are likely to regard itinerant fishing in an area as insufficient to denote intent to occupy the features as a matter of law. Occupation requires an affirmative level of state action,<sup>57</sup> such as active management of the fisheries and licensing of fishing; isolated and sporadic acts by private citizens do not qualify as occupation.<sup>58</sup> Traditional fishing is a legitimate factor under UNCLOS in the delimitation of an opposing or adjacent continental shelf or adjacent territorial boundaries – around the margins. In this case, if China had longstanding and internationally transparent regulations which licensed and scientifically managed the fisheries in that region, perhaps the result would be different – but those are not the facts at hand.

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<sup>54</sup> This was addressed in the *Eritrea v. Yemen* case, *supra*, note 39 as related to title over the Mohabbakahs, which are four rocky islets that amounted, in the panel’s words, to “little more than navigational hazards.” At 467. In the panel’s view, absent specific evidence that the islets were titled in another state, “There is a strong presumption that islands within the twelve-mile coastal belt will belong to the coastal state.” At 474. This analysis would necessarily apply to islets which are part of a country’s continental shelf.

<sup>55</sup> Gao, *supra* note 4, at 62-63.

<sup>56</sup> Gao’s suggestion that the claim to Scarborough Shoal is based on historical title is really misplaced, based on a careful reading of the *Eritrea v. Yemen* case, which he cites in support of his statement. While the court did not totally reject the possibility of historic title, the panel made repeated statements that its major focus would be on what had happened over the past few decades concerning particular disputed features.

<sup>57</sup> This principle is established in the *Clipperton Island Case* that the occupying power must make an absolute and undisputed disposition over the territory. *Clipperton Island Arbitration (Mexico v. France)*, 2 R.I.A.A. 1105 (1931) [hereinafter *Clipperton Island Case*]. The English translation can be found at 26 Am. J. Int’l L. 390. See pp. 393-394 (1932). The arbitrator described the process of taking of possession as follows: “taking of possession is a necessary condition of occupation. This taking of possession consists in the act, or series of acts, by which the occupying state reduces to its possession the territory in question and takes steps to exercise exclusive authority there.”

<sup>58</sup> It also noteworthy that states possessing areas in which there are international fisheries have an affirmative legal obligation under Articles 116-119 to make frequent surveys of the areas being used for fisheries in order to ensure that the resources are managed to the maximum sustainable yield. There is no evidence whatsoever that China ever made such conservation surveys.

China's modern actions to make the case for effective occupation based on government action are also problematic. The rules for acquisition of territory were summarized in the first (1998) *Eritrea v. Yemen Arbitration Award*: "the acquisition (or attribution) of territory generally requires that there be an intentional display of power and authority over the territory, by the exercise of jurisdiction and state functions, on a continuous and peaceful basis. The latter two criteria are tempered to suit the nature of the territory and size of its population, if any."<sup>59</sup> Also, the critical data for assessing this conduct are based on actions before a dispute over the features becomes crystallized.<sup>60</sup> Therefore, only actions prior to 1997 (the date on which the dispute became crystallized between China and the Philippines) are legally relevant in assessing the strength of the two claims.<sup>61</sup> Put another way, once the legal issues have been made known to the international community, neither party can enhance the legal merits of its case based on subsequent actions. China seems to base much of its occupation claim on fishing in the Shoal; for a legal claim, it would need to have taken consistent action to assert rights in the fisheries and regulate fishing prior to 1997, when the bilateral dispute became manifest.

Regarding the effectiveness of Chinese actions prior to 1997, the *Eritrea* case states that the modern international law of acquisition of territory requires that there be an "intentional" display of "state functions" on a continuous and peaceful basis, which, in the case of islands, includes both a declaration of sovereignty and legislative acts seeking to regulate activity on the islands.<sup>62</sup> Simply excluding fishermen from an area was not held to be sufficient evidence of effective occupation. Also, simply making the annexation declaration in 1935 and including the territory on Chinese maps circa 1947 is insufficient absent evidence of effective occupation. Most of the contestants in the SCS rely heavily upon early maps as evidence of their claim; however, the ICJ in the case of *Kasikili/Sedudu Island*<sup>63</sup> "made it clear that maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title...."

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<sup>59</sup> *Eritrea vs. Yemen*, *supra* note 39, at para. 239.

<sup>60</sup> *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007, pp. 697, para. 117 [hereinafter *Nicaragua v. Honduras*]. Accord: *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia) Judgment*, I.C.J. 2002 Judgment [hereinafter *Palau/Ligitan*]. In particular see para. 135: "it cannot take into consideration acts having taken place after the date on which the dispute between the Parties crystallized unless such acts are a normal continuation of prior acts and are not undertaken for the purpose of improving the legal position of the Party which relies on them."

<sup>61</sup> The bilateral dispute came to the surface in 1997 when Filipino naval vessels prevented three Chinese fishing boats from entering the area and then erecting a flag. China lodged a protest in response to that action. IBRU Bulletin, *supra* note 42, at p. 73.

<sup>62</sup> Regulatory activities mentioned by the court include: Licensing Activity; Granting of Permission to Cruise Around or to Land on the Islands; Publication of Notices to Mariners or Pilotage Instructions Relating to the Waters of the Islands; Search and Rescue Operations; The Maintenance of Naval and Coast Guard Patrols in the Waters Around the Islands; Environmental Protection; Fishing Activities by Private Persons; Other Jurisdictional Acts Concerning Incidents at Sea; landing parties on the Islands; the establishment of military posts on the Islands; the construction and maintenance of facilities on the Islands; the licensing of activities on the land of the Islands; the exercise of criminal or civil jurisdiction in respect of happenings on the Islands; the construction or maintenance of lighthouses; the granting of oil concessions; and limited life and settlement on the Islands; overflight; maps; and petroleum agreements and activities.

<sup>63</sup> I.C.J. Reports 1986, p. 582, para 54. This principle was affirmed by the ICJ in the *Nicaragua v. Colombia* (2012) case wherein the court held that maps generally have a "limited scope as evidence of sovereign title." Judgment, *supra* note 48, at para. 100.

Perhaps the most important factor in assessing the relative weight of the claims was China's complete acquiescence in the U.S. Navy's survey of Scarborough in 1964 and 2005<sup>64</sup> using unarmed survey vessels. This militates against the notion that China regarded Scarborough to be part of greater China. As is well documented, China takes a very dim view of U.S. Navy survey activities in Chinese waters and has used a combination of military actions and diplomatic protests to resist those actions. It undertook no such actions or protests in 1964 or 2005, however, even though publicly available charts clearly depict the presence of U.S. naval vessels in the Shoal during those periods.

The question of which sovereign first discovered Scarborough Shoal is not easily answered since both sovereigns recorded its location only to warn mariners to stay clear. The aggregate records of activity by Spain, the United States, and the Philippines over the last 100 years seem to support the notion that Spain was the first to discover the Shoal and assert a form of sovereignty over it. Regardless, even assuming *arguendo* that China first discovered Scarborough Shoal, the claim of China to have effectively occupied the Shoal over the past 100 years is extremely weak. Further, the case law does not support a claim to historic title. China's actions in 2012 to establish barriers to prevent Philippine fisherman from entering the area and threatening the use of military force does not enhance their legal position since they occurred after the "critical date" when the dispute became crystallized (~1997).

#### b. The Philippines

The few isolated rocks above water at high tide are capable of sovereign appropriation since the ICJ in *Nicaragua v. Colombia* held that all features which are above waters at high tide are capable of appropriation. If these features were below water at high tide or were *terra nullius*, they would clearly belong to the Philippines as an appurtenant portion of its continental shelf. However, because the question of appropriation has been fairly raised by both countries, it is clear that Scarborough Shoal is no longer *terra nullius* and the claim must be decided based on the strength of each country's title as of the critical date (~1997).

It is the author's view that the evidence supports Philippine sovereignty over the Shoal. When comparing the Chinese and Philippine cases, evidence of effective occupation is not overwhelming in either case – but, of the two, the Philippines' case is stronger. Past activities by the U.S. Navy and Philippine authorities to survey the Shoal so that it could be safe for shipping, constitute some positive occupation, along with its contemporaneous appearance on Philippine charts. Past actions by the Philippine armed forces to exercise law enforcement jurisdiction in the 1960s, both to eject smugglers and to monitor future movement, show intent to exercise jurisdiction over the atoll. The past uses of the shoal by the U.S. Navy for military activities and its legal assessment that the atoll was part of the Philippines also support the case that the Republic of the Philippines was exercising sovereignty over the atoll. Even though the Philippines today asserts that its current claims are independent of the territory that was ceded by Spain to the United States, the key point is that the U.S. government considered it to be part of the Philippines, and any "occupying" activities which it undertook can be vicariously attributed

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<sup>64</sup> U.S. Navy hydrographic surveys of foreign coastal waters are done with the permission of a coastal state. It is very likely that the U.S. Navy secured the Philippine government's consent before conducting those surveys. Given the rather large size of the Shoal, it is likely that ships were present in the atoll for a considerable period of time, i.e., many weeks. Consequently, the assertion that these surveys were not readily observable is not valid: hydrographic survey vessels move very slowly over a survey area grid and must often make multiple passes over an area in order to confirm their findings.

to the Philippines because the United States was the legal proxy for the Philippine people until full independence in 1946. Conversely, after that time – when the U.S. Navy surveyed the area and installed navigational aids – it took those actions with Philippine consent since it was functioning as military ally. Finally, the Philippines should only be able to claim the Shoal as a high-tide elevation (or rock), not as an island (as defined in Article 121 of UNCLOS) entitled to a full maritime zone under Article 121 of UNCLOS. Given that this Shoal already sits on the Philippine continental shelf and EEZ, the 12-nm zone around it would simply be assimilated into the larger EEZ and continental shelf (albeit the features would generate their own territorial sea).

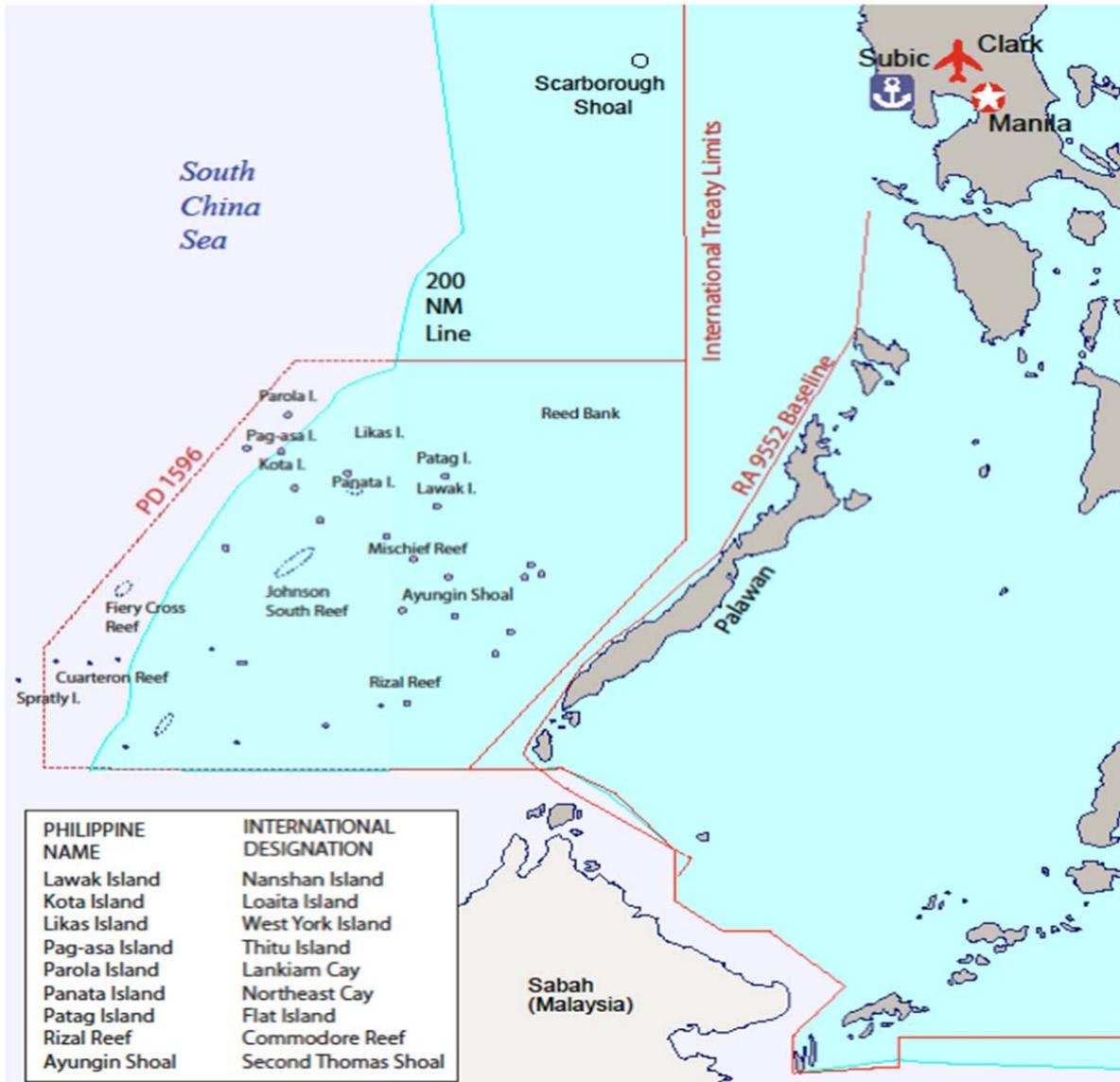


Figure 5. The Kalayaan Island Group Claim. Source: CNA Graphics.

## B. The Kalayaan Island Group (the Spratlys)

Figure 5 depicts the Kalayaan island group, which is currently claimed by the Philippines and lies within the Spratly island chain. China, Vietnam, and Taiwan also claim all of the features in the KIG, and Malaysia claims some of them. Of note, many of the minor features in the KIG are within 200 nautical miles of its archipelagic baselines and – absent a superior claim and

occupation – would presumptively be part of the Philippine EEZ/continental shelf. The KIG claim includes the various features inside the red line (labelled PD 1596) and the associated maritime areas. The claim was formally asserted by President Marcos in Presidential Decree 1596 on June 11, 1978. The total amount of KIG land area is less than one square mile, but the overall region consists of nearly 65,000 square miles of ocean territory. The KIG is part of Palawan Province, and it has a mayor and local government to see to the needs of its 222 inhabitants, who reside on 9-10 features. The features consist of six islets, two cays, and two reefs. Those currently occupied by the Philippines (all above water at high tide) are listed in table 1 of the appendix. The high tide elevations occupied other countries are listed in table 2.

In addition to the preceding seven high tide elevation features, there are two submerged reefs that are currently occupied by Philippine military personnel: Rizal Reef (Commodore Shoal)<sup>65</sup> and Ayungin Shoal (Second Thomas Shoal). Ayungin Reef – Second Thomas Shoal is near Mischief Reef, which is a permanent Chinese military outpost built on a coral reef. (See figure 6.) Second Thomas Shoal is also a coral reef and hosts a former World War II LST, now known as BRF *Sierra Madre*, which the Philippine armed forces deliberately ran aground in 1999 to establish a Philippine presence near Mischief Reef. (See figure 7.)



**Figure 6. Chinese Military Structures on Mischief Reef. Source: chinhdangvu.blogspot.ru**



**Figure 7. BRF *Sierra Madre*: Source: Jamestown Foundation, June 21, 2013.**

The Philippine Ministry of Foreign Affairs stated that it considers Second Thomas Shoal an “integral part” of the Philippines because it is well within the 200-nm expanse of the Philippine continental shelf. The Chinese government maintains that China exercises “indisputable sovereignty” over the submerged shoal and will assert its sovereignty to prevent Philippine ships from entering the area to resupply the military contingent aboard *Sierra Madre*.<sup>66</sup>

There are many contested features in and around the KIG. In the Spratly island chain as a whole, China occupies seven features, Taiwan occupies one (the largest island in the Spratly group – Itu Aba), Vietnam occupies roughly 16 features and Malaysia occupies three. Of note, China

<sup>65</sup> This feature lies on overlapping continental shelf claims of Malaysia and the Philippines. There are sparse data on the extent to which the reef is above water at high tide, but the Philippines appears to be occupying it as a feature rather than seeing it as simply appurtenant to their continental shelf. Malaysian maps (1979) do not reflect a 12-nm zone around this feature. For purposes of this study, the sovereignty claims will not be separately analyzed because the parties (or any dispute settlement fora) would almost certainly discount this very minor feature in making a delimitation of the adjacent continental shelf claims.

<sup>66</sup> B. Glaser, *Second Thomas Shoal Likely as the Next Flashpoint in the South China Sea*. Jamestown Foundation (June 21, 2013), available at <http://www.aspmia.org/2013/blogs/second-thomas-shoal-likely-the-next-flashpoint-in-the-south-china-sea/>.

possesses only one feature that might protrude above water at high tide (Cuarteron Reef) and could generate a maritime zone. All of the other features that it occupies are low-tide elevations (see table 3). This is because Beijing was the last of the claimants to begin occupying features in the Spratlys and all the best “real estate” had already been taken.

### *1. The Legal Status of Philippine Claims to High-Tide Elevations and Islands Within the KIG That Are Currently Occupied by the Philippines*

#### a. Overview: Vietnam vs. China vs. Philippines and the Spratlys

Batongbacal,<sup>67</sup> Bonnet,<sup>68</sup> and others have looked at the historical basis for the KIG claim, and all seem to converge on 1933 as the first time that Philippine authorities demonstrated any interest in the features in what is now known as the KIG.<sup>69</sup> According to Bonnet, early Philippine interest was documented in a 1937 communication between the Philippine interior minister and the U.S. Department of State, asserting a claim to seven KIG features for reasons of national security and geographic proximity. However, no evidence could be adduced which indicated that there was any follow-up to these actions. No record could be found that formal claims were asserted (to include publication in the Philippine legal gazette) against other potential claimants, including France, Great Britain, Japan, and China. Japan annexed all of the Spratly Islands in the lead-up to World War II in the Pacific, and used Itu Aba/Taiping as a staging area to launch attacks on the Philippines, Indonesia, and Malaysia.

Before proceeding to a discussion of the activities by the Philippines after World War II, it is important at this point to examine the activities of other claimants – especially Vietnam. Pedrozo did this in a parallel study<sup>70</sup> and so the details of that report will not be repeated herein. However, to put the Philippine actions in their proper context, it is necessary to give a brief overview of conduct of the other claimants during the 30-year period of 1948-1978.

China’s position on its sovereignty is set forth in a June 2000 document, *The Issue of South China Sea*.<sup>71</sup> That document asserts that Chinese sovereignty of what is now known as the Spratly Islands is based on numerous factors, including historical evidence, economic development, effective occupation, and international recognition. Pedrozo refutes these theories and generally finds in favor of the claim of Vietnam (through France) to the Spratly Islands. In that view, most of the Philippines’ claims to the KIG would have to be compared to only the claims of Vietnam; however, this author believes that neither of the ubiquitous claims should be given weight and that a feature-by-feature assessment is necessary. That will be done in the following sections, but it is important to recap Pedrozo’s assessment of key aspects of China’s claims to features inside the KIG and assess that analysis in the case of the features (listed in table 1) which the Philippines are currently occupying:

- Most of the data supporting China’s “historic” claim are based on a haphazard collection of old charts and sporadic visits by Chinese fishermen. International law is

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<sup>67</sup> Philippine Claims Primer, *supra* note 3, at 21.

<sup>68</sup> Francois-Xavier Bonnet, *The Spratlys: A Past Revisited*, V. 23 World Bulletin, p. 18 (July-December 2004). Bonnet made reference to a letter from Senator Isabelo de los Reyes, to U.S. Governor General Frank Murphy, Bureau of Insular Affairs (August 12, 1933).

<sup>69</sup> Philippine Claims Primer, *supra* note 3, at 21.

<sup>70</sup> Pedrozo, *supra* note 47.

<sup>71</sup> Ministry of Foreign Affairs of the People’s Republic of China, *The Issue of South China Sea* (June 2000), available at <http://www.fmprc.gov.cn/eng/5767.html>.

quite clear that charts have little normative value other than to corroborate other facts which support sovereignty.<sup>72</sup> Moreover, not all Chinese charts include the modern-day Spratly island group and certainly do not indicate the specific features in the group that were part of Chinese territory or specify whether the Chinese claim, in most cases, is to waterspace or territory. That latter point is especially important given the extremely small size of the features relative to the waterspace which surrounds them: it is possible that China's intent in encompassing the modern-day Spratlys on a chart many years ago was to assert control over the waterspace versus tiny specks of land that were of no practical value. If this was China's intent, it does not help that country's modern legal position, since claims to waterspace that are unrelated to a feature which is above water at high tide are not legally supportable.

- In terms of effective occupation, case law is quite clear that simple reliance upon historic evidence alone is insufficient<sup>73</sup> and that archeological artifacts do not help much in fortifying the case. There must be facts “on the ground,” and sporadic contacts by fishermen are insufficient to establish dominion.<sup>74</sup> Mere awareness of geography does not constitute even discovery, much less occupation.<sup>75</sup> Likewise, assuming that the Chinese did indeed discover the Spratlys before the French, they did not satisfy the other important legal requirement: effectively occupying the features in the modern era.<sup>76</sup> Noted historian Marwyn Samuels similarly concluded that “despite (some) vociferous protests the PRC was simply unable to implement its claims whether by military or diplomatic means.”<sup>77</sup>

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<sup>72</sup> *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)*, I.C.J. Reports 1986, 554, at pp. 582-583. *Accord Island of Palmas Case (Netherlands/U.S.A.)*, R.I.A.A., Vol. II, p. 829 (1928), p. 831, at pp. 852-854, available at [http://legal.un.org/riaa/vol\\_II.htm](http://legal.un.org/riaa/vol_II.htm); *Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)*, I.C.J. Reports 1999, p. 1045, at pp. 1096-1100; *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, I.C.J. Reports 2002, p. 625, at pp. 666-668; *Case Concerning the Frontier Dispute (Benin/Niger)*, I.C.J. Reports 2005, p. 90, at pp. 117-120. See also Florian Dupuy and Pierre-Marie Dupuy, *A Legal Analysis of China's Historic Rights Claim in the South China Sea*, Am. J. Int'l L. Vol. 107, No. 1 (Jan. 2013), at pp. 133-134.

<sup>73</sup> *Eritrea v. Yemen*, *supra* note 39 and accompanying text. That court flirted with the question of historic title but did not – contrary to the suggestion of Judge Gao – lend much actual support for the concept. Instead, it put much more reliance on actual “facts of the ground” and recent history.

<sup>74</sup> C. Joyner, *The Spratly Islands Dispute: What Role for Normalizing Relations Between China and Taiwan?*, Vol. 32, No. 2, New England School of Law (1998), available at <http://www.nesl.edu/userfiles/file/lawreview/vol32/2/joyner.htm>.

<sup>75</sup> Monique Chemillier-Gendreau, *Sovereignty over the Paracel and Spratly Islands* (Brill/Martinus Nijhoff Publishers, 2000), at p. 16 and Annex 18 (Note dated 8 March 1928 from Mr. Bourgoquin) at pp. 52, 54, 56.

<sup>76</sup> *Island of Palmas Case (Netherlands/U.S.A.)*, R.I.A.A., Vol. II, p. 829 (1928), p. 831, at p. 846. Compare with the *Eastern Greenland Case*. That case stands for the proposition that evidence of occupation is less rigorous for geographically remote/sparsely populated areas. However, the court said that there must still be some concrete evidence in which the state assumed possession over the territory – even uninhabited territory. The citation for the *Eastern Greenland Case* is: *Legal Status of Eastern Greenland Case (Denmark v. Norway)*, P.C.I.J., Series A/B, No. 53 (1933), at p. 46. Instructively, the arbitral panel in *Eritrea v. Yemen*, *supra* note 39, repeatedly spoke of activities in the past “decade” or two to assess whether the contestants had occupied certain features. This is noted only because no decision could be found which squarely addresses the question of temporality, i.e., how recent the history must be in order to be legally probative. Whether a decade or two is the legal yardstick cannot be determined; however, evidence of occupation which is centuries old is unlikely to be given any legal effect.

<sup>77</sup> Marwyn Samuels, *Contest for the South China Sea* (Methuen & Co 1982) [hereinafter Samuels].

- Actions by private citizens (fishermen) cannot be considered actions by a sovereign government unless they are followed by official actions.<sup>78</sup> Likewise, the evidence of Chinese naval patrols in the area is sketchy at best and hardly sufficient to demonstrate that China exercised authoritative control over the features.
- China never made a timely protest of French assertions of sovereignty when France annexed specific designated areas in the Spratlys (and KIG) in July 1933.<sup>79</sup> The French Ministry of Foreign Affairs' announcement was made in two public declarations in France's official gazette (*Journal Officiel*), on July 25-26, at pages 7837 and 7784.<sup>80</sup> However, it was not until 1935 that the Spratlys appeared on official Chinese maps in the modern era.<sup>81</sup>
- After those 1935 maps were produced, there is no credible evidence that China did anything more to contest the French claim.
- French claims to the Spratlys were diplomatically ceded to Vietnam in 1950-1951 and China did not protest these actions.<sup>82</sup> The PRC did, however, assert ownership of the Spratlys on at least two occasions: in 1951, during the San Francisco Treaty negotiations; and in 1956, when it protested the activities of the Philippine adventurer Thomas Cloma.
- Forcible occupation of French/Vietnamese territories after the effective date of the UN Charter by Taiwan, China, and the Philippines is legally ineffective because it took place after the critical date on which a dispute became manifest. Also, as a matter of international law in the post UN Charter era, forcible occupation of the territory of another sovereign is legally ineffective as a method of acquiring title to international territory. However, France's annexation of the named territories in 1933 was lawful under the international legal principle of inter-temporal law,<sup>83</sup> which, in this context, means that if it was lawful for France to annex or conquer territory at the time that it was "vested" of property, that legal annexation will be respected today.

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<sup>78</sup> "As the ICJ observed in the *Pulau Ligitan* case, *supra* note 60, "activities by private persons cannot be seen as effectivities if they do not take place on the basis of official regulations or under governmental authority." See also Pedrozo, *supra* note 47, at 19.

<sup>79</sup> The primary reason for the French annexation was to establish lighthouses and other navigational aids for safety of navigation purposes. Pedrozo, *supra* note 47, at 17, 41-42. China did, however, protest French annexation of the Paracel Islands in that same time frame.

<sup>80</sup> The French government has caused the following isles and islets to be occupied by French naval units: (1) Spratly Island, situated at 8°39' latitude north and 111°55' longitude east of Greenwich, with its dependent isles (possession taken April 13, 1930); (2) islet cay of Amboine, situated at 7°52' latitude north and 112°55' longitude east of Greenwich, with its dependent isles (possession taken April 7, 1933); (3) Itu Aba Island, situated at latitude 10°2' north and longitude 114°21' east of Greenwich, with its dependent isles (possession taken April 10, 1933); (4) group of two islands [North East Cay and Shira Island], situated at latitude 11°29' north and longitude 114°21' east of Greenwich, with their dependent isles (possession taken April 10, 1933); (5) Loaita Island, situated at latitude 10°42' north and longitude 114°25' east of Greenwich, with its dependent islands (possession taken April 12, 1933); and (6) Thi Tu Island, situated at latitude 11°7' north and longitude 114°16' east of Greenwich, with its dependent islands (possession taken April 12, 1933).

<sup>81</sup> The 1935 map, which depicted the Spratlys, Macclesfield Bank, and Scarborough Shoal, was the product of an interagency committee established by the Republic of China, which met between 1932 and 1935 to catalog features in the South China Sea.

<sup>82</sup> Pedrozo, *supra* note 47, at 99-100.

<sup>83</sup> Ian Brownlie, *Principles of Public International Law* 126-127 (5<sup>th</sup> ed., Oxford Press 1998) [hereinafter Brownlie].

## b. Itu Aba

Most analysts agree that there are only a handful of features in the Spratly island chain which would support human habitation and economic life of their own such that they would enjoy an entitlement to a full 200-nm EEZ. Itu Aba is the best candidate to be classified as an island and entitled to the full maritime zone entitlements under UNCLOS Article 121 and thereby geographically dominates the other features in the KIG competing for waterspace. Therefore, much of the legal future of the Spratlys (and the KIG) could depend on how a tribunal would consider Itu Aba.

According to Samuels,<sup>84</sup> at the end of World War II General MacArthur ordered all Japanese troops in the Paracels and Vietnam to surrender to Nationalist Chinese forces. The Nationalist Chinese, in turn, ordered all Japanese forces to vacate the Spratly Islands and move to Hainan Island. Around October 1946, the French warship *Chevreud* landed Vietnamese forces on both Spratly Island and Itu Aba and placed a stone marker on Itu Aba to record their presence.<sup>85</sup> Thereafter, in December 1946 a four-ship Taiwanese flotilla sailed to the Paracels, and two ships (*T'ai-ping* and *Chung-yeh*) sailed to Itu Aba and took possession of the island as well as the Woody Island in the Paracels. The French actively protested the ships that went to Woody Island, and both filed diplomatic protests and sent a warship into the area. The French did not take any specific actions in relation to Itu Aba, probably because they were unaware that the ROC naval force had retaken it. A year later, on December 1, 1947, the Taiwanese government formally passed legislation integrating Itu Aba into the Kuangtang Province as part of its omnibus claim to the Spratly Islands; however, Taiwan has (so far as determined) only gone so far as to establish municipal administration over Itu Aba. Itu Aba is part of the Municipality of Kaohsiung City, Qijin District of the Republic of China.

Pedrozo argues that Vietnam (via France) continues to enjoy a superior claim to Itu Aba vis-à-vis China /Taiwan because France never abandoned its claims to Itu Aba and it was not duty bound to use force to eject ROC forces. Pedrozo cites the fact that France specifically acquiesced in the Chinese Nationalist forces taking control of Itu Aba to accept Japanese surrender in 1945-1946<sup>86</sup> as well as a specific agreement between France and Chinese Nationalist (ROC) forces that the Chinese would depart in March 1946. The subsequent acts by the ROC to establish military outposts were inconsistent with that agreement and arguably inconsistent with Article 2(4) of the UN Charter, which prohibits states from forcibly occupying the territorial integrity of other states. France protested this holdover by ROC forces in 1946, and, in 1956, sent the naval vessel *Dumont d'Urville* to Itu Aba in order to reassert French sovereignty; however, again, it did not use force to eject the ROC.<sup>87</sup>

The noted international lawyer Chris Joyner suggests that ROC occupation for more than four decades might substantiate a claim that the ROC has acquired title through prescription – i.e., the peaceful and open possession of territory belonging to another who acquiesces in that occupation.<sup>88</sup> An Australian lawyer, Greg Austin,<sup>89</sup> also supports this view, saying that France

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<sup>84</sup> Samuels, *supra* note 77

<sup>85</sup> Samuels, *supra* note 77, at 76.

<sup>86</sup> Pedrozo, *supra* note 47, at 36. *Exchange of Letters between China and France Relating to the Relief of Chinese Troops by French Troops in North Indochina*, Chungking, Feb. 28, 1946, U.N.T.S. Vol. 14, 1948, at p. 151.

<sup>87</sup> Pedrozo, *supra* note 47, at 59.

<sup>88</sup> *Supra* note 73.

did not exercise sufficient due diligence when it came to protesting the actions of the ROC, specifically in the timeframe of 1946 to 1947. What Joyner does not include in his assessment is the fact that Vietnam has a fairly extensive public record of protesting ROC occupation of Itu Aba.<sup>90</sup> Also, it is likely that non-public diplomatic communications between Vietnam and the ROC exist, which would support the Vietnamese contention that they did not abandon their claim.

The author generally associates himself with Pedrozo's analysis that France enjoyed title to Itu Aba and did not abandon its claim. Still, there are significant facts in dispute – in particular, the extent to which France protested the ROC's occupation in the 1947 timeframe and the actual record of protests. If, as suggested by Austin, France – and later Vietnam – did little more than “go through the motions” of protesting the claim, a court could very well take the position, suggested by Joyner, that the ROC (and, through it, the PRC if unification occurs) acquired the territory prescriptively i.e., the possession has been open, visible, and continuous with full knowledge of the original owner. As noted above, this is analogous to the common law principle of adverse possession.

### c. Vietnamese vs. Chinese Claims in the KIG

One internal reviewer has suggested that Pedrozo's conclusions in favor of France/Vietnam are misplaced because France abandoned its Spratly Islands claims in the course of World War II and because there were defects in the way in which modern-day Vietnam succeeded to territories formerly claimed/occupied by France. The case of Itu Aba is unique since this particular feature was specifically named in the 1933 French annexation document, was physically occupied by both sides, and was formally annexed by ROC well before title passed to Vietnam in 1954. But, the question of whether French claims passed to modern-day Vietnam or were abandoned, is very much in play with regard to three other high-tide features which the Philippines now occupies – Thitu Island (Pagasa), Loaita Island (Kota Island), and Northeast Cay (Parola) – which were also formally named in the 1933 French annexation document. The question of passage of title is also important in the assessment of the conflicting claims to the Paracels and conflicting claims to high-tide elevations listed in tables 1 and 2.

The Geneva Convention of April 24, 1954, which ended French rule in Indochina, created the independent states of Cambodia, Laos, and Vietnam. The Convention acknowledges the transfer of sovereignty from France to those three modern-day states. No countries other than France are mentioned as having an interest in the former French Indochina. This action was formally acknowledged by the Republic of France, the State of Vietnam, the United Kingdom, the United States, and the People's Republic of China:

11. The Conference takes note of the declaration of the French Government to the effect that for the settlement of all the problems connected with the reestablishment and consolidation of peace in Cambodia, Laos, and Viet-Nam, the French Government will proceed from the principle of respect for the independence and sovereignty, unity, and territorial integrity of Cambodia, Laos, and Viet-Nam.

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<sup>89</sup> Greg Austin, *China's Ocean Frontier: International Law, Military force and National Development* (Sydney, Allen Irwin 1998) [hereinafter Austin], at page 143.

<sup>90</sup> See Vietnam Ministry of Foreign Affairs. Website: [http://www.mofa.gov.vn/en/tt\\_baochi/pbnfn/ns051229163816/view?b\\_start:int=5](http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns051229163816/view?b_start:int=5). Keyword “Itu Aba.” Accessed February 6, 2014.

12. In their relations with Cambodia, Laos, and Viet-Nam, each member of the Geneva Conference undertakes to respect the sovereignty, the independence, the unity, and the territorial integrity of the above-mentioned states, and to refrain from any interference in their internal affairs.<sup>91</sup>

Had China believed that it was the heir apparent to what was then considered part of French Indochina, i.e., the Spratlys and Paracels, it would have insisted that it be included in the transfer instruments. Given that the PRC ratified the actions in 1954, it is difficult for the Chinese to also maintain that the French annexation documents in of 1933 have no legal effect, because China was well aware of the 1933 French annexation claim. In fact, during the San Francisco Peace Treaty talks in 1951, Zhou Enlai asserted that the Spratly archipelago was Chinese territory.<sup>92</sup> Had China believed itself the lawful owner of the Spratlys, it should not have acquiesced in the transfer of French sovereignty over all its lands to Vietnam in 1954 or, at least, should have insisted that there be a caveat in the transfer instruments.

Likewise, those who argue that modern-day Vietnam did not succeed to the territorial interests of France ignore the fact that the principle of state succession arises by operation of law (versus some overt acts) and that the transfer of real property is “inherent in the grant of territorial sovereignty....”<sup>93</sup> This should include both “mainland” and “minor” territories, even though the latter were never specifically called out in the Geneva Convention documents. This result also is legally indicated because the international law concerning state succession seeks to establish the orderly transfer of title to property from one sovereign to another as opposed to having areas in which sovereignty is questioned. In addition, there are strong policy underpinnings for this, because surety of title is essential in fixing legal and political accountability and in enabling economic development.

Chinese scholars contend that in 1958 there was an acknowledgment of Chinese sovereignty over the Spratly Islands by North Vietnamese officials and that this constitutes a complete repudiation of the Vietnamese claim. The document in question was a diplomatic note dated September 14, 1958 between a North Vietnamese diplomat to Zhou Enlai. The relevant part of the note reads: “The Government of the Democratic Republic of VN recognizes and supports the declaration of the Government of the People's Republic of China on its decision concerning China territorial sea made on 4/9/1958.” However, there are two problems with the 1958 diplomatic communication:<sup>94</sup> First, it was made by a foreign affairs official in the nascent North Vietnamese government at a time when it was trying to glean political and military support from Beijing. Also, the statement was made to garner support from the PRC to prevent the areas from being occupied by the United States to attack the North. Second, the strict reading states that the government of North Vietnam recognizes the Chinese 12-nm territorial sea claims in various places, including the Spratly Island.<sup>95</sup>

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<sup>91</sup> <http://www.fordham.edu/halsall/mod/1954-geneva-indochina.html>.

<sup>92</sup> Austin, *supra* note 89, at 142.

<sup>93</sup> Brownlie, *supra* note 83, at 653.

<sup>94</sup> Reprinted in: <http://www.mevietnam.org/lanhtho-lanhhai/feer-dispute.html>.

<sup>95</sup> The 1958 Law states: “The People’s Republic of China hereby announces: (1) This width of the territorial sea of the People’s Republic of China is twelve national miles. This provision applies to all Territories of the People’s Republic of China, including the mainland China and offshore islands, Taiwan (separated from the mainland and offshore islands by high seas) and its surrounding islands, the Penghu Archipelago, the Dongsha Islands, the Xisha islands, the Zhongsha Islands, the Nansha Islands and other islands belonging to China. (2) The straight lines linking each basic point at the mainland’s coasts and offshore outlying islands are regarded as base lines of the territorial sea of the mainland China and offshore islands. The waters extending twelve nautical miles away from the base lines are

The diplomatic statement neither catalogs nor defines the Spratly Islands, and it makes no reference to a common frame of geographic reference. It does not explicitly recognize Chinese sovereignty over some or all of the Nansha (Spratly) Islands. Also, the South Vietnamese government did not agree to this diplomatic position and sent troops to the Spratlys in the spring of 1975 in order to reassert the “government’s” interest in the Spratlys. Finally, of course, after Vietnam was unified in 1976, the government reasserted its claims in the Spratlys and moved to supply Vietnamese military garrisons, and, in 1988, Vietnam fought a bloody battle at Johnson Reef with the Chinese in which 70 Vietnamese sailors were machine-gunned. Given that the 1958 communication does not explicitly recognize Chinese sovereignty over the Spratlys and that it was not made by an official from the unified government, it is difficult to accord the communication too much legal weight; particularly given the circumstances in which it was made<sup>96</sup> Even assuming that the communication was legally effective, this author is unaware of any specific actions that the PRC took to perfect this claim, including the occupation of territories in the Spratlys or the passage of contemporaneous legislation prior to the time that the unified Vietnam repudiated the 1958 statement.

The best argument that China can make to dispute these modern-day claims of Vietnam is that during the period following World War II Hanoi did little to confront China, Taiwan, or the Philippines over their acquisition of the disputed territories in the KIG during their wars with the French and later the United States. Hanoi’s reliance on China for material and political support may provide an excuse for its inconsistent posture vis-à-vis Beijing concerning the disputed territories during the post-war period. Yet, China did not begin occupying territories until 1988, well after Vietnam began to reassert its claims in 1975, in response to Philippine incursions (it reasserted its claims again in 1988, mainly in response to Chinese incursions). Given that China was also not actively pursuing claims during the period 1958-1975, it does not appear that Vietnam’s inactivity during that period can be logically (or legally) equated to abandonment of its claims to the disputed features – particularly as regards China.<sup>97</sup>

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China’s territorial sea. The waters inside the base lines, including Bohai Bay and Giongzhou Strait, are China’s inland sea. The islands inside the base lines, including Dongyin Island, Gaodeng Island, Mazu Inland, Baiquan Island, Niaoqin Island, Big and Small Jinmen Islands, Dadam Island, Erdan Island and Dongding Island, are China’s inland sea islands.(3) Without the permit of the government of the People’s Republic of China, allforeign aircrafts and military vessels shall not be allowed to enter China’s territorial sea and the sky above the territorial sea. Any foreign vessel sailing in China’s territorial sea must comply with the relevant orders of the government of the People’s Republic of China.” The law is reprinted in the Appendix of Ian Lamont *Defining a Territorial Sea: China’s South China Sea Policy in the 1950s and its 1958 Declaration on the Territorial Sea*. Harvard University Research Proposal. (2004) Available at: <http://www.scribd.com/doc/5020468/Proseminar-China-s-South-China-Sea-Policy-in-the-1950s>.

<sup>96</sup> By contrast, Austin, *supra* note 89, puts considerable weight on the North Vietnamese recognition document and argues that modern-day Vietnam is estopped from asserting sovereignty based on the original French claims. As discussed in this paper, the author is unwilling to go down that path based on a single diplomatic communication that was immediately refuted by the other competing government faction (South Vietnam) and later by the unified government. Also, during this intervening period China did nothing to perfect its claims except for making occasional rhetorical flourishes. Austin concludes his analysis by stating that he is “fairly comfortable” finding in favor of China’s ubiquitous nine-dashed-line claim because of the difficulties inherent in going feature by feature. However, feature-by-feature analysis is the only legally supportable approach given the diverse history of each feature and its different claimants. There are also human rights considerations since some of the features are inhabited and the inhabitants should have a legal voice in determining who has sovereignty over the territory in which they reside.

<sup>97</sup> The author did not have access to Vietnamese diplomatic protests which were lodged against China, Taiwan, or the Philippines for their occupation activities during the “quiet period.” According to Austin, China established a Spratly administrative office on Woody Island but no record could be found which indicates that this was ever communicated to the outside world. Yet Taiwan was active in 1963 when it sent a naval reconnaissance team to

#### d. Philippine Claims in the KIG

Immediately following World War II, there is no record of U.S. activity vis-à-vis the KIG territories which can be reasonably attributed to the Philippines; however, some Philippine scholars claim that there were communications between the Philippine Ministry of Foreign Affairs and General MacArthur, circa 1946 and 1947, requesting that the Spratly Island features be returned to the Philippines.<sup>98</sup> Apart from this one sketchy reference, nothing else (and nothing substantive) could be found in the various historical accounts of the Philippine claim. But, things changed in about 1956 when, according to the “definitive” Philippine legal historian, interest in the Spratly Islands intensified: oil was discovered nearby, and this fueled a Philippine re-discovery of the islands by Tomas Cloma.<sup>99</sup>

The Philippine legal scholars interviewed in connection with this study do not give much weight to the actions by Cloma, who supposedly made some visits to the Spratly Islands in 1948 and found the reefs and islands to be unoccupied. In 1956, Cloma led a 38-day expedition to the area and then issued a “Proclamation to the World” asserting ownership by discovery and occupation to “33 islands, sand cays, sands (sic) bars, coral reefs and fishing grounds in the Spratlys covering an area of 64,976 square nautical miles.”<sup>100</sup> What happened next is not in dispute: the People’s Republic of China, Vietnam, and France all issued diplomatic rebukes of this declaration. In August 1956, the Vietnamese Navy launched a series of operations to assert control over the “archipelago,” and the crew of the cruiser *Tuy Dong* (HQ-04) was directed to erect sovereignty steles on a variety of the islands and to hoist the Vietnamese flag on the islands which were claimed. Thereafter, in 1961, crew-members of the Vietnamese cruisers *Van Kep* and *Van Don* landed on Southwest Cay, Thitu Island (Pagasa), Kota Island (Loatia) and Amboyna Cay and reportedly erected sovereignty steles and the Vietnamese flag.<sup>101</sup>

As is well settled in international law, the actions of private citizens cannot be regarded as sovereign acts unless the central government takes specific actions to ratify something that has been done. The ICJ reinforced this principle in the *Pulau Ligitan and Pulau Sipadan* case, saying that “activities by private persons cannot be seen as effectivités if they do not take place on the basis of official regulations or under governmental authority.”<sup>102</sup> As this relates to Cloma, no official act by the Philippine government could be found which contemporaneously and specifically ratified his declaration. However, in 1968 the Philippine government began sending troops to occupy the area and in 1971 made an official announcement that the Philippines were occupying several of the features in KIG for “reasons of national security and to “protect the interests of the state and its citizens.” Also in 1971, the Philippines posted troops first on Nanshan (Lawak) Island and then on Loaita (Kota), West York (Likas), Thitu (Pagasa), and Northeast Cay (Parola).<sup>103</sup> Thitu (Pagasa) is the most developed of the islands. It hosts a weather station, a lighthouse, a laboratory, a fisheries research center, a runway, and miscellaneous military structures. With the exception of a peaceful ruse that resulted in Vietnamese reoccupying

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Thitu (Pagasa) and Nam Yit, part of Tizard Bank) to erect boundary markers (at p. 149). There is no record of follow-up by Taiwan on any of these other islands or follow-up by China.

<sup>98</sup> The Philippine Claims Primer, *supra* note 3 at 21.

<sup>99</sup> Yorac, *supra* note 14.

<sup>100</sup> Yorac, *supra* note 14, at 3.

<sup>101</sup> Pedrozo, *supra* note 47.

<sup>102</sup> *Pulau Ligitan Case*, *supra* note 60, at 683.

<sup>103</sup> The Philippine Claims Primer, *supra* note 3, at 22-23.

Southwest Cay (from Philippine forces) in 1975, Philippine occupiers have not met with any resistance to their occupation.

The Philippines occupied eight features from 1968 to 1971. In 1978, President Marcos issued Presidential Decree 1596, formally asserting sovereignty over the KIG. That decree asserts sovereignty over the features in the KIG zone depicted in figure 5 in much the same way as the PRC asserts sovereignty over the features (at least) within the zone encompassed by its nine-dashed-line claim.<sup>104</sup> The decree states both that the Kalayaan island group is part of the Philippine continental margin and that the other “areas do not legally belong to any state or nation but, by reason of history, indispensable need and effective occupation and control established in accordance with international law, must now be deemed to belong and be subject to the sovereignty of the Philippines.” It continues, stating that “while other states have laid claims to some of the areas, their claims have lapsed by abandonment and cannot prevail over that of the Philippines on legal, historic and equitable grounds.”<sup>105</sup>

#### e. Philippines vs. Vietnam: Assessment of Claims to Features in the KIG

Even though the Philippines now occupies Thitu Island (Pagasa), and Loaita Island (Kota Island), and Northeast Cay, all three of these features were formally named in the 1933 French annexation document and were probably visited by Vietnamese troops in at least 1956 to reassert sovereignty. This is in contrast to some of the much smaller features that may have legally fallen below Vietnam’s “radar screen” and are now occupied by others, including the Philippines, because they appeared to be vacant. Table 1 contains a list of the features (high-tide elevations) that the Philippines now occupies.

The question becomes whether the six features which the Philippines now occupies belong to the Philippines, either on the basis of discovery (unclaimed by France or anyone else) or by prescription (France/Vietnam did nothing to protect their claims). In the author’s judgment, two of the three territories named, Thitu and Loaita, were not abandoned by France/Vietnam; Northeast Cay is too difficult to call because of incomplete historical data. The French claim was precisely established by names and coordinates, and there were some modest efforts by Vietnam, following the Cloma affair, to reestablish sovereignty over those features. However, the remaining high-tide-elevation features which the Philippines occupies in the KIG (listed on table 1) were never properly assimilated by France and Vietnam. Accordingly, the Philippine claims – based on discovery and occupation – are probably legitimate. Issues surrounding Philippine occupation of two low-tide elevations are discussed separately.

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<sup>104</sup> China has not been terribly precise in how it has asserted its claims in the South China Sea. In the Law Number 55 of February 25, 1992 (*available at* <http://www.asianlii.org/cn/legis/cen/laws/lotprocottsatz739/> ), it asserts a territorial sea and contiguous zone around all of its sovereign islands, which it simply labels Diayu, Penghu, Donsha, Xisha, Zhongsha, and Nansha. China’s territorial sea claim does not delineate among these groupings. Also, in China’s opposition to the extended continental shelf claim submissions by Malaysia and Vietnam in May 2009, it followed a statement in opposition and appended a copy of the nine-dashed-line claim which it had inherited from the Kuomintang government and asserted its indisputable sovereignty to the land features as well as the waterspace. See [http://www.un.org/depts/los/clcs\\_new/submissions\\_files/submission\\_mysvnm\\_33\\_2009.htm](http://www.un.org/depts/los/clcs_new/submissions_files/submission_mysvnm_33_2009.htm). The nine-dashed-line claim encompasses roughly 1.4 million square miles in the South China Sea. The claim has been rejected by the United States, Indonesia, and a number of other states, and its status is “on trial” in the pending arbitration between the Philippines and China.

<sup>105</sup> The Philippine Claims Primer, *supra* note 3, at 22-23.

Modern international law recognizes that mere discovery of some territory is not sufficient to vest in the discoverer valid title of ownership to territory. Rather, discovery only creates inchoate title, which must be perfected by subsequent continuous and effective acts of occupation, generally construed to mean permanent settlement. This is the principal reason why Pedrozo was able to conclude that Vietnam's claim to the features in the Spratlys, described in its 1933 annexation decree is much more durable than the claims of others because the claim is precise and it was communicated in a transparent manner for the world to judge.

The other central legal question is how France's claim—which is a claim to relatively specific features—is to be legally measured vis-à-vis those of China, Taiwan, and the Philippines which have asserted omnibus claims to all of the features in the Spratly islands or inside of a “box” which primarily consists of ocean territory. The “feature by feature” approach has not been specifically litigated; however, in the *Nicaragua v. Columbia* case the ICJ was presented with the question of how to adjudicate the maritime zones associated with two small islets that belonged to Columbia but were physically located within the Continental Shelf of Nicaragua (Quitassuenao and Serrana). In both cases, the court awarded both islets a 12NM territorial sea enclave even though both of these areas were located within the larger EEZ/Continental Shelf projection of Nicaragua. Similarly, Greg Austin's excellent analysis of the competing claims in the South China Sea concludes with the statement that “given that almost all of the Spratly Islands are subject to claims by at least three states, an international tribunal could be forced down the path of examining sovereignty of each discrete island.”<sup>106</sup> And, while the case law on effective occupation is more liberal when it comes to geographically remote and uninhabited areas, like Eastern Greenland, the Spratly Island Group is comparatively compact and is located in areas adjacent to major trade routes and population centers. They have also been the site of numerous shipwrecks, fishing, mining and surveys. Given that, this author is of the view that a court would be more exacting when it comes to weighing the evidence in support of a sovereignty claim to the entire chain or a large “box.” This means that sovereignty over each feature will need to be demonstrated through discovery (or cession) and is then affirmed by evidence of peaceful and continuous occupation.

Regarding the features above tide which the Philippines now occupies, there is strong evidence that France lawfully annexed Thitu Island (Pagasa) and Loaita Island (Kota Island) in 1933, and occupied those islands more or less until World War II. France did nothing to jeopardize or abandon those claims. Both islands are specifically mentioned in the annexation document. Also, the actions by Vietnamese authorities to install sovereignty steles in 1956 and conduct naval patrols in the early 1970s in those areas is persuasive evidence that Vietnam never intended to abandon those claims. This evidence undermines the Philippine contention that these two features were *terra nullius*. Also, these actions by Vietnam were taken proximate to the date(s) when the Philippines occupied them. The temporal aspect is important since in the jurisprudence of sovereignty disputes, a state may be deemed to have ceded its title prescriptively to another state in occupation if it has sat on its rights for a considerable period of time in the face of a live dispute.

The Philippines has occupied these islands since the 1970s and will undoubtedly argue that it enjoys sovereignty because France (and Vietnam) had abandoned its claims. However, even the Philippines' main legal historian (Yorac) has this to say about abandonment:

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<sup>106</sup> Austin, *supra* note 89, at 160.

Abandonment and forfeiture presuppose the existence of prior title to territory. Lindley uses the term abandonment to include both voluntary abdication of title and one affected under compulsion. In any case, it involves both the fact of physical abandonment coupled with the intention to relinquish title. In the absence of direct evidence, abandonment may be presumed from the length of time that passes from the time of physical abandonment. Renunciation by treaty or otherwise is direct evidence of abandonment.<sup>107</sup>

Even though the Philippines has been an occupier of Thitu Island (Pagasa) and Loaita Island (Kota Island) for over 40 years and Vietnam has not taken any action to forcibly eject them, the fact remains that the Philippines occupied those two islands in 1971 using armed force. Also, so far as can be determined, the Vietnamese government has never officially acquiesced in that action; indeed, statements by the Vietnamese Ministry of Foreign Affairs would indicate otherwise.<sup>108</sup>

The occupation by Philippine armed forces in 1971 was unlawful under Section 2.4 of the UN Charter, and such action cannot convey inchoate title to the Philippines. Further, the date that those two features were occupied by the Philippines became the “critical date” on which the dispute between the Philippines and Vietnam became crystallized; under the principle in the *Palmas Island* case,<sup>109</sup> no act by parties subsequent to the date that the dispute became crystallized can enhance their position. Consequently, continued military occupation does not enhance the Philippine claim to Thitu or Loaita. Had this been a situation in which unarmed Philippine citizens had taken up residence on these features and then the community was later recognized (politically) by the Philippines, the outcome might well be different.

The situation involving the four of the remaining five high tide features occupied by the Philippines in the KIG: West York Island (Likas), Nanshan Island (Lawak), Flat Island (Patag), and Linkiam Cay (Panata Island) is different as a matter of law. In the first place, since France chose to use specific coordinates and names of features to establish their claims over features in the Spratly’s, then France/Vietnam are bound to the process. In other words, absent evidence that either France or its successor Vietnam had taken action to establish dominion over one of these features and the occupy it, the Philippines was justified in regarding the West York (Likas), Nanshan (Lawak), Flat Island (Patag), and Lankiam Cay (Panata) as *terra nullius* when they were occupied by Philippine forces in the 1970s. Vietnam may argue that some of these features were dependent “isles” and part of the original claim, however, Vietnam can’t have it both ways legally. Thus, absence specific evidence that Vietnamese forces has visited any of these four features and planted flags or sovereignty steles, or called these features out in a long succession of diplomatic protests, the Philippines did not have adequate notice of the Vietnamese claims to these features to run afoul of Article 2.4 of the UN Charter.

In this author’s judgment, the best legal case for Vietnam to pursue regarding its claim to the Spratlys would be to focus on retaining title to the major islands in the Spratlys, including Itu Aba and Thitu, that are identified in the 1933 annexation declaration, which is quite specific,<sup>110</sup> since those two islands are likely to be deemed compliant with Article 121 of UNCLOS and

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<sup>107</sup> Yorac, *supra* note 14, at 57.

<sup>108</sup> See Vietnamese Ministry of Foreign Affairs, *Remarks by Foreign Ministry Spokesman Luong Thanh Nghi on the Arbitral Proceedings Instituted by the Philippines under the Annex VII to the UNCLOS* (January 2013), available at [http://www.mofa.gov.vn/en/tt\\_baochi/pbnfn/ns051229163816/view?b\\_start:int=5](http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns051229163816/view?b_start:int=5).

<sup>109</sup> *Island of Palmas Case (Netherlands/U.S.A.)*, U.N. Rep., Vol. II, p. 829 (1928).

<sup>110</sup> That approach is also more in keeping with clear intent in UNCLOS article 16.1, which requires that states shall make their claims to territorial sea using charts and specific coordinates.

receive a full maritime zone. This necessitates that they differentiate their claim from those of China/Taiwan and the Philippines, which claimants that assert a right to everything inside a dotted/dashed drawn line on a chart. Divorcing themselves from the “box” approach to making claims, Vietnam could separately claim a number of the high-tide elevations in the KIG (see table 2), which it currently occupies, on the basis of discovery and effective occupation. These include Namyt Island, Sin Cowe Island, Southwest Cay, Sand Cay, Great Discovery Reef, London Reef(s), Pearson Reef, and Pigeon Reef.

Parola (Northeast Cay) is a high-tide elevation which was included in the original annexation document and is currently occupied by the Philippines. There was evidence that French forces actually occupied the small island in the 1930s, but the evidence of reoccupation of the feature by Vietnam is sparse. Some reporting says that Vietnamese forces rebuilt the sovereignty steles that were installed by the French in 1963. This obviously would have been before the Philippine occupation in approximately 1968. Whether this actually transpired is important because it would have given Philippine forces actual knowledge of the Vietnamese claim. More likely than not, a court would put this territory into the same group as Pagasa (Thitu) and Kota (Loaita) and rule that Vietnam never abandoned its claim to this feature and that the Philippine occupation was illegal. However, a court would require additional facts to make a definitive judgment about this feature.

#### f. The Legal Status of Philippine Claims to High-Tide Elevations and Islands Within the KIG That Are Not Currently Occupied by the Philippines

Recalling the principles by which sovereignty is established, the only basis by which the Philippines could establish sovereignty over features such as Itu Aba would be through a demonstration that the features were legally unoccupied at the time that the Philippines “discovered” them when it made its ubiquitous claim to the KIG in 1978 or that the elevations were ceded to the Philippines.<sup>111</sup> Since neither the Philippine government nor its leading academics align themselves with any type of theory that these occupied features were part of either the territory ceded by Spain in 1898 or that ceded by some other sovereign, the Philippine claim to islands/high-tide elevations must rise and fall on that country’s ability to show that it discovered the territories when they were *terra nullius* and effectively occupied the features before anyone else in the modern era. Table 2 in the appendix A lists the high-tide elevations in the KIG that are occupied by other countries. The table also contains a listing of some other features which are occupied (such as Cuateron Reef) but there is conflicting data whether these features would qualify as a high-tide elevation and be subject to appropriation by a nation state and entitled to a 12-nm territorial sea. Again, the ICJ stated in the *Nicaragua v. Colombia* case that there is no “minimum size for a maritime feature to qualify as an island” and be subject to appropriation,<sup>112</sup> although the court ruled in that case that features known as Quitasueño were only a low-tide elevation because to qualify as a high-tide elevation there must be definitive evidence that the feature is above water in all tidal conditions. As this relates to the KIG, convincing evidence concerning characteristics of a number of the features listed in table 2 is needed in order to determine whether a court would accord them even a 12-nm maritime zone.

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<sup>111</sup> In this context, the term legally occupied means either that no state had ever claimed one of the features or that another state may (like France-Vietnam) may have laid claim to certain features but it had not taken sufficient actions to legally protect that claim in the face of evidence that another state had illegally occupied its territory. This later issue comes into play in the case of the features listed on Table 2.

<sup>112</sup> *Nicaragua v. Colombia*, *supra* note 47, at para. 36-38.

While it is true that the passage of the KIG legislation is a component of an effective occupation claim, physical occupation, including the construction of public works and human presence, would be legally required in the current circumstances to perfect the claim.<sup>113</sup> The ubiquitous KIG legislation also occurred later than the 1947 nine-dashed-line “claim” by China<sup>114</sup> (as well as the ROC)<sup>115</sup> and obviously much later than the annexation by France in 1933 of specific features. Also, the 1978 enactment occurred much later than the actual occupation of territories by Vietnam, the ROC, and the PRC. As a consequence, it is the author’s view that the Philippine claims to high-tide elevations inside of the KIG that it does not currently occupy are not legally sustainable.

#### g. The Legal Status of Occupied Low-Tide Elevations or Submerged Features Occupied by Other States Within the KIG (or Philippine Continental Shelf)

Philippine military personnel also occupy two submerged reefs: Rizal Reef (Commodore Shoal) and Ayungin Shoal (Second Thomas Shoal). Both are near both Reed Bank and Mischief Reef. A number of other low-tide elevations occupied by China, Vietnam, and Taiwan in the KIG are listed in table 3 in the appendix.

Rocks and islands can be claimed as sovereign territory, but low-tide elevation(s) (LTE), or wholly submerged features, such as a coral reef, cannot be unless those features are appurtenant to a feature that is above water at high tide.<sup>116</sup> A LTE is a naturally formed area of land, surrounded by and above water but submerged at high tide.<sup>117</sup> Similarly, artificial islands, installations, and structures do not possess the status of islands even though they are above high

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<sup>113</sup> The Permanent Court of International Justice in the *Eastern Greenland Case* (1931-33), *supra* note 78, states that effective occupation in remote areas – in that case, the vast arctic territories in Greenland – does not require substantial evidence of “actual exercise of sovereign rights” given the inhospitable and desolate nature of the areas in dispute. In that case there was also substantial historical evidence as to whether Norway or Denmark had the superior claim. Even though this principle might be applicable to claims to tiny islets which are fundamentally incapable of habitation and have had no human presence to date, this entire area is much less remote than Greenland and it has seen considerable human activity for well over 150 years. Compared to eastern Greenland, the areas inside the KIG are both more “hospitable” and “accessible” as a matter of law. Given that, it is the author’s view that any court would not award title to a contested feature simply by comparing which historic claim was made earlier. Given the political realities of the South China Sea and the need to use the law to promote stability in the region by making permanent assignments of sovereignty, a court would give strong deference to the legal claims which came first in time but would also look to evidence thereafter that the claimant has effectively occupied the feature.

<sup>114</sup> Article 2 of China’s 1992 Territorial Sea Law formalized its claim over the Spratlys. The Chinese Territorial Sea Claim can be found in Annex 2 of the Department of State’s *Limits of the Seas*, No. 117 of July 9, 1996, *available at* <http://www.state.gov/e/oes/ocns/opa/c16065.htm>.

<sup>115</sup> Taipei’s Territorial Sea Law of 1998, states: “All islands and atolls of the Nansha Chiundau surrounded by the Chinese traditional U-shape lines are the territory of the Republic of China. The delimitation of the baselines in this region shall be determined by a combination of straight baselines and normal baselines. The related information concerning names of the base points, their co-ordinates, and charts shall be promulgated in the future.” See Department of State, *Limits of the Seas*, No. 127 (Nov 15, 2005), *available at* <http://www.state.gov/e/oes/ocns/opa/c16065.htm>.

<sup>116</sup> *Nicaragua v. Colombia*, *supra* note 48, at para. 26 and 37 states: “Quita Sueño, being permanently submerged at high tide, is at the present time not subject to the exercise of sovereignty....” See also R. Beckman, *Geographic Features in the East Asian Seas and the Law of the Sea*: “it is thus not established that in the absence of other rules and legal principles, low-tide elevations can, from the viewpoint of the acquisition of sovereignty, be fully assimilated....” Paper given at Academia Sinica, Taipei, Taiwan, 20-21 September 2012, pp. 10-11, 14-15. *Available at* <http://cil.nus.edu.sg/wp/wp-content/uploads/2012/09/Beckman-LTE-submerged-features-Taipei-20-21-Sep1.pdf> The United States also expressed this same view in a dispute with Bolivia. See Embassy Bogotá note No. 694, Sept. 8, 1972, 1307 UNTS 383.

<sup>117</sup> UNCLOS article 13.1

tide. Importantly, they have no territorial sea of their own,<sup>118</sup> and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone, or the continental shelf of islands; nor does their presence affect the delimitation of maritime zones. A LTE can be appropriated by a coastal state if it is “naturally” lying within the continental shelf of that coastal state, as is the case with many submerged KIG features which are currently occupied.<sup>119</sup> A LTE that lies wholly outside the breadth of a coastal state’s territorial sea has “no territorial sea of its own.”<sup>120</sup>

Table 3 lists features within the KIG that are currently occupied and are candidates to be classified as LTEs; it is possible that some features (listed in table 2) could be also classified as low-tide elevations if there were data indicating that they were above water in all tidal conditions.<sup>121</sup> If a feature is exposed at high tide, to include “coral debris” or “solid material attached to substrate,” that feature will likely be considered a rock and entitled to a 12-nm territorial sea. As noted above, this issue was addressed in *Nicaragua v. Colombia*,<sup>122</sup> wherein the court held that “international law does not prescribe any minimum size which a feature must possess in order to be considered an island.” In terms of making a finding on which features in table 3 are capable of appropriation, survey data on the condition of the feature prior to the construction of structures thereon would be dispositive, as would be data on whether the “feature” is permanently attached to substrate and above water at all times during high tide.

Based on publicly available data, features such as Mischief Reef, Cornwallis South Reef, McKennan Reef, and Gaven Reef (see table 3) would be part of the Philippine continental shelf: they are appropriately classified as low-tide elevations, are located within the technical dimensions of the Philippine continental shelf, and are not capable of legal appropriation (even though the PRC and Vietnam have already appropriated them).<sup>123</sup> Johnson Reef and Pigeon Reef (table 2) could conceivably be classified as low-tide elevations and part of the Philippine continental shelf (and not capable of appropriation by another state), but additional data are necessary to ascertain whether the features are above water during all tidal conditions. If they are below water at high tide, they belong to the Philippines since they are within 200 nautical miles of the Philippines’ archipelagic baseline and part of the continental shelf. The other listed features – which do not lie upon the Philippine continental shelf, or are not on the continental

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<sup>118</sup> UNCLOS article 60.8. Coastal states may establish 500-meter safety zones around artificial structures. See UNCLOS 60.4-5.

<sup>119</sup> *The Case Concerning Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* 2008 ICJ judgment [hereinafter *Pedra Branca*] states: “...in the absence of other rules and legal principles, low-tide elevations can, from the viewpoint of the acquisition of sovereignty, be fully assimilated with islands or other land territory.” At para. 296. See UNCLOS article 13.

<sup>120</sup> UNCLOS article 13.2.

<sup>121</sup> Even though the Nicaragua court held that there was no minimum size for an “island” and stated in passing that the same rule also applied to high-tide elevations, it is not beyond the realm of possibility that subsequent courts will scale back that finding – particularly in the case of the Spratly Islands – because of the large number of rocks that will generate their own separate 12-nm maritime zones. To eliminate the incentive for states to make such sovereignty assertions over isolated rocks or coral protrusions, a subsequent court of arbitral panel might take the view that only those high-tide features which are predominantly above water at high tide (as opposed to those in which an isolated rock may poke through the surface) can be appropriated. As of yet, the case law does not support this result even though the arbitrators in the *Eritrea v. Yemen* case intentionally disregarded (as insignificant) a few small rocks that would have made a difference in the way that the opposing coastlines were demarcated. (See para. 124.)

<sup>122</sup> *Nicaragua v. Colombia*, *supra* note 48, at para. 37.

<sup>123</sup> It logically follows that if these features are not capable of appropriations, the outposts that have been built upon the LTE will need to be dismantled so the area can be reclaimed by the Philippines.

shelf of an island being given full effect (under UNCLOS 121) – are international property because they are not capable of appropriation.

The Philippine position that most of the occupied features are part of its continental shelf is not an open-and-shut case because the continental shelf projections from the Philippines would have to take into account the continental shelf entitlements of any of the true islands in the Spratly Islands. Itu Aba is clearly the most logical candidate for such treatment since it has been inhabited for many years and has fresh water. Therefore, if there were a finding that Itu Aba belonged to Taiwan/China or Vietnam (the rightful owner under Pedrozo's analysis), there would be a possibility that Itu Aba's own EEZ/continental shelf entitlement of a 200-nm circular zone would encompass many of the features such as Mischief Reef, as well as Ayungin Shoal (Second Thomas Shoal), even though the Philippines has expended a naval vessel to establish its claim.

Figure 8 shows what the outcome would be if Itu Aba were to be classified as an island and given a "full effect" maritime entitlement. The shaded area reflects the circular arc that a court could draw around the island extending to a median point opposite the Philippine archipelago baseline (the line labeled RA 9552). The effect would be that all of the submerged features (including low-tide elevations) would become part of the continental shelf of Itu Aba. This presents obvious difficulties for the Philippines because the territories currently occupied by the Philippines inside the shaded area (including Flat Island and Nanshan) are likely not classified as islands entitled to a full maritime entitlement under Article 121 of UNCLOS. The high-tide elevations currently occupied by the Philippines, including Flat Island (Patag), Thitu (Pagasa) Island, Nanshan (Lawak) Island, and Linkiam Cay (Panata Island) would continue to exist as sovereign Philippine territory; however, they would be likely be enclaved within the maritime zone established by Itu Aba. Even though they would each rate their own territorial sea, they would be unable to "defeat" the western continental shelf projection coming from Itu Aba. Similarly, the particular geographic location of Thitu (Pagasa) Island (the next best candidate after Itu Aba for island status) does not help defeat the eastern continental shelf projection from Itu Aba into Mischief Reef and Second Thomas Shoal.

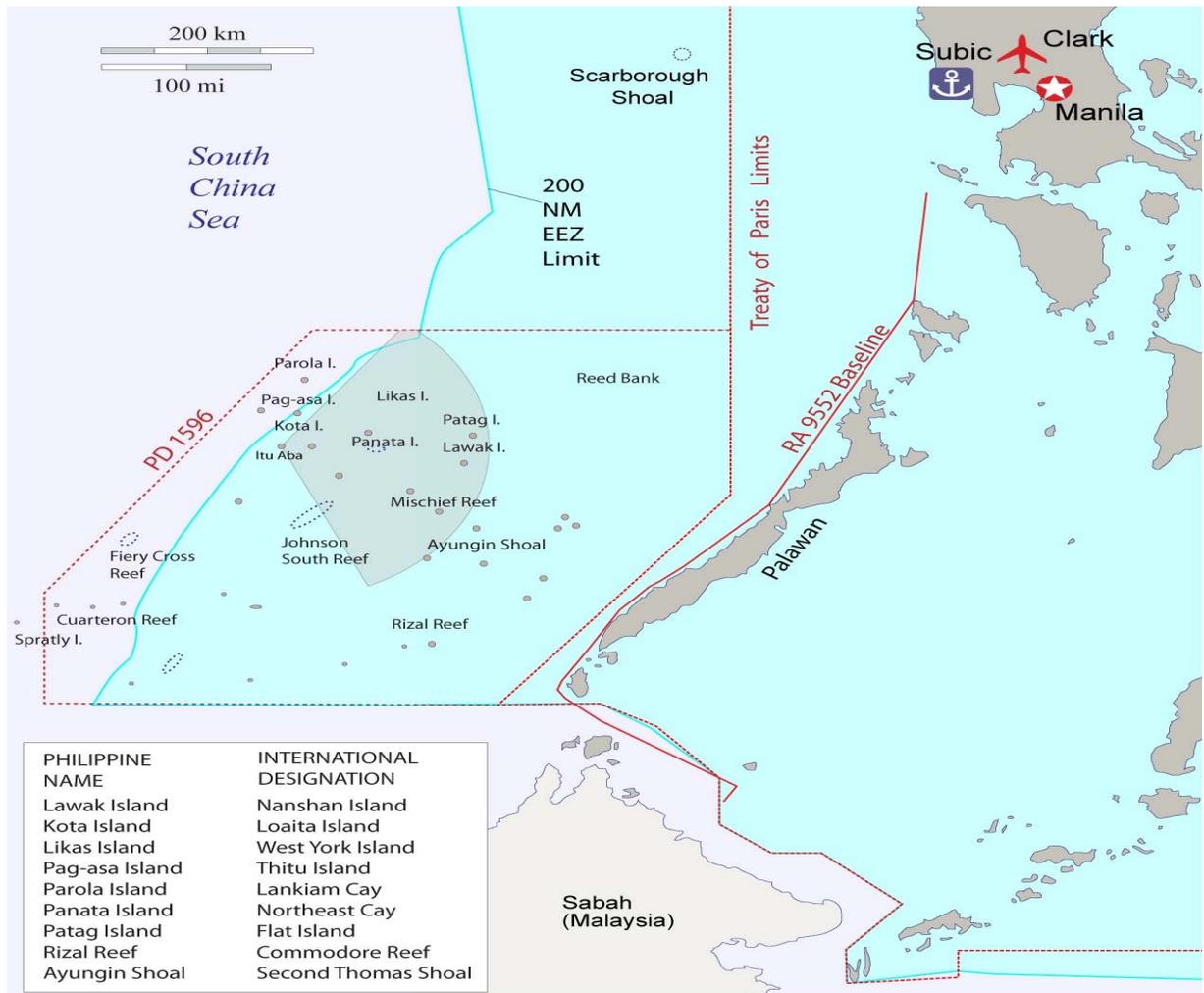


Figure 8. Itu Aba Given Full Effect. Source: CNA Graphics.

Taking into account the political realities of the situation, it seems unlikely that a court would give Itu Aba full effect, particularly given the current trend in the case law. The 2009 ICJ decision in the so-called *Serpent Island Case* concerning median line delimitation between Ukraine vs. Romania in the Black Sea<sup>124</sup> is instructive. In deciding to not give an island any effect – such that it would distort the median line separating the Romanian and Ukrainian territorial seas (and beyond) – the court cited a number of factors which it could consider in deciding how to determine the effect that an island would have on the claims which project from a continental land mass. The court noted a number of factors, including a comparison of the relative lengths of the opposing coastlines,<sup>125</sup> the impacts on other states, the geographic

<sup>124</sup> *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, ICJ Report 2009 [hereinafter *Serpent Island case*], available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=95&case=132&code=ru&p3=4>.

<sup>125</sup> As authority, the court cited the case: *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria; Equatorial Guinea intervening)*. In that ICJ decision, the court acknowledged “that a substantial difference in the lengths of the parties’ respective coastlines may be a factor to be taken into consideration in order to adjust or shift the provisional delimitation line” (Judgment, ICJ Report 2002, p. 446, para. 301. Accord *Dispute concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment of 14 March 2012 available on the website of the ITLOS, at [http://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_16/1-C16\\_Judgment\\_14\\_02\\_2012.pdf](http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/1-C16_Judgment_14_02_2012.pdf). The Bay of Bengal case is analyzed by M. Rosen, in *Myanmar v. Bangladesh: The Implications of the Case for the Bay of Bengal and Elsewhere*. CNA Corporation (2013), available at

predominance of one coastline over the other, and inequitable results for continental shelf and fisheries zone claims.<sup>126</sup> Thus, in the case of an opposing continental shelf claim of Itu Aba, versus the claim of the Philippines, all of these factors significantly favor the Philippines. The *Serpent Island* case and other recent decisions suggest that Itu Aba will only be given a 12-nm territorial sea on its eastern side because such a projection would distort both the Philippines' continental shelf claim and the claims of other various states. Such a result is logically consistent with the decision in *Nicaragua v. Colombia*. It also takes into account the fact that there are multiple high-tide elevations currently occupied by the Philippines that could be ruled islands to defeat Itu Aba's projection into Reed Bank or, perhaps, Mischief Reef, and thereby eliminate the legal underpinning for the nearby outposts by Vietnam and China that are constructed on LTEs.

#### h. Reed Tablemount/Reed Bank

Reed Bank is a totally submerged feature which is approximately 80 nautical miles west of Palawan Island.<sup>127</sup> It is within the KIG claim boundary and within the Philippine EEZ and on its



**Figure 9. Reed Bank Concession Map. Source: Forum Energy PLC**

commenced survey activity in SC 72. On March 2, 2011, two Chinese patrol boats threatened to ram the vessels which were involved in the seismic work and ordered them to quit the area because the site was under Chinese jurisdiction.<sup>130</sup> Also, according to news reports quoting the

continental shelf. But it is also within China's nine-dashed-line claim, and this has created a problem. This area was the site of natural gas activity in 1970-1976 at the Sampaguita field, in which natural gas was discovered and exploited.<sup>128</sup> In 2010, the Philippines granted a service contract to Forum Energy PLC to perform an additional geologic and seismic survey of the area in and around Reed Bank. The licensed area (SC 72) is depicted in figure 9. It comprises 565 square kilometers,<sup>129</sup> and is the site of authorized drilling of two test wells and initial well development.

In February 2011, the UK firm Forum Energy entered the licensed area and

[www.cna.org/sites/default/files/research/Myanmar\\_Bangladesh.pdf](http://www.cna.org/sites/default/files/research/Myanmar_Bangladesh.pdf).

<sup>126</sup> In support of that factor, the court cited to: *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)* ICJ Reports, Judgment, paras 28-31, 1993, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=gjm&case=78&k=e0>.

<sup>127</sup> Middlebury College's *Digital Gazetteer of the Spratly Island* confirms that the feature, at its shallowest point, is 9 meters under water. Available at <http://community.middlebury.edu/~scs/macand/gazetteer.htm>.

<sup>128</sup> J. Himmelman, *A Game of Shark and Minnow*, New York Times Magazine, Oct 23, 2103, p. 28.[hereinafter Himmelman]. Himmelman reports that the U.S. energy department projects that the Spratlys may hold up to 5.4 billion barrels of oil and 55.1 trillion cubic feet of natural gas and that "much of that is concentrated in Reed Bank...."

<sup>129</sup> <http://www.forumenergyplc.com/operations/oilandgas/reed-bank.aspx>.

<sup>130</sup> B. Glaser, *Tensions Flare in the South China Sea* CSIS (2011), available at [http://csis.org/files/publication/110629\\_Glaser\\_South\\_China\\_Sea.pdf](http://csis.org/files/publication/110629_Glaser_South_China_Sea.pdf).

Philippine Ministry of Foreign Affairs, in May 2011 there was an increased presence of Chinese marine surveillance vessels in the area around Reed Bank and the presence of a mysterious barge that contained building materials.<sup>131</sup>

The Chinese actions prompted Forum Energy to quit the area. However, the Philippine government did extend the license terms until August 2015 to account for the interruption of the firm's activity. According to the most recent financial statements by Forum Energy, the company has not abandoned its development of SC 72, which it carries as a book value of \$24 million; however, the board of directors has stated that it is reviewing options as to whether and how to continue to fund development of SC 72 and whether to remain a "going concern" in the Philippines.<sup>132</sup> The *Wall Street Journal* indicates that Philex Petroleum, which owns a majority stake in Forum Energy, is currently in talks with China's National Oil Corporation (CNOOC) to explore the possibility of joint development of the SC 72 concession.<sup>133</sup>

Inasmuch as all of the features, including Reed Tablemount/Reed Bank, are totally submerged and well within 200 nautical miles of the Philippine archipelagic baseline, the actions by China are inexplicable given the Philippines' legal entitlements and the fact that this area was never really in dispute until 2011. Indeed, there apparently was significant natural gas activity in the 1970s and some joint surveys in the 2005 timeframe, which, according to Philippine officials, collapsed because China would not share the seismic survey data with its Philippine partners. Shortly after the 2011 incident, Chinese Foreign Ministry spokesman Hong Lie issued a simple statement that it is "unlawful" for any country or company to explore oil and gas "in areas under Chinese jurisdiction."<sup>134</sup> The use of this term "jurisdiction" versus "sovereignty" is interesting and something for policy experts to debate. One possible explanation is that China is using less absolutist language to signal the Philippines that there is room for a joint development deal.

Since the Chinese do not occupy any high-tide elevations in the immediate vicinity of Reed Bank, which is totally submerged, it is difficult to envision how they can claim this feature as part of their continental shelf and under Chinese jurisdiction. Itu Aba's EEZ/continental shelf does overlap that of the Philippines; however, Taiwan currently occupies Itu Aba and has made no claim upon Reed Bank. And, as discussed above, it is very unclear, given the current trend in the case law, that Itu Aba would generate a full maritime zone to the east, seeing as how it would result in a gross distortion of the Philippine EEZ/continental shelf claim. Also, given that neither Taiwan nor Vietnam, which both occupy high-tide features within 200 nautical miles of Reed Bank, protested the Philippine actions in 2011, it appears that the Chinese actions are completely without legal foundation other than their nine-dashed-line claim, which has no legal standing in the UNCLOS era. China does occupy nearby Mischief Reef; however, that feature is a low-tide elevation and at most (if somehow classified as a high-tide elevation) would only generate a 12-nm territorial sea and certainly no continental shelf. Even if it were classified as a high-tide elevation, China would still have no entitlement since Mischief Reef does not lie within 12 nautical miles of SC 72.

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<sup>131</sup> GMA News Online, June 1, 2011, *available at* <http://www.gmanetwork.com/news/story/222246/news/nation/phl-asks-china-to-explain-ships-near-reed-bank>.

<sup>132</sup> GMA News Online, <http://www.forumenergyplc.com/news/annual-report-and-accounts-2012.aspx>.

<sup>133</sup> C. Larano, *Philex Petroleum CEO: Still in Talks With CNOOC on Reed Bank Drilling*, WSJ (Online Edition) June 14, 2013, *available at* <http://online.wsj.com/article/BT-CO-20130614-704025.html>.

<sup>134</sup> I. Storey, *China and the Philippines: Implications of the Reed Bank Incident China Brief*, Vol. 11, Issue 8, May 6, 2011.

The evidence is overwhelming that Reed Bank/Reed Tablemount is a submerged feature which is part of the Philippine continental shelf. Chinese actions to interfere with its development constitute a violation of international law and the Philippines should not consider itself under any obligation to undertake joint development of SC 72 to avoid future conflict with China. Indeed, to the extent that the actions by Philex Petroleum can be attributed to the government of the Philippines, it may wish to reconsider those actions lest they be considered acquiescence to the illegal claims by China.

## V. The Philippine-Chinese Arbitration: Implications for the Future

### A. Background on the Case

On January 22, 2013, the Republic of the Philippines instituted arbitral proceedings against the People's Republic of China under Annex VII to the UNCLOS concerning its "dispute with China over the maritime jurisdiction of the Philippines in the West Philippine Sea." On February 19, 2013, China presented a *note verbale* to the Philippines in which it described the "position of China on the South China Sea issues," and rejected and returned the Philippines' arbitration notification.

The Permanent Court of Arbitration (PCA) acts as registry for this arbitration.<sup>135</sup> A five-member arbitral panel has been appointed. Three of the five members on the panel are sitting judges on the International Tribunal on the Law of the Sea (ITLOS). The chair, Thomas Mensah, is the former president of ITLOS. China has not appointed an agent to represent it in the proceedings, and reiterated in a statement in August 2013 that it does not accept the arbitration that was initiated by the Philippines.

The Philippines chose an arbitral panel under Annex VII of UNCLOS since under Article 287(3) this is the "default" mechanism that is to be used for UNCLOS disputes if the parties do not elect the same type of dispute settlement process. Even though the Chinese will not be appearing, the Philippines still filed its 4,000-page "memorial" with the panel on March 31, 2014, to demonstrate that the panel has jurisdiction over the matter and to establish the Philippines' legal position on the questions pending before the arbitral panel.<sup>136</sup> An official copy of the memorial is not yet available on the court's website at the time of publication.

The selection of an arbitral panel is relatively uncontroversial; the question of whether the arbitral panel has subject matter jurisdiction over the issues raised by the Philippines is another matter. When China deposited its instruments of ratification with the UN Secretariat, it indicated that it was excluding from the scope of its mandatory dispute settlement matters relating to "sea boundaries," matters relating to "military activities," and matters under the jurisdiction of the UN Security Council.<sup>137</sup> However, to get around China's "opt out" from the classes of matters

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<sup>135</sup> Case summary is a nearly verbatim description of the proceedings by the court. See [http://www.pca-cpa.org/showpage.asp?pag\\_id=1529](http://www.pca-cpa.org/showpage.asp?pag_id=1529).

<sup>136</sup> See generally [http://www.pca-cpa.org/showpage.asp?pag\\_id=1288](http://www.pca-cpa.org/showpage.asp?pag_id=1288). For an analysis of the memorial, see: Center for International Ocean Law, *The Philippine-China Arbitral Case: Why China should reconsider its position of non-appearance in the Case*, May 7, 2014, available at <http://oceanandlaw.org/philippine-china-arbitral-case-china-reconsider-position-non-appearance-case>.

<sup>137</sup> [http://www.un.org/depts/los/convention\\_agreements/convention\\_declarations.htm](http://www.un.org/depts/los/convention_agreements/convention_declarations.htm).

mentioned in the preceding sentence (under Article 298 of UNCLOS), the Philippines asked the panel to address four specific issues that do not specifically relate to a sea boundary.<sup>138</sup>

1. The nine-dashed-line claim by China is inconsistent with international law given that the claim does not delineate China's entitlements within the zone in a manner consistent with UNCLOS, and China must revise its domestic laws to reflect the invalidity of the claim.
2. Mischief Reef and McKennan Reef, which are occupied by China (in the KIG), are submerged features, which are part of the Philippine continental shelf, and China must discontinue its occupation and activities thereon.
3. Gaven Reef and Subi Reef are wholly submerged features and are incapable of appropriation by China as a matter of law, and China must terminate its occupation of those features.
4. Scarborough Shoal, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef are submerged features, except at high tide, when each has a small protrusion that remains above water. Therefore, these "rocks" can only be accorded a 12-mile territorial sea and no EEZ or continental shelf. As a result, China cannot interfere with the activities of the Philippines beyond 12 nautical miles of these features.

The precise wording of the questions put before the arbitral tribunal was not available to the author, but it is important to note that these questions do not go to the ultimate questions of sovereignty over particular features or delineation of the actual maritime boundaries which each of these features would produce. Rather, the panel is being asked in questions 2-4 to look at the attributes of various pieces of geography and give an opinion as to "what it is" and describe the associated legal entitlements in terms of maritime zones.<sup>139</sup> As for the first question, the panel is being asked to rule not on the specifics of the Chinese claim but rather on whether such a claim can be made lawfully. This is hardly just a difference in semantics, since international commentators have significantly different opinions on the precise nature of the nine-dashed-line claim.

## **B. Effects of a Default Judgment**

The Chinese government appears to be content to let the arbitration proceed without it.<sup>140</sup> The Philippines has assembled a very talented legal team, including Robert Smith, who is a former geographer of the U.S. Department of State, and Bernard Oxman, who has served as the ad hoc

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<sup>138</sup> The author was able to view of a copy of the Philippine memorial but was not allowed to keep it. However, the four questions are consistent with a briefing that the author attended, given by Mr. Paul Reichler, lead for the Philippine legal team. A synopsis is available in the Wall Street Journal, *Q&A: Taking China to Court of the South China Sea*, October 15, 2013 [hereinafter *WSJ on Arbitration*], available at <http://blogs.wsj.com/chinarealtime/2013/10/15/qa-the-philippines-vs-china-in-south-china-sea-claims/>. The four questions can also be implied from a review of the "Notification and Statement of the Claim," which is in the form of a diplomatic note. Note No. 13-0211, Republic of the Philippines, Ministry of Foreign Affairs, Jan 22, 2013. (Copy on file with the author.)

<sup>139</sup> Professor Stefan Talmon of the University of Bonn and St. Anne's College in Oxford feels that the Philippines is being too clever and that the questions being asked of the court are essentially relating to a boundary dispute and excludable from consideration. See J. Ku, "The First Serious Defense of China's Position on the Philippines UNCLOS Arbitration," *OpinioJuris.org*, May 21, 2013, available at <http://opiniojuris.org/2013/05/21/the-first-serious-defense-chinas-position-on-the-philippines-unclos-arbitration/>.

<sup>140</sup> This will not be the first time an arbitration involving a State has proceeded with a State party in absentia. In the investment treaty context, disputes involving Tajikistan, Belize, and Moldova all progressed to final resolution notwithstanding a State's failure to participate in the proceedings.

U.S. judge to ITLOS. The lead counsel, Paul Reichler, has extensive litigation experience before international tribunals. Obviously, if the Philippine team does not secure a strong written opinion, it will be a major political setback. Even worse, if the arbitral panel declines to make a finding that it can exercise jurisdiction over the matter, that will be a significant setback in terms of the types of things that courts and arbitral panels can do to constructively resolve longstanding territorial and sovereignty disputes in the South China Sea and elsewhere.

If the Philippines gain a favorable ruling (which appears likely in the author's opinion), the panel should issue a written opinion to memorialize its findings.<sup>141</sup> Unlike commercial arbitration, in which decisions often do not have precedential value, the decisions by arbitral tribunals are generally considered a source of international law, particularly as they relate to interpretations of international agreements and conventions such as UNCLOS. Also, given that the composition of this particular arbitral panel (with three sitting ITLOS judges and one former president of ITLOS), it will be very hard for China to argue that a resulting decision should not be given precedential weight.

Paul Reichler, the lead counsel for the Philippines, makes this statement concerning the possible effects of a positive judgment:

.... in more than 95% of international cases—litigation and arbitration before various international courts and tribunals—the states comply with the judgment, even if they are unhappy with it. There are at least two reasons for this: (1) its reputation and the influence that comes with it; (2) many states understand it is to their advantage, and the advantage of others, to live in a rules-based system. Now, in the case of China, we see a country that is a great power that wishes to project its influence across the international community. China also advertises itself as the anti-imperialist great power....<sup>142</sup>

Because the Philippines does not have the economic leverage or the military capacity to confront China in any other way than this, Reichler should have added that China's international reputation will greatly suffer if it consciously ignores an adverse ruling. Legally, China would be on thin ice to act in derogation of a ruling since Article 296 of UNCLOS expressly provides that states have a duty to comply with "any decision rendered by a court or tribunal." That clause would apply in this particular case; it would undermine the legal underpinnings for China's occupation of many territories in the KIG (including submerged areas) and its nine-dashed line claim, and greatly limit China's entitlements in those areas, like Scarborough Shoal, which are classified as rocks. Indeed, if the Philippines is successful in obtaining a judgment that Mischief Reef and McKennan Reef (both low low-tide elevations) are not susceptible to appropriation by any state and are part of the Philippine continental shelf, it would logically follow that China would be legally bound to dismantle its outposts and vacate the features.

How exactly the Philippines would enforce this judgment is unclear; however, most courts, including those in the United States, honor foreign arbitral<sup>143</sup> awards. Whether this will translate into U.S. or international tribunals issuing punitive orders to seize Chinese assets or persons in

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<sup>141</sup> Not all decisions for which the Permanent Court of Arbitration (PCA) serves a registrar are public; however, since China is waiving its right to appear it would seem inevitable that the Philippines would want to make public any decision by the arbitral tribunal.

<sup>142</sup> WSJ on Arbitration, *supra* note 138.

<sup>143</sup> See generally, *BG Group PLC v. Republic of Argentina*, 134 S.Ct. 1198 (2014). In a press release of March 30, 2014, the U.S. Department of State positively endorsed the process that the Philippines is following as consistent with international law.

order to ensure respect for the lawful judgments is difficult to conceive. At a bare minimum, if China acts in derogation of a lawful decision of the arbitral tribunal, it could have its access suspended to institutions which were created pursuant to UNCLOS, such as ITLOS or the International Seabed Authority (ISA). At the time of this writing (March 2014), China has three ISA-licensed projects to undertake deep seabed mineral exploration, mostly in the Indian Ocean.

## VI. The Case for Joint Development

In the course of this study, various experts lamented the fact that the claimants have been unable to arrive at a formula for joint management and development of the ocean resources in the disputed areas. Parola Island (Northeast Cay) is a case in point. This very small island is not habitable because of high salinity in the ground water, and the reef has been destroyed by the use of dynamite fishing and cyanide fishing methods employed by “outside” fishing boats. There is extensive press reporting of swarms of unregulated fishing in disputed waters as well as the harvesting of sea turtles and other endangered species.

There is no guarantee that the resources of the South China Sea would be better managed if the sovereignty disputes were settled; however, due to the absence of recognized sovereignty over land territories, and associated maritime zones, there will necessarily be great lapses in the ability of marine management authorities in all of the coastal states to enter the region, conduct fisheries surveys, and actively manage the catch of those that are licensed to fish. For example, after China enacted its fishing ban in January 2014,<sup>144</sup> virtually all of the regional states have said that they regard the ban as illegal and that they will not enforce the ban against ships flying their flag. The point is not that this highly provocative move could very well result in conflict.<sup>145</sup> Rather, it is that dueling laws will create a legal vacuum since no one is in charge. The net result will almost certainly be considerable amounts of unlicensed and unregulated fishing.<sup>146</sup> In the end, the victims will be the marine environment and the coastal communities that depend on the sea for their livelihood.

The Rome-based Food and Agriculture Organization (FAO) of the United Nations is the closest thing to a neutral reporter on the condition of the world’s fisheries. FAO is a UN technical organization that both monitors the conditions of worldwide fisheries and works with regional fishery management organizations to enhance fisheries’ production consistent with the standards in UNCLOS to achieve the maximum sustainable yield (MSY) of fishery resources. In any event,

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<sup>144</sup> U.S.-China Economic and Security Review Commission Staff Report, “China’s New Fishing Regulations Seek to Justify and Consolidate Control in the South China Sea,” January 27, 2014, *available at* [http://www.uscc.gov/research\\_security](http://www.uscc.gov/research_security). The text of the new fisheries law can be accessed at the Hainan Maritime Safety Administration website, [http://www.hnmsa.gov.cn/news\\_2489.aspx](http://www.hnmsa.gov.cn/news_2489.aspx). China has approximately 110 ocean-going ships and 1,050 patrol craft available to enforce the fisheries edict.

<sup>145</sup> The edict was issued by Hainan Province but purports to apply to most of the entire South China Sea. The regulation requires all “foreign” shipping to obtain a license from Hainan Province officials. U.S. authorities have labeled the January 2014 move “dangerous and provocative.” South China Morning Post, *U.S. Says Chinese Fishing Rules for South China Sea Provocative*, January 10, 2014, *available at* <http://www.scmp.com/topics/south-china-sea>.

<sup>146</sup> This may be unduly charitable to China. According to Himmelman, *supra* note 128, the Chinese have enacted a fishing ban so that their fishermen will have exclusive access to the waters. He chronicles large Chinese fishing vessels a few miles off the coast of Pagasa Island “cutting coral from the reef...to harvest giant clams and other rare species” (p. 48). Around Subi Reef, he observed “20 enormous Chinese fishing boats along with 50 or so smaller sampans busily working” (p. 49).

the FAO office in Bangkok issued a report in 2013<sup>147</sup> in which it reported on what is already common knowledge: the Asia-Pacific region continues to be the world's largest producer of fisheries and the consumers of over 50% of world fishery resources. Top consumers include: China (32%); India (10%); Japan (9%); Philippines (5%); Vietnam (5%); Malaysia (3%); and Taiwan (2%). To satisfy this demand, the capture of 26.5 million tons of fishery products from the region's seas was necessary in 2013. .

In general, the FAO noted these trends concerning the South China Sea:

The number of vessels in the region is increasing and there has been a trend of increasing motorization and total fleet capacity in the region although a large fraction of the fisheries are classified as "small scale" fishing operations (as contrasted with the operation of large "commercial" or "factory" ships);

In the northern part of the South China Sea—there are no reliable statistics since the late 1980s but some national catch indexes (2010) reveal that total catch declined after 1990 indicating dominating low-trophic species being overfished;

The abundance of the more valuable fishes (groupers, snappers, sharks and rays) has decreased sharply although less valuable fisheries populations have not;

The overall conclusion posited by the FAO marine biologists:

The picture that emerges is one of a .... fishery that has been under heavy fishing pressure for more than 30 years and which has been fished down considerably. The changes were less obvious previously, but there remains a clear trend of a declining catch of large demersal and pelagic species and a rising catch of smaller fast recruiting species. In the northern part of the South China Sea, large pelagics, sharks and rays have disappeared from the catch since the 1970s until the present.

The news is not all bad for small pelagic species but FOA expressed caution because regional fishing organizations either have shown little interest or, due to the disputes, have been prevented from conducting fish population assessments. They single out the western side of the South China Sea (shelf fisheries around Sabah, Sarawak and parts of the Philippines) as the areas of most intense fisheries and, obviously, of great concern given the overall increase in the number of fishing vessels.

Fishing is not the only area which suffers due to lack of governance. The United Nations Environment Program<sup>148</sup> concluded a 2005 assessment of the South China Sea region which looked at a variety of measures addressing the long-term sustainability of the South China Sea region. The program looked at issues such as deforestation, habitat loss, and marine pollution (both land and vessel based). After noting the heavy dependence of countries such as the Philippines, Vietnam, and Malaysia on commercial exploitation of natural resources, particularly fisheries, aquaculture, mariculture, and other forms of agriculture and mining, the report notes increasing freshwater shortages and widespread pollution of existing water supplies. Also, the

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<sup>147</sup> FAO, *Regional Overview of Fisheries and Aquaculture in Asian and the Pacific 2012*, Publication 2012/26 (2013), available at <http://www.fao.org/docrep/017/i3185e/i3185e00.pdf>.

<sup>148</sup> UNEP, *South China Sea GIWA Regional Assessment No. 54*, available at [http://www.unep.org/dewa/giwa/areas/reports/r54/giwa\\_regional\\_assessment\\_54.pdf](http://www.unep.org/dewa/giwa/areas/reports/r54/giwa_regional_assessment_54.pdf).

natural river flow into the South China Sea has been altered, leading to increased saline intrusion into coastal lands and freshwater lakes.<sup>149</sup>

The United Nations Development Program (UNDP) noted some positive developments to establish coral reef protective measures and reforest coastal mangrove areas, but found that “future levels of environmental impacts are expected to remain as severe” with continued deterioration projected through 2020.<sup>150</sup> The UNDP authors appropriately flagged the Spratly Island dispute as contributing to the inability of the region to establish regional control measures.

U.S. policy-makers would be unwise to ignore the fact that the maritime disputes discussed in this paper affect the ability of the various littoral countries to sensibly (and sustainably) manage their own resources. Friendly nations will continue having to cope with the impacts of extreme weather events on the Philippines, Indonesia, and perhaps other countries which, due to coastal erosion and loss of barrier islands, cannot protect themselves from hurricanes/typhoons. All of these factors will inevitably lead to instability, as the regional populations compete for fish, unpolluted lands, and fresh water. That instability can obviously implicate the U.S. military because of U.S. treaty obligations; it can also create economic chaos and displace populations.

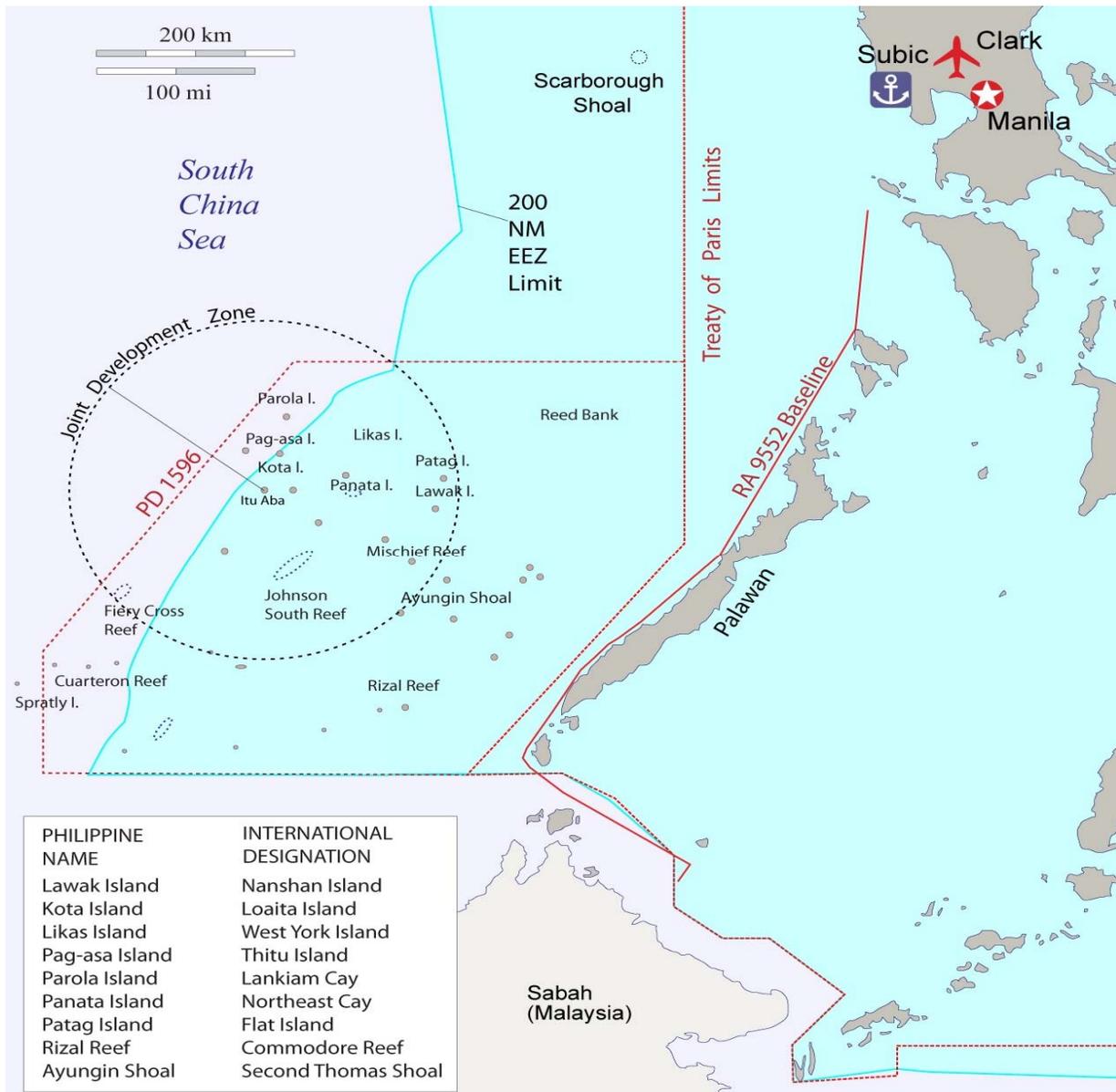
Part IX (Article 123) of UNCLOS provides a strong policy imperative for cooperation either on a multilateral basis or through an appropriate regional organization, such as ASEAN. Unfortunately, the precise legal mandates in that section are not spelled out. Also, ASEAN is unlike the European Union – which has both legal personality and significant legal, regulatory, and judicial powers – and has not shown any appetite for forcibly injecting itself into this complex and highly contentious matter.

For the United States, there appears to be a clear imperative to insert itself, in alignment with other states, in order to insist upon the establishment of provisional measures to prevent further collapse of the region’s fisheries and decline in the environmental health of the contested waters. Figure 10 depicts a 200-nm diameter zone in the disputed region that would be an excellent candidate for some type of joint development scheme encompassing the claims of China, Taiwan, the Philippines, and Vietnam. This particular area was chosen as a pilot project because it contains the two largest features in the disputed region: Itu Aba and Thitu (Pagasa) Island.

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<sup>149</sup> *Id.* at 6-27.

<sup>150</sup> *Id.* at 39.



**Figure 10. Suggested Joint Development Zone. Source: CNA Graphics.**

It would obviously be best if a joint development arrangement could be negotiated under the auspices of ASEAN or the United Nations; however, China would most assuredly exercise its constructive “veto” in both fora to block the establishment of a zone in what the Chinese consider to be their territorial waters. Therefore, borrowing from history, the Svalbard Treaty of 1925<sup>151</sup> provides a useful model for establishing a joint development zone. That treaty, which remains in force, vests Norway with sovereign rights over the Spitsbergen archipelago but grants rights to various states (including Russia, Italy, Japan, the Netherlands, and the United States) that were present on Svalbard Island when the treaty was concluded – i.e., rights to maintain their population centers and exploit the natural resources in their areas that they occupy.

<sup>151</sup> <http://www.jus.uio.no/english/services/library/treaties/01/1-11/svalbard-treaty.xml>.

Borrowing from the Spitsbergen Treaty, the terms of a multilateral joint development zone agreement between China, Taiwan, Vietnam, and the Philippines could include these notional terms:

- A non-claimant state would be designated as the administrator (or trustee) over the zone. Indonesia, given its stature in ASEAN, might be suited for doing this.
- All countries that have occupied high-tide features in the zone would be allowed to remain; however, they would replace all military occupiers with civilians. Military equipment would be removed.
- All structures built on fully submerged and low-tide elevations would be dismantled.
- The four parties would mutually agree to not assert territorial claims around any feature, except that each occupier would have the right to establish 500-meter safety zones around each island/feature for safety of navigation purposes.
- The trustee would allow each of the four claimant states to fish anywhere in the disputed area and be the sole licensee of any fishing. Licensing would be based on current FAO standards to ensure sustainment of regional fishing stocks. Each claimant would be entitled to 25 percent of the catch.
- Mining in the area would also follow the “25 percent” formula.
- Oil and gas prospecting would be licensed by the administrator on a strictly competitive basis. The “25 percent” formula would be applied to any royalties received.
- The administrator (Indonesia) would be the only state permitted to have permanently based military forces in the area, in order to enforce the terms of the agreement.
- The United States and EU would provide security guarantees to Indonesia in the event that any Indonesian forces came under attack.
- The agreement would enter into force by agreement among three of the four countries and any outlier’s share would be held in escrow by the administrator.

Law of the Sea purists might object in principle to the establishment of such a “zone,” which might encompass areas in which high seas freedoms – including the rights of navigation and overflight – exist. But, this proposal strictly deals with allocations of rights on land territories and in maritime zones (and resources) which are derivative of those territories. Also, since the primary purpose for establishing this zone is to uphold the regional cooperation obligations of states in UNCLOS Article 123, it would seem that this zone is fully UNCLOS compliant. Indeed, given the recent move by China to ban most fishing in much of the SCS – coupled with the significant stresses on the region’s resources – there is little question that the factual predicate for invoking Article 123 in a serious way is present.

## **VII. Summary of Findings**

The starting point for understanding the disputes between the Philippines and other claimants to features in the South China Sea is to recall the legal origins of the Philippine archipelago as well as international law concerning entitlement to maritime features.

The Republic of the Philippines was seen as an archipelago by its former colonial rulers – Spain and the United States. To the outside world, it consisted of a large “box” wherein both the waters and the features were considered part of the Philippines. Over time, the Philippines abandoned the “box” and modified its claims to conform to the 1982 UN Law of the Sea Convention. It did

so in a number of enactments commencing in 1961 and ending in 2009. The 80 archipelagic baselines that form the modern-day Philippines are UNCLOS compliant.

The Philippines has asserted claims to Scarborough Shoal as well a collection of 50 features which are known collectively as the Kalayaan island group (KIG). The Philippine claims to sovereignty over the features known as Scarborough Shoal and the KIG are independent of their archipelagic status both legally and historically.

Because Scarborough Shoal is a feature which exists above high tide, it is capable of sovereign appropriation under international law. Historical evidence surrounding this particular feature is unpersuasive: most mariners charted this feature only in order to remain well clear of it since it was a hazard to navigation. Similarly, the presence of itinerant fishermen from either China or the Philippines is legally insufficient to establish a legal presence. However, there is evidence that the Philippines and the U.S. Navy visited the feature, charted it, and exercised law enforcement jurisdiction over the features. That evidence is hardly a legal “slam dunk,” the evidence supporting Philippine sovereignty appears stronger. The fact that it is 400 nautical miles closer to the Philippines than to China and well within the Philippine EEZ also weighs in this determination.

The KIG claim is much like the Chinese nine-dashed-line claim which China (and the ROC) vicariously uses to justify its claims to features and waterspace. Using this methodology to claim territories in large areas of water is not, standing alone, likely to be regarded as legally sufficient to establish sovereignty over ocean territories. By contrast, the claim of Vietnam devolves from a legal annexation document issued by the French in 1933 that has specific coordinates and affects specific territories (listed below). The legal annexation by France was, at the time, a lawful method of territorial acquisition and its rights devolved to Vietnam. French activity prior to World War II supports their sovereign claims. The subsequent occupation of the territories named in the French annexation by armed forces from Japan, the ROC, and the Philippines was not lawful, because, after since 1945, international law has no longer respected the forcible acquisition of territory from another state.

Itu Aba (Taiping), Thitu Island (Pagasa), Loaita (Kota), and possibly Northeast Cay (Parola) are small islands (high-tide features) which are derivative of the original French claims and are now being occupied by the ROC and Philippines, respectively. There is no evidence that France and later Vietnam abandoned their claims; indeed, there is evidence that from time to time the Vietnamese authorities took actions to reassert their sovereignty over these areas. In the period immediately following World War II, France/Vietnam seem to have acquiesced in the occupation of Itu Aba by the ROC and neither France nor, later, Vietnam took sufficient actions to protest continued occupation by the ROC. Given that, the ROC that it acquired title to Itu Aba by prescription (similar to the common law principle of adverse possession – open, visible, and continuous use with knowledge of the original owner). As regards the four above high tide features currently occupied by the Philippines, there is insufficient evidence that France/Vietnam abandoned their claims to these features. Put another way, even though upwards of 60 years have passed since these areas were militarily occupied by the Philippines, it does not change their status legally since Vietnam took a series of actions after World War II to reinforce the original French claims to these territories (although some questions of fact may exist regarding actions taken by Vietnam regarding the Northeast Cay). The political realities of uprooting Philippine citizens from these areas (especially Thitu) may be something different entirely.

West York Island (Likas), Nanshan Island (Lawak), Flat Island (Patag), and Lankiam Cay (Panata) are four very small islands in the KIG area which are currently being occupied by the Philippines. (See table 1.) While Vietnam might argue that these small islands were covered by its original claim, they are not clearly identified in the original annexation document and there is little or no historical evidence to support continued activity to reassert sovereignty. Similarly, China has produced no evidence that it specifically annexed or physically occupied these features. Absent evidence that Vietnam actively disputed sovereignty, the Philippines was legally justified in classifying the features as *terra nullius* when it occupied them in the late 1960s. Title in these four small islands should vest to the Philippines.

The high-tide elevations described in table 2 that are currently occupied by Vietnam should presumptively remain in Vietnamese hands. As noted previously, even though China may have encompassed the Spratlys on maps prior to their occupation by Vietnam in the 1970s, China never took the next step and occupied the features through human contact or administrative actions. The same can be said about the KIG claim: the publication of the Philippine claim in 1978 took place well after most of these features were occupied by Vietnam. Thus, Vietnam was justified in classifying the features as *terra nullius* when it occupied them; however, this analysis focused on the claims of the Philippines. Vietnamese claims to these high-tide elevations are not connected to the earlier claims by France; rather, they are made strictly on the basis of physical occupation after World War II.

The Philippines is entitled to a 200-nm EEZ and continental shelf as measured from its new archipelagic baselines. That entitlement includes sovereignty over features which are classified as low-tide elevations, such as Reed Bank and Mischief Reef. (See table 3.) Under international law, these features are not susceptible to sovereignty or occupation. Chinese interference with the Philippines' use and management of their continental shelf resources is illegal. Other features within the KIG which are being illegally occupied by the China and Taiwan include Subi Reef (Zhubi Reef), Zhongzhou Jio Reef, Gaven Reef, McKennan Reef, and Cornwallis South Reef.

Table 2 shows six or so features which are being occupied within the KIG that are predominantly low-tide elevations but may have a few rocks, or some coral or sand, which protrude at high tide. These include Johnson North Reef, Cuarteron, Great Discovery Reef, London Reef, Pearson Reef, and Pigeon Reef. Even though the ICJ in *Nicaragua v. Colombia* has said that there is no international size standard, past judicial activism as regards the maritime entitlements of islands could force a reexamination of that standard in order to prevent the South China Sea from becoming pockmarked with 24-nm-diameter blobs.<sup>152</sup> In the absence of such activism, title to those high-tide elevations should vest in the country which currently occupies them: Vietnam or China.

The pending arbitration action by the Philippines versus China pursuant to Annex VII of the UNCLOS should have a salutary effect from a legal governance perspective since the arbitral panel is being presented with an opportunity to “codify” many of the legal principles discussed in this report. Even though China continues to boycott the activities of the arbitral panel, it does so at its peril. The panel is composed of outstanding jurists, and the legal team representing the Philippines has done an excellent job of “teeing” up the case so that it does maximum damage to

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<sup>152</sup> Capability of “appropriation” implies a duty of a sovereign to chart the features, install navigational markers and aids to prevent ships from running aground and build minor structures thereon to be able to enable humans to monitor the conditions of adjacent reefs and take appropriate protective measures. Most of the features noted above which slightly protrude a high tide fall well short of this standard.

the legal underpinning of China's various claims and activities in the South China Sea. Enforceability of a positive judgment is perhaps the most vexing legal question; however, an adverse judgment will certainly cost China politically.

The arbitral panel will hopefully play an important but small role in helping advance conflict resolution in the South China Sea. These disputes are likely to remain, because it is unlikely that any court would ever award a single country title to all of the disputed features in the South China, and, thus, it is necessary to undertake a feature-by-feature examination of the positions of each country. Complicating this process are the resource implications of tiny islands such as Itu Aba, Thitu, and Spratly Island – each of which would generate huge maritime zones unless a court were given an opportunity to intervene and give the island less than full effect as has happened in a few cases decided by the International Tribunal for Law of the Sea and the International Court of Justice. Given this chaotic (and inequitable) state of affairs, a joint development scheme is something which the United States should actively promote as required by UNCLOS 123. The Svalbard approach is a good example to use in beginning the process.

As regards the Philippines, these legal conclusions are reached:

- The Philippines has a superior claim to Scarborough Shoal.
- Reed Bank should be legally classified as a feature which is part of the Philippine continental shelf.
- The ubiquitous KIG claim by the Philippines carries little legal weight. It stands on the same footing as the nine-dashed-line claim. Also, it was made later than the claims of China, the ROC, and Vietnam.
- The Philippines has a superior claim to four specific high-tide elevations in the KIG based on a principle of first discovery and effective occupations – namely, West York, Nanshan Island, Flat Island, and Lankiam Cay.
- The Philippines is illegally occupying two small islands in the KIG that are the rightful property of Vietnam (based on the French annexation document): Thitu (Pagasa) Island and Loaita (Kota) Island. It is possible that Northeast Cay should also be included on this list, but more evidence is needed.

## Appendix: Features Occupied in the KIG

**Table 1. Features in the KIG Occupied by the Philippines**

Philippine Name	International Designation	Land Area (in hectares)	Occupation Status	Annexed by France, 1933	Comments
Pagasa	Thitu Island	32.7–islet; some arable land	Mixed military/civil population; avg. 200 persons	Yes	Has air strip. Second largest of Spratly group; has agriculture & some fresh water.
Likas	West York Island	18.6–islet; no arable land	Small military contingent	No	Giant sea turtle sanctuary; little vegetation; a few military structures
Parola	Northeast Cay	12.7–islet; no arable land	Small military contingent lives in 2 structures.	Yes	Not habitable because of high salinity in ground water; near VN’s “Southwest Cay”; reef destroyed by dynamite fishing.
Lawak	Nanshan Island	7.9–islet; no arable land	Philippines armed forces have occupied since 1968; 11-person force.	No	Bird sanctuary. Some phosphate mining; near Flat Island
Kota Island	Loaita Island	6.45–islet; no arable land	Token armed presence	Yes	Wildlife sanctuary and phosphate source
Patag Island	Flat Island	.57–cay; no arable land	Philippines armed forces based on Lawak have occupied since 1968.	No	A cay, it changes shape seasonally; has no vegetation or water. Some structures being built for troops.
Panata Island	Lankiam Cay	.44–cay; no arable land but has a lagoon	Philippine armed forces from Kota Island remotely occupy the cay on a stilted structure.	No	Most surface area washed away leaving calcarenite foundation; no vegetation.

\*1 hectare = 2.471 acres = .3861 sq. mi.

**Table 2. High-Tide Elevations in KIG Occupied by Vietnam and Taiwan**

Name (s)	Size (in hectares)*	Claimants	Occupation Status	Year Round Civilian Occupation	Sustain Econ. Activity?	True 121 Island?
Taiping Island/Itu Aba	46 hectares	ROC, PRC, VN, and RP	Y-ROC troops	No	Fresh water but little arable land	No—but best case among group
Namyit Island	5.3 hectares	PRC and RP	Y-VN troops	No	No	No
Sin Cowe Island or Sinh Ton Island	8.0 hectares	VN, RP, Malaysia, RP, ROC, and PRC	VN	No	No	No
SW Cay or Pugad	12 hectares	PRC, VN, Malaysia, and ROC	VN displaced RP soldiers in 1975	No	No	No
Sand Cay	7 hectares	PRC, VN, and RP	VN	No	Some arable land but no water	No
Cuarteron Reef	Coral Rocks only; no lagoon; high-tide protrusion (possibly a “rock”)	RP, PRC, and VN	PRC since 1988	Military	No	No – Activist Court may rule it an LTE.
Great Discovery Reef	Reef—a few rocks protrude at high tide.	PRC, VN, and RP	VN since 1988	Probably military	No	No – Activist Court may rule it an LTE.
London Reefs (adjacent to Cuarteron Reef)	Mostly submerged; a few coral rocks may protrude at high tide.	PRC, VN, and RP	VN since 1988	Probably military	No	No- Activist Court may rule it an LTE.
Pearson Reef	2 sand cays—part of surrounding reef above water at high tide	PRC, VN, and RP	VN since 1988	Probably military	No	No-Activist Court may rule it an LTE.
Pigeon Reef	Rocks above water at high tide—no land	PRC, VN, and RP	VN since 1988	Probably military	Yes	No—has lighthouse. Within 200 nm of Phil. baseline.

\*1 hectare = 2.471 acres = .3861 sq. mi.

**Table 3. Occupied Low-Tide Elevations in the KIG**

Names(s)	Composition	Claimants	Occupier	Civil/Military?	200 nm From Phil. Arch. Territorial Baseline
Mischief Reef or Meiji Reef	Low-tide elevation (a few rocks)	PRC, RP, VN, ROC	PRC since 1994	Military	Yes – 130 nm
Fiery Cross Reef	Combination of three submerged reefs; all rocks submerged at high tide (data conflicting whether high-tide protrusions)	RP, PRC, and VN	PRC since 1988	Military	No
Subi-Reef or Zhubi Reef	Low-tide elevation w/lagoon	VN, PRC, and RP	PRC	Mixed–heavy fishing presence 2012	No
Zhongzhou Jio Reef	Reef with slight exposure at low tide	ROC, VN, PRC, and RP	ROC	Mixed–ROC USCG wooden structures. Part of Union Bank.	Very close
Gaven Reef	Sand dune plus fringing reef, submerged at high tide	PRC, RP, and VN	PRC since 1988-92	Concrete structure; military	Very close
Johnson North Reef (part of Union Banks) a/k/a Collins Reef	Submerged at high tide with a small “coral dune” protrusion	PRC, VN, and RP	VN, No date	Unknown	Yes
McKenna Reef (part of Union Bank)	Wholly submerged at high tide	PRC, VN, and RP	PRC since 1988	Structure	Yes
Cornwallis South Reef	Low-tide elevation	PRC, VN, and RP	VN since 1988	Probably military	Yes

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