

The Arbitral Court's Ruling on the South China Sea: Pro and Cons, Contexts and Consequences

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**APARC, Stanford University
Philippines Conference Room,
Encina Hall, 3rd Floor**

October 6, 2016, 12:00 – 1:30



The SCS Arbitration Case

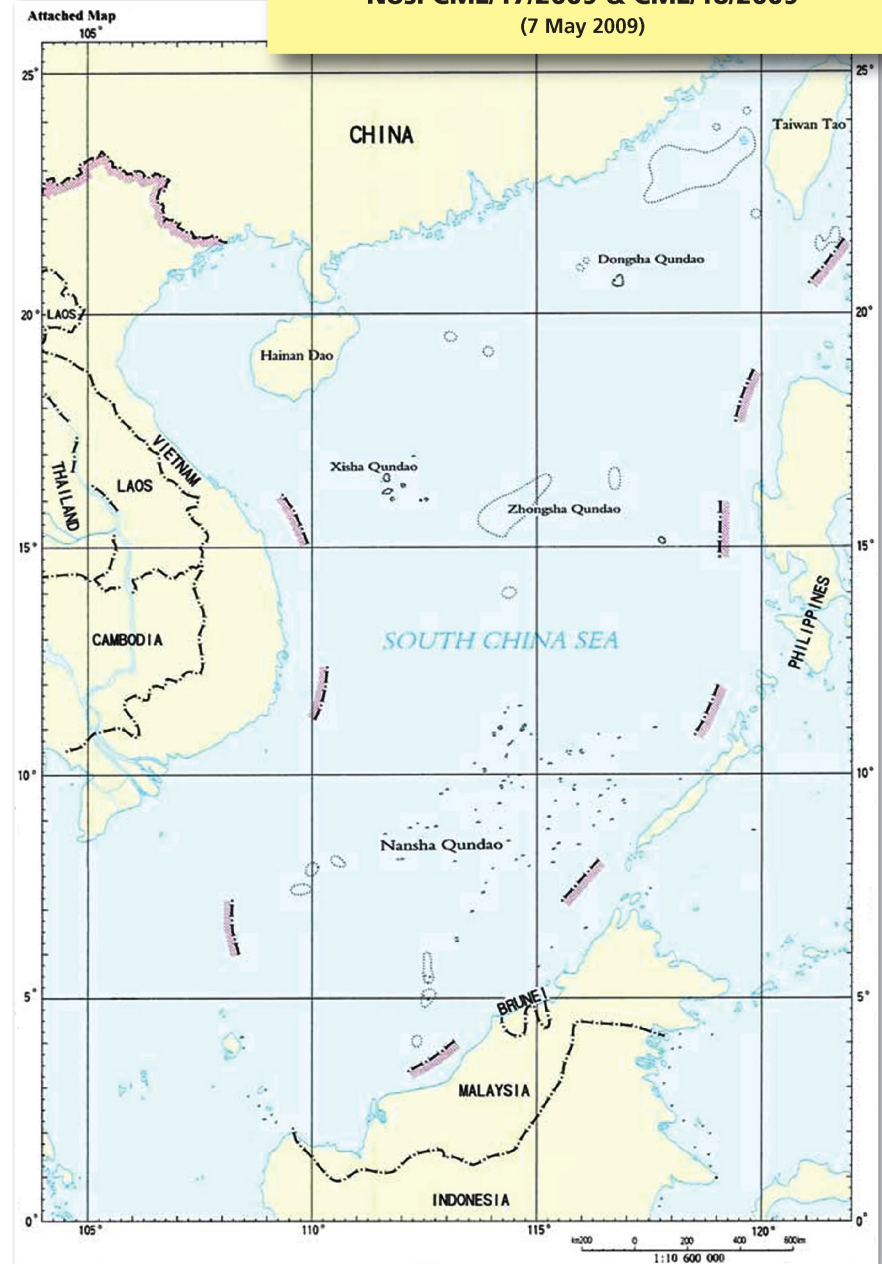
The Republic of the Philippines v. The People's Republic of China

PCA Case No. 2013-19

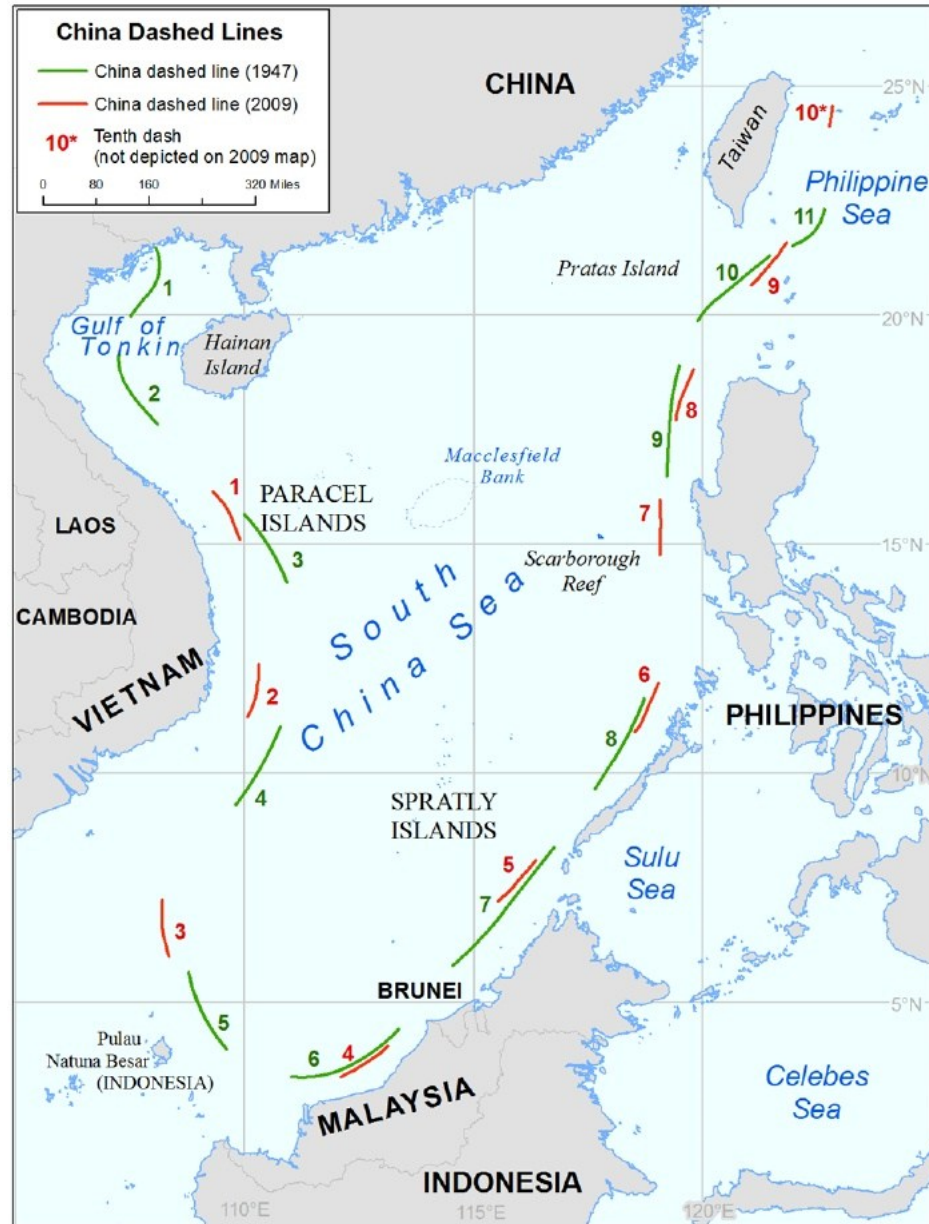
The SCS – A semi-enclosed sea

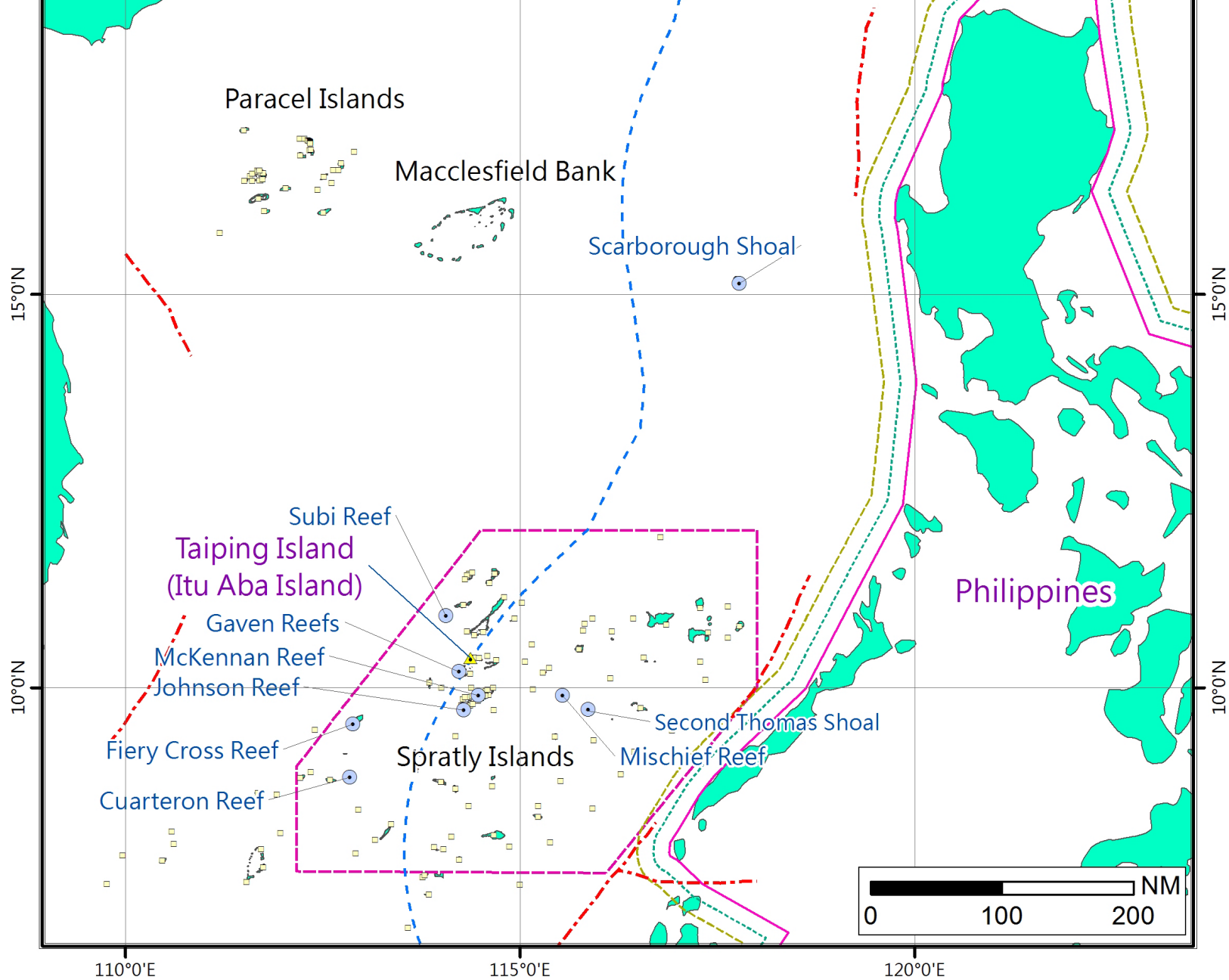


MAP ATTACHED TO CHINA'S NOTES VERBALES
Nos. CML/17/2009 & CML/18/2009
(7 May 2009)



Map 5: Comparison of Dashed Line in 2009 and 1947 Maps





▲ 太平島位置

● 菲南海國際仲裁所提及島礁

—— 菲律賓2009年公告群島基線

----- 菲律賓群島基線延伸12浬示意範圍

Islands

South China sea

South China Sea

Philippine

Bajo de Masinloc

9-dash line

Philippine Claimed 200-nm EEZ limit

Philippine archipelagic straight baselines

9-dash line

Viet-
namese
Claimed
200-nm
EEZ
limit

Subi Rf

Spratly Islands

Gaven Rf

McKenna Rf

Mischief Rf

Johnson South Rf

Fiery Cross Rf

Cuarteron Rf

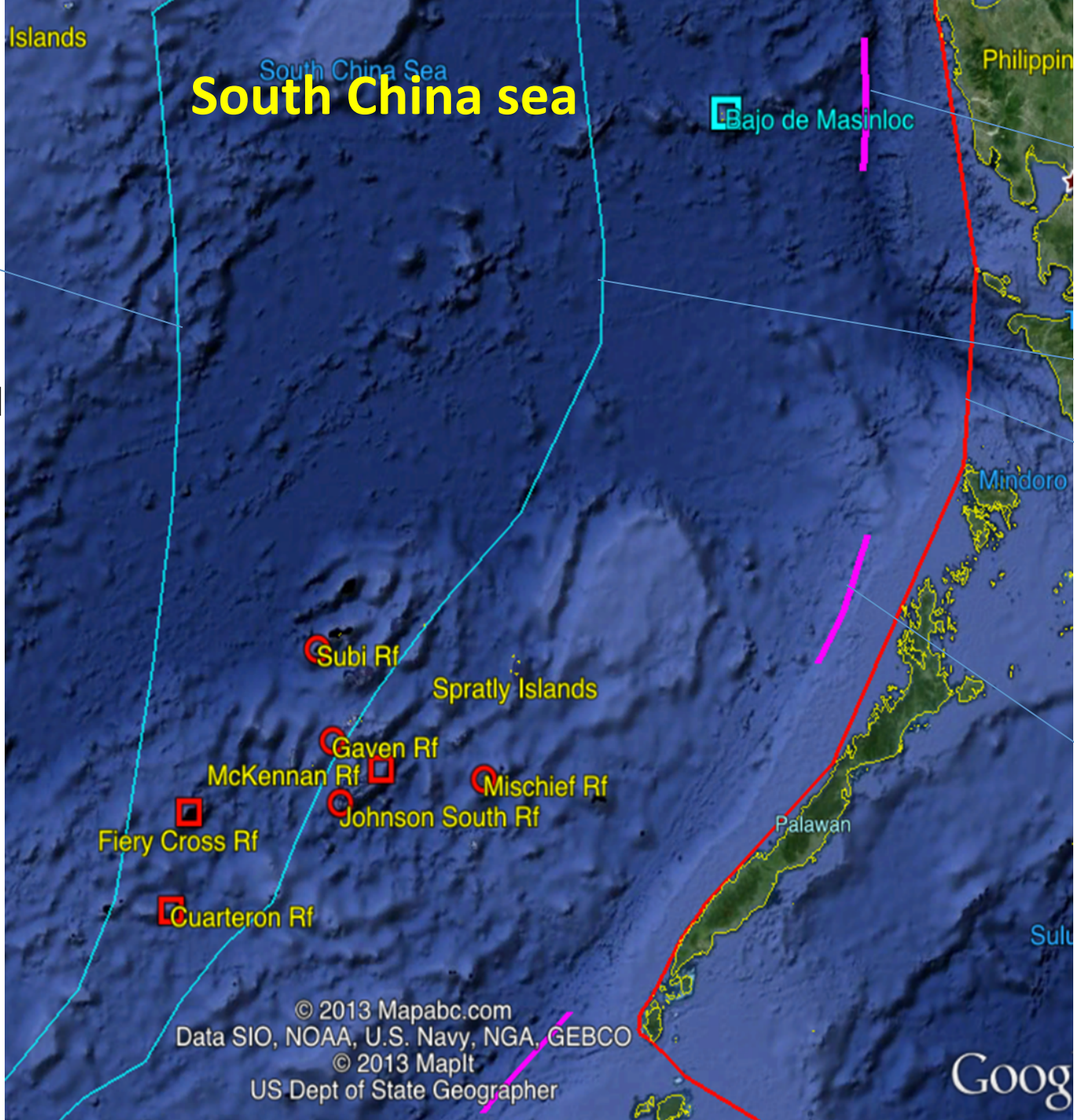
Palawan

Mindoro

Sulu

© 2013 Mapabc.com
Data SIO, NOAA, U.S. Navy, NGA, GEBCO
© 2013 MapIt
US Dept of State Geographer

Goog



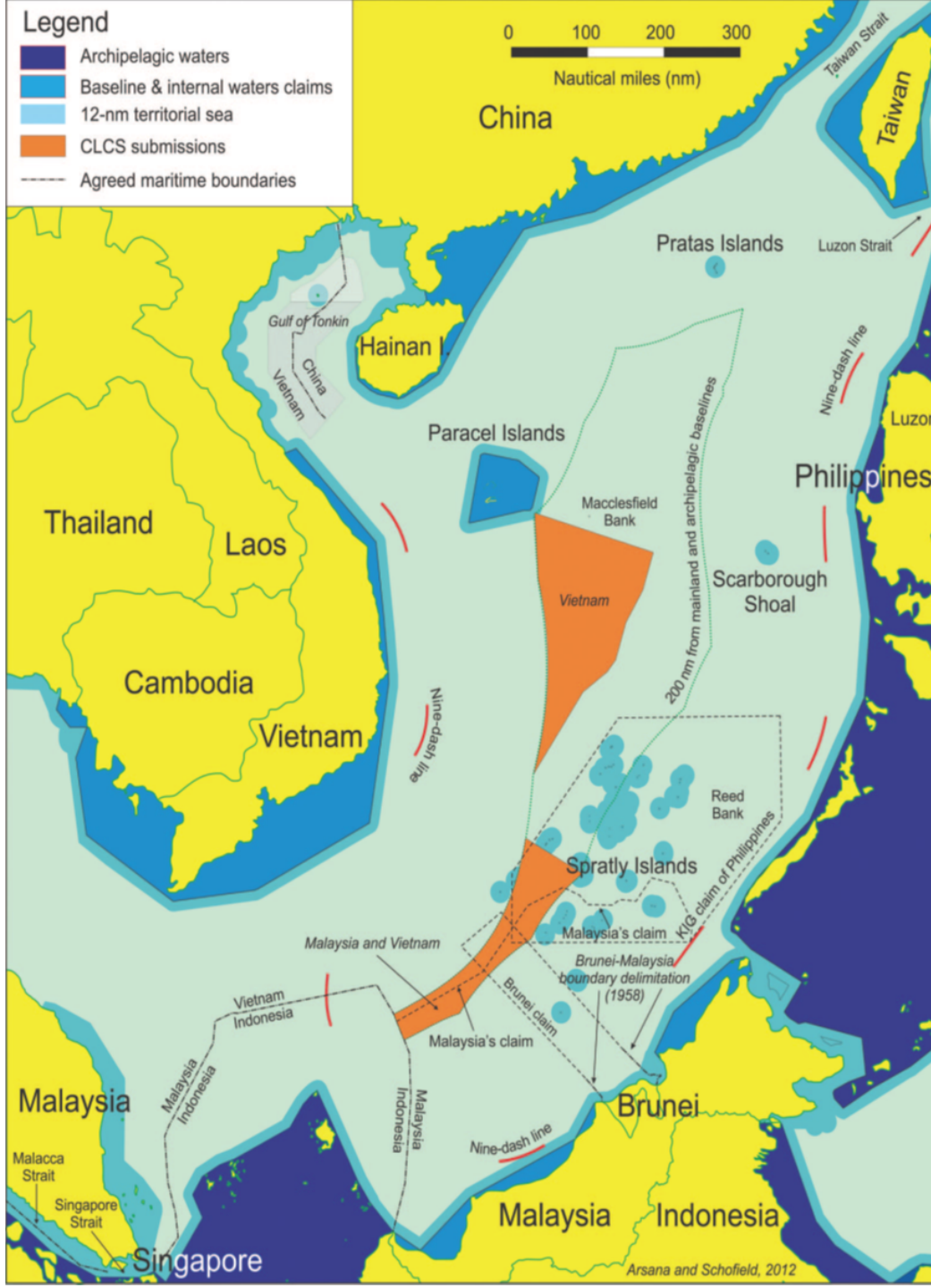


Legend

- Archipelagic waters
- Baseline & internal waters claims
- 12-nm territorial sea
- CLCS submissions
- Agreed maritime boundaries

0 100 200 300

Nautical miles (nm)



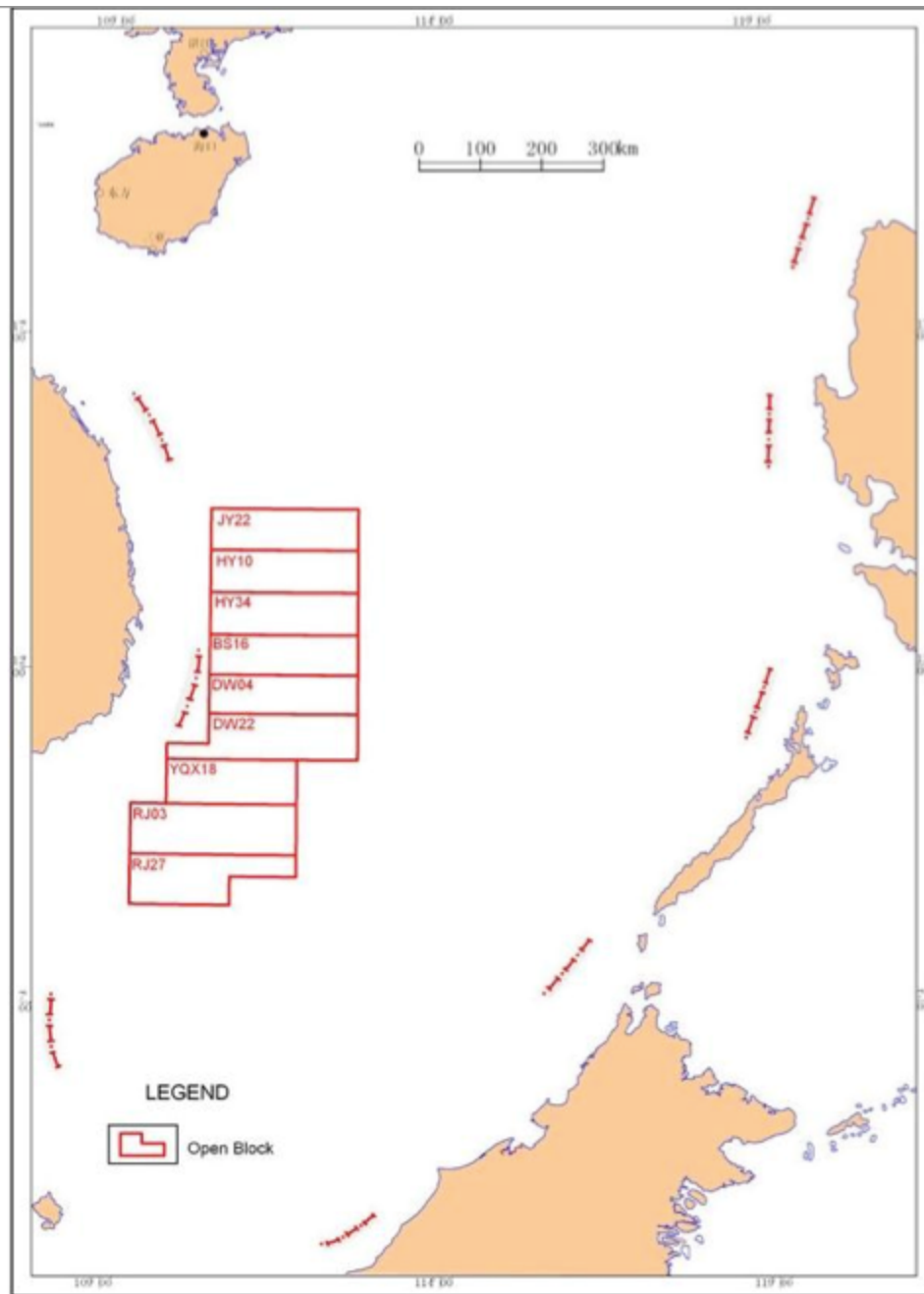
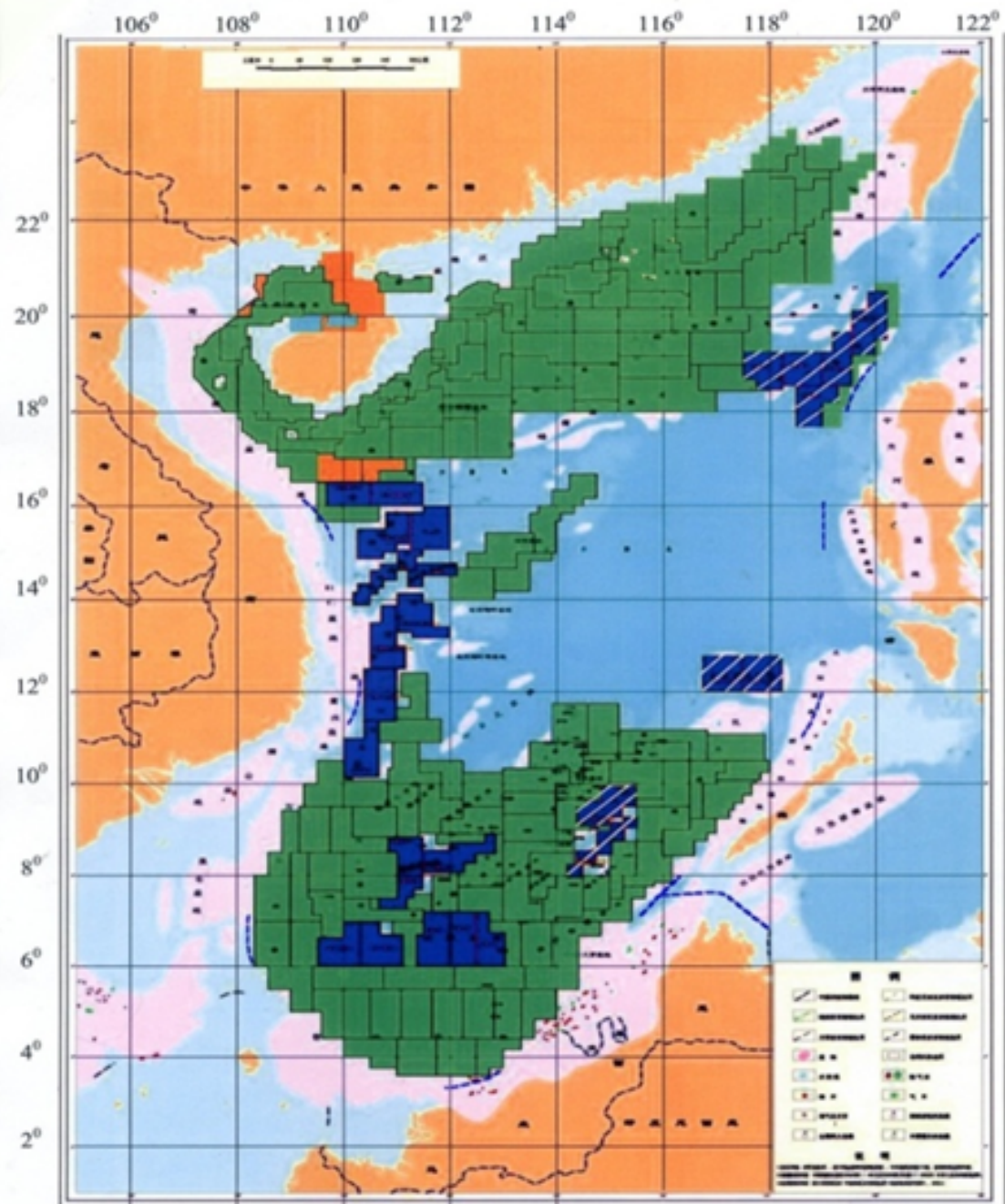


Figure 3: Map enclosed with China National Offshore Oil Corporation Press Release Notification of Part of Open Blocks in Waters under Jurisdiction of the People's Republic of China Available for Foreign Cooperation in the Year of 2012 (23 June 2012) (Annex 121)



The Nature of the South China Sea Arbitration Case

- A Legal warfare?
- A Trial of the Century?
- A political farce?
- An arbitration under the disguise of law?
- A piece of trash paper?
- A possible diplomatic “shame-fare”?
- Increasing “reputation costs” for China?
- A “game changer”?

Timeline: The SCS Arbitration Case

- **6/16/2015** PRC passed deadline to submit any final statements in response to the Philippines' Supplemental Written Submission ;
- **7/07-13/2015** First Oral Hearing on Jurisdiction and Admissibility
- **10/29/2015** Award on Jurisdiction & Admissibility issued ;
- **10/30/2015** PRC's reaction to the Award
- **10/31/2015** Taiwan's reaction to the Award
- **11/24-26 and**
- **11/30/2015** Hearings on pending jurisdictional issues and Merits
- **12/2015 – 6/2016** A series of “preemptive” or “defensive” actions taken by the PRC
- **12/2015- 6/2016** Also a series of “defensive” actions taken by Taiwan, in particular, re. the status of Itu Aba (Taiping Island)
- **7/12/2016** The Award was issued (501 pages)

Core Submissions and Key Rulings

- The historic rights, or other sovereign rights, or jurisdiction claimed by China in the waters encircled by the “9-dash line” in the SCS are contrary to the UNCLOS and without lawful effect.

Core Submissions and Key Rulings

- None of the high-tide features located in the Spratly Islands, including Itu Aba (Taiping Island), in their natural condition, are capable of generating maritime entitlements beyond a 12-nm territorial sea, which means that these features have no 200-nm EEZ or continental shelf.

**Some Comments on the
Findings and Declarations
made in the Arbitral Award**

A case of “putting the cart before the horse”?

- The territorial sovereignty dispute is the real heart of the problem in the case. This also gives rise to the issue of maritime boundary delimitation.
- One former UK’s legal official pointed out that there is no precedent for deciding merely on “status of ‘special features’ unless sovereignty is disputed and cannot be decided by the tribunal.”

The Flaw concerning Fact-finding

- The Tribunal exercised its power to seek “external” evidence, whether by appointing a number of independent experts to review the evidences or reports submitted by the Philippines and the evidences included in the amicus curiae brief submitted by the Chinese (Taiwan) Society of International Law and then relied upon that “external evidence in reaching conclusions.

The Problem of State Consent

- Compulsory arbitration and other compulsory procedures under the UNCLOS are strictly based on State consent.
- These procedures are authorized only for disputes concerning the international and application of the Convention (Art. 286). Without mutual state consent, an arbitral tribunal cannot address territorial disputes.
- Parties to maritime disputes can agree upon the means to settle their dispute and to exclude any further procedure, including the procedures provided for in the UNCLOS (Art. 281, 282).
- States are entitled the right to declare that they do not accept compulsory procedures regarding disputes concerning maritime boundary delimitation, historic titles, law enforcements or military activities, and other disputes involving vital national interests (Art. 298).

The Problem of State Consent

- Section 3 of Part 15 of the UNCLOS establishes important limitations and exceptions to the applicability of the compulsory procedures of section 2 of the Convention.
- Article 297 and 298 are the two limitative provisions.
- Article 299 of UNCLOS provides that disputes excluded by Article 297 or exempted by Article 298 from application of compulsory section 2 procedures may be submitted to such procedures “only by agreement of the parties to the dispute”.

China did not agree to settle their disputes via arbitration under Article 287 of the Convention.

The Problem of State Consent

- The Tribunal in ***the Southern Bluefin Tuna Arbitration Case*** (Australia and New Zealand v. Japan, 2000) considered that UNCLOS falls significantly short of establishing a truly comprehensive regime of compulsory jurisdiction entailing binding decisions.
- The Tribunal took into account the fact that a significant number of international agreements with maritime elements, entered into after the adoption of UNCLOS, **exclude with varying degrees of explicitness unilateral reference of a dispute to compulsory adjudicative or arbitral procedures.**

The Problem of State Consent

- The Tribunal stated that many of these agreements effect such exclusion by expressly requiring disputes to be resolved by mutually agreed procedures, whether by negotiation and consultation or other method acceptable to the parties to the dispute or by arbitration or recourse to the International Court of Justice by common agreement of the parties to the dispute.
- Other agreements preclude unilateral submission of a dispute to compulsory binding adjudication or arbitration, not only by explicitly requiring disputes to be settled by mutually agreed procedures, but also, by requiring the parties to continue to seek to resolve the dispute by any of the various peaceful means of their own choice.
- *China argued that the Philippines is bound by the 2002 SCS DOC in seeking ways to settle their disputes.*

The problem of unenforceability

- The arbitral process is geared towards a final award that would finally resolve the dispute.
- In dispute resolution, the judgment or award is the end of the dispute.
- But *what if you go to arbitration knowing that you may obtain an award that may not be enforceable* (i.e. because a party contests the legitimacy of the tribunal; its jurisdiction): *what is the role of arbitration in that context?*
- *What is the purpose for obtaining an award without enforceability by the parties?* Can legal mechanisms such as Annex VII arbitral proceedings under the UNCLOS merely seek a positional advantage, in a diplomatic war?

The problem of unenforceability

- Apparently, the Award in the SCS arbitration case is not an end in itself but rather the means to something else, such as “*diplomatic shamefare*” or “a mere *strategic positioning* in the chessboard of a wider spectrum of contentious issues concerning territorial and maritime delimitation in the SCS.

Procedural defects

- Taiwan was unable to defend its position in the arbitral proceedings re. the *Amicus Curiae* brief submission, the reports by the experts appointed by the Philippines and the Tribunal, and the reliance on the British, French, and Japanese historic records in the 1920s and 1930s to reach its conclusions on the status of Itu Aba.
- As commented by Professor Jerome Cohen (NYU Law School), “*The tribunal erred in not allowing Taiwan adequate opportunity to state its case.*” (The Wisdom of The Hague’s South China Sea Decision, The WSJ, 7/19/2016)

Other Flaws

Questionable interpretation of Article 121(3) of the UNCLOS

- A stable human community?
- Indigenous population?
- Capacity of the feature, past, present, or future?
- Interfering forces, such as civil war, WWII?
- Extractive economic activities, mining and fishing?
- Historic records and evidence, how far back?
- Military personnel, sovereignty-related function?
- Lack of citing other authoritative LOS scholars' views on the interpretation of Article 121(3)?
- Lack of citing State practices in the interpretation and application of Article 121(3)?

China's reaction to the Award

- No implementation of the ruling;
- The award is “null and void”;
- Urging to turn this page of arbitration over;
- Focusing on PRC-Philippine bilateral talks;
- Carefully studying the award and preparing for needed responses, including legal countering arguments and policy options; and
- Implementing the so-called “dual-track approach” to manage the SCS dispute.

Taiwan's Reaction to the Ruling

- On 7/12/2016, Taiwan declared that the Tribunal's decisions “have no legally binding force on the ROC because of the following reasons:
 - (1) Taiwan was excluded from the arbitral proceedings;
 - (2) the Tribunal found that Itu Aba (Taiping Island) – the largest naturally formed high-tide feature in the Spratly island group, is a “rock” and therefore has no right to generate a 200-nm EEZ or continental shelf; and
 - (3) the term “*Taiwan Authority of China*” was used in the Award.

State Responses to the South China Sea Arbitral Award

Countries that recognize
the Award as
legally binding

Countries that do not
consider the
ruling as
legally binding

Australia
Canada
Japan
The Philippines
New Zealand
Singapore
United States
Vietnam

v.

China
Pakistan
Montenegro
Russia
Sudan
Taiwan
Vanuatu

	Parties to UNCLOS	Position on Article 121 at UNCLOS III	Calling ruling final and binding	Against ruling and binding force	Supporting general principles, rule-based order, rule of law, UNCLOS, FON/Overflight
Country/ Organization					
PRC	✓			✓	✓
Malaysia	✓				✓
Taiwan	NO			✓	✓
Vietnam	✓		✓		✓
Cambodia	NO				✓
Indonesia	✓				✓
Myanmar	✓				✓
Philippines	✓		✓		✓
Singapore	✓	✓	✓		✓
Thailand	✓				✓
Australia	✓		✓		✓
Canada	✓		✓		
India	✓				✓
Japan	✓	✓	✓		✓
Montenegro	✓			✓	✓
New Zealand	✓		✓		✓
Pakistan	✓			✓	✓
U.S.	NO		✓	Π	✓
Russia	✓			✓	✓
Sudan	✓			✓	✓
Vanuatu	✓			✓	✓
ASEAN (except Cambodia)	✓	✓			✓
EU	✓	✓			✓

No mention of the SCS arbitral award nor calling upon China to comply with the Tribunal's ruling in the *Joint Communique* or Chairman's statements (July ~ September 2016)



49th ASEAN Foreign Minister's Meeting (AMM)



28th and 29th ASEAN SUMMITS



Every ASEAN nation has its own set of interests and priorities with Beijing, which has become more influential in dictating their SCS policies.

The Philippines: A Wild Card in the Implementation of the Award

- 9/16/2016 No preconditions to discuss competing claims in the SCS with China.
- 9/28/2016, Philippine President Rodrigo Duterte said that joint exercises of Filipino and American troops this week will be the last such drills.
- Duterte will visit Beijing on Oct. 19 to 20.

Singapore's Interesting position

- Singapore serves as the country coordinator for China-ASEAN dialogue relations between 7/2015-7/2018.
- **Interestingly to note, the Philippines will chair ASEAN in 2017 and serve as the country coordinator between China and ASEAN (7/2018-7/2021.**

Singapore's Interesting position

- 8/2016, Singaporean Prime Minister Lee Hsien Loong, during his visit to the US, reportedly said that Singapore hoped other countries would respect the arbitration result.
- 9/21/2016, it was reported that at the 17th Non-Aligned Movement Summit held in Venezuela, Singapore raised the issue of SCS disputes or the July 2016 Arbitral Award. But Singapore's ambassador in Beijing denied it.
- 9/29/2016, Japan's *Kyodo News* reported that Singaporean Prime Minister Lee Hsien Loong, during his visit to Tokyo, asked China to respect the tribunal's ruling. But Singapore's *South China Morning Post* mentioned no similar remarks made by the Prime Minister.
- 10/01/2016, China should make Singapore “pay the price for seriously damaging China's interests”, says Prof. Jin Yanan, director of the strategic research institute at the PLA's National Defense University.

Indonesia's response

- Prior to the Tribunal's ruling, Indonesia had been consistently arguing about the illegality of China's '9-dash' claim.
- But in its statement issued in response to the 7/2016 Award, Indonesia did not address the 9-dash line issue and the Tribunal's ruling.
- 10/04/2016 Indonesia's air force is holding its largest military exercise in the area near Natuna Islands in a show of maritime claim to the gas-rich area which is overlapping with the area enclosed within the Chinese 9-dash line.

Possible Impact on External Parties' Maritime Claims (Features and their right to generate 200-nm EEZ)

- 1. Australia
- 2. Japan
- 3. The United States

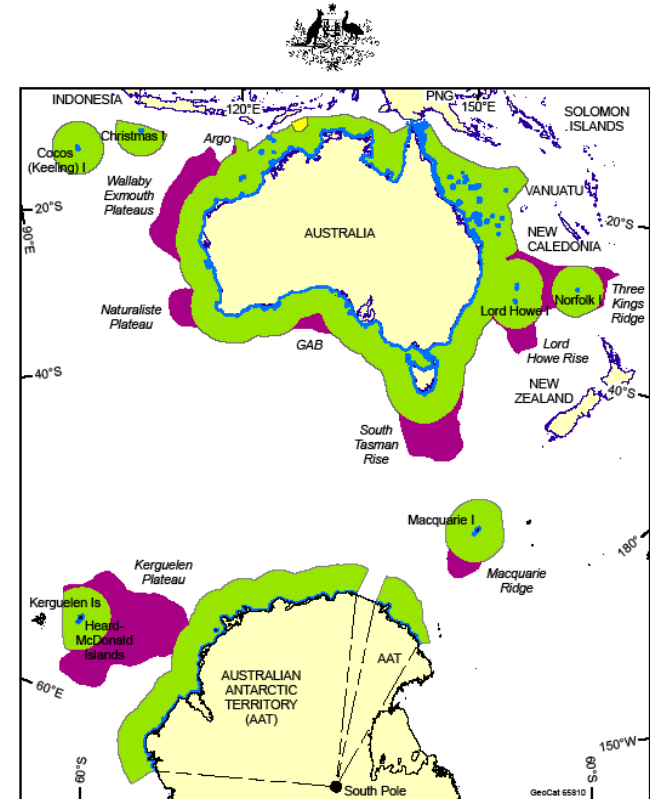
A need to redraw the geopolitical map?

A need to revise the existing maritime claims?

An invitation to more maritime disputes in the
world's oceans and seas?

Peace and stability v. conflict and tensions?

Australia's claim for Heard Island and McDonald Island



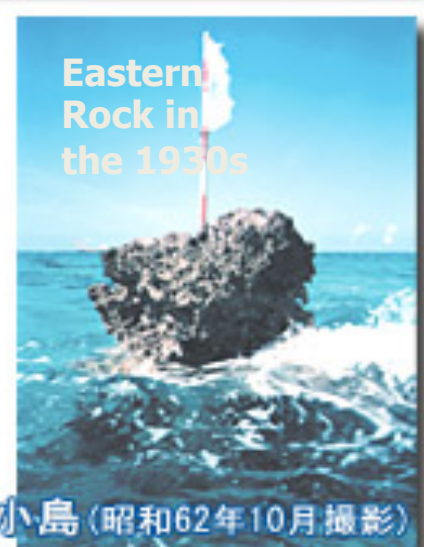
AUSTRALIA'S CONTINENTAL SHELF CONFIRMED BY THE COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF



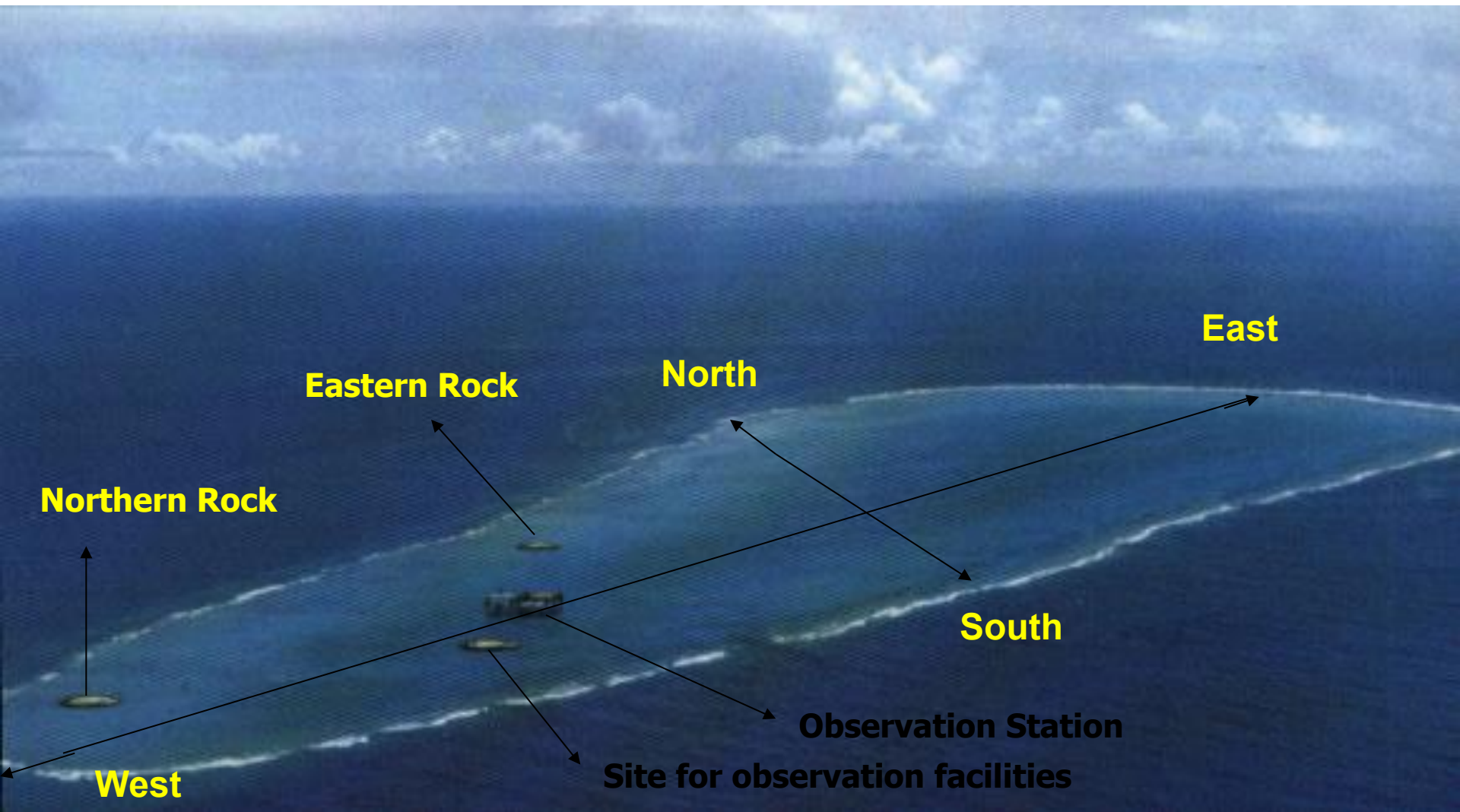
Note: The areas of continental shelf depicted to the north-west of Australia reflect the terms of the 1997 maritime boundary treaty with Indonesia which has not yet entered into force.

1 nautical mile (M) = 1852m

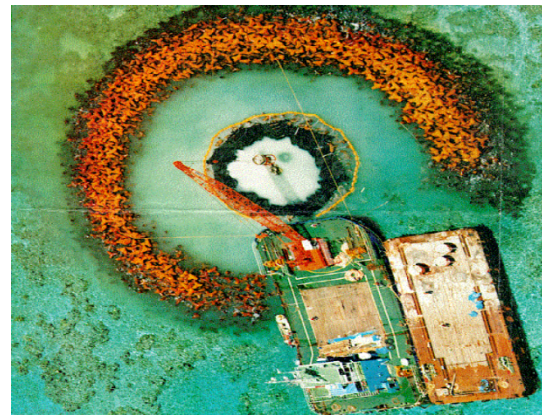
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Okinotorishima is a slender elliptical shape area in an east to west direction, extending 4.5 km from east to west, 1.7 km from north to south, with a circumference of 11 km.



Japan's Okinotorishima



Actions taken by Japan to prevent erosion from the sea

- From 1987 to 1993, Japan fortified the two islets with concrete wave breakers and covered most of the exposed parts with concrete



Okinotorishima







The eroding protrusion surrounded by concrete.



Jon Van Dyke, Letter to the Editor, *The New York Times*, January 21, 1988, p. A26.

***Okinotorishima* – which consists of two eroding protrusions no larger than king-size beds – is not entitled to generate a 200-mile EEZ.**

THE NEW YORK TIMES, THURSDAY, JANUARY 21, 1988

Letters

Speck in the Ocean Meets Law of the Sea

To the Editor:

A front page article from Tokyo Jan. 4 on the attempts by Japan to build up the tiny islet of Okinotorishima and keep it from being swallowed by the sea leaves the impression that international law permits a nation to claim exclusive jurisdiction over ocean resources in a 200-mile zone around such an uninhabitable islet. The opposite is the case.

Article 121(3) of the 1982 Law of the Sea Convention, which Japan has signed, states that "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." Okinotorishima — which consists of two eroding protrusions no larger than king-size beds — certainly meets the description of an uninhabitable rock that cannot sustain economic life of its own. It is not, therefore, entitled to generate a 200-mile exclusive economic zone.

The Law of the Sea Convention is also quite clear — in Article 60 (8) — that artificially built islands do not generate 200-mile resource zones. The more than \$200 million the Japa-



Janusz Kapusta

nese are spending to construct what is in essence an artificial island cannot, therefore, be the basis for a claim to the exclusive control over the resources in the waters around such a construction.

JON VAN DYKE
Professor of Law
University of Hawaii at Manoa
Honolulu, Jan. 7, 1988

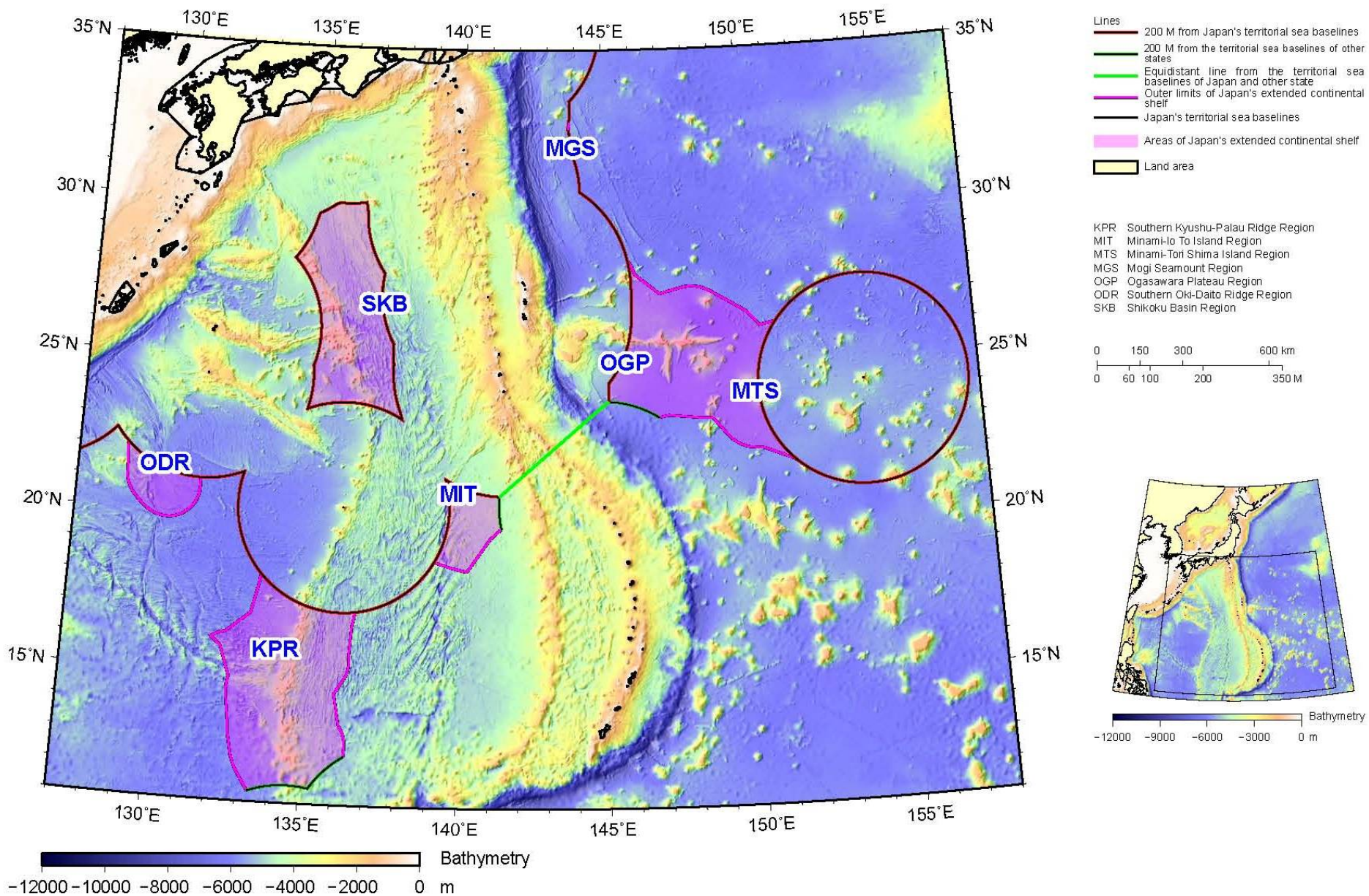
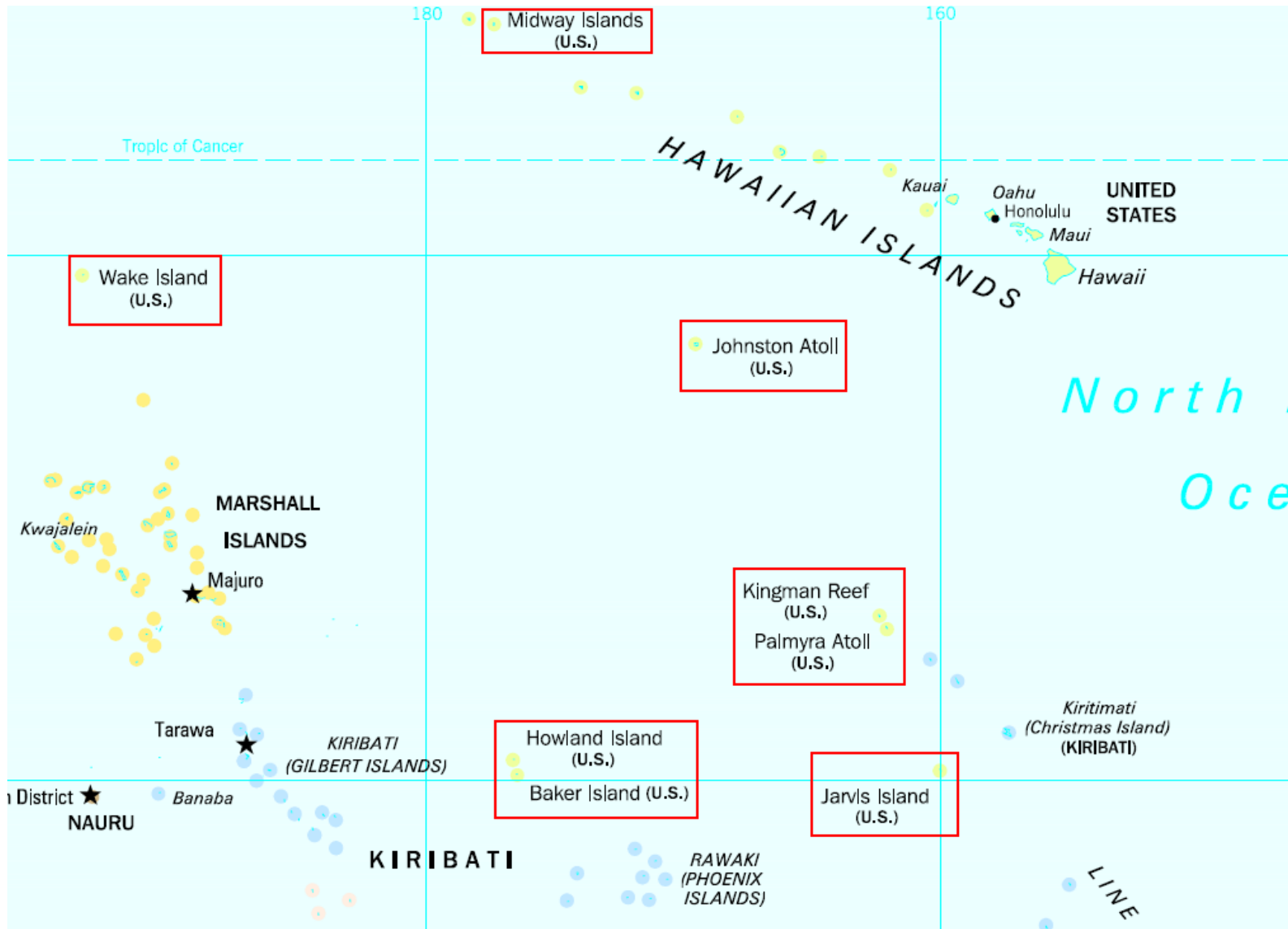
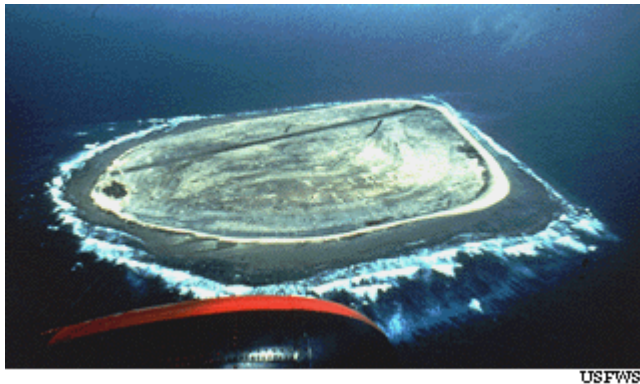
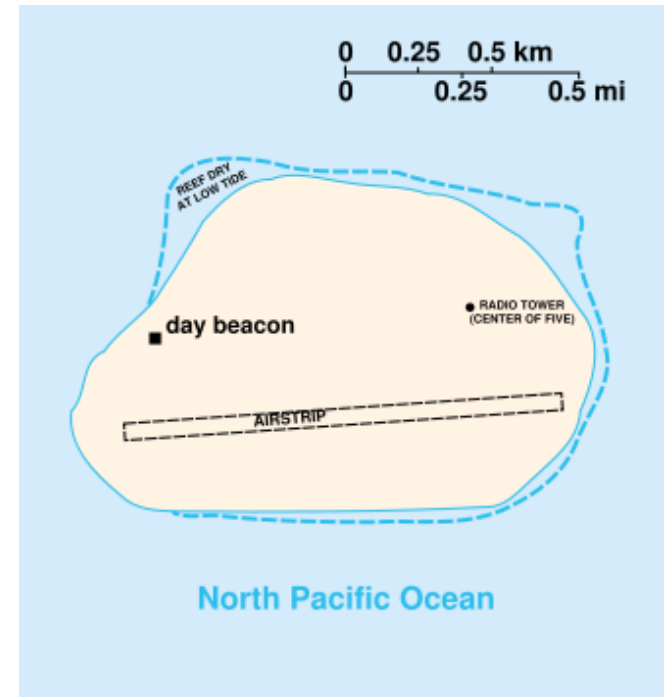


Figure 1.1. Areas of Japan's extended continental shelf

United States Minor Outlying Islands



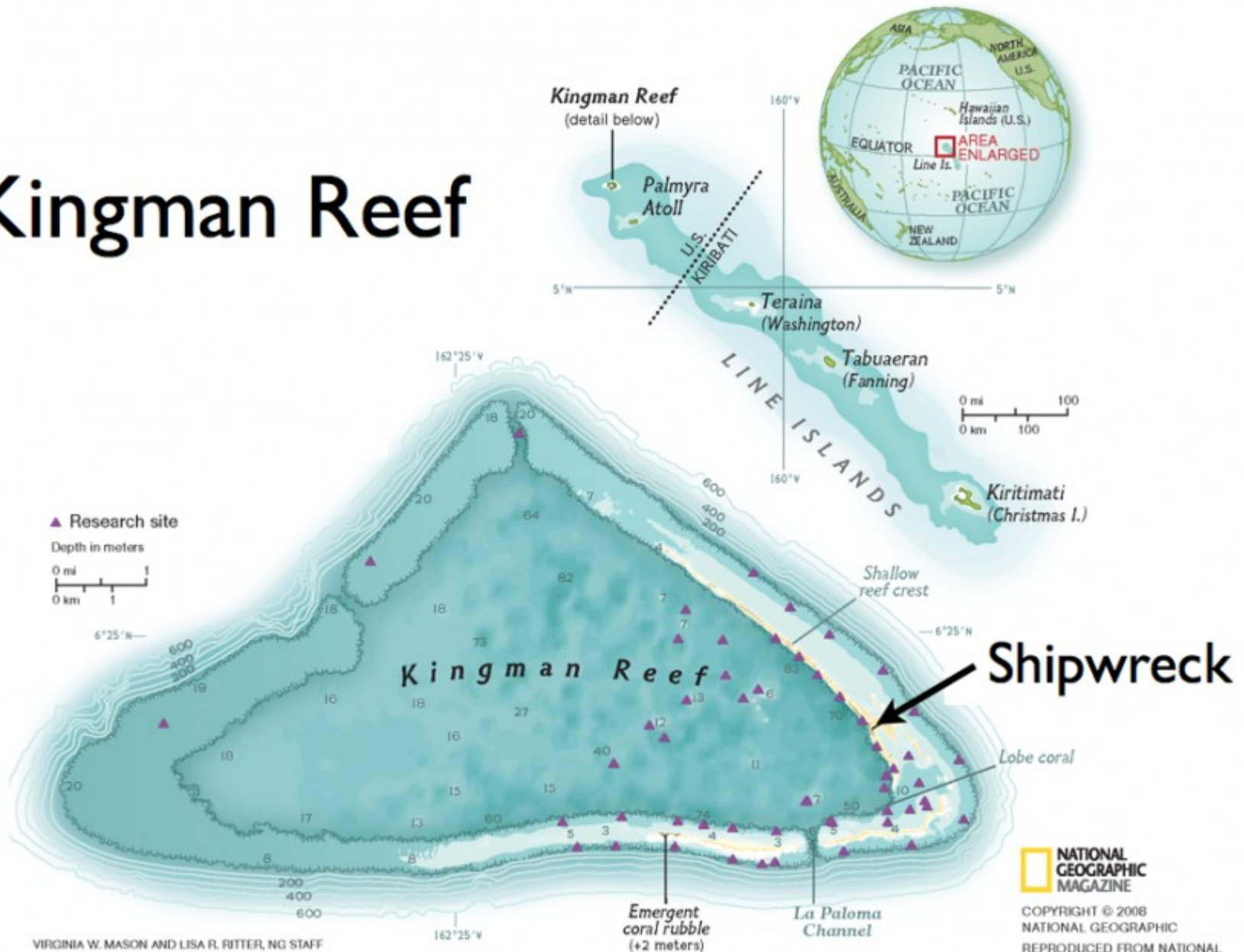


Size of Baker Island: 1.24 km²

Size of Howland Island: 1.62 km²

Some of U.S. Pacific Remote Islands may not meet the criteria for generating an EEZ or continental shelf under Article 121 of UNCLOS, but U.S. does claim an EEZ around its uninhabited rocks, islands, and coral atolls in the Pacific Ocean.

Kingman Reef



VIRGINIA W. MASON AND LISA R. RITTER, NG STAFF
 SOURCES: GEOEYE (REFERENCE SATELLITE IMAGE);
 NOAA; U.S. FISH AND WILDLIFE SERVICE

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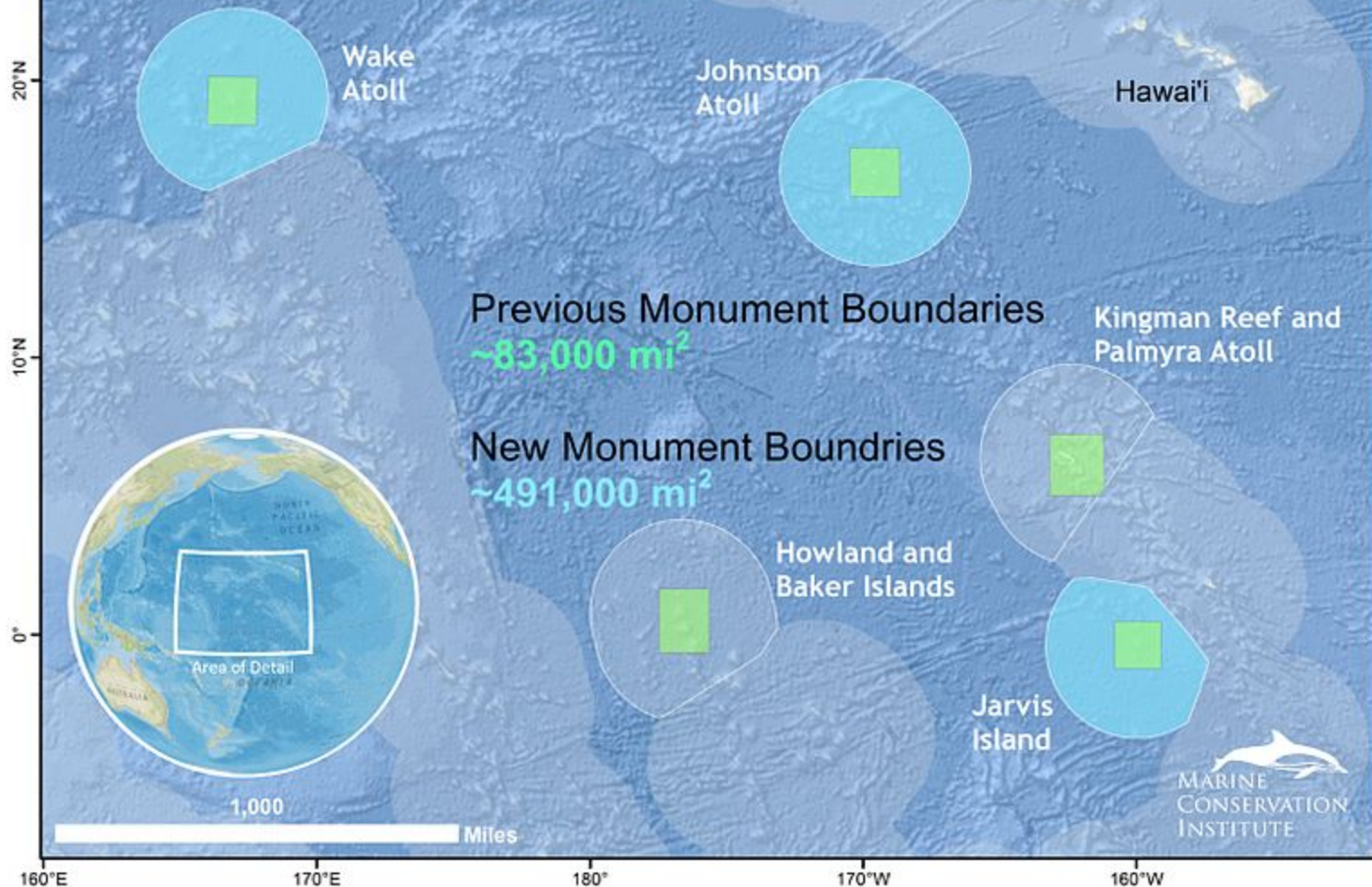
US KINGMAN REEF



U.S. Claimed Exclusive Economic Zones



Pacific Remote Islands Marine National Monument: 2014 Expansion



Thank you very much for your attention!

Questions and Comments?

