

# The Philippines – China arbitration under Annex VII UNCLOS

- Initiated by the Philippines (*22/ Jan/ 2013*)
- Rejected by China (*19/ Feb/ 2013*)
- 05 arbitrators were nominated/appointed
- Arbitral Tribunal
  - established rules of procedure
  - set deadline for submission of memorial (*30/3/2014*)  
including:
    - *the tribunal's jurisdiction,*
    - *admissibility of the claim,*
    - *the merits of the dispute*

# The Philippines' Claims

- In Philippines' Statement of Claims: 13 points,
- Grouped into 5 main points
  - (i) China's U-shaped line
  - (ii) submerged features
  - (iii) features that are rocks
  - (iv) illegal exploitation of resources
  - (v) interference of rights, including freedom of navigation

- Some remarks:
  - Avoids touching upon rights and interests of third parties
  - Conscious of the China's Declaration 2006, does not ask for
    - determination of sovereignty
    - Maritime delimitation
  - Emphasizes UNCLOS in the claims

# Jurisdiction of Arbitral Tribunal

- Art. 286: “Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section”
  - ⇒ Section 1, Art. 283 to be satisfied
  - ⇒ Section 3, Art. 298 not applied

# Obligation to exchange views

- China referred to commitment to resolve dispute by negotiation under DOC
- DOC, paragraph 4:

The Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea

- Southern Bluefin Tuna case: “prolonged, intense and serious”
  - IM/V “Louisa” case, ARA Libertad
    - request for information
    - Notify the other side
    - inform the Permanent Mission at UN
  - Railway Traffic between Lithuania and Poland case: “an obligation to negotiate does not imply an obligation to reach an agreement”
  - North Sea Continental Shelf: “negotiations are meaningful” but not the case when a party insists on its own position without contemplating any modification of it
- ⇒ Loose interpretation of this obligation
- ⇒ Not clear whether the Tribunal would request evidence of exchanges of views related to all these 13 points, or to the whole case in general, or to the 3 main groups in the Statement of Claims

# Exclusions under Art. 298

- China's rejection of the Tribunal jurisdiction based on *2006 Declaration under Article 298*
- Issues beyond Art. 298 -> Tribunal may have jurisdiction:
  - *alleged violation of the freedom of navigation*
  - *the 4 features considered rocks or islands*
- Issues unclear as to how the Tribunal will decide on the jurisdiction:
  - *the U-shape line*
  - *submerged features*
  - *alleged violation of the right of exploitation in EEZ and CS*

# Exclusions under Art. 298

- Disputes concerning delimitation of territorial sea, the EEZ and continental shelf and historic bays or historic titles.
- Disputes concerning military activities and those relating to law enforcement activities with respect to fisheries and marine scientific research not yet covered under Article 297(b) and (c)
- Disputes under consideration by the UN Security Council

# China's U-shaped line

- China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (see attached map).
- No official explanation provided up to date on legal basis nor claim that China sought
  - ⇒ still largely undefined and unformulated
  - ⇒ May be more reasonable for the tribunal to hold its decision on jurisdiction until China clarifies its claims
- If claimed as line within which China enjoys historic rights, would Tribunal have jurisdiction?



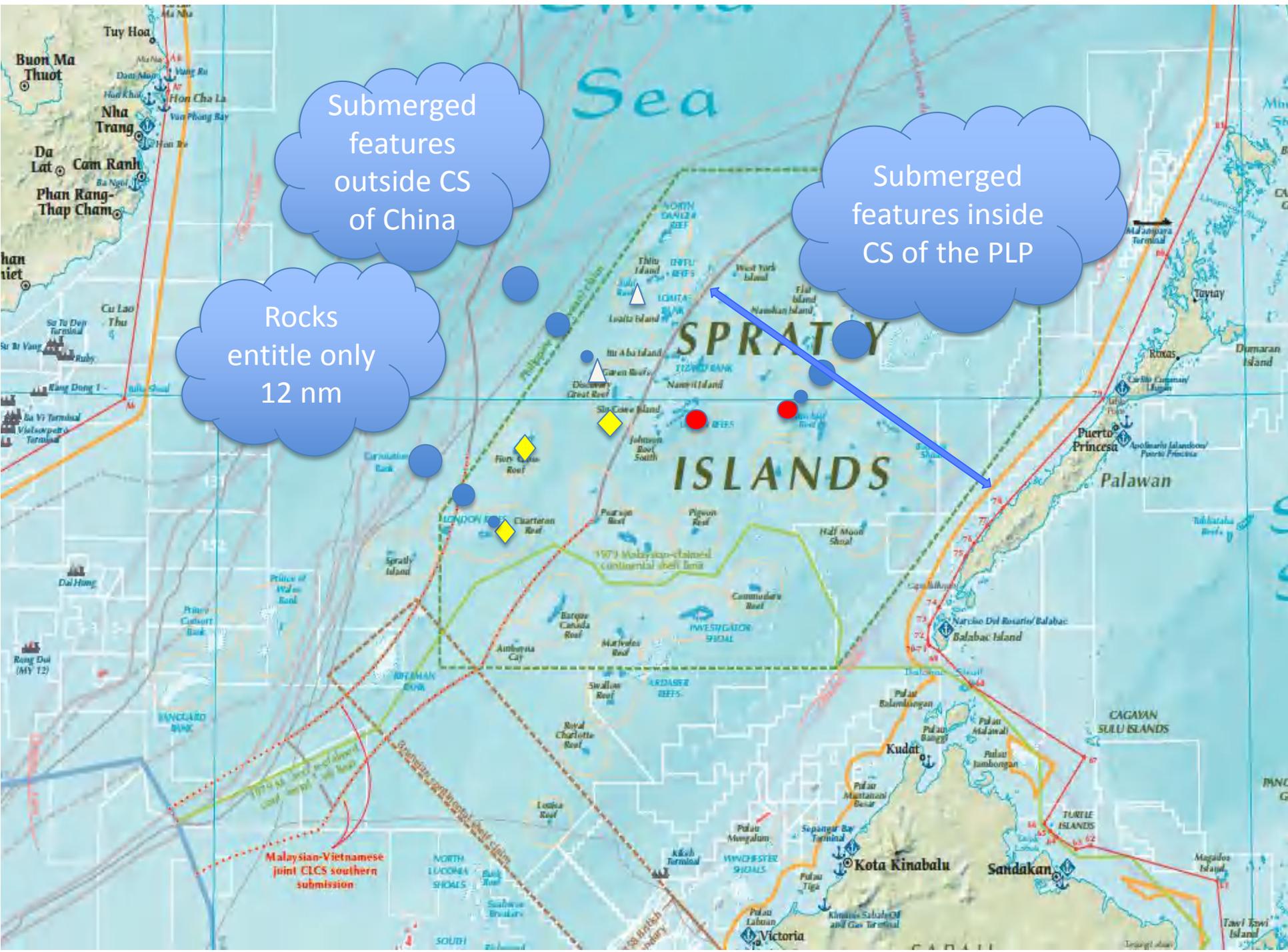
# Issues not excluded from compulsory procedures

## Historic title

- Justifies territorial sovereignty over ‘historic bays’ or ‘historic waters’
- May be relied on to claim certain areas of waters as internal or territorial waters (*Anglo-Norwegian Fisheries 1951*)
- no other State can potentially be entitled to exercise powers over the area to which the title is referred

## Historic rights

- so far mostly invoked as historic fishing rights
- Do not lead to recognition of an exclusive “quasi-territorial right” to the fishing ground themselves or to the superjacent waters (*Qatar – Bahrain 2001*)
- non- exclusive nature, reconcilable with a maritime title vested in another State

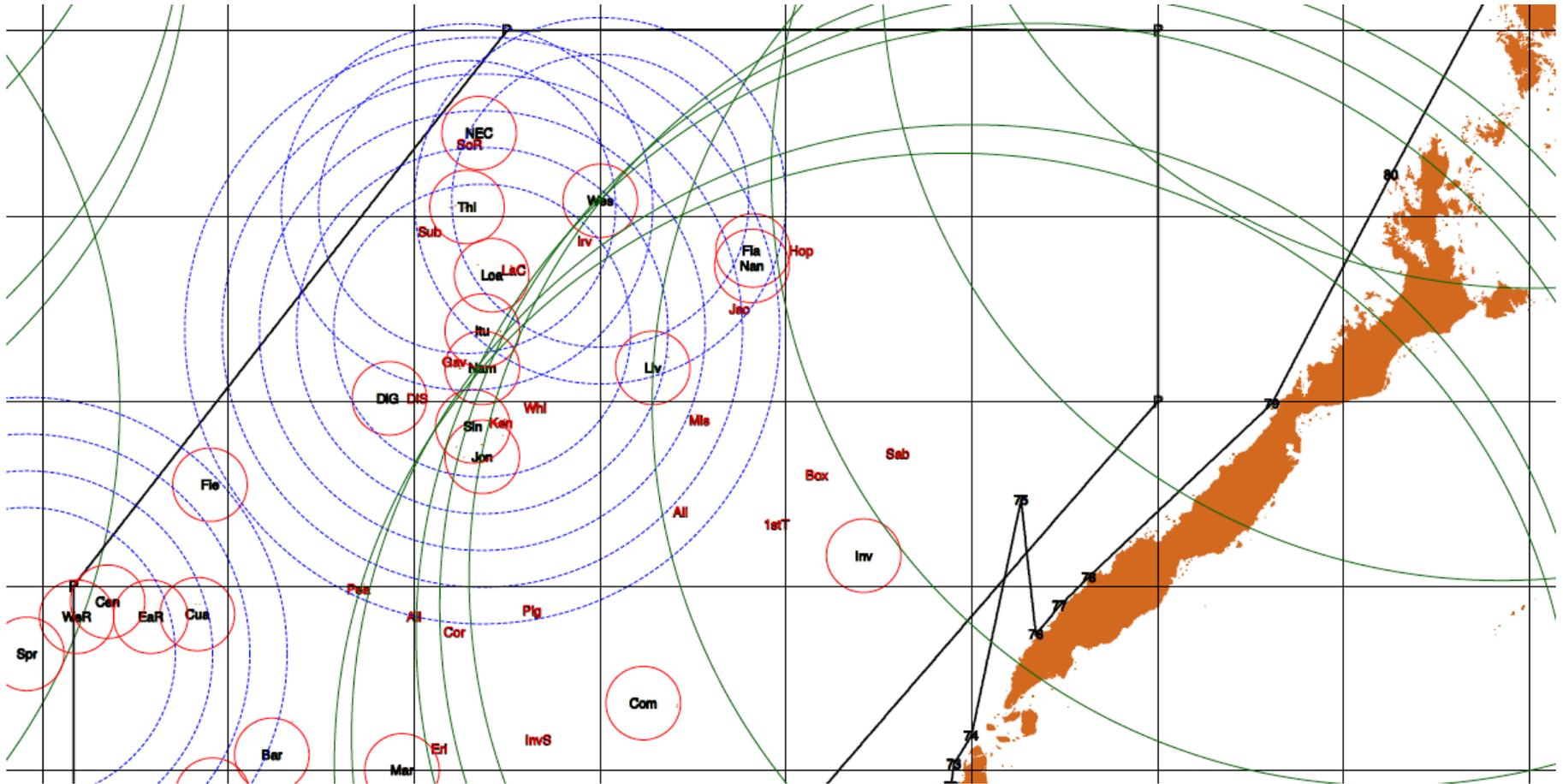


Submerged features outside CS of China

Submerged features inside CS of the PLP

Rocks entitle only 12 nm

Malaysian-Vietnamese joint CLCS southern submission



Map by Mr. Duong Danh Huy

# Submerged features not subject to occupation

- Qatar v. Bahrain:
  - it is not established that low-tide elevations can, from the viewpoint of the acquisition of sovereignty, be fully assimilated with islands or other land territory.
- Malaysia v. Singapore:
  - if there is a low-tide elevation in an area of overlapping territorial sea claims, it is under the sovereignty of the State in whose territorial sea it lies.
- Nicaragua v. Colombia:
  - low-tide elevations cannot be appropriated, although a coastal State has sovereignty over low-tide elevations which are situated within its territorial sea

# Submerged features not subject to occupation

- Questions that Tribunal has to consider:
  - whether these features are within the territorial sea of any of islands in the South China Sea over which China claims sovereignty → Delimitation + sovereignty
  - Whether these features are not located on China's continental shelf and in the Philippines' continental shelf → Delimitation
  - What standing does the Philippines have with regards to Gaven Reef and Subi Reef ?

# Rocks not entitled to EEZ and CS

- Art. 121: maritime entitlement, Art. 298: maritime delimitation
  - Does Art. 121 fall within exclusions under Art.298?
- ⇒ No: salami-slicing the dispute, against States' consent and free choice of dispute settlement of states
- ⇒ Yes
- No delimitation requested, no isolation of issues
  - As long as the question concerns interpretation and application of UNCLOS
  - Exceptions intended to be limited to the maximum, states can only exclude the three categories included therein
  - Legal regime of islands was not at any time envisaged to be included in Article 298 in negotiations → inclusion disturbs the balance struck by drafters

# Exploitation of resources and interference with rights to exploit in EEZ

- If fisheries, both Art. 297(3)(a) and Art.298(1)(b) apply
- But only disputes arising from law enforcement activities in the undisputed maritime zones of a coastal state are
  - ⇒ Both Philippines and China claim the waters
  - ⇒ Disputed waters? → Maritime delimitation?

# Interference with freedom of navigation

- Disputes under Article 297(1) beyond the reach of Article 298, including alleged violations of freedoms and rights of navigation  
⇒ Arguably within jurisdiction of Tribunal

# Issue of features under Article 121

- Courts have tendency to side-step the issue
  - Black Sea: any CS and EEZ entitlements possibly generated by Serpents' Island could not project further than the entitlements generated by Ukraine's mainland coast
  - Nicaragua v. Colombia:
    - Quitasueno: it has not been suggested by either Party that QS 32 is anything other than a rock
    - Serrana: any entitlement to maritime spaces which might generate within the relevant area outside the territorial sea would entirely overlap with the entitlement to a CS and EEZ generated by the islands of San Andrés, Providencia and Santa Catalina
- ⇒ ICJ avoided the question of Serpent Island's legal status

# Why do Courts avoid such issue?

- Courts do not want to go beyond what is required to settle the dispute
- Courts do not want to be put into spotlight for sensitive issues
- Courts are now more reserved and cautious than before

# How would Arbitral Tribunal proceed?

- Tribunal is expected to proceed to answer the question
- All features are islands?  
⇒ Most likely not because:
  - Small in size, no permanent population, no economic life
  - Presence of military troops does not constitute “inhabitation” (Malaysia v. Singapore)

# How would Arbitral Tribunal proceed?

- Some/All features are rocks?
  - Scarborough Shoal, Johnson Reef: within 200nm of Palawan
    - ⇒ May be given only 12nm (Nicaragua v. Colombia)
  - Cuerton Reef, Fiery Cross Reef: beyond 200nm
    - ⇒ Uncertain, facts-dependent