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Status of Insular Features: The Perpetuation of Legal Fiction

I know not
| *“seems”*
(Hamlet
1.ii.76)

When can we pretend?

Can the law pretend?

The South China Seas Arbitration (2016)

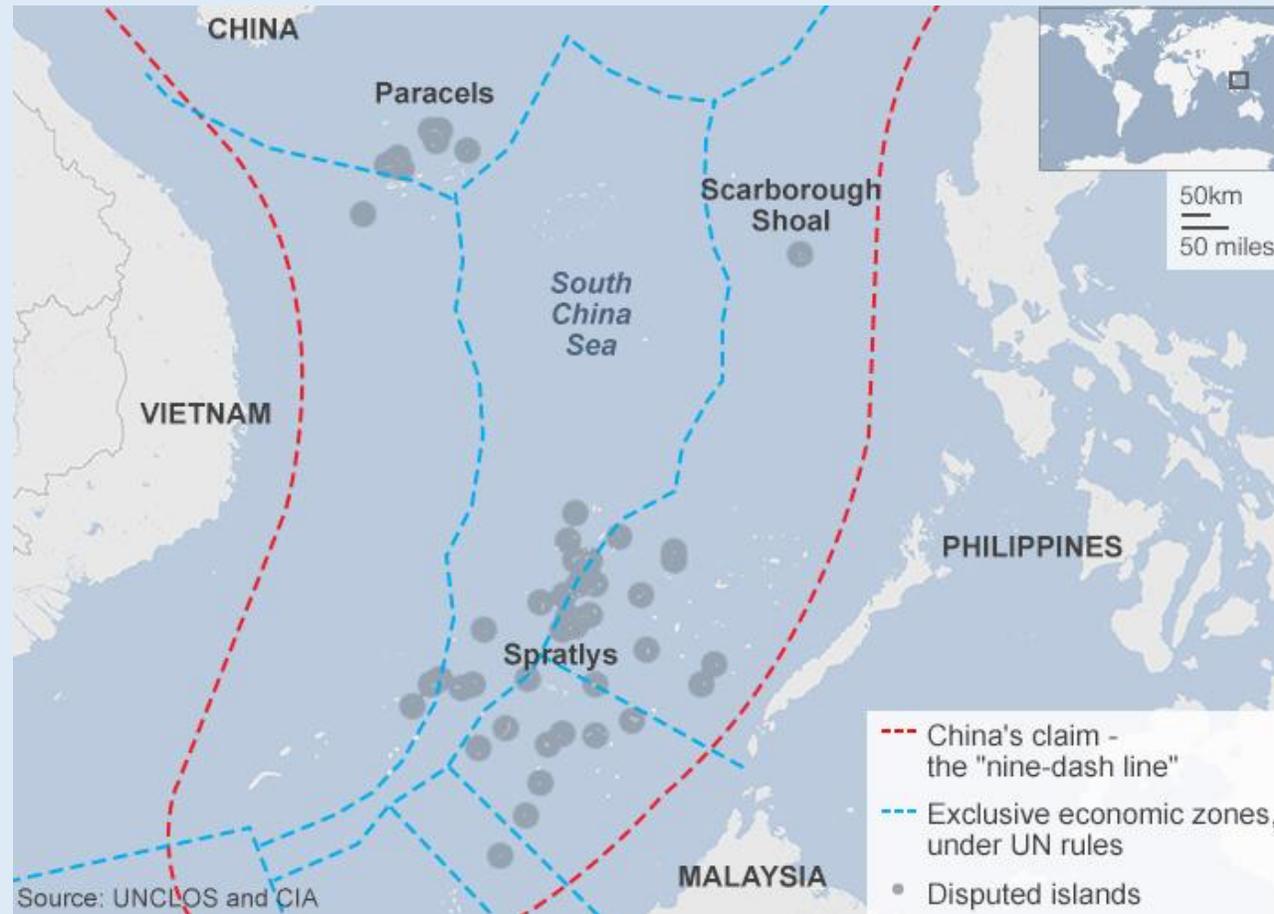


Figure 1: South China Seas Dispute

BBC News, 'China's Island Factory' <<http://www.bbc.co.uk/news/resources/idt-1446c419-fc55-4a07-9527-a6199f5dc0e2>>

Fiery Cross Reef: Then

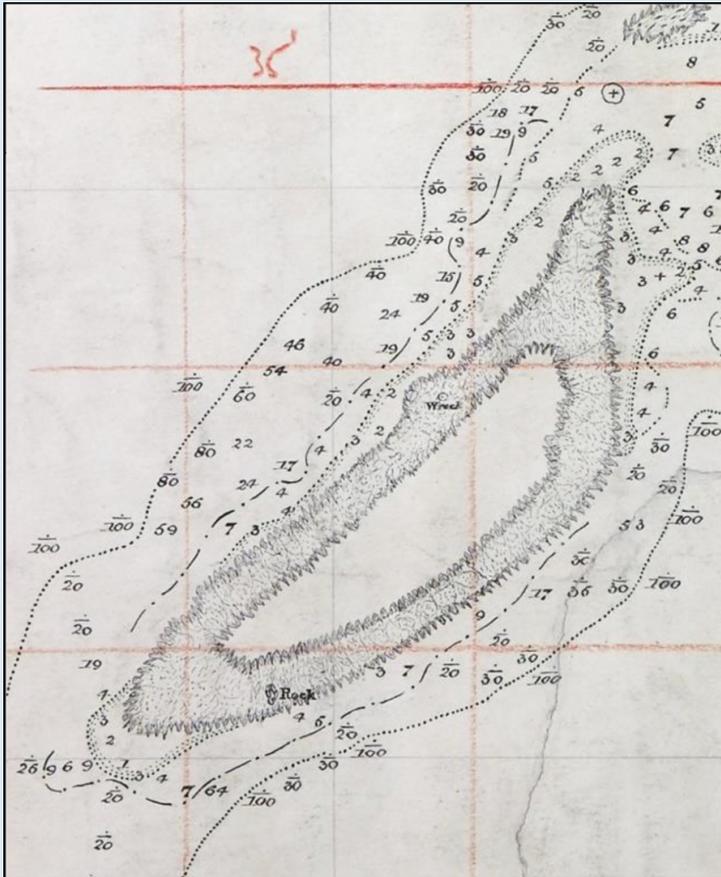


Figure 2: Fiery Cross Reef. Survey by HMS Rifleman (1866) (with enlargement)

The South China Sea Arbitration (The Republic of Philippines v The People's Republic of China) (12 July 2016) Award on the Merits, PCA Case No. 2013-19, at p. 149.



Figure 3: The status of Fiery Cross Reef, January 22 2006.

Center for Strategic & International Studies, Asia Maritime Transparency Initiative, “Fiery Cross Reef Tracker,” available at https://amti.csis.org/wp-content/uploads/2016/09/fierycross_jan22_2006_qb02_overview_28886104116_o.jpg

Fiery Cross Reef: Now

Figure 4: The status of Fiery Cross Reef, June 3 2016. Clearly showing extensive scale of the modification efforts.

Center for Strategic & International Studies, Asia Maritime Transparency Initiative, “Fiery Cross Reef Tracker,” available at https://amti.csis.org/wp-content/uploads/2016/09/fierycross_6_3_16_r1c1-1_28842320051_o.jpg



Mischief Reef: Then

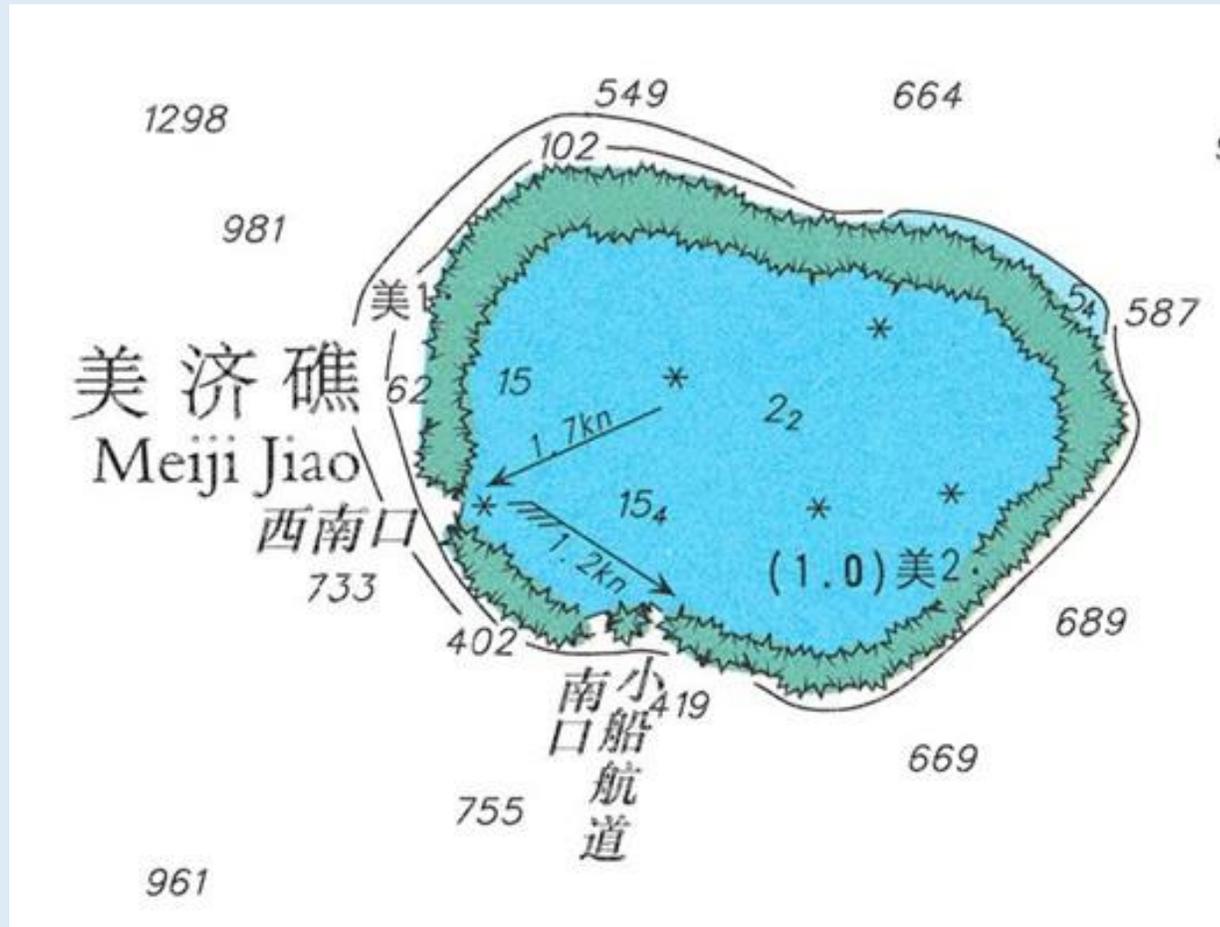


Figure 5: China Chart No. 18500 (depicting height of 1.0 metres above Mean Sea Level in S.E. corner)

The South China Sea Arbitration (The Republic of Philippines v The People's Republic of China) (12 July 2016) Award on the Merits, PCA Case No. 2013-19, at p. 171.

Mischief Reef: Now



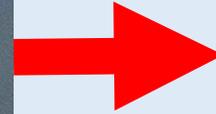
Figure 6: Mischief Reef, July 22 2016.

Center for Strategic & International Studies, Asia Maritime Transparency Initiative, “Fiery Cross Reef Tracker,” available at < https://amti.csis.org/wp-content/uploads/2016/09/mischief_stitched_28316476233_o.jpg >

What is the effect of this on the status of the features?

- ‘The inclusion of the term “naturally formed” in the definition of both a low-tide elevation and an island indicates that the status of a feature is to be evaluated on the basis of its natural condition. As a matter of law, human modification cannot change the seabed into a low-tide elevation or a low-tide elevation into an island. A low-tide elevation will remain a low-tide elevation under the Convention, regardless of the scale of the island or installation built atop it.’ (*The South China Sea Arbitration (The Republic of Philippines v The People’s Republic of China)* (12 July 2016) Award on the Merits, PCA Case No. 2013-19, [305], referring to Articles 13 and 121(1) LOSC.)
- ‘China’s construction on [these features], however extensive, cannot elevate its status from rock to fully entitled island.’ (*The South China Sea Arbitration (The Republic of Philippines v The People’s Republic of China)* (12 July 2016) Award on the Merits, PCA Case No. 2013-19, [565])

Application of this principle



Retention of its original status?

Legal
Fictions: a
working
definition and
its application

The supposition of the truthfulness
of an untruth

Conscious falsity

To achieve some utility or purpose

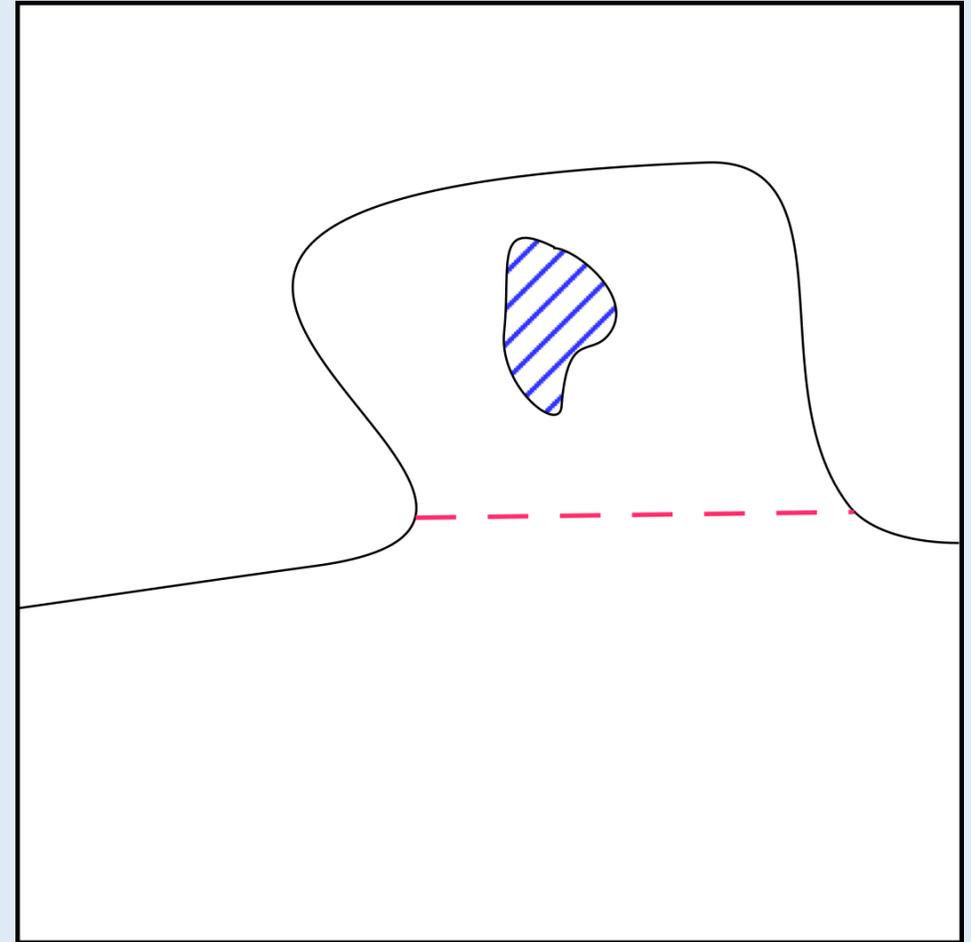
Is this an appropriate thing for
UNCLOS to *do*?

Denying the reality its supposed to
grapple with?

UNCLOS and Fiction

Fiction of Geographic Reality

- Ambulatory effect of baselines and ability to “freeze” reality.
- Islands within bays: Art 10(3)
“Islands within an indentation shall be included as if they were part of the water area of the indentation.”



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