

WEBINAR

***The Law of the Sea and Maritime Security
along the New Maritime Silk Road***

15 July 2021

KEYNOTE SPEECH

***21st Century Maritime Silk Road and
the Law of the Sea***

Giuseppe Cataldi

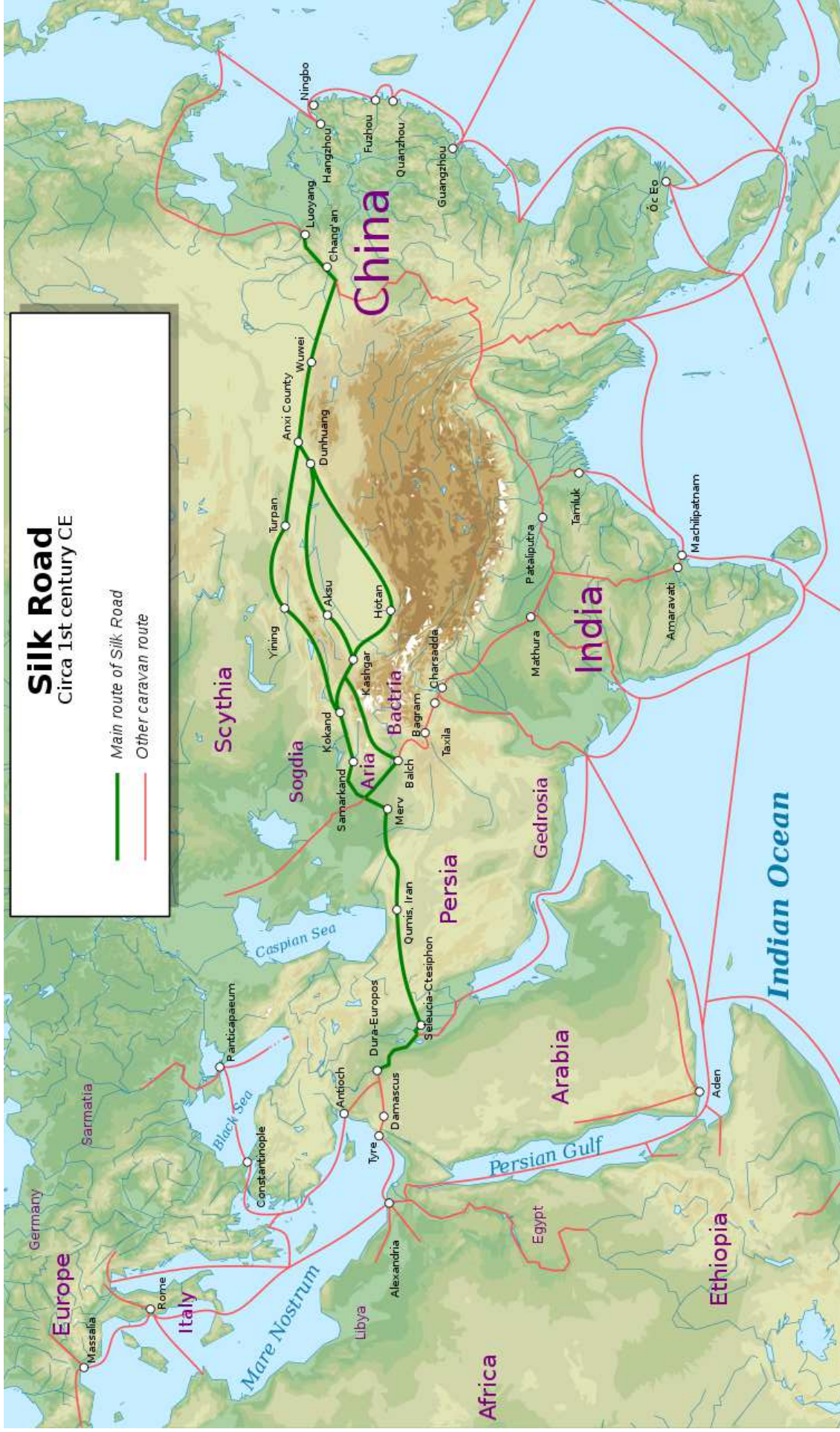
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Coordinator, EU Network Jean Monnet «MAPS» (Migration and Asylum Policy Systems)*

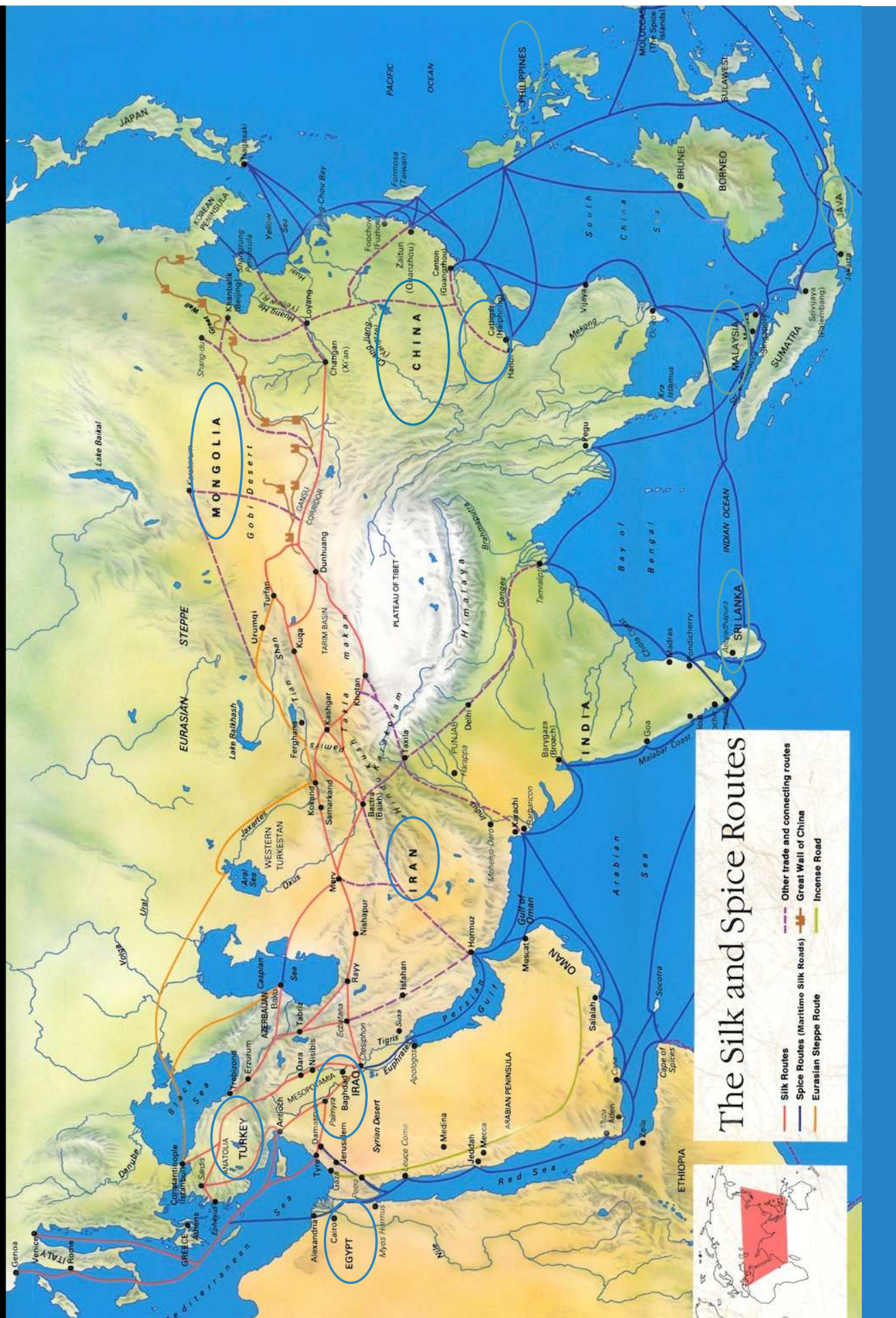


Historical roots

- Eurasian and African worlds were connected for a long time;
- Central Asia was for several centuries the pathway and the area for cultural exchanges and passing of caravans;
- This transit allowed technology transfer and cultural proximity along the Ancient Route;
- The maritime silk road and spice road came later.





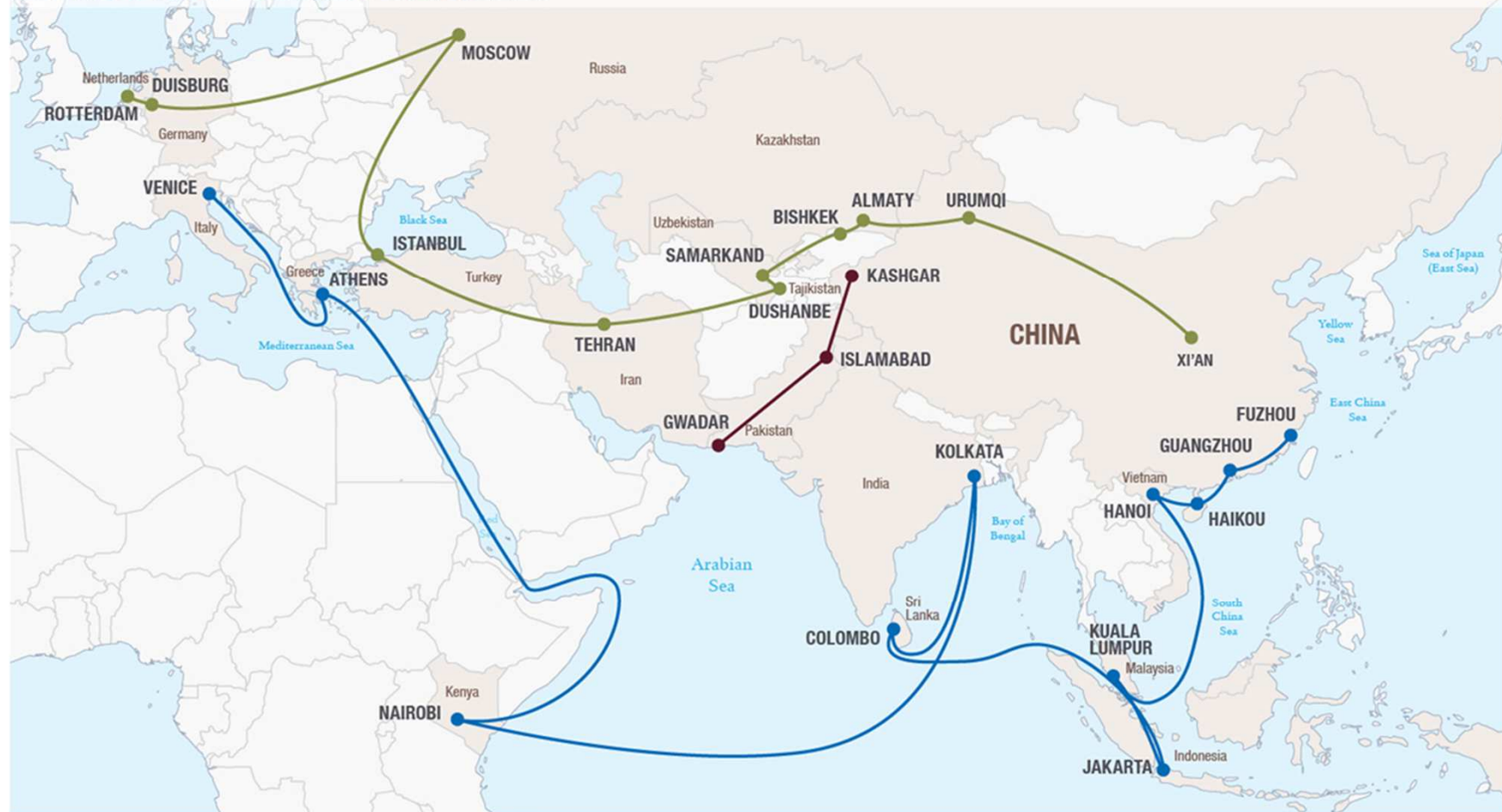


Revival

- Several efforts to revive the silk roads by building a greater connectivity of the regions between China and Europe through plans for railways that would cross the Central and South Asia;
- The projects remained in the shell;
- A possible reason was the economic backwardness of China and its restricted openness to the outside world;
- Only in the 21st century China joined the WTO [2001], and diversified its economy.



CHINA'S PROPOSED NEW SILK ROADS



—●— SILK ROAD ECONOMIC BELT

—●— MARITIME SILK ROAD

—●— CHINA-PAKISTAN ECONOMIC CORRIDOR

Source: Xinhua

Credits: James McBride, Julia Ro

COUNCIL on
FOREIGN
RELATIONS



China and the energy trap

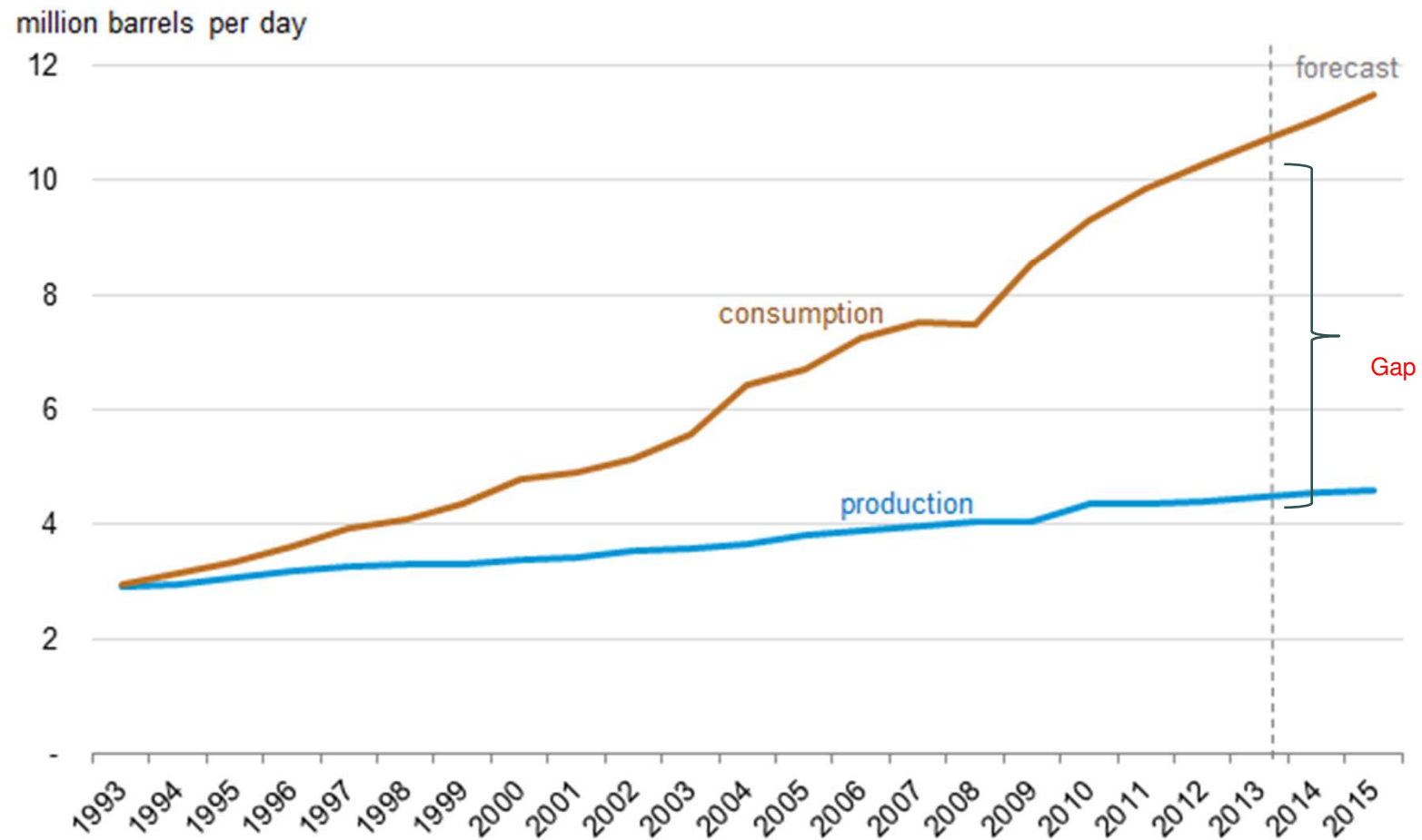
China become a net importer of oil in 1993 and natural gas in 2007;

China is dependent on oil [crude] to secure the necessities of its industry and infrastructure build up: oil dependence was 30% in 2000 but 57% in 2014.



A non-stop demand

China's oil production and consumption, 1993-2015



Source: EIA *International Energy Statistics and Short-Term Energy Outlook*, January 2014.



A FASTER ROUTE FOR TRADE



Sources: Ministry of Commerce, General Administration of Customs, YuXinOu Rail Logistics Company

FENG XIUXIA / CHINA DAILY



Troubled Waters



Main maritime route

\$ 5.3 trillion of trade passes – per year – through this route

India – buffer zone to China projection of power

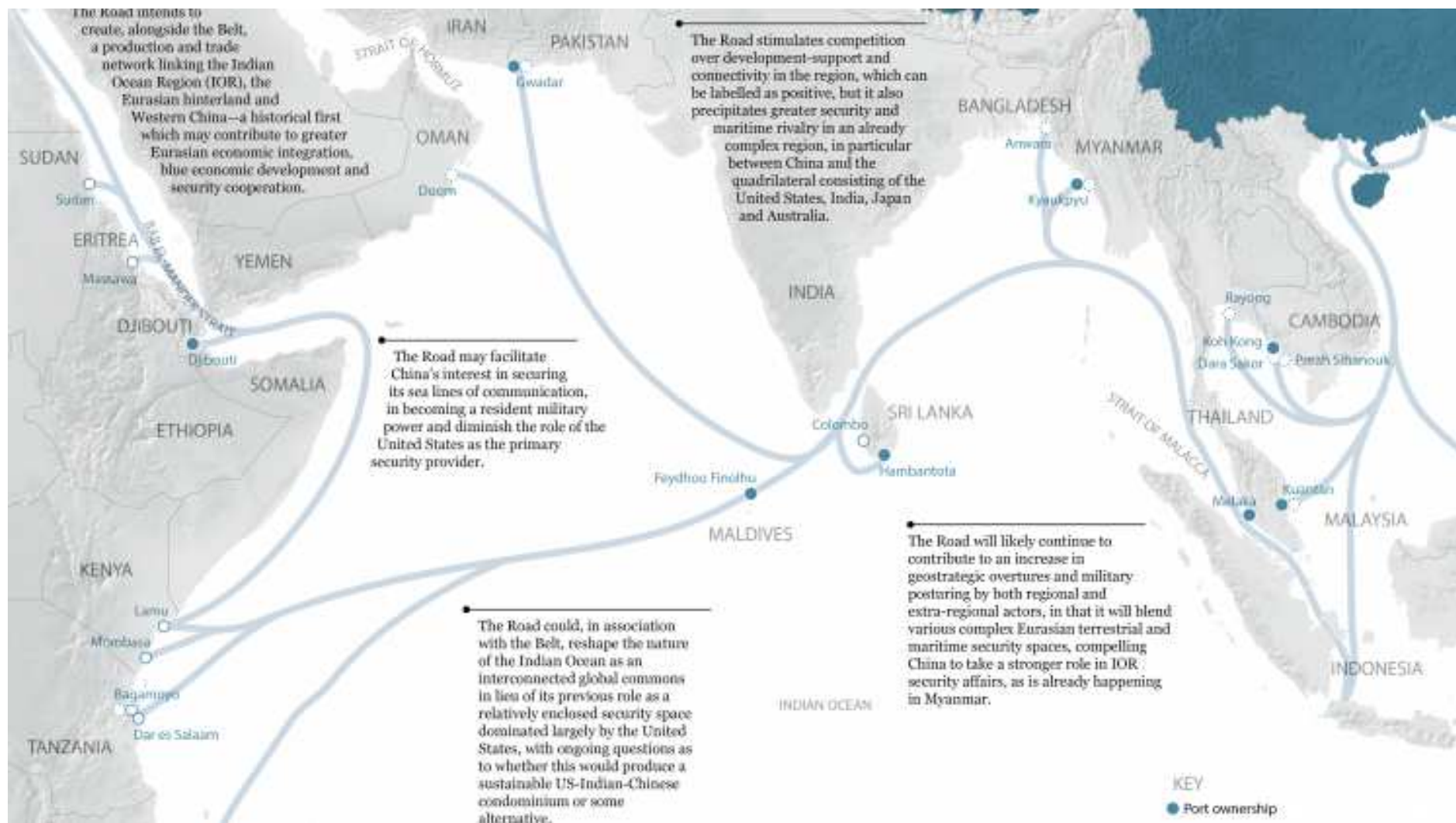


American allies



New American friends











Dependence on sea lanes

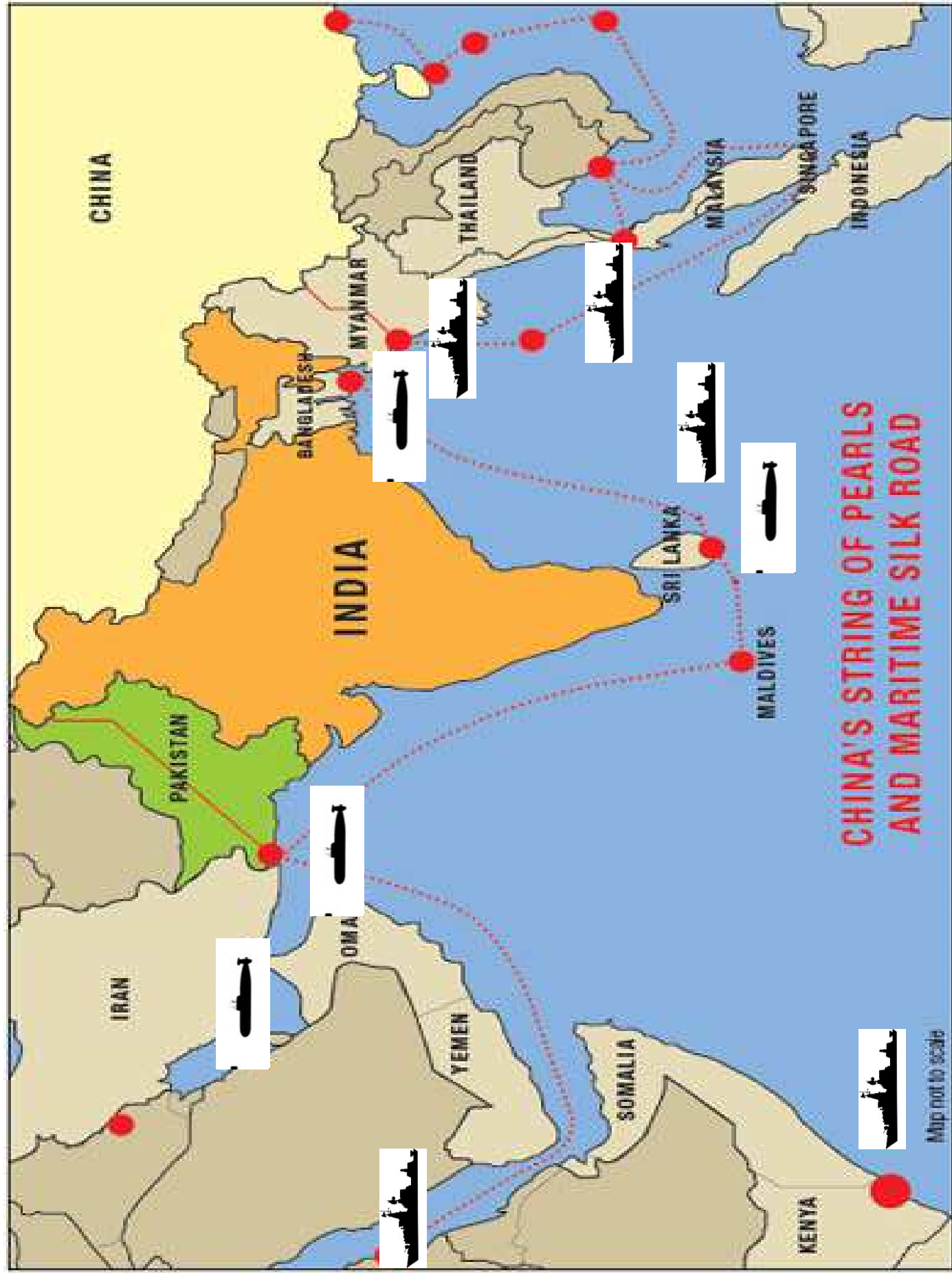
**Economic prosperity
intertwined with maritime
affairs**

**Regional waterways :
strategic for merchant and
naval shipping**

**Military modernisation :
Maritime orientation**

THE BLUE TAPESTRY







Strait of Hormuz



AFP



Developments in South China Sea



SOUTH CHINA SEA





EUROPE

Bodies of Water





Part IX UNCLOS

Enclosed or Semi-enclosed Seas

Article 122 - Definition

- For the purposes of this Convention, "enclosed or semi-enclosed sea" means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.

Article 123 - Cooperation of States bordering enclosed or semi-enclosed seas

- States bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour, directly or through an appropriate regional organization:
 - (a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea;
 - (b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;
 - (c) to coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;
 - (d) to invite, as appropriate, other interested States or international organizations to cooperate with them in furtherance of the provisions of this article.



Article 121: Regime of islands

1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.
3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.





OVERLAPPING CLAIMS -- HOW THE SOUTH CHINA SEA IS DIVIDED



Philippines v. China, also known as the **South China Sea Arbitration**, was an arbitration case brought by the Republic of the Philippines against the People's Republic of China under Annex VII to UNCLOS concerning certain issues in the South China Sea including the legality of China's Nine-dash line.

On 19 February 2013, China declared that it would not participate in the arbitration.

On 29 October 2015, the arbitral tribunal ruled that it has jurisdiction over the case.

On 12 July 2016, the Permanent Court of Arbitration ruled in favor of the Philippines. It clarified that it would not "...rule on any question of sovereignty over land territory and would not delimit any maritime boundary between the Parties". The tribunal also ruled that China has "no historical rights" based on the "nine-dash line" map. China has rejected the ruling



Philippines' Application

- Not question of boundary delimitation or sovereignty over islets and islands (this latter out of the scope of UNCLOS) but whether the features in question were capable or not of generating any zones at all (paras. 141-145).

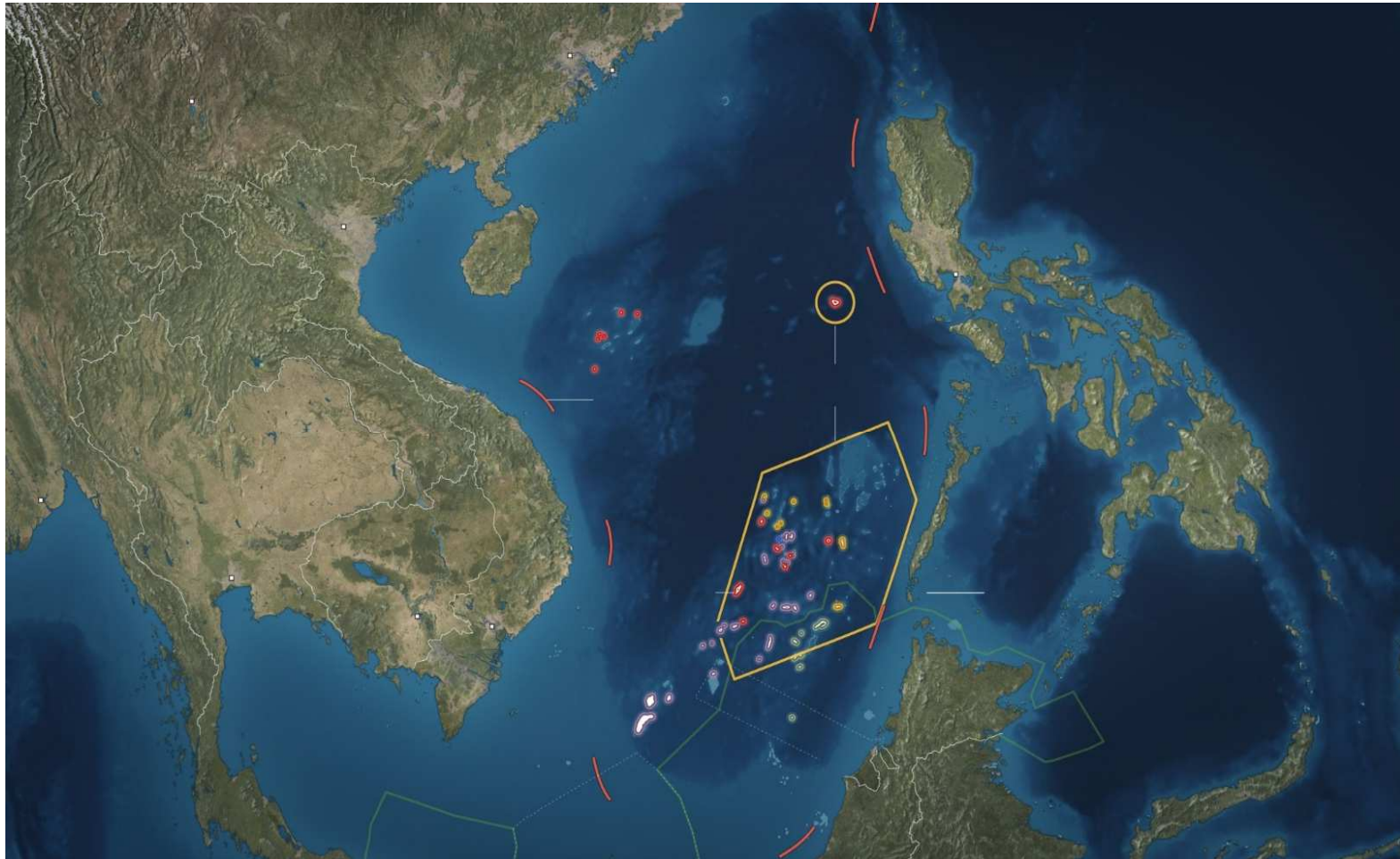


The Award

- Nine Dash line has no basis in law
- There are no islands in the disputed area within the meaning of Art. 123 UNCLOS
- China has interfered in the Philippines' EEZ
- China's action have aggravated the dispute
- Chinese island-building activities in some maritime features within the Philippines' EEZ are in violation of sovereign rights of the Philippines
- Chinese violation of UNCLOS obligations regarding the protection and preservation of marine environment
- Chinese Violation of art. 300 UNCLOS: good faith!

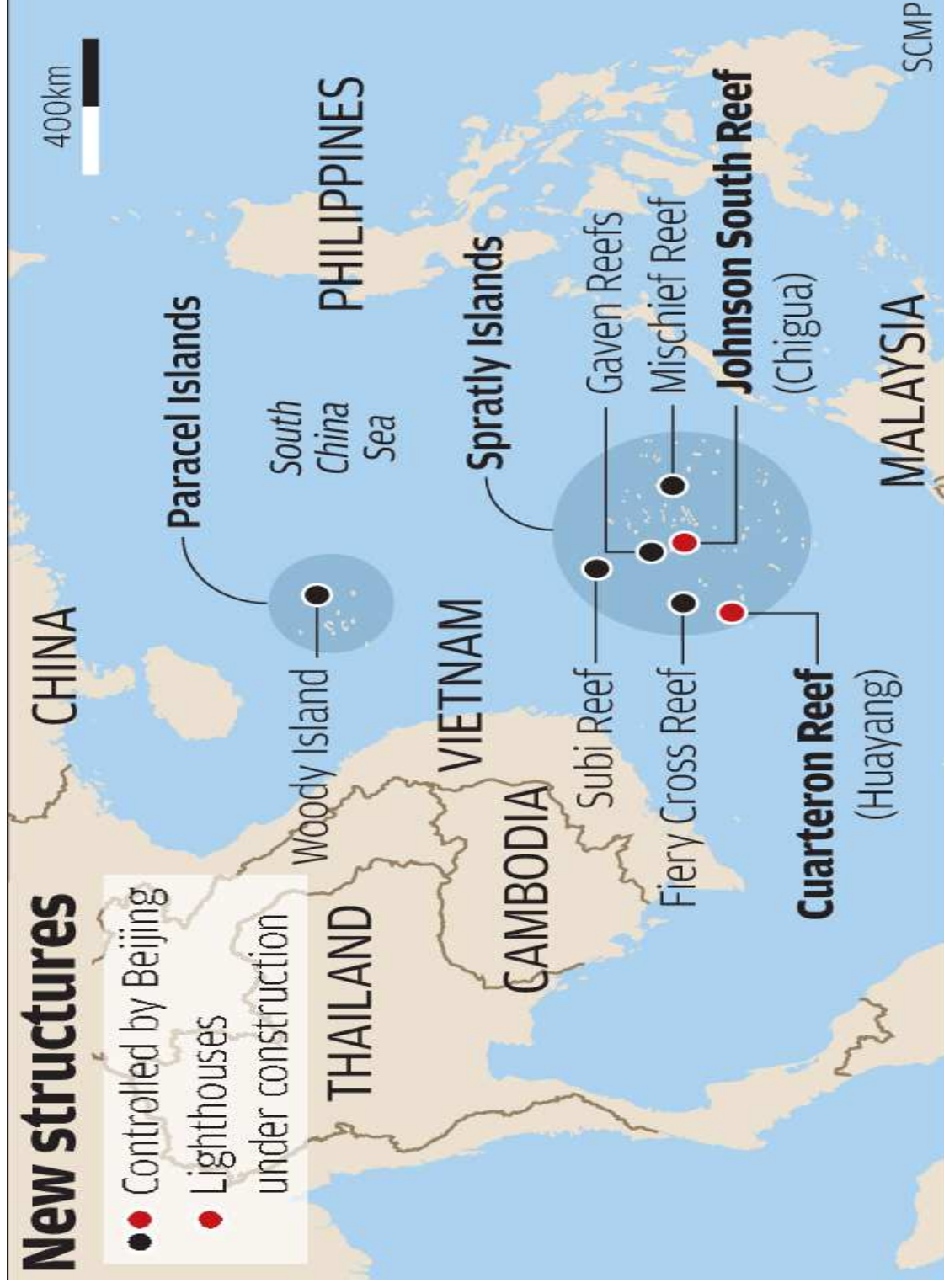


Islands are colored by occupying country: **China (RED, 9 dash line)**, the **Philippines (YELLOW)**, **Malaysia (GREEN)**, **Vietnam (VIOLET)** or **Taiwan (BLU)**. Lines in the same colors show the extent of territorial claims.

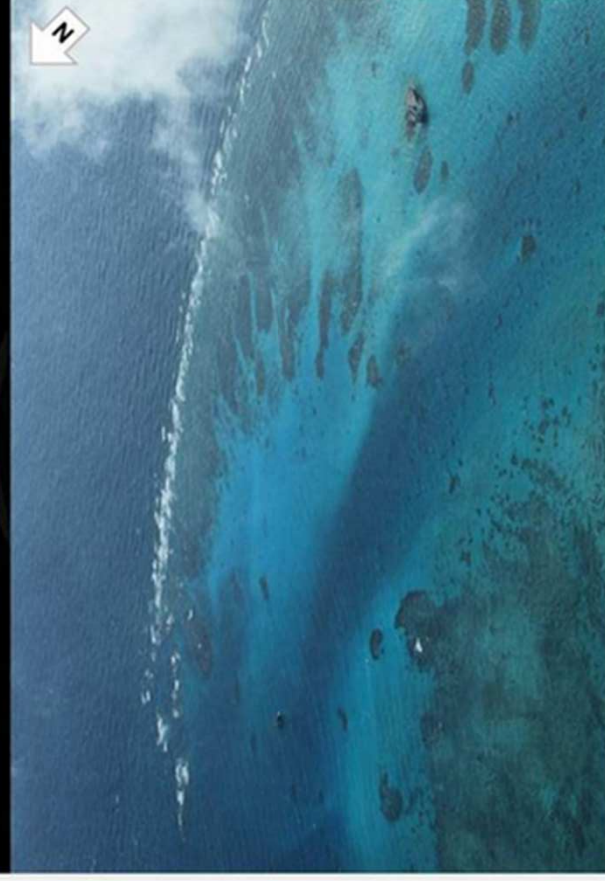


New structures

- Controlled by Beijing
- Lighthouses under construction



MABINI REEF (13 MARCH 2012)



MABINI REEF (28 FEBRUARY 2013)



MABINI REEF (25 FEBRUARY 14)



MABINI REEF (11 MARCH 14)





Image by Victor Robert Lee & DigitalGlobe

17 April, 2015



bar = 3 kilometers

Image by Victor Robert Lee & DigitalGlobe

5 June, 2015

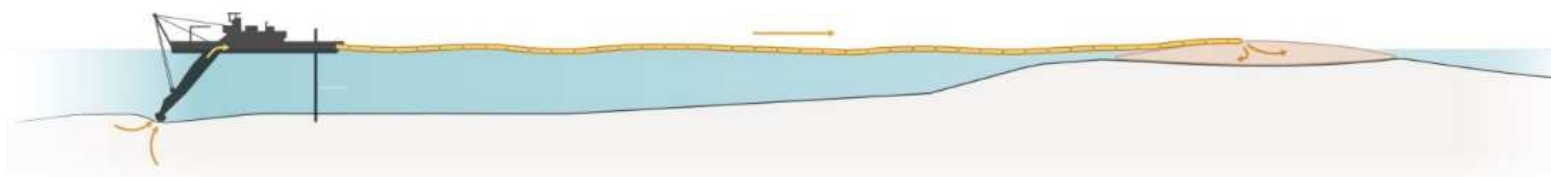
Subi Reef, South China Sea

Sediment is broken up and **sucked** from the seabed.

Material is **transported** through a floating pipe.

Dredged material is **deposited**

Washington does not recognize China's ownership of the islands, and in February President Obama reiterated the government's position that "the United States will continue to fly, sail and operate wherever international law allows." To reinforce the message, the United States Navy sent missile destroyers in October and January within 12 nautical miles of the islands, the conventional limit for territorial waters. According to statements from David Shear, the top Pentagon official in charge of Asia and the Pacific, the last time before October that the United States had sent ships or aircraft that close to the islands was in 2012.





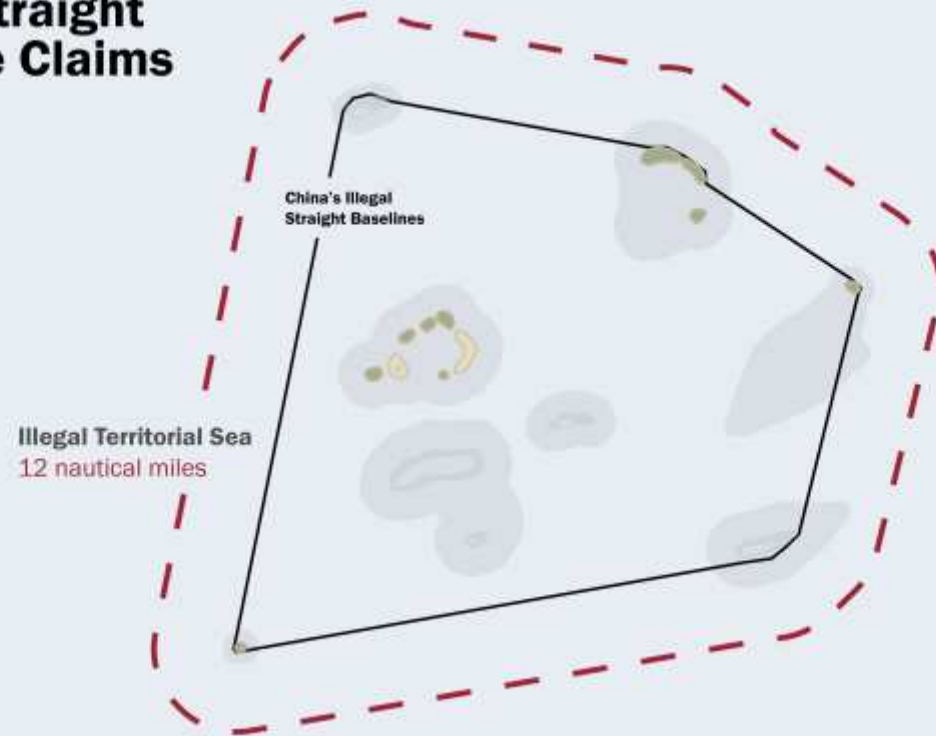


Straight baselines in the Xisha Islands (Paracel Islands)



Paracel Islands

Illegal Straight Baseline Claims



- HIGH SEAS: RES NULLIUS (Nobody's space, without law) or
- RES COMMUNIS OMNIUS (Common Heritage of Mankind)?



"Freedom of the high seas" is a principle considered by a few to mean that the high seas are res nullius or "without law" and beyond the jurisdiction of any nation State except that of the flag state. Res nullius is an antiquated concept. In fact, customary and conventional international law indicate that the high seas and its resources are subject to res communis or the "law of the commons". Numerous treaties, including the United Nations Law of the Sea Convention (UNCLOS), restrict the use of the global ocean commons to that which is "reasonable" and does not infringe on the rights of others. "Freedom of fishing" for example, is subject to a whole host of conditions, indicative that the world community considers high seas fishing resources to be common property resources.



A rule in the making? Intervention on the high seas on foreign ships carrying drugs

- No customary rule in existence which allows the seizure on the High Seas of a ship engaged in drug traffic and the infliction of penalties on the smugglers as they were pirates?
- US Practice in this sense
- Art. 108: cooperation
- Bilateral Treaties; Vienna Convention 1988 against illicit traffic in Narcotic Drugs: mutual control on the High Seas



Piracy

The most known exception is maritime piracy (art. 101 ff. UNCLOS), crime *juris gentium* which, as is well known, is now experiencing a fervent and worrying upsurge. On the high seas, according to a very ancient customary rule, any State can, by means of its public ships, capture a pirate ship (or aircraft), arrest those responsible and seize its assets. The courts of the capturing State will rule on the sentence to be imposed and the measures to be taken against ships and property.



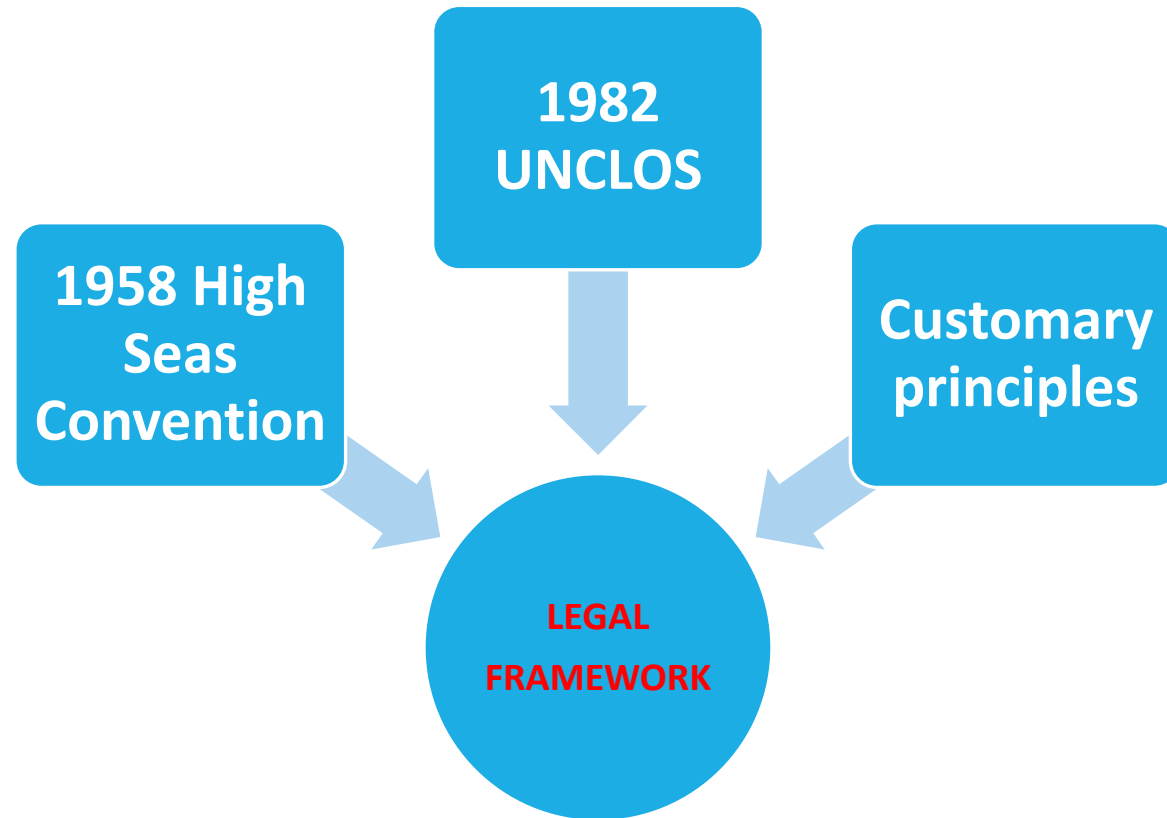
a) any unlawful act of violence or kidnapping, or any act of robbery, committed for private purposes by the crew or passengers of a private ship or aircraft, and directed:

i) on the high seas, against another ship or aircraft or against persons or property carried by them

ii) against a ship or aircraft, or against persons and property, in a place outside the jurisdiction of any State;

b) any act of voluntary participation in the activities of a ship or aircraft, committed with knowledge of facts such as to render such means a pirate ship or aircraft;





Overview: Piracy under International Law of the Sea



Binding Instruments

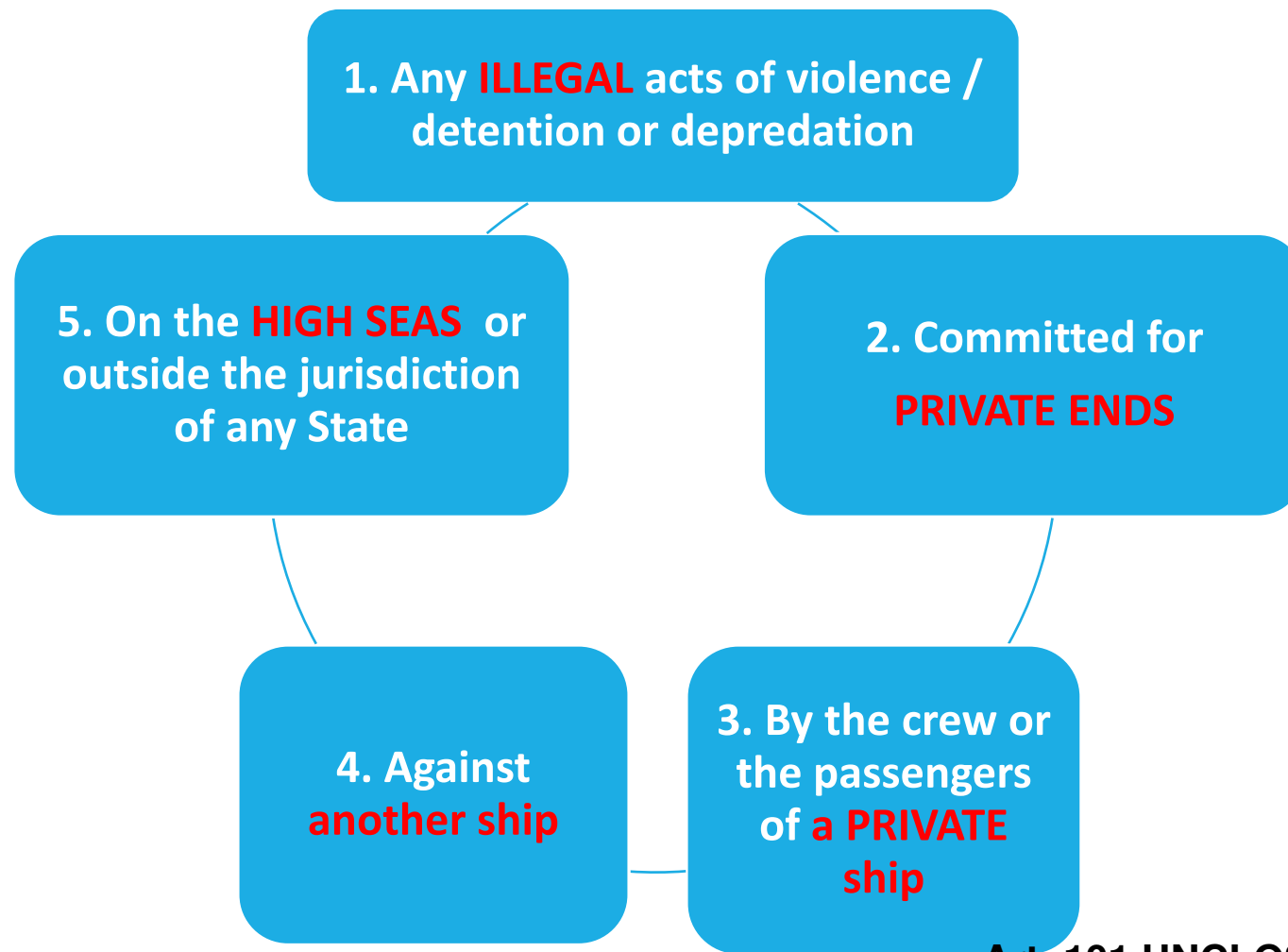
Other Treaties - eg.
SUA & Hostage
Convention
National legislations
UNSC Resolution
adopted under
Chapter VII of the UN
Chart

Soft law

IMO circulars and
recommendations
Best Management
Practice
GUARDCON (BIMCO
standard contract for
the employment of
security guards on
board)

Overview: Other Legal Instruments





Art. 101 UNCLOS

Overview: Piracy Essential Elements



Art. 105 UNCLOS

Seizure of a pirate ship or aircraft

On the high seas, or in any other place outside the jurisdiction of any

State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.








Mr. POMES WAS WRONG ...

"2. Mr. POMES (Uruguay) said that his delegation had proposed (...) the deletion *in toto* of articles 38 to 45 [all provisions on piracy] because piracy no longer constituted a general problem (...) and it would be out of all proportion for the present draft to contain eight articles dealing with an Eighteenth century concept."

*Records of the Diplomatic Conference
on the Law of the Sea (1958)*



 = Attempted Attack  = Boarded  = Fired upon  = Hijacked  = Suspicious vessel



IMB Piracy Report - 2013

Overview: Where Pirates Operate?



In South-East Asia

Mainly robbers operating in territorial waters or against ships at anchor off the coasts of the following countries:

Indonesia

India

Bangladesh

Malaysia

Increasing low-level opportunistic thefts, whereas hijacks on the high seas are possible, but very rare.

Overview: Who is a Pirate?





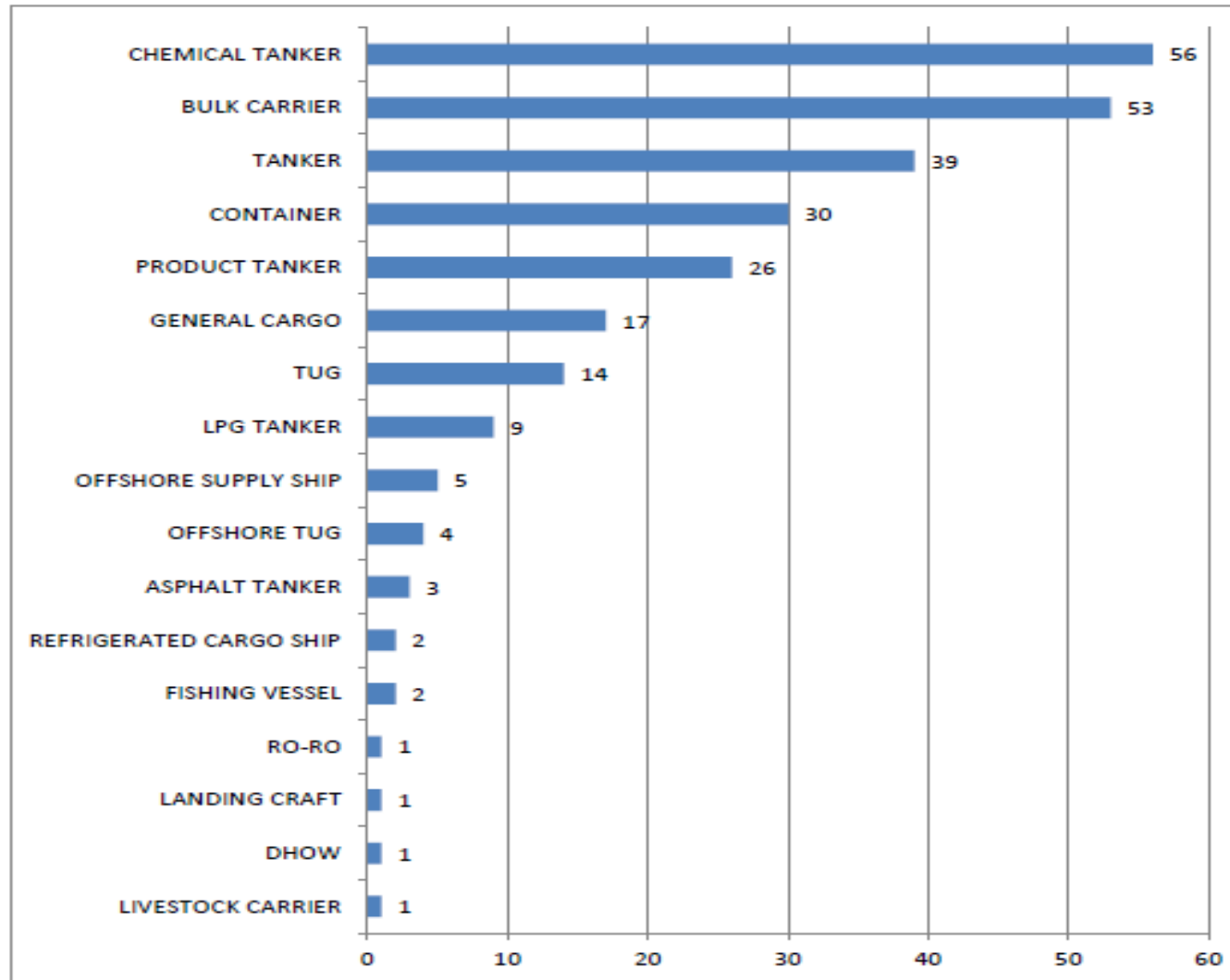
**Piracy costs for the GLOBAL ECONOMY =
btw \$5.7/\$6.1 billion in 2012 and concerned
mainly the following items:**

- ✓ Insurance
- ✓ Security equipment and armed guards
 - ✓ Increased speed
 - ✓ Ransoms & recovery
 - ✓ Military operations
 - ✓ Re-routing
- ✓ Counter-piracy organizations
- ✓ Prosecution and imprisonment

www.oceansbeyondpiracy.org

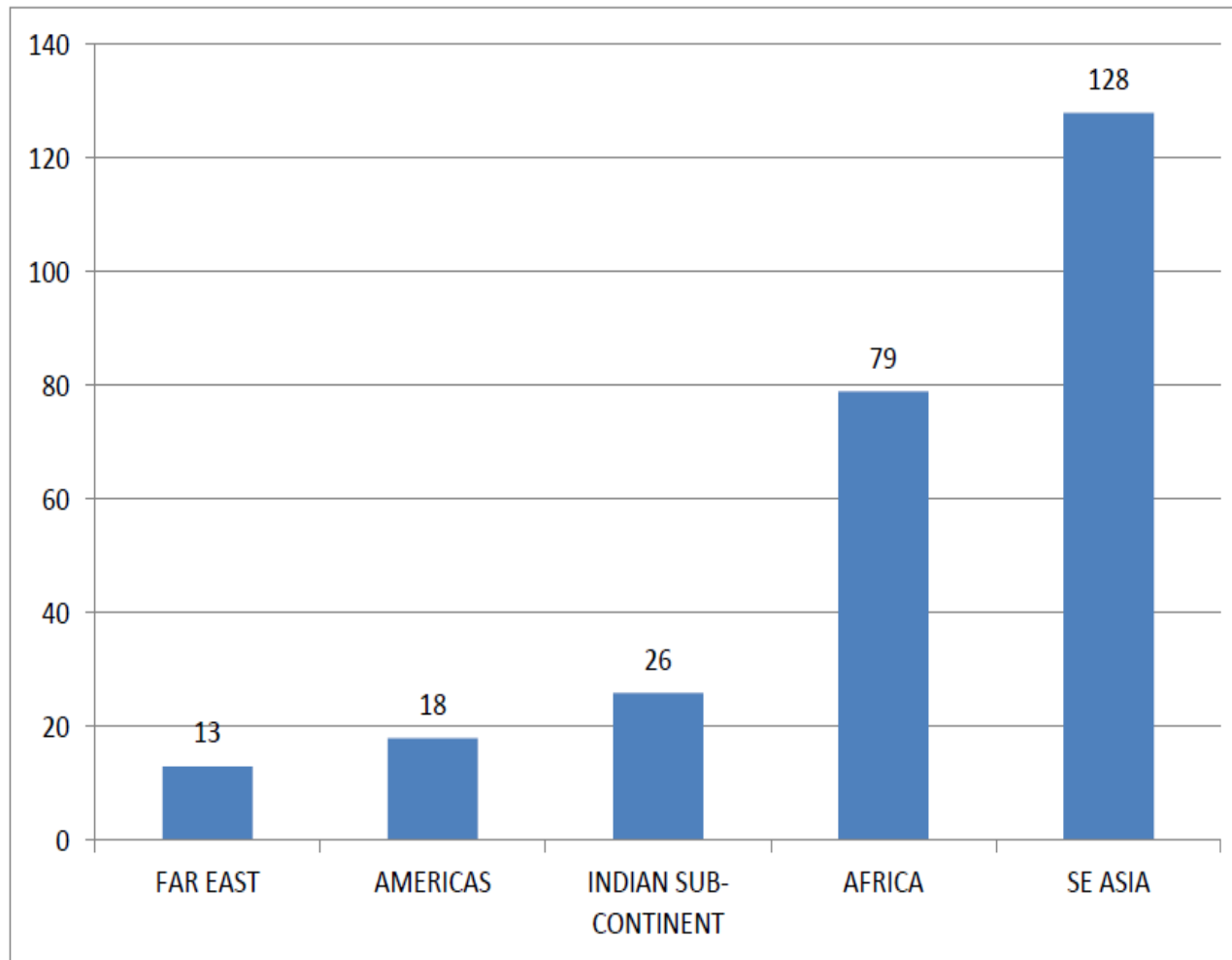
Economic Impact





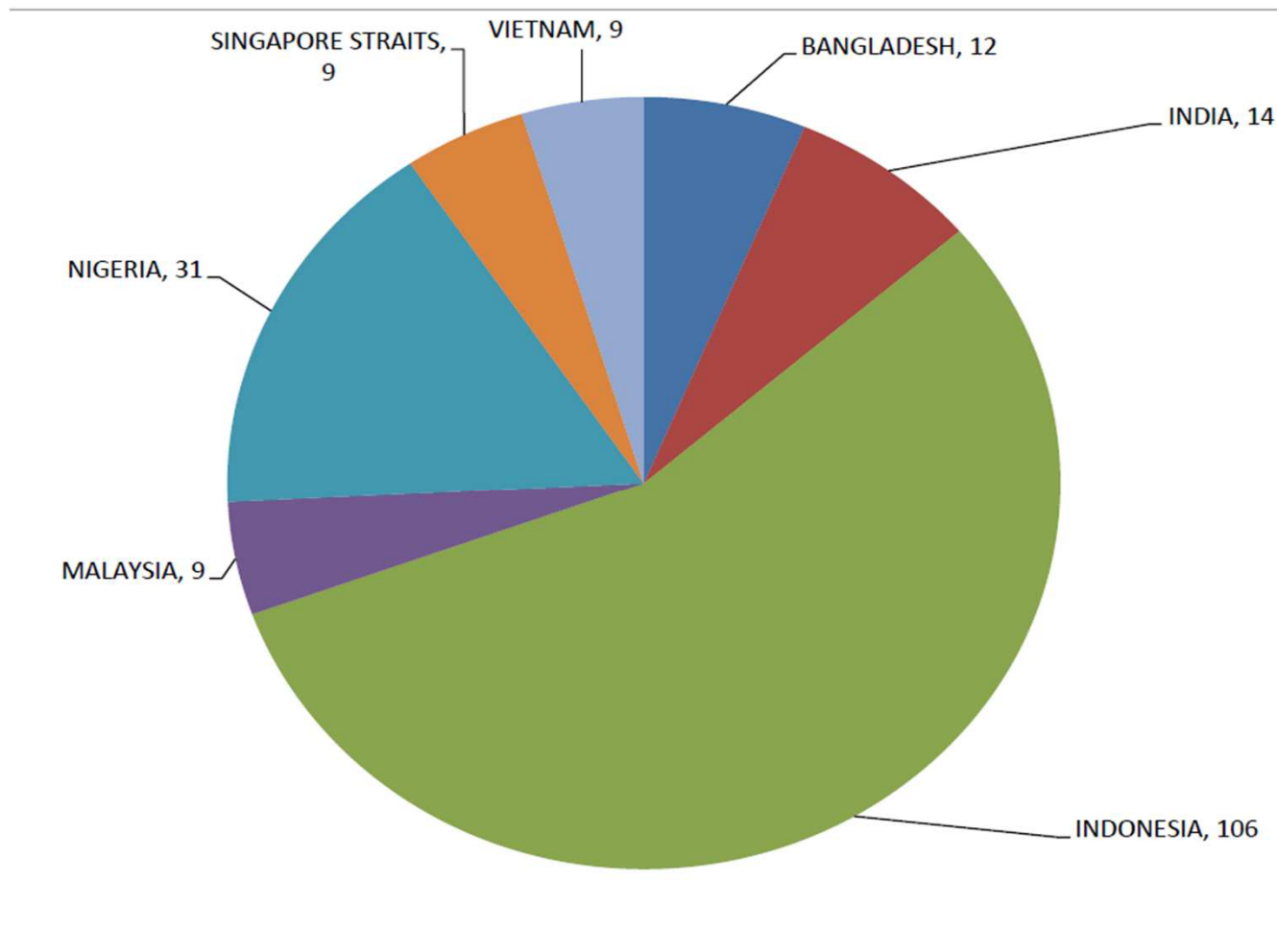
The Impact for the maritime industry





IMPACT: Total Incidents as per Region of the World





IMPACT: The 7 above locations recorded just under 75% attacks from a total of 264 reported attacks for 2013



Counter-Piracy



- Naval forces
- Ships-protection
- Security services

• **PREVENTION
ACTIVITIES**

- National
prosecution
- Transfer
Agreements

• **PROSECUTION
ACTIVITIES**

Counter-piracy: Main International Strategies



Naval patrols act as deterrents, using their **POWERS UNDER INTERNATIONAL LAW** to board vessels where piracy is suspected.

Every State may exercise the following POWERS:

“A SEIZURE on account of piracy may be carried out only by warships or aircrafts, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect”
(Art. 107 UNCLOS)

“RIGHT TO BOARD” **(art. 110 UNCLOS)**

“RIGHT OF HOT PURSUIT” **(art. 111 UNCLOS)**

“UNIVERSAL JURISDICTION” **(art. 105 UNCLOS)**

Counter-piracy: Naval Forces



Independent operations

- Some States operate with independent anti-piracy national units
- EG. China, India, Japan, Russia, and others

Multinational operations

- Ocean Shield
- EUNAVFOR/Atalanta
- Combined Task Force 151
- The Malacca Strait Patrols

Counter-piracy: Naval Forces





Operation Ocean Shield (OOS) = NATO's Counterpiracy Mission

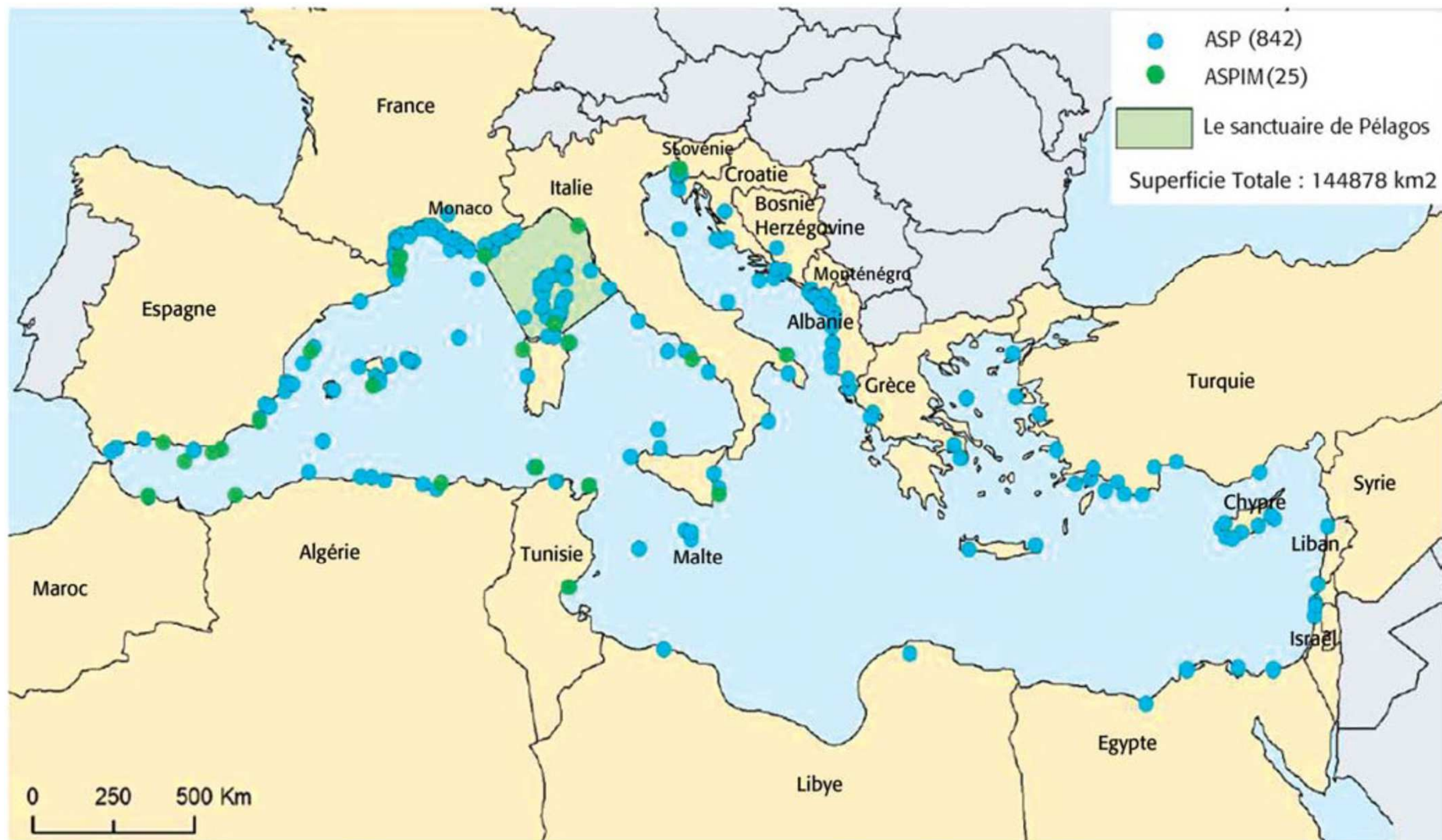
Since August 2009, NATO warships and aircrafts have been patrolling the waters off the Horn of Africa as part of OOS. On 19 March 2012, the North Atlantic Council extended the operation until THE END OF 2014.

Counter-piracy: NATO's role

The Mediterranean Sea

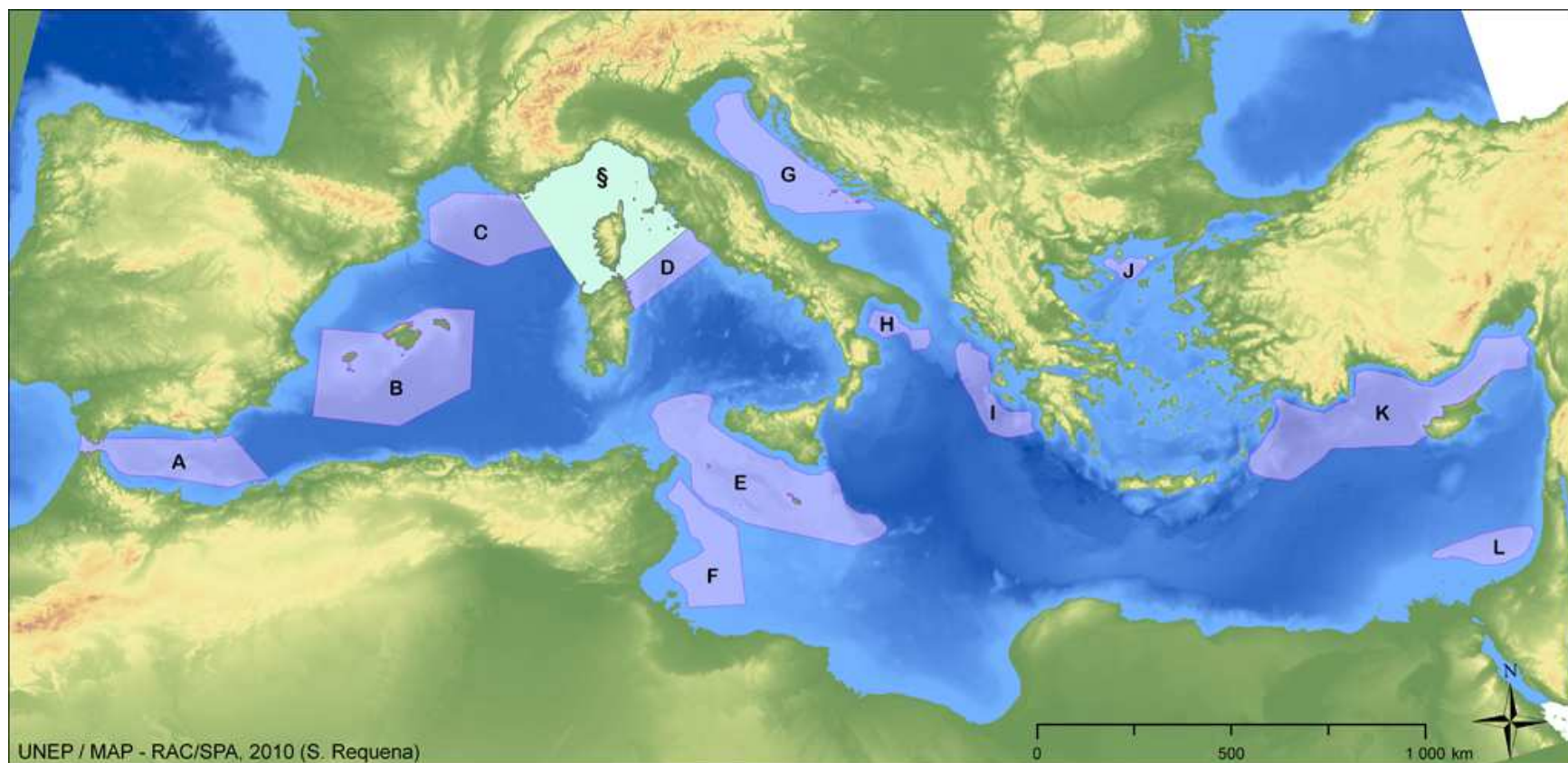
Barcelona Convention – SPAs and BD Protocol





List and geographical situation of Marine Protected Areas in the Mediterranean (source: RAC/SPA, 2007)





A: Alborán Seamounts; B: Southern Balearic; C: Gulf of Lions shelf and slope; D: Central Tyrrhenian; E: Northern Strait of Sicily (including Adventure and nearby banks); F: Southern Strait of Sicily; G: Northern and Central Adriatic; H: Santa Maria di Leuca; I: Northeastern Ionian; J: Thracian Sea; K: Northeastern Levantine Sea and Rhodes Gyre; L: Nile Delta Region

§: Pelagos Sanctuary declared as SPAMI in 2001

Priority conservation areas in the open seas, including the deep sea, that could contain sites that could be candidates for the SPAMI List and the Pelagos Sanctuary (the latter in green colour).



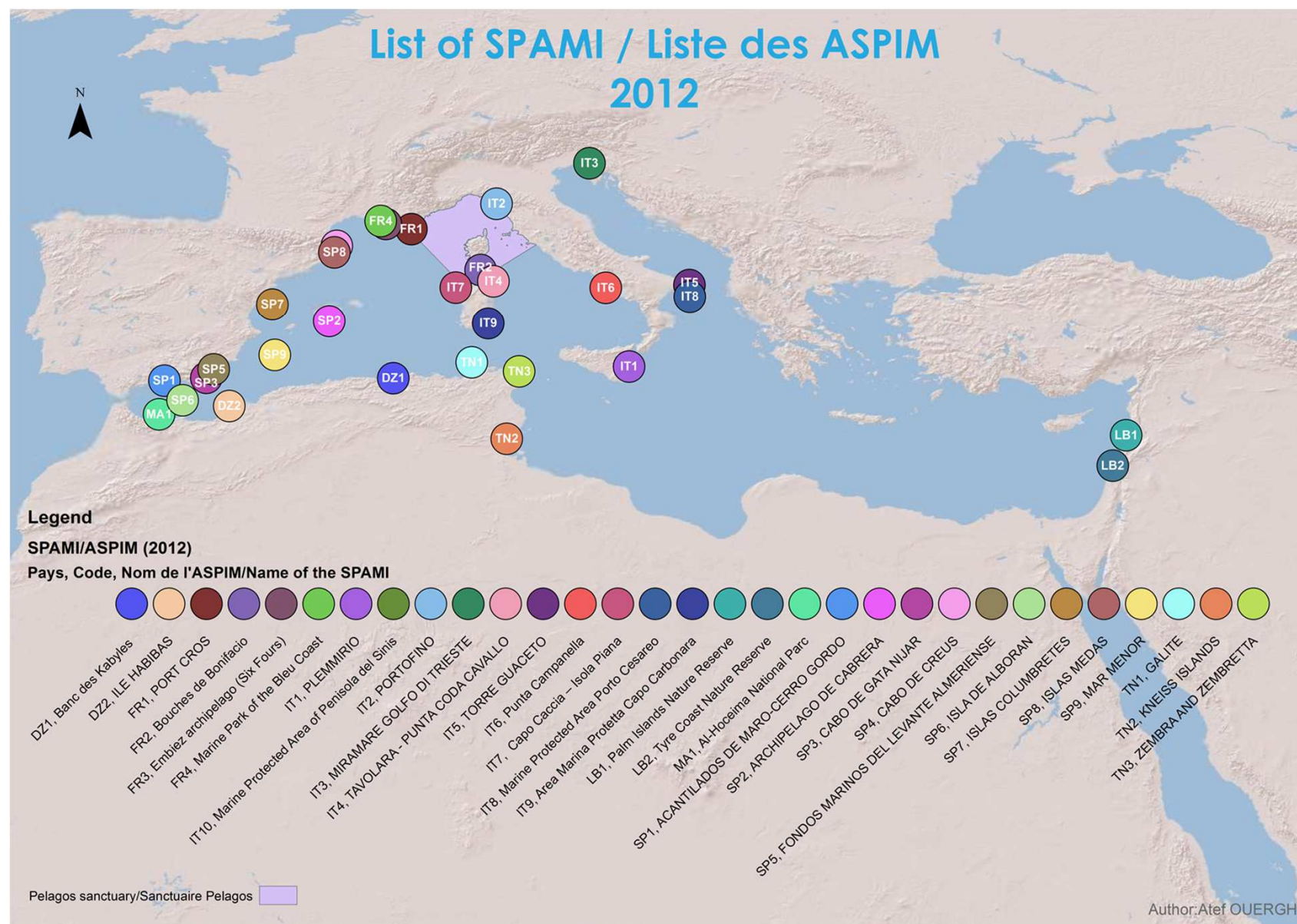


SPAMI List (2010)

Code	Name of the SPAMI	Year of inscription
DZ1	Banc des Kabyles	2005
DZ2	Habibas Island	2005
FR1	Port cros	2001
FR2	Bouches de Bonifacio	2009
IT1	Plemmirio	2008
IT2	Portofino	2005
IT3	Miramare golfo di trieste	2005
IT4	Tavolara - punta coda cavallo	2008
IT5	Torre guaceto	2008
IT6	Punta campanella	2009
IT7	Capo caccia – isola piana	2009
MA1	Al-hoceima	2009
SP1	Acantilados de maro-cerro gordo	2003
SP2	Archipelago de cabrera	2003
SP3	Cabo de gata nijar	2001
SP4	Cabo de creus	2001
SP5	Fondos marinos del levante almeriense	2001
SP6	Isla de alboran	2001
SP7	Islas columbretes	2001
SP8	Islas medas	2001
SP9	Mar menor	2004
TN1	Galite	2001
TN2	Kneiss islands	2001
TN3	Zembra and zembretta	2001
TB1	Pelagos Sanctuary	2001

RAC/SPA 2010









Il Parco francese delle Bocche di Bonifacio.



Sustainability of Choices:

a) *Principles*

- Principle of integration (Article 11 TFEU)

Environmental protection requirements must be integrated into the definition and implementation of policies and actions with a view to promoting sustainable development.

- Principle of preventive action and correction, as a priority at source, of damage caused to the environment (Article 191 TFEU)

objective and proven risks avoiding or minimizing the chances of damage occurring (preventing the causes of accidents) damage mitigation if events occur



- Precautionary principle (Article 191 TFEU)

In the event of a risk of serious or irreversible damage, the absence of scientific certainty must not serve as a pretext for postponing the abolition of appropriate and effective measures, including in relation to costs, aimed at preventing environmental degradation.

- Polluter-pays principle (Article 191 TFEU)

Public authorities should promote the internalisation of the costs of environmental protection and the use of economic instruments, given that it is the polluter who, in principle, has to bear the costs of pollution, in the public interest.



b) *Tools/Approaches*

- Environmental Impact Assessment
- Science-based approach: best available scientific and technical data
- Participatory approach: involvement of all levels of government and relevant non-institutional actors
- Complexity of decisions
- Transversality, Irreversibility of some effects, Involvement of a plurality of actors, Uneven distribution of information, Uncertainty (development of available knowledge over time), Distribution asymmetry of costs and benefits.



Thank you!

