

In the matter of an arbitration
under Annex VII to the United Nations
Convention on the Law of the Sea

PCA Case No. 2013-19

Permanent Court of Arbitration
Peace Palace
The Hague
The Netherlands

Day 3

Monday, 13th July 2015

Hearing on Jurisdiction and Admissibility

Before:

JUDGE THOMAS MENSAH (President)
JUDGE JEAN-PIERRE COT
JUDGE STANISLAW PAWLAK
PROFESSOR ALFRED SOONS
JUDGE RÜDIGER WOLFRUM

BETWEEN:

THE REPUBLIC OF THE PHILIPPINES

-and-

THE PEOPLE'S REPUBLIC OF CHINA

PAUL S REICHLER and LAWRENCE H MARTIN, of Foley Hoag LLP,
PROFESSOR BERNARD H OXMAN, of University of Miami,
PROFESSOR PHILIPPE SANDS QC, of Matrix Chambers, and
PROFESSOR ALAN BOYLE, of Essex Court Chambers, appeared
on behalf of the Republic of the Philippines.

The People's Republic of China was not represented.

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ALSO APPEARING

FOR THE PERMANENT COURT OF ARBITRATION

Registry:

Hugo Hans Siblesz, Secretary-General of the PCA
Judith Levine, Registrar and Senior Legal Counsel
Garth Schofield, Senior Legal Counsel
Brian McGarry, Assistant Legal Counsel
Nicola Peart, Assistant Legal Counsel
Robert James, Assistant Legal Counsel
Julia Solana, Assistant Legal Counsel
Gaëlle Chevalier, Case Manager/Translator

FOR THE REPUBLIC OF THE PHILIPPINES

Agent:

Florin T Hilbay, Solicitor General of the Philippines

Members of the Delegation:

Feliciano Belmonte Jr, Speaker of the House of Representatives
Paquito N Ochoa Jr, Executive Secretary
Albert F Del Rosario, Secretary of Foreign Affairs
Leila M De Lima, Secretary of Justice
Voltaire T Gazmin, Secretary of National Defense
Alfredo Benjamin S Caguioa, Chief Presidential Legal Counsel
Ronaldo M Llamas, Presidential Adviser on Political Affairs
Francis H Jardeleza, Special Adviser and Associate Justice of the Supreme Court
Antonio T Carpio, Associate Justice of the Supreme Court
Jaime Victor B Ledda, Ambassador of the Philippines to the Kingdom of the Netherlands
Victoria S Bataclan, Ambassador of the Philippines to the Kingdom of Belgium and the Grand Duchy of Luxembourg and Head of the Mission of the Philippines to the European Union
Menardo I Guevarra, Deputy Executive Secretary for Legal Affairs
Emmanuel T Bautista, Undersecretary, Executive Director of the Cabinet Cluster on Security, Justice and Peace

Abigail DF Valte, Undersecretary, Deputy Presidential Spokesperson

Mildred Yovela Umali-Hermogenes, Undersecretary, Office of the Chief Presidential Legal Counsel

Benito B Valeriano, Assistant Secretary, Department of Foreign Affairs

Maria Cleofe R Natividad, Assistant Secretary, Department of Foreign Affairs

Eduardo Jose De Vega, Assistant Secretary, Department of Foreign Affairs

Naealla Rose Bainto-Aguinaldo, Assistant Secretary, Office of the Executive Secretary

Jose Emmanuel David M Eva III, Assistant Secretary, Office of the Executive Secretary

Sarah Jane T Fernandez, Associate Justice of the Sandiganbayan

Henry S Bensurto Jr, Consul General, Department of Foreign Affairs

Marie Charlotte G Tang, Minister and Consul General, Department of Foreign Affairs

Dinno M Oblena, Minister and Consul, Department of Foreign Affairs

Ana Marie L Hernando, Director, Department of Foreign Affairs

Zoilo A Velasco, Second Secretary and Consul, Department of Foreign Affairs

Danilo D Isleta, Brigadier General, Department of National Defense

Romulo A Manuel Jr, Colonel, Armed Forces

Josel Mostajo, Attorney, Department of Foreign Affairs

Maximo Paulino T Sison III, Attorney, Office of the Solicitor General

Aiza Katrina S Valdez, Attorney, Supreme Court of the Philippines

Elvira Joselle R Castro, Associate Solicitor, Office of the Solicitor General

Maria Graciela D Base, Associate Solicitor, Office of the Solicitor General

Melbourne D Pana, Associate Solicitor, Office of the Solicitor General

Ruben A Romero, Office of the Executive Secretary

Rene Fajardo, Department of Foreign Affairs

Bach Yen Carpio, Observer

Jennie Logronio, Attorney, Observer

Holy Ampaguey, Attorney, Observer

Oliver Delfin, Attorney, Observer

Melquiades Marcus N Valdez, Attorney, Observer

Counsel:

Yuri Parkhomenko, Foley Hoag LLP
Nicholas M Renzler, Foley Hoag LLP

Technical Expert:

Scott Edmonds, International Mapping

Assistants:

Jessie Barnett-Cox, Trinity College, University of Cambridge

Elizabeth Glusman, Foley Hoag LLP
Nancy Lopez, Foley Hoag LLP

OBSERVERS

The Socialist Republic of Vietnam:

Trinh Duc Hai, Vice-Chairman of the National Boundary Commission, Foreign Ministry, Head of the Delegation
Nguyen Duy Chien, Ambassador of Vietnam to the PCA
Nguyen Dang Thang, Deputy Director-General for Maritime Policy, National Boundary Commission, Foreign Ministry
Thomas Grant, Counsel

Malaysia:

Azfar Mohamad Mustafar, Director-General, Department of Maritime Affairs, Ministry of Foreign Affairs
Tan Ah Bah, Director of Survey, Boundary Affairs Division, Department of Survey and Mapping
Mohd Helmy Ahmad, Principal Assistant Secretary, National Security Council, Prime Minister's Department
Ahmad Zuwairi Yusoff, Counsellor, Embassy of Malaysia

The Republic of Indonesia:

Ibnu Wahyutomo, Chargé d'Affaires/Deputy Chief of Mission, Embassy of Indonesia
Ayodhia GL Kalake, Senior Official, Coordinating Minister for Maritime Affairs
Damos Dumoli Agusman, Secretary to the Directorate General of International Treaties and Legal Affairs, Ministry of Foreign Affairs
Ourina Ritonga, Political Affairs, Embassy of Indonesia
Monica Nila Sari, Political Affairs, Embassy of Indonesia

Tita Yowana Alwis, Officials Directorate Treaties on Political, Security and Territorial Affairs, Ministry of Foreign Affairs

Fedra Devata Rossi, Officials Directorate Treaties on Political, Security and Territorial Affairs, Ministry of Foreign Affairs

Japan:

Masayoshi Furuya, First Secretary, Legal Adviser, Embassy of Japan

Nobuyuki Murai, First Secretary, Embassy of Japan

Kaori Matsumoto, Researcher/Adviser, Embassy of Japan

The Kingdom of Thailand:

Ittiporn Boonprachaeng, Ambassador

Asi Mamanee, Minister Counsellor

Prim Masrinuan, Counsellor

Kanokwan Ketchaimas, Counsellor

Natsupang Poshyananda, First Secretary

Participants may not have been present for the entire hearing.

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Monday, 13th July 2015

(10.05 am)

THE PRESIDENT: Good morning. May I welcome you all back. The hearing on jurisdiction and admissibility in the arbitration between the Philippines and China is resumed.

On Friday morning, the Arbitral Tribunal circulated to the parties some questions for the Philippines to address at this second round of arguments. I understand that copies of these questions have now been made available to the observer delegations so they can follow the discussions. Additionally, some of my colleagues will also pose individual questions this morning, which the Philippines can address after the break. It is of course open to the Philippines to answer in writing after the hearing if it is not able to provide a full answer to any question today, and we will give you until 23rd July to do so.

Before I invite the distinguished representatives of the Philippines to address the Arbitral Tribunal on those questions, I wish to extend a welcome to the new members of the Philippines' delegation who are attending for the first time today.

I also wish to welcome His Excellency Mr Hugo Hans

1 Siblesz, the Secretary-General of the Permanent Court
2 of Arbitration. We are very grateful for your
3 presence and, if I may say so, for the excellent
4 assistance that your staff have given us in these
5 proceedings.

6 Finally, I wish to note that the Arbitral Tribunal
7 has received over the weekend several letters from the
8 Agent of the Philippines. These include:

9 - The Philippines' comments on various requests
10 from the observer delegations.

11 - A copy of the *note verbale* from the Embassy of
12 the People's Republic of China in Manila dated
13 6th July 2015;

14 - A new Annex 583 comprising a list of (i) dates
15 that satellite photos were taken, and (ii) dates of
16 surveys on which navigational charts are based. This
17 information was filed in response to questions raised
18 in the Arbitral Tribunal's letter of 23rd June 2015.

19 - And finally, we have received a list of new
20 documents referred to in the course of the
21 Philippines' oral pleadings, with annex numbers, for
22 which the Registry is grateful.

23 Mr Reichler, you have the floor now. Thank you.

24

1 **(10.08 am)**

2 **Second-round submissions by MR REICHLER**

3 **MR REICHLER:** Mr President, members of the Tribunal, good
4 morning. I hope you had an enjoyable weekend. Our
5 team, as you might imagine, was quite busy, but we are
6 by no means complaining. For us, our work on behalf
7 of the Philippines, even on weekends, is a great
8 privilege.

9 This morning we will respond to the six questions
10 that you put to us in writing last Friday.

11 Afterwards, the honourable Solicitor General and Agent
12 of the Philippines will provide closing remarks. We
13 have found your questions to be most helpful, and we
14 have striven to provide complete and accurate answers
15 to all of them. We have also aimed to be as direct
16 and efficient as possible. We expect to conclude our
17 answers to your questions before noon.

18 The order of presentation of answers to your
19 questions will be this: I will respond to Question 1;
20 Professor Sands will then respond to Questions 2 and
21 6; Mr Martin will respond to Question 3 and the first
22 part of Question 4, pertaining to the Treaty of Amity
23 and Cooperation; Professor Boyle will then respond to
24 the remainder of Question 4, pertaining to the
25 question on biological diversity; then Professor Oxman

1 will respond to Question 5, concerning the exception
2 for military activities.

3 Question 1 invites the Philippines to direct the
4 Arbitral Tribunal to the sources relied upon for
5 ascertaining China's position with respect to each of
6 the Philippines' specific submissions in the context
7 of establishing the existence of a legal dispute. We
8 are very pleased to accept the Tribunal's invitation.

9 At tab 4.1 of your folders today, you will find
10 a document that we have created in response to this
11 question. It may be helpful to you if you allow me to
12 take you to it now.

13 You will see on page 1 a heading that reads
14 "Submissions 1 and 2". This is followed by the texts
15 of these submissions, which comprise the Philippines'
16 claims in regard to these matters, and then you will
17 see statements of China's position in opposition to
18 our claims.

19 If you turn the page, you will see a "List of
20 Sources". This is a list of the documentary and other
21 sources in the written pleadings, and in the public
22 record, upon which the Philippines has relied for
23 ascertaining China's positions opposing those of the
24 Philippines, and establishing the existence of legal
25 disputes.

26 We have taken this approach in respect of each of

1 the Philippines' 14 submissions. For example, at
2 page 11, you will see the heading "Submission 3", and
3 following that page, you will find the list of sources
4 where China's position opposing that of the
5 Philippines in regard to submission 3 can be found.
6 The pattern is repeated for each of the subsequent
7 submissions.

8 We trust that you will find this approach helpful.
9 We thought it would be more convenient for the
10 Tribunal than standing here for hours reading out the
11 list of sources in respect of all 14 submissions; or
12 worse, reading all of the source material itself aloud
13 to you.

14 That said, I think it would be helpful if
15 I briefly reviewed with you some of the highlights.
16 If this were television, and you were watching
17 Eurosport or ESPN, this would be equivalent not to
18 showing all of the goals that were scored in all of
19 the most recent English Premier League matches, but
20 only the most notable and memorable ones. You have
21 a collection of all the goals at tab 4.1.

22 So I will begin with the most important sources
23 relating to submissions 1 and 2, and in particular to
24 China's claim that its maritime entitlements in the
25 South China Sea extend beyond those permitted by
26 UNCLOS (in opposition to our submission 1), and its

1 claim to "historic rights", including sovereign rights
2 and jurisdiction, within the maritime area encompassed
3 by the nine-dash line beyond the limits of its UNCLOS
4 entitlements (in opposition to our submission 2).

5 On July 7th, I cited, quoted from, and showed you
6 some of these sources during my presentation. It may
7 be worth recalling China's 2009 *notes verbales*
8 asserting China's claim to "sovereign rights and
9 jurisdiction over the relevant waters as well as the
10 seabed and subsoil thereof (see attached map)",¹
11 depicting the nine-dash line; and the statements by
12 senior Chinese officials that, "While [the
13 Philippines] has legal rights under UNCLOS, China has
14 historical rights which are acknowledged under
15 UNCLOS";² and that China has "rights and relevant
16 claims over the South China Sea [that] have been
17 formed in history and upheld by the Chinese
18 government";³ and that UNCLOS "does not entitle any
19 country to extend its EEZ or continental shelf" to any

¹ Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/17/2009 (7 May 2009). MP, Vol. VI, Annex 191; Note Verbale from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/18/2009 (7 May 2009). MP, Vol. VI, Annex 192.

² Memorandum from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-064-2011-S (21 June 2011), para. 8. MP, Vol. IV, Annex 72.

³ Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Jiang Yu's Regular Press Conference on September 15, 2011* (16 Sept. 2011), p. 2. MP, Vol. V, Annex 113.

1 areas where they might "restrain or deny a country's
2 right which is formed in history and abidingly
3 upheld";⁴ and that China claims sovereign rights,
4 including rights to oil and gas extraction, and to
5 fishing, in "all the waters within the nine-dash
6 line";⁵ and that, in explicit regard to the alleged
7 lawfulness of China's assertion of maritime rights
8 within the nine-dash line, "China's rights and
9 interests in the South China Sea are formed in history
10 and protected by international law".⁶

11 The direct sources of all of these Chinese
12 statements were cited in footnotes to my speech, and
13 they appear again today at tab 4.1 in the list of all
14 sources.

15 Last week, I also showed you a map depicting
16 China's assertion that it is entitled -- I should say
17 exclusively entitled -- to the non-living resources up
18 to the limit of the nine-dash line, even in areas that
19 are within Vietnam's continental shelf, and more than
20 200 miles from any land feature over which China

⁴ *Id.*

⁵ Jane Perlez, "China Asserts Sea Claim with Politics and Ships", *New York Times* (11 Aug. 2012), p. 3. MP, Vol. X, Annex 320.

⁶ Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Hong Lei's Statement Regarding Comments by an Official of the United States Department of State on the South China Sea* (8 Feb. 2014). MP, Vol. V, Annex 131 (official translation quoted available at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1127014.shtml).

1 claims sovereignty. This map, which is from our
2 Memorial and is at tab 2 of your folders today,
3 tab 4.2, shows the geographic area covered by
4 Philippines oil block SC-58, in relation to the
5 nine-dash line, and the Philippines' 200-mile
6 continental shelf.

7 On 30th July 2010, China protested Philippine
8 activity in this area on the ground that SC-58:

9 "... and other nearby service contracts are
10 located 'deep within China's 9-dash line'. China
11 considers the Philippines as violating and encroaching
12 on China's sovereignty and sovereign rights in these
13 areas [deep within the nine-dash line]."⁷

14 This Chinese protest is also documented at
15 tab 4.2.

16 China has repeatedly protested the Philippines'
17 oil-related activities at or near Reed Bank, which is
18 now highlighted on the screen, and, since the public
19 unveiling of the nine-dash line claim in 2009, has
20 sent its law enforcement vessels to interfere with and
21 prevent any such Philippine activities in this area.

22 This map, showing oil block GSEC-101, is at
23 tab 4.3. Also at that tab is the record of China's

⁷ Memorandum from Rafael E. Seguis, Undersecretary for Special and Ocean Concerns, Department of Foreign Affairs, Republic of the Philippines, to the Secretary of Foreign Affairs of the Republic of the Philippines (30 July 2010), p. 1. MP, Vol. IV, Annex 63.

1 protest of 9th March 2011, which states:

2 "Since ancient times, China has indisputable
3 sovereignty over the waters of Nansha Islands and its
4 adjacent waters. The GSEC-101 ... area is situated in
5 the adjacent waters of the Nansha Islands."⁸

6 This map is at tab 4.4.

7 On 6th July 2011, China sent a *note verbale* to the
8 Philippines in respect of these Philippine oil blocks:

9 "The Chinese side urges the Philippines side to
10 immediately withdraw the bidding offer for AREA 3 and
11 AREA 4, [and] refrain from any action that infringes
12 on China's sovereignty and sovereign rights ..." ⁹

13 China's note to that effect is also at tab 4.4.

14 China has also claimed exclusive fishing rights
15 in, and denied Philippine fishermen from entering,
16 waters encompassed by its "historic rights" claim,
17 beyond its UNCLOS entitlements. In May 2012, China
18 adopted regulations imposing a fishing moratorium
19 throughout the northern sector of the South China Sea,
20 within the limits of the nine-dash line.¹⁰ China has

⁸ Memorandum from Acting Assistant Secretary of the Department of Foreign Affairs of the Republic of the Philippines to the Secretary of Foreign Affairs (10 Mar. 2011), p. 1. MP, Vol. IV, Annex 70.

⁹ Note Verbale from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (11) PG-202 (6 July 2011), p.1. MP, Vol. VI, Annex 202.

¹⁰ People's Republic of China, Ministry of Agriculture, South China Sea Fishery Bureau, *Announcement on the 2012 Summer Ban on Marine Fishing in the South China Sea Maritime Space* (10 May 2012), Art. 1, nn.1-2. MP, Vol. V, Annex 118. See also "Fishing ban starts in South China Sea", *Xinhua* (17 May 2012). MP, Vol. X, Annex 318.

1 imposed a similar ban in the southern sector. It has
2 allowed only Chinese vessels to fish in the waters in
3 this sector, and has banned Philippine vessels.

4 The moratorium in this area is still in effect.
5 As recently as last Monday, 6th July, on the eve of
6 these hearings, the Chinese Embassy in Manila sent
7 a communication to the Philippines' Department of
8 Foreign Affairs, as follows:

9 "The Chinese side issues 'Nansha Certification of
10 Fishing Permit' to the Chinese vessels, allowing them
11 to conduct fishery production activities outside the
12 areas under fishing moratorium. This is in conformity
13 with the Chinese laws and relevant regulations. The
14 Chinese side does not accept and firmly opposes the
15 groundless protests and accusation of the Philippine
16 side, and hereby requests the Philippine side to
17 earnestly respect China's sovereignty, sovereign
18 rights and jurisdiction, and to educate its own
19 fishermen, so that they can strictly abide by the
20 fishing moratorium of South China Sea issued by the
21 Chinese government and the administrative managements
22 and law-enforcing authorities. The Chinese
23 law-enforcing authorities will strengthen their
24 maritime patrols and other law-enforcing actions,
25 investigate and punish the relevant fishing vessels
and fishermen who violate the fishing moratorium in

1 accordance with the law."¹¹

2 China's note is at tab 4.5.

3 In this sector of the South China Sea, China
4 claims both historic rights within the nine-dash line
5 and 200-mile entitlements, purportedly under UNCLOS,
6 for all of the Spratly features. It has said
7 repeatedly that:

8 "China's Nansha Islands are fully entitled to
9 Territorial Sea, Exclusive Economic Zone and
10 Continental Shelf."¹²

11 The sources of these statements too are included
12 in the list at tab 4.1.

13 As I explained last week, both of China's claims
14 give rise to legal disputes with the Philippines,
15 because both exceed the limits on entitlements under
16 UNCLOS, which the Philippines claims, in its
17 submissions 1 and 2, to be the exclusive source of
18 such entitlements.¹³

19 This is the position of the Philippines with
20 respect to its maritime entitlements and those of the
21 so-called Nansha Islands under UNCLOS. China's

¹¹ Note Verbale from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (15) PG-299 (6 July 2015). Hearing on Jurisdiction, Annex 580.

¹² Note Verbale from the Permanent Mission of the People's Republic of China to the Secretary-General of the United Nations, No. CML/8/2011 (14 Apr. 2011), p. 2. MP, Vol. VI, Annex 201.

¹³ Mr. Reichler, 7 July 2015 Transcript, pp. 59:1-72:26.

1 entitlements do not extend to Mischief Reef or
2 Reed Bank, because the former is a low-tide elevation
3 and the latter is entirely submerged under the water
4 at all times. China has got it entirely wrong when it
5 says this is a case primarily about territorial
6 sovereignty, and only peripherally about maritime
7 rights and jurisdiction.

8 The Philippines considers that none of the
9 high-tide features in the Spratlys is entitled to more
10 than a 12-mile territorial sea, because none is
11 capable of supporting human habitation or economic
12 life. The total areas of those features, including
13 their 12-mile entitlements, within 200 miles of the
14 Philippines -- now shaded in blue -- is 28,690 square
15 kilometres. The total area of the remainder of the
16 waters within 200 miles of the Philippines -- that is,
17 within its entitlements under UNCLOS in this sector --
18 is 188,535 square kilometres. These measurements
19 speak for themselves. Only a mere 13.2% of this area
20 is land or territorial sea. The remaining 86.8%
21 consists of sea and seabed beyond 12 miles from any
22 insular feature.

23 This shows clearly that the dispute between the
24 parties is primarily about maritime rights and
25 jurisdiction, and access to resources. The dispute
26 over the land features themselves -- which is not part

1 of this case -- is of far, far lesser significance
2 than the UNCLOS disputes that are before you. This
3 map is at tab 4.6.

4 Mr President, as you and your colleagues on the
5 Tribunal examine these and the other sources on the
6 list at tab 4.1, it is absolutely clear that China has
7 opposed, and continues to oppose, the claims made by
8 the Philippines in submissions 1 and 2, and that legal
9 disputes between the parties plainly exist. Judge Gao
10 understood that China's claim within the nine-dash
11 line is one of historic rights, which include
12 sovereign rights and jurisdiction beyond China's
13 entitlements under UNCLOS.¹⁴ We see no basis on which
14 this Tribunal could reach any other understanding, or
15 harbour any doubt about the nature of China's claims
16 or the fact that they are disputed by the Philippines.

17 The legal disputes in regard to each of the other
18 submissions are just as clear. I will very briefly
19 review some of those highlights too.

20 In opposition to submission 3, in which the
21 Philippines claims that Scarborough Shoal is a rock
22 under Article 121(3) of the Convention, and is
23 entitled only to a 12-mile territorial sea, China has
24 asserted that the feature "is not a sand bank but

¹⁴ Z. Gao and B.B. Jia, "The Nine-Dash Line in the South China Sea: History, Status, and Implications", *American Journal of International Law*, Vol. 107, No. 1 (2013), pp. 109-110. MP, Vol. X, Annex 307.

1 rather an island",¹⁵ and China has claimed that
2 Scarborough Shoal generates an exclusive economic
3 zone.¹⁶ The sources of these statements are in the
4 list at tab 4.1, pages 12 and 13.

5 The source list also shows that China has likewise
6 opposed the claims made by the Philippines in
7 submissions 4 through 7 in regard to the character and
8 entitlements of eight other specific features, all of
9 which are in the Spratlys, and which the Philippines
10 regards as low-tide elevations with no maritime
11 entitlements, or rocks with only a 12-mile
12 entitlement. In contrast, China claims a 200-mile EEZ
13 and continental shelf for all of these Spratly
14 features.¹⁷

15 Mr President, there are many sources for our
16 statements that China opposes the claims set forth in
17 submissions 8 and 9, and these are also listed at
18 tab 4.1, pages 31 to 45. But I must again call your
19 attention to China's *note verbale* of 6th July 2015,
20 which, of course, could not have been included in our

¹⁵ Department of Foreign Affairs of the Republic of the Philippines, *Record of Proceedings: 10th Philippines-China Foreign Ministry Consultations* (30 July 1998), p. 23. MP, Vol. VI, Annex 184.

¹⁶ See Foreign Ministry of the People's Republic of China, *Chinese Foreign Ministry Statement Regarding Huangyandao* (22 May 1997), p. 2. MP, Vol. V, Annex 106.

¹⁷ Note Verbale from the Permanent Mission of the People's Republic of China to the Secretary-General of the United Nations, No. CML/8/2011 (14 Apr. 2011), p. 2. MP, Vol. VI, Annex 201.

1 written pleadings, and so we submitted it yesterday.

2 In that note, as you will recall, China states, in
3 regard to maritime areas indisputably within 200 miles
4 of the Philippines and more than 12 miles from any
5 insular feature claimed by China, that only China may
6 determine where it is permissible to fish, that only
7 Chinese fishermen may fish in the allowable areas, and
8 that Philippine fishermen may not.¹⁸ As I have also
9 shown you, China also claims for itself the exclusive
10 right to explore for oil in the same area, and has
11 prevented the Philippines from doing so.

12 There can be no doubt, therefore, that China's
13 position is directly opposed to that of the
14 Philippines with respect to submissions 8 and 9, and
15 that this is demonstrated both by China's statements
16 and its enforcement actions against the Philippines.

17 Submission 10 concerns China's denial of
18 traditional fishing rights at and within 12 miles of
19 Scarborough Shoal in and after 2012. The main sources
20 are two Chinese statements. One, 24th May 2012:
21 "Philippines should withdraw its vessels from
22 Huangyan Island waters."¹⁹

¹⁸ Note Verbale from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (15) PG-299 (6 July 2015). Hearing on Jurisdiction, Annex 580.

¹⁹ Memorandum from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-080-2012-S (24 May 2012), p. 2. MP, Vol. IV, Annex 81.

1 Huangyan Island is China's name for Scarborough
2 Shoal.

3 And two, 26th July 2012:

4 "Philippine vessels, including fishing vessels,
5 should not return to the area ... The two sides can
6 talk about the possibility of Philippine fishing
7 vessels in the area, under the condition that Chinese
8 sovereignty is guaranteed."²⁰

9 That has remained China's position.

10 The parties' legal dispute in regard to
11 submission 11, concerning China's failure to protect
12 and preserve the marine environment at Scarborough
13 Shoal and Second Thomas Shoal, is evidenced by the
14 Philippines' repeated protest notes over construction
15 activities and the destruction of coral reefs, the
16 dynamiting of fish populations, and the harvesting of
17 endangered species. The relevant notes are included
18 in the list at tab 4.1, pages 52 to 54. China's
19 opposition is reflected in its actions, its refusal to
20 act, and its Foreign Ministry's statements.

21 First, China has repeatedly ignored the
22 Philippines' protests. Second, Chinese law
23 enforcement vessels have protected the Chinese fishing

²⁰ Memorandum from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-110-2012-S (26 July 2012), p. 5. MP, Vol. IV, Annex 84.

vessels engaged in these environmentally destructive practices. The Memorial includes indisputable photographic evidence of this;²¹ the cites are in the list at tab 4.1. And third, Chinese law enforcement vessels have physically prevented Philippine law enforcement vessels from intervening to stop the harmful practices of the Chinese fishermen.

As the Tribunal is well aware, words of disagreement may not be necessary to demonstrate the existence of a legal dispute; it can be deduced or inferred from a party's actions. The case law for this well-established proposition is cited in footnote.²²

But further, the Chinese Foreign Ministry has stated that:

"[China's activities on the] Nansha islands and reefs fall within the scope of China's sovereignty, and are lawful, reasonable, and justified ... nor have they caused or will they cause damage to the marine ecological system and environment in the South China

²¹ MP, Figure 6.5, at p. 177, and 6.7, at p. 185.

²² See *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, Judgment, ICJ Reports 1998, para. 89. MP, Vol. XI, Annex LA-25; *United States Diplomatic and Consular Staff in Tehran*, Judgment, I. C. J. Reports 1980, paras. 46, 47, 49, 51. SWSP, Vol. XII, Annex LA-175.

1 Sea, and thus are beyond reproach."²³

2 Needless to say, that assertion is very much
3 disputed by the Philippines.

4 In respect of submissions 12(a), (b) and (c) --
5 pertaining to Chinese construction of installations,
6 environmental destruction and purported appropriation
7 of Mischief Reef, a low-tide elevation only 126 miles
8 from the Philippine coast, and more than 12 miles from
9 any insular feature over which China claims
10 sovereignty -- China has responded to the Philippines'
11 protests with numerous statements like the following:

12 "Chinese Government exercises sovereignty over the
13 Nansha Islands and it is the sovereign prerogative of
14 the Chinese government to undertake repair and
15 renovation works on the structures erected in 1995 [at
16 Mischief Reef]."²⁴

17 And the following:

18 "Mischief Shoal has always been part of China, as
19 part of the Nansha islands ..."²⁵

20 And this:

²³ Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Lu Kang's Remarks on Issues Relating to China's Construction Activities on the Nansha islands and Reefs* (16 June 2015). Hearing on Jurisdiction, Annex 579.

²⁴ Memorandum from Ambassador of the Republic of Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-76-98-S (6 Nov. 1998), p. 1. MP, Vol. III, Annex 33.

²⁵ Government of the Republic of the Philippines and Government of the People's Republic of China, *Philippine-China Bilateral Consultations: Summary of Proceedings* (20-21 Mar. 1995), p. 7. MP, Vol. VI, Annex 175.

1 "Chinese local fishing authorities will undertake
2 'soon' the renovation and reinforcement works which
3 have become necessary ..."²⁶

4 China's opposition to the claim set forth in
5 Submission 13 is well established, *inter alia*, by
6 an exchange of notes in April and May 2012. The
7 Philippines' note of 30th April 2012 asserted that
8 Chinese law enforcement vessels were threatening
9 Philippine search and rescue vessels at Scarborough
10 Shoal by making "provocative and extremely dangerous
11 manoeuvres" against them.²⁷ China rejected the
12 Philippines' claim on 25th May 2012:

13 "The various jurisdiction measures adopted by the
14 Chinese government over Huangyan Island and its
15 waters..."

16 That's China's name for Scarborough Shoal:

17 ".... and activities by Chinese ships, including
18 government public service ships and fishing boats, in
19 Huangyan Island and its waters are completely within
20 China's sovereignty."²⁸

²⁶ Memorandum from Lauro L. Baja, Jr., Undersecretary for Policy, Department of Foreign Affairs, Republic of the Philippines to all Philippine Embassies (11 Nov. 1998), p. 1. MP, Vol. III, Annex 35.

²⁷ Note Verbale from the Department of Foreign Affairs of the Philippines to the Embassy of the People's Republic of China in Manila, No. 12-1222 (30 Apr. 2012). MP, Vol. VI, Annex 209.

²⁸ Note Verbale from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (12) PG-239 (25 May 2012). MP, Vol. VI, Annex 211.

1 This brings me to the final submission,
2 Submission 14. The Philippines has protested all of
3 the specified Chinese behaviours at Second Thomas
4 Shoal: interfering with navigation rights, preventing
5 the rotation and resupply of personnel, and
6 endangering their health and wellbeing. China has
7 been perfectly clear in rejecting these protests, both
8 in word and action. China's statements include: the
9 "Chinese side w[ill] not allow the continuous
10 stranding of the vessel" at Second Thomas Shoal.²⁹
11 China also demanded that Philippine "ships have to
12 leave the area and should bear full responsibility of
13 the consequences resulting there from".³⁰ China's
14 actions at Second Thomas Shoal demonstrating its
15 opposition to the Philippines' claims are also
16 described in tab 4.1, pages 64 and 65.

17 Mr President, as I said earlier, this is just
18 a sampling of the source material we have provided
19 documenting China's explicit opposition to each and
20 every one of the claims raised by the Philippines in
21 its 14 Submissions. There can be no question that
22 each of these claims is opposed by China, and that

²⁹ Memorandum from the Secretary of Foreign Affairs of the Republic of the Philippines to the President of the Republic of the Philippines (23 Apr. 2013), p. 1. MP, Vol. IV, Annex 93.

³⁰ Letter from the Virgilio A. Hernandez, Major General, Armed Forces of the Philippines, to the Secretary of Foreign Affairs, Department of Foreign Affairs of Republic of the Philippines (10 Mar. 2014), p. 1. MP, Vol. IV, Annex 99.

1 a legal dispute exists in regard to every one of them.
2 Moreover, as I explained last week in regard to
3 Submissions 1 through 9,³¹ and as my colleagues
4 explained in regard to Submissions 10 through 14,³² in
5 all of these Submissions the legal dispute arises
6 under UNCLOS and calls for the Convention's
7 interpretation or application.

8 In sum, Mr President, your jurisdiction to address
9 all 14 of the Philippines' Submissions is fully and
10 firmly established, and this is so even if the
11 standard is that a legal dispute must be shown to
12 exist separately for each and every Submission. We
13 note in this regard, however, that UNCLOS itself does
14 not appear to set such a high bar: it does not use the
15 words "legal disputes". And other Annex VII tribunals
16 appear not to have imposed the standard separately for
17 each of the applicant state's submissions.
18 Nevertheless, even if this Tribunal were to establish
19 such a standard and require a showing of a legal
20 dispute separately for each submission, we have

³¹ Tr., 7 July 2015, pp. 27:5-25, 29:16-50:26, 55:9-57:7, 58:10-58:24 (Presentation of Mr. Paul S. Reichler) (reference is to uncorrected version).

³² Tr., 8 July 2015, pp. 94:10- 100:6, 101:21-103:17, 108:16-109:14, 107:3-114:5, 116:17-25 (Presentation of Prof. Alan Boyle) (reference is to uncorrected version). See also Tr., 8 July 2015, pp. 93:21-120:1 (Presentation of Prof. Alan Boyle) (reference is to uncorrected version);Tr., 8 July 2015, pp. 39:23-40:6, 47:23-48:20, 84:16- 92:13 (Presentation of Prof. Bernard H. Oxman) (reference is to uncorrected version).

1 plainly met it.

2 Mr President, members of the Tribunal, I thank you
3 again for your kind courtesy and patient attention
4 this morning, and throughout these proceedings. I ask
5 that you give the floor to Professor Sands, who will
6 be much briefer than I have been.

7 **THE PRESIDENT:** Thank you very much, Mr Reichler.

8 I will, without ado, ask Professor Sands, please.

9 **Tribunal questions**

10 **JUDGE WOLFRUM:** Mr Reichler, sorry, I have a question,
11 which has been announced by the President.

12 You have referred to, Mr Reichler, this note
13 verbale of 6th July which just has been added to the
14 folder. In this note verbale there is a reference to
15 the Philippines' note verbale 15-2341 of 16th June.

16 I don't recall to have seen it; maybe my mistake.

17 Could you perhaps provide us with a copy of that
18 note verbale? This is the first part of my only
19 question.

20 **MR REICHLER:** May I answer that? I will be the first of
21 my colleagues to venture to answer a question from the
22 podium. The question to your question is: yes, we
23 will very gladly provide you with a copy of that note.

24 **JUDGE WOLFRUM:** May I continue my question? In this
25 note verbale of China, there is, as you said,

1 reference to "indisputable sovereignty over the South
2 China Sea Islands and their adjacent waters". There
3 is a certain -- yes, how should I put it? -- there is
4 room for interpreting the word "Islands" in this
5 respect. It is not for you to interpret this *note*
6 *verbale*, but do we have to take it as referring to
7 reefs, low-tide elevations and islands, or only
8 islands, technically speaking? That is the first part
9 of the question.

10 Second, there is a reference to the Treaty of
11 Paris of 1898, the Treaty of Washington of 1900, and
12 another treaty of 1930. I don't recall that these
13 treaties have been referred to much in substance.
14 This is certainly an issue which you would like to
15 look into, and perhaps it is better you provide the
16 answer thereto in writing. I would like to hear about
17 the relevance of these treaties in the context of this
18 dispute, if any.

19 Thank you, Mr Reichler.

20 **MR REICHLER:** Thank you very much, Judge Wolfrum.

21 If there are no further questions at this time,
22 Mr President, I would ask that you kindly call
23 Professor Sands to the podium.

24 **THE PRESIDENT:** Yes, except that we would like to know at
25 some point, not necessarily this morning, at some
26 point we would like to know whether you intend to

1 respond to this question -- the question from
2 Judge Wolfrum -- now, or you need some time to address
3 that question.

4 **MR REICHLER:** Yes, Mr President, I will consult with our
5 Agent and with colleagues, and we will advise you in
6 the course of this morning at what time we will
7 respond to those pending questions. We will let you
8 know the answer to that in the course of this morning.

9 **THE PRESIDENT:** Thank you very much. Thank you. That is
10 enough, yes. Professor Sands, then.

11 (10.43 am)

12 **Second-round submissions by PROFESSOR SANDS**

13 **PROFESSOR SANDS:** Mr President, members of the Tribunal,
14 I will answer Questions 2 and 6.

15 With respect to Question 2, the Tribunal has
16 invited us to elaborate on the relevance of the
17 reference to the *Mauritius v. United Kingdom* decision
18 to the present case, and I can be brief.

19 The recent decision might be said to have
20 relevance for two reasons: first, it confirms that
21 an Annex VII tribunal established under Part XV of the
22 Convention can and will distinguish between that part
23 of a dispute which raises matters of territorial
24 sovereignty and those parts of the dispute which do
25 not, and that it has and will exercise jurisdiction

1 over those latter parts; and second, the *Mauritius v.*
2 *United Kingdom* case did raise a question about which
3 state had sovereignty over land territory, while the
4 present case very obviously does not raise such
5 a question.

6 In such circumstances, the *Chagos* award offers
7 clearly authority for this Tribunal to rule that it
8 has jurisdiction over the claims of the Philippines,
9 and it should exercise that jurisdiction.

10 The Tribunal has also asked in that question
11 whether any issues of sovereignty that may be
12 implicated in this case can be considered "minor
13 issue[s] of territorial sovereignty" that fall within
14 the Arbitral Tribunal's "ancillary" jurisdiction. The
15 answer to that question is no, because this Tribunal
16 is not called upon to determine which of two or more
17 competing claims to sovereignty over land territory is
18 to prevail. The issue of ancillary jurisdiction over
19 "territorial sovereignty" simply does not arise at all
20 in this case, and so this Tribunal is not called upon
21 to express any view as to that matter.

22 In this regard, it is important to emphasise the
23 point that, under the Convention, a low-tide elevation
24 is not to be treated as land territory, and the
25 determination of its status is a matter that plainly
26 falls within the jurisdiction of an Annex VII tribunal

1 under Article 13 of the 1982 Convention.

2 With respect to Question 6, my statement last week
3 that we believe there are no issues of jurisdiction or
4 admissibility which should be deferred was intended to
5 reflect our view that all such issues can be addressed
6 and resolved at this stage of the proceedings. By its
7 nature, it was a summary remark that did not repeat my
8 colleagues' more detailed reasoning.

9 The portion of Professor Oxman's statement with
10 respect to the issue of the law enforcement activities
11 exception in Article 298(1) (b) that is quoted in
12 Question 6 relates only to a decision as to whether
13 there is an island claimed by China that generates
14 an EEZ in the area in question. Immediately following
15 this remark, Professor Oxman continued:

16 "That said, it is unnecessary to decide whether
17 there is an island claimed by China that generates
18 an EEZ in the area in question in order to decide
19 whether Article 297(3) excludes jurisdiction. There
20 are other reasons for deciding that jurisdiction is
21 not excluded ..."³³

22 None of the alternative reasons identified by
23 Professor Oxman requires deferral for consideration
24 with the merits. And similarly, his comments on each

³³ Tr., 8 July 2015, pp. 79:18 to 79:23 (Presentation of Prof. Bernard H. Oxman) (reference is to uncorrected version).

1 of the specific submissions identified in the question
2 include reasons for concluding that the law
3 enforcement exception does not apply to that
4 submission, and so do not require deferral for
5 consideration with the merits.³⁴

6 Mr Reichler stated that the question of whether
7 China's alleged "historic rights" are in conflict with
8 the Convention, or are preserved by them, necessarily
9 falls within the Tribunal's jurisdiction, and we say
10 that this could not be any clearer. His reference to
11 the possibility -- the possibility -- of joining the
12 issue to the merits related only to the possibility
13 that the Tribunal might harbour doubts regarding the
14 nature and extent of China's "historic rights" claims,
15 and in that context he stated the view of the
16 Philippines that there is cause for none. If,
17 however, the Tribunal considers otherwise on any
18 particular issue, then of course the approach taken by
19 the *Arctic Sunrise* tribunal commends itself as
20 an obvious approach.

21 Thus, while neither Professor Oxman nor
22 Mr Reichler excluded the possibility that the Tribunal
23 would decide that resolution of an issue of
24 jurisdiction or admissibility did not possess

³⁴ Tr., 8 July 2015, pp. 85:8 to 85:13; 86:2 to 86:7; 87:10 to 87:15; 90:24 to 92:4 and 92:14-20 (Presentation of Prof. Bernard H. Oxman) (reference is to uncorrected version).

1 an exclusively preliminary character, both indicated
2 the view of the Philippines that the issues they
3 addressed could and should be resolved at this stage
4 of the proceedings. And we are grateful to the
5 Tribunal and welcome the opportunity to clarify. We
6 do see -- as I have made clear, I hope -- no
7 inconsistency amongst the various views expressed.

8 Mr President, members of the Tribunal, that
9 concludes my responses to Questions 2 and 6. Unless
10 there are any other questions from the Tribunal,
11 I would invite you to invite Mr Martin to the bar.
12 I thank you for your very kind attention.

13 **THE PRESIDENT:** Thank you very much, Professor Sands.
14 I think we have questions, but they are not related to
15 this, and therefore I will ask Mr Martin to come on.
16 Thank you.

17 **(10.50 am)**
18 **Second-round submissions by MR MARTIN**

19 **MR MARTIN:** Mr President, members of the Tribunal, good
20 morning. I will address two of the Tribunal's
21 questions: first, the question Judge Wolfrum asked me
22 last Wednesday concerning estoppel; second, Question 4
23 relating to the Treaty of Amity and Cooperation.
24 Professor Boyle will deal with that question insofar
25 as it relates to the Convention on Biological

1 Diversity.

2 Last week Judge Wolfrum asked about estoppel, and
3 whether or not the DOC and later references to it
4 might estop the Philippines from bringing a case
5 before an arbitral tribunal. The answer is no. There
6 is nothing in the DOC, taken alone or together with
7 later references to it, that gives rise to any
8 estoppel.

9 The requirements for estoppel in international law
10 were recently summarised in the *Chagos Islands Award*.
11 They are: (1) a state has made clear and consistent
12 representations; (2) such representations were made
13 through an authorised agent; (3) the state invoking
14 estoppel relied on such representations to act to its
15 detriment; and (4) such reliance was legitimate.³⁵
16 These requirements are not met here.

17 Estoppel is a doctrine that is frequently invoked
18 in international proceedings, but rarely succeeds.
19 There are very few cases in the modern age where
20 estoppel has been found by the majority. These

³⁵ *Mauritius v UK*, ¶ 435. Hearing on Jurisdiction, Annex LA-225. The principle as it exists in international law was well summarized by Judge Spender in *Temple of Preah Vihear*: "the principle [of estoppel] operates to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State, either expressly or impliedly, on which representation the other State was, in the circumstances, entitled to rely and in fact did rely, and as a result the other State has been prejudiced or the State making it has secured some benefit or advantage for itself. (*Cambodia v Thailand*, Judgment of 15 June 1962, Dissenting Opinion of Judge Spender, ICJ Reports 1962, p. 101 at pp. 143-44)".

1 include the *Temple* case and the *Chagos* case. Many
2 other cases rejecting estoppel are cited in
3 footnote.³⁶ The reasons pleas of estoppel so rarely
4 succeed is because the requirements are strict. This
5 is especially true in the case of procedural estoppel,
6 as would be the case here, since the issue relates to
7 the Tribunal's jurisdiction.³⁷

8 The first requirement for estoppel is, as I said,
9 that a state has made clear and unequivocal
10 representations. In his question, Judge Wolfrum noted
11 that:

12 "... there are many principles referred to in the
13 dock which are matters of at least customary
14 international law, such as the obligation to settle
15 disputes by peaceful means ..."

16 It is true that in paragraph 1 of the DOC, the
17 signatory states reaffirm their commitment to

³⁶ Cases where pleas for estoppel was refused include e.g.: *Aerial Incident of 10 August 1999 (Pakistan v India)*, Jurisdiction of the Court, Judgment, ICJ Reports 2000, p. 12, ¶45; *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, Judgment, ICJ Reports 1998, p. 275, ¶57. MP, Vol. XI, Annex LA-25; *Serbian Loans*, Judgment No. 14, 1929, PCIJ, Series A, No. 20, p. 39; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, ICJ Reports 2008, p. 12 at p. 81. MP, Vol. XI, Annex LA-31; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)*, Judgment of 12 October 1984, ICJ Reports 1984, p. 246, ¶145. MP, Vol. XI, Annex LA-12; *Barcelona Traction ((Belgium v Spain) Preliminary Objections*, Judgment, ICJ Reports 1964, p. 3 at p. 25; *Legality of Use of Force (Serbia and Montenegro v Canada) (Preliminary Objections)*, ¶42; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene*, Judgment, ICJ Reports 1990, p. 92, ¶63; *Bangladesh/Myanmar*, ¶125. MP, Vol. XI, Annex LA-43.

³⁷ *ARA Libertad* (ITLOS Case No. 20), Joint Separate Opinion of Judge Wolfrum and Judge Cot, ¶ 67.

1 "universally recognized principles of international
2 law which shall serve as the basic norms governing
3 state-to-state relations". In paragraph 4, they also
4 undertake "to resolve their territorial and
5 jurisdictional disputes by peaceful means".

6 But none of these statements constitutes
7 a representation by the Philippines that it would not
8 bring a case before a court or tribunal under Part XV
9 of UNCLOS. There is nothing in "universally
10 recognized principles of international law" that
11 prevents a state from having recourse to compulsory
12 dispute settlement. To the contrary, Article 33(1) of
13 the UN Charter makes clear that judicial settlement
14 and arbitration form part of the very fabric of
15 international law on the acceptable means of dispute
16 settlement. And, there is no requirement to negotiate
17 in advance. As Gautier has written:

18 "In general international law, there is no rule
19 prescribing parties to negotiate before submitting
20 a dispute to an international court."³⁸

21 Other authorities to the same effect are cited in
22 footnote.³⁹

³⁸ Ph. Gautier, *Settlement of Disputes*, in The IMLI Manual on International Maritime Law: Volume I: The Law of the Sea edited by D. Attard, M. Fitzmaurice, N. Gutierrez (2014), p. 541.

³⁹ See *Cameroon v Nigeria* (Preliminary Objections), ¶56. MP, Vol. XI, Annex LA-25; *Georgia v Russia* (joint dissent) (stating that "the Court has never conditioned its jurisdiction on the existence of prior negotiations between the parties, except on the basis of an express provision to that effect.").

1 The DOC's mere invocation of universally
2 recognised principles of international law therefore
3 cannot be construed as a representation that the
4 Philippines would not bring compulsory proceedings
5 against China.

6 Nor can the reference to negotiations and
7 consultations in paragraph 4 of the DOC operate to
8 create an estoppel. There is absolutely no
9 contradiction between an undertaking to negotiate, on
10 the one hand, and bringing compulsory proceedings, on
11 the other. The ICJ made this perfectly clear in its
12 decision in the *Aegean Sea* case, in which it stated:

13 "Negotiation and judicial settlement are
14 enumerated together in Article 33 of the Charter of
15 the United Nations as means for the peaceful
16 settlement of disputes. The jurisprudence of the
17 Court provides various examples of cases in which
18 negotiations and recourse to judicial settlement have
19 been pursued *pari passu* ... [T]he fact that
20 negotiations are being actively pursued during
21 [ongoing] proceedings is not, legally, any obstacle to
22 the exercise by the Court of its judicial function."⁴⁰

23 The *Cameroon v Nigeria* case is particularly
24 instructive, and particularly on point. In that case,
25 Nigeria raised a jurisdictional objection, arguing

⁴⁰ *Aegean Sea Continental Shelf*, ¶ 29. MP, Vol. XI, Annex LA-9.

1 that:

2 ".... for a period of at least 24 years prior to
3 the filing of the Application the Parties have in
4 their regular dealings accepted a duty to settle all
5 boundary questions through the existing bilateral
6 machinery."⁴¹

7 According to Nigeria, an agreement was thus
8 reached to resort exclusively to such machinery, and
9 Cameroon was estopped from having recourse to the
10 court.⁴² The court rejected Nigeria's pleas without
11 difficulty, finding that:

12 ".... an estoppel would only arise if by its acts
13 or declarations Cameroon had consistently made it
14 fully clear that it had agreed to settle the boundary
15 dispute submitted to the Court by bilateral avenues
16 alone."⁴³

17 That condition was not met because:

18 "Cameroon did not attribute an exclusive character
19 to the negotiations conducted with Nigeria ..."⁴⁴

20 It is exactly the same here, Mr President. Last
21 Wednesday, I showed that the 2002 DOC did not purport

⁴¹ *Cameroon v Nigeria* (Preliminary Objections), ¶ 48. MP, Vol. XI, Annex LA-25

⁴² *Ibid.*

⁴³ *Ibid.*, ¶ 57.

⁴⁴ *Ibid.* See also *Aerial Incident of 10 August 1999 (Pakistan v India)*, Jurisdiction of the Court, Judgment, ICJ Reports 2000, p. 12, ¶45.

1 to exclude further procedures within the meaning of
2 Article 281. Paragraph 4 of the DOC does not
3 "attribute an exclusive character to" the
4 negotiations. Indeed, it does quite the opposite,
5 since it specifically contemplates recourse to
6 compulsory proceedings. It expressly states:

7 "The Parties concerned undertake to resolve their
8 territorial and jurisdictional disputes by peaceful
9 means ... through friendly consultations and
10 negotiations ... in accordance with ... recognized
11 principles of international law, including the 1982
12 UN Convention on the Law of the Sea."

13 The reference to the 1982 Convention includes all
14 aspects of the Convention, including Part XV.

15 Exactly the same point comes through in
16 paragraph 1 of the DOC, in which:

17 "The parties reaffirm their commitment to the
18 purposes and principles of the Charter of the
19 United Nations [and] the 1982 UN Convention on the Law
20 of the Sea ..."

21 Both the UN Charter and the 1982 Convention
22 explicitly recognise arbitration as an appropriate
23 means of peaceful dispute settlement.

24 The DOC therefore does not constitute
25 a representation that the Philippines would never have
26 recourse to third-party dispute settlement, much less

1 a clear and unequivocal one.⁴⁵

2 Nor can the two statements by the Philippines that
3 China cites in its 2014 Position Paper that postdate
4 the DOC somehow convert it into the clear and
5 unequivocal representation that estoppel requires.

6 China refers to two statements, one in 2004 and
7 one in 2011. In 2004, China and the Philippines
8 issued a joint press statement in which:

9 "They agreed that the early and vigorous
10 implementation of the 2002 ASEAN-China Declaration on
11 the Conduct of the Parties in the South China Sea will
12 pave the way for the transformation of the South China
13 Sea into an area of cooperation."

14 And in 2011, the two sides issued a joint
15 statement in which they "reaffirmed their commitment
16 to respect and abide by" the DOC.

17 Insofar as both statements merely reaffirm the
18 DOC, they cannot give that instrument more weight than
19 the drafters intended. Neither statement can
20 plausibly be read as a commitment, much less a clear
21 and unequivocal one, not to have recourse to
22 third-party settlement.

23 The circumstances here contrast sharply with those
24 present in the recent *Libertad* case before ITLOS on

⁴⁵ See *Payment of Various Serbian Loans Issued in France*, Judgment of 12 July 1929, PCIJ Series A, Nos. 20/21, p. 5 at p. 39 (declining to find an estoppel in the absence of a "clear and unequivocal representation").

1 provisional measures. There, two judges of the
2 tribunal -- who shall remain nameless -- found, on the
3 particular facts of that case, that Ghana was estopped
4 from contesting the Tribunal's jurisdiction in light
5 of its unequivocal assurances to Argentina that the
6 Libertad, a military vessel, could dock at Tema
7 Harbour in Ghana.⁴⁶ They identified what they
8 considered to be a clear, unequivocal, unqualified
9 official representation. By contrast, there is
10 nothing remotely equivalent present in this case.

11 Also plainly not satisfied is the requirement that
12 the state in whose favour estoppel is invoked was
13 induced by the other state's representations to act to
14 its detriment. There is no indication in China's
15 Position Paper, in the record before the Tribunal or
16 anywhere else, that China changed its behaviour based
17 on the Philippines' (non-existent) representations.

18 *Cameroon v Nigeria* is again instructive. In
19 denying Nigeria's estoppel argument, the court
20 determined that Nigeria did not show that it had
21 changed its position to its detriment, or that it had
22 suffered any prejudice in the sense that it was
23 precluded from taking some action it might have done

⁴⁶ *ARA Libertad* (ITLOS Case No. 20), Joint Separate Opinion of Judge Wolfrum and Judge Cot, para. 67.

1 in reliance on Cameroon's representations.⁴⁷ It is
2 just the same here. There can be no estoppel.

3 Likewise, the requirement that any reliance on the
4 part of the state claiming estoppel was legitimate is
5 also not met. Also I explained a few moments ago,
6 China could not legitimately have relied on the DOC as
7 a basis on which to conclude that the Philippines
8 would not institute compulsory proceedings. There is
9 nothing in the text that attributes an exclusive
10 character to negotiations. To the contrary, the
11 references to general international law, to the UN
12 Charter and to the 1982 Convention all make clear that
13 the negotiations referred to were to be conducted
14 against the backdrop of the possibility of compulsory
15 proceedings. Thus, even if China had relied on the
16 DOC -- and there is absolutely no indication that it
17 did -- that reliance would not have been reasonable.

18 If estoppel has any application in this case,
19 Mr President, it is against China, not the
20 Philippines. As I noted last Wednesday, China itself
21 has repeatedly admitted that the DOC is "a political
22 document ... instead of a legal document to solve
23 specific disputes".⁴⁸ China cannot be allowed to blow

⁴⁷ *Cameroon v Nigeria* (Preliminary Objections), ¶ 57. MP, Vol. XI, Annex LA-25

⁴⁸ Ministry of Foreign Affairs of the People's Republic of China, "Spokesperson's Comment on China-Asean Consultation" (30 Aug. 2000), p.1. SWSP, Vol. VIII, Annex 491.

1 hot and cold, and now take exactly the opposite
2 view.⁴⁹ To allow it to do so would constitute
3 manifest inequity. *Allegans contraria non audiendus*
4 *est.*

5 With that, Mr President, I come to the first part
6 of Question 4, concerning the High Council provisions
7 of the Treaty of Amity and Cooperation. In its
8 question, the Tribunal asked:

9 ".... whether, in light of the compulsory nature of
10 the High Council Provisions of the Treaty of Amity and
11 Cooperation ... it was necessary for the Philippines
12 to attempt the resolution of the Parties' dispute
13 through [those mechanisms] before having recourse to
14 the dispute resolution provisions of the Convention."

15 With great respect, Mr President, the Philippines
16 does not agree with the premise that appears to
17 underlie the question. We do not consider the High
18 Council provisions of the Treaty of Amity and
19 Cooperation to be compulsory. We say this on the
20 basis of the plain text.

21 In its question, the Tribunal highlighted the
22 portion of Article 15 that provides:

⁴⁹ See also Memo of China's Position Regarding the Latest Draft Code of Conduct by the ASEAN (December 18, 1999), SWSP, Vol. VIII, Annex 471 (stating: "The draft of the Chinese side (early last October 1999) is positive and constructive. It covers comparatively an extensive sphere and general content, providing a guideline for developing relations and cooperation among countries in the region of South China Sea in the new century. This is in accordance with the consensus that the Code should be a political document of principle.").

1 ".... the High Council shall take cognizance of the
2 dispute ... and shall recommend to the parties in
3 dispute appropriate means of settlement ..."

4 Whether or not this creates a binding obligation
5 to refer matters to the High Council cannot, however,
6 be determined by reference to Article 15 alone. The
7 provision must be read in the context of the treaty as
8 a whole, and in particular the two paragraphs that
9 come immediately after it.

10 The first is Article 16. And here, Mr President,
11 I must apologise. The copy of the treaty we submitted
12 as an annex, and included in your folders last week,
13 contained a typographical error in Article 16. In the
14 copy we previously gave you, the first six words of
15 Article 16 read:

16 "The foregoing provision [singular] of this
17 Chapter..."

18 In fact, the actual text, which we have taken off
19 the UN website and included in your folders today at
20 tab 4.7, reads:

21 "The foregoing provisions ..."

22 The word is in the plural, not singular:

23 "The foregoing provisions of this Chapter shall
24 not apply to a dispute unless all the parties to the
25 dispute agree to their application to that dispute."

26 Article 16's reference to "this Chapter" is to

1 Chapter IV of the treaty, which is entitled "Pacific
2 Settlement of Disputes", and includes Articles 13
3 through 17. When Article 16 says that the foregoing
4 provisions of Chapter IV do not apply "unless all the
5 parties to the dispute agree", it expressly includes
6 the High Council provisions of Article 15.

7 To put it simply, Article 16 makes it clear that
8 Article 15 is not compulsory. More than this,
9 Article 16 makes clear that Article 15 cannot apply to
10 this case, because the parties to the dispute, the
11 Philippines and China, have never agreed to submit the
12 dispute, or any part of it, to the High Council.

13 Article 17 further confirms the point. It
14 provides:

15 "Nothing in this Treaty shall preclude recourse to
16 the modes of peaceful settlement contained in
17 Article 33(1) of the Charter of the United Nations."

18 As I have already said -- and the Tribunal needs
19 no reminding in any event -- arbitration is among the
20 means of peaceful settlement Article 33(1) specifies.
21 No priority is given to any particular means. This
22 can only mean that nothing in the Treaty of Amity
23 prevents recourse to arbitration at any time, without
24 precondition.

25 State practice further confirms the point. At
26 least two compulsory proceedings have been brought

1 under UNCLOS by states parties to the Treaty of Amity:
2 the *Land Reclamation* case and *Bangladesh v India*. In
3 neither case did the respondent state raise any
4 objection based on the treaty, nor was there any prior
5 resort to the High Council, which has never even been
6 constituted in any event. This reflects the shared
7 understanding that the High Council provisions are not
8 compulsory.

9 Because the High Council provisions of the Treaty
10 of Amity are not compulsory, and because Article 16
11 makes them inapplicable to these proceedings in any
12 event, it cannot have been necessary for the
13 Philippines to attempt the resolution of these
14 disputes through the High Council before having
15 recourse to the dispute settlement provisions of
16 UNCLOS. There was no need for it to do so, and it did
17 not do so.

18 Mr President, distinguished members of the
19 Tribunal, thank you very much for your kind attention
20 both today and last week. It has been a great
21 pleasure to be part of these proceedings with you and
22 your extraordinarily able colleagues from the
23 Registry. May I ask that you call Professor Boyle to
24 the podium?

25 **THE PRESIDENT:** Thank you very much, Mr Martin. As you
26 suggested, we will call Professor Boyle.

1 **(11.09 am)**

2 **Second-round submissions by PROFESSOR BOYLE**

3 **PROFESSOR BOYLE:** Mr President, members of the Tribunal,
4 good morning. I have been asked to respond to
5 Question 4 insofar as it refers to the Convention on
6 Biological Diversity and to the requirement to
7 conciliate under Article 27(4) of that Convention.

8 The Philippines has made no attempt to invoke
9 Article 27(4) because it has no dispute with China
10 concerning compliance with the Convention on
11 Biological Diversity, and no part of its case in the
12 present proceedings will involve any question of
13 compliance with the Convention on Biological
14 Diversity.

15 Given its clear and unambiguous wording,
16 Article 27(4) can only be relevant to a dispute
17 concerning interpretation and application of the
18 Convention on Biological Diversity. For simplicity
19 I will refer to that as the "CBD". It is clearly not
20 relevant to a dispute that exclusively concerns
21 interpretation and application of UNCLOS. And the
22 only dispute which the Philippines' submissions 11 and
23 12 require the Tribunal to decide is a dispute
24 concerning UNCLOS Part XII and related provisions.
25 That alone eliminates Article 27(4) of the CBD as

1 a potential obstacle to jurisdiction under Article 281
2 of UNCLOS.

3 So whether Article 281 requires prior resort to
4 conciliation under the CBD before invoking Part XV of
5 UNCLOS is, for that reason, strictly academic in these
6 proceedings. For it to have that effect, it would
7 have to be shown that Article 27(4) constitutes
8 an agreement by the parties "to seek settlement of the
9 dispute by a peaceful means of their own choice."

10 As Judge Wolfrum observed in the *Mox Plant*
11 (*Provisional Measures*) case:

12 ".... such agreement among the parties to
13 a conflict cannot be presumed. An intention to
14 entrust the settlement of disputes concerning the
15 interpretation and application of the Convention to
16 other institutions must be expressed explicitly in
17 respective agreements."⁵⁰

18 The "dispute" to which Article 281 makes reference
19 can only be a dispute concerning interpretation and
20 application of UNCLOS; it cannot be a dispute
21 concerning some other treaty. That is the ordinary
22 and unambiguous meaning of the words used, and neither
23 the context of Article 281 nor the object and purpose
24 of Part XV would suggest otherwise. The purpose of

⁵⁰ *Separate Opinion, Mox Plant Case (Ireland v United Kingdom), Provisional Measures, ITLOS No 10, Order of 3 December 2001.*

1 Part XV is, of course, to ensure that UNCLOS disputes
2 can be settled by some agreed procedure, and the
3 purpose of Articles 281 and 282 within that broader
4 framework is to ensure that, where the parties have
5 agreed on another form or another procedure, that
6 agreement prevails.⁵¹

7 That purpose is not served by treating an UNCLOS
8 dispute as if it were a dispute under some other
9 treaty. As I said last Wednesday, the fact that a few
10 substantive provisions of the CBD may be relevant to
11 the interpretation of Articles 192 and 194 does not
12 convert this case into a dispute about interpretation
13 and application of the CBD. If you were to hold
14 otherwise, that would deter parties to an UNCLOS
15 dispute from referring to any other treaty, or from
16 invoking Article 31(3)(c) of the Vienna Convention on
17 Treaties, or indeed Article 293 of UNCLOS.

18 So our conclusion, therefore, is that
19 Article 27(4) of the CBD does not bar UNCLOS Part XV
20 proceedings for an alleged violation of Articles 192
21 and 194, even if the Convention on Biological
22 Diversity is relevant to the interpretation of those
23 articles.

24 Moreover, biodiversity is only one small part of

⁵¹ Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge, 2005), p.2, references cited at nn. 5 and 6, and p.34ff.

1 our case under submissions 11 and 12. So even if
2 there were some overlap between our UNCLOS case and
3 a hypothetical CBD dispute, that should not bring
4 Article 281 into play. Treaty obligations and treaty
5 dispute settlement options may overlap, but that does
6 not mean that they merge or lose their separate
7 identity.

8 A comparable question arose, as you will be well
9 award, in the *Mox Plant* case at the provisional
10 measures stage,⁵² albeit that it was concerned with
11 Article 282 rather than Article 281. You will find
12 the text of paragraphs 48 to 52 from the ITLOS order
13 of 3rd December 2001 at tab 4.8 in your folder. But
14 if I may summarise what the ITLOS held, they concluded
15 that:

16 "... the dispute settlement procedures under the
17 OSPAR Convention, the EC Treaty and the Euratom Treaty
18 deal with disputes concerning the interpretation and
19 application of those agreements, and not with disputes
20 arising under the Convention."

21 They went on to say that although those three
22 treaties "contain rights or obligations similar to or
23 identical with the rights and obligations set out in
24 the Convention, the rights and obligations under those

⁵² *Mox Plant Case (Ireland v United Kingdom) (Provisional Measures)* ITLOS No 10, Order of 3 December 2001, paras. 48-52. MP, Vol. XI, Annex LA-39.

1 agreements have a separate existence from those under
2 the Convention". The ITLOS then concluded:

3 ".... since the dispute before the Annex VII
4 arbitral tribunal concerns the interpretation or
5 application of the Convention and no other agreement,
6 only the dispute settlement procedures under the
7 Convention are relevant to that dispute."

8 On the same point, I would also draw your
9 attention to the separate opinion in that case of
10 Judge Wolfrum, the relevant excerpts of which are at
11 tab 4.9 in your folder.⁵³

12 Mr President, members of the Tribunal, these
13 passages from the ITLOS decision in *Mox Plant* are
14 equally applicable to the present dispute. In our
15 view, you should apply the same reasoning to the
16 Convention on Biological Diversity and its
17 relationship to Article 281 of the Convention. There
18 is no reason to differentiate Article 281 from
19 Article 282 in this respect. The dispute settlement
20 procedures of the CBD deal with disputes concerning
21 interpretation and application of that treaty.
22 A dispute under UNCLOS does not become a dispute under
23 the CBD merely because there is some overlap between
24 the two. Parallel regimes remain parallel regimes.
25 You have a case to decide under UNCLOS. You do not

⁵³ Judge Wolfrum, pp. 1-2.

1 have a case to decide under the CBD.

2 We acknowledge that the reasoning of the ITLOS in
3 *Mox Plant* is not consistent with the reasoning of the
4 Annex VII Tribunal in the *Southern Bluefin Tuna* case,
5 but, as you will recall, the Philippines regards the
6 latter case as wrongly decided on this issue, and it
7 has invited you not to follow the reasoning of the
8 arbitral tribunal. It is not possible for both of
9 these cases to be correct. We believe you should
10 prefer the reasoning adopted by the ITLOS, because it
11 respects the characterisation of the dispute adopted
12 by the party bringing the case, and because it better
13 reflects the need for a coherent integration of
14 different treaty regimes with each other.

15 Mr President, unless I can be of any further
16 assistance to the Tribunal, that concludes the
17 Philippines' answer to Question 4. It has been
18 a great pleasure to appear before you, and I would now
19 ask you to invite Professor Oxman to the podium.

20 **THE PRESIDENT:** Thank you very much indeed,

21 Professor Boyle. I will call now Professor Oxman,
22 please.

23 **(11.19 am)**

24 **Second-round submissions by PROFESSOR OXMAN**

25 **PROFESSOR OXMAN:** Good morning, Mr President, members of

1 the Tribunal. Mr President, Mr Reichler indicated
2 this morning that we expect to complete our remarks by
3 noon. With your permission, sir, I will now continue.
4 Thank you very much, sir.

5 Mr President, members of the Tribunal, Question 5
6 requests the Philippines to elaborate on a number of
7 points regarding the military activities exception set
8 forth in Article 298(1) (b). The question is posed in
9 the context of the activities at Mischief Reef that
10 are the object of submission 12. In this regard
11 I note that the points raised are not relevant to the
12 references to Mischief Reef in submissions 4 and 5,
13 because those submissions do not in any way address
14 activities; they are concerned with the status of
15 features and their entitlements, if any.

16 In its Supplemental Written Submission in response
17 to the questions posed by the Tribunal on
18 16th December 2014, the Philippines indicated that it
19 had presented in its Memorial all the information
20 available to it concerning the construction and
21 operation of the Chinese facilities at Mischief Reef.

22 As described in the Memorial, the Philippines
23 first confronted China over reports of Chinese
24 construction activities at the feature in 1995.

25 China responded by asserting that the structures
26 were not military in nature, but rather intended as

1 a shelter for its fishermen. Three years later, when
2 China substantially expanded its initial structures,
3 it again underscored "the civilian nature of the
4 facilities". In 1999, China added a helipad, wharves
5 and additional communications equipment. It
6 maintained the previous position it had taken, stating
7 that, "The new facilities are meant for civilian use
8 and not for military purposes". Documents regarding
9 the foregoing communications can be found at tab 2.17
10 of your folders.

11 China's approach is confirmed by the Sailing
12 Directions for Meiji Reef (the Chinese name for
13 Mischief Reef) that were published in 2011 by the
14 Navigation Guarantee Department of the Chinese Navy
15 Headquarters,⁵⁴ and that were submitted as part of the
16 Philippines' Supplemental Written Submission in
17 March 2014. They state:

18 "To develop the distant-sea fishing industry, in
19 1994, China fishing authorities constructed stilt
20 houses and navigational aid facilities on this reef,
21 set up administrative offices, and created the
22 conditions for distant-sea operations, fishing vessel
23 safety and production, supply, wind protection, and
24 mooring."

25 This can be found at tab 4.10 of your folders.

⁵⁴ SWSP, Vol. II, p. 127.

1 We have inserted pictures of Mischief Reef taken
2 in 2003, 2012 and 2013 at tab 4.11 of your folders.
3 These pictures appeared in the Memorial. They show
4 Mischief Reef and the structures that were constructed
5 there prior to the time of the Notification and
6 Statement of Claim and the filing of the Memorial.

7 The first slide⁵⁵ is from a satellite image taken
8 in 2012. It shows two small structures, one that is
9 labelled "Site #1" and the other that is labelled
10 "Site #2".

11 The second slide⁵⁶ is an aerial photograph of those
12 two structures that was taken in 2003. The small
13 octagonal structures at the bottom right appear to be
14 the "stilt houses" referred to in the Chinese Sailing
15 Directions that I read.

16 The third slide⁵⁷ contains a 2013 picture of one of
17 the larger structures.

18 The fourth slide⁵⁸ contains a 2013 picture of the
19 other structure, as well as the small octagonal
20 structures.

21 The facilities shown on the photographs could have
22 been used for a variety of non-military purposes,

⁵⁵ MP Figure 5.9.

⁵⁶ MP Figure 6.8.

⁵⁷ MP Figure 6.9.

⁵⁸ MP Figure 6.10.

1 including law enforcement. The Philippines had no
2 basis at the time it commenced these arbitration
3 proceedings in January 2013, or at the time it filed
4 its Memorial in March 2014, for contradicting China's
5 assurances that the purposes of the facilities were
6 non-military.

7 Accordingly, the evidence in the record of this
8 case indicates that at the time that the dispute was
9 submitted to this Tribunal, China steadfastly and
10 consistently maintained the position that its
11 facilities at Mischief Reef were civilian, not
12 military. The record also indicates that in its
13 official communications with China on the matter, the
14 Philippine Government repeatedly requested
15 explanations and contested the lawfulness of the
16 appropriation and construction activities, but it did
17 not contest China's assurances regarding their
18 purpose. Nor has it done so in its pleadings in this
19 case. Submission 12 questions only the consistency of
20 China's appropriation and construction activities with
21 its obligations under the Law of the Sea Convention.

22 China's statement of 16th June 2015, to which the
23 Tribunal's question adverts, does not refer
24 specifically to Mischief Reef. We have, however,
25 placed photographs of China's dredging activities at
26 Mischief Reef -- photographs that were retrieved from

1 publicly available websites -- in your folders at
2 tab 4.12. They trace efforts to create an artificial
3 island at Mischief Reef this year.

4 The first photograph was taken in February of this
5 year. It shows the dredging of sand from the seabed
6 for use as landfill to create an artificial island not
7 far from Site #2. A dredger is located at the lower
8 right of the picture, and the landfill is just above
9 the centre.

10 The second photograph shows the progress that was
11 made by mid-March of this year, and you can see the
12 area in Site #2 at the bottom and the other areas now
13 at the upper left.

14 The third photograph shows further progress in
15 mid-April of this year.

16 The last photograph was taken from the
17 International Space Station on 9th June of this year.
18 It shows an artificial island created by landfill
19 covering the entire northern half of the reef. The
20 large number of dredgers and other vessels used to
21 achieve this can be seen in the picture -- in my case
22 at least if it's enlarged.

23 These photographs suggest a substantial expansion
24 of activity. Its nature and purpose, however, is
25 unknown. But dredging and landfill are not inherently
26 military in nature, and China does not suggest

1 otherwise.

2 Question 5 asks us to consider whether an activity
3 that is military in nature can be deprived of that
4 characterisation for purposes of Article 298(1) (b) by
5 virtue of the activity concurrently serving other
6 purposes. The answer is yes. The express exception
7 in the article is for military activities, not
8 mixed-use activities. For example, substantial mixed
9 use of a dock by both naval and other vessels might
10 well mean that operation of the dock would not come
11 within the exception for military activities. Only
12 military activities of the naval vessels would remain
13 within the exception.

14 Even if China's references to reefs are regarded
15 as including Mischief Reef, its statement of
16 16th June 2015 accordingly confirms that the nature
17 and purpose of China's activities at Mischief Reef are
18 not military for purposes of Article 298(1) (b). Even
19 if the newly constructed facilities (that is,
20 facilities that were constructed after the filing of
21 the Memorial) are said to be "satisfying the need of
22 necessary military defense", China itself declares
23 that the "main purpose of [its construction]
24 activities is to meet various civilian demands", which
25 it then proceeds to identify. Those construction
26 activities are plainly non-military; they do not fall

1 within the exception of Article 298(1) (b).

2 The Philippines informed the Tribunal of the
3 appearance of Chinese military personnel at Mischief
4 Reef. That fact does not, as such, change the
5 characterisation of the facilities' nature or purpose.
6 The mere presence of military personnel does not
7 determine the nature and purpose of the underlying
8 activity. For example, the presence of a military
9 garrison and weapons guarding the entrance to
10 a harbour does not render the operation of the harbour
11 a military activity, or turn the harbour into
12 a military facility. Neither does the harbour's
13 strategic location or importance.

14 Moreover, any change in the nature or purpose of
15 the facility would not be relevant to the Philippines'
16 claims regarding China's acts of appropriation and
17 construction at the time that they occurred,
18 commencing in the mid-1990s and continuing through the
19 filing of the Statement of Claim in this case. Those
20 acts are, in our view, unlawful because they were
21 carried out without the requisite consent, located as
22 they are within the limits of the Philippine exclusive
23 economic zone and continental shelf. The question of
24 whether their purpose might be military is pertinent
25 only to an objection to the jurisdiction of this
26 Tribunal on grounds that the nature and purpose of

1 China's activities at Mischief Reef is military --
2 an assertion that China has not made either in regard
3 to these proceedings or in its other statements
4 regarding its activities at the Mischief Reef.

5 Once the applicant has established that there is
6 a dispute concerning the interpretation or application
7 of the Convention that has been submitted to the
8 appropriate tribunal under Section 2 of Part XV, the
9 respondent bears the burden of asserting an optional
10 objection to jurisdiction under Article 298 and
11 proving the facts necessary to sustain that objection.
12 This is especially true where the issue concerns the
13 nature and purpose of the respondent's own activities,
14 a matter with respect to which the respondent is in
15 the best position to garner the evidence.

16 In the *Arctic Sunrise* case, the Law of the Sea
17 Tribunal stated that:

18 "... the Netherlands should not be put at
19 a disadvantage because of the non-appearance of the
20 Russian Federation in the proceedings."⁵⁹

21 The same principle clearly applies in this case as
22 well. China has not appeared. It has submitted
23 a Position Paper that does not raise the exception for
24 military activities. Quite to the contrary, it has
25 consistently claimed at all relevant times that its

⁵⁹ *Arctic Sunrise*, ITLOS, Order, 2013, para. 56. MP, Vol. XI, Annex LA-45.

1 activities at Mischief Reef are not military in
2 character. In these circumstances, Mr President, we
3 see no basis for declining jurisdiction on the grounds
4 that those activities are military.

5 The decision by a state to refrain from
6 characterising its activities as military should be
7 accorded significant weight. As I observed last week,
8 the decision whether to characterise activities as
9 military is not made lightly, and the implications of
10 characterising activities as military can transcend
11 the Law of the Sea Convention. It is difficult for
12 others to determine what those implications, and their
13 potential effects, might be.

14 There would appear to be little, if any, risk that
15 a state would characterise its activities as civilian
16 rather than military for self-serving purposes under
17 Article 298. For example, even if China had asserted
18 a jurisdictional objection to submission 12 based on
19 the military activities exception, it would have
20 encountered difficulty proving it in light of its own
21 statements to the contrary. Indeed, China's repeated
22 assurances to the Philippines regarding the civilian
23 nature of its activities at Mischief Reef are so clear
24 and specific that the Tribunal would be justified in
25 concluding that China is procedurally estopped from
26 now asserting that those activities are military;

1 an assertion which, of course, China has not made.

2 Even if China, in its statement of 16th June 2015,
3 had made a specific assertion indicating that the
4 purpose of its facilities at Mischief Reef is now
5 military -- which it has not done -- such an assertion
6 would have no effect on the jurisdiction of this
7 Tribunal. The nature of the activity complained of is
8 determined as of the time that activity occurred. The
9 respondent cannot thereafter unilaterally change the
10 jurisdictional facts regarding its past conduct,
11 especially two and a half years after the proceedings
12 were commenced.

13 In sum, Mr President, the facts are that China's
14 acts of appropriation and construction began in 1995,
15 were expanded in 1999, and continued between then and
16 2012, and that China repeatedly assured the
17 Philippines at the time that their purpose was
18 civilian, not military. There is accordingly no
19 basis, in our view, for concluding that the activities
20 of which the Philippines complains in submission 12
21 are military activities.

22 Mr President, that concludes my remarks on
23 Question 5. I thank you and the other members of the
24 Tribunal for your kind attention. Mr President, I ask
25 that you invite Mr Reichler to the podium to respond
26 to your question this morning regarding the timing of

1 our responses to the two questions posed by
2 Judge Wolfrum following Mr Reichler's presentation.

3 Thank you, sir.

4 **THE PRESIDENT:** Thank you very much, Professor Oxman.

5 I will now ask Mr Reichler, please, to come forward.

6 **MR REICHLER:** Mr President, as promised, I address you
7 now in response to your question about the timing of
8 our answers to the questions put by Judge Wolfrum at
9 the end of my presentation this morning.

10 We would propose to answer the question about
11 China's characterisation of the Spratly features as
12 "islands", in its note of 6th July 2015 and elsewhere,
13 orally, immediately after the break. However, we
14 would respectfully reserve the right, if we may, to
15 amplify our answers after we have had a chance to more
16 thoroughly review the written pleadings and annexes.
17 We would supply any such amplification of our answer
18 to that question on or before 23rd July, as you have
19 instructed.

20 In regard to Judge Wolfrum's question pertaining
21 to the treaties invoked by China in its note of
22 6th July 2015, and their relevance, if any, to the
23 legal disputes in this case, we would propose to
24 provide our answer to that question in writing on or
25 before 23rd July.

26 Mr President, unless I can be of further

1 assistance to you or your colleagues on the Tribunal,
2 I would propose that this might be an excellent time
3 for the break. And perhaps, Mr President, in order to
4 allow a sufficient time to prepare and review the
5 answer we will give you orally after the break, you
6 might kindly consider instructing us to return at
7 12.15.

8 Thank you, Mr President.

9 **THE PRESIDENT:** Thank you very much. I think other
10 members of the Tribunal have questions, which I think
11 it would be useful to put them now, before we break.
12 So I will ask Professor Soons to ask his question
13 first.

14 **Tribunal questions**

15 **PROFESSOR SOONS:** My question relates to the potential
16 effects of the Declaration of Conduct on the issues of
17 jurisdiction and admissibility. This issue was
18 addressed by Mr Martin on Wednesday, and again this
19 morning when he dealt with particularly the estoppel
20 issue, but I am not asking for further clarification
21 on estoppel now.

22 On Wednesday, Mr Martin stated:

23 "In its Memorial, the Philippines argued that even
24 if the [Declaration of Conduct] were a binding
25 agreement within the meaning of Article 281

1 (*quod non*), and even if it purported to exclude
2 further procedures (also *quod non*), China could still
3 not rely on it to avoid jurisdiction due to its own
4 conduct in flagrant disregard of the undertakings it
5 made in the DOC."⁶⁰

6 Mr Martin then mentioned:

7 ".... a general principle of law that 'a party
8 which ... does not fulfil its own obligations cannot
9 be recognized as retaining the rights which it claims
10 to derive from the relationship'."⁶¹

11 The clean hands doctrine.

12 As the Philippines is aware, the Chinese
13 Government has repeatedly referred to alleged
14 Philippine activities on some of the islands occupied
15 by it: construction activities, reclamation,
16 et cetera. This morning we saw an example during your
17 speech, Mr Reichler, when you referred to the document
18 that is in Annex 63 of the Memorial, I think, on
19 page 2, "Second Thomas Shoal":

20 "China reiterates its concern over the
21 Philippines' alleged building of new structures in the
22 Second Thomas Shoal. This, for them, is a violation
23 of the DOC ..."

⁶⁰ Tr., 8 July 2015, p. 17:4-10 (Presentation of Mr. Larry Martin)
(reference is to uncorrected version).

⁶¹ Tr., 8 July 2015, p. 20:2-6 (Presentation of Mr. Larry Martin)
(reference is to uncorrected version).

1 Could the Philippines elaborate on any
2 implications of such observations made by China with
3 respect to the Philippines' compliance with its
4 obligations in the South China Sea? Thank you.

5 **MR REICHLER:** Thank you very much, Professor Soons.

6 I will, of course, consult with our Agent and
7 colleagues in regard to the timing of our answer to
8 that question.

9 **THE PRESIDENT:** Thank you very much. Judge Pawlak also
10 has some questions.

11 **JUDGE PAWLAK:** Thank you, Mr President. Mr President,
12 I have some questions to Professor Sands and to
13 Mr Martin for clarification and a further
14 understanding of their views as presented last week.

15 To Professor Sands: Professor, you argued in your
16 interesting statements last week that the question of
17 which state has sovereignty over the insular feature
18 is "entirely irrelevant" to the characterisation of
19 an insular feature or the entitlements it may have,
20 and that:

21 "... such matters ... fall to be determined by
22 this Tribunal exclusively by interpretation and
23 application of Articles 13 and 121, and other relevant
24 provisions of the Convention."⁶²

⁶² Tr., 8 July 2015, p. 3:14-62 (Presentation by Mr. Philippe Sands QC) (reference is to uncorrected version).

1 Could you agree, sir, that among those "other
2 relevant provisions" that should be taken into
3 consideration is the preamble of the Convention,
4 including the paragraph in which the states parties to
5 the Convention "recogniz[e] the desirability of
6 establishing through this Convention, with due regard
7 for the sovereignty of all States" -- I repeat: "with
8 due regard for the sovereignty of all States" --
9 a legal order for the seas and oceans"?

10 And the second question: could you also indicate
11 any relevant jurisprudence or practice of states when
12 entitlements to maritime features were decided
13 separately from sovereignty over them?

14 They are the questions to Professor Sands, and
15 I have questions to Mr Martin.

16 Mr Martin, would you agree that Article 283
17 requires the parties to a dispute not only to exchange
18 views on some aspects of their dispute, but also
19 imposes on the parties the duty to exchange views
20 expressly -- I underline "expressly" -- for the
21 purpose of settling the dispute "by negotiation or
22 other peaceful means"?

23 In light of this understanding, could you comment
24 on some discrepancies between your statement made last
25 week that "the Philippines has more than met its
26 obligation to exchange of views with China under

1 Article 283",⁶³ with the following information that is
2 set out in the Chinese Position Paper of
3 7th December 2014:

4 ".... the exchanges of views between China and the
5 Philippines in relation to their disputes have so
6 far..."

7 I underline "so far":

8 ".... pertained to responding to incidents at sea
9 in the disputed areas and promoting measures to
10 prevent conflicts, reduce frictions, maintain
11 stability in the region, and promote measures of
12 cooperation."⁶⁴

13 As you see, there is nothing in this quotation on
14 entitlements for maritime features. China asserts
15 also that:

16 ".... the two countries have never engaged in
17 negotiations with regard to subject-matter of the
18 arbitration."⁶⁵

19 Thank you, Mr President.

20 **MR REICHLER:** Thank you, Judge Pawlak. Thank you very
21 much.

22 **THE PRESIDENT:** Finally, I think we have a question from
23 Judge Cot.

⁶³ Tr., 8 July 2015, p. 7:19-21 (Presentation by Mr. Larry Martin)
(reference is to uncorrected version)..

⁶⁴ Chinese Position Paper, para. 47.

⁶⁵ Chinese Position Paper, para. 45.

1 **JUDGE COT:** Thank you, Mr President.

2 Mr President, my question is for Professor Sands.

3 Professor Sands answered the Tribunal's question on
4 vertical datum. In my opinion, he didn't really
5 answer it. He answered by examining the question of
6 the Chinese charts, but not vertical datum as such.

7 We all know that vertical datum is an essential
8 element in qualification of low-tide elevations. At
9 least the International Court of Justice did so in the
10 *Nicaragua v Colombia* case, and the parties actually
11 spent quite some time on identifying the relevant
12 vertical datum, and they were opposed to the methods
13 of identifying these vertical datum.

14 I would like to have some answer to the question
15 of the vertical datum here, and more specifically:
16 what is the Philippines' position on vertical datum in
17 the South China Sea? What is the definition the
18 Philippines eventually gives of this vertical datum?
19 Is it the same as that of other states; of China,
20 naturally, but also of third-party states who have
21 their own definitions of vertical datum, if I have
22 read correctly the pleadings?

23 So I would like to have some elements on this, to
24 answer fully the question put forward to you by the
25 Tribunal. Thank you.

26 **MR REICHLER:** Thank you, Judge Cot. Mr President, does

1 that comprise the entirety of the questions?

2 **THE PRESIDENT:** Yes. For the moment, yes.

3 **MR REICHLER:** Thank you.

4 As I indicated, we certainly would be prepared to
5 give an oral answer to one of Judge Wolfrum's
6 questions put earlier this morning after the break,
7 again subject to our right to amplify in writing after
8 we have had a chance to thoroughly review the record
9 by the deadline that you have given us of 23rd July.

10 I doubt we are going to have a three- or four-hour
11 break this morning. Given what I would assume to be
12 the very reasonable amount of time for the break that
13 you are undoubtedly likely to order, I think it is
14 most likely that we would want to answer all of the
15 very serious and excellent questions that we have
16 received at this time in writing on or before
17 23rd July. However, we will take a look at the
18 provisional transcript during the break and see if it
19 is possible for us to provide any further answers, or
20 partial answers, at the end of the break.

21 I don't mean to appear to be flattering anybody,
22 but I think it is quite obvious these are all very
23 serious and well-thought-out and important questions,
24 and they merit a serious and well-thought-out response
25 by the Philippines. Therefore, I think it is unlikely
26 that we would want -- or that I think the Tribunal

1 would want us -- to provide answers after 15 or
2 20 minutes, but rather that we take the time that
3 serious questions like this merit.

4 By characterising these questions as serious and
5 excellent and well-thought-out, I do not mean to
6 suggest that I think we have any difficulty providing
7 persuasive answers to all of them. In fact, I am
8 quite sure we can, and that we will be able to
9 persuade you in our answers to these questions -- as
10 we have said throughout these hearings -- that there
11 is not a shred of doubt that this Tribunal has
12 jurisdiction over each and every one of our
13 submissions, that legal disputes exist in respect of
14 each and every one of our submissions, and that these
15 legal disputes arise under and call for interpretation
16 and application of the 1982 Convention, therefore
17 leaving no doubt that all of our submissions are
18 within your jurisdiction and entirely admissible.

19 But we will return after the break and at least
20 provide you with an oral response to one of
21 Judge Wolfrum's questions.

22 Thank you, Mr President.

23 **THE PRESIDENT:** Thank you very much. I think we will
24 certainly want to hear whatever you are able to give
25 at this time. If not, naturally we will expect that
26 you will provide the amplification that you mentioned,

not only to Judge Wolfrum's question but to the other questions, if necessary, at the time that we have set.

MR REICHLER: Yes. We will do our best, sir.

THE PRESIDENT: Yes. Thank you very much indeed. So we will close now, and come back at 12.30.

MR REICHLER: Thank you, Mr President.

(11.57 am)

(A short break)

(12.37 pm)

10 **THE PRESIDENT:** So, Mr Reichler, I notice that you have
11 been chosen as the spokesperson.

12 **MR REICHLER:** Yes. They actually asked me to do it in
13 Chinese, but I had to decline that mission! So I will
14 use my inartful English, and do the best I can.

(12.38 pm)

Response to Tribunal questions by MR REICHLER

24 The questions, as I indicated before the break,
25 are very serious ones, they are certainly relevant,

1 important ones; and as such, they merit our deepest
2 thought and analysis prior to giving you our
3 definitive responses. And so I say, before I venture
4 into giving you the answers that we are able to
5 provide today in a half-hour, that we would
6 respectfully provide written amplifications to all of
7 these questions, as you have indicated, on or before
8 23rd July.

9 With that said, I will provide our answers,
10 insofar as we have been able to develop them in the
11 time allotted, to the questions that have been posed
12 this morning. I will take them in the order in which
13 they were given, if that is acceptable.

14 Judge Wolfrum referred to China's diplomatic note
15 of 6th July 2015 and particularly to the words "South
16 China Sea Islands". I think this brings up a very
17 critical point. China repeatedly refers to the South
18 China Sea features, particularly Scarborough Shoal and
19 all of the Spratly features, as "islands". It refers
20 to all of the Spratly features in particular as the
21 "Nansha Islands".

22 Now, in its diplomatic exchanges, both *notes*
23 *verbales* and its oral *démarches*, and its official
24 statements, it has claimed that every feature in the
25 Nansha Islands is an island, and that the Nansha
26 Islands are a unified whole. China even refers to

1 submerged features like Reed Bank as an island, as
2 part of the Nansha Islands; and it refers to low-tide
3 elevations, including Mischief Reef, as islands. And
4 it claims a 200-mile entitlement for the Nansha
5 Islands as a whole, including all of its features;
6 and, as we showed this morning, it claims a 200-mile
7 EEZ for Scarborough Shoal. All of these statements of
8 China's position are included at tab 4.1 today, as
9 part of the sources of China's positions that
10 demonstrate legal disputes in regard to these matters.

11 So there can be no question that there are legal
12 disputes about all of the features that the
13 Philippines has included in its submissions:
14 Scarborough Shoal and all eight Spratly features.
15 China regards them as islands; the Philippines regards
16 all of these features, as I have said, either as
17 low-tide elevations, entitled to no maritime zone, or
18 at least not even to a 12-mile territorial sea, and/or
19 rocks, which are entitled to no more than a 12-mile
20 territorial sea.

21 But there is another dispute here that recalls
22 Judge Cot's question, to which I will come in the
23 course of the answers I am presenting at this time.
24 There is a dispute between China's characterisation of
25 all of these features in its diplomatic notes and
26 *démarches* and its official statements, and China's own

charts. China's own charts are in agreement with the Philippines, or vice versa. China's own nautical charts call a low-tide elevation every feature that the Philippines calls a low-tide elevation, and they call a submerged feature those areas that the Philippines regards as submerged.

This does not negate the existence of a legal dispute between the Philippines and China because, of course, China has adopted policy positions which are in direct contradiction with its own charts, and it has sought to enforce those positions, as I have pointed out repeatedly and as is demonstrated throughout the record. You will, of course, find all of the sources in our list of sources. We will amplify on this response prior to 23rd July.

Professor Soons brought up the DOC and specifically asked if the Philippines has, in some way, been in violation of it. I hope you will bear with me as I insist that the DOC, in the first place, is not a legally binding instrument. I need not elaborate; you are very well aware of our position and the justification for it. And in any event, it envisions -- rather than precludes -- recourse to arbitration per Article 33 of the UN Charter or per Part XV of UNCLOS, and in fact it specifically refers to the dispute resolution mechanisms of these

1 instruments.

2 Now, in regard to the issue of unclean hands, as
3 Professor Soons pointed out, it is the Philippines
4 that has invoked the doctrine of unclean hands as
5 a form of estoppel against China asserting the DOC.
6 Again, we don't believe the Tribunal needs to reach
7 that issue because the issue is ended with your
8 finding -- if you agree with us -- that the DOC is not
9 a legally binding agreement in the first place, or it
10 is not preclusive of recourse to the dispute
11 resolution mechanisms of UNCLOS.

12 But on the subject of unclean hands, well, you,
13 Mr President, members of the Tribunal, can determine
14 whether their hands are unclean; but as
15 Professor Oxman showed you, they are covered with sand
16 and other dredged materials. In regard to the
17 Philippines, the bald and unsupported statements by
18 China to the effect that the Philippines is somehow in
19 violation of the political commitments it made under
20 the DOC are exactly that: bald, unsupported and,
21 I might say, completely false.

22 The Philippine vessel BRP Sierra Madre became
23 stuck on Second Thomas Shoal in the late 1990s, and
24 its rusted hulk, manned by a handful of Philippine
25 personnel, has been there ever since. In other words,
26 its presence at Second Thomas Shoal predates by

1 several years the DOC. The DOC, as you will recall,
2 calls for maintaining the status quo; it doesn't call
3 for any state to withdraw its personnel or equipment
4 from any feature at which they were present prior to
5 its signature.

6 In regard to the other features in the Spratlys
7 that are occupied by Philippine personnel, again,
8 China has presented nothing, either publicly or in
9 diplomatic exchanges or in its Position Paper, to
10 support the idea that the Philippines has engaged in
11 any enhancement of its presence or facilities
12 whatsoever. In fact, the contrary is true: the
13 Philippines has not enhanced its presence, its
14 facilities, its personnel, at any feature in the
15 Spratlys under Philippine occupation at any time since
16 prior to the DOC.

17 In fact, as you will recall from our Memorial, the
18 largest feature in the Spratlys occupied by the
19 Philippines -- which is known as Thitu or Pagasa --
20 has a runway. That runway is full of potholes. The
21 Philippines has even refrained from filling in the
22 potholes in the runway in order to avoid any
23 suggestion that it is enhancing its presence at any of
24 these features. I might say that I think that is
25 a bit extreme: I think filling in potholes in a runway
26 for the purposes of safety would not violate any

1 political commitments the Philippines has made. But
2 this gives you a good idea of how rigorous the
3 Philippines has been in avoiding violation of any of
4 the political commitments it undertook in the DOC.

5 Again, our response to Professor Soons' question
6 will be amplified within the deadline established by
7 the Tribunal.

8 Judge Pawlak asked two questions of
9 Professor Sands and one of Mr Martin. Again, we will
10 answer briefly today, in part because you have asked
11 for jurisprudence, and we want to take care to be
12 thorough and accurate in citing the relevant
13 jurisprudence.

14 But we will answer briefly today simply by stating
15 that in relation to the question of whether the
16 preamble of the 1982 Convention is to be treated as
17 one of the other relevant provisions to which
18 Professor Sands referred alongside Articles 13 and
19 121, the Tribunal will have noted what he said last
20 week: that the preambular language of a treaty is
21 generally not treated as having the same status as the
22 operative parts of a Convention. The preamble thus is
23 not to be treated as one of the "other relevant
24 provisions" that Professor Sands had in mind.

25 But in any event -- as you will see elaborated in
26 the response we will provide in writing -- the

1 position of the Philippines in this case is entirely
2 consistent with the preambular language in regard to
3 respect for the sovereignty of the states parties.
4 There is absolutely no contradiction between the
5 Philippines' position in this case in regard to your
6 jurisdiction, and that particular preambular language.

7 As regards Judge Pawlak's second question, as you
8 know, the Philippines' position is that the character
9 of a maritime feature -- whether it is a low-tide
10 elevation, a rock or a full island -- is distinct
11 from, and can be decided separately from, the question
12 of which state may be sovereign over it. That is
13 decided separately. Professor Sands did cite some of
14 the relevant jurisprudence, particularly in his
15 presentation last week. A fuller and more detailed
16 response on the applicable jurisprudence and practice
17 under it will be provided within the time limits
18 established by the Tribunal.

19 Judge Pawlak directed a question in regard to
20 Mr Martin's presentation concerning the obligation to
21 exchange views. Once again, we will answer fully in
22 writing as of 23rd July. But for present purposes, we
23 would note that China's assertion in its Position
24 Paper of December 2014 that the parties' exchanges of
25 views to date have been limited to "preventing
26 incidents at sea, promoting measures to reduce

1 conflicts" is not correct. In fact, it is shamefully
2 false. Shamefully false.

3 As we showed in our Memorial, and as Mr Martin
4 demonstrated last week -- and this is fully supported
5 in all the footnote references in his speech -- the
6 parties have exchanged views repeatedly over many
7 years on the substance of their disputes, as we have
8 presented them in this case. In fact, the Honourable
9 Secretary of Foreign Affairs gave you a recitation of
10 a good many -- but certainly not all -- of these
11 exchanges of views between the Philippines and China
12 regarding the maritime disputes that are at the centre
13 of this case; indeed, all of them.

14 It is our position -- again, as we will further
15 elaborate, but to be perfectly clear -- that, contrary
16 to China's assertion in its Position Paper, the
17 parties have exchanged views repeatedly, and over many
18 years, on all aspects of the maritime disputes that
19 have been placed before you in these proceedings.
20 Unlike China, we will not support this statement with
21 empty words. We have supported it amply in the
22 record, and we will call your attention to all of that
23 evidence in our written response.

24 Finally, I come to the question posed by
25 Judge Cot. We acknowledge or understand that
26 Judge Cot does not consider the response that we have

1 provided to the Tribunal's question on vertical datum
2 to be fully adequate, and we do apologise for that.
3 This is, of course, a technical question, and one that
4 we will devote considerable attention to in the coming
5 week, in consultation with the technical experts who
6 have been retained by the Philippines.

7 Judge Cot -- who was then ad hoc Judge Cot -- will
8 remember very well Dr Robert Smith, who was the
9 technical advisor to Colombia. He is one of the
10 technical advisors to the Philippines, and we are
11 quite confident that he will be able to assist us in
12 getting it right the second time round; that we will
13 be able to answer this question to your and the
14 Tribunal's satisfaction before 23rd July. I will say
15 this, if I may, as a placeholder, because we are
16 attempting to answer all of the questions, at least in
17 part, in advance of our written responses.

18 As I indicated previously in response to
19 Judge Wolfrum's question on islands, the Chinese
20 charts that you have been given -- these are all
21 official Chinese charts -- indicate the status, the
22 character, the nature of these various features --
23 that is, whether they are below water, whether they
24 are low-tide elevations or whether they are above
25 water at high tide -- and the Philippines considers
26 that all of the characterisations of these features in

1 the Chinese charts -- whether as submerged low-tide
2 elevations or above water at high tide -- are
3 accurate. The Philippines accepts them, and indeed
4 has incorporated them into its own presentations in
5 this case. There are no discrepancies there.

6 There is no factual dispute between the
7 Philippines and China, at least in regard to China's
8 charts, regarding the nature/status/character of these
9 features under Article 13 or under Article 121(3).
10 The dispute exists because China, in its diplomatic
11 statements, *démarches*, notes, official statements, and
12 in its enforcement actions in the South China Sea, in
13 fact has adopted positions that are diametrically
14 opposed to those reflected in its own charts.

15 Mr President, I trust that you will regard this as
16 a good faith effort on the part of the Philippines, in
17 the short time allotted, to give the most direct
18 and -- hopefully -- helpful answers to the Tribunal to
19 the various questions that have been posed this
20 morning. We will, of course, revert to you within ten
21 days with our fuller written responses.

22 Unless I can be of any further assistance to the
23 Tribunal in regard to these matters, I would
24 respectfully request that you call the Honourable
25 Solicitor General and Agent of the Philippines to the
26 podium for closing remarks.

1 **THE PRESIDENT:** Thank you very much indeed, Mr Reichler.

2 I think that what you have said is in line with what
3 the Tribunal expected. So we will expect to receive
4 the amplifications that you have promised, and I do
5 not think that we need any further explanation from
6 you.

7 So I will now ask the Agent to come to the podium
8 and give the submissions. Thank you.

9 **(1.01 pm)**

10 **Closing remarks by SOLICITOR GENERAL HILBAY**

11 **SOLICITOR GENERAL HILBAY:** Mr President, distinguished
12 members of the Tribunal, I am honoured to conclude the
13 oral presentation submitted by the Philippines on
14 jurisdiction, which, if I may add, have been so
15 diligently prepared and presented by our exceptional
16 legal team. I know I speak for all of us, including
17 the Honourable Secretary of Foreign Affairs, when
18 I say that it has been such a remarkable privilege to
19 prepare the Philippines before you in these
20 proceedings.

21 On behalf of the Filipino people and our
22 government, I convey to you, Mr President, and to each
23 esteemed member of this eminent Tribunal, our deep
24 gratitude. We also thank the excellent staff of the
25 Permanent Court of Arbitration, the stenographers, and

1 the entire team that has made these hearings run so
2 smoothly.

3 Despite the challenges that China's non-appearance
4 has posed, you have demonstrated your evident
5 determination to "satisfy [yourselves] ... that [you]
6 ha[ve] jurisdiction over the dispute" we have brought
7 before you. Your astute questions, raised both before
8 and during these hearings, have made quite clear that
9 the Tribunal has left no stone unturned. We hope that
10 we have properly and sufficiently addressed all the
11 points that you have raised, and demonstrated why
12 there is manifestly no bar to the Tribunal exercising
13 jurisdiction in this case.

14 Before concluding, I do wish to acknowledge and
15 extend our appreciation to the observers from
16 Indonesia, Japan, Malaysia, Thailand and Vietnam. By
17 their presence in this Great Hall of Justice, they
18 have demonstrated the vital importance of these issues
19 to the region, and indeed to the 1982 Convention and
20 to the international rule of law. This case is not
21 just between the Philippines and China; it is about
22 everyone who has coasts facing on to the South China
23 Sea. It is about respect for the integrity of the
24 Convention itself. I thank you, distinguished ladies
25 and gentlemen.

26 Mr President, members of the Tribunal, I thank you

1 once again for your kind attention, which we know was
2 made more difficult by what Professor Philippe Sands
3 described as the "tropical heat" we all experienced in
4 this Great Hall, especially on the first day! We are
5 certain that you will deliberate carefully, taking
6 account of all our arguments, and that your expertise
7 and wisdom will bring us to the correct and just
8 result in accordance with international law.

9 Mr President, members of the Tribunal, I will now
10 present the Philippines' final submissions. The
11 Philippines respectfully asks the Tribunal to adjudge
12 and declare that the claims brought by the
13 Philippines, as reflected in its submissions recorded
14 at pages 271 and 272 of our Memorial, are entirely
15 within its jurisdiction and are fully admissible.

16 Mr President, I thank you and the members of the
17 Tribunal for your courtesy and attention, today and
18 throughout these hearings. Have a pleasant afternoon.

19 **THE PRESIDENT:** Thank you very much indeed,
20 Mr Solicitor General.

21 **(1.05 pm)**
22 **Closing remarks by THE PRESIDENT**

23 **THE PRESIDENT:** I shall shortly be declaring this hearing
24 closed, but before I do so, allow me to make a few
25 remarks about the next steps in the proceedings.

1 As I mentioned in my opening remarks on Tuesday,
2 the Arbitral Tribunal has been conscious of its duty
3 under Article 5 of Annex VII of the Convention to
4 "assure each party a full opportunity to be heard and
5 to present its case". I noted that the Arbitral
6 Tribunal has kept China updated on all developments in
7 the arbitration. The Registry has been delivering to
8 the Chinese Embassy copies of the daily transcripts of
9 this hearing, a copy of the judge's folder handed up
10 by the Philippines, and the new materials received
11 from the Philippines over the weekend.

12 The parties will have until next Monday -- that is
13 20th July 2015 -- to review and submit corrections to
14 the transcripts. The Registry will be in contact with
15 the parties regarding the format and method of
16 submitting such corrections. With respect to requests
17 by the observers for copies of the reviewed and
18 corrected transcripts, as well as other documents in
19 connection with the case, the Registry will be in
20 contact with the observers in due course. The
21 Philippines will have until next Thursday -- that is
22 23rd July 2015 -- to submit written answers to any of
23 the arbitrators' questions, or to amplify their oral
24 answers in writing.

25 Article 25(2) of the Rules of Procedure deals with
26 a party's failure to appear or to make submissions.

1 It sets forth a procedure, already implemented, for
2 the Arbitral Tribunal to invite written arguments from
3 the appearing party, and for the non-appearing party
4 to comment on those further written arguments.

5 Article 25(2) additionally provides that:

6 "The Arbitral Tribunal may take whatever other
7 steps it may consider necessary, within the scope of
8 its powers under the Convention, its Annex VII, and
9 these Rules, to afford to each of the Parties a full
10 opportunity to present its case."

11 In line with this, the Arbitral Tribunal has
12 decided to provide China with the opportunity to
13 comment in writing by Monday, 17th August 2015 on
14 anything that was said during this hearing on
15 jurisdiction and admissibility, and the subsequent
16 written answers from the Philippines which are to be
17 filed on 23rd July 2015.

18 As the Arbitral Tribunal now enters its
19 deliberations, and as noted in Procedural Order No. 4,
20 the Arbitral Tribunal is conscious of its duty to
21 conduct proceedings in order "to avoid unnecessary
22 delay and expense and to provide a fair and efficient
23 process". The Arbitral Tribunal will endeavour to
24 issue its decision on issues of jurisdiction and
25 admissibility that it determines to be appropriate as
26 soon as possible.

1 As further noted in Procedural Order No. 4, if the
2 Arbitral Tribunal determines that there are
3 jurisdictional objections or issues of admissibility
4 that do not possess an exclusively preliminary
5 character, then, in accordance with Article 20(3) of
6 the Rules of Procedure, such matters will be reserved
7 for consideration and decision at a later stage of the
8 proceedings.

9 Finally, on behalf of the Arbitral Tribunal,
10 I wish to thank Mr Trevor McGowan, the court reporter,
11 for his excellent services. I also express our thanks
12 to the Registrar, Ms Judith Levine, her colleague
13 Mr Garth Schofield, and their team from the Permanent
14 Court of Arbitration, for their services to the
15 Tribunal in all matters. I also wish to thank the
16 observer delegations for their presence. Finally,
17 I wish to thank -- and heartily to thank -- the
18 distinguished representatives of the Philippines for
19 their helpful oral submissions, and for their written
20 submissions that they have promised us today.

21 I thank you very much, and I now declare this
22 hearing closed and wish everyone a safe return journey
23 home. Thank you very much indeed.

24 **(1.11 pm)**

25 **(The hearing concluded)**