

In the matter of an arbitration
under Annex VII of 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 2

Wednesday, 25th November 2015

Hearing on the Merits and Remaining Issues
of 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, LAWRENCE H MARTIN and ANDREW B
LOEWENSTEIN, of Foley Hoag LLP, PROFESSOR BERNARD H
OXMAN, of University of Miami, PROFESSOR PHILIPPE SANDS
QC, of Matrix Chambers, and PROFESSOR ALAN E 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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INDEX

First-round submissions by MR LOEWENSTEIN (continued)..... 1

 Tribunal questions 13

First-round submissions by PROFESSOR SANDS..... 17

 Tribunal questions 55

First-round submissions by MR MARTIN..... 57

First-round submissions by MR REICHLER..... 96

First-round submissions by PROFESSOR SANDS..... 131

First-round submissions by MR MARTIN..... 162

 Tribunal questions 188

First-round submissions by MR LOEWENSTEIN..... 189

1
2 **Wednesday, 25th November 2015**

3 **(10.01 am)**

4 **THE PRESIDENT:** You can now continue. But just to inform
5 everybody, we will go until to 1.10 pm in the morning,
6 in order to accommodate the Philippines' request for
7 a schedule adjustment. Thank you. Please go ahead.

8 **MR LOEWENSTEIN:** Thank you very much, Mr President.
9 **First-round submissions by MR LOEWENSTEIN (continued)**

10 **MR LOEWENSTEIN:** Mr President, members of the Tribunal,
11 good morning. I will begin by answering the question
12 posed by Judge Pawlak, who asked about the reference
13 to China "taking over" the South China Sea after the
14 defeat of Japan during the Second World War.

15 China did not effectuate a takeover of the South
16 China Sea. The idea of a takeover was aspirational.
17 The phrase appears in the plan set out in the
18 1st October 1946 internal Republic of China memorandum
19 that I reviewed yesterday, and which you can find at
20 tab 1.24. This is the same document that noted the
21 need to rename the South China Sea's features because
22 of the lack of Chinese names. The plan was never
23 implemented. The Chinese authorities of that era
24 never took or exercised control over the South China
25 Sea. In the Spratlys, they did no more than send

1 a military occupation force to Itu Aba.

2 In any event, the Republic of China's aspirations
3 lacked any legal or historical basis. As I discussed
4 yesterday, China never claimed any South China Sea
5 islands until the 1930s. Nor was China's claim to the
6 islands legitimised by any subsequent legal
7 instrument. To the contrary, although Japan renounced
8 its claims to the Spratlys and Paracels in the 1951
9 Treaty of San Francisco, the treaty did not specify
10 which state would have sovereignty over those
11 features.¹ The 1952 treaty between China and Japan
12 did not purport to give sovereignty over the features
13 to China either; it merely acknowledged the
14 renunciation of Japan's claims.²

15 In any event, China's belated claim to the islands
16 of the South China Sea did not include a claim to the
17 waters beyond their territorial seas. In 1948, China
18 published a map that had previously been circulated
19 internally in 1947.³ This map depicted the South
20 China Sea's insular features as being enclosed by

¹ Treaty of Peace with Japan ("Treaty of San Francisco"), 136 UNTS 45 (8 Sept. 1951), entered into force 28 Apr. 1952, Art. 2(f). MP, Vol. XI, Annex LA-72.

² Treaty of Peace between the Republic of China and Japan ("Treaty of Taipei"), 138 UNTS 3 (28 Apr. 1952), entered into force 5 Aug. 1952, Art. 2. MP, Vol. XI, Annex LA-73.

³ SWSP, Vol. II, para. A14.22.

1 an eleven-dash line.⁴ The evidence shows that this
2 map was intended only to depict China's claim to
3 sovereignty over islands, not to depict any special
4 rights to the enclosed waters. This is apparent from
5 the title of the map itself, which bears the caption
6 "Map Showing the Location of the Various Islands in
7 the South China Sea".⁵

8 As you can see on the screen, the dashed line is
9 intended to distinguish the islands claimed by China
10 from the islands that China did not claim, such as
11 Borneo, Palawan and Luzon. As Judge Gao wrote in his
12 2013 article:

13 "... the eleven dash line was presumably to
14 reaffirm and reiterate China's sovereignty over the
15 island groups in the South China Sea."⁶

16 That interpretation has been confirmed by
17 President Ma,⁷ who said on 1st September 2014 that the
18 1947 map was a "map of the islands of [the] South
19 China Sea and their locations".⁸ He was clear that

⁴ Boundary Department of the Ministry of Interior, *Nanhai shu dao wei shi tu [Map Showing The Location of The Various Islands in The South Sea]* (China, 1947). SWSP, Vol. VI, Annex M20. Available at Tab 1.26.

⁵ Boundary Department of the Ministry of Interior, *Nanhai shu dao wei shi tu [Map Showing The Location of The Various Islands in The South Sea]* (China, 1947). SWSP, Vol. VI, Annex M20.

⁶ 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), p. 103. MP, Vol. X, Annex 307.

⁷ SWSP, para. 15.3.

⁸ Transcript of Office of the President of the Taiwan Authority of China, President Ma Ying-jeou, "Excerpts from Remarks at Opening Ceremony for the

1 the map did not claim rights to the waters beyond
2 China's entitlement to a territorial sea.

3 President Ma correctly observed that at the time
4 China published the map, the "concept of [the]
5 territorial sea was 3 nautical miles", and that "[i]f
6 there was smuggling", the Chinese authorities "would
7 try to capture the smugglers at twice the distance or
8 at most 12 nautical miles".⁹ There was, as
9 President Ma put it, "*no claim at all on other*
10 *so-called sea regions*".¹⁰

11 The official summary of President Ma's remarks
12 underscored this critical point:

13 "... when the [Republic of China] issued the
14 *Location Map of the South China Sea Islands* in 1947,
15 aside from the concept of territorial waters, no other
16 concepts regarding maritime zones existed, *nor had any*
17 *claims been made*."¹¹

Exhibition of Historical Archives on the Southern Territories of the Republic of China" (1 Sept. 2014), p. 4, available at <http://www.president.gov.tw/Default.aspx?tabid=131&itemid=33125&rmid=514> (accessed 27 Jan. 2015). SWSP, Vol. VIII, Annex 495.

⁹ *Id.*, p. 7.

¹⁰ *Id.* (emphasis added).

¹¹ See Office of the President of the Taiwan Authority of China, "President Ma attends opening ceremonies of Exhibition of Historical Archives on the Southern Territories of the Republic of China" (1 Sept. 2014), available at <http://english.president.gov.tw/Default.aspx?tabid=491&itemid=33215&rmid=2355> (accessed 25 Feb. 2015), p. 3 (emphasis added). SWSP, Vol. VIII, Annex 496. See also Office of the President of the Taiwan Authority of China, "The President Attended the Opening Ceremony for 'Republic of China Southern Historical Exhibition'" (1 Sept. 2014), p. 4 (emphasis added). SWSP, Vol. VIII, Annex 492. (Stating that, when Taiwan published its "Map of South China Sea Islands and Their Locations" in 1947, "other than the territorial waters, there were no other claims and concepts of maritime space".)

1 In the decades following the publication of the
2 first map to depict a dashed line in the South China
3 Sea, China made no attempt to claim historic rights in
4 the waters enclosed by that line. To the contrary,
5 China adhered to the rules of general international
6 law, which at that time restricted a coastal state's
7 maritime rights to a 3-mile belt of territorial sea.

8 China confirmed that position during the UNCLOS II
9 negotiations in 1960. Here is what the representative
10 of the Republic of China said:

11 "For many decades now, my Government has abided by
12 the three-mile limit, because we felt that the rule
13 was the most widely accepted by the major users of the
14 sea, and had served satisfactorily the shipping and
15 commercial interests of the world. We held to this
16 position at the Hague Conference of 1930. We are
17 still of the opinion that unless there is a formal
18 agreement to the contrary, the three-mile rule cannot
19 be considered as obsolete or entirely discarded."¹²

20 For its part, the People's Republic of China
21 asserted no claim to historic rights beyond the
22 territorial sea either. But before proceeding
23 further, now is an opportune time to answer
24 Judge Wolfrum's question about whether one can

¹² UN Conference on the Law of the Sea II, Plenary, *18th Meeting* (6 Apr. 1960), UN Doc. A/CONF.19/9 (1962), p. 343. Supplemental Documents, Vol. VI, Annex LA-293.

1 distinguish between, on the one hand, the Republic of
2 China or Taiwan, and the People's Republic of China,
3 on the other.

4 The Philippines considers that there is only one
5 China, and that it is the People's Republic of China.
6 Since 1949, only the People's Republic of China has
7 been able to speak for or on behalf of China. The
8 actions of predecessor governments prior to 1949,
9 including the Republic of China, which is now based in
10 Taiwan, are, of course, attributable to China as well.

11 The actions of the Taiwanese authorities since
12 1949 are not *per se* attributable to the PRC. In fact,
13 there are many issues on which the authorities in
14 Beijing and Taipei, including in regard to
15 entitlements of features or sovereign rights over the
16 waters of the South China Sea. For example, the PRC
17 has never contended that any individual feature in the
18 Spratlys is capable of sustaining human habitation or
19 economic life, as Mr Reichler will discuss later this
20 morning. Accordingly, in the Philippines' view, it
21 cannot be assumed that the actions or views of the
22 Taiwanese authorities are on behalf of, or
23 attributable to, China.

24 With that in mind, I note that on 4th September
25 1958, the PRC claimed a 12-mile territorial sea in
26 regard not only to its mainland and Taiwan and Hainan

1 islands, but also various features in the South China
2 Sea, including Pratas and the Paracels and Spratlys.¹³
3 You can find a copy at tab 1.27.

4 China mentioned no putative rights beyond the belt
5 of territorial sea. To the contrary, Article 1 stated
6 that the maritime features in the South China Sea are
7 separated from the "mainland" by the "high seas"; in
8 other words, beyond the territorial sea were waters
9 outside the national jurisdiction of any coastal
10 state.

11 On the screen is a sketch map we have prepared
12 that depicts China's claim to maritime rights as set
13 out in its 1958 declaration.¹⁴ To be sure, the
14 Philippines does not accept China's assertion of
15 sovereignty over the sea's insular features. But for
16 present purposes, the important point is that the
17 entire area coloured light blue was defined by China
18 as the "high seas".

19 34 years later, this remained China's position.
20 On 25th February 1992, China enacted its Law on the
21 Territorial Sea and the Contiguous Zone; it may be
22 found at tab 1.30. China proclaimed a 12-mile
23 territorial sea around the features it claimed in the

¹³ People's Republic of China, *Declaration of the Government of the People's Republic of China on China's Territorial Sea* (4 Sept. 1958), in *Collection of the Sea Laws and Regulations of the People's Republic of China* (3rd ed. 2001), para 1. MP, Vol. V, Annex 103.

¹⁴ Also available at Tab 1.28.

1 South China Sea.¹⁵ The only rights China claimed
2 beyond the territorial sea were a 12-mile contiguous
3 zone¹⁶ and the right to engage in hot pursuit.¹⁷ The
4 law mentions no historic rights beyond the territorial
5 sea. This is significant because, as Judge Gao wrote
6 soon afterwards in an article published in 1994 in the
7 journal *Ocean Development and International Law*, China
8 enacted the 1992 law in order to "legalize its
9 claim".¹⁸

10 Indeed, Judge Gao wrote in the same article that:

11 "... careful study of Chinese documents reveals
12 that China has never claimed the entire water column
13 of the South China Sea, but only the islands and their
14 surrounding waters within the line. Thus, the
15 boundary line on the Chinese map is merely a line that
16 delineates ownership of islands rather than a maritime
17 boundary in the conventional sense".¹⁹

18 Further, the "Chinese documents" relied upon by
19 Judge Gao to support this conclusion included a volume
20 entitled *Collection of Historical Materials on China's*

¹⁵ People's Republic of China, *Law on the Territorial Sea and the Contiguous Zone* (25 Feb. 1992), Arts. 2-3. MP, Vol. V, Annex 105.

¹⁶ *Id.*, Arts. 4, 13.

¹⁷ *Id.*, Art. 14.

¹⁸ Zhiguo Gao, "The South China Sea: From Conflict to Cooperation?", *Ocean Development and International Law*, Vol. 25, No. 3 (1994), p. 346. MP, Vol. VII, Annex 255.

¹⁹ *Id.*, p. 346.

1 *Islands in the South China Sea* that was published in
2 Beijing in 1988.²⁰ The fact that Judge Gao made no
3 reference then to any historical rights within the
4 dashed line is, we say, particularly telling.

5 China's position remained unchanged through the
6 period up to its ratification of UNCLOS on
7 7th June 1996 and beyond. As you can see at tab 1.31,
8 China declared at that time:

9 "In accordance with the provisions of the
10 United Nations Convention on the Law of the Sea, the
11 People's Republic of China shall enjoy sovereign
12 rights and jurisdiction over an exclusive economic
13 zone of 200 nautical miles and the continental
14 shelf."²¹

15 Once again, it made no claim to historic rights or
16 jurisdiction beyond its entitlements under UNCLOS. To
17 the contrary, China confined its declared maritime
18 rights to those set out in the provisions of UNCLOS
19 regarding the EEZ and continental shelf.

20 The first hint that China might change its
21 position came only two years after it ratified UNCLOS,
22 in June 1998, when China enacted its EEZ and
23 Continental Shelf Act. Article 2 established

²⁰ *Id.*, p. 357 n.5.

²¹ People's Republic of China, "Chinese Declaration Upon Ratification" (7 June 1996), *Multilateral Treaties Deposited with the Secretary-General*, Vol. 3, Part 1, Chapters 12-29, and Part 2, UN Doc. ST/LEG/SER.E/26 (1 Apr. 2009), p. 450, para. 1. MP, Vol. XI, Annex LA-67.

1 a 200-mile EEZ and defined the continental shelf in
2 accordance with UNCLOS.²² However, Article 14
3 cryptically stated:

4 "The provisions of this Act shall not affect the
5 historical rights of the People's Republic of
6 China."²³

7 This was the first time that China had ever
8 referred to any such historic rights. The act did not
9 identify where those alleged rights might be located,
10 nor did it explain their alleged nature. China
11 certainly did not suggest that any such historic
12 rights existed in the South China Sea. And Article 14
13 was not interpreted by others as referring to historic
14 rights there. As the US State Department observed in
15 its 2014 monograph on *Maritime Claims in the South*
16 *China Sea*:

17 "The reference to 'historic rights' in China's
18 1998 EEZ and continental shelf law is, as a legal
19 matter, a 'savings clause'; the statement makes no
20 claim in itself, and the law contains no reference to
21 the dashed-line map."²⁴

²² People's Republic of China, *Exclusive Economic Zone and Continental Shelf Act* (26 June 1998), Art. 2. MP, Vol. V, Annex 107.

²³ *Id.*, Art. 14.

²⁴ US Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, "China: Maritime Claims in the South China Sea", *Limits in the Seas*, No. 143 (5 Dec. 2014), p. 18. Supplemental Documents, Vol. I, Annex 661.

1 In short, Mr President, the evidence offers
2 conclusive proof that China never exercised sovereign
3 rights or jurisdiction over the waters within the
4 nine-dash line, let alone continuously for a long
5 period of time, and made no claim to historic rights
6 until very recently.

7 Nor could it be said that other states have
8 acquiesced in that regard. To the contrary, when
9 China did first assert historic rights in respect of
10 the waters within the nine-dash line -- just six years
11 ago, in May 2009 -- the claim elicited protests by the
12 other littoral states, including Vietnam,²⁵ Malaysia²⁶
13 and Indonesia,²⁷ as well as the Philippines.²⁸ You can
14 find their diplomatic protests at tab 1.32.

15 Even if China's actions could somehow be construed
16 as having asserted a claim to historic rights prior to
17 May 2009, the actions of the littoral states belie any
18 alleged acquiescence. I will not repeat the acts that
19 I have already mentioned, or the many others discussed

²⁵ *Note Verbale* from the Permanent Mission of the Socialist Republic of Vietnam to the United Nations to the Secretary-General of the United Nations, No. 86/HC-2009 (8 May 2009). MP, Vol. VI, Annex 193.

²⁶ *Note Verbale* from the Permanent Mission of Malaysia to the United Nations to the Secretary-General of the United Nations, No. HA 24/09 (20 May 2009), p. 1. MP, Vol. VI, Annex 194.

²⁷ *Note Verbale* from the Permanent Mission of the Republic of Indonesia to the United Nations to the Secretary-General of the United Nations, No. 480/POL-703/VII/10 (8 July 2010), pp. 1-2. MP, Vol. VI, Annex 197.

²⁸ *Note Verbale* from the Permanent Mission of the Republic of the Philippines to the United Nations to the Secretary-General of the United Nations, No. 000228 (5 Apr. 2011), p. 1. MP, Vol. VI, Annex 200.

1 in the written pleadings.²⁹

2 The Philippines certainly did not acquiesce, as
3 evidenced by, among other things, its claim to
4 a continental shelf in 1949,³⁰ its 1968 proclamation
5 declaring exclusive jurisdiction and control over the
6 continental shelf,³¹ and its declaration of
7 a 200-nautical-mile EEZ in 1978, which you can see on
8 the screen.³² Since a coastal state's rights in the
9 EEZ and continental shelf are -- by definition --
10 exclusive, declarations of this nature are necessarily
11 incompatible with a competing claim of historic rights
12 in the same area.

13 Mr President, we submit, with the greatest of
14 respect for the other side, that China's claim to have
15 historic rights is not just hopeless, it is
16 indefensible. Before 2009, China never asserted
17 historic rights in respect of the waters of the South

²⁹ See Memorial, paras. 2.19-2.41; SWSP, paras. 13.9-13.13, A13.1-A13.54.

³⁰ Memorial, para. 3.2; Republic of the Philippines, *Republic Act No. 387, An Act to Promote the Exploration, Development, Exploitation, and Utilization of the Petroleum Resources of the Philippines; to Encourage the Conservation of such Petroleum Resources; to Authorize the Secretary of Agriculture and Natural Resources to Create an Administration Unit and a Technical Board in the Bureau of Mines; to Appropriate Funds Therefor; and for Other Purposes* (18 June 1949), Art. 3. MP, Vol. III, Annex 7.

³¹ Memorial, para. 3.5; Republic of the Philippines, *Presidential Proclamation No. 370, Declaring as Subject to the Jurisdiction and Control of the Republic of the Philippines all Mineral and other Natural Resources in the Continental Shelf* (20 Mar. 1968). MP, Vol. III, Annex 10.

³² Memorial, para. 3.7; Republic of the Philippines, *Presidential Decree No. 1599, Establishing an Exclusive Economic Zone and for Other Purposes* (11 June 1978), § 2. MP, Vol. III, Annex 13. A sketch map reflecting this is available at Tab 1.33.

1 China Sea. It never exercised effective
2 administration over these waters. And no state has
3 ever acquiesced to a claim by China of exclusive
4 rights within the nine-dash line. None of the three
5 conditions for historic rights under general
6 international law is met, let alone all three.

7 Mr President, this concludes my presentation.
8 Thank you for your kind attention. Professor Sands
9 will now begin the Philippines' presentation on the
10 entitlements of maritime features.

11 **THE PRESIDENT:** Thank you very much. I think before
12 Professor Sands comes on, Judge Pawlak wants to ask
13 a question.

14 **(10.19 am)**

15 **Tribunal questions**

16 **JUDGE PAWLAK:** Thank you, Mr President.

17 Thank you, Mr Loewenstein, for answering my
18 question, but I have a follow-up. I would like to
19 turn to my yesterday's question concerning the South
20 China Sea islands. It was an interesting speech of
21 the Minister of Foreign Affairs of China in August,
22 during the ASEAN meeting. He said that:

23 "Seventy years ago, pursuant to the Cairo
24 Declaration and the Potsdam Proclamation, China
25 lawfully recovered the Nansha and Xisha Islands which

1 were illegally occupied by Japan and resumed exercise
2 of sovereignty. As a matter of fact, the military
3 vessels China used in recovering the islands were
4 provided by the United States ..."

5 I would like to get your comments on this
6 statement, which was important, because this is
7 related to the legal basis which China claims for
8 recovering sovereignty over the islands.

9 With your permission, I have another question, but
10 to Mr Reichler.

11 **THE PRESIDENT:** Just let Mr Loewenstein answer this
12 question, and then after that we can ask another
13 question.

14 **MR LOEWENSTEIN:** Thank you very much, Judge Pawlak. With
15 your permission, I would propose that we review the
16 comments in question that you noted by the Foreign
17 Minister, and then return with an answer after we've
18 had a chance to review that specific statement.

19 **THE PRESIDENT:** Is that okay? Yes. So you want to ask
20 another question of Mr Reichler.

21 Thank you very much, Mr Loewenstein, so that
22 should be all for the moment.

23 **MR LOEWENSTEIN:** Thank you very much.

24 **THE PRESIDENT:** Judge Pawlak, you can ask your question
25 now.

26 **JUDGE PAWLAK:** Thank you. Mr Reichler, I am pleased to

1 see you again here among us, but I would like to
2 return to your yesterday's analysis concerning duality
3 of Chinese claims in the South China Sea, claims both
4 to islands and to historic rights.

5 It is interesting that you did not mention
6 important remarks of the Chinese Minister of Foreign
7 Affairs, Mr Wang Yi, on South China Sea issues at the
8 ASEAN Regional Forum in August this year. It is
9 interesting that the minister did not mention the
10 nine-dash line and historic rights. He only
11 concentrated on Chinese sovereignty in that area,
12 saying, "The South China Sea islands are China's
13 territory", which were recovered after defeat of Japan
14 in the Second World War, and that:

15 "... China has the right to defend its
16 sovereignty, rights and interests ..."

17 Could you, sir, comment on that statement in light
18 of your yesterday's remarks on the nature of Chinese
19 claims?

20 Thank you, Mr President.

21 **MR REICHLER:** Thank you, Judge Pawlak. Like
22 Mr Loewenstein, I would like an opportunity, if you
23 will indulge me, to review the entire remarks of the
24 Chinese Foreign Minister on that occasion before
25 giving you our response. We will attempt to do so
26 tomorrow; if not, certainly by Monday. But we have

1 a full day of pleadings today, so it would be this
2 evening before we are able to do the research into the
3 various statements. But we will get back to you as
4 soon as we possibly can with a complete answer. Thank
5 you.

6 **THE PRESIDENT:** So that will then be either tomorrow, or
7 at least by Monday?

8 **MR REICHLER:** That's right, Mr President. If there are
9 no further questions for me, then perhaps
10 Professor Sands could ...

11 **THE PRESIDENT:** Judge Wolfrum wants to ask a question
12 too.

13 **JUDGE WOLFRUM:** Yes. Mr Reichler --

14 **THE PRESIDENT:** For Mr Reichler?

15 **JUDGE WOLFRUM:** Generally for the team. Also the answer
16 to be expected not today, but at the latest on Monday,
17 as the President just indicated.

18 Meanwhile, I have in front of me the Treaty of
19 San Francisco, and it reads, in Article 2(b):

20 "Japan renounces all right, title and claim to
21 Formosa and the Pescadores."

22 Mr Loewenstein has said there is no beneficiary
23 named in this respect. That is correct, not
24 explicitly. But I want to reconsider the word
25 "renounces". If you renounce something, isn't then
26 the legal consequence that the claim or the title

1 falls back to the one who occupied this feature
2 before? Please give this some consideration. Thank
3 you.

4 **MR REICHLER:** We certainly shall. As you will hear in my
5 presentation -- I don't mean to undermine the impact
6 of my own presentation this afternoon -- but under
7 that reading, which I agree is an appropriate reading,
8 it would fall back to no one, because no one occupied
9 it before Japan. But in due course.

10 **JUDGE WOLFRUM:** Okay.

11 **MR REICHLER:** Thank you.

12 **THE PRESIDENT:** Thank you very much. Now we can ask
13 Professor Sands.

14 **(10.25 am)**

15 **First-round submissions by PROFESSOR SANDS**

16 **PROFESSOR SANDS:** Mr President, members of the Tribunal,
17 it is an honour for me to appear before you on behalf
18 of the Philippines. I will address the status and
19 entitlements of the five low-tide elevations that form
20 the subject matter of the Philippines' case. The four
21 high-tide features identified in our Submissions 3 and
22 7 will then be addressed by Mr Martin, and he will
23 demonstrate that all four of those features are
24 "rocks" within the meaning of Article 121,
25 paragraph 3, and that they therefore generate no

1 entitlement to an EEZ or continental shelf.

2 Mr Reichler will then conclude this morning's session
3 by showing that none of the other features in the
4 Spratly Islands group generates an entitlement to
5 an EEZ or continental shelf.

6 My submissions this morning are in two parts.
7 First, I will address the status and corresponding
8 maritime entitlements of each of the five low-tide
9 features put before the Tribunal. The Philippines has
10 collated and analysed a considerable amount of
11 material regarding hydrography, geography and
12 historical context of each of these features, and we
13 have done so for the purposes of assisting the
14 Tribunal in forming a view as to their juridical
15 status under the Convention.

16 The second part of my submission addresses the
17 matter of China's artificial structures and the
18 extensive programme of island building in the South
19 China Sea. My task is to establish that such
20 activity, and the construction by China of artificial
21 structures, cannot change the status of a feature
22 within the meaning of the Convention. A low-tide
23 elevation cannot become a "rock" or an "island" merely
24 because it has been subject to some degree of human
25 manipulation. Equally, a "rock" cannot be upgraded to
26 an "island" by human intervention.

1 Mr President, members of the Tribunal, the matter
2 of the status and entitlements of low-tide elevations
3 is the subject of the Philippines' Submissions 4, 5
4 and 6, which you will see now on your screens.

5 I won't read them all out, but they concern the status
6 and entitlements of two categories: Mischief Reef,
7 Second Thomas Shoal and Subi Reef, Submissions 4 and
8 5; and Gaven Reef and McKennan Reef, Submission 6.

9 Pertinent to these Submissions are the issues
10 identified by the Tribunal in sections I(b), II(b) and
11 II(c) of the Annex of Issues sent to the Parties on
12 10th November 2015.³³ We have looked at these very
13 carefully, and in due course I will address the points
14 raised in the Tribunal's letter.

15 I turn then to the status and entitlements of the
16 five low-tide features put before the Tribunal,
17 a matter that turns on the interpretation and
18 application of Article 13 of the Convention. You
19 should be able to see Article 13 on the screens, and
20 it provides that the definition of a low-tide
21 elevation is founded on two essential elements. These
22 are set out in the first sentence of Article 13(1),
23 which provides in simple and clear terms that:

24 "A low-tide elevation is a naturally formed area

³³ Letter from the Permanent Court of Arbitration to the Parties dated 10 November 2015, Annex of Issues the Philippines May Wish to Address at November Hearing.

1 of land which is surrounded by and above water at low
2 tide, but submerged at high tide."³⁴

3 The first requirement is therefore that the
4 feature should be "a naturally formed area of land",
5 a factor that is identical to the first definitional
6 element of an island in Article 121(1). The second
7 element is that the feature should be "above water at
8 low tide but submerged at high tide"; this element is
9 what distinguishes a low-tide elevation from
10 an island.

11 Mr President, you will recall that during the
12 first of my presentations at the hearing on
13 jurisdiction and admissibility I explained that
14 low-tide elevations are not land territory, and they
15 are not subject to appropriation or acquisition as
16 such. Moreover, no measure of occupation or control
17 can establish sovereignty over such features.³⁵
18 A low-tide elevation, regardless of its size, forms
19 part of the seabed and subsoil. It does not and
20 cannot, of its own, generate any maritime
21 entitlements.

22 The question of maritime entitlement is distinct
23 from the question of sovereignty over land, a matter

³⁴ UNCLOS, Article 13(1).

³⁵ Hearing on Jurisdiction and Admissibility, Final Amended Transcript, Day 1, p. 89 line 15 to p. 92 line 12, Professor Sands QC, 7 July 2015. See also SWSP, Vol. I, paras. 18.1-18.9.

1 which is not within the scope of this arbitration. As
2 far as sovereignty and sovereign rights with regard to
3 low-tide elevations is concerned, there are three
4 distinct categories of such elevations.

5 First, Article 2(2) of the Convention provides
6 that the sovereignty of a coastal state:

7 "... extends to the airspace over the territorial
8 sea as well as to its bed and subsoil."³⁶

9 It follows from this that where a low-tide
10 elevation is located within 12 miles of a high-tide
11 feature, sovereignty over the low-tide elevation rests
12 with the state by reason of the sovereignty it has
13 over the high-tide feature.

14 The second category comprises those low-tide
15 elevations that lie wholly beyond 12 miles, but within
16 a state's exclusive economic zone or continental
17 shelf. Here, the coastal state enjoys exclusive
18 sovereign rights and jurisdiction with regard to the
19 low-tide elevation in accordance and within the limits
20 of the regime provided for in Articles 56(3) and 77 of
21 the 1982 Convention.

22 Third, a low-tide elevation could theoretically be
23 at an even greater distance, beyond areas of national
24 jurisdiction. In such cases, it is part of the deep
25 seabed and subject to Part XI of the Convention, and

³⁶ UNCLOS, Article 2(2).

1 no state can purport to exercise sovereignty or any
2 sovereign rights over or in respect of it.³⁷

3 With respect to maritime entitlements, Article 13
4 of the Convention makes clear that low-tide
5 elevations, of their own, generate no territorial sea,
6 and a *fortiori* can generate no exclusive economic zone
7 or continental shelf. However, Article 13 does draw
8 a distinction between low-tide elevations that are
9 within 12 miles of "the mainland or an island" and
10 those that are beyond 12 miles.

11 By virtue of the second sentence of Article 13(1),
12 a low-tide elevation that is wholly or partly within
13 the territorial sea can serve as a basepoint for
14 measuring the breadth of the territorial sea.
15 Provided that a low-tide feature is within 12 miles of
16 an island, it can be used to determine the limits of
17 the territorial sea of that island. The low-tide
18 elevation itself is not entitled to any maritime space
19 of its own but, at most, it may serve to extend the
20 entitlement of a nearby island or the mainland with
21 which it is in proximate relation.

22 This is to be contrasted with low-tide features
23 that lie beyond the territorial sea. Under
24 Article 13(2), they cannot be used for the purpose of
25 placing a basepoint, and therefore have no capacity to

³⁷ See further SWSP, paras 18.1-18.9.

1 generate claims to maritime jurisdiction.

2 Against that background, let us now consider each
3 of the five low-tide features identified by the
4 Philippines in the written pleadings. You can see
5 them on the screen. Of the five, three are governed
6 by the rule set forth in Article 13(2) of the
7 Convention. Second Thomas Shoal, Mischief Reef and
8 Subi Reef are all entirely located at a distance of
9 more than 12 miles from any other high-tide feature.
10 The other two low-tide elevations, McKennan and Gaven
11 Reefs, are both located within 12 miles of high-tide
12 features, namely Namyit and Sin Cowe respectively.
13 While they do not generate any maritime entitlements
14 of their own, they "may be used as the baseline for
15 measuring the breadth of the territorial sea" of these
16 two neighbouring high-tide features.³⁸

17 Let's start with the appropriately named Mischief
18 Reef. It is located 125.6 miles from the nearest
19 point in the Philippines and 596.3 miles from the
20 nearest point on China's Hainan Island. It is
21 a circular coral reef that measures approximately
22 4 miles in diameter. It is described in the Chinese
23 Navy Headquarters *Sailing Directions* as "exposed

³⁸ UNCLOS, Article 13(1).

1 during low tide and submerged during high tide".³⁹
2 Likewise, both the US and UK *Sailing Directions*
3 describe Mischief Reef as "awash" with drying patches
4 and rocks.⁴⁰

5 Mr President, members of the Tribunal, we wish to
6 be clear: the total consistency of all charting
7 authorities who have constructed nautical charts with
8 safety of navigation as their primary concern, and on
9 the basis of hydrographic surveys, including direct
10 human observation of the features in question, is
11 telling.

12 China took physical control of Mischief Reef in
13 August 1995, and it built rudimentary structures on
14 stilts on top of the reef at four different locations.
15 Three years later, in 1998, these were replaced by
16 more sophisticated facilities, including a number of
17 buildings upon concrete platforms. You can see the
18 locations and the type on the screens now. Prior to
19 this, the evidence shows that the reef was unoccupied,
20 other than very occasionally by Filipino fishermen who
21 would do no more than take occasional shelter on the

³⁹ Navigation Guarantee Department of the Chinese Navy Headquarters, *China Sailing Directions: South China Sea* (A103) (2011). SWSP, Vol. III, Annex 232(bis). See also SWSP, Vol. II, pp. 124-126.

⁴⁰ United States National Geospatial-Intelligence Agency, Pub. 161 *Sailing Directions (Enroute), South China Sea and The Gulf of Thailand* (13th ed., 2011). MP, Vol. VII, Annex 233; United Kingdom Hydrographic Office, *Admiralty Sailing Directions: China Sea Pilot (NP31)*, Vol. 2 (10th ed., 2012). MP, Vol. VII, Annex 235.

1 reef for short periods of time.⁴¹

2 In our Memorial we produced multi-band Landsat
3 satellite photographs of each of the five low-tide
4 features. Two sets of images were produced from
5 different parts of the electromagnetic spectrum
6 resulting in varying wavelengths.⁴² The band 1 images
7 correspond to a shorter wavelength of between 0.45 and
8 0.52 micrometres, and these can penetrate water. The
9 band 4 images correspond to a longer wavelength of
10 between 0.76 and 0.90 micrometres, which are almost
11 entirely absorbed by water. A band 4 image can
12 therefore only show features that are above water.

13 On your screens now are the band 1 and band 4
14 images of Mischief Reef. The circular coral atoll is
15 faintly visible below the surface of the water on the
16 band 1 image on the left, but the atoll is no longer
17 visible on the band 4 image on the right.

18 Mr President, in its letter of 10th November 2015,
19 the Tribunal asked the Philippines to submit the
20 metadata:

21 "... relating to the EOMAP imagery from Landsat 8
22 ... and the Digital Elevation Model ..." ⁴³

⁴¹ MP, para. 3.26.

⁴² See MP, para. 5.61.

⁴³ Letter from the Permanent Court of Arbitration to the Parties dated 10 November 2015, Annex of Issues the Philippines May Wish to Address at November Hearing.

1 The Tribunal has also asked:

2 "Whether the tidal state at the time that
3 satellite imagery of bathymetric data was obtained can
4 be ascertained with precision for different locations
5 in the South China Sea."⁴⁴

6 In answer to these questions, it should be
7 mentioned that EOMAP is a German company that
8 specialises in generating bathymetric models from
9 high-resolution satellite images. It is "the largest
10 commercial producer of satellite derived shallow water
11 depth data globally", and it has developed
12 sophisticated algorithms and methods to correct for
13 certain atmospheric effects, including sun glare.⁴⁵

14 EOMAP had no involvement in the production of the
15 Landsat images in the Memorial. However, the
16 Philippines has since engaged the services of EOMAP to
17 provide a detailed analysis of satellite imagery
18 relating to the five features identified by the
19 Philippines as low-tide elevations.⁴⁶ EOMAP analysis
20 sets out the metadata, including the data source of
21 each image and the date of recording.

22 We made the images available at Annex 807 in the

⁴⁴ *Ibid.*

⁴⁵ EOMAP, "Satellite Derived Bathymetry", available at <http://www.eomap.com/services/bathymetry/> (accessed 21 July 2015). PWRTQ, Vol. II, Annex 598.

⁴⁶ PWRTQ, Vol. I, para. IV.10.

1 letter submitted pursuant to your questions on
2 19th November 2015. We can also make the relevant
3 data models available to the Tribunal, if this would
4 be helpful.

5 On your screens now is the EOMAP analysis for
6 Mischief Reef at lowest astronomical tide. All parts
7 of the reef that appear light brown or orange in
8 colour are above water. The parts that are blue and
9 dark purple in colour remain below water at lowest
10 astronomical tide. If we change now to an image at
11 mean high water, you will see that all parts of
12 Mischief Reef that were exposed at low tide now appear
13 as blue on the analysis. The reason for this is that
14 the reef is completely submerged by water at high
15 tide. Mischief Reef is, in our submission, properly
16 to be treated as a low-tide elevation within the
17 meaning of Article 13 of the Convention, and it can
18 generate no maritime entitlements.⁴⁷

19 We have put the EOMAP analysis for all five
20 low-tide elevations in your arbitrators' folders.

⁴⁷ There is also recent correspondence between the Parties on the status of Mischief Reef as a low-tide elevation under Article 13 of the Convention, see: *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 15-3529 (25 Aug. 2015). SWSP, Vol. II, Annex 691 ("Panganiban Reef is a low-tide elevation as defined in Article 13 of the United Nations Convention on the Law of the Sea (UNCLOS). As such, no State may claim sovereignty of the air space over it. Nor may any State prohibit flight over it. Moreover, Panganiban Reef is located in the exclusive economic zone of the Philippines and on its continental shelf. Only the Philippines has the sovereign rights and jurisdiction in the area where Panganiban Reef is located").

1 There are three images for each of these five
2 features: one at lowest astronomical tide, one at mean
3 high water, and, for completeness, one at highest
4 astronomical tide. The analysis for Mischief Reef is
5 at tab 2.1.

6 The second low-tide elevation is Second Thomas
7 Shoal. This is situated 104.1 miles to the west of
8 Palawan and 613.9 miles to the southeast of Hainan.
9 The feature is completely submerged at high tide and
10 is depicted as a low-tide elevation in the chart
11 produced by the Chinese Navy Headquarters, as well as
12 all other nautical charts.⁴⁸ The Philippines has
13 maintained a peaceful and continuous presence at
14 Second Thomas Shoal, despite the efforts of China to
15 force the Philippines to withdraw, as Professor Oxman
16 will explain in due course.

17 You can now see on your screens the EOMAP analysis
18 of Second Thomas Shoal. This is at lowest
19 astronomical tide. You will see a little bit of
20 orange. Now you can see Second Thomas at mean high
21 water, and you will see that it is entirely submerged.
22 None of the faint orange colour remains, and the
23 reason for that is that the entire feature is

⁴⁸ Navigation Guarantee Department of the Chinese Navy Headquarters, Chart No. 10019 (Huangyan Dao (Minzhu Jiao) to Balabac Strait). Navigation Guarantee Department of the Chinese Navy Headquarters, *China Sailing Directions: South China Sea (A103)* (2011), p. 172. MP, Vol. VII, Annex 232. See also MP, para. 5.60.

1 submerged below the water at high tide. Because no
2 part of it is above water at high tide, it is
3 a low-tide elevation and entitled to no maritime
4 zones. The EOMAP analysis of Second Thomas Shoal is
5 at tab 2.2 of your folders.

6 The third low-tide feature is Subi Reef, located
7 231.8 miles from Palawan and 502.1 miles from the
8 nearest point in China. The relevant *Sailing*
9 *Directions* depict the reef as drying at low tide.⁴⁹
10 China has maintained artificial structures on Subi
11 Reef since 1989, and you can see on your screens the
12 large Chinese installation that is built on top of the
13 reef. There are at least three large buildings and
14 a helipad.⁵⁰ It is reported that 200 PLA military
15 personnel are there stationed.⁵¹

16 As with the previous two low-tide features, the
17 EOMAP analysis shows that parts of the reef encircling
18 the lagoon are above water at lowest astronomical
19 tide; again in orange. But if you now look at the
20 same reef at mean high water, you will see that no

⁴⁹ Philippine National Mapping and Resource Information Agency, *Philippine Coast Pilot* (6th ed., 1995). MP, Vol. VII, Annex 231; United States National Geospatial-Intelligence Agency, Pub. 161 *Sailing Directions (Enroute), South China Sea and The Gulf of Thailand* (13th ed., 2011). MP, Vol. VII, Annex 233; United Kingdom Hydrographic Office, *Admiralty Sailing Directions: China Sea Pilot (NP31)*, Vol. 2 (10th ed., 2012). MP, Vol. VII, Annex 235.

⁵⁰ Armed Forces of the Philippines, *Matrix of Events: Subi (Zamora)* (2013). MP, Vol. IV, Annex 91.

⁵¹ SWSP, para. 10.10. See also David Jude Sta Ana, "China reclaiming land in 5 reefs?", *The Philippine Star* (13 June 2014). SWSP, Vol. XI, Annex 564.

1 part of Subi Reef is above water; it is all in blue.
2 It, too, is therefore a low-tide elevation, and it can
3 be concluded that Subi Reef also cannot generate any
4 maritime entitlements. The EOMAP analysis is included
5 at tab 2.3 of your folders.

6 I turn to the last two low-tide elevations,
7 McKennan and Gaven Reefs, which are both located
8 within 12 miles of a high-tide feature. McKennan Reef
9 includes the neighbouring Hughes Reef, where China has
10 built two artificial installations. It is situated
11 180.4 miles from the Philippines, 566.7 miles from
12 China, and 7 miles from Sin Cowe, a small "rock" under
13 Article 121(3), occupied by Vietnam.

14 McKennan Reef has been occupied by China since
15 1988. There are at least two installations, one of
16 which consists of a large three-floor building and
17 a helipad.⁵² China also maintains PLA personnel at
18 this facility and it is equipped with anti-aircraft
19 weaponry.⁵³

20 Charts produced by China, the Philippines, the UK
21 and US and Japan all depict McKennan Reef as
22 a low-tide elevation.⁵⁴ Again, the EOMAP analysis
23 shows that elements of this feature are exposed at

⁵² Armed Forces of the Philippines, *Matrix of Events: Chigua (Kennan) Reef* (2013). MP, Vol. IV, Annex 86.

⁵³ SWSP, para. 10.9.

⁵⁴ MP, para. 5.66.

1 lowest astronomical tide, as you can see on your
2 screens, whereas the analysis corresponding to mean
3 high water shows that nothing at McKennan Reef is
4 above water at high tide. These images are at tab 2.4
5 of your arbitrators' folder. Again, McKennan Reef is
6 a low-tide elevation.

7 The final low-tide elevation is Gaven Reef, which
8 consists of a northern and southern reef approximately
9 2.5 miles apart. This feature lies 200.1 miles from
10 the Philippines, just beyond the limit of the
11 Philippines' EEZ, and 544.1 miles from the Chinese
12 island of Hainan. Namyit Island, a very small "rock"
13 under Article 121(3), occupied by Vietnam, is located
14 6.3 miles away.

15 In response to the Tribunal's question as to which
16 of the reefs the Philippines is referring to in our
17 Submission 6, references to Gaven Reef in the Memorial
18 refer primarily to the northern reef because this is
19 the part of Gaven Reef that has been occupied by China
20 since at least 1988.⁵⁵ China constructed a large
21 concrete platform, which you can see here on the
22 screens, upon which sit a number of buildings and
23 again a helipad.⁵⁶ However, as is made clear in the

⁵⁵ Letter from the Permanent Court of Arbitration to the Parties dated 10 November 2015, Annex of Issues the Philippines May Wish to Address at November Hearing.

⁵⁶ *Forces of the Philippines, Matrix of Events: Gaven (Burgos)* (2013). MP, Vol. IV, Annex 89.

1 Atlas produced by the Philippines, both the northern
2 and southern reefs are low-tide elevations.

3 On your screen now is the EOMAP analysis for the
4 northern reef at lowest astronomical tide. Parts of
5 it, in orange, are clearly above water. But at mean
6 high water, as you can now see, there is no evidence
7 that any of the reef is above water. This image is at
8 tab 2.5 of your folders. The *Philippine Coast Pilot*
9 confirms that "Gaven Reefs cover at [high water]".⁵⁷
10 And likewise, the Chinese Navy Headquarters sailing
11 directions provide that:

12 "During high tide, these reef rocks are all
13 submerged by seawater."⁵⁸

14 We submit that Gaven Reef, again, is a low-tide
15 elevation.

16 Mr President, this may be an appropriate point to
17 address a question in the Tribunal's Request for
18 Further Written Argument, and certain points raised by
19 your letter of November 10th 2015. You will see now
20 on the screen your question 21, which invited us to
21 provide historical, anthropological, geographic and
22 hydrographic information on Namyit and Sin Cowe, and
23 to elaborate on the implications of the proximity of

⁵⁷ Philippine National Mapping and Resource Information Agency, *Philippine Coast Pilot* (6th ed., 1995). MP, Vol. VII, Annex 231.

⁵⁸ Navigation Guarantee Department of the Chinese Navy Headquarters, *China Sailing Directions: South China Sea* (A103) (2011). SWSP, Vol. III, Annex 232(bis).

1 Gaven and McKennan Reefs to these two features.

2 The question is in two parts. First, with regard
3 to the historical, anthropological, geographic and
4 hydrographic information about Sin Cowe and Namyit,
5 this is provided in the *Atlas* provided by the
6 Philippines.⁵⁹ This information demonstrates that
7 both of these features fail to meet the criteria of
8 a fully fledged island. Both Sin Cowe and Namyit are
9 "rocks" within the meaning of Article 121(3) of the
10 Convention.⁶⁰ Neither is capable of sustaining human
11 habitation or economic life of its own.

12 The status of these features as "rocks" informs
13 the answer to the second part of the question. The
14 implications of the proximity of Gaven and McKennan
15 Reefs to Namyit and Sin Cowe are twofold. The first
16 implication concerns the question of sovereignty. As
17 McKennan and Gaven Reefs lie within the territorial
18 sea of high-tide features, in accordance with
19 Article 2(2) of the Convention, the state that enjoys
20 sovereignty over Sin Cowe and Namyit would also enjoy
21 sovereignty over McKennan and Gaven Reefs
22 respectively. However, I do not need to say anything
23 more about the issue of sovereignty as it is not in
24 issue in these proceedings.

⁵⁹ SWSP, Vol. II.

⁶⁰ SWSP, pp. 131-133, 166-168.

1 The second implication that arises relates to the
2 question of what maritime entitlement, if any, is
3 generated. This is a matter that does come within the
4 scope of this arbitration. As both features are
5 situated wholly or partially within 12 miles of the
6 high-tide features, Gaven and McKennan Reefs are
7 governed by the second sentence of Article 13(1).
8 While they do not of themselves generate any maritime
9 entitlement, these two features may be used as
10 basepoints for the purposes of measuring the outer
11 limit of the territorial sea of the neighbouring
12 high-tide features.

13 As far as the question of entitlement is
14 concerned, however, that is the only implication.
15 Given that Namyit and Sin Cowe are both "rocks" within
16 the meaning of Article 121(3), the question of whether
17 they are entitled to an exclusive economic zone or
18 continental shelf of their own simply does not
19 arise.⁶¹

20 I turn to certain points raised by the Tribunal's
21 letter of 10th November 2015. First, you enquired
22 "[w]hether the available evidence is consistent" and
23 whether the available evidence "suffices to establish
24 the status of features as above or below water at high

⁶¹ *Ibid.*

1 tide in the absence of direct observation".⁶² The
2 answer to that is: yes, the evidence is entirely
3 consistent, and yes, it suffices to establish the
4 status of these features as low-tide elevations.

5 We have collected all the available charts and
6 other evidence we can find. The satellite imagery,
7 including the EOMAP analysis of each of the features,
8 consistently, completely and without the slightest
9 ambiguity demonstrates that all five features are
10 covered by water at high tide. This is simply not an
11 issue and cannot reasonably be disputed.

12 The charts produced by all the relevant charting
13 agencies -- including the Philippines, China,
14 Malaysia, Vietnam, the United Kingdom and the
15 United States -- agree that all five features are
16 low-tide elevations.⁶³ All of the evidence, including
17 the satellite imagery and the *Sailing Directions* set
18 out in the *Atlas*, is remarkably -- and, we say,
19 gloriously -- consistent in its depiction of the
20 features as low-tide elevations.⁶⁴

21 A second point raised by your letter of
22 10th November is connected to your recent Award on

⁶² Letter from the Permanent Court of Arbitration to the Parties dated 10 November 2015, Annex of Issues the Philippines May Wish to Address at November Hearing.

⁶³ PWRTQ, Vol. I, para IV.6.

⁶⁴ SWSP, Vol. II, pp. 56-59; 122-129; 162-165; 180-183.

1 Jurisdiction and Admissibility, and in particular the
2 conclusion at paragraphs 401 and 403 of that award
3 that the Tribunal has jurisdiction to address
4 Submissions 4 and 6, subject to a caveat with regard
5 to any potential entitlement of China to an exclusive
6 economic zone or continental shelf overlapping that of
7 the Philippines in the area of the low-tide
8 elevations.

9 The Tribunal considered that such an overlapping
10 entitlement "may have practical considerations for the
11 selection of the vertical datum and tidal model
12 against which the status of the features is to be
13 assessed"; all the more so if, as the Tribunal put it,
14 "the Parties' respective data and models indicate
15 differing results".⁶⁵

16 Your letter of 10th November further invited us to
17 address:

18 "Whether, in light of the status of features in
19 the South China Sea, any maritime feature claimed by
20 China generates an entitlement to an exclusive
21 economic zone or continental shelf overlapping with
22 that of the Philippines in the area of [the five
23 features I am addressing] ..."⁶⁶

⁶⁵ Award on Jurisdiction and Admissibility, 29 October 2015, paras. 401 and 403.

⁶⁶ Letter from the Permanent Court of Arbitration to the Parties dated 10 November 2015, Annex of Issues the Philippines May Wish to Address at November Hearing.

1 I can be very clear in response to this
2 invitation: there are no overlapping entitlements to
3 an EEZ or continental shelf in the area surrounding
4 these five low-tide elevations. As set out fully and
5 clearly in the written pleadings, there are no
6 features within 200 miles of any of the low-tide
7 elevations that generate an EEZ or continental
8 shelf.⁶⁷ None of the features in the Spratly group
9 are islands entitled to an EEZ or continental shelf
10 within the meaning of Article 121(1) of the
11 Convention. Mr Martin and Mr Reichler will say more
12 about this during the course of the next two
13 presentations.

14 Third, with respect to Submission 5, the Tribunal
15 has asked:

16 "In the event that there are overlapping
17 entitlements ... in the area of Mischief Reef or
18 Second Thomas Shoal, whether the Tribunal is precluded
19 from granting the relief requested ..."⁶⁸

20 The answer to this question is the same: there are
21 no overlapping entitlements to an EEZ and continental
22 shelf in the area of Mischief Reef and Second Thomas
23 Shoal.

⁶⁷ Mischief Reef, Second Thomas Shoal and McKennan Reef are situated within 200 M of Palawan.

⁶⁸ Letter from the Permanent Court of Arbitration to the Parties dated 10 November 2015, Annex of Issues the Philippines May Wish to Address at November Hearing.

1 However, even if, *quod non*, the Tribunal were to
2 take a different view and determine that there are
3 overlapping entitlements in the area around these two
4 features, it would not alter the status of these
5 features as low-tide elevations that are incapable of
6 generating maritime entitlements. Nor would it
7 deprive the Tribunal of jurisdiction to address the
8 respective rights and obligations of the Parties under
9 UNCLOS pending an eventual delimitation of the
10 maritime boundary. This is a matter that
11 Professor Oxman will address tomorrow.

12 Fourth, the Tribunal has asked whether the
13 Philippines has sought hydrographic survey plans
14 "undertaken by the United Kingdom in the Nineteenth
15 Century and by Japan in the period leading up to the
16 Second World War".⁶⁹ The answer to the question is:
17 no. In light of the absolute consistency of the
18 relevant charts and satellite data, British and
19 Japanese hydrographic survey plans from the 19th and
20 early 20th centuries did not fall within the scope of
21 the Philippines' enquiries in the preparation of the
22 written pleadings. However, for the sake of
23 completeness, I draw your attention to volume VI of
24 the Supplemental Written Submissions, which contains
25 15 UK maps of the South China Sea from the

⁶⁹ *Ibid.*

1 19th century, as well as two Japanese maps from 1941
2 and 1943.⁷⁰

3 Fifth, Mr President, members of the Tribunal, your
4 letter of 10th November 2015 further invited us to
5 address a number of evidentiary issues and matters of
6 what one might call a technical nature in relation to
7 direct observation, tidal models and patterns and
8 vertical datum. The point was raised in relation to
9 Article 121(1), but it applies equally in relation to
10 Article 13. I will respond briefly to each of the
11 points raised.

12 In response to the question on the standard of
13 proof required by Article 121(1) in the absence of
14 direct observation, we submit that this is no
15 different from the standard in relation to any other
16 matter. The Tribunal has the authority, on the basis
17 of the available evidence, much of which was based on
18 direct observation when it was obtained, to make such
19 factual determinations as are necessary to resolve the
20 legal dispute between the Parties.

21 The Tribunal has also asked whether "existing
22 models of tidal patterns ... are sufficiently complete
23 and reliable", and whether "measurements and models of
24 tidal patterns ... by both the Philippines and China

⁷⁰ SWSP, Vol. VII, Annexes M76, M77, M135-M149.

1 ... differ significantly".⁷¹ Relatedly, we are asked
2 whether the "vertical datum and tidal model" used by
3 the Parties "lead to differing conclusions"; and, in
4 the event that they do, "the basis for resolving such
5 differences".⁷² A further question on evidentiary
6 issues is the "weight to be accorded to satellite
7 imagery or bathymetric data", and to "nautical charts
8 ... handbooks, and ... historic accounts of
9 observations".⁷³

10 I'll take these technical questions together.
11 There is in this case no difference of view in the
12 published charts. For this reason, we submit, there
13 appears to be little need for further precision
14 regarding the vertical datum and tidal models. Such
15 data might be necessary to determine with precision
16 the exact location of the low-water line. However, as
17 the issue of delimitation is not before the Tribunal,
18 and as the Philippines has not requested the Tribunal
19 to determine the precise location of the limits
20 measured from the low-water line, there is, we say, no
21 need to make a precise determination of the exact
22 location of base points on the low-water line.

⁷¹ Letter from the Permanent Court of Arbitration to the Parties dated 10 November 2015, Annex of Issues the Philippines May Wish to Address at November Hearing.

⁷² *Ibid.*

⁷³ *Ibid.*

1 As explained in the Philippines' Written Responses
2 of 23rd July 2015, the International Hydrographic
3 Office's preferred datum for navigational charts is
4 the lowest astronomical tide. This is the standard
5 that is applied in the charts of China, Vietnam and
6 Malaysia.⁷⁴ The Philippines has no objection to the
7 Tribunal relying on these charts for the purposes of
8 these proceedings.⁷⁵

9 As to the weight to be accorded to nautical
10 charts, we note that the 1982 Convention provides that
11 the use of "large-scale charts officially recognized
12 by the coastal State" is the prescribed method for
13 determining the normal baseline for measuring the
14 breadth of the territorial sea.⁷⁶ There is nothing in
15 the Convention to suggest that charts cannot be used
16 to determine the status of a feature.

17 Moreover, the satellite imagery, and in particular
18 the satellite-derived bathymetric data provided by
19 EOMAP, a fine German company, confirms the
20 classification of insular features illustrated on the
21 nautical charts. We cannot conceive of any more
22 reliable large-scale contemporaneous evidence that the

⁷⁴ PWRTQ, Vol. I, pp. 24-27.

⁷⁵ *Ibid*, para IV.7.

⁷⁶ UNCLOS, Article 5. See also Article 6 on the measuring of the breadth of the territorial sea of islands situated on atolls or of islands having fringing reefs.

1 Philippines might obtain to determine whether the
2 features in question are above or below water at low
3 tide and at high tide. The *Sailing Directions* and the
4 historic accounts are, in all material respects,
5 consistent with the charts and fully corroborative.

6 Sixth, the Philippines is asked to confirm
7 "whether it has been able to obtain information
8 relating to ... tidal observations, in particular the
9 harmonic constants" with regard to Chinese
10 hydrographic charts, including NC17, NC24 and NC25.
11 Mr President, I am sure that "harmonic constants" are
12 things we all strive for in our daily lives, whether
13 in a symphony hall or on a football pitch or in this
14 courtroom; at least they sound like the things we
15 ought to be striving for. And what I can say about
16 harmonic constants is the following.

17 We noted in our Written Responses of
18 13th July 2015 that the vertical datum appertaining to
19 the Chinese charts is lowest astronomical tide.⁷⁷ In
20 contrast, charts of the Philippines use mean lower low
21 water.⁷⁸ In answer to the Tribunal's question, beyond
22 the tidal information provided on the Chinese charts
23 themselves, the tidal observations and harmonic
24 constants are not available to the Philippines. In

⁷⁷ PWRTQ, Vol. I, p. 24.

⁷⁸ *Ibid.*, p. 25.

1 the absence of such observations and constants, the
2 point is nevertheless clear: despite the differing
3 chart datum in the Chinese and Philippine charts, both
4 come to exactly the same conclusions as to the status
5 of the Spratly features at issue in this case.

6 Seventh, the Tribunal has asked:

7 "... whether the Philippines has been able to
8 standardise the names of features as they appear in
9 different languages and in different sources on the
10 record."

11 In answer to this question, the names of features
12 adopted by the Philippines in the written pleadings
13 are those of most common usage. The various names by
14 which each of these features is known in the
15 Philippines, and by other states in the region,
16 including China, are set out in the *Atlas* produced by
17 the Philippines.⁷⁹

18 The final question from the Tribunal to be
19 addressed is whether "account should be taken that
20 some of the maritime features are occupied by States
21 or entities not parties to the present legal
22 dispute".⁸⁰ Here, three points may be made.

23 First, none of the nine features that the

⁷⁹ SWSP, Vol II.

⁸⁰ Letter from the Permanent Court of Arbitration to the Parties dated 10 November 2015, Annex of Issues the Philippines May Wish to Address at November Hearing.

1 Philippines has put before the Tribunal are occupied
2 or controlled by a state or entity not party to the
3 present dispute.

4 Second, the fact of occupation or control of
5 a particular feature is not a relevant consideration
6 for the purposes of determining its status or
7 entitlements under Articles 13 or 121 of the
8 Convention. The matter is one for objective
9 determination. It is, or is not, a low-tide elevation
10 or anything else irrespective of who does or does not
11 control it.

12 Third, as your recent award recognises, there are
13 no indispensable third parties to these proceedings.⁸¹

14 Mr President, members of the Tribunal, having
15 addressed the question of status and entitlements,
16 I move on to the second part of my presentation on the
17 question of China's artificial structures and
18 island-building on these low-tide elevations, which
19 will be much briefer.

20 Over the past two decades, China has taken
21 physical control of numerous features, some of which
22 are within the exclusive economic zone and continental
23 shelf of the Philippines. China has constructed
24 a number of artificial installations, and more

⁸¹ Award on Jurisdiction and Admissibility, 29 October 2015, paras. 179-188.

1 recently undertaken an island-building programme, and
2 it has done so at very great speed. The purpose it
3 seems to seek is to consolidate control over vast
4 areas of the South China Sea. The Chinese Government
5 maintains artificial structures on seven of the nine
6 maritime features identified in the Philippines'
7 submissions.

8 Before turning to China's island-building
9 activities, there are three matters of a more general
10 nature that arise from the Tribunal's list of issues.
11 The first is the:

12 "... decisive time to decide as to whether
13 a maritime feature constitutes an island within the
14 meaning of article 121(1) of the Convention or
15 a low-tide elevation."⁸²

16 An analogy can be drawn with the concept of
17 "critical date" in the case law on sovereignty over
18 land, and more recently applied in maritime
19 delimitation cases. The "decisive time" here -- the
20 date upon which a feature is to be characterised in
21 accordance with the Convention -- is the date on which
22 the Philippines presented China with its Notification
23 of Claim and Statement of Claim, namely
24 22nd January 2013. This approach is consistent with

⁸² Letter from the Permanent Court of Arbitration to the Parties dated 10 November 2015, Annex of Issues the Philippines May Wish to Address at November Hearing.

1 that of the International Court of Justice.⁸³ There
2 is no indication or evidence before you that the
3 natural state of these features has changed in any way
4 since that date.

5 Separately, the Philippines first became aware of
6 China's island-building activities in early 2014,
7 13 months after these arbitral proceedings were
8 initiated. Those activities cannot be taken into
9 account in characterising the nature of the features
10 on which they occur, whether they occurred before or
11 after the date on which the dispute arose.

12 By seeking to build artificial islands and
13 structures, China is apparently seeking to change the
14 status of maritime features in the South China Sea,
15 with the aim of altering and extending the maritime
16 entitlements which these features might generate.
17 China's Foreign Ministry acknowledged in April this
18 year that the "main purpose" of China's activities is
19 to "better safeguard [China's] territorial sovereignty
20 and maritime rights and interests".⁸⁴

21 The accelerating programme of island-building
22 might well be intended to establish a new *status quo*

⁸³ *Case Concerning Sovereignty over Pulau Litigan and Pulau Sipadan (Indonesia v. Malaysia)*, Judgment, I.C.J. Reports 2002, para. 135. Hearing on Merits, Annex LA-300.

⁸⁴ Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on April 9, 2015* (9 Apr. 2015), p. 1. SWSP, Vol. I, Annex 624.

1 in the South China Sea before the Tribunal is able to
2 issue its award on the merits. It seeks to present
3 the Philippines and this Tribunal with
4 a *fait accompli*. Such actions by China, we submit,
5 cannot in any way alter the legal situation as it was
6 at the time the dispute arose.

7 A second related matter that arises from the
8 Tribunal's list of issues is how Article 121(1)
9 "applies to situations of changing geology or
10 geomorphology".⁸⁵ There is no evidence before the
11 Tribunal to indicate that any of these features are
12 the subject of "changing geology or geomorphology".
13 If there were such evidence, there is nothing in the
14 Convention or the relevant jurisprudence to preclude
15 the Tribunal from exercising jurisdiction to determine
16 the status of a feature in such a situation. In
17 *Nicaragua v Honduras*, for example, the International
18 Court was not precluded from applying Article 15 of
19 the Convention in an area where "rapid morphological
20 changes [had] occurred",⁸⁶ and where "unstable islands
21 and shoals"⁸⁷ were present.

⁸⁵ Letter from the Permanent Court of Arbitration to the Parties dated 10 November 2015, Annex of Issues the Philippines May Wish to Address at November Hearing.

⁸⁶ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)*, Merits, Judgment, ICJ Reports 2007, p. 659, para. 31. SWSP, Vol. XII, Annex LA-177.

⁸⁷ *Ibid*, para. 32.

1 A more recent example is the treatment of South
2 Talpatty Island, a low-tide elevation in the case of
3 *Bangladesh v India*, looked for but recently not found.
4 Despite the highly active hydromorphology of the
5 Bengal Delta, the tribunal saw no difficulty in
6 applying the Convention and coming to the conclusion
7 that South Talpatty was "not a suitable geographical
8 feature for the location of a base point".⁸⁸ That
9 said, as I have already mentioned, we do not appear to
10 be faced in the present case with such a situation,
11 which of course concerns coral reef features.

12 The third related matter identified in the
13 Tribunal's list of issues is how Article 121(1)
14 applies to:

15 "... situations where the status of a feature as
16 above or below water at high tide can no longer be
17 directly observed as a result of human activity."⁸⁹

18 The answer to this question must surely be that
19 Article 121(1) is to be interpreted and applied on the
20 basis of the best evidence available to the Tribunal
21 as to the situation that pertained before the human
22 activity precluded such direct observation. In the

⁸⁸ *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v India)*, Award, UNCLOS Annex VII Tribunal (7 July 2014), para. 263. SWSP, Vol. XII, Annex LA-179.

⁸⁹ Letter from the Permanent Court of Arbitration to the Parties dated 10 November 2015, Annex of Issues the Philippines May Wish to Address at November Hearing.

1 present case there is ample evidence -- in the form of
2 nautical charts, *Sailing Directions* and satellite
3 imagery -- of the natural conditions before China's
4 recent island-building activities.

5 Let us turn now briefly to the specifics of
6 China's activities. Johnson Reef offers an example of
7 what is going on. An artificial structure that was
8 approximately 1,000 square metres in size has now been
9 extended by building an area of land that is more than
10 1,000 times greater in its geographic area.

11 To take another example, the island-building at
12 Fiery Cross, which you can see on the screens now,
13 commenced in August 2014 and is progressing very
14 quickly.⁹⁰ Where once only 2 square metres were above
15 water at high tide⁹¹ -- that's basically me taking
16 a step to the right, a step to the left, a step
17 forward, a step back; that's 2 square metres -- newly
18 created land now extends almost the entire length of
19 the reef. That is -- and I'm not exaggerating -- the
20 distance from where I am standing to the beach at
21 Scheveningen. That is what has been built in that
22 period.

⁹⁰ J. Hardy & S. O'Connor, "China Building Airstrip Capable Island on Fiery Cross Reef", *HIS Jane's Defence Weekly* (20 Nov. 2014). Supplemental Documents, Vol. III, Annex 720.

⁹¹ Navigation Guarantee Department of the Chinese Navy Headquarters, *China Sailing Directions: South China Sea (A103)* (2011). SWSP, Vol. III, Annex 232(bis).

1 The area measures 3,000 metres by 200 to
2 300 metres. The previous Chinese facility was
3 11,000 square metres, but there are now 2.65 square
4 kilometres of dry land.⁹² A 2-square-metre rock has
5 been transformed into the area of an entire suburb as
6 a result of human activity.⁹³ Yet the fact remains
7 that the evidence of how this feature was before such
8 activity is not disputed, or disputable, on the basis
9 of all the charts and all the satellite evidence.

10 Professor Oxman will have more to say tomorrow
11 about the extent of China's island-building programme.
12 My task is limited to making two simple points: first,
13 the status of a feature is to be determined on the
14 basis of the best available evidence that existed
15 before the human activity transformed it; and second,
16 such anthropogenic activity cannot transform its
17 status as a feature under the Convention.

18 The first definitional element of an island, rock
19 and low-tide elevation, common to both Articles 13(1)
20 and 121(1), is that it must be a "naturally formed
21 area of land".⁹⁴ The construction of concrete

⁹² Victor R. Lee, "China's New Military Installations in the Disputed Spratly Islands: Satellite Image Update", *Medium* (16 Mar. 2015), p. 4. Supplemental Documents, Vol. III, Annex 750.

⁹³ Simon Denyer, "U.S. Navy alarmed at Beijing's 'Great Wall of Sand' in South China Sea", *Washington Post* (1 Apr. 2015), p. 2. Supplemental Documents, Vol. III, Annex 751.

⁹⁴ UNCLOS, Articles 13(1) and 121(1).

1 platforms and large-scale island building plainly does
2 not meet this definition. A manmade concrete platform
3 is not "naturally formed". China's concrete
4 structures and newly created land areas are not
5 "naturally formed"; they are unnaturally formed; they
6 are installations. They are "artificial" within the
7 meaning of Article 60 of the Convention.

8 It is to be noted, as you can see on your screens,
9 that Article 60(1) distinguishes between artificial
10 islands and artificial installations and structures.
11 But Article 60(8) makes it clear that:

12 "Artificial islands, installations and structures
13 do not possess the status of islands. They have no
14 territorial sea of their own, and their presence does
15 not affect the delimitation of the territorial sea,
16 the exclusive economic zone or the continental
17 shelf."⁹⁵

18 Throughout the Convention there is a clear
19 distinction between naturally formed maritime
20 features, which are capable of generating maritime
21 entitlements, and artificial islands, which are
22 incapable of generating maritime zones. Article 11
23 provides that:

24 "For the purpose of delimiting the territorial
25 sea, the outermost permanent harbour works which form

⁹⁵ UNCLOS, Article 60(8).

1 an integral part of the harbour system are regarded as
2 forming part of the coast."

3 However, Article 11 makes clear that:

4 "Offshore installations and artificial islands
5 shall not be considered as permanent harbour works."⁹⁶

6 Unlike a naturally formed island, rock or low-tide
7 elevation, an artificial island cannot be used to
8 artificially extend the territorial sea by passing it
9 off as "permanent harbour works".

10 In our submission, the words "naturally formed"
11 require that a feature is formed by natural processes,
12 without any human intervention. The use of the verb
13 "formed" makes clear that it is the means by which the
14 feature comes into existence that is key. The Oxford
15 English Dictionary defines the verb "form" as "to give
16 form or shape to", to "fashion", or to "mould".

17 It follows that the words "naturally formed" must
18 exclude artificial islands, regardless of what they
19 are made from. An artificial island may be composed
20 of natural material, but it must have been formed
21 "naturally", without human, mechanical or other
22 unnatural intervention.

23 An examination of the Convention's *travaux* and the
24 writings of leading academics and practitioners
25 confirms this interpretation. The commentary to

⁹⁶ UNCLOS, Article 11.

1 Article 121 sets out the origins and effects of the
2 formulation.⁹⁷ The commentary adds that:

3 "In describing an island as a 'naturally formed
4 area of land', it excludes artificial islands, which
5 are dealt with in various provisions of the
6 Convention."⁹⁸

7 This is a view shared by Jayewardene, who writes
8 that the words "naturally formed":

9 "... clearly and finally excluded artificial
10 islands and any potential thereof for generating
11 territorial sea rights or other maritime zones."⁹⁹

12 Likewise, Professor Robert Kolb explains that:

13 "De la definition de l'île come étant 'une étendue
14 naturelle de terre' ... il résulte que toute structure
15 artificielle est exclue."¹⁰⁰

16 In conclusion, regardless of how one characterises
17 the Chinese structures, installations and newly built
18 land masses, they are not "naturally formed", and they
19 fall outside the scope of Articles 13 and 121. In

⁹⁷ *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 3 (M. Nordquist, et al., eds., 2002), p. 327. MP, Vol. XI, Annex LA-146.

⁹⁸ *Ibid.*, p. 338.

⁹⁹ H. Jayewardene, *The Regime of Islands in International Law* (1990) p. 8. Supplemental Documents, Vol. VI, Annex LA-278.

¹⁰⁰ Robert Kolb, "The Interpretation of Article 121, Paragraph 3 of the United Nations Convention on the Law of the Sea: Rocks Which Cannot Sustain Human Habitation or Economic Life of Their Own", in *French Yearbook of International Law*, Vol. 40 (1994), p. 906. MP, Vol. XI, Annex LA-132. ("In the definition of an island as 'a naturally formed area of land... (Article 121, first paragraph)' it is clear that any artificial structure is excluded.")

1 determining the status and entitlements generated by
2 the features identified in the Philippines'
3 submissions, the unnatural activities of any states,
4 including China, are to be entirely disregarded.
5 Contained within the written pleadings, including the
6 *Atlas*, the Tribunal has the benefit of all the
7 necessary information that is required to determine
8 the status of the features identified in
9 Submissions 4, 5 and 6.

10 On the basis of this voluminous geographic,
11 hydrographic and historical data obtained, collated
12 and analysed by the Philippines, with the assistance
13 of numerous questions from the Tribunal in the course
14 of these proceedings, for which we are very grateful,
15 it is submitted that:

16 (a) Second Thomas Shoal, Mischief Reef and Subi
17 Reef are low-tide elevations that fall within the
18 scope of Article 13(2) of the Convention. They
19 generate no territorial sea, EEZ or continental shelf,
20 and are not capable of appropriation or occupation.

21 (b) McKennan Reef and Gaven Reef are low-tide
22 elevations within the scope of the second sentence of
23 Article 13(1). They do not generate a territorial
24 sea, EEZ or continental shelf of their own, but they
25 can serve as basepoints for the measurement of the
26 territorial sea of nearby high-tide features.

1 Mr President, I am very grateful to you for your
2 attention. Perhaps you are going to say that after
3 the break Mr Martin should come next, but it may be
4 that there are questions in the meantime.

5 **THE PRESIDENT:** There is a question from Judge Wolfrum,
6 so I think we will ask him to ask that question first.

7 (11.21 am)

8 **Tribunal questions**

9 **JUDGE WOLFRUM:** I have a question, Professor Sands. It
10 goes back -- I apologise for that -- to the beginning
11 of your statement, but I don't think it would have
12 been appropriate to interrupt you.

13 You said -- and I believe it is a direct quote --
14 low-tide elevations cannot become a rock or an island
15 by land reclamation activities, and you tried to
16 explain and reason this statement, which in a way is
17 where my question comes from.

18 We are here in the Netherlands. The Netherlands
19 is well known for land reclamation activities. To the
20 best of my knowledge, nobody ever has argued that the
21 land gained from the sea is not part of the Dutch
22 territory. You saw that point, you mentioned it, and
23 said: low-tide elevations are not land. This was the
24 main reason why you treat differently land reclamation
25 from the coast and land reclamation for low-tide

1 elevations.

2 Now, this is my question. Is this really giving
3 us a complete picture? First of all, how would you
4 treat land reclamation activities on low-tide
5 elevations which are in the 12-nautical-mile belt of
6 the coast? Would you treat them as if they were land
7 reclamation from the land or treat them as you treat
8 them here?

9 But apart from that is the question: when you
10 argue low-tide elevations are not land, this is
11 certainly well understood. But the fixed point for
12 land reclamation, you start from the land; and you
13 have nothing comparable for low-tide elevation,
14 therefore can you really compare the two? Isn't this
15 really something totally different?

16 I assume you would like to answer this a little
17 bit later, but I would be interested in your answer.

18 Thank you very much. .

19 **PROFESSOR SANDS:** Judge Wolfrum, I will follow the
20 customary practice of batting it into a later session,
21 but I will say this.

22 I've gone back just to look at the first part of
23 what I think you took my words from. On my notes I've
24 got, I referred to "manipulation", and I was very
25 careful not to refer to the words "land reclamation"
26 because it is the position of the Philippines that

1 what is going on is not land reclamation.

2 But we will come back to this in due course,
3 either tomorrow or on Monday, and I express our thanks
4 for the question.

5 **THE PRESIDENT:** So we will now have a short break of
6 15 minutes for coffee, and then we will come back at
7 about 11.40. Thank you very much.

8 **(11.25 am)**

9 **(A short break)**

10 **(11.43 am)**

11 **THE PRESIDENT:** Yes, Mr Martin.

12 **First-round submissions by MR MARTIN**

13 **MR MARTIN:** Mr President, distinguished members of the
14 Tribunal, good morning. It is again an honour to
15 appear before you, and a genuine privilege to do so on
16 behalf of the Philippines in these critical hearings.

17 My intervention this morning will be somewhat
18 longer than yesterday. I will be addressing you on
19 a matter that has drawn the attention of the
20 international community for the better part of
21 a century: the extent of the maritime space to which
22 small insular features are entitled. My principal
23 purpose is to discuss the interpretation of
24 Article 121(3) of the Convention. But understanding
25 that text requires a brief excursion into earlier

1 attempts to address the same issue.

2 Mr President, before I begin, let me say that the
3 proper interpretation of Article 121(3) is a question
4 on which authoritative guidance is sorely needed.
5 There is perhaps no other provision of the Convention
6 that has generated so much commentary, yet yielded so
7 little certainty. State practice is of little
8 guidance. And there is an unhelpful lack of judicial
9 authority.

10 In only one case has an international court or
11 arbitral tribunal actually applied Article 121(3) to
12 determine whether a specific feature generates
13 entitlement to 200 miles or not, and that was
14 a case -- Nicaragua v Colombia -- in which the only
15 issue was whether the feature was a rock or a low-tide
16 elevation, entitled to no maritime zones at all. In
17 every other case where the issue has arisen, courts
18 and tribunals have found a way to navigate around it.

19 These circumstances, if I may say so, present this
20 Tribunal with a unique opportunity. There is no
21 getting around the question here. The interpretation
22 of Article 121(3) lies at the very heart of this case.
23 This Tribunal's decision will therefore inject
24 much-needed legal clarity, not only in the South China
25 Sea but around the globe.

26 Mr President, let me return briefly to the origins

1 of the issue. One of the earliest attempts to address
2 the question of the maritime space generated by small
3 insular features took place in this city during the
4 1930 League of Nations Hague Codification Conference.
5 The Conference did not produce a Convention, but its
6 provisions on islands are nonetheless considered to
7 reflect customary international law at the time.

8 During the conference, there was initial
9 disagreement on the question of whether small islands
10 should be entitled to generate a territorial sea of
11 their own. In a characteristically Britannic act of
12 modesty, the United Kingdom, together with Australia
13 and South Africa, proposed to limit the category of
14 insular features that could generate a territorial sea
15 to pieces of "territory surrounded by water,
16 permanently above high water in normal circumstances
17 and capable of occupation and use".¹⁰¹

18 In contrast, in a characteristically American act
19 of immodesty, the United States, joined by several
20 other countries, took a different view. They proposed
21 that an island should be defined as any naturally

¹⁰¹ J.M Van Dyke and R.A. Brooks, "Uninhabited Islands: Their Impact on the Ownership of the Oceans' Resources", *Ocean Development and International Law*, Vol. 12, No. 3-4 (1983), p. 272. MP, Vol. XI, Annex LA-124; B. Kwiatkowska and A. H.A. Soons, "Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of their Own", *Netherlands Yearbook of International Law*, Vol. 21 (1990), p. 154. MP, Vol. XI, Annex LA-132 (citing League of Nations Conference for the Codification of International Law, *2 Cases of Discussion*, League of Nations Doc. No. C.74M.39.1929.V, pp. 52-53).

1 formed part of the earth's surface above water at low
2 tide. There was, moreover, no requirement that the
3 feature be capable of occupation and use.¹⁰²

4 The Final Act of the Conference represented
5 a compromise solution, and determined: (1) that
6 an island was "an area of land, which is permanently
7 above high-water mark"; and (2) that every island had
8 its own territorial sea. As part of this compromise,
9 the criteria of occupation and use were dropped.

10 The definition of "island" adopted during the 1930
11 Codification Conference was largely carried over to
12 Article 10 of the ILC's 1956 Articles Concerning the
13 Law of the Sea, except only that the phrase "in normal
14 circumstances" was added before the requirement that
15 the feature be permanently above water at high tide.¹⁰³

16 During the ILC's deliberations, a renewed proposal
17 by Hersch Lauterpacht to introduce a requirement that
18 an island be capable of "effective occupation and
19 control" was rejected, because some considered that
20 these criteria did not impose any meaningful
21 limitations. As Professor François put it, who was
22 the special rapporteur:

¹⁰² J.M Van Dyke and R.A. Brooks, "Uninhabited Islands: Their Impact on the Ownership of the Oceans' Resources", *Ocean Development and International Law*, Vol. 12, No. 3-4 (1983), p. 272. MP, Vol. XI, Annex LA-124.

¹⁰³ International Law Commission, Report of the International Law Commission Covering the Work of its Eighth Session, U.N. Doc. A/3159 (4 July 1956), Articles Concerning the Law of the Sea, Art. 10, p.270. Annex LA-62.

1 "Any rock could be used as a radio station or
2 a weather observation post. In that sense, all rocks
3 were capable of effective occupation and use."¹⁰⁴

4 To avoid lengthy debate, Lauterpacht agreed to
5 drop the proposal.

6 The ILC's definition of "island" was then largely
7 carried over intact into Article 10(1) of the 1958
8 Geneva Convention on the Territorial Sea. The only
9 difference was that the phrase "naturally formed",
10 about which Professor Sands just talked, was added, to
11 make clear that states could not arrogate to
12 themselves a territorial sea through the expedient of
13 creating artificial areas of land.

14 Mr President, this then was the state of the law
15 in the years leading to the UNCLOS III negotiations.
16 Much has been written about the history of those
17 negotiations and what they mean for the interpretation
18 of Article 121(3), but only general -- but still
19 critical -- insights can be gleaned from the *travaux*.
20 As former Judge Anderson has written:

21 "Paragraph 3 differs from the many proposals
22 submitted to the LOS Conference that sought to qualify

¹⁰⁴ International Law Commission, "260th Meeting" (2 July 1954), in *Yearbook of the International Law Commission 1954*, Vol. I (1954), p. 93. Hearing on Merits, Annex LA-308; B. Kwiatkowska and A. H.A. Soons, "Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of their Own", *Netherlands Yearbook of International Law*, Vol. 21 (1990), p. 155. MP, Vol. XI, Annex LA-132.

1 or reduce the effect of islands. The *travaux*
2 *préparatoires* record disagreements which were not
3 resolved by the main protagonists across the table.
4 For this reason, the records are not a reliable guide
5 to the provision's interpretation."¹⁰⁵

6 This is certainly true with respect to the
7 particular form of words used, but it does not prevent
8 certain clear conclusions regarding the object and
9 purpose of the provision. In particular, the
10 negotiation records reflect that what former ITLOS
11 President Jesus called "an overwhelming number of
12 countries"¹⁰⁶ opposed the idea of granting
13 insignificant islands maritime zones beyond the
14 territorial sea.

15 At a 1971 meeting of the UN Sea-Bed Committee, the
16 preparatory body for UNCLOS III, Ambassador Arvid
17 Pardo of Malta expressed the stakes for the
18 forthcoming negotiations. He said:

19 "If a 200-mile limit of jurisdiction could be
20 founded on the possession of uninhabited, remote or
21 very small islands, the effectiveness of international
22 administration of ocean space beyond a national

¹⁰⁵ David Anderson, "Islands and Rocks in the Modern Law of the Sea" in *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 2 (M. Nordquist, et. al., eds., 2002), p. 313. MP, Vol. XI, Annex LA-149.

¹⁰⁶ Jose Luis Jesus, "Rocks, New-born Islands, Sea Level Rise, and Maritime Space" in *Negotiating for Peace* (Jochen A. Frowein, et. al., eds., 2003), p. 583. MP, Vol. XI, Annex LA-151.

1 jurisdiction could be gravely impaired."¹⁰⁷

2 Similar concerns were expressed throughout the
3 negotiations. For example, the delegate of Tunisia,
4 Mohamed Marsit, who later became an ITLOS judge,
5 stated that the then-existing law, which drew no
6 distinction among islands:

7 "... favoured mainly those countries which had
8 been able to extend their power over a large number of
9 islands, while it was detrimental to the developing
10 countries, which had not participated in the
11 elaboration of the 1958 Geneva Conventions and which
12 for the most part did not possess any islands. It was
13 also unfavourable to all land-locked and other
14 geographically disadvantaged States, which, having
15 expected an equitable distribution of the resources of
16 the international zone, were justly concerned at
17 seeing that concept rendered meaningless by the
18 exaggerated claims of countries possessing islands
19 ..."¹⁰⁸

20 As Professor Oxman said yesterday, China
21 consistently aligned itself with the developing
22 countries -- as it itself then was -- during the

¹⁰⁷ *Russia v Australia*, Declaration of Judge Vukas, para. 10. MP, Vol. XI, Annex LA-40 (citing UN Sea-Bed Committee, Doc. A/AC.138/SR.57, p. 167).

¹⁰⁸ United Nations, Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea: Régime of Islands: Legislative History of Part VIII (Article 121) of the United Nations Convention on the Law of the Sea, Part 8* (1988), p. 65. MP, Vol. XI, Annex LA-118.

1 UNCLLOS III negotiations.

2 There was also much concern about the potential
3 for insignificant insular features to intrude on the
4 maritime entitlements of other States. Former
5 President Jesus wrote:

6 "The very purpose of the rock provision ... was to
7 deny tiny islands ... the capacity to generate
8 unfairly and inequitably huge maritime spaces ...
9 which would, in most cases, impinge on other States'
10 maritime space or on the area of the international
11 seabed ..."¹⁰⁹

12 The oft-quoted Danish view captures the consensus
13 perfectly. The majority of states were concerned
14 that, in the absence of a provision that limited the
15 maritime entitlements of small insular features:

16 "... tiny and barren islands, looked on in the
17 past as mere obstacles to navigation, would
18 miraculously become the golden keys to vast maritime
19 zones. This would indeed be an unwarranted and
20 unacceptable consequence of the new law of the sea."¹¹⁰

21 There is thus no doubt that Article 121(3)
22 reflects a deliberate choice to depart from the

¹⁰⁹ Jose Luis Jesus, "Rocks, New-born Islands, Sea Level Rise, and Maritime Space" in *Negotiating for Peace* (Jochen A. Frowein, et. al., eds., 2003), p. 588. MP, Vol. XI, Annex LA-151.

¹¹⁰ United Nations, Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea: Régime of Islands: Legislative History of Part VIII (Article 121) of the United Nations Convention on the Law of the Sea, Part 8* (1988), p. 107. MP, Vol. XI, Annex LA-118.

1 earlier law and establish a new -- and pragmatic --
2 approach which makes a feature's entitlement subject
3 to certain practical conditions (which I will address
4 shortly).

5 The ICJ recognised just this point in its 2012
6 judgment in *Nicaragua v Colombia*, in which the court
7 determined that paragraph 3, just as much as
8 paragraphs 1 and 2 of Article 121, formed part of
9 customary international law. It reasoned:

10 "By denying an exclusive economic zone and
11 a continental shelf to rocks which cannot sustain
12 human habitation or economic life of their own,
13 paragraph 3 provides an essential link between the
14 long-established principle that 'islands, regardless
15 of their size ... enjoy the same status, and therefore
16 generate the same maritime rights, as other land
17 territory' and the more extensive maritime
18 entitlements recognized in UNCLOS..."¹¹¹

19 The particular words in which the drafters chose
20 to create this "link" have, as I said, been the
21 subject of much discussion. And as Judge Anderson
22 said, the final text differs substantially from the
23 various proposals submitted by states like Colombia,
24 Malta, Romania, Turkey and a group of 14 African

¹¹¹ *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Merits, Judgment, ICJ Reports 2012, para. 139. MP, Vol. XI, Annex LA-35.

1 states, among others. Several of the specific
2 proposals are detailed in our Memorial, and I don't
3 need to elaborate on them here.

4 In the end, the agreed text was the product of the
5 work of the Second Committee's informal consultative
6 group on islands. The group produced the text that
7 ultimately became Article 121 during the Third Session
8 in Geneva in April 1975, but it left no records of its
9 work.

10 To interpret the exact meaning of Article 121(3)
11 thus requires taking its text at face value, in light
12 of the object and purpose I have just described. It
13 is the plain text to which I will now turn.

14 The Tribunal is well aware of the text of
15 Article 121 as a whole. For convenience, it is
16 projected on the screen now.

17 Paragraphs 1 and 2 are generally unremarkable.
18 They provide that islands -- that is, naturally formed
19 areas of land, surrounded by water, which are above
20 water at high tide -- generate maritime zones to the
21 same extent as other land territory.

22 Paragraph 3 then creates an exception for
23 a certain category of high-tide features; namely,
24 "rocks which cannot sustain human habitation or
25 economic life of their own". Such features generate
26 neither a continental shelf nor an EEZ.

1 "Rocks which cannot sustain human habitation or
2 economic life of their own". These seemingly simple
3 twelve words distinctly recall the British proposal at
4 the 1930 Codification Conference to require occupation
5 and use. At the same time, they raise a number of
6 interpretive questions, all of which the Tribunal
7 itself flagged in its 10th November Annex of Issues:

- 8 • What is a "rock"? Is the geology and the
9 geomorphology of the feature relevant?
- 10 • What does it mean to "sustain" something?
- 11 • What is "human habitation"?
- 12 • And what about "economic life of its own"?
- 13 • Must the feature in question meet both of
14 these criteria in order to avoid being
15 classified as a "rock", or only one of them?

16 I will address each of these issues in turn.

17 First, is a "rock" defined by its geological and
18 geomorphological characteristics? This question at
19 least is easy. The answer is: no. An Article 121(3)
20 "rock" does not need to be a rock in its lay sense.

21 I note in the first instance that the ordinary
22 meaning of the term "rock" is not limited to this lay
23 meaning. According to the Oxford English Dictionary,
24 for example, it means:

25 "[The] solid mineral material forming much of the
26 substance of the earth (or any similar planetary

1 body), whether exposed on the surface or overlain by
2 soil, sand, mud, etc."¹¹²

3 Moreover, in the one case in which a feature has
4 been held to be an Article 121(3) rock, the feature in
5 question -- Colombia's Quitasueño -- was not a "rock"
6 narrowly defined. It was rather a protrusion of
7 coral, which is not a lifeless mineral mass, but
8 instead a collection of living organisms and the
9 skeletons of their ancestors. In that connection, the
10 court held that:

11 "International law defines an island by reference
12 to whether it is 'naturally formed' and whether it is
13 above water at high tide, not by reference to its
14 geological composition ... The fact that the feature
15 is composed of coral is irrelevant."¹¹³

16 The meaning of "rock" under Article 121(3) is thus
17 not limited to its geological characteristics.

18 The reason "rock" must be interpreted in this
19 broader sense is obvious. A contrary approach would
20 lead to a result that is manifestly absurd, in
21 violation of the most basic precepts of treaty
22 interpretation. It would mean that a small
23 uninhabitable sand spit, or a mud patch, or a piece of

¹¹² "Rock", *Oxford English Dictionary* (accessed 18 Nov. 2015), p. 2. Supplemental Documents, Vol. V, Annex 818.

¹¹³ *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Merits, Judgment, ICJ Reports 2012, para. 37. MP, Vol. XI, Annex LA-35.

1 coral, devoid of economic life, would be entitled to
2 generate expanded maritime rights and jurisdiction,
3 even though an otherwise identical feature that
4 happens to be composed of granite would not be. This
5 would not only be unreasonable, it would also
6 contradict the purpose of the provision.

7 Insignificant sand spits, mud patches, coral
8 protrusions, would indeed miraculously become the
9 golden keys to vast maritime zones.

10 Also uncontroversial is the term "cannot". This
11 is plainly meant to refer to the capacity of the
12 feature to sustain either human habitation or economic
13 life. It does not entail an enquiry into whether the
14 feature does now sustain, or has ever in the past
15 sustained, human habitation and economic life. The
16 issue is the feature's potential to do so.

17 That said, and in response to one of the issues
18 identified by the Tribunal, history and current
19 reality are certainly relevant. The fact that
20 a feature was historically uninhabited and sustained
21 no economic life constitutes evidence -- indeed, very
22 powerful evidence -- of its lack of capacity to do so.
23 If a feature were surrounded by populated land masses,
24 and known to have existed for centuries, yet never to
25 have been inhabited, that would tell you something
26 important about its capacity to sustain habitation.

1 There would have to be a reason for the absence of
2 habitation. And surely the most obvious would be that
3 the feature is uninhabitable. The same is true if the
4 feature is currently uninhabited; all the more, given
5 the explosion of human population and advances in
6 technology.

7 The Tribunal also asked whether the abandonment of
8 past human habitation would be relevant. With
9 apologies for giving such a lawyerly response, the
10 answer is: it depends. If a feature were previously
11 inhabited but then depopulated, due, for example, to
12 an international conflict or some other reason having
13 nothing to do with the capacity of the feature itself,
14 the fact of abandonment might not be relevant. On the
15 other hand, if habitation were abandoned due to
16 a change in the natural characteristics of the island,
17 for example, as the result of a catastrophic storm,
18 that would certainly be relevant.

19 For the sake of completeness, I should note that
20 the other authentic texts reflect the same meaning as
21 the English term "cannot". Now, and for the balance
22 of my comments this morning, I will limit myself to
23 the English, the Chinese and the Spanish texts. I do
24 so only because of my own limitations. These are the
25 languages I can pronounce without being laughed out of
26 this Great Hall. All the other authentic texts,

1 though, are entirely consistent.

2 In Chinese, "cannot" is "bu neng", which means
3 "not able" or "unable".¹¹⁴ Also, for example, the
4 Spanish text uses the phrase "no aptas"; again, "not
5 able", "unable".

6 Unfortunately, Mr President, I have now exhausted
7 the list of easy questions. On the remaining issues
8 of interpretation, the commentary is less than
9 uniform. In our view, however, insufficient attention
10 has been paid to the plain meaning of the words used.
11 A close analysis of the words "cannot sustain human
12 habitation or economic life of their own", read
13 individually and together, yields certain very clear
14 answers.

15 Let's start with the verb "sustain". "Sustain"
16 has a distinct meaning. The Oxford English Dictionary
17 defines it to mean:

18 "To keep in exist, maintain, *spec[ifically]* to
19 cause to continue in a certain state for an extended
20 period [of time] or without interruption; to keep or
21 maintain at the proper level, standard, or rate; to
22 preserve the status of.

23 "To maintain (a person, etc.) in life and health;
24 to provide with food, drink, and other substances

¹¹⁴ "Bù" and "Néng", *Oxford Chinese Dictionary* (2010), pp. 55, 522.
Supplemental Documents, Vol. V, Annex 810.

1 necessary for remaining alive; to feed, to keep."¹¹⁵

2 It follows that for a feature to escape status as
3 a "rock", it must be capable of providing the fresh
4 water, the food, the shelter and the living space that
5 are necessary to keep human beings alive for
6 an extended period of time.

7 The feature must, moreover, be able to do so on
8 its naturally occurring conditions. Paragraph 1 of
9 Article 121 provides that an island is a "naturally
10 formed" area of land that is above water at high tide.
11 Article 121(3) "rocks" are a subcategory of islands.
12 The "naturally formed" criterion thus applies equally
13 to rocks, and dictates that a feature's capacity to
14 sustain human habitation and economic life must be
15 determined by reference to its natural conditions.

16 It cannot be that building a desalination plant to
17 provide a source of fresh water counts. It cannot be
18 that importing soil to render agriculture possible
19 counts. And it cannot be that artificial land
20 reclamation to provide living space counts.

21 A contrary rule would create perverse incentives
22 for states to undertake such actions to extend their
23 maritime zones to the detriment of other coastal
24 states and/or the common heritage of mankind. Under

¹¹⁵ "Sustain", *Oxford English Dictionary* (accessed 18 Nov. 2015), pp. 1-2 & 4. Supplemental Documents, Vol. V, Annex 819.

1 such an interpretation, every high-tide feature, no
2 matter how small, no matter how remote, and no matter
3 how incapable of sustaining human habitation or
4 economic life in its natural conditions, could be
5 converted into an island generating a 200-mile
6 entitlement if the state that claims it is willing to
7 devote and regularly supply the resources necessary to
8 sustain a human settlement.

9 The same understanding of what it means to
10 "sustain" something follows equally from the other
11 authentic texts. In Chinese, the word used is
12 "*wéichi*", which means to "maintain", or keep or
13 preserve.¹¹⁶ In Spanish, the verb used is "*mantener*",
14 which, according to the Dictionary of the Royal
15 Spanish Academy, means:

16 "Provide someone with the necessary food.

17 "Finance someone's economic necessities.

18 "Main something in its being, to give it vigor and
19 permanence."¹¹⁷

20 After the verb "sustain", of course, is the phrase
21 "human habitation". This, too, has a very clear
22 meaning. Again according to the Oxford English

¹¹⁶ "*Wéichi*", *Oxford Chinese Dictionary* (2010), p. 770. Supplemental Documents, Vol. V, Annex 810.

¹¹⁷ "*Mantener*", *Real Academia Española, Diccionario de la lengua española [Dictionary of the Royal Spanish Academy]* (accessed 18 Nov. 2015), p. 1. Supplemental Documents, Vol. V, Annex 817. (Proveer a alguien del alimento necesario; costear las necesidades económicas de alguien; conservar algo en su ser, darle vigor y permanencia.)

1 Dictionary, "habitation" means:

2 "The action of dwelling in or inhabiting as
3 a place of residence; occupancy by inhabitants."¹¹⁸

4 In Spanish, the word is "*habitación*", which,
5 according to the Royal Academy Dictionary, has the
6 same meaning as its English equivalent.¹¹⁹ And in
7 Chinese, the word used is "*juzhu*", which means "to
8 dwell" or "to live".¹²⁰

9 One noted Chinese scholar has observed that:

10 "International law experts universally believe
11 that [to be habitable] an island must: sustain and
12 maintain fresh water, be able to grow vegetation that
13 can sustain human habitation, produce some material
14 that can be used for human shelter, and be able to
15 sustain a human community ... Indeed, food, fresh
16 water and live space constitute the very fundamental
17 criteria for human habitation on an island. With
18 these three criteria, the island may be considered as
19 being able to sustain human habitation."¹²¹

20 Thus, it is not enough that a feature be able to

¹¹⁸ "Habitation", *Oxford English Dictionary* (accessed 16 Nov. 2015), p. 1. Supplemental Documents, Vol. V, Annex 815.

¹¹⁹ "Habitación", *Real Academia Española, Diccionario de la lengua española [Dictionary of the Royal Spanish Academy]* (accessed 18 Nov. 2015), p. 1. Supplemental Documents, Vol. V, Annex 814.

¹²⁰ "Jūzhù", *Oxford Chinese Dictionary* (2010), p. 393. Supplemental Documents, Vol. V, Annex 810.

¹²¹ G. Xue, "How Much Can a Rock Get? A Reflection from the Okinotorishima Rocks", in *The Law of the Sea Convention: U.S. Accession and Globalization* (M. Nordquist, et. al., eds., 2012), p. 356. MP, Vol. XI, Annex LA-166.

1 keep a single soul alive, or provide episodic shelter
2 for a group of people. To "sustain human habitation"
3 can only mean to maintain a stable group of human
4 beings by providing food, water and other necessities
5 that they require to live.

6 Moreover, the use of the words "sustain" and
7 "habitation" includes an obvious time element. As the
8 dictionary definition reflects, to "sustain" something
9 is an action that occurs across "an extended period"
10 of time. So too is "habitation". To inhabit a place
11 is to reside there, not to stop there for periods of
12 time on an episodic basis. Thus, to "sustain human
13 habitation" means to support a stable group of human
14 beings across a significant period of years, if not
15 permanently, such that the human population can
16 validly be considered to make their residence on the
17 feature.

18 This understanding is consistent with the long
19 history of efforts to impose limitations on the
20 maritime entitlements that small insular features
21 generate. As I mentioned at the 1930 Hague
22 Codification Conference, the British sought to
23 introduce a requirement that islands be "capable of
24 occupation and use". The origins of this proposal
25 date to the 1923 Imperial Conference in London, the
26 purpose of which was to set common policy for the

1 British Empire. Resolution four stated that an island
2 should be "capable of use or habitation".¹²² In
3 an explanatory memorandum, it was stated that:

4 "... 'capable of habitation' should mean capable,
5 without artificial addition, of permanent human
6 habitation."¹²³

7 Writing several years after the 1930 Codification
8 Conference, French delegate Gilbert Gidel expressed
9 dissatisfaction with the compromise definition of
10 island that had been adopted. He proposed his own.
11 Gidel proposed that an island be required:

12 "... in its natural conditions that it permit the
13 residence of a stable group of organised people."¹²⁴

14 Human beings are, of course, endlessly
15 resourceful. The Russian cosmonaut Valeriy Poliyakov
16 lived on the space station Mir for 437 days, taking
17 his food and water with him. But I don't think anyone
18 would suggest that Mir was capable of sustaining human
19 habitation.

20 Plainly not included in the phrase "human

¹²² Barry H. Dubner, "The Spratly 'Rocks' Dispute - A 'Rockapelago' Defies Norms of International Law", *Temple International & Comparative Law Journal*, Vol. 9, No. 2 (1995), p. 305. Supplemental Documents, Vol. II, Annex 705.

¹²³ *Id.*

¹²⁴ J.M Van Dyke and R.A. Brooks, "Uninhabited Islands: Their Impact on the Ownership of the Oceans' Resources", *Ocean Development and International Law*, Vol. 12, No. 3-4 (1983), p. 288. MP, Vol. XI, Annex LA-124 (citing B. Gidel, 3 *Le Droit international public de la mer* (1934), p. 684 (Gidel proposed that an island be required to have natural conditions "permettent la résidence stable de groupes huaines organisés.")).

1 habitation" is the maintenance of an official or
2 military presence. Judge Anderson has written:

3 "The introduction on to a small feature, such as
4 a rock or a sand spit, of an official or military
5 presence, serviced from the outside, does *not*
6 establish that the feature is capable of sustaining
7 human habitation or has an economic life of its
8 own." ¹²⁵

9 For these reasons, the Philippines shares the
10 considered views of Van Dyke and Brooks, who wrote
11 that in determining whether a feature can sustain
12 human habitation:

13 "The key factor must be whether the island can in
14 fact support a stable population. Islands should not
15 generate ocean space if they are claimed by some
16 distant absentee landlord who now desires the island
17 primarily because of the ocean resources around the
18 island. Islands should generate ocean space if stable
19 communities of people live on the island and use the
20 surrounding ocean areas." ¹²⁶

21 This is because, in their words:

22 "... it does not serve the central purposes of the

¹²⁵ David Anderson, "Islands and Rocks in the Modern Law of the Sea" in *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 2 (M. Nordquist, et. al., eds., 2002), p. 313. MP, Vol. XI, Annex LA-149 (emphasis added).

¹²⁶ J.M Van Dyke and R.A. Brooks, "Uninhabited Islands: Their Impact on the Ownership of the Oceans' Resources", *Ocean Development and International Law*, Vol. 12, No. 3-4 (1983), p. 286. MP, Vol. XI, Annex LA-124.

1 Treaty to grant ocean space to barren atolls that have
2 only slight links to some distant nation."¹²⁷

3 That brings me then to what it means to sustain
4 "economic life of its own". I have already addressed
5 what it means to "sustain" something, and I don't need
6 to pause any longer on that issue, other than to
7 underscore that the grammatical structure of
8 Article 121(3) makes it absolutely clear that the verb
9 applies equally to the economic life requirement and
10 the human habitation requirement.

11 Mr President, I hope you won't mind if I tackle
12 the meaning of "economic life of its own" backwards,
13 by focusing first on the "of its own" requirement.
14 I do that because that is the easier part of the
15 issue. Indeed, the meaning of the phrase "of its own"
16 could scarcely be any clearer; all the more when the
17 other authentic texts are also examined, including the
18 Chinese.

19 On its plain and obvious meaning, "of its own"
20 means that the feature itself has the ability to
21 support an independent economic life without infusion
22 from the outside. In his monograph on *"The Legal
23 Regime of Islands in International Law"*, Sir Derek
24 Bowett put the point this way:

25 "The phrase 'of their own' means that a State

¹²⁷ Id.

1 cannot avoid a rock being denied both an EEZ and
2 a shelf by injecting artificial life, based on
3 resources from its other land territory."¹²⁸

4 As I said, this same idea is expressed even more
5 clearly in some of the other authentic texts,
6 including the Chinese. I considered inviting
7 Mr Reichler to the podium to help with this particular
8 phrase, but decided to go it alone instead. In
9 Chinese, "of its own", the phrase used is "*qibenshen*
10 *de jingji shenghuo*", in which the term "*qibenshen*"
11 means "it itself",¹²⁹ and it proceeds and modifies the
12 phrase "economic life", "*jingji shenghuo*". It is
13 therefore clear that whatever "economic life" means,
14 it must be particular to and localised on the feature
15 itself.

16 Now to the issue of what "economic life" means.
17 More than one commentator has confused "economic life"
18 with "economic value". Charney, for example, has
19 suggested that:

20 "The phrase seems merely to require proof that the
21 rock actually has ... some economic value for
22 society."¹³⁰

¹²⁸ D. W. Bowett, *The Legal Regime of Islands in International Law* (1979), p. 34. MP, Vol. XI, Annex LA-123.

¹²⁹ "Běnsēn" and "Qí", *Oxford Chinese Dictionary* (2010), pp. 33, 567. Supplemental Documents, Vol. V, Annex 810.

¹³⁰ Jonathan Charney, "Rocks that Cannot Sustain Human Habitation", *American Journal of International Law*, Vol. 93, No. 4 (1999), p. 868. MP, Vol. XI, Annex LA-142.

1 Elsewhere in the same article, he similarly
2 posited that a feature's "status may depend on its
3 actual economic worth", and he used the example of
4 exploitable hydrocarbon resources as something that
5 would likely to be sufficient to render a feature
6 entitled to an EEZ and continental shelf.¹³¹

7 With all due respect -- which is considerable --
8 we say that it is wrong to equate "economic life" with
9 "economic value". If Article 121(3) were intended to
10 capture the latter meaning, it would have used those
11 words, or others to the same effect. But it didn't.
12 On its plain meaning, economic "life" suggests the
13 presence of local economic activity that is the
14 expression of human life. According to the Oxford
15 English Dictionary, "life" in this sense means:

16 "Vitality or activity embodied in material
17 (esp[ecially] human or animal) forms."¹³²

18 For a feature to sustain an "economic life", it
19 must therefore support the development and maintenance
20 of local human economic activities across time. This
21 presupposes more than the existence of a resource or
22 the presence of an installation of an economic nature.
23 As former ITLOS President Jesus has observed, it

¹³¹ *Id.*, p. 870.

¹³² "Life", *Oxford English Dictionary* (accessed 18 Nov. 2015), p. 3.
Supplemental Documents, Vol. V, Annex 816.

1 requires that a feature have the capacity:

2 "... to develop its own sources of production,
3 distribution and exchange in a way that ... it would
4 constitute the material basis that would justify the
5 existence and development of a stable human habitation
6 or community ..."¹³³

7 This, moreover, must be true of the feature as
8 naturally formed. Conditions to support economic life
9 cannot be artificially created or injected from the
10 outside. This does not mean, and we do not argue,
11 that links with the mainland must be entirely ruled
12 out. 100% self-sufficiency is not required.
13 Especially in the modern world, there is no such
14 place. But the economic life must be real and not
15 contrived, local and not imported.

16 The fact that the capacity of the feature to
17 sustain an economic life of its own must be determined
18 by reference to the feature itself raises the
19 question, also posed by the Tribunal, of the relevance
20 of maritime resources. One might argue that to the
21 extent Article 121 focuses on the capacity of
22 islands -- that is, "naturally formed areas of
23 land" -- to sustain economic life of their own,
24 maritime resources are irrelevant. But that is not

¹³³ Jose Luis Jesus, "Rocks, New-born Islands, Sea Level Rise, and Maritime Space" in *Negotiating for Peace* (Jochen A. Frowein, et. al., eds., 2003), p. 590. MP, Vol. XI, Annex LA-151.

1 our view.

2 As I discussed, it has been settled international
3 law for the better part of a century, including for
4 more than 50 years before UNCLOS, that all high-tide
5 features, regardless of their characteristics,
6 generate territorial sea. That being the case, we
7 think the better view is that the capacity of
8 a feature to sustain an economic life of its own --
9 and to sustain human habitation -- should be
10 determined by reference also to the resources of the
11 territorial sea. They are as much a part of the
12 sovereign territory of the coastal state as the land
13 territory itself.

14 By the same token, we think it is equally clear
15 that the resources beyond the territorial sea in the
16 EEZ and on the continental shelf should not be taken
17 into account. To count them as relevant for purposes
18 of determining whether or not a feature has
19 entitlement to them in the first place would be
20 entirely circular. It would also turn the most basic
21 precept of maritime entitlement on its head. The land
22 dominates the sea. To consider the resources of the
23 EEZ and continental shelf relevant to determining the
24 status of land territory would entail the sea
25 dominating the land. Such a result would obviously be
26 illogical.

1 That brings me to still another much-discussed
2 issue: are the human habitation and economic life
3 criteria cumulative or not? In other words, in order
4 to avoid being classified as a rock, must a feature be
5 able to sustain both human habitation and an economic
6 life of its own, or is it enough that it satisfies
7 only one of the two criteria?

8 I will state the bottom line upfront: it must
9 satisfy both. One is not enough. The plain meaning
10 of the text supports this view, as do the object and
11 purpose of the provision.

12 First, the plain text. Mr President, members of
13 the Tribunal, in the commentary, emphasis has been
14 placed on the use of the word "or" in Article 121(3).
15 The question is sometimes phrased as whether "or"
16 means "or", or whether it means "and" instead. We
17 think putting the question this way misses the point.

18 Let me be clear: "or" means "or". At the same
19 time, the grammatical context in which "or" is used in
20 Article 121(3) makes clear that it creates
21 a cumulative requirement. A feature must be able to
22 sustain both human habitation and an economic life of
23 its own in order to generate entitlement to an EEZ and
24 continental shelf.

25 Article 121(3) creates an exception to the general
26 rule by providing that rocks which "cannot sustain

1 human habitation or economic life of their own" are
2 not entitled to an EEZ or shelf. It is, in that
3 sense, a disabling provision. Features which "cannot
4 sustain human habitation or economic life of their
5 own" are denied the expanded maritime entitlements
6 UNCLOS confers.

7 In this disabling provision, the negative verb
8 "cannot sustain" modifies the phrase "human habitation
9 or economic life". As a matter of logic, the
10 combination of a negative verb form with the
11 disjunctive "or" creates a cumulative requirement. It
12 is, in essence, a double negative. It follows that to
13 be entitled to an EEZ and continental shelf,
14 an insular feature must be able both to sustain human
15 habitation and to sustain economic life of its own.

16 This is the most natural reading, and it becomes
17 obvious if the provision is written out:

18 "Rocks which cannot sustain human habitation or
19 which cannot sustain economic life of their own shall
20 have no exclusive economic zone or continental shelf."

21 This means that if a feature fails on either
22 prong, it fails the test and is denied expanded
23 entitlements. By contrast, replacing "or" with "and"
24 in this structure would lead to the opposite meaning:
25 a feature would have to fail on both prongs to be
26 denied an EEZ and shelf.

1 The point can also be understood by imagining that
2 paragraph 3 had been written in a positive rather than
3 a negative way. It might, for example, have said:

4 "Only islands which can sustain human habitation
5 or an economic life of their own generate exclusive
6 economic zone and continental shelf."

7 In that case, the use of the word "or" would
8 indeed create disjunctive criteria, such that the
9 satisfaction of only one would be enough. But it is
10 precisely the negative, disabling phraseology of
11 Article 121(3) that renders the conditions stated
12 cumulative in nature.

13 The cumulativeness of the two conditions is also
14 underscored by the interrelated nature of the "human
15 habitation" and "economic life" requirements. It is
16 difficult to conceive of sustained human habitation
17 without economic life. Indeed, economic life is
18 an expression of meaningful and sustained human
19 habitation.¹³⁴ It is therefore only logical to read
20 Article 121(3) to require both criteria to be
21 satisfied, not just one of them.

22 This approach is also consistent with the purposes

¹³⁴ See J.M. Van Dyke, et. al., "The Exclusive Economic Zones of the Northwestern Hawaiian Islands. When Do Uninhabited Islands Generate an EEZ?", *San Diego Law Review*, Vol. 25 (1988), p. 437. MP, Vol. XI, Annex LA-129; B. Kwiatkowska and A. H.A. Soons, "Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of their Own", *Netherlands Yearbook of International Law*, Vol. 21 (1990), p. 365. MP, Vol. XI, Annex LA-132.

1 of the Convention, including the purpose of affording
2 coastal states substantially broader maritime zones.

3 Van Dyke and Brooks have written:

4 "The negotiating process that led to the Law of
5 the Sea Treaty was prompted in part by the expansive
6 claims of coastal state jurisdiction over coastal
7 waters by Latin American nations. During the process
8 of negotiations, it was determined that these claims
9 made sense with regard to the living and non-living
10 resources of these coastal waters, because of the need
11 of the coastal peoples for these resources and their
12 likely ability to manage and conserve these resources
13 effectively."¹³⁵

14 Another commentator has observed, however, that:

15 "To accord an uninhabitable small island a right
16 to an EEZ on the basis of an ability to sustain
17 an economic life of its own would mean that this
18 economic life would have to be carried out by people
19 living elsewhere. This would not be in accordance
20 with the purpose of the EEZ regime, which is to accord
21 rights and responsibilities to the populations of the
22 lands that generate the zones."¹³⁶

¹³⁵ J.M Van Dyke and R.A. Brooks, "Uninhabited Islands: Their Impact on the Ownership of the Oceans' Resources", *Ocean Development and International Law*, Vol. 12, No. 3-4 (1983), p. 286. MP, Vol. XI, Annex LA-124.

¹³⁶ Marius Gjetnes, "The Spratlys: Are They Rocks or Islands?", *Ocean Development and International Law*, Vol. 32, No. 2 (2001), p. 194. Supplemental Documents, Vol. III, Annex 717.

1 Indeed, requiring the feature to satisfy only one
2 of the two criteria would lead to manifestly absurd
3 results. Charney himself points up this issue, albeit
4 unintentionally, when he suggests that a feature
5 should be entitled to an EEZ and continental shelf if
6 it satisfies either of the two criteria, not both, and
7 that it would be enough if a feature:

8 "... were found to have valuable hydrocarbons (or
9 other characteristics of value, e.g., newly
10 harvestable fisheries in its territorial sea, or
11 perhaps even a profitable gambling casino) whose
12 exploitation could sustain an economic sufficient to
13 support that activity through the purchase of
14 necessities from external sources."¹³⁷

15 We say this approach would lead to undesirable
16 consequences. If it were followed, it is hard to
17 imagine a feature that would not meet such loose
18 criteria. A coastal state could use factory ships or
19 oil platforms, or even casinos built on stilts, to
20 convert the merest speck of a feature into a golden
21 key that generates entitlement to more than
22 31,000 square miles of ocean space. Article 121(3)
23 would effectively be read out of the Convention
24 entirely, in violation of the principle of

¹³⁷ 37Jonathan Charney, "Rocks that Cannot Sustain Human Habitation",
American Journal of International Law, Vol. 93, No. 4 (1999), p. 870. MP,
Vol. XI, Annex LA-142.

1 effectiveness.

2 Mr President, this understanding of what it means
3 to sustain human habitation and economic life yields
4 clear, but nevertheless only general, guidance on how
5 to separate a rock from a true island. Apart from the
6 food, water and shelter requirements, there are, and
7 there can be, no bright-line rules. Size matters, but
8 is not by itself determinative. The presence of
9 productive soil matters, but it is not by itself
10 determinative. Existing flora and fauna matter, but
11 are not by themselves determinative.

12 In the end, it is a question of appreciation in
13 light of the natural characteristics of a given
14 feature. That question of appreciation in this case
15 is entrusted to you.

16 In its 10th November Annex of Issues, the Tribunal
17 asked about the relevance of subsequent state practice
18 to the interpretation of Article 121(3). The short
19 answer is that it is not relevant. This is true for
20 a number of reasons.

21 First, the practice is too varied and too
22 contradictory to admit of any conclusions. Under
23 Article 31(3)(b) of the Vienna Convention on the Law
24 of Treaties, subsequent state practice may be taken
25 into account in the interpretation of a treaty's terms
26 only if it establishes the agreement of the parties

1 regarding its interpretation. In the case of
2 a multilateral treaty like UNCLOS, such practice would
3 have to be universal, or at least nearly so. Such
4 consistency and unanimity is conspicuously absent in
5 the case of Article 121(3).

6 Second, much of the state practice is, if I may
7 say so, bad state practice. In this respect, it is
8 not unlike the case of straight baselines, of which
9 literally dozens of examples could be found that are
10 plainly inconsistent with the conditions so clearly
11 stated in Article 7 of the Convention.

12 This is perhaps inevitable. In the face of
13 a provision that might be read in more than one way,
14 and in the absence of authoritative guidance in the
15 jurisprudence, states -- being states -- quite
16 naturally succumb to what one very distinguished
17 commentator has called the "territorial temptation";
18 that is, the unvarying thirst for more. That same
19 commentator posed the following rhetorical question:

20 "If experience teaches us the difficulties of
21 overcoming states' resistance to restraints on the
22 discretion that accompanies territorial sovereignty,
23 and the power of emotional appeals to territorial
24 sovereignty by those who would resist international
25 restraints, why allow the territorial temptation to

1 expand its reach in[to] the sea?"¹³⁸

2 The grant of a 200-mile EEZ, and a continental
3 shelf that can in some cases extend even beyond that
4 distance, already represent a significant reach of the
5 territorial temptation into the law of the sea. That
6 reach, however, was intentionally and expressly
7 limited by, among other provisions, Article 121(3).
8 Honouring the Convention's package deal, and holding
9 the line against unwarranted maritime expansionism,
10 thus requires that the ground rules be made clear,
11 precisely because they are contrary to the conduct of
12 some states.

13 That said, there is at least one aspect of the
14 state practice that is very interesting. It is
15 China's own state practice outside the South China
16 Sea. Since my time is short, I will leave it to
17 Mr Reichler to pick that juicy fruit when he follows
18 me to the podium in just a few minutes.

19 Mr President, members of the Tribunal, I trust
20 you'll be happy to hear that I have come to the last
21 part of my intervention this morning; that is, the
22 application of the law as I have just described it to
23 the four high-tide features identified in the
24 Philippines' Submissions 3 and 7: Scarborough Shoal,

¹³⁸ Bernard H. Oxman, "The Territorial Temptation: A Siren Song at Sea", *American Journal of International Law* Vol. 100, No. 4 (Oct. 2006), p. 845. Hearing on Merits, Annex LA-329.

1 and Johnson, Cuarteron and Fiery Cross Reefs. These
2 are issues on which I can be comparatively -- and
3 perhaps even mercifully -- brief. All four of these
4 features are such that there can be no genuine dispute
5 about their status as Article 121(3) rocks.

6 As I mentioned at the outset of my comments, there
7 is just one case in which an international court or
8 tribunal determined a feature to constitute a rock
9 that did not generate entitlement to an EEZ or shelf.
10 The case was *Nicaragua v Colombia*, and the feature
11 was, as I said, Colombia's Quitasueño. A picture of
12 it is displayed on the screen now in all its rocky
13 glory. Also on the screen is my dear friend, and
14 worthy opponent in that case, Dr Robert Smith. He is
15 the grey-haired gringo you see in the picture.

16 The court found that:

17 "... all of the features at Quitasueño are
18 miniscule and, even on the Grenoble Tide Model, are
19 only just above the water at high tide."¹³⁹

20 It determined that only one such feature was
21 convincingly shown to be above water at high tide:
22 QS-32, which is on the screen.

23 If Quitasueño is a rock -- which it obviously
24 is -- so too are Scarborough Shoal, and Johnson,

¹³⁹ *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Merits, Judgment, ICJ Reports 2012, para. 36. MP, Vol. XI, Annex LA-35.

1 Cuarteron and Fiery Cross Reefs. On the screen now
2 are images of Scarborough Shoal. The only evident
3 difference from Quitasueño is that instead of one
4 coral protrusion, there are six. But six coral
5 boulders in the middle of the sea are no more capable
6 of sustaining human habitation and economic life than
7 one; all the more because they are, in most cases,
8 separated from one another by several kilometres of
9 submerged reef.

10 The same conclusions apply equally to Johnson,
11 Cuarteron and Fiery Cross Reefs. Unfortunately, we do
12 not have sea-level photographs of these features in
13 their natural state to show you; nor, given China's
14 recent island-building activities, will we ever. But
15 the evidence we do have makes clear that each of these
16 features in their natural states were identical in all
17 relevant respects to Quitasueño and Scarborough Shoal.

18 With respect to Johnson Reef, China's *Sailing*
19 *Directions* describe it as a low-tide elevation, saying
20 that it is submerged at high tide.¹⁴⁰ According to the
21 US *Sailing Directions*, however, there are several
22 rocks above water at high tide, the largest of which

¹⁴⁰ Navigation Guarantee Department of the Chinese Navy Headquarters, *China Sailing Directions: South China Sea* (A103) (2011), p. 178. SWSP, Vol. III, Annex 232(bis).

1 measures 1.2 metres in height.¹⁴¹

2 Given the greater detail in, and specificity of,
3 the US information, the Philippines considers it to be
4 the most reliable evidence of the feature's status.
5 That said, what China's information does underscore is
6 the utter insignificance of such high-tide features as
7 there are, and thus the conclusion that they can be no
8 more than Article 121(3) rocks.

9 With respect to Cuarteron reef, China's *Sailing*
10 *Directions* again state that it is submerged at high
11 tide.¹⁴² The Philippine, UK and US data, however,
12 state that there are several rocks present on the
13 northern part of the feature.¹⁴³ According to the US
14 *Sailing Directions*, which provide the most specific
15 information, there are "[s]everal rocks, 1.2 to
16 1.5 m[etres] high".¹⁴⁴

17 Here again, given the consensus among the
18 Philippine, UK and US data, as well as the very
19 detailed nature of the US information, the Philippines
20 endorses that data as the most reliable. At the same

¹⁴¹ United States National Geospatial-Intelligence Agency, Pub. 161 Sailing Directions (Enroute), *South China Sea and The Gulf of Thailand* (13th ed., 2011), p. 11. MP, Vol. VII, Annex 233.

¹⁴² Navigation Guarantee Department of the Chinese Navy Headquarters, *China Sailing Directions: South China Sea* (A103) (2011), p. 178. SWSP, Vol. III, Annex 232(bis).

¹⁴³ See SWSP, Vol. II, p. 103.

¹⁴⁴ United States National Geospatial-Intelligence Agency, Pub. 161 Sailing Directions (Enroute), *South China Sea and The Gulf of Thailand* (13th ed., 2011), p. 13. MP, Vol. VII, Annex 233.

1 time, all of it confirms that Cuarteron, in its
2 natural conditions, is not capable of sustaining human
3 habitation or economic life.

4 In the case of Fiery Cross Reef, the sources are
5 this time unanimous. The Philippine, Chinese, UK and
6 US data all agree that there is a single rock,
7 approximately 1 metre in height, that is above water
8 at high tide.¹⁴⁵ It is thus very much like Quitasueño,
9 only about half the height. Its status as
10 an Article 121(3) rock is therefore not open to
11 debate.

12 The Tribunal will have noted that even before
13 China's most recent island building, Johnson,
14 Cuarteron and Fiery Cross Reefs had small Chinese
15 outposts built on them. This does not remotely mean
16 that they were capable of sustaining "human
17 habitation" under any possible interpretation of that
18 phrase. They were tiny artificial structures built
19 atop coral reefs, manned by governmental personnel and
20 sustained entirely from outside. Such actions plainly
21 cannot convert these features into true islands that
22 can generate EEZ and shelf.

23 Finally, Mr President, members of the Tribunal,
24 I conclude by underscoring that, for the reasons
25 Professor Sands explained, China's actions converting

¹⁴⁵ See SWSP, Vol. II, p. 49.

1 each of Johnson Reef, Cuarteron Reef and Fiery Cross
2 Reef into more substantial, but entirely artificial,
3 high-tide features does not and cannot change their
4 status as a matter of law. I repeat the point again
5 here and now merely to leave the record absolutely
6 clear that, in the view of the Philippines, China's
7 actions, whatever their intent, can have no bearing on
8 the questions of law that we have placed before you.

9 Mr President, members of the Tribunal, I thank
10 each of you very much for your very patient and kind
11 attention. I would ask that you invite Mr Reichler to
12 the lectern, but perhaps after questions, if there are
13 any.

14 **THE PRESIDENT:** Thank you very much, Mr Martin. We will
15 ask Mr Reichler to come to the podium now.

16 **MR REICHLER:** Mr President, members of the Tribunal, good
17 morning. Mr President, I would like to seek your
18 guidance. Even if I eliminate all of the Chinese from
19 my speech, I still will not finish before the lunch
20 break. I leave it to your good judgment whether now
21 would be an appropriate time to take the lunch break,
22 or if you would prefer that I proceed to deliver
23 approximately half of my speech, and then break for
24 lunch.

25 **THE PRESIDENT:** I think it would be better if you could
26 divide the speech into two. So you could deliver the

1 first part now, and then at a convenient point, close
2 to 1 o'clock or 1.10, you can perhaps decide to
3 postpone the rest until the afternoon.

4 **MR REICHLER:** Thank you very much, Mr President.
5 I appreciate your flexibility.

6 (12.41 pm)

7 **First-round submissions by MR REICHLER**

8 **MR REICHLER:** Mr President, my colleagues Professor Sands
9 and Mr Martin have shown you that none of the features
10 whose status the Philippines has asked you to
11 determine in its Submissions 3 through 7 generates
12 a maritime entitlement beyond 12 miles. It now falls
13 to me to respond to your enquiry whether there might
14 be any other maritime feature claimed by China that is
15 capable of generating an entitlement to a 200-mile EEZ
16 or continental shelf which would overlap the 200-mile
17 entitlements of the Philippines. The answer is: No.
18 There are no such maritime features. In particular, in
19 the view of the Philippines -- which is also the view of
20 Vietnam, Malaysia, and Indonesia, and the most
21 distinguished experts on the South China Sea -- none of
22 the features that comprise the Spratly group is entitled
23 to an exclusive economic zone or continental shelf.

24 Mr President, there are hundreds of small maritime
25 features in the Spratlys. The vast majority are

1 submerged at all times; others are uncovered only at
2 low tide. There are, at most, only 28 features that
3 remain above water, at least in part, at high tide.
4 None of them comprises as much as half a square
5 kilometre. They range in size from a high of
6 0.43 square kilometres to a low of less than 2 square
7 metres.

8 I will now provide you with a complete history of
9 human settlement on all 28 of these features, from the
10 beginning of time to World War II. I ask that you
11 please listen carefully. **(Pause)** That was it. In
12 case you missed it, I will go over it again a bit more
13 slowly. **(Pause)** I have now covered it in its entirety
14 twice. Mr President, there is no problem with the
15 microphone or the audio equipment; still less,
16 I reassure you, is there a problem with your hearing.
17 The comprehensive historical and anthropological
18 evidence that is before you shows you that there was
19 no human settlement on any of these features -- none
20 at all -- between the first chapter of Genesis and the
21 middle of the 20th century. This is particularly
22 compelling evidence of their non-habitability. For
23 thousands of years, sophisticated seafaring societies
24 have existed nearby, along the South China Sea coasts
25 of present-day Vietnam, Indonesia, Malaysia and the
26 Philippines. Yet, no civil settlement has ever been

1 established on any of these features. There can be
2 only one reason: they are not -- and were never
3 considered to be -- capable of sustaining human
4 habitation.

5 Mr President, the natural conditions of these
6 features have not changed. They remain to this day
7 incapable of sustaining human habitation or economic
8 life.

9 Let us consider them then as they exist today.
10 You will find a list of all 28 at tab 2.16. Full
11 descriptions of them, including aerial and satellite
12 photographs, official nautical charts, and
13 comprehensive geographical and historical and
14 anthropological information, are provided in the
15 *Atlas*, which was submitted by the Philippines in
16 March 2015 as part of its Supplemental Written
17 Pleading in response to the Tribunal's questions of
18 December 2014. Collectively, all of these features
19 add up to less than 5 square kilometres of surface
20 above water. All of them together would fit within
21 the narrow confines of Mischief Reef; in fact, they
22 would all fit within this small area more than eight
23 times over. Nevertheless, notwithstanding their
24 exceptionally small size and their economic
25 unimportance -- none of them can sustain an economic
26 life of its own -- all but one are under military

1 occupation. Why? For one reason only: To establish
2 and reinforce the sovereignty claims of various
3 states: China, the Philippines, Vietnam and Malaysia,
4 as well as the claims of Taiwan.

5 The first feature to be militarily occupied by one
6 of the South China Sea coastal states was Itu Aba.
7 The Republic of China sent its armed forces there in
8 1946 precisely to back up its claim of sovereignty.
9 According to a Taiwanese scholar who examined the
10 recently disclosed archives of the former Chinese
11 Nationalist government, Itu Aba was occupied from 1946
12 to 1950:

13 "for the explicit purpose of 'reclaiming',
14 demonstrating, and protecting its sovereignty from
15 foreigners."¹⁴⁶

16 In 1950, the Chinese Nationalists redeployed their
17 forces back to Taiwan to defend against an anticipated
18 military assault from the Chinese mainland. When the
19 threat of invasion died down, the Taiwanese
20 authorities sent their occupation forces back to
21 Itu Aba in 1956, and they have been garrisoned there
22 ever since. While Taiwan has recently built
23 facilities to accord better accommodations and
24 services for these forces, Itu Aba remains nothing

¹⁴⁶ Chris P.C. Chung, "Drawing the U-Shaped Line: China's Claim in the South China Sea, 1946-1974", *Modern China* (11 Aug. 2015), p. 7. Supplemental Documents, Vol. III, Annex 721.

1 more than a Taiwan[ese] military base. As provisioned
2 as it currently may be, it is only that: a military
3 garrison. It has no civilian inhabitants. It depends
4 entirely on the regular delivery of supplies,
5 including all essentials of life, from outside.¹⁴⁷ It
6 is not capable on its own of sustaining human
7 habitation, and there is no evidence before you that
8 points to a contrary conclusion.

9 The other 27 high-tide Spratly features remained
10 uninhabited for another quarter-century, until the
11 1970s and 1980s. The Philippines sent its military to
12 occupy eight features between 1970 and 1980.¹⁴⁸
13 Between 1973 and 1979, the Vietnamese military
14 occupied ten features;¹⁴⁹ Malaysian armed forces
15 occupied two in 1983;¹⁵⁰ and China, the last to join
16 the competition for control of these features, first
17 sent its military to seize three of them in 1988.¹⁵¹
18 Vietnam reacted by occupying two more features in the
19 same year.¹⁵² Malaysia occupied another in 1998.¹⁵³ In

¹⁴⁷ See MP, paras. 5.95-96; and SWSP, Vol. II, pp. 74-5.

¹⁴⁸ The Philippines occupied Nanshan Island, Thitu, West York, Northeast Cay, Loaita Island, Flat Island, Lankiam Cay and Commodore Reef during this period.

¹⁴⁹ Vietnam occupied Spratly Island, Namyit, Southwest Cay, Sand Cay, Sin Cowe, Pearson Reef, Amboyna Cay, Barque Canada Reef and Grierson Reef during this period.

¹⁵⁰ Malaysia occupied Swallow Reef and Mariveles Reef in 1983.

¹⁵¹ China occupied Fiery Cross Reef, Cuarteron Reef, and Johnson South Reef in 1988.

¹⁵² Vietnam occupied London East and West Reefs in 1988.

1 all cases, the human presence at these 27 features has
2 been in the form of military occupation, for the
3 purpose of establishing and defending a claim of
4 sovereignty over the feature. In no case was the
5 occupation driven by a perceived sustainability of
6 human habitation or economic life on the feature. In
7 no case was a civilian settlement established. The
8 28th feature, the only one that is not militarily
9 occupied, Alicia Annie Reef, is entirely free of human
10 presence.

11 Distinguished commentators have expressed the view
12 that military bases are not sufficient to establish
13 that an insular feature is capable of sustaining human
14 habitation or economic life of its own. Mr Martin
15 quoted Judge Anderson, who wrote that:

16 "The introduction onto a small feature ... of
17 an official or military presence, serviced from the
18 outside, does not establish that the feature is
19 capable of sustaining human habitation or has
20 an economic life of its own."¹⁵⁴

21 According to the Norwegian Professor Marius
22 Gjetnes:

23 "[A]s derived from the UNCLOS III *travaux*

¹⁵³ Malaysia occupied Erica Reef in 1998.

¹⁵⁴ David Anderson, "Islands and Rocks in the Modern Law of the Sea" in *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 2 (M. Nordquist, et. al., eds., 2002), p. 313. MP, Vol. XI, Annex LA-149.

1 *préparatoires*, and the object and purpose of
2 Article 121, the requirement of human habitation can
3 and should be interpreted so as to disregard personnel
4 stationed on an island for sovereignty ... purposes.
5 It must be concluded that the requirement of human
6 habitation is not fulfilled by the presence of
7 soldiers since they obviously have a sovereignty
8 purpose. ... If an island should be attributed large
9 areas of maritime jurisdiction because it is
10 reasonable to allow its indigenous inhabitants to
11 exploit and preserve the area because they seem best
12 suited to do so, huge areas of maritime jurisdiction
13 should not apply to islands where there is no such
14 population."¹⁵⁵

15 This reasoning applies to each and every one of
16 the 27 high-tide features in the Spratlys where
17 military forces are now stationed. There is not and
18 never has been an indigenous population on any of
19 these features. The civilians who are present at some
20 of them are all government officials and support
21 personnel for the military forces stationed there, all
22 of whom fulfil the same single purpose of supporting
23 and maintaining a sovereignty claim, and nothing more.

24 Of the 27 occupied features in question, 23 are

¹⁵⁵ Marius Gjetnes, "The Spratlys: Are They Rocks or Islands?", *Ocean Development and International Law*, Vol. 32, No. 2 (2001), p. 200. Supplemental Documents, Vol. III, Annex 717.

1 occupied by the forces of states other than China.
2 Vietnamese forces occupy 12; Philippine forces, 8; and
3 Malaysian forces, 3.¹⁵⁶ None of these states claims
4 an entitlement beyond 12 miles. And they are joined
5 by another prominent coastal state, Indonesia, which
6 wrote to the Secretary-General of the United Nations
7 in 2010 that the:

8 "remote or very small features in the South China
9 Sea do not deserve exclusive economic zone or
10 continental shelf of their own. Allowing the use of
11 uninhabited rocks, reefs and atolls isolated from the
12 mainland and in the middle of the high sea as
13 a basepoint to generate maritime space concerns the
14 fundamental principles of the Convention and
15 encroaches the legitimate interest of the global
16 community."¹⁵⁷

17 China claims sovereignty not only over the three
18 high-tide features that its armed forces occupy --
19 Fiery Cross, Cuarteron and Johnson South Reefs -- but
20 over all the rest as well. However, it has never
21 asserted that any of these individual features

¹⁵⁶ The Philippines occupies Nanshan Island, Thitu, West York, Northeast Cay, Loaita Island, Flat Island, Lankiam Cay, and Commodore Reef. Vietnam occupies Spratly Island, Namyit, Southwest Cay, Sand Cay, Sin Cowe, Pearson Reef, Amboyna Cay, Barque Canada Reef, Grierson Reef, and London East and West Reefs. Malaysia occupies Swallow Reef, Mariveles Reef and Erica Reef. See generally SWSP, Vol. II.

¹⁵⁷ *Note Verbale* from the Permanent Mission of the Republic of Indonesia to the United Nations to the Secretary-General of the United Nations, No. 480/POL-703/VII/10 (8 July 2010), pp. 1-2. MP, Vol. VI, Annex 197.

1 generates an entitlement beyond the 12-mile
2 territorial sea under Article 121, and it has never
3 argued that any of them is capable of sustaining human
4 habitation or economic life of its own. Nor has it
5 supplied, in any of its public statements, any
6 justification for such a conclusion. Nor has China
7 ever declared an EEZ or continental shelf with regard
8 to any such feature, or indicated where the 200-mile
9 limits are located. Instead, China has simply
10 claimed, in general terms, that it is entitled to
11 a 200-mile EEZ and continental shelf from the Spratly
12 group as a whole.¹⁵⁸ By this, China claims the full
13 suite of maritime entitlements from every feature in
14 the Spratlys, including the low-tide elevations like
15 Mischief Reef, and even submerged features like
16 Reed Bank.¹⁵⁹

17 China's claim in this regard is entirely at odds
18 with Parts II, V, VI and VIII of the Convention in
19 relation to the status of maritime features and
20 entitlements to an EEZ and continental shelf. It also
21 contravenes the provisions of Part IV on archipelagic
22 states, which China, of course, is not.

23 Notably, China's claim of 200 miles from the

¹⁵⁸ *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.

¹⁵⁹ See Written Responses of The Philippines to the Tribunal's 13 July 2015 Questions (23 July 2015), paras. I.1-I.3.

1 Spratlys as a whole contradicts its own official
2 position on Article 121(3). In a February 2009
3 *note verbale*, China objected to Japan's claim of
4 an extended continental shelf from Okinotoroshima on
5 the following basis:

6 "Article 121(3) of the Convention stipulates that,
7 'Rocks which cannot sustain human habitation or
8 economic life of their own shall have no exclusive
9 economic zone or continental shelf.' Available
10 scientific data fully reveal that the rock of
11 Okinotoroshima, on its natural conditions, obviously
12 cannot sustain human habitation or economic life of
13 its own, and therefore shall have no exclusive
14 economic zone or continental shelf. Even less shall
15 it have the right to the extended continental shelf
16 beyond 200 nautical miles."¹⁶⁰

17 China elaborated on its views of Article 121(3) in
18 a 22nd May 2009 *note verbale* on the agenda of the
19 19th meeting of the states parties to UNCLOS. Its
20 position was quite clear:

21 "In the submissions received by the Commission [on
22 the Limits of the Continental Shelf], most States have
23 abided by the provisions of the Convention, and made
24 serious efforts to safeguard the overall interests of

¹⁶⁰ *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/2/2009 (6 Feb. 2009), p. 1. MP, Vol. VI, Annex 189.

1 the international community when claiming their
2 rights. However, there is also some case in which the
3 Convention is not abided by, for example, claims on
4 the continental shelf within and beyond 200 nautical
5 miles with an isolated rock in the ocean as a base
6 point. Recognition of such claim will set a precedent
7 which may lead to encroachment upon the high seas and
8 the Area on a larger scale. Therefore, the
9 international community should express serious
10 concerns on this issue."¹⁶¹

11 It is not insignificant, Mr President, that these
12 expressions of China's official position on
13 Article 121(3) were issued three months before and two
14 weeks following its 7th May 2009 *notes verbales*
15 indicating that its sovereign rights and jurisdiction,
16 formed in history, extended to the limits of the
17 nine-dash line. If these contemporaneous expressions
18 of China's position are to be regarded as consistent
19 with one another, they reflect a view on China's part
20 that its maritime entitlements in the South China Sea
21 are derived from history, and based on general
22 international law rather than on the Convention and

¹⁶¹ *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 (21 May 2009), reprinted in UN Convention on the Law of the Sea, Meeting of States Parties, *Proposal for the inclusion of a supplementary item in the agenda of the nineteenth Meeting of States Parties*, UN Doc. SPLOS/196 (22 May 2009). Supplemental Documents, Vol. II, Annex 668.

1 Article 121(3). Mr Loewenstein has shown you that
2 general international law does not support China's
3 claim to such entitlements.

4 That leaves only Taiwan as claiming entitlement to
5 a 200-mile EEZ and continental shelf for any of the
6 individual Spratly features based on Article 121.

7 Taiwan's claim in this regard is expressly limited to
8 Itu Aba. It makes no EEZ or continental shelf claim
9 in respect of any other feature in the Spratlys.

10 According to Taiwan, in its official statement of
11 31st October 2015, issued in the wake of the
12 Tribunal's Award on Jurisdiction, Itu Aba:

13 "indisputably qualifies as an 'island' according
14 to the specifications of Article 121 of the United
15 Nations Convention on the Law of the Sea ... and can
16 sustain human habitation and economic life of its own;
17 it is thus categorically not a 'rock' under the same
18 article."¹⁶²

19 This statement is in stark contrast with China's
20 absolute silence on Itu Aba, as well as the official
21 positions of Indonesia, Malaysia, Vietnam and the
22 Philippines, which reject it.

23 But since Itu Aba -- all 0.43 square kilometres of
24 it -- is the largest of the Spratly features, just

¹⁶² Ministry of Foreign Affairs of the Republic of China (Taiwan), *ROC government reiterates its position on South China Sea issues* (31 Oct. 2015), para. 3. Supplemental Documents, Vol. I, Annex 657.

1 a hair larger than Thitu, it offers a good example of
2 why none of these features, including Itu Aba, is
3 entitled to an EEZ or a continental shelf under
4 Article 121(3). Apart from its conclusory language,
5 the Taiwanese statement of 31st October 2015 has only
6 this to say about why Itu Aba is more than a mere
7 rock:

8 " (Itu Aba), the largest ... of the naturally
9 formed ... (Spratly) Islands, has been garrisoned by
10 ROC troops since 1956."¹⁶³

11 End of quote, and full stop. That is the entire
12 purported justification for the claimed 200-mile
13 entitlement. It cannot be enough. The mere presence
14 of a military garrison for purposes of manifesting
15 sovereignty, dependent entirely on supplies from
16 outside, is not evidence that the feature can sustain
17 human habitation or economic life.

18 Taiwan was only slightly more expansive in its
19 statement of 7th July 2015, timed to coincide with the
20 opening of oral hearings on jurisdiction in these
21 proceedings. In that statement, as in the one issued
22 on 31st October, the emphasis was again on military
23 occupation and defence. Itu Aba:

24 "has been garrisoned by ROC troops since 1956. In
25 the same year, the ROC government established the

¹⁶³ *Id.*

1 Defense Zone of the ... Spratly Islands on ... Itu Aba
2 ... For the past six decades, ROC military and
3 civilian personnel have dwelled on ... Itu Aba,
4 conducting their respective missions ..."¹⁶⁴

5 However, a very recent article by a Taiwanese
6 research fellow reports that the "total population" of
7 Itu Aba:

8 "is close to 200 with no civilians. All of the
9 people living [there] are from Taiwan's Coast Guard
10 Administration and a number of soldiers from the Navy
11 [and] Air Force[,] who are stationed there for
12 safeguarding sovereignty, national defense, security
13 ... and other purposes."¹⁶⁵

14 We say again that the stationing of military
15 forces, and even civilian administrators, if there are
16 any, for purposes of sovereignty and/or defence does
17 not convert a feature that has been regarded as
18 uninhabitable throughout human history into one that
19 is suddenly capable of sustaining human habitation
20 within the meaning of Article 121(3). The question of
21 whether a feature is capable of sustaining human
22 habitation is a matter for objective determination,

¹⁶⁴ Ministry of Foreign Affairs of the Republic of China (Taiwan), *Statement on the South China Sea* (7 July 2015), para. 3. Supplemental Documents, Vol. I, Annex 656.

¹⁶⁵ Yann-huei Song, "Legal Status of Taiping Island under the United Nations Convention on the Law of the Sea: Taiwan's View", *Korean Journal of International and Comparative Law*, Vol. 3, No. 2 (2015), p. 119. Hearing on Merits, Annex 834.

1 not assertion, or subjective (and self-serving)
2 appreciation.

3 The Taiwanese statement goes on to assert:

4 "Itu Aba has groundwater wells, natural
5 vegetation, and phosphate ore and fishery resources.
6 Moreover, personnel stationed on the island cultivate
7 vegetables and fruit and rear livestock."¹⁶⁶

8 No evidence is furnished. More to the point,
9 there is no evidence that these are sufficient to
10 sustain human habitation or economic life. In fact,
11 the evidence is entirely to the contrary,
12 notwithstanding the huge propaganda offensive launched
13 by Taiwan since December 2014 to portray Itu Aba as
14 something qualitatively more than it actually is,
15 including the two volumes that the Tribunal sent to
16 the Philippines for comment on 10th November.¹⁶⁷

17 Take the subject of groundwater wells, for
18 example. Taiwan offers no specifics, but the
19 Philippines does. Based on its extensive research,
20 the Philippines has provided evidence of "two shallow
21 wells" on Itu Aba whose "underground water is salty

¹⁶⁶ Ministry of Foreign Affairs of the Republic of China (Taiwan), *Statement on the South China Sea* (7 July 2015), para. 3. Supplemental Documents, Vol. I, Annex 656.

¹⁶⁷ See Ministry of the Interior of the Republic of China, *A Frontier in the South China Sea: Biodiversity of Taiping Island, Nansha Islands* (Dec. 2014); and Ministry of the Interior of the Republic of China, *Compilation of Historical Archives on the Southern Territories of the Republic of China* (Aug. 2015).

1 and unusable for drinking".¹⁶⁸ This explains why
2 Taiwan has had to build desalination facilities.¹⁶⁹ If
3 there were naturally occurring fresh water, as there
4 is on the next largest of the Spratly features, Thitu,
5 there would be no need for such unnatural facilities.

6 Taiwan claims that natural vegetation is present
7 on Itu Aba. It is, and Taiwan displays attractive
8 photographs of it.¹⁷⁰ But vegetation is also present
9 on at least 15 of the 28 high-tide Spratly features,
10 as attested by the photographs in the Philippines'
11 *Atlas of March 2015*.

12 Natural vegetation, in the form of trees and
13 scrub, does not make a maritime feature capable of
14 sustaining human habitation or economic life. Some
15 plants are capable of growing almost anywhere,
16 including on volcanic rocks, coral or sandy cays. Are
17 they the kind, or present in sufficient abundance, to
18 sustain human habitation or productive agriculture?
19 That is a different question, and one that Taiwan does
20 not answer. The fact is, none of the Spratly features
21 has life-sustaining natural vegetation, nor does any

¹⁶⁸ T-C Huang et. al., "The Flora of Taipingtao (Aba Itu Island)", *Taiwania*, Vol. 39, No. 1-2 (1994), p. 1. MP, Vol. VII, Annex 254; Bill Hayton, *The South China Sea: The Struggle for Power in Asia* (2014), p. 111. SWSP, Vol. V, Annex 459.

¹⁶⁹ See Memorial, para. 5.97.

¹⁷⁰ See, e.g., Ministry of the Interior of the Republic of China, *A Frontier in the South China Sea: Biodiversity of Taiping Island, Nansha Islands* (Dec. 2014), p. 28.

1 have soil sufficient for agricultural purposes. Some
2 limited cultivation may take place on Itu Aba. But,
3 as Taiwan itself admits, this is done only by military
4 personnel who are stationed there in their spare time,
5 not by farmers engaged in real agricultural
6 production; and even then, they use only soil that is
7 shipped in from the outside.¹⁷¹

8 According to the British Royal Air Force, Itu Aba
9 has a "porous constitution", and is covered by:

10 "loose fine sand, broken Coral, and thin crust of
11 conglomerate coral sand too rough as it stands even
12 when ... cleared of trees."¹⁷²

13 Although this report was prepared in 1938, the
14 natural composition and surface of Itu Aba have not
15 changed. Without imported soil, agriculture,
16 including the cultivation of vegetables and fruits, is
17 not possible there, or on any of the other Spratly
18 features.

19 Taiwan claims that Itu Aba is a source of
20 phosphate ore. This is a euphemism for bird
21 droppings, which is all that the evidence produced by
22 Taiwan shows.¹⁷³ This is true¹⁷⁴ of most of the

¹⁷¹ See, e.g., SWSP, Vol. II, p. 195.

¹⁷² Message from HMS "Herald", United Kingdom, to British Admiralty (27 Apr. 1938). SWSP, Vol. III, Annex 377.

¹⁷³ See, e.g., Ministry of the Interior of the Republic of China, *A Frontier in the South China Sea: Biodiversity of Taiping Island, Nansha Islands* (Dec. 2014), p. 53.

1 Spratlys that remain above water at high tide. The
2 seabirds are equal-opportunity droppers; they do not
3 favour Itu Aba. But more to the point, guano does not
4 sustain human life, and all prior attempts to extract
5 commercial quantities of guano from the Spratlys have
6 failed in short order.¹⁷⁵

7 In regard to livestock, none, no animals are
8 naturally present on any of these features. To be
9 sure, some chickens and goats have been imported in
10 a number of places to feed the soldiers.¹⁷⁶ But these
11 small animals themselves depend for their survival on
12 imported feed, as well as the detritus produced by
13 military personnel.

14 In sum, there is nothing -- absolutely nothing --
15 to show that Itu Aba or any of the other Spratly
16 features "on its natural conditions"¹⁷⁷ -- quoting from
17 China's February 2009 *note verbale* -- can sustain
18 human habitation or economic life. Even on their
19 humanly enhanced unnatural conditions, these features,
20 including Itu Aba, are capable of providing no more

¹⁷⁴ See, e.g., SWSP, Vol. II, pp. 13; 171; 176; 194.

¹⁷⁵ See, e.g., SWSP, Vol. II, p. 177.

¹⁷⁶ See, e.g., Republic of the Philippines, Municipality of Kalayaan, "Municipal Background", available at http://www.kalayaanpalawan.gov.ph/about_the_municipality/municipal_background.html (accessed 2 Mar. 2015), pp. 2-3. SWSP, Vol. III, Annex 350.

¹⁷⁷ *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/2/2009 (6 Feb. 2009), p. 1. MP, Vol. VI, Annex 189.

1 than very limited sustenance for military occupation
2 forces that still remain entirely dependent for their
3 survival on supplies of all essential goods from the
4 mainland.

5 Taiwan's fancy photographs of a paved airstrip,
6 communications equipment and various buildings change
7 nothing.¹⁷⁸ They amount to no more than a manmade
8 façade, a Potemkin "island", if you will, whose
9 artifices serve mainly to divert attention from the
10 true nature of the feature: a remote dot of exposed
11 coral that is incapable naturally of sustaining any
12 human habitation or economic life of its own.

13 Some commentators, apparently unaware of these
14 actual conditions, have suggested that Itu Aba and
15 some other Spratly features may qualify as islands
16 rather than rocks under Article 121(3). These
17 opinions seem to be based principally, if not
18 exclusively, on size. My very good friend, and the
19 tallest lawyer I know, Alex Oude Elferink -- well,
20 I guess it's understandable he would focus on size --
21 wrote in 2001 in regard to the South China Sea
22 islands:

23 "Some islands seem to fall squarely within the
24 definition of rocks, due to their very limited size.

¹⁷⁸ See, e.g., Ministry of the Interior of the Republic of China, *Compilation of Historical Archives on the Southern Territories of the Republic of China* (Aug. 2015), pp. 230-31 & 245.

1 ... On the other hand ... the largest islands in the
2 Paracel and Spratly Islands, due to their size and
3 other characteristics, do not appear to fall within
4 Article 121(3)."¹⁷⁹

5 Professor Oude Elferink, who does not identify any
6 of these "other characteristics", suggests that
7 Itu Aba, Thitu and Spratly Island could fall into this
8 category. But even if, *quod non*, size alone were
9 determinant of island status, Itu Aba and Thitu
10 comprise only 0.43 and 0.4 square kilometres
11 respectively, and Spratly Island is no larger than
12 0.17 square kilometres.

13 Professors Kwiatkowska and Soons appropriately
14 refer to the South China Sea as the
15 "rocks-paradise".¹⁸⁰ They describe Itu Aba as
16 comprising "only 489,600 square metres", and subject
17 to a dispute as to its status as an Article 121(1) and
18 (2) island or an Article 121(3) rock.¹⁸¹ They list it
19 among "potential Article 121(3) rocks, possessing the
20 EEZ/[continental shelf] ..."¹⁸²

¹⁷⁹ Alex G. Oude Elferink, "The Islands in the South China Sea: How Does Their Presence Limit the Extent of the High Seas and the Area and the Maritime Zones of the Mainland Coasts?", *Ocean Development and International Law*, Vol. 32, No. 2 (1994), p. 178. Supplemental Documents, Vol. III, Annex 714.

¹⁸⁰ B. Kwiatkowska & A. H.A. Soons, "Some Reflections on the Ever Puzzling Rocks-Principle Under UNCLOS Article 121(3)", *Global Community Yearbook of International Law and Jurisprudence*, Vol. 1 (2011), p. 123. Hearing on Merits, Annex LA-331.

¹⁸¹ *Id.*, p. 131.

¹⁸² *Id.*, p. 153.

1 To be sure, its status as an alleged "island" is
2 disputed, by the Philippines, and also by Vietnam,
3 Malaysia and Indonesia. It is this dispute that the
4 Tribunal is called upon to decide in the course of
5 determining whether any maritime feature claimed by
6 China generates a 200-mile entitlement that overlaps
7 that of the Philippines.

8 The evidence that is before you conclusively shows
9 that Itu Aba is an Article 121(3) rock that cannot
10 sustain human habitation or economic life of its own,
11 and that it therefore generates no entitlement to
12 an EEZ or continental shelf. This is the conclusion
13 reached by eminent experts who have actually studied
14 the feature. Commodore Lee Cordner, then Director of
15 Naval Warfare of Australia, determined that it was:

16 "unlikely ... that the islet could 'sustain human
17 habitation or economic life of [its] own' and,
18 therefore, while it would generate a territorial sea
19 and a contiguous zone, the application of an EEZ or
20 a continental shelf is less certain under
21 Article 121."¹⁸³

22 Professor Gjetnes concluded, based on his review:

23 "it seems doubtful that a court would find any of
24 the Spratly features to be capable of sustaining human

¹⁸³ Lee G. Cordner, "The Spratly Islands Dispute and the Law of the Sea", *Ocean Development and International Law*, Vol. 25, No. 1 (1994), p. 69. Supplemental Documents, Vol. II, Annex 702.

1 habitation."¹⁸⁴

2 Professors Prescott and Schofield, who are two of
3 the most well-respected authorities on the islands of
4 the South China Sea, prepared an expert report for the
5 Philippines in these proceedings which addresses all
6 of the Spratly features. Their assessment of Itu Aba
7 reads as follows:

8 "Itu Aba meets the requirements of Article 121(1).
9 That is, it is a naturally formed feature, composed of
10 land, surrounded by water and elevated above the
11 high-tide level. It is vegetated and is occupied,
12 being host to government and military personnel.
13 There is no permanent indigenous population, the
14 personnel stationed there are reliant on supplies
15 provided from outside and there is no evidence of
16 meaningful economic activity ongoing or in the past.
17 It would therefore be appropriate to treat this
18 feature in the same manner as a[n] UNCLOS
19 Article 121(3) rock, and accord it no more than a 12
20 nautical mile territorial sea."¹⁸⁵

21 Professors Prescott and Schofield conclude as well
22 that none of the other Spratly features qualifies

¹⁸⁴ Marius Gjetnes, "The Spratlys: Are They Rocks or Islands?", *Ocean Development and International Law*, Vol. 32, No. 2 (2001), p. 201. Supplemental Documents, Vol. III, Annex 717.

¹⁸⁵ C. Schofield, et al., *An Appraisal of the Geographical Characteristics and Status of Certain Insular Features in the South China Sea* (Mar. 2015), p. 24. SWSP, Vol. IX, Annex 513.

1 under Article 121(3) for an EEZ or a continental shelf
2 either. You will hear from Professor Schofield on
3 this tomorrow.

4 My colleague Mr Martin has comprehensively
5 addressed the legal standards for distinguishing
6 between Article 121(1) and (2) islands and
7 Article 121(3) rocks. In doing so, he has provided
8 the Philippines' responses to the Tribunal's written
9 questions concerning these standards, as set forth in
10 item I(C)(1) of the Annex of Issues sent to the
11 Parties on 10th November. He has shown that, by
12 application of these criteria, none of the high-tide
13 features identified by the Philippines in its
14 Submissions 3, 5 or 7 is entitled to an EEZ or
15 continental shelf. By application of the same
16 criteria, this is also true for all of the other
17 high-tide features in the Spratly Islands. Not
18 a single one is entitled to an EEZ or continental
19 shelf, because none of them can sustain human
20 habitation or economic life of their own. As such,
21 they are all rocks under Article 121(3).

22 Mr President, members of the Tribunal, I thank you
23 very much for your indulgence in allowing me to come
24 to this point. With your permission, I would suggest
25 this is an appropriate time to break for lunch, and
26 I will resume with the final part of my presentation

1 when we return.

2 **THE PRESIDENT:** Thank you very much, Mr Reichler. As you
3 suggested, I think we will resume after lunch. Thank
4 you very much.

5 (1.20 pm)

6 (Adjourned until 2.30 pm)

7 (2.30 pm)

8 **THE PRESIDENT:** Mr Reichler, please go ahead.

9 **MR REICHLER:** Thank you, Mr President. And my thanks to
10 you and your fellow members of the Tribunal for your
11 indulgence this morning in allowing me to go on
12 a little longer in order to reach a convenient break
13 point.

14 As I indicated, the two largest occupied features
15 in the Spratlys are Itu Aba and Thitu. They are
16 similar in size and other characteristics. Both
17 Thitu, which is the second-largest feature, and the
18 next-largest high-tide feature, West York Island, are
19 occupied by Philippine military personnel. Itu Aba
20 and Thitu are virtually the same size. West York is
21 half the size of those features, at a mere 0.21 square
22 kilometres.

23 The other 24 occupied high-tide features in the
24 Spratlys in their natural conditions range in size
25 downward from Spratly Island, at 0.17 square
26 kilometres, to Fiery Cross Reef, at less than 2 square

1 metres. Of all these features, the only one with
2 natural potable water is Thitu, which has been
3 described by independent observers as "brackish but
4 drinkable".¹⁸⁶ But notwithstanding the presence of
5 drinkable water, human habitation is still not
6 sustainable at Thitu but for the supply of "basic
7 commodities"¹⁸⁷ from the mainland.

8 Both Thitu and West York are especially well known
9 to the Philippines, which is the only state to have
10 ever occupied either feature, in both cases
11 continuously since 1971; that is, for the last
12 44 years.

13 Today I had the pleasure of speaking with
14 representative Rodolfo Biazon, the former military
15 officer who commanded the forces that first occupied
16 these features. He is now chair of the Committee on
17 National Defence and Security of the House of
18 Representatives of the Philippines, and is a member of
19 the Philippine delegation proudly representing his
20 country at these proceedings. Thitu, like Itu Aba,
21 has an airstrip and control tower, numerous structures

¹⁸⁶ *Memorandum* from Commanding Officer, H.M.S. "Herald", to Commander-in-Chief, China Station, British Royal Navy (3 May 1937), pp. 1-2. SWSP, Vol. III, Annex 370.

¹⁸⁷ Republic of the Philippines, Municipality of Kalayaan, "Municipal Background", available at http://www.kalayaanpalawan.gov.ph/about_the_municipality/municipal_background.html (accessed 2 Mar. 2015), pp. 2-3. SWSP, Vol. III, Annex 350.

1 and some fruit trees.¹⁸⁸ Although it too is mainly
2 a military garrison, in contrast with Itu Aba, it also
3 has a small civilian population, including school-age
4 children.¹⁸⁹ But everyone on Thitu has been
5 transplanted from the Philippine mainland. Human
6 habitation is not naturally sustainable there.
7 Without regular supplies of essentials from Palawan or
8 other major Philippine islands, it would disappear.
9 The conditions are even harsher at much smaller
10 West York Island, which is a sandy cay with more
11 coconut trees than human beings. Only seven
12 Philippine military personnel are stationed there.¹⁹⁰
13 There are no civilians. All supplies are brought in
14 from outside.¹⁹¹

15 As regards the conditions on the 25 smaller
16 high-tide features, they are even less hospitable to
17 human habitation or economic life than those on
18 West York, Thitu or Itu Aba. There is no evidence to
19 support a finding that any of these features meets the
20 legal criteria of Article 121 for entitlement to
21 an EEZ or continental shelf.

¹⁸⁸ See *e.g.*, SWSP, Vol. II, p. 75; and Memorial, para. 5.99.

¹⁸⁹ See SWSP, Vol. II, p. 195.

¹⁹⁰ Letter from Rear Adm. Roberto B. Enriquez, Philippines Navy, to Asst. Secretary Benito B. Valeriano, Department of Foreign Affairs, Republic of the Philippines (27 Feb. 2015), p. 2. SWSP, Vol. III, Annex 349.

¹⁹¹ See Memorial, para. 5.101.

1 Both China and Taiwan know this. Their knowledge
2 is reflected in their approach to the Diaoyu or
3 Senkaku Islands in the East China Sea, which are
4 disputed with Japan. Both China and Taiwan consider
5 them rocks under Article 121(3). In a 1994 study,
6 Professor Jo Guoxing of Shanghai Jiaotong University
7 explained that:

8 "China holds that the Diaoyu Islands are small,
9 uninhabited, and cannot sustain economic life of their
10 own, and that they are not entitled to have
11 a continental shelf."¹⁹²

12 Similarly, the President of Taiwan, Ma Ying-jiu,
13 has written that:

14 "The Diaoyu Islands themselves are not entitled to
15 have a continental shelf or EEZ ..."¹⁹³

16 This is revealing, because the Diaoyu Islands are
17 larger and more significant than any of the Spratly
18 features. The largest, Diaoyu Dao, measures
19 4.32 square kilometres in area, making it ten times
20 larger than Itu Aba. It has a peak elevation of
21 383 metres, and is covered by lush vegetation. On your
22 screens, and at tab 2.17, is a side-by-side comparison
23 of Diaoyu Dao and Itu Aba. If the former does not

¹⁹² Ji Guoxing, "The Diaoyudao (Senkaku) Disputes and Prospects for Settlement", *Korean Journal of Defense Analysis*, Vol. 6, No. 2 (1994), p. 306. Supplemental Documents, Vol. II, Supplemental Documents, Vol. II, Annex 704.

¹⁹³ *Id.*

1 generate entitlement to an EEZ and continental shelf,
2 as China and Taiwan both agree, there can be no
3 serious argument about the latter.

4 Mr President, there is still another basis for the
5 Tribunal to reach this inevitable conclusion. If this
6 were a case of maritime delimitation -- which it is
7 not -- there would be no doubt whatsoever that every
8 one of these 28 high-tide features would be enclaved
9 within, at most, a 12-mile radius. That is, none of
10 them would generate a maritime zone beyond a 12-mile
11 territorial sea, and none would be allowed to
12 influence an equidistance line beyond 12 miles from
13 its coast. Up to now, Mr President, prior to your
14 Award on Jurisdiction, we have understandably been
15 very wary of mentioning the word "delimitation", for
16 obvious reasons. But as you can see, I have just done
17 so, and no trapdoor has opened beneath my feet casting
18 me into the nether world below. But just to be safe,
19 I will explain from here why this is a relevant point,
20 even though -- I emphasise -- you are not called upon
21 to delimit any boundaries by the Philippines'
22 submissions in this case.

23 As Mr Martin pointed out, the jurisprudence is
24 very thin on the definition of a "rock" under Article
25 121(3). In fact, the issue has been squarely
26 addressed in only one case, *Nicaragua v Colombia*, and

1 only in relation to a single feature, Quitasueño,
2 which no one argued was anything more than a rock.
3 Nicaragua believed it was not even that, but at most
4 a low-tide elevation. Although there have been many
5 cases involving very small maritime features, the ICJ,
6 ITLOS and arbitral tribunals were able to avoid
7 interpreting or applying Article 121(3) by addressing
8 such features in the context of boundary delimitation,
9 without having to formally classify them as either
10 rocks or islands. That option is, as we know, not
11 available to the Tribunal here.

12 But this does not mean that the Tribunal should be
13 precluded from looking at the jurisprudence regarding
14 small maritime features for guidance. There are some
15 helpful examples. Perhaps the most helpful is Serrana
16 Cay, which was enclaved within 12 miles by the ICJ in
17 *Nicaragua v Colombia*. It is on your screens now, and
18 at tab 2.18. Its total area of 0.4 square kilometres
19 is the same as that of Itu Aba and Thitu. Like them,
20 it too has trees, up to 10 metres in height in the
21 case of Serrana, and scrub. It has a 6-metre-wide
22 well for the water supply of visiting fishermen and
23 the Colombian marines who use it as a base to control
24 drug trafficking and illegal fishing. There is also
25 a heliport, as well as a lighthouse operated by the
26 Colombian Navy.

1 The ICJ gave Serrana the same treatment that it
2 gave Quitasueño; that is, only a 12-mile territorial
3 sea. The court found it unnecessary to decide whether
4 to apply Article 121(3), but held that Serrana's:

5 "small size, remoteness and other characteristics
6 mean that, in any event, the achievement of
7 an equitable result requires that the boundary line
8 follow the outer limit of the territorial sea around
9 the island."¹⁹⁴

10 The same treatment was given by the court to
11 Alburquerque,¹⁹⁵ Roncador,¹⁹⁶ and the East-Southeast
12 cays,¹⁹⁷ which, like Serrana, also resemble the largest
13 features of the Spratlys in terms of size and natural

¹⁹⁴ *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Merits, Judgment, ICJ Reports 2012, para. 238. MP, Vol. XI, Annex LA-35.

¹⁹⁵ Alburquerque is an atoll with a diameter of about 8 km, including the reef terrace. Two of the cays on Alburquerque, North Cay and South Cay, are about two meters above sea level, and have exuberant vegetation mainly made up of coconut trees, some rubber trees and low bushes. There is a Colombian Marine Infantry detachment stationed there. Small weather and radio stations are also located there, as well as a lighthouse on North Cay operated by the Colombian Navy. *Nicaragua v Colombia*, Counter-Memorial of Colombia, paras. 2.15-2.17. MP, Vol. XI, Annex LA-32.

¹⁹⁶ Roncador Cay is some 550 metres long and 300 metres wide. It has elevations that are approximately five metres above sea level. On the cay, there is a detachment of the Colombian Marine Infantry, as well as a communication system and a heliport. The vegetation is composed of bushes, thickets and palm trees. There is a lighthouse operated by the Colombian Navy. *Id.*, para. 2.21.

¹⁹⁷ The East-Southeast Cays are located on an atoll extending over some 13 km. On the East Cays, there are coconut trees and low bushes. Fishermen use it as a shelter, and it is visited by tourists. On one of the West Cays, there is a detachment of the Colombian Marine Infantry in charge of controlling fishing in the area and aiding in the control of illicit drug-trafficking. There are shelters for fishermen, a heliport, small weather and radio stations and a lighthouse operated by the Colombian Navy. There is also a well that provides water for the marines. *Id.*, paras. 2.18-2.20.

1 conditions.¹⁹⁸

2 Another pertinent example is the treatment given
3 to St Martin's Island in *Bangladesh v Myanmar*. ITLOS
4 enclaved it within 12 miles because of its inequitable
5 effect on the projection of Myanmar's coast,¹⁹⁹
6 notwithstanding the size of the island (8 square
7 kilometres), its large civilian population (7,000) and
8 its unchallenged capacity to sustain both human
9 habitation and economic life.²⁰⁰

10 Similarly, small islands were enclaved to prevent
11 inequitable results in: *Romania v Ukraine* (Serpents'
12 Island);²⁰¹ *Dubai v Sharjah* (Abu Musa);²⁰² and the
13 *France/United Kingdom Continental Shelf Boundary case*
14 (the Channel Islands).²⁰³ All of the islands in these
15 cases were inhabited; some -- Abu Musa and the
16 Channel Islands -- had sizeable populations and
17 economic activity, and were unquestionably capable of

¹⁹⁸ MP, paras. 5.110 - 5.112.

¹⁹⁹ *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment of 14 March 2012, ITLOS Reports 2012, paras. 318 & 337. MP, Vol. XI, Annex LA-43.

²⁰⁰ *Id.*, paras. 318 & 337.

²⁰¹ *Maritime Delimitation in the Black Sea (Romania v Ukraine)*, Merits, Judgment, ICJ Reports 2009, p. 123, para. 188. MP, Vol. XI, Annex LA-33.

²⁰² *Dubai/Sharjah Border Arbitration*, Award (19 Oct. 1981), 91 I.L.R. 543 (1981), p. 677. PWRTQ, Vol. II, Annex LA-231.

²⁰³ *Case Concerning the Delimitation of the Continental Shelf Between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, Decision (30 June 1977), XVIII R.I.A.A. 3, para. 202. Supplemental Documents, Vol. VI, Annex LA-246.

1 sustaining both human habitation and economic life.
2 Nevertheless, all were enclaved within 12 miles or
3 less.

4 What these particular cases, and the entire body
5 of jurisprudence involving small islands, make
6 absolutely clear is this: in any future boundary
7 delimitation in the South China Sea that may be
8 performed by an international judicial body, applying
9 well-established principles of law, all of the Spratly
10 high-tide features would be enclaved, and in no case
11 given more than a 12-mile territorial sea.

12 Mr President, the bottom line is this: none of
13 these features is capable of sustaining human
14 habitation or economic life of its own. If you so
15 conclude, the matter is put to rest. There will be no
16 overlapping EEZs or continental shelves in the
17 southern part of the South China Sea, and no
18 ambiguities over which coastal states have sovereign
19 rights and jurisdiction in respect of the living and
20 non-living resources beyond 12 miles from these
21 features.

22 In contrast, if you were to find that one or more
23 of these tiny and insignificant features generates
24 a 200-mile entitlement, or that it may do so, this
25 would open the door to much mischief; and I am not
26 referring here only to the reef of that name. It

1 would allow China and potentially other claimants --
2 Taiwan, for example -- to continue to assert EEZ and
3 continental shelf rights that overlap and, in their
4 view, preclude those of the Philippines. A map of the
5 South China Sea in the vicinity of the Spratly
6 Islands, reflecting the claimed entitlements of the
7 various coastal states, including now a claimed EEZ
8 and continental shelf for just one of these tiny
9 features -- Itu Aba, for example -- would look like
10 this. You can also find it at tab 2.19.

11 Mr President, this can't be right. It cannot be
12 what the Convention requires. Yet, if China remains
13 determined to avoid any form of legally binding
14 adjudication or arbitration of the boundary between
15 Itu Aba and the Philippines, in full knowledge that
16 its claim beyond 12 miles from that feature would be
17 rejected by any tribunal hearing the case, the dispute
18 in this part of the South China Sea would remain
19 frozen in place, perhaps permanently. China, as the
20 superior power, would continue to run roughshod over
21 the Philippines, Vietnam, Malaysia and the other
22 coastal states, claiming and exercising all rights and
23 jurisdiction for itself. And all this in regard to
24 a tiny and uninhabitable feature whose sovereignty is
25 in dispute among China, Vietnam, and the Philippines.

26 In these circumstances, Mr President, the

1 Philippines respectfully submits that the avoidance of
2 such a frozen conflict is consistent with the
3 Tribunal's mandate to promote the maintenance of legal
4 order in respect of the relevant maritime areas, and
5 the avoidance or reduction of threats to international
6 peace and security that inevitably would emanate from
7 a situation of such legal uncertainty, in accordance
8 with the principles of the United Nations Charter and
9 the object and purpose of the 1982 Convention.

10 Indeed, a determination that none of these
11 features is entitled to an EEZ or a continental
12 shelf -- which we say is called for by application of
13 Article 121(3) -- could very well be the most
14 important contribution this Tribunal could make to the
15 establishment of legal order and the maintenance of
16 peace in the South China Sea, as well as the
17 protection and preservation of its marine environment.
18 The incentive to flex muscles and demonstrate
19 sovereignty over minuscule features would be greatly
20 diminished if they are held -- as they should be under
21 Article 121(3) -- to entitlements no greater than
22 12 miles. The race to occupy and enlarge them, at the
23 expense of regional stability and precious ecosystems,
24 would lose steam. This might not result in a complete
25 *volte-face* by the interested states, in the form of
26 abandonment or divestment of current holdings. But

1 the incentives to acquire and build more would no
2 longer exist, and therefore the prospects would be
3 greatly enhanced for a peaceful negotiated solution to
4 the most contentious issue fuelling the dispute
5 between China and its neighbours.

6 Mr President, in light of all that we have said
7 today, as well as what we have said in our written
8 pleadings, and by way of conclusion to this
9 presentation, the Philippines responds to the issues
10 raised by the Tribunal in items I(D) and II(C) of the
11 Annex of Issues as follows: First, the features
12 claimed by China that are above water at high tide,
13 and which are located within 200 miles of Mischief
14 Reef or Second Thomas Shoal, are those identified at
15 tab 2.20. Second, there are no features at which the
16 level of existing or potential human habitation
17 suffices for purposes of Article 121(3). Third, there
18 are no such features at which the level of existing or
19 potential economic life suffices for purposes of
20 Article 121(3). Therefore, however you interpret the
21 word "or" in Article 121(3), the result is the same:
22 none of the features in the Spratlys meets either of
23 the two criteria.

24 Accordingly, there are no features that generate
25 an entitlement to an EEZ or a continental shelf, let
26 alone an entitlement that overlaps the area of

1 Mischief Reef or Second Thomas Shoal, or that overlaps
2 the area where China's activities in the EEZ, claimed
3 by the Philippines and addressed by Submissions 8 and
4 9, have taken place.

5 Finally, the fact that some features are occupied
6 by states or entities other than China does not affect
7 any of these conclusions, since neither the status of
8 a feature nor its entitlements under UNCLOS depends on
9 which state or entity occupies or claims sovereignty
10 over it.

11 Mr President, members of the Tribunal, this brings
12 me to the end of my presentation. I thank you once
13 again for your generous patience and kind courtesy.
14 The Philippines' next speaker is Professor Sands, who
15 will address China's violations of the Philippines'
16 sovereign rights in its EEZ and continental shelf.

17 **THE PRESIDENT:** Thank you very much indeed. We shall now
18 call Professor Sands.

19 **(2.54 pm)**

20 **First-round submissions by PROFESSOR SANDS**

21 **PROFESSOR SANDS:** Mr President, members of the Tribunal,
22 my presentation this afternoon follows on very neatly
23 from what Mr Reichler has just concluded with, and
24 will address China's interference with the
25 Philippines' exercise of its sovereign rights under

1 Parts V and VI of the Convention, with respect to
2 living and non-living natural resources both in the
3 EEZ and continental shelf. I will be followed by
4 Mr Martin, who will address China's interference with
5 the traditional fishing activities of Filipino
6 fishermen around Scarborough Shoal. We will then
7 conclude today with Mr Loewenstein, who will address
8 China's unlawful construction of artificial islands
9 and installations.

10 You will recall, sirs, that the Philippines'
11 Submission no. 8 requests the Tribunal to adjudge and
12 declare that:

13 "China has unlawfully interfered with the
14 enjoyment and exercise of the sovereign rights of the
15 Philippines, with respect to the living and non-living
16 resources of its exclusive economic zone and
17 continental shelf."²⁰⁴

18 And Submission no. 9 is that:

19 "China has unlawfully failed to prevent its
20 nationals and vessels from exploiting the living
21 resources in the exclusive economic zone of the
22 Philippines."²⁰⁵

23 In accordance with Articles 57 and 76 of the
24 Convention, the Philippines is entitled to a 200-mile

²⁰⁴ MP, Submissions of the Republic of the Philippines, p. 271.

²⁰⁵ *Ibid.*

1 EEZ measured from its archipelagic baselines, and
2 a continental shelf extending to at least that
3 distance. This you can now see on your screens in the
4 darker blue shade.

5 As your award of 29th October 2015 recognises, the
6 only limitation on the Philippines' entitlement to
7 an EEZ and continental shelf is to the extent that any
8 nearby maritime features claimed by China might
9 generate overlapping entitlements; and you have just
10 heard from Mr Reichler why, in the submission of the
11 Philippines, they do not do so.

12 I earlier addressed five low-tide features off the
13 western coast of Palawan. Mr Reichler and Mr Martin
14 demonstrated that, as with those, none of the
15 high-tide features in the relevant area -- not even
16 the largest of them -- may be said to be fully fledged
17 "islands" entitled to an EEZ and continental shelf.

18 We say that it follows from this that the seabed
19 and subsoil and the waters that are located within
20 200 miles of the Philippines' western coast, but which
21 lie beyond 12 miles from any high-tide feature,
22 necessarily constitute the EEZ and continental shelf
23 of the Philippines. That area, as you can see on the
24 screens, is within 200 miles of the Philippines, but
25 beyond areas that could be claimed by any other state.
26 It is far beyond 200 miles of China, and outside the

1 12-mile territorial sea of all high-tide features.

2 It is in this area that the Philippines, not
3 China, enjoys sovereign rights and jurisdiction under
4 Parts V and VI of the Convention. As I will show now,
5 and as our pleadings have shown, all of the activities
6 of China that I shall address occur within this area
7 of darker blue. And all of these activities violate
8 the sovereign rights of the Philippines under the 1982
9 Convention, with regard to petroleum exploration,
10 seismic surveys and fishing.

11 To address China's violations, it is necessary to
12 briefly revisit the legal framework, which is fully
13 addressed in our written pleadings,²⁰⁶ and which we
14 recognise you know well. We do so also in response to
15 the Tribunal's question in its letter of
16 10th November, when you asked about the:

17 "... nature of the Philippines' sovereign rights
18 with respect to living and non-living resources in the
19 EEZ and continental shelf."²⁰⁷

20 So let me just begin briefly with the EEZ and
21 Article 56 of the Convention, relevant parts of which
22 you can see on the screens. It makes clear that the
23 coastal state has:

²⁰⁶ MP, paras. 6.6-6.14.

²⁰⁷ Letter from the Permanent Court of Arbitration to the Parties dated 10 November 2015, Annex of Issues the Philippines May Wish to Address at November Hearing.

1 "... sovereign rights for the purpose of exploring
2 and exploiting, conserving and managing the natural
3 resources, whether living or non-living, of the waters
4 superjacent to the seabed, and of the seabed and its
5 subsoil, and with regard to other activities for the
6 economic exploitation and exploration of the zone,
7 such as the production of energy from the water,
8 currents and winds ..."²⁰⁸

9 Four points may be made in relation to
10 Article 56(1)(a).

11 First, it makes clear that a coastal state's
12 rights in the EEZ apply both to "living" and
13 "non-living" natural resources.

14 Second, those rights can be exercised for two
15 distinct purposes: firstly, for "exploring and
16 exploiting"; and secondly, for "conserving and
17 managing".

18 Third, the Philippines is entitled to exercise its
19 "sovereign rights" in relation to living and
20 non-living resources for both of these purposes. As
21 to the meaning of the words "sovereign rights", the
22 *Virginia Commentary* explains that this expression:

23 "... echoes the language of article 2 of the 1958

²⁰⁸ UNCLOS, Article 56.

1 Convention on the Continental Shelf ..."²⁰⁹

2 By that provision, coastal states were conferred
3 "sovereign rights for the purpose of exploring ... and
4 exploiting" natural resources in the continental
5 shelf.

6 In its commentary on this provision, the ILC
7 confirmed that this formulation:

8 "... leaves no doubt that the rights conferred
9 upon the coastal State cover all rights necessary for
10 and connected with the exploitation of the continental
11 shelf."²¹⁰

12 I emphasise the word "all".

13 The ILC further confirmed that:

14 "Such rights include jurisdiction in connection
15 with the prevention and punishment of violations of
16 the law."²¹¹

17 The Tribunal's letter of November 10th also asks
18 whether the sovereign rights conferred by Part V "are
19 exclusive or are compatible with the existence of
20 Chinese historic rights".²¹² Mr President, there are

²⁰⁹ *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 2 (M. Nordquist, et. al., eds., 2002), para. 56.11(a). MP, Vol. XI, Annex LA-145.

²¹⁰ International Law Commission, *Report of the International Law Commission Covering the Work of its Eighth Session*, UN Doc. A/3159 (4 July 1956), Art. 68 Commentary, para. 2 (emphasis added). MP, Vol. XI, Annex LA-62.

²¹¹ *Ibid.*

²¹² Letter from the Permanent Court of Arbitration to the Parties dated 10 November 2015, Annex of Issues the Philippines May Wish to Address at November Hearing.

1 no Chinese "historic rights", as Mr Loewenstein made
2 very clear. But even if there were, the Tribunal's
3 question takes us to a fourth and final point to be
4 made on Article 56(1)(a) and Part V more generally.

5 The sovereign rights conferred on the coastal
6 state are exclusive. "Exclusive" means exclusive. It
7 does not mean: exclusive, but not in relation to
8 China. It does not mean: exclusive, but not in
9 relation to any historic rights which may pre-exist.
10 They are, therefore, not compatible with any purported
11 "historic rights", even those of a kind so novelly and
12 so recently claimed by China in the South China Sea.

13 The exclusive nature of the rights conferred by
14 this provision is apparent from other provisions in
15 Part V. For example, Article 58(3) obliges states to
16 "have due regard to the rights and duties of the
17 coastal State" in the EEZ, and to "comply with the
18 laws and regulations adopted by the coastal State in
19 accordance with the provisions of [the] Convention and
20 other rules of international law" that are not
21 incompatible with the Convention.²¹³

22 Another example of the exclusivity of the coastal
23 state's sovereign rights is to be found in
24 Article 61(1), which confers on the coastal state the
25 exclusive right to determine the allowable catch of

²¹³ UNCLOS, Article 58(3).

1 living resources in the EEZ. Under Article 62(2),
2 other states only have access to the surplus of the
3 allowable catch, pursuant to "terms, conditions, laws
4 and regulations" adopted by the coastal state.²¹⁴

5 That's the EEZ. Let's turn to the continental
6 shelf.

7 Part VI of the Convention concerns the exploration
8 and exploitation of non-living resources in the
9 continental shelf. Article 78 stipulates that Part VI
10 doesn't affect "the legal status of the superjacent
11 waters or the air space above those waters".²¹⁵

12 However, like the regime established under
13 Article 56(1) in relation to the EEZ, Article 77,
14 paragraph 1 -- as you can see on your screens --
15 provides that:

16 "The coastal State exercises over the continental
17 shelf sovereign rights for the purpose of exploring it
18 and exploiting its natural resources."

19 Again, these are "sovereign rights" that entail
20 "jurisdiction in connection with the prevention and
21 punishment of violations of the law".²¹⁶

22 By Article 77(4), as you can see:

²¹⁴ UNCLOS, Article 62(2).

²¹⁵ UNCLOS, Article 78(1).

²¹⁶ International Law Commission, *Report of the International Law Commission Covering the Work of its Eighth Session*, UN Doc. A/3159 (4 July 1956), Art. 68 Commentary, para. 2. MP, Vol. XI, Annex LA-62.

1 "... [the] natural resources ... consist of the
2 mineral and other non-living resources of the seabed
3 and subsoil together with living organisms belonging
4 to sedentary species ..."²¹⁷

5 "Sedentary species" under Part VI includes,
6 amongst other things, coral.²¹⁸

7 Here, too, the sovereign rights conferred on the
8 coastal state in the continental shelf are exclusive.
9 Let's look at Article 77(2). It states that:

10 "... no one may undertake these activities without
11 the express consent of the coastal state."²¹⁹

12 As far as we're aware, "no one" means no one. The
13 text does not say: no one but China. Nor does it say:
14 no one but any state that claims to have historic
15 rights. "No one" means: no one. It follows from that
16 that if China is not the coastal state, it has no
17 right to explore for or exploit non-living resources
18 in the relevant continental shelf.

19 As the International Court of Justice made clear
20 as long ago as 1969, in the *North Sea Continental*
21 *Shelf* cases, such sovereign rights are "inherent".²²⁰

²¹⁷ UNCLOS, Article 77(4).

²¹⁸ See for example *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*, UNCLOS Annex VII Tribunal, Award (18 Mar. 2015), para. 304. Hearing on Jurisdiction, Annex LA-225.

²¹⁹ 16 UNCLOS, Article 77(2).

²²⁰ *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, Judgment, ICJ Reports 1969, para. 19. MP, Vol. XI, Annex LA-4.

1 As Article 77(3) makes clear, they "do not depend on
2 occupation, effective or notional, or on any express
3 proclamation".²²¹

4 Mr President, the sovereign rights of the
5 Philippines in the EEZ and continental shelf in
6 question -- coming back to the first map -- are
7 exclusively those of the Philippines. The
8 Philippines, and the Philippines exclusively, is
9 entitled, under the Convention, to enjoy and exercise
10 sovereign rights over living and non-living natural
11 resources in the area shaded in a darker blue.

12 That, in a nutshell, is the legal background.
13 Against this background, let's now look at some of the
14 facts. More are set out, of course, in the Memorial,
15 and in particular in chapter 6, which provides details
16 of a number of actions and legislative measures
17 adopted by the Government of China which have
18 manifestly violated the rights of the Philippines
19 under the Convention. I just have time to take three
20 incidents, in relation to non-living resources, to
21 illustrate the extent of the violation.

22 The first incident concerns a concession that is
23 located in the West Philippine Sea, GSCE 101. In
24 2002, the Philippine Department of Energy contracted
25 with a company based in the United Kingdom, a company

²²¹ UNCLOS, Article 77(3).

1 called Sterling Energy plc.²²² The contract awarded
2 Sterling Energy a licence to explore oil and gas
3 deposits within that block known as GSCE 101, which is
4 located near Reed Bank, about 75 miles from the coast
5 of Palawan.

6 Exploration in this area dates back to 1970, and
7 gas was first there discovered -- as you can see
8 marked in yellow -- in 1976.²²³ That map is also in
9 your folders at tab 3.2. It is located within the
10 200-mile zone of the Philippines. It has been
11 estimated that this area could contain up to
12 2.6 trillion cubic feet of gas resources, which makes
13 it a promising and potentially valuable area for oil
14 and gas exploration within the Philippines' EEZ.²²⁴

15 The block is located well within the Philippines'
16 200-mile limit, and is more than 19 miles from the
17 nearest high-tide feature, Flat Island. GSCE 101 is
18 far beyond any maritime area that China could
19 conceivably be entitled to. It is 555 miles from the
20 nearest point on the island of Hainan.

21 On 15th February 2010, Sterling Energy's licence
22 was converted to a service contract. This prompted
23 a protest from China, no doubt pursuant to some new

²²² Forum Energy plc, "SC72 Recto Bank (Formerly GSEC101)". MP, Vol. X, Annex 342.

²²³ *Ibid.*

²²⁴ *Ibid.*

1 Chinese policy. By diplomatic note dated
2 22nd February 2010, the Chinese Government
3 "express[ed] its strong objection and indignation",²²⁵
4 and it asserted what it referred to as its
5 "indisputable sovereignty, sovereign rights and
6 jurisdiction over the Nansha Islands" -- that's to say
7 the Spratly Islands -- "and its adjacent waters". It
8 urged the Philippines to "withdraw the Service
9 contract immediately".²²⁶

10 This was followed by another diplomatic note a few
11 weeks later, once more urging the Philippines to
12 "immediately withdraw the decision to award [the]
13 Service contract".²²⁷

14 The Chinese notes were intended to have -- and did
15 have -- a chilling effect on the Philippines'
16 activities in those areas. Put yourself in the
17 position of the company that is granted the
18 concession, and ask yourself the question: would you
19 proceed in such circumstances?

20 In response, the Philippines explained that
21 GSCE 101 is not within 12 miles of "any relevant

²²⁵ *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. (10)PG-047 (22 Feb. 2010), p. 1. MP, Vol. VI, Annex 195.

²²⁶ *Ibid.*

²²⁷ *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. (10) PG-137 (13 May 2010), p. 1. MP, Vol. VI, Annex 196.

1 geological feature", and that Reed Bank "is
2 a completely submerged bank that is part of the
3 continental margin of Palawan".²²⁸ The Philippines'
4 *note verbale* made clear that Reed Bank is "85 miles
5 from the nearest coast of Palawan and about 595 miles
6 from the coast of Hainan", and that it "forms part of
7 the 200[-mile] continental shelf of the Philippines'
8 archipelago under UNCLOS".²²⁹

9 The Philippines invoked Articles 56 and 77 of the
10 Convention, and reiterated that it "exercises
11 exclusive sovereign rights over the Reed Bank", and
12 added that the awarding of the service contract was
13 "fully consistent with international law", and:

14 "... [did] not impinge on the sovereignty of the
15 People's Republic of China, or violate the ASEAN-China
16 Declaration of Conduct on the South China Sea ..."²³⁰

17 The Philippines also reiterated its commitment to
18 "the peaceful resolution of disputes in the South
19 China Sea".²³¹

20 The story did not end there. After the Philippine
21 Department of Energy commissioned the MV *Veritas*

²²⁸ *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 110885 (4 Apr. 2011), p. 2. MP, Vol. VI, Annex 199.

²²⁹ *Ibid.*

²³⁰ *Ibid.*

²³¹ *Ibid.*

1 Voyager to undertake seismic surveys at Reed Bank, two
2 Chinese Marine Surveillance vessels, CMS-71 and
3 CMS-75, began to shadow the *Veritas Voyager*. The
4 Tribunal has asked to be provided with specific
5 details of this incident, and has asked whether the
6 actions of CMS-71 and CMS-75 are "imputable to China
7 and constitute a violation of the Convention".²³²

8 As to the specific details, the area in which the
9 *Voyager* was operating, 135 miles off the coast of
10 Palawan, is within the EEZ and continental shelf of
11 the Philippines. You can see this area on your
12 screens and at tab 3.3. The Chinese vessels, both
13 over 70 metres in length -- these are large vessels:

14 "... conducted aggressive manoeuvres by steering
15 a direct course against the [*Voyager*] and veering off
16 to starboard then stopping abruptly dead ahead."²³³

17 A member of the *Voyager's* crew explained to the
18 Chinese vessels that it was carrying out its work in
19 a "permitted survey area".²³⁴ However, by reason of
20 China's actions, the *Voyager* was compelled to leave
21 the area, and the operation was terminated "due to"

²³² Letter from the Permanent Court of Arbitration to the Parties dated 10 November 2015, Annex of Issues the Philippines May Wish to Address at November Hearing.

²³³ Armed Forces of the Philippines, *Special Report: The Jackson Atoll and Reed Bank Incident in West Philippine Sea* (2011), p. 3. MP, Vol. IV, Annex 67.

²³⁴ *Ibid.*

1 the two Chinese surveillance vessels.²³⁵

2 In our submission, there can be no question but
3 that the actions of CMS-71 and CMS-75 are imputable to
4 China, and that these actions engage the
5 responsibility of China under international law for
6 violations of Articles 56 and 77 of the Convention.
7 At the time of the incident, both CMS vessels were
8 part of the China Marine Surveillance fleet, which was
9 then an integral part of the Chinese Ministry of
10 Transport. You can find more detailed information at
11 Annex 67 of our Memorial, a special report on the
12 incident, and Annex 69, a detailed account by Colonel
13 Casem, who was the officer in charge of the MV *Veritas*
14 *Voyager* at the time of the incident.

15 The Philippine Department of Foreign Affairs
16 issued a strong protest to the Chinese Embassy in
17 Manila. It expressed "serious concern" about the
18 incident "involving violation by Chinese vessels of
19 Philippines' sovereignty and jurisdiction".²³⁶

20 One of the questions raised by this Tribunal in
21 its letter of 10th November is:

22 "Whether China has sought to enforce its claimed

²³⁵ *Memorandum* from Nathaniel Y. Casem, Colonel, Philippine Navy, to Flag Officer in Command, Philippine Navy (Mar. 2011), p. 2. MP, Vol. IV, Annex 69.

²³⁶ *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 110526 (2 Mar. 2011). MP, Vol. VI, Annex 198.

1 rights in respect of non-living resources other than
2 in respect of the GSCE contract and the MV *Veritas*
3 *Voyager*. "²³⁷

4 We very much regret having to say that the answer
5 to that question is: yes. The threat of further
6 dangerous incidents has prevented the Philippines from
7 returning to GSCE 101 to exercise its sovereign
8 rights. Fearing further confrontation with Chinese
9 Government vessels, none of the private companies
10 licensed by the Philippines Government has been
11 willing to undertake the risk. The violation of
12 Philippine rights is manifest and longstanding, as are
13 the financial damages suffered as a direct consequence
14 of actions directly imputable to China.

15 In addition to the incident involving the *Veritas*
16 *Voyager*, there are two further examples of China's
17 interference with the Philippines' enjoyment and
18 exercise of its sovereign rights and jurisdiction with
19 respect to non-living resources.

20 Let's turn to the second incident. It concerns
21 Nido Petroleum Limited, which was granted a service
22 contract authorising it to carry out surveys in
23 an area known as Block SC 58. You can now see SC 58
24 on your screens, well within 200 miles of Palawan, and

²³⁷ Letter from the Permanent Court of Arbitration to the Parties dated 10 November 2015, Annex of Issues the Philippines May Wish to Address at November Hearing.

1 well beyond 12 miles of any high-tide features.

2 Tab 3.4 of your folders contains this map.

3 Nido Petroleum formed the view that SC 58:

4 "... contains an extensive deepwater fairway, with
5 a number of large multi hundred million barrel
6 structures ..." ²³⁸

7 On 30th July 2010 the Deputy Chief of Mission at
8 the Chinese Embassy in Manila called upon the
9 Philippine Department of Foreign Affairs.

10 A contemporaneous account reveals that the Chinese
11 deputy chief asserted that SC 58, notwithstanding its
12 location, was located "deep within China's 9-dash
13 line", ²³⁹ and that:

14 "China considers this as a very serious matter and
15 that it reserves the right to unilaterally act on this
16 matter to protect [its] interests." ²⁴⁰

17 China made no attempt whatsoever to justify its
18 actions by reference to any purported rights under the
19 1982 Convention or any other rules of international
20 law.

21 Three days after the meeting at the Philippines'

²³⁸ Letter from Mr. Anthony P. Ferrer, Country Representative, Nido Petroleum, to the Office of the Undersecretary, Department of Energy of the Republic of Philippines (7 Oct. 2013), p. 1. MP, Vol. X, Annex 340.

²³⁹ 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.

²⁴⁰ *Ibid.*

1 Department of Foreign Affairs, the Chinese Embassy
2 took matters into its own hands. On 2nd August 2010,
3 the office manager at Nido received an email directly
4 from the Chinese Embassy. The Embassy requested
5 a meeting between the Chinese First Secretary and the
6 then Nido vice president.

7 The meeting took place four days later, in the
8 course of which the Chinese First Secretary showed the
9 Nido vice president a map depicting China's nine-dash
10 line, and informed him that the area covered by Nido's
11 service contract was "claimed by" the People's
12 Republic of China.²⁴¹ No justification for the claim
13 was made under international law. You can well
14 imagine the reaction of Nido's then vice president.

15 It will come as no surprise to you that since that
16 meeting, and the very direct threat that was made with
17 it, there has been no further exploration within
18 SC 58. The matter has been frozen. And Mr Reichler
19 has explained to you what the consequences might be of
20 certain decisions from this Tribunal if this kind of
21 situation were not addressed.

22 The third incident concerns the offer of 15 blocks
23 for exploration and development by the Philippine
24 Department of Energy in 2011. Two of these blocks,

²⁴¹ *Letter* from Mr. Anthony P. Ferrer, Country Representative, Nido Petroleum, to the Office of the Undersecretary, Department of Energy of the Republic of Philippines (7 Oct. 2013), p. 1. MP, Vol. X, Annex 340.

1 AREA 3 and AREA 4, are located to the northwest of
2 Palawan. These blocks, which you can now see on your
3 screens, and which are at tab 3.5 of your folders, are
4 located, respectively, 65 miles and 35 miles from the
5 Philippines coast. Again, they are well beyond
6 12 miles of any high-tide features. They lie
7 552 miles from China's Hainan Island.

8 On the basis that none of the maritime features in
9 the Spratly area are to be treated as islands that
10 generate an EEZ and continental shelf, there is no
11 question that these areas are located within the EEZ
12 and continental shelf of the Philippines.

13 Again, China objected to the Philippines
14 exercising sovereign rights over non-living resources
15 here located. China asserted that the blocks were
16 situated in waters over which China claims so-called
17 "historic rights", including sovereign rights and
18 jurisdiction.²⁴² China urged upon the Philippines to:

19 "... immediately withdraw the bidding offer for
20 AREA 3 and AREA 4 ..."²⁴³

21 Again, China was unable to articulate any claim
22 under the 1982 Convention or international law.

23 These three incidents demonstrate a consistent

²⁴² *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). MP, Vol. VI, Annex 202.

²⁴³ *Ibid.*

1 pattern of behaviour by China, interfering with the
2 Philippines' sovereign rights over non-living
3 resources in its EEZ and continental shelf.

4 In answer to the Tribunal's question on this
5 issue, China's assertion of rights and its manifest
6 objections to the GSCE and SC-58 contracts, and the
7 tender for AREA 3 and AREA 4, constitute manifest
8 violations of Articles 56, 77 and 81 of the
9 Convention. The Philippines has sought to support its
10 position by reference to the legal framework in
11 Parts V and VI, but from China we have had simply
12 silence on the relationship of their claimed rights
13 with the Convention. We say that China's violations
14 of the Philippines' rights over non-living resources
15 are flagrant and persistent. They continue today.

16 I turn now to the interference with living
17 resources. This interference has primarily been
18 effected by the enactment of wide-ranging and
19 far-reaching -- in all senses -- laws and regulations
20 that purport to extend China's law enforcement
21 jurisdiction throughout the entire area encompassed by
22 the nine-dash line, and well within the Philippines'
23 EEZ and continental shelf. Again, for reasons of
24 time, I will limit myself to just two examples.

25 The first example is the unilateral implementation
26 of a fishing ban, which, in the words of China's

1 fishing authorities, is said to apply to "most parts
2 of the South China Sea".²⁴⁴ Without any consultation
3 with the Philippines, the Fishery Bureau of China's
4 Ministry of Agriculture sought to impose a ban on
5 fishing activity from May 16th to August 1st 2012 in
6 all areas north of the 12°N parallel. That is a vast
7 area, as you can see on your screens, and large parts
8 of it overlap with the Philippines' EEZ and
9 continental shelf. That's at tab 3.6 of your folders.
10 Again, just as with non-living resources, China offers
11 no justification, by reference to the Convention or
12 any other rule of international law, to justify this
13 action.

14 In announcing the fishing ban, a Chinese Ministry
15 of Agriculture spokesman explained that fishing by
16 foreign ships in this area will now be seen as
17 a "blatant encroachment on China's fishery
18 resources".²⁴⁵ The Chinese Ministry of Agriculture
19 asserted that:

20 "Violators will face punishments such as fines,
21 license revocations, confiscations and possible
22 criminal charges ..."²⁴⁶

23 The Philippines has refused to recognise the

²⁴⁴ "Fishing ban starts in South China Sea", *Xinhua* (17 May 2012). MP, Vol. X, Annex 318.

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid.*

1 enforcement of this action within the EEZ and
2 continental shelf of the Philippines.²⁴⁷

3 A second example of legislative overreach and the
4 grab of resources by China came months after the end
5 of that purported fishing ban. On 31st December 2012,
6 China revised the *Hainan Provincial Regulation on the*
7 *Control of Coastal Border Security*, so that any
8 foreign vessel entering waters claimed by China must
9 obtain the consent of the Hainan provincial
10 authorities.

11 This unprecedented legislation requires all
12 foreign ships to "obey the laws and regulations of the
13 People's Republic of China", which provide that they
14 cannot "enter or exit ... without inspection and
15 approval, or change the entry or exit ports without
16 approval".²⁴⁸ The new Coastal Border Security
17 Regulations also empower Chinese authorities to board,
18 inspect, detain and deport foreign ships, and threaten
19 those on board with prosecution.²⁴⁹

20 We say that these regulations manifestly and
21 persistently contravene the exclusive rights of the
22 Philippines under Article 73 to enforce its laws and

²⁴⁷ "Fishing ban starts in South China Sea", *Xinhua* (17 May 2012). MP, Vol. X, Annex 318.

²⁴⁸ People's Republic of China, Hainan Province, *Hainan Provincial Regulation on the Control of Coastal Border Security* (31 Dec. 2012), Art. 31. MP, Vol. V, Annex 123.

²⁴⁹ *Ibid.*, Article 47.

1 regulations in the EEZ.

2 Vietnam has protested these regulations. It has
3 accused China of infringing its "sovereignty,
4 sovereign rights and national jurisdiction".²⁵⁰ For
5 its part, the Philippines has repeatedly requested
6 that China clarify the scope and application of the
7 new regulations.²⁵¹ The Philippines has also sought
8 assurances from China that the new regulations do not
9 change the position adopted in the equivalent 1999
10 regulations, which limited enforcement activity to
11 within 12 miles of the island of Hainan.²⁵²

12 Although China has not responded to the
13 Philippines' enquiries directly, it has made clear
14 through its actions, if not its words, that the new
15 regulations are intended to apply well beyond 12 miles
16 of China's coast, including in areas within the
17 Philippines' EEZ and continental shelf.

18 During the same month that the new regulations
19 were announced, December 2012, a new Maritime Safety

²⁵⁰ Ministry of Foreign Affairs of the Socialist Republic of Vietnam, *Remarks by Foreign Ministry Spokesman Luong Thanh Nghi on January 14, 2013* (14 Jan. 2013). MP, Vol. VI, Annex 168.

²⁵¹ See for instance *Note Verbale* from the Department of Foreign Affairs of the Republic of Philippines to the Embassy of the People's Republic of China in Manila, No. 12-3391 (30 Nov. 2012). MP, Vol. VI, Annex 215; *Note Verbale* from the Department of Foreign Affairs of the Republic of Philippines to the Embassy of the People's Republic of China in Manila, No. 13-0011 (2 Jan. 2013). MP, Vol. VI, Annex 216.

²⁵² *Note Verbale* from the Department of Foreign Affairs of the Republic of Philippines to the Embassy of the People's Republic of China in Manila, No. 13-0011 (2 Jan. 2013). MP, Vol. VI, Annex 216.

1 Administration vessel was commissioned. This is the
2 *Haixun 21*, 93 metres long, with a range of up to
3 4,000 miles and speeds of up to 22 knots. The deputy
4 director of China's Maritime Bureau of the Ministry of
5 Transport, Mr Huang He, has explained that this vessel
6 offers China "stronger protection of national
7 sovereignty and maritime rights and interests".²⁵³

8 The Chinese State-owned press has reported that:

9 "... [the] *Haixun 21*, along with Hainan's current
10 patrol ships, will enable the maritime
11 surveillance" -- and this is the important bit -- "to
12 fully cover the coastal areas, coastal waters and the
13 South China Sea waters of nearly 2 million square
14 nautical miles [sic] within the jurisdiction of Hainan
15 Province."²⁵⁴

16 I draw your attention to this statement because it
17 confirms the geographical scope of China's new
18 regulations. By amazing coincidence -- or perhaps
19 not -- 2 million square kilometres happens to be
20 equivalent to the area encompassed by China's
21 nine-dash line. The new regulations, as with the
22 earlier measures that I have described, have had
23 a chilling effect on Filipino fishermen.

²⁵³ "'Haixun 21' Formally Commissioned under Hainan Maritime Bureau Today, Serving Hainan Jurisdiction", *Maritime News* (27 Dec. 2012), p. 1. MP, Vol. X, Annex 323.

²⁵⁴ *Ibid.* This area is equivalent to the entire area encompassed by the nine-dash line (1,940,000 km²). See MP, para. 4.16.

1 In the list of issues of 10th November 2015, you
2 asked, Mr President, members of the Tribunal:

3 "Whether China has sought to enforce either the
4 May 2012 fishing ban or the Regulations for the
5 Management of Coastal Border Security in Hainan
6 Province against Philippine fishing vessels."²⁵⁵

7 The answer to that question is: yes. The most
8 recent example is the *note verbale* dated
9 6th July 2015, mentioned by Mr Reichler yesterday. In
10 this *note*, the Chinese Government explains that:

11 "... competent authorities of the Chinese
12 government have been imposing [a] fishing moratorium
13 on waters under China's jurisdiction in the South
14 China Sea [every summer since 1999]."²⁵⁶

15 The *note verbale* proceeds to request that the
16 Government of the Philippines:

17 "... respect China's territorial sovereignty,
18 sovereign rights and jurisdiction, and ... educate its
19 own fishermen, so that they can strictly abide by the
20 fishing moratorium ..."²⁵⁷

21 The Chinese Government continues to assert in that

²⁵⁵ Letter from the Permanent Court of Arbitration to the Parties dated 10 November 2015, Annex of Issues the Philippines May Wish to Address at November Hearing.

²⁵⁶ *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-229 (6 July 2015). Hearing on Jurisdiction, Annex 580.

²⁵⁷ *Ibid.*

1 note that:

2 "Chinese law-enforcing authorities will strengthen
3 their maritime patrols and other law-enforcing
4 actions, investigate and punish the relevant fishing
5 vessels and fishermen who violate the fishing
6 moratorium ..."²⁵⁸

7 Statements like that have a deeply chilling effect
8 on Filipino fishermen and their activities.

9 China's legislative agenda is coupled with the
10 forcible prevention of fishing by vessels from the
11 Philippines in areas under its control while
12 facilitating, allowing, encouraging access to Chinese
13 fishermen. This leads me to two further questions
14 from the Tribunal. The Philippines is asked whether
15 "China's actions to prevent fishing by Philippines
16 vessels" at Mischief Reef and at Second Thomas Shoal
17 "occurred within or beyond 12 nautical miles", and
18 "the specifics of actions taken by China".²⁵⁹

19 In relation to Mischief Reef, China has acted to
20 prevent Filipino fishermen from fishing there ever
21 since it took physical control of the reef in 1995.
22 The Philippines Memorial sets out the specifics of
23 these actions, many of which have occurred within

²⁵⁸ *Ibid.*

²⁵⁹ Letter from the Permanent Court of Arbitration to the Parties dated 10 November 2015, Annex of Issues the Philippines May Wish to Address at November Hearing.

1 12 miles of Mischief Reef; although -- and I come back
2 to my earlier presentation today -- it bears repeating
3 that, as a low-tide elevation, Mischief Reef, like
4 Second Thomas Shoal, has no territorial sea.

5 At the first Philippines-China bilateral
6 consultations in August 1995, the Chinese Assistant
7 Foreign Minister made clear that Filipino fishermen
8 could only shelter at Mischief Reef "with the consent
9 of the Chinese government".²⁶⁰ In response, the
10 Philippines' Undersecretary of Foreign Affairs pointed
11 out that Mischief Reef:

12 "... provides shelter for fishermen and
13 traditionally, our fishermen [have used] this shelter
14 facility quite freely in the past and our people are
15 wondering why they are not free to enter the reef any
16 more."²⁶¹

17 A footnote in the transcript will direct you to
18 the relevant paragraphs of the Memorial.²⁶²

19 The Memorial also describes China's actions to
20 restrict Filipino fishing at Second Thomas Shoal.²⁶³

²⁶⁰ Government of the Republic of the Philippines, *Transcript of Proceedings Republic of the Philippines-People's Republic of China Bilateral Talks* (10 Aug. 1995), pp. 1-2. MP, Vol. VI, Annex 181. See also Government of the Republic of the Philippines and Government of the People's Republic of China, *Agreed Minutes on the First Philippines-China Bilateral Consultations on the South China Sea Issue* (10 Aug. 1995), p. 1. MP, Vol. VI, Annex 180.

²⁶¹ *Ibid.*, p. 2.

²⁶² MP, paras. 1.49; 3.26; 4.90; 5.65; 6.36-6.37.

²⁶³ MP, paras. 1.49; 3.67; 3.59-3.67; 5.62; 6.36; 6.63-6.65.

1 These actions have also primarily taken place within
2 12 miles of Second Thomas Shoal ever since China took
3 *de facto* control of that feature in May 2013. Chinese
4 marine surveillance vessels, navy warships and fishing
5 administration vessels have surrounded the shoal.
6 They have blocked Philippine vessels, including
7 civilian vessels, from approaching Second Thomas
8 Shoal.²⁶⁴ As Mr Martin will shortly explain, China has
9 also interfered with traditional fishing by Filipino
10 fishermen at Scarborough Shoal.

11 The proclamation of the fishing ban and the
12 promulgation of the new Coastal Border Security
13 Regulations constitute further violations of the
14 Convention, and in particular Articles 56, 58, 61, 62,
15 73 and 77. China's interference with the Philippines'
16 sovereign rights over living resources has created
17 a climate of profound uncertainty. It has had the
18 effect of dissuading Filipino fishermen from fishing
19 in waters within the Philippines' own EEZ and
20 continental shelf area. The Philippines' director of
21 the Bureau of Fisheries and Aquatic Resources has
22 described China's conduct as causing:

23 "... a deep sense of fear among Filipino fishermen
24 [which has] significantly curtailed their fishing
25 activities and severely impacted their ability to earn

²⁶⁴ MP, para. 3.67.

1 a livelihood." ²⁶⁵

2 On subject of living resources, let me say
3 something quickly about the Philippines' Submission 9,
4 namely that:

5 "China has unlawfully failed to prevent its
6 nationals and vessels from exploiting the living
7 resources in the exclusive economic zone of the
8 Philippines." ²⁶⁶

9 In the list of issues identified by the Tribunal,
10 four questions are relevant to this submission. The
11 first of your questions relates to:

12 "... [the] source within the Convention of any
13 duty on a State to prevent its nationals and vessels
14 from exploiting the living resources of the [EEZ] of
15 another State." ²⁶⁷

16 As I explained in my submissions during the
17 hearing on jurisdiction and admissibility,
18 Submission 9 is the flipside of Submission 8. ²⁶⁸ It
19 challenges the legality under the Convention of
20 China's purported grant of rights to its nationals and

²⁶⁵ Affidavit of Asis G. Perez, Director, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines (26 Mar. 2014). MP, Vol. VII, Annex 241.

²⁶⁶ MP, p. 272.

²⁶⁷ Letter from the Permanent Court of Arbitration to the Parties dated 10 November 2015, Annex of Issues the Philippines May Wish to Address at November Hearing.

²⁶⁸ Hearing on Jurisdiction and Admissibility, Final Amended Transcript, Day 2, pp.140-141.

1 vessels. The source of a state's duty to prevent its
2 nationals and vessels from exploiting the living
3 resources of the EEZ of another state is Article 56 of
4 the Convention. Under that provision, states have
5 an obligation, acting in good faith, to take the
6 measures necessary to prevent their nationals from
7 exploiting the living resources in the EEZ of another
8 state party.

9 I turn to your second question. You asked whether
10 the duty is applicable "pending the resolution of
11 a dispute concerning the scope of maritime
12 entitlements".²⁶⁹ There is nothing in the Convention,
13 Mr President, to indicate that such a duty does not
14 continue to apply pending the resolution of a dispute
15 concerning the scope of maritime entitlements. The
16 consequence of non-compliance with this duty, which is
17 derived from obligations arising under Article 56, is
18 no different from any other duty imposed by the
19 Convention on State parties.

20 The third question you asked was about the scope
21 of the duty and the consequences of non-compliance.
22 Its scope extends to such actions as are reasonably
23 necessary to give full effect to the exclusive rights
24 of the coastal state conferred by Article 56. The

²⁶⁹ Letter from the Permanent Court of Arbitration to the Parties dated 10 November 2015, Annex of Issues the Philippines May Wish to Address at November Hearing.

1 consequence of non-compliance is to engage China's
2 responsibility under international law. It's as
3 simple as that.

4 And fourth, you sought specifics as to how China
5 has violated the duty to prevent its nationals and
6 vessels from exploiting living resources in the
7 Philippines' EEZ. In short, we say that China has
8 fallen far below the standard necessary to give effect
9 to Article 56, as I have already described. Our
10 Memorial sets out the manner in which China, having
11 taken control of Mischief Reef, Scarborough Shoal and
12 Second Thomas Shoal, has acted to restrict the
13 activities of Filipino fishermen, whilst at the same
14 time permitting free access to Chinese fishing
15 vessels.²⁷⁰

16 Mr President, in conclusion, China's interference
17 with oil and gas exploration and exploitation, and the
18 measures adopted to prevent fishing in the
19 Philippines' EEZ and continental shelf, constitute
20 manifest violations of UNCLOS and continuing
21 violations of UNCLOS, and in particular violations of
22 Articles 56, 58, 61, 62, 73, 77 and 81. China has
23 acted contrary to the Convention because it has
24 interfered with the sovereign rights and jurisdiction
25 of the Philippines.

²⁷⁰ MP, paras. 6.36 and 6.63-6.65.

1 Provided that the Tribunal is satisfied -- as we
2 say it must be, having listened to Mr Reichler just
3 a little earlier this afternoon -- that none of the
4 relevant features constitute "islands" that could
5 generate overlapping entitlements to an EEZ and
6 continental shelf, all of the incidents I have
7 described fall within areas that are indisputably
8 Philippines' EEZ and continental shelf. These are
9 areas in which only the Philippines can exercise
10 sovereign rights over living and non-living resources.

11 Mr President, once again, I thank you for your
12 very kind attention. That concludes my submissions
13 this afternoon. The next speaker, as and when you are
14 ready, is Mr Martin.

15 **THE PRESIDENT:** Thank you very much, Professor Sands.

16 I think we will break for coffee, and then after that
17 Mr Martin can come over. Thank you.

18 **(3.38 pm)**

19 **(A short break)**

20 **(4.00 pm)**

21 **THE PRESIDENT:** So, Mr Martin, you can continue.

22 **MR MARTIN:** Thank you, Mr President.

23 **First-round submissions by MR MARTIN**

24 **MR MARTIN:** Mr President, members of the Tribunal, good
25 afternoon. My thanks in advance for enduring a second

1 presentation by me in a single day. I promise to be
2 shorter this time.

3 My subject this afternoon is traditional fishing
4 by Filipino fishermen at Scarborough Shoal. I will
5 first discuss the law on the subject and then the
6 facts showing that this tradition has existed for
7 a long period of time.

8 On the law, let me begin by saying what this is
9 not about. It is obviously not about China's claim to
10 sovereignty over Scarborough Shoal. It is not about
11 China's claim to a 12-mile territorial sea. It is
12 also not about historic sovereign rights of the sort
13 that China is claiming beyond 12 miles from the
14 features over which it claims sovereignty in the South
15 China Sea, which, as Professor Oxman showed, were
16 superseded by UNCLOS; and which, as Mr Loewenstein
17 showed, China would not have under general
18 international law either. It is also not about
19 fishing in another state's EEZ, or even in an area of
20 overlapping EEZs.

21 What it is about, and the only thing it is about,
22 is the protection of a longstanding prior use in, and
23 only in, the territorial sea around Scarborough Shoal.
24 What is at stake are the interests of the Filipino
25 fishermen who, since April 2012, China has prevented
26 from pursuing their traditional livelihood of fishing

1 at Scarborough Shoal.

2 In its 10th November Annex of Issues, the Tribunal
3 asked about:

4 "... the source, within the Convention, of any
5 legal duty not to interfere with traditional fishing
6 rights."

7 The answer is: Article 2, paragraph 3. That
8 provision provides:

9 "The sovereignty over the territorial sea is
10 exercised subject to this Convention and to other
11 rules of international law."²⁷¹

12 In the *Chagos* case, the parties debated whether or
13 not this provision imposed an obligation on coastal
14 states to comply with other rules of international law
15 in their exercise of sovereignty over the territorial
16 sea. Mauritius said that it did. The UK took the
17 view that the language was "purely descriptive".²⁷²
18 The tribunal unanimously rejected the UK's argument.
19 It held that:

20 "... the multilingual 'terms of the treaty in
21 their context and in the light of its object and
22 purpose', together with the negotiating history of the
23 Convention, lead to the interpretation that

²⁷¹ UNCLOS, Art. 2(3).

²⁷² *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*, Award, UNCLOS Annex VII Tribunal (18 Mar. 2015), para. 499. Hearing on Jurisdiction, Annex LA-225.

1 Article 2(3) contains an obligation on States to
2 exercise their sovereignty subject to 'other rules of
3 international law'."²⁷³

4 In determining the scope of this *renvoi* to "other
5 rules of international law", the tribunal carefully
6 examined, among other things, the ILC's commentary to
7 its 1956 Draft Articles on the Territorial Sea. It
8 determined that it did not apply to any and all
9 obligations under international law. Rather, it said:

10 "... the obligation in Article 2(3) is limited to
11 exercising sovereignty subject to the general rules of
12 international law."²⁷⁴

13 The question is thus whether there is a general
14 rule of international law that requires a state to
15 respect long and uninterrupted fishing by the
16 nationals of another state in its territorial sea.
17 The answer is: yes.

18 Fishing, particularly local fishing, has always
19 enjoyed a privileged status in international law. In
20 my own country, one need only look to the 1900 *Paquete*
21 *Habana* case, in which the US Supreme Court adopted and
22 applied the rule of customary international law that
23 exempts fishing vessels from prize capture in

²⁷³ *Id.*, para. 514.

²⁷⁴ *Id.*, para. 516.

1 wartime.²⁷⁵ Quoting England's Lord Stowell from 1798,
2 the court said that the rule derived from
3 a "tenderness to a poor and industrious order of
4 people";²⁷⁶ a wonderful 18th century turn of phrase,
5 which we will hear again.

6 Writing in 1953, Sir Gerald Fitzmaurice took the
7 view that fishing over a long period of time by the
8 nationals of one state in the waters of another state
9 was entitled to protection. Writing about the
10 *Anglo-Norwegian Fisheries* case, Fitzmaurice
11 approvingly cited to separate opinion of
12 Judge Alvarez, in which the latter stated that
13 although a State "might determine the extent of its
14 territorial waters", this was subject to the condition
15 "that it does not infringe on rights acquired by other
16 states".²⁷⁷

17 Fitzmaurice further wrote:

18 "... if the fishing vessels of a given country
19 have been accustomed from time immemorial or over
20 a long period, to fish in a certain area, on the basis
21 of the area being high seas and common to all, it may

²⁷⁵ *The Paquete Habana*, 175 U.S. 677 (U.S. Supreme Court, 1900). Hearing on Merits, Annex LA-332.

²⁷⁶ *Ibid.*, p. 693.

²⁷⁷ Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice", *British Yearbook of International Law*, Vol. 30 (1953), p. 51. MP, Vol. XI, Annex LA-120 (citing *Anglo-Norwegian Fisheries (United Kingdom v Norway)*, Judgment, ICJ Reports 1951, p. 150. MP, Vol. XI, Annex LA-2.)

1 be said that their country has through them ...
2 acquired a vested interest that the fisheries of that
3 area should remain available to its fishing vessels
4 (of course on a *non-exclusive basis*) -- so that if
5 another country asserts a claim to that area as
6 territorial waters, which is found to be valid or
7 comes to be recognized, this can only be subject to
8 the acquired rights of the fishery in question, *which*
9 *must continue to be respected.*"²⁷⁸

10 Thus, to exist, such rights should derive from the
11 fact of fishing by "vessels of a given country"
12 conducted "over a long period". The rights are,
13 moreover, non-exclusive. Fitzmaurice writes elsewhere
14 in the same study that to the extent acquiescence may
15 be required, it can be inferred by the absence of
16 opposition over the same long period of time.²⁷⁹

17 The issue of traditional fishing featured
18 prominently in the *Eritrea/Yemen* arbitration. In the
19 first stage of the arbitration, during which
20 sovereignty issues were resolved, the parties directed
21 the tribunal to decide those issues on the basis of
22 "historic titles"; that is, general international
23 law.²⁸⁰ In its decision at that stage, the tribunal

²⁷⁸ *Id.* (emphasis added).

²⁷⁹ *See id.*, pp. 27-31.

²⁸⁰ *Eritrea v Yemen*, First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute), Award (9 Oct. 1998), para. 2. MP, Vol. XI, Annex LA-48.

1 noted that people from both sides of the Red Sea had
2 historically been:

3 "... freely fishing and navigating throughout the
4 maritime space using the existing islands as way
5 stations ... and occasionally as refuge ..." ²⁸¹

6 The tribunal also observed:

7 "This traditionally prevailing situation reflected
8 deeply rooted cultural patterns leading to the
9 existence of what could be characterized from
10 a juridical point of view as *res communis* permitting
11 the African as well as the Yemeni fishermen to operate
12 with no limitation throughout the entire area ..." ²⁸²

13 That being the case, the tribunal decided:

14 "In finding that the Parties each have sovereignty
15 over various of the Islands the Tribunal stresses to
16 them that *such sovereignty is not inimical to, but*
17 *rather entails*, the perpetuation of the traditional
18 fishing regime in the region." ²⁸³

19 In particular, the tribunal directed that:

20 "Yemen shall ensure the traditional fishing regime
21 of free access and enjoyment for the fishermen of both
22 Eritrea and Yemen shall be preserved for the benefit
23 of the lives and livelihoods of this poor and

²⁸¹ *Id.*, para. 127.

²⁸² *Id.*, para. 128.

²⁸³ *Id.*, para. 526 (emphasis added).

1 industrious order of men."²⁸⁴

2 Echoes of *Paquete Habana*.

3 In the second stage of the arbitration, the
4 parties asked the tribunal to delimit their maritime
5 boundary:

6 "... taking into account the opinion it will have
7 formed on questions of territorial sovereignty, the
8 United Nations Convention on the Law of the Sea, and
9 any other pertinent factor."²⁸⁵

10 Applying these rules, the tribunal determined in
11 the second stage that:

12 "The traditional fishing regime ... entitles both
13 Eritrean and Yemeni fishermen to engage in artisanal
14 fishing around the islands which, in its Award on
15 Sovereignty, the Tribunal attributed to Yemen ...
16 Equally, these fishermen remain entitled freely to use
17 these islands for those purposes traditionally
18 associated with such artisanal fishing -- the use of
19 the islands for drying fish, for way stations, for the
20 provision of temporary shelter, and for the effecting
21 of repairs."²⁸⁶

22 At the same time, the tribunal made clear that:

23 "... the traditional regime of fishing does not

²⁸⁴ *Id.*

²⁸⁵ *Eritrea v Yemen*, Second Stage of the Proceedings (Maritime Delimitation), Award (17 Dec. 1999), para. 6. MP, Vol. XI, Annex LA-49.

²⁸⁶ *Id.*, para. 103.

1 extend to large-scale commercial or industrial
2 fishing..."²⁸⁷

3 The tribunal further ruled:

4 "Insofar as environmental considerations may in
5 the future require regulation, any administrative
6 measure impacting upon these traditional rights shall
7 be taken by Yemen only with the agreement of
8 Eritrea ..."²⁸⁸

9 On the basis of these authorities, and in response
10 to the Tribunal's question concerning "[t]he standard
11 in international law for the formation and maintenance
12 of traditional fishing rights", the Philippines takes
13 the view that general international law protects
14 traditional fishing in another state's territorial
15 sea, provided it has been exercised over a long period
16 of time without interruption or opposition. We should
17 note that in the *Abyei* arbitration, the tribunal
18 applied the same rule even to the delimitation of
19 a land boundary to protect traditional grazing
20 rights.²⁸⁹ As I will discuss shortly, Philippine
21 fishing at Scarborough Shoal plainly meets this
22 standard.

²⁸⁷ *Id.*, para. 106.

²⁸⁸ *Id.*, para. 108.

²⁸⁹ *Government of Sudan v. Sudan People's Liberation Movement/Army (Abyei Arbitration)*, Final Award (22 June 2009), paras. 753-754. Hearing on Merits, Annex LA-304.

1 The Tribunal also asked about:

2 "... the scope of traditional fishing rights and
3 the circumstances in which a State may restrict
4 traditional fishing activities within its territorial
5 sea."

6 In response to the first part of that question, we
7 say that the scope of the traditional fishing rights
8 are defined by reference to the tradition itself. As
9 the *Eritrea/Yemen* tribunal put it:

10 "The traditional fishing regime covers those
11 entitlements that all the fishermen have exercised
12 continuously ..."²⁹⁰

13 In other words, the rights extend as far as, but
14 no further than, the extent of the traditional
15 practice. Large-scale industrial fishing could not be
16 included, given the distinctly modern origin of that
17 practice.

18 In response to the second part of the Tribunal's
19 question, concerning the circumstances in which
20 a state may restrict traditional fishing, our answer
21 is that it may only do so to the extent those
22 activities may go beyond those that have traditionally
23 been conducted. Again, as the *Eritrea/Yemen* tribunal
24 suggested, any other administrative measure that might
25 impact the traditional use must be agreed between the

²⁹⁰ *Id.*, para. 104.

1 states involved. But even if, *quod non*, the state
2 which is sovereign could unilaterally impose catch
3 limits for conservation purposes, or restrict certain
4 fishing practices that it considers environmentally
5 harmful, these would have to be imposed on
6 a non-discriminatory basis. That is, the sovereign
7 could not favour its own fishermen, in form or in
8 fact, at the expense of those of other nations with
9 traditional rights.

10 In its 10th November Annex of Issues, the Tribunal
11 also asked about:

12 "... how the compatibility of traditional fishing
13 rights with the Convention differs from the
14 compatibility of any Chinese historic rights with the
15 Convention."

16 We say these are very different concepts. There
17 are at least three important differences.

18 First, the historical rights China asserts are
19 rights of control; in particular, the right to control
20 the exploration for and exploitation of all the
21 resources within the nine-dash line. The Philippines,
22 in contrast, does not seek to control anything. It
23 seeks only access for its fishermen to pursue their
24 traditional livelihood.

25 Second, as I said at the outset, the Philippines
26 here challenges neither China's alleged sovereignty

1 over Scarborough, nor its nominal right to a 12-mile
2 territorial sea. That being the case, the rights of
3 its fishermen that the Philippines seeks to protect
4 are both individual and non-exclusive in nature. In
5 contrast, China claims exclusive sovereign rights to
6 all the resources in areas beyond 12 miles from
7 Scarborough. Both under the Convention and under
8 general international law, there is an obvious and
9 significant difference between individual,
10 non-exclusive rights on the one hand, and exclusive
11 sovereign rights on the other.

12 Third, the prior use for which the Philippines
13 seek protection is limited to the territorial sea, the
14 regime of which includes a specific *renvoi* to "other
15 rules of international law". China in contrast seeks
16 to assert exclusive historic rights not only beyond
17 the territorial sea, but also beyond the limits of any
18 conceivable entitlement under the Convention. Yet, as
19 Professor Oxman demonstrated, the Convention not only
20 does not provide for any such rights, it precludes
21 them in the EEZ and continental shelf.

22 The extent to which historical interests may be
23 protected in those areas is specifically stated and
24 quite limited. In the EEZ, for example, as Professors
25 Oxman and Sands have already mentioned, Article 62(3)
26 states:

1 "In giving access to other States to its exclusive
2 economic zone under this article, the coastal State
3 shall take into account all relevant factors,
4 including, *inter alia* ... the need to minimize
5 economic dislocation in States whose nationals have
6 habitually fished in the zone ..." ²⁹¹

7 By specifically making the manner in which
8 a coastal state exercises sovereignty in the
9 territorial sea subject to other rules of
10 international law, the applicable regime there is, on
11 the plain text of the Convention, quite different.

12 I turn then to the facts. The Tribunal has asked:

13 "... whether the fishing activities by Philippine
14 nationals at Scarborough Shoal meet the requirements
15 to generate historic fishing rights."

16 The answer is again: yes.

17 Filipino fishermen have a long and a deep
18 connection to Scarborough Shoal. This is reflected
19 even in the traditional Filipino names for the
20 feature. Scarborough Shoal is known locally as "Bajo
21 de Masinloc". In Spanish, "*bajo*" means "under". Thus
22 "Bajo de Masinloc" is under -- that is, connected
23 to -- Masinloc, the town on the Luzon coast from which
24 many fishermen at the shoal have historically come, at
25 least until their expulsion by China in 2012.

²⁹¹ UNCLOS, Art. 62(3).

1 Another longstanding local name is "Panatag
2 Shoal". "*Panatag*" means "calm" in Filipino, and thus
3 reflects the fishermen's long use of the shoal for
4 shelter during storms.

5 The long use of Scarborough Shoal by Filipino
6 fishermen is reflected also in the documentary record.
7 In the first instance, Scarborough Shoal has been
8 reflected on maps of the Philippines since well back
9 into the Spanish colonial period. A circa 1784 map
10 showed the feature -- here labelled "Bajo de
11 Masinloc" -- as being part of the Philippines. It
12 thus plainly reflects the local connection to the
13 feature at that time and before.²⁹² This map, by the
14 way, can be found at tab 3.7 of your folders.

15 In the post-colonial period, a 1953 book published
16 by the Philippines' Bureau of Fisheries contains
17 a section on "reef fishing". According to that book:

18 "The successful introduction of the Japanese trap
19 net (muro-ami) in the early 1930s stimulated the
20 development of an insular demersal fishery."²⁹³

21 It then goes on to state that what it calls
22 "Scarborough Reef" is a "principal [reef] fishing

²⁹² No title [Map of Pacific Ocean between the coast of California and Mexico and Japan, Philippines, and the coast of China] (Spain, c. 1784), available at <http://www.loc.gov/item/91680984/> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M113.

²⁹³ Porfirio Manacop, "The Principal Marine Fisheries" in *Philippine Fisheries: A Handbook Prepared by the Technical Staff of the Bureau of Fisheries* (D.V. Villadolid, ed., 1953), pp. 119-20. MP, Vol. III, Annex 8.

1 area".²⁹⁴ The book also notes that fishing methods are
2 not limited to trap-net but include also other
3 longstanding traditional methods, such as:

4 "... simple hand[lines] ... multiple hand[lines]
5 ... trawl lines ... fish corrals, and deepwater fish
6 pots... The simple handline is operated day and night
7 and employs light when used during the dark of the
8 moon. Trawl-lines and multiple hand-lines are
9 generally used during the day."²⁹⁵

10 The December 1960 issue of the Philippines'
11 Farmer's Journal similarly contains an article titled
12 "Problems and Prospects of the Philippine Fishing
13 Industry" that again identifies "Scarborough Reef" as
14 a "principal reef fishing area".²⁹⁶

15 These longstanding uses have extended
16 uninterrupted into the modern era; until 2012, that
17 is. The Philippines has submitted a number of sworn
18 activities from local fishermen,²⁹⁷ including from the

²⁹⁴ *Id.*, p. 121.

²⁹⁵ *Id.*

²⁹⁶ Andres M. Mane, "Status, Problems and Prospects of the Philippine Fisheries Industry", *Philippine Farmers Journal*, Vol. 2, No. 4 (1960), p. 34. MP, Vol. VII, Annex 244.

²⁹⁷ *Affidavit* of Mr. Richard Comandante (12 Nov. 2015). Supplemental Documents, Vol. II, Annex 693; *Affidavit* of Mr. Tolomeo Forones (12 Nov. 2015). Supplemental Documents, Vol. II, Annex 694; *Affidavit* of Mr. Miguel Lalong (12 Nov. 2015). Supplemental Documents, Vol. II, Annex 695; *Affidavit* of Mr. Jowe Legaspi. (12 Nov. 2015). Supplemental Documents, Vol. II, Annex 696; *Affidavit* of Mr. Crispin Talatagod (12 Nov. 2015). Supplemental Documents, Vol. II, Annex 697; *Affidavit* of Mr. Cecilio Taneo (12 Nov. 2015). Supplemental Documents, Vol. II, Annex 698.

1 town of Masinloc, to which Scarborough Shoal has long
2 been connected. These fishermen, whose testimony was
3 taken in Tagalog and has been translated into English,
4 attest to direct personal knowledge of local fishing
5 extending back to 1972.

6 Mr Richard Comandante, for example, testifies that
7 his father first moved to Masinloc in 1972 and was
8 fishing at Scarborough Shoal from that time forward.²⁹⁸

9 Mr Comandante states that his father fished at
10 Scarborough twice a month in a motorised boat with
11 other men.²⁹⁹ According to Mr Comandante, the men
12 would stay at the shoal "for 3 days only because the
13 cargo capacity of their boat was small";³⁰⁰ that is,
14 only about 500 kilos.³⁰¹ The fish they caught included
15 "[b]onito, talakitok, tanguige" -- my apologies --
16 "and other species of fish found beneath or near
17 rocks".³⁰² I knew I would get tripped up eventually.

18 Mr Jowe Legaspi similarly testifies that his
19 father had been fishing at Scarborough since 1982, at
20 which time, he said:

21 "There were already stories from old fishermen

²⁹⁸ *Affidavit* of Mr. Richard Comandante (12 Nov. 2015), para. A12.
Supplemental Documents, Vol. II, Annex 693.

²⁹⁹ *Id.*, para. A7.

³⁰⁰ *Id.*, para. A9.

³⁰¹ *Id.*, para. A10.

³⁰² *Id.*, para. A11.

1 that there were so many fish there."³⁰³

2 Mr Legaspi himself first started fishing at
3 Scarborough Shoal in 1994, when the family business
4 was passed down to him.³⁰⁴ He and his crew fished in
5 wooden "outrigger pump boats 60 [feet] long and 5
6 [feet] wide".³⁰⁵ Their fishing methods included
7 artisanal methods such as spear and net fishing.³⁰⁶
8 For nearly 20 years, no one stopped them or anyone
9 else from fishing at the shoal.³⁰⁷

10 Mr Crispen Talatagod, now 75 and retired, reports
11 the longest personal experience fishing at Scarborough
12 Shoal. He testifies that he began fishing there in
13 1982, soon after moving to the area.³⁰⁸ He began
14 fishing there, he said, because:

15 "We were told by other fishermen that there were
16 plenty of fish in Scarborough Shoal, so we went
17 there."³⁰⁹

18 He states further:

19 "I regularly return to this place to fish because

³⁰³ *Affidavit* of Mr. Jowe Legaspi. (12 Nov. 2015), para. A4. Supplemental Documents, Vol. II, Annex 696.

³⁰⁴ *Id.*, para. A5.

³⁰⁵ *Id.*, para. A6.

³⁰⁶ *Id.*, para. A12.

³⁰⁷ *See id.*, para. A24.

³⁰⁸ *Affidavit* of Mr. Crispen Talatagod (12 Nov. 2015), para. A7. Supplemental Documents, Vol. II, Annex 697.

³⁰⁹ *Id.*, para. A6.

1 there are plenty of fish in the area. If the weather
2 permits, we go there every week to fish inside the
3 Scarborough Shoal itself and its surrounding areas."³¹⁰

4 The scale of Mr Talatagod's fishing was limited.
5 He states:

6 "When I started fishing back in 1982, my boat was
7 only small. It was 30 feet long and 35 inches wide.
8 It was made of wood and equipped with a 16 horsepower
9 motor. At about the year 2002, I was able to save
10 enough money to have a bigger boat made. My larger
11 boat then was a pump boat with outrigger, measuring 60
12 feet in length, and 5 feet in width. Its weight
13 capacity is 3 tons ..."³¹¹

14 Mr Cecilio Taneo testifies to having started
15 fishing at Scarborough Shoal in 1989, soon after
16 Mr Talatagod, and again just a short time after he
17 relocated to that area of the Philippines.³¹² He began
18 fishing at Scarborough because, he says:

19 "A fellow fisherfolk advised me to try to catch
20 fish in the Scarborough Shoal."³¹³

21 Mr Taneo fished at Scarborough as part of
22 a small-scale commercial enterprise. He states that

³¹⁰ *Id.*, para. A7.

³¹¹ *Id.*, para. A17.

³¹² *Affidavit* of Mr. Cecilio Taneo (12 Nov. 2015), paras. A4, A7.
Supplemental Documents, Vol. II, Annex 698.

³¹³ *Id.*, para. A8.

1 he was:

2 "... recruited by a business man to join a group
3 composed of more or less 35 persons to catch fish in
4 Scarborough Shoal."³¹⁴

5 This group was broken into smaller groups of about
6 six to eight that would catch about 600 to 700 kilos
7 of fish per day.³¹⁵

8 All the Filipino fishermen report that, until
9 2012, they were never prevented by anybody from
10 fishing at Scarborough Shoal.³¹⁶ Several recall
11 periodically seeing Filipino official vessels in the
12 area, but no official Chinese presence is reported
13 until 2008. And even then, the Chinese ship in
14 question took no steps to prevent the Filipinos from
15 pursuing their traditional livelihoods.³¹⁷

16 Each and every one of the fishermen also report
17 consistently seeing the nationals of other states
18 fishing at Scarborough, including fishermen from
19 Vietnam, Taiwan and the Chinese mainland.³¹⁸ All of

³¹⁴ *Id.*, para. A9.

³¹⁵ *Id.*, paras. A11, A13.

³¹⁶ See *Affidavit* of Mr. Richard Comandante (12 Nov. 2015), para. A37. Supplemental Documents, Vol. II, Annex 693; *Affidavit* of Mr. Jowe Legaspi. (12 Nov. 2015), para. A24. Supplemental Documents, Vol. II, Annex 696; *Affidavit* of Mr. Crispen Talatagod (12 Nov. 2015), para. A24. Supplemental Documents, Vol. II, Annex 697.

³¹⁷ *Affidavit* of Mr. Tolomeo Forones (12 Nov. 215), para. A24. Supplemental Documents, Vol. II, Annex 694.

³¹⁸ *Affidavit* of Mr. Richard Comandante (12 Nov. 2015), para. A38. Supplemental Documents, Vol. II, Annex 693; *Affidavit* of Mr. Tolomeo Forones (12 Nov. 2015), para. A8. Supplemental Documents, Vol. II, Annex

1 the Filipinos state that the interactions among the
2 various groups were cordial, and that they sometimes
3 even exchanged goods. Typical is the description of
4 Mr Michael Lalong, who testifies:

5 "We usually pass by them along the fishing
6 grounds. They wave their hands to greet us. There
7 were instances when Chinese fishermen would to have
8 the ropes of their boats tied into ours. Through hand
9 signs, we got to communicate with them. We sometimes
10 exchange goods such as cigarettes, liquor or rice."³¹⁹

11 This long, peaceful and uninterrupted tradition of
12 Filipino fishing came to an abrupt end in April 2012.
13 The very first incident occurred when Chinese
14 Government ships intervened to prevent Philippine law
15 enforcement from arresting Chinese fishermen
16 harvesting endangered species.³²⁰ The Philippines
17 responded by informing China of its "grave concern"
18 over the incident.³²¹ Just a few days later, though,
19 another Chinese vessel, this time joined by a Chinese

694; *Affidavit* of Mr. Miguel Lalong (12 Nov. 2015), para. A26. Supplemental Documents, Vol. II, Annex 695; *Affidavit* of Mr. Jowe Legaspi. (12 Nov. 2015), para. A18. Supplemental Documents, Vol. II, Annex 696; *Affidavit* of Mr. Crispin Talatagod (12 Nov. 2015), para. A7. Supplemental Documents, Vol. II, Annex 697; *Affidavit* of Mr. Cecilio Taneo (12 Nov. 2015), para. A18. Supplemental Documents, Vol. II, Annex 698.

³¹⁹ *Affidavit* of Mr. Miguel Lalong (12 Nov. 2015), para. A22. Supplemental Documents, Vol. II, Annex 695

³²⁰ Memorial, para. 35.1

³²¹ *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 12-0894 (11 Apr. 2012). MP, Vol. VI, Annex 205.

1 aircraft, moved to assert control over the shoal by
2 harassing and evicting a Philippine boat conducting
3 marine research there.³²²

4 The combination of these unprecedented events led
5 the Philippines to suggest to China that they:

6 "... bring the matter before an appropriate
7 third-party adjudication body under international law,
8 specifically, the International Tribunal for the Law
9 of the Sea (ITLOS) ..." ³²³

10 Not for the first time, China rejected the
11 Philippines' proposal for a judicial settlement.

12 Instead, China consolidated its hold on Scarborough by
13 deploying and anchoring Chinese vessels in such
14 a manner as to form an effective physical barrier that
15 prevented Philippine fishing boats from entering the
16 shoal.³²⁴

17 By 21st May 2012, the area surrounding Scarborough
18 Shoal was occupied by numerous Chinese vessels,
19 including:

20 "... 5 Chinese Government vessels ... and 16

³²² See *Note Verbale* from the Department of Foreign Affairs of the Philippines to the Embassy of the People's Republic of China in Manila, No. 12-1030 (15 Apr. 2012). MP, Vol. VI, Annex 206.

³²³ *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 12-1137 (26 Apr. 2012). MP, Vol. VI, Annex 207.

³²⁴ See *Memorandum* from Commander, Naval Forces Northern Luzon, Philippine Navy, to the Flag Officer in Command, Philippine Navy, No. CNFNL Rad Msg Cite NFCC-0612-001 (2 June 2012), paras. 3-7. MP, Vol. IV, Annex 83.

1 Chinese fishing boats, 10 of which are inside the
2 shoal while 6 are outside. In addition, there are 56
3 utility boats, 27 of which were inside and 29 were
4 outside the shoal."³²⁵

5 That month, China warned the Philippines not to
6 send any of its vessels to Scarborough Shoal. Since
7 then, China has exercised exclusive control over the
8 feature and, with only slight exceptions, has
9 prohibited Philippine vessels of any kind, including
10 fishermen, from entering the area.

11 Some of the Filipino fishermen who have submitted
12 activities experienced China's actions firsthand. The
13 75-year-old Mr Talatagod states:

14 "I stopped fishing in 2012 because we were
15 prohibited from fishing there by the Chinese.
16 I remember that when my companions and I went to
17 Scarborough Shoal, we were met by an armed member of
18 Chinese Coast Guard. The guard told us that they own
19 Scarborough Shoal and he prevented us from fishing
20 there. We were surprised and afraid at that time. We
21 tried to hide and wait for nighttime before starting
22 to fish, but the Chinese were able to anticipate this.
23 Again, they prohibited us from fishing in Scarborough

³²⁵ *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.

1 Shoal. I was not able to return since then."³²⁶

2 Mr Tolomeo Forones reports how, after the initial
3 Chinese action:

4 "... several fishermen from a different
5 municipality were able to get around the Philippine
6 Coast Guard ...", who were trying to stop them to
7 prevent tensions, "... to get near the Scarborough
8 Shoal. However, the Chinese prevented them from
9 fishing in the area by firing the water cannon at the
10 Filipino fishermen."³²⁷

11 The effect on the fishermen's income, and indeed
12 their sustenance, has been profound. Mr Forones
13 states that:

14 "I earned a lot of money from fishing in
15 Scarborough Shoal because there were plenty of fish in
16 that area. I had no problems catching fish then and
17 I am able to earn Php40,000 every 3 months. But now
18 my earnings decreased because I no longer fish for
19 a living. My current salary as a security guard is
20 only Php7,000 a month. Furthermore, my employment as
21 a security guard is only contractual for every
22 3 months so my income and earnings is uncertain."³²⁸

³²⁶ *Affidavit* of Mr. Crispen Talatagod (12 Nov. 2015), para. A24. Supplemental Documents, Vol. II, Annex 697.

³²⁷ *Affidavit* of Mr. Tolomeo Forones (12 Nov. 2015), para. A24. Supplemental Documents, Vol. II, Annex 694.

³²⁸ *Id.*, para. A27.

1 Mr Talatagod testifies that China's actions forced
2 him to retire. He states:

3 "Before I retired and after this incident
4 happened, I fished near the coast of Infanta only. If
5 there are plenty of fish, I sell my catch. But if the
6 catch is few, we don't sell it anymore and eat it
7 instead. This is why my earnings noticeably decreased
8 as compared to the time I was fishing in Scarborough
9 Shoal. But money was not the only thing that was
10 lost; we lost our livelihood as well. Our primary
11 source of food is gone. When Scarborough was still
12 open for fishing, we had food for the whole year. But
13 now, our food supply is unsure because it largely
14 depends on the chance of catching enough fish."³²⁹

15 The Tribunal asked whether these actions:

16 "... constitute violations of the Convention; and,
17 if so, the provisions of the Convention that the
18 Philippines alleges to have been violated."

19 The answer to the first question is: yes. And the
20 answer to the second question follows from the law
21 I discussed during the first part of my presentation.
22 By preventing Philippine fishermen from conducting
23 their traditional livelihood in the territorial sea at
24 and around Scarborough Shoal, China has violated the

³²⁹ *Affidavit* of Mr. Crispen Talatagod (12 Nov. 2015), para. A27.
Supplemental Documents, Vol. II, Annex 697.

1 obligations incumbent on it under Article 2(3) of the
2 Convention; and with it, also Article 300, which
3 requires China to fulfil its obligations in good
4 faith.

5 The Tribunal also asked whether China's
6 December 2012 "Regulations for the Management of
7 Coastal Border Security in Hainan Province", pursuant
8 to which China purported to require foreign vessels to
9 seek permission before entering "China's waters" in
10 the South China Sea, constitute a violation of the
11 Convention.³³⁰ To the extent that these form any part
12 of the putative legal basis for preventing traditional
13 Philippine fishing at Scarborough Shoal, the answer is
14 again: yes. The measure violates China's obligations
15 under Article 2(3) and 300.

16 Now, I say "to the extent that" because, as stated
17 in our Memorial, and as Professor Sands noted again
18 today, the Philippines has repeatedly requested -- but
19 never received -- written clarification concerning the
20 precise areas to which the regulations apply.³³¹ Of
21 course, the answer has effectively been delivered in
22 practice.

23 In sum, Mr President, we believe that China has
24 an obligation under the Convention to allow Filipino

³³⁰ MP, para. 3.57.

³³¹ *Id.*

1 fishermen to continue fishing, consistent with their
2 traditional practices, within the 12-mile territorial
3 sea around Scarborough Shoal. Its failure to respect
4 that obligation should be remedied.

5 Mr President, members of the Tribunal, thank you
6 once again for your kind attention. Would you please
7 invite Mr Loewenstein to the lectern, unless of course
8 there are questions.

9

1 (4.32 pm)

2

Tribunal questions

3 **JUDGE WOLFRUM:** Sorry, Mr Martin, to hold you up at the
4 end of a long day. You based the right for
5 traditional fishing in the 12-mile limits of
6 Scarborough Shoal on an interpretation of
7 Article 2(3), right?

8 **MR MARTIN:** Yes, sir, that's correct.

9 **JUDGE WOLFRUM:** Traditional fishing is mentioned in the
10 Convention, particularly in Article 51(1). There is
11 a direct reference to the protection of traditional
12 fishing from adjacent states. Could you perhaps
13 consider comparing the relationship between
14 Articles 2(3) and 51(1); not for today, for tomorrow
15 or next week. Thank you.

16 **MR MARTIN:** Thank you, Judge Wolfrum. Of course we'd be
17 happy to not only consider but also address that,
18 certainly no later than Monday.

19 **THE PRESIDENT:** Judge Pawlak has a question.

20 **JUDGE PAWLAK:** You mentioned that in the area of
21 Scarborough fishing, when the difficulties became
22 imminent, the Philippines suggested China could bring
23 a dispute before the appropriate third party for
24 judicial settlement, and China refused. What form of
25 offer was that? Was it a note? Was it in private

1 talks? Was it in the form of a general statement? Or
2 in what form was the Chinese response to that
3 proposal? Thank you.

4 **MR MARTIN:** That I can answer now. Those exchanges are
5 reflected in the record in an exchange of notes
6 between the two sides. We would be happy to
7 specifically identify which annexes those are at the
8 next earliest opportunity.

9 **THE PRESIDENT:** Thank you, Mr Martin. I think that will
10 be all. So we will ask Mr Loewenstein to come to the
11 podium and conclude the remarks for today.

12 (4.35 pm)

13 **First-round submissions by MR LOEWENSTEIN**

14 **MR LOEWENSTEIN:** Mr President, Members of the Tribunal,
15 good afternoon. I will address China's unlawful
16 construction activities on Mischief Reef, a low-tide
17 elevation located within the Philippines' exclusive
18 economic zone and on its continental shelf. I will
19 show that by engaging in these activities, China has
20 not only violated the Philippines' rights under
21 Article 60 and Article 80 of the Convention, it has
22 also breached its obligation not to attempt to
23 appropriate a low-tide elevation located on the
24 continental shelf of another state.

25 I will also set out the facts concerning China's

1 wider artificial island-building project, which, by
2 employing the same destructive techniques used at
3 Mischief Reef, has created more than 1,300 hectares of
4 new land by destroying the surrounding coral and
5 heaping the resulting debris atop previously submerged
6 reefs. Tomorrow Professor Boyle will address how
7 these and other actions by China have breached its
8 environmental obligations under the Convention, and
9 Professor Oxman will show that China has unlawfully
10 aggravated and extended the Parties' dispute.

11 I begin with Mischief Reef. As you can see on the
12 screen,³³² Mischief Reef is located in the central part
13 of the Spratlys, within the 200-nautical-mile EEZ of
14 the Philippines. The nearest island in the main
15 Philippine archipelago is Palawan, 125.6 nautical
16 miles away.³³³ Mischief Reef is 596.3 nautical miles
17 from Hainan.³³⁴

18 Professor Sands has demonstrated that Mischief
19 Reef is a low-tide elevation. As the Chinese Navy's
20 2011 *Sailing Directions* put it, Mischief Reef is
21 "exposed during low tide" and "submerged during high
22 tide".³³⁵ This is confirmed by the nautical charts of

³³² Tab 3.8.

³³³ SWSP, Vol. II, p. 126.

³³⁴ *Id.*

³³⁵ *Id.*, p. 127.

1 the Philippines, the United States, the United
2 Kingdom, Vietnam, Russia and Japan.³³⁶ Mischief Reef
3 does not lie within the territorial sea of any other
4 feature. The nearest land above water at high tide is
5 Alicia Annie Reef, 27.8 nautical miles away.³³⁷

6 Legal consequences flow from these geographical
7 facts. One is that Mischief Reef is part of the
8 Philippines' continental shelf. That is because
9 Article 76 provides that:

10 "... [the] continental shelf of a coastal State
11 comprises the seabed and subsoil of the submarine
12 areas that extend beyond its territorial sea [at
13 least] to a distance of 200 nautical miles from the
14 baselines from which the breadth of the territorial
15 sea is measured."

16 Since Mischief Reef is less than 200 nautical
17 miles from Palawan, and there are no other features
18 capable of generating a 200-nautical-mile entitlement
19 in the area, Mischief Reef must form part of the
20 Philippines' continental shelf and fall within the
21 superjacent waters of its EEZ.

22 A further legal consequence is that only the
23 Philippines may construct, or authorise the
24 construction of, artificial islands, installations and

³³⁶ *Id.*, pp.127-128.

³³⁷ *Id.*, p. 126.

1 structures on Mischief Reef. Article 56(1)(b)
2 provides that in its EEZ the coastal state has:

3 "... jurisdiction as provided for in the relevant
4 provisions of this Convention with regard to [among
5 other things] the establishment and use of artificial
6 islands, installations and structures."

7 One of those relevant provisions is Article 60(1),
8 which provides:

9 "In the exclusive economic zone, the coastal State
10 shall have the exclusive right to construct and to
11 authorise and regulate the construction, operation and
12 use of: (a) artificial islands; (b) installations and
13 structures for the purposes provided for in article 56
14 and other economic purposes; [and] (c) installations
15 and structures which may interfere with the exercise
16 of the rights of the coastal State in the zone."

17 Paragraph (3) of Article 60 further provides that:

18 "Due notice must be given of the construction of
19 such artificial islands, installations or structures,
20 and permanent means for giving warning of their
21 presence must be maintained."

22 Article 80 is another relevant provision referred
23 to in Article 56(1)(b). It provides that the
24 obligations concerning artificial islands,
25 installations and structures that are set out in
26 Article 60 apply in regard to the continental shelf as

1 well.

2 Put simply, in its own EEZ and continental shelf,
3 the coastal state has exclusive jurisdiction in regard
4 to artificial islands, and over installations and
5 structures that are constructed for economic purposes
6 and/or which may interfere with the exercise of the
7 coastal state's rights. No other state may construct
8 them within the coastal state's consent. Thus, even
9 if, *quod non*, China had historic rights -- which we
10 have shown is not the case -- the exclusive nature of
11 the Philippines' rights under Articles 60 and 80 would
12 preclude China from being able to construct such
13 artificial islands, installations or structures
14 unilaterally.

15 China has violated these rights of the Philippines
16 in regard to Mischief Reef. Soon after occupying
17 Mischief Reef, China, in 1995, began building
18 structures made from aluminium and fibreglass,
19 supported by steel bars with cemented bases.³³⁸ Each
20 structure featured a guardhouse over which China
21 hoisted its flag.³³⁹ When the Philippines protested,³⁴⁰

³³⁸ Armed Forces of the Philippines, *Chronology of Events in the Kalayaan Island Group* (2004), p. 1. MP, Vol. III, Annex 53.

³³⁹ *Id.*; Letter from Alexander P. Pama, Captain, Philippine Navy, to Alicia C. Ramos, Assistant Secretary for Asian and Pacific Affairs, Department of Foreign Affairs, Republic of the Philippines (13 Nov. 2004), p. 2. MP, Vol. III, Annex 54.

³⁴⁰ *Memorandum* from the Undersecretary of Foreign Affairs of the Republic of the Philippines to the Ambassador of the People's Republic of China in Manila (6 Feb. 1995). MP, Vol. III, Annex 17.

1 China responded by claiming that it had built the
2 structures for economic purposes, describing them as:

3 "... typhoon shelters constructed by local Chinese
4 fishing authorities for the purpose of protecting the
5 lives of Chinese fishermen and their production."³⁴¹

6 China emphasised that these were "not military
7 structures" and "d[id] not pose [a] threat to any
8 country".³⁴²

9 On 10th August 1995, during bilateral talks, China
10 again emphasised the structures' economic character,
11 saying that they were facilities for sheltering
12 Chinese fishermen from the wind, and denying that
13 China was constructing any other facilities on the
14 reef. China's Vice Minister of Foreign Affairs said:

15 "It is nothing serious for the Chinese side to
16 construct some windsheltering facilities for peaceful
17 purposes. Some people just exaggerated this and they
18 said that the Chinese side is constructing a military
19 facility. This does not square with the fact."³⁴³

20 China proceeded to construct more sophisticated
21 structures and installations, including three-storey

³⁴¹ *Memorandum from the Ambassador of the Republic of the Philippines in Beijing to the Undersecretary of Foreign Affairs of the Republic of the Philippines (10 Mar. 1995). MP, Vol. III, Annex 18.*

³⁴² *Id.*

³⁴³ *Government of the Republic of the Philippines, Transcript of Proceedings Republic of the Philippines-People's Republic of China Bilateral Talks (10 Aug. 1995), p. 1. MP, Vol. VI, Annex 181.*

1 buildings at two of four construction sites on the
2 reef, deploying an estimated 100 to 150 personnel to
3 lay the foundation.³⁴⁴ This prompted the Philippines
4 to protest via a *Note Verbale* dated 5th November 1998,
5 which emphasised that Mischief Reef is submerged.³⁴⁵

6 The Philippines demanded that China:

7 "... immediately cease and desist from doing
8 further improvements over the illegal structures it
9 has built [and] dismantle any repair works,
10 renovations, reinforcements, fortifications and/or
11 improvements made therein."³⁴⁶

12 In response, China again characterised
13 installations as being "the work of local fishing
14 authorities undertaking repair and renovation".³⁴⁷

15 China's Minister of Foreign Affairs informed his
16 Philippine counterpart on 14th November 1998 that:

17 "... the structures are solely for shelter of
18 fishermen ..."

19 That:

20 "Repair works [were] needed because of

³⁴⁴ Armed Forces of the Philippines, *Chronological Development of Artificial Structures on Features*, p. 33. MP, Vol. IV, Annex 96.

³⁴⁵ *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 983577 (5 Nov. 1998), pp. 1-2. MP, Vol. VI, Annex 185.

³⁴⁶ *Id.*

³⁴⁷ *Memorandum* from Ambassador of the Republic of Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-77-98-S (9 Nov. 1998), p. 1. MP, Vol. III, Annex 34.

1 deterioration due to climatic conditions ..."

2 And that:

3 "The scale of work is small and there is no change
4 in the civilian nature of the facilities."³⁴⁸

5 After China added a helicopter pad, more
6 communications equipment, and wharves, it repeated, as
7 its Assistant Foreign Minister represented on
8 15th March 1999, that:

9 "By repairing the structures ..."

10 Which was how he referred to the new construction:

11 "... China's actual intention to use them as
12 fishermen shelters will be supported ..."

13 And that:

14 "... [the] new facilities are meant for civilian
15 use and not for military purposes."³⁴⁹

16 In regard to what he referred to as the "so-called
17 radar facilities", he said these were:

18 "... nothing but dish-type television satellite
19 antennae to enable the personnel on the reef to watch
20 ordinary TV programs."³⁵⁰

21 On 23rd March 1999, China promised that the

³⁴⁸ *Memorandum* from the Secretary of Foreign Affairs of the Republic of the Philippines to the President of the Republic of the Philippines (14 Nov. 1998), p. 1. MP, Vol. III, Annex 36.

³⁴⁹ *Memorandum* from Ambassador of the Republic of Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-18-99-S (15 Mar. 1999), p. 1. MP, Vol. III, Annex 38.

³⁵⁰ *Id.*

1 facilities "will remain for civilian purposes".³⁵¹

2 Now on the screen are photographs of the
3 installations as they were on 4th December 2003.³⁵²

4 By the time the Philippines submitted its Memorial
5 on 30th March 2014, the structures and installations
6 on Mischief Reef included several buildings
7 constructed on concrete platforms, quays,
8 a greenhouse, and various weather and communications
9 instruments. Now on the screen are photographs of two
10 of them taken on 27th February 2013.

11 Although the construction we have just reviewed
12 was a violation of China's obligations under UNCLOS --
13 a point to which I will return in a moment -- its
14 scale was dwarfed by what would soon come.

15 In 2014, China significantly expanded its unlawful
16 construction activities when it commenced
17 an artificial island-building project involving -- so
18 far at least -- no fewer than seven coral reefs
19 throughout the Spratlys.³⁵³ At these locations, China
20 has built large artificial islands where before there
21 were just submerged coral or, at most, minuscule
22 rocks. The low-tide elevation at Mischief Reef is one

³⁵¹ Government of the Republic of the Philippines and Government of the People's Republic of China, *Joint Statement: Philippine-China Experts Group Meeting on Confidence Building Measures* (23 Mar. 1999), p. 2. Hearing on Merits, Annex 178(bis).

³⁵² Tab 3.9.

³⁵³ Tab 3.10.

1 of these places.

2 There, like elsewhere in the South China Sea,
3 China's land-building project uses huge ship-borne
4 drillings to pulverise and extract coral and rock
5 sediment from the sea floor. As Professor Carpenter
6 and Professor Chou explain in their expert report:

7 "China has deployed a large fleet of complex
8 machinery capable of displacing massive amounts of
9 material from the seabed [which it uses to extract and
10 then] bury coral reefs and create artificial
11 islands."³⁵⁴

12 The heavy equipment used by China includes large
13 cutter-suction dredgers. The schematic on the screen
14 illustrates how they work.³⁵⁵ The vessel extends its
15 drill into the seabed, where its rotating teeth break
16 apart and extract the coral and rock. This material
17 is then transported through a floating tube and
18 deposited onto the reef to create dry land. The
19 process is explained in a video prepared by the Dutch
20 dredging company Van Oord, excerpts of which will now
21 appear on your screen.³⁵⁶

³⁵⁴ K.E. Carpenter & L.M. Chou, *Environmental Consequences of Land Reclamation Activities on Various Reefs in the South China Sea* (14 Nov. 2015), p. 9. Supplemental Documents, Vol. II, Supplemental Documents, Vol. II, Annex 699.

³⁵⁵ Tab 3.11.

³⁵⁶ Van Oord, "Cutter Suction Dredger Castor", Video (2012), available at <http://www.vanoord.com/activities/cutter-suction-dredger> (accessed 5 Nov. 2015). Supplemental Documents, Vol. IV, Supplemental Documents, Vol. IV, Annex 796.

1 (Video played)

2 **VIDEO:** "The rotating cutter head cuts into the soil and
3 is pulled across the bottom horizontally at the same
4 time. The cuttered material, along with a large amount
5 of water, is drawn into the suction mouth by the
6 dredge pumps. The cutter-suction dredger is equipped
7 with an underwater dredge pump on the ladder, and one
8 or two high-power dredge pumps inboard. These pumps
9 move the dredged material through the floating
10 pipeline at the stern of the vessel to a reclamation
11 area which can be several kilometres from the dredging
12 location."

13 **MR LOEWENSTEIN:** One of China's dredgers is the *Tian Jing*
14 *Hao*, which translates into English as the *Heavenly*
15 *Whale*. A photograph of it is on the screen.³⁵⁷
16 According to its manufacturer, this is the most
17 powerful dredger in Asia, and the third most powerful
18 in the world.³⁵⁸ The vessel's dimensions speak for
19 themselves: 127.5 metres long and 22 metres wide.³⁵⁹

20 It works by deploying a massive rotating drill,
21 the "cutter", which is outfitted with large metal

³⁵⁷ Tab 3.12.

³⁵⁸ CCCC Tianjin Dredging Co., Ltd. "Tian Jing Hao", available at <http://en.tjhdj.com/index.php?mod=product&act=view&cid=46&id=397> (accessed 24 Nov. 2015). Hearing on Merits, Annex 857.

³⁵⁹ K.E. Carpenter & L.M. Chou, *Environmental Consequences of Land Reclamation Activities on Various Reefs in the South China Sea* (14 Nov. 2015), p. 9. Supplemental Documents, Vol. II, Supplemental Documents, Vol. II, Annex 699.

1 teeth that are designed to break apart and extract
2 hardened soil, rock and reef. As Professors Carpenter
3 and Chou explain, the drill's "teeth are essentially
4 picks that chisel away at the seabed or reef, layer by
5 layer".³⁶⁰

6 This particular dredger has a minimum dredging
7 depth of 6 metres. It can operate up to a depth of
8 30 metres.³⁶¹ Alone, it can extract up to 4,500 cubic
9 metres of seabed per hour.³⁶² But the *Heavenly Whale*
10 does not dredge alone. No fewer than 32 dredgers were
11 in action at Mischief Reef on 28th May 2015.³⁶³

12 Mr President, China appears to have begun its
13 artificial island building at Mischief Reef in
14 January 2015.³⁶⁴ Before then, the reef appeared as you
15 see it in the satellite image now on the screen. For
16 reference, in its natural submerged state,
17 Mischief Reef was 8.5 kilometres in diameter and had
18 a circumference of 25 kilometres, all of which was, as

³⁶⁰ *Id.*, p. 10.

³⁶¹ *Id.*, p. 9.

³⁶² *Id.*

³⁶³ *Letter* from Voltaire T. Gazmin, Secretary of National Defense of the Republic of the Philippines, to Albert F. Del Rosario, Secretary of Foreign Affairs of the Republic of the Philippines (22 June 2015). Supplemental Documents, Vol. I, Annex 610. ("Aerial photo of Panganiban (Mischief) Reef dated May 28 reveals new dredging area (Annex E). There were around 32 dredger vessels, 32 cargo ships and three (3) ocean tugs. The fish cages previously installed at the inner lagoon of the reef were not sighted".)

³⁶⁴ *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 15-0359 (3 Feb. 2015). Supplemental Documents, Vol. II, Annex 682.

1 I said, submerged at high tide.

2 You can now see on the screen an image of work
3 underway on 1st February 2015.³⁶⁵ The dredger, its
4 pipeline and the accumulating pile of pulverised coral
5 are all visible. Even though work had only just
6 begun, already the newly created land is approximately
7 three times the size of the previously constructed
8 installation, which itself is large: approximately
9 5,800 square metres.

10 Photographs taken one month later, on
11 6th March 2015, will now appear on the screen.
12 Because they were taken at an oblique angle, from
13 relatively close range, you can see detail.³⁶⁶ The
14 first shows a dredger shooting material onto the
15 reef.³⁶⁷ The next shows another dredger depositing
16 material onto the ever-expanding pile of debris. At
17 the centre of the image, you can see the same
18 Chinese-built installation we saw in the 1st February
19 image. While the pile was then approximately three
20 times the size of the installation, now it is roughly
21 40 times bigger.

22 You can get a sense of the magnitude of the
23 artificial island-building at Mischief Reef from the

³⁶⁵ Tab 3.13.

³⁶⁶ Tab 3.13.

³⁶⁷ Tab 3.13.

1 photographs now on the screen. They show three
2 different parts of the reef, all on 16th March 2015.³⁶⁸
3 For scale, you can see the large dredgers in each
4 image.

5 Now let's compare the satellite image of the
6 entire reef taken before construction with one just
7 three months after the project began. During the
8 first three months of construction alone, China
9 created 65 hectares of new land. Now look at the reef
10 one month later, on 13th April 2015. During that
11 single month, 170 hectares of additional land were
12 created.³⁶⁹

13 Here is what Mischief Reef looked like on
14 19th October 2015. By then, China had expanded the
15 artificial reef's landmass by a further 363 hectares.
16 When the image is blown up, you can see that,
17 in addition to creating an artificial island, China
18 has also done a tremendous amount of construction on
19 top of it. Also, according to analysis by independent
20 observers, an area approximately 3,000 metres long
21 "has been cleared and flattened along the northern rim
22 of the reef".³⁷⁰ This may indicate the intention to

³⁶⁸ Tab 3.13.

³⁶⁹ Tab 3.13.

³⁷⁰ Gregory Poling, "Spratly Airstrip Update: Is Mischief Reef Next?", *Center for Strategic & International Studies* (16 Sept. 2015). Hearing on Merits, Annex 835.

1 build an airstrip.³⁷¹

2 In total, China has created approximately
3 598 hectares of new land at Mischief Reef. Every
4 square metre of this had previously been submerged --
5 and undisturbed -- coral.

6 China has also constructed an access channel which
7 is approximately 250 metres wide and deep enough to
8 allow transit into the lagoon by large vessels.³⁷² The
9 artificial island has fortified seawalls, nine
10 temporary loading piers, and nine cement plants.³⁷³

11 To put this into perspective, let's return to the
12 most recent image of the reef. Now consider the
13 illustration that is on your screen. It compares the
14 size of the city block that encompasses the
15 Peace Palace and all of its surrounding gardens --
16 an area of approximately 9 hectares -- with the area
17 converted by China at Mischief Reef into dry land.³⁷⁴
18 The newly created land is 66 times larger.

19 Now consider the fact that Mischief Reef is just
20 one of the seven features where China has carried out
21 artificial island-building on this scale.

³⁷¹ "Third South China Sea airstrip being built, says expert, citing satellite photos", *The Guardian* (15 Sept. 2015). Supplemental Documents, Vol. IV, Supplemental Documents, Vol. IV, Annex 770.

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ Tab 3.14.

1 Another is Subi Reef. As you can see on the
2 screen,³⁷⁵ this is a low-tide elevation located on the
3 high sea, beyond the 200-mile limit of any feature
4 entitled to an EEZ.³⁷⁶ There are no other maritime
5 features within 12 miles. The closest is Thitu, which
6 is 12.2 nautical miles away.³⁷⁷

7 China initially constructed an installation on the
8 feature in 1989.³⁷⁸ You can see it in the southwest
9 corner of the July 27th 2012 satellite image now
10 appearing on your screen.³⁷⁹ Its more recent effort to
11 build a significant artificial island was underway by
12 26th January 2015, as you can see in the next image.
13 Here is a photograph of four cutter-suction dredgers
14 at work on part of the reef on 19th February 2015.³⁸⁰
15 By 5th March 2015, the reef looked like this.³⁸¹ Here
16 is how it looked by 5th June 2015.³⁸² And now, by
17 6th November, the reef looked like this.³⁸³

18 A similar project was undertaken on Fiery Cross

³⁷⁵ Tab 3.15.

³⁷⁶ SWSP, Vol. II, p. 180.

³⁷⁷ *Id.*

³⁷⁸ Armed Forces of the Philippines, *Matrix of Events: Subi (Zamora)* (2013). MP, Vol. IV, Annex 91.

³⁷⁹ Tab 3.16.

³⁸⁰ Tab 3.16.

³⁸¹ Tab 3.16.

³⁸² Tab 3.16.

³⁸³ Tab 3.16.

1 Reef, a high-tide feature that qualifies as a rock
2 under Article 121(3).³⁸⁴ In its natural condition, it
3 had a single rock protruding 1 metre above high
4 tide.³⁸⁵

5 This is how it looked in August 2014, when work
6 began.³⁸⁶ You can see in the extreme west of the reef
7 the structure that China initially built in 1988.³⁸⁷
8 The reef looked like this in September 2014;³⁸⁸ like
9 this in November 2014;³⁸⁹ like this in February 2015;³⁹⁰
10 like this in September 2015; and like this in
11 October 2015.³⁹¹ By that time, China had created
12 an artificial island large enough for an airstrip more
13 than 3,000 metres in length.³⁹²

14 I will not impose on you any further by reviewing
15 in the same detail the artificial island-building that
16 China has undertaken at the four other features,
17 Gaven Reef, Johnson South Reef, Cuarteron Reef and

³⁸⁴ Tab 3.17.

³⁸⁵ SWSP, Vol. II, p. 50.

³⁸⁶ Tab 3.18.

³⁸⁷ Armed Forces of the Philippines, *Matrix of Events: Fiery Cross (Kagitingan) Reef* (2013). MP, Vol. IV, Annex 88.

³⁸⁸ Tab 3.18.

³⁸⁹ Tab 3.18.

³⁹⁰ Tab 3.18.

³⁹¹ Tab 3.18.

³⁹² J. Hardy & S. O'Connor, "China completes runway on Fiery Cross Reef", *IHS Jane's Defence Weekly* (25 Sept. 2015). Supplemental Documents, Vol. V, Supplemental Documents, Vol. V, Annex 812.

1 McKennan (Hughes) Reef. You can find illustrative
2 satellite images and photographs of its work on each
3 of them at tabs 3.19 through 3.22. Suffice to say,
4 China's actions there are of a similar magnitude and
5 destructiveness as at the other features we have
6 reviewed. Collectively, more than 1,300 hectares of
7 artificial land have been created.

8 Mr President, there can be no doubt that China's
9 actions at Mischief Reef have violated the
10 Philippines' rights under Articles 60 and 80 of the
11 Convention. To begin with, it has constructed
12 an artificial island, despite the fact that
13 Article 60(1)(a) expressly assigns the exclusive right
14 to construct and authorise artificial islands to the
15 coastal state.

16 An "island" is defined in Article 121(1) as:

17 "... [a] naturally formed area of land surrounded
18 by water, which is above water at high tide."

19 It necessarily follows that an "artificial island"
20 is a feature that has the characteristics of an island
21 but which is not naturally formed, but rather created
22 by human hands. That is precisely what China has
23 made. It has converted a low-tide elevation that its
24 own *Sailing Directions* describe as being submerged at
25 high tide into nearly 6 square kilometres of land that
26 are now above water at high tide. That is a textbook

1 example of an artificial island.

2 China has also violated Article 60(1)(b) by
3 constructing installations and structures for the
4 purposes provided for in Article 56 and other economic
5 purposes. Again, the facts permit no other
6 interpretation. The photographic evidence speaks for
7 itself; and China has acknowledged them in its
8 diplomatic exchanges with the Philippines. China has
9 also repeatedly characterised their purpose as
10 economic, stating that they are for the purpose of
11 assisting fishing by its nationals. Fishing, of
12 course, is the quintessential economic activity in the
13 EEZ.

14 Moreover, it cannot be seriously questioned that
15 the structures and installations built by China
16 interfere with the rights of the Philippines in its
17 EEZ. Finally, China has violated Article 60(3) by
18 failing to give due notice of its construction
19 activities. Indeed, no notice was given at all.

20 Mr President, further and separately, China has
21 acted unlawfully by attempting to appropriate Mischief
22 Reef.

23 The Tribunal has asked the Philippines to address
24 the source of the legal obligation to refrain from
25 appropriating a low-tide elevation. That obligation
26 is founded in Article 77 of the Convention.

1 Paragraph 2 provides that a coastal state's
2 continental shelf rights:

3 "... are exclusive in the sense that if the
4 coastal State does not explore the continental shelf
5 or exploit its natural resources, no one may undertake
6 these activities without the express consent of the
7 coastal State."

8 Paragraph 3 further provides that:

9 "The rights of the coastal state over the
10 continental shelf do not depend on occupation,
11 effective or notional, or on any express
12 proclamation."

13 As Judge Mensah has observed in his declaration in
14 *Nicaragua v Colombia*:

15 "... it is important to note that Article 77 of
16 UNCLOS (which clearly reflects customary international
17 law) categorically states that the rights of the
18 coastal State over the continental shelf do not depend
19 on occupation or express proclamation."³⁹³

20 This is a longstanding rule of general
21 international law. The ICJ, in the *North Sea*
22 *Continental Shelf* cases, referred to it as being:

23 "... no doubt ... the most fundamental of all the
24 rules of law relating to the continental shelf,

³⁹³ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Merits, Judgment, Declaration of Judge *ad hoc* Mensah, I.C.J. Reports 2012, para. 7. Hearing on Merits, Annex LA-302.

1 enshrined in Article 2 of the 1958 Geneva Convention
2 though quite independent of it."³⁹⁴

3 The court thus famously held that:

4 "... the rights of the coastal State in respect of
5 the area of continental shelf that constitutes
6 a natural prolongation of its land territory into and
7 under the sea exist *ipso facto* and *ab initio*, by
8 virtue of its sovereignty over the land."³⁹⁵

9 The ICJ's holding applies to all parts of
10 a state's continental shelf.³⁹⁶ That necessarily
11 includes low-tide elevations located beyond its
12 territorial sea. As one commentator has observed,
13 a low-tide elevation "situated on the continental
14 shelf is in essence part of the seabed and of the same
15 juridical status".³⁹⁷

16 The jurisprudence is thus clear that low-tide
17 elevations are not capable of appropriation. In
18 *Nicaragua v Colombia*, the ICJ, relying upon its
19 judgment of 16th March 2001 in *Qatar v Bahrain*, held

³⁹⁴ *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, Judgment, ICJ Reports 1969, para. 19. MP, Vol. XI, Annex LA-4.

³⁹⁵ *Id.*

³⁹⁶ *Id.*, para. 20.

³⁹⁷ Clive R. Symmons, *The Maritime Zones of Islands in International Law* (1979), p. 6. SWSP, Vol. XII, Annex LA-198; See also, *United States v Ray*, 423 F.2d 16, 20 (US Court of Appeals, 5th Cir. 1970). SWSP, Vol. XII, Annex LA-219; Roberto Lavalle, "The Rights of States over Low-tide-elevations: A Legal Analysis", *International Journal of Marine and Coastal Law*, Vol. 29 (2014), p. 476. SWSP, Vol. XII, Annex LA-214.

1 that:

2 "It is well established in international law that
3 islands, however small, are capable of appropriation.
4 By contrast, low-tide elevations cannot be
5 appropriated..."³⁹⁸

6 Indeed, that is the reason why, in *Qatar*
7 *v Bahrain*, the court rejected Bahrain's argument that
8 it had sovereignty over Fasht ad Dibal, a low-tide
9 elevation upon which Bahrain argued it had carried out
10 "acts of authority".³⁹⁹

11 As Sir Gerald Fitzmaurice has observed:

12 "It is a well-established rule of international
13 law that territory, in order to be capable of
14 appropriation in sovereignty, must be situated
15 permanently above high-water mark and not consist e.g.
16 of a drying-rock, only uncovered at low tide, unless
17 it is already within the territorial waters of
18 appropriable territory."⁴⁰⁰

19 Despite this clear rule, China has sought to
20 appropriate Mischief Reef even though it accepts that
21 Mischief is a low-tide elevation located more than

³⁹⁸ *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Merits, Judgment, ICJ Reports 2012, para. 26. MP, Vol. XI, Annex LA-35.

³⁹⁹ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*, Merits, Judgment, ICJ Reports 2001, p. 91, paras. 199-204, 205-206. MP, Vol. XI, Annex LA-26.

⁴⁰⁰ Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-4: Points of Substantive Law, Part II", *British Yearbook of International Law*, Vol. 32 (1956), pp. 46-47. SWSP, Vol. XII, Annex LA-193.

1 12 miles from its coast, or indeed from any high-tide
2 feature, which means that it is part of the
3 continental shelf and thus juridically incapable of
4 falling under the sovereignty of any state. Since it
5 is well within 200 miles of Palawan, and there is no
6 other feature in the area capable of sustaining
7 a 200-nautical-mile entitlement, Mischief Reef can
8 only be located on the continental shelf of the
9 Philippines.

10 It is beyond dispute that China claims to have
11 appropriated Mischief Reef. From the time it first
12 built structures on the reef, China has flown its flag
13 on them:⁴⁰¹ the classic display of a state authority
14 indicating a claim of sovereignty. Its claim to
15 sovereignty over Mischief Reef is clear from the
16 diplomatic note of 28th June 2015 protesting
17 overflight of the reef by Philippine aircraft. China
18 wrote that this "severely infringed upon China's
19 sovereignty" and, using the Chinese name for Mischief
20 Reef, stated that:

21 "China has indisputable sovereignty over Nansha
22 Islands and their adjacent waters, *Meiji Jiao* [or

⁴⁰¹ Armed Forces of the Philippines, *Chronology of Events in the Kalayaan Island Group* (2004), p. 1. MP, Vol. III, Annex 53; Letter from Alexander P. Pama, Captain, Philippine Navy, to Alicia C. Ramos, Assistant Secretary for Asian and Pacific Affairs, Department of Foreign Affairs, Republic of the Philippines (13 Nov. 2004), p. 2. MP, Vol. III, Annex 54.

1 Mischief Reef] ... included."⁴⁰²

2 China's response to the Philippines' diplomatic
3 note of 3rd February 2015 protesting the construction
4 on Mischief Reef also makes the sovereignty claim
5 explicit. In that note, the Philippines emphasised
6 that Mischief Reef:

7 "... is a low-tide elevation located in the
8 exclusive economic zone of the Philippines on its
9 continental shelf ..."

10 That:

11 "Pursuant to Articles 60 and 80 [of UNCLOS] the
12 Philippines has the exclusive right to authorise the
13 construction of artificial islands, installations or
14 other structures ..."

15 And that:

16 "... [China's] activities constitute a flagrant
17 violation of these rights."⁴⁰³

18 China responded to the Philippines' invocation of
19 Mischief Reef's status as a low-tide elevation, and
20 its corresponding rights under Articles 60 and 80, by
21 stating that:

22 "... [it] has indisputable *sovereignty* over the

⁴⁰² *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)-214 (28 June 2015). Supplemental Documents, Vol. II, Supplemental Documents, Vol. II, Annex 689.

⁴⁰³ *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 15-0359 (3 Feb. 2015). Supplemental Documents, Vol. II, Annex 682.

1 Nansha Islands and its adjacent waters. The
2 development of any facility in the Nansha Islands
3 falls within the scope of China's *sovereignty*." ⁴⁰⁴

4 That was a quote from the diplomatic note.

5 The Tribunal has asked whether it would have
6 jurisdiction to consider Submission 12 if China's
7 installation at Mischief Reef are military in nature.
8 Professor Oxman will have more to say about this. For
9 now, I will simply note that China itself does not
10 characterise its activities on Mischief Reef as being
11 of a military character. To the contrary, as
12 demonstrated by the diplomatic statements we have
13 reviewed earlier, China has *denied* that they are
14 military, and repeatedly characterised them as being
15 civilian.

16 That is still China's position. On
17 9th April 2015, when asked about China's activities,
18 Hua Chunying, spokesperson for China's Ministry of
19 Foreign Affairs, gave the following explanation:

20 "The Chinese government has been carrying out
21 maintenance and construction work on some of the
22 garrisoned Nansha Islands and reefs with the main
23 purposes of optimizing their functions, improving the

⁴⁰⁴ *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)-053 (12 Feb. 2015) (emphasis added). Supplemental Documents, Vol. II, Supplemental Documents, Vol. II, Annex 683.

1 living and working conditions of personnel stationed
2 there, better safeguarding territorial sovereignty and
3 maritime rights and interests, as well as better
4 performing China's international responsibility and
5 obligation in marine search and rescue, disaster
6 prevention and mitigation, marine science and
7 research, meteorological observation, environmental
8 protection, navigation safety, fishery production
9 service and other areas."⁴⁰⁵

10 She then continued:

11 "After the construction, the islands and reefs
12 will be able to provide all-round and comprehensive
13 services to meet various civilian demands besides
14 satisfying the need of necessary military defense."

15 Ms Hua then re-emphasised that the primary
16 function was civilian:

17 "The maritime areas in the South China Sea, where
18 shipping lanes criss-cross and fishing grounds scatter
19 around, are far away from the landmass. These areas
20 are prone to marine accidents due to the influence of
21 typhoon and monsoon. Civilian functions and
22 facilities will be included in the construction for
23 ship to take shelter, and for navigation aid, search
24 and rescue, marine meteorological observation and

⁴⁰⁵ Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on April 9, 2015* (9 Apr. 2015). Supplemental Documents, Vol. I, Annex 624.

1 forecast fishery service and administration, so as to
2 provide services to ships of China, neighbouring
3 countries and other countries that sail across the
4 South China Sea." ⁴⁰⁶

5 On 6th August 2015, China's Minister of Foreign
6 Affairs described the nature of China's activities in
7 similar terms. In regard to China's plans, he said
8 that China will:

9 "... build facilities mainly for public good
10 purposes, including multi-functional lighthouse,
11 search and rescue facilities for maritime emergencies,
12 meteorological observation station, marine scientific
13 and research center, as well as medical and first aid
14 facilities. China stands ready to open these
15 facilities to other countries upon completion. As the
16 largest littoral state in the South China Sea, China
17 has the capability and obligation to provide regional
18 countries with these much needed public goods [at]
19 sea." ⁴⁰⁷

20 Mr President, in summary, China has engaged in
21 a massive artificial island-building project on
22 Mischief Reef. Because that feature is a low-tide
23 elevation located on the Philippines' continental

⁴⁰⁶ *Id.*

⁴⁰⁷ Ministry of Foreign Affairs of the People's Republic of China, *Wang Yi on the South China Sea Issue At the ASEAN Regional Forum* (6 Aug. 2015). Supplemental Documents, Vol. V, Annex 634.

1 shelf and within its 200-mile EEZ, only the
2 Philippines has the right to engage in this
3 undertaking. By doing so, China has breached
4 Article 60 and Article 80 of the Convention. It has
5 also breached those articles by building installations
6 and structures on the same feature. Finally, China
7 has breached its obligation not to attempt to
8 appropriate a low-tide elevation located on the
9 continental shelf of another state.

10 Mr President, thank you once again for your kind
11 attention. This concludes my presentation, as well as
12 the Philippines' submissions this afternoon. **(Pause)**

13 **THE PRESIDENT:** Thank you, Mr Loewenstein. I'm sorry,
14 I just wanted to check to find out whether there were
15 any questions for you. But there are no questions for
16 you.

17 So we will take it from there, and we will break
18 until tomorrow morning, when we will have the further
19 remarks from the Philippines. Thank you very much.

20 **MR LOEWENSTEIN:** Thank you, Mr President.

21 **(5.15 pm)**

22 **(The hearing adjourned until 10.00 am the following day)**

23