

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 3

Thursday, 26th 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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(Participants may not have been present for the entire hearing.)

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1
2 **Thursday, 26th November 2015**

3 **(10.00 am)**

4 **THE PRESIDENT:** Yes, Mr Reichler, you may proceed.

5 **MR REICHLER:** Good morning, Mr President and members of
6 the Tribunal. It will be our pleasure this morning to
7 present, in addition to the speeches of counsel, the
8 statements of two independent expert witnesses. We
9 understand that it had been the Tribunal's preference
10 to hear from the witnesses in the first round, and so
11 of course we have accommodated.

12 Our intention is to begin this morning's session,
13 with your permission, with the statement of
14 Professor Clive Schofield. After Professor Schofield
15 delivers his statement, Professor Boyle will then
16 speak on behalf of the Philippines in regard to
17 violations of China's environmental obligations.
18 After Professor Boyle, Professor Kent Carpenter will
19 then deliver his statement on the subject of
20 environmental impacts of certain activities conducted
21 in the South China Sea.

22 Then Professor Boyle will return to speak about
23 violations of the international regulations concerning
24 avoidance of collisions at sea. Professor Oxman will
25 then deliver the final presentation on behalf of the
26 Philippines this morning with respect to aggravation

1 and extension of the dispute, and addressing some of
2 the remaining jurisdictional questions that the
3 Tribunal has put to the Philippines.

4 We consider the two experts to be independent, and
5 specifically in the sense that they have been asked to
6 give their own statements, based on their own views
7 and their own expertise. They will be speaking in
8 that context, and they will also be available on
9 Monday to respond to any questions that the Tribunal
10 would like to put directly to them as experts.

11 So, with that introduction, I would like, with
12 your permission, for Professor Schofield to deliver
13 his statement.

14 **THE PRESIDENT:** Thank you very much. I think it is very
15 clear now. As I understand it, we will have the two
16 experts called by the Philippines,
17 Professor Schofield, who will then be followed by
18 Professor Boyle, and then Professor Carpenter will
19 come on; and then after his statement he will be
20 followed by Professor Boyle, and then after that we
21 will have Professor Oxman.

22 **MR REICHLER:** That's exactly right, Mr President.

23 **THE PRESIDENT:** Any questions that the Tribunal wishes to
24 put to the Philippines' team, including the experts,
25 will be provided tomorrow.

26 **MR REICHLER:** Excellent. Thank you very much. I assume

1 the Tribunal will designate which questions are for
2 counsel and which questions are for the expert. If
3 you care to ask questions directly to the experts, of
4 course they are available for that purpose. We will
5 see what the questions are tomorrow.

6 **THE PRESIDENT:** Thank you. That is very clear.

7 **MR REICHLER:** Thank you, Mr President.

8 (10.04 am)

9 **PROFESSOR CLIVE SCHOFIELD (called)**

10 **THE PRESIDENT:** Good morning, Professor Schofield. Thank
11 you for being with us today. As has been said by
12 Mr Reichler, you are appearing here as an expert
13 independent witness. We believe you appreciate that
14 testifying before an international tribunal such as
15 this is a very serious matter. Accordingly, the
16 Tribunal would like you to make the solemn declaration
17 which is in front of you before you make your
18 statement.

19 **PROFESSOR SCHOFIELD:** Certainly. Thank you. I solemnly
20 declare upon my honour and conscience that I will
21 speak the truth, and that my statement will be in
22 accordance with my sincere belief.

23 **THE PRESIDENT:** Thank you very much. Please proceed.

24 **PROFESSOR SCHOFIELD:** Thank you.

25

1 (10.05 am)

2 Statement by PROFESSOR SCHOFIELD

3 **PROFESSOR SCHOFIELD:** Mr President, distinguished members
4 of the Tribunal, good morning. I am Professor
5 Clive Schofield and I serve as director of research at
6 the Australian National Centre for Ocean Resources and
7 Security at the University of Wollongong in Australia.
8 Concurrently I am the leader of the University of
9 Wollongong's Global Challenges Program on Sustaining
10 Coastal and Marine Zones.

11 It is a great honour and pleasure to be here
12 before you to provide testimony as an independent
13 expert witness. My task this morning is to summarise
14 the findings of my report on the *Geographical*
15 *Characteristics and Status of Certain Insular Features*
16 *in the South China Sea*. This was included as
17 Annex 513 and it also appears as tab 4.1 in your
18 folders.

19 I prepared this report in partnership, in
20 collaboration with Professor Emeritus J.R. Victor
21 Prescott. As I suspect you may be well aware, he has
22 been one of the leading commentators on international
23 boundaries on both land and sea for the past five
24 decades and more.

25 My other co-author was Mr Robert Van de Poll, who

1 is a geologist, geodesist and geographical information
2 systems (GIS) expert with the leading surveying
3 company Fugro Group, who are headquartered here in the
4 Netherlands.

5 The objective of the report was to provide
6 a critical assessment of the geographical
7 characteristics and appropriate categorisation and
8 status of all 49 features identified by the Tribunal
9 in its Request for Further Written Evidence and
10 Argument on 16 December 2014.

11 We expressed our independent view in regard to the
12 following categories of maritime feature: that is,
13 islands that are capable of generating a continental
14 shelf and exclusive economic zone rights, in keeping
15 with Article 121, paragraphs 1 and 2 of the United
16 Nations Convention on the Law of the Sea; rocks which
17 are unable to sustain human habitation or an economic
18 life of their own, consistent with Article 121,
19 paragraph 3 of the same Convention; low-tide
20 elevations covered at high tide and exposed at low
21 tide; and features which are entirely and permanently
22 covered by water.

23 In summary, we found that of the 49 features
24 identified by the Tribunal, 22 are permanently above
25 water at high tide. We determined that 18 features
26 are low-tide elevations, and a further two are

1 permanently submerged under water. This leaves seven
2 further features where the evidence was insufficiently
3 conclusive to determine whether they could be
4 categorised as above-high-tide features or should be
5 more properly accounted for as low-tide elevations.
6 I will return to this category of features towards the
7 end of my remarks.

8 Concerning the above-high-tide features, we
9 conclude that it is appropriate to consider all of
10 them as "rocks" within the meaning of Article 121(3)
11 of the Convention. A small number of these features
12 do have vegetation on them, and host government and/or
13 military personnel which are stationed on them. But
14 none of them have a indigenous population, and the
15 personnel stationed on them are reliant on supplies
16 from outside. There is no evidence of meaningful
17 economic activity, either now or in the past.

18 In preparing our opinion, we adopted the following
19 methodology or approach. First, we examined the
20 nautical charts of China, the Philippines, Viet Nam,
21 Malaysia, the United Kingdom, the United States, Japan
22 and Russia. Excerpts of these charts are contained in
23 the Atlas compiled by the Republic of the Philippines.
24 Based on this examination, we determined that the
25 charts are remarkably consistent in their depictions
26 of the insular features of the South China Sea. This

1 is supported by the description of these features in
2 the relevant Sailing Directions, particularly those
3 produced by the charting authorities of China, the
4 Philippines, the United Kingdom and the United States.

5 Second, we analysed high-resolution satellite
6 imagery which provides recent and large-scale
7 depiction of the features in question. This satellite
8 imagery allows for multi-spectral image analysis,
9 which involves different red, green and blue --
10 R+G+B -- band combinations from within the satellite
11 image. This enables us to more easily distinguish
12 between those features that are above water and those
13 which are entirely submerged, by either maximising or
14 minimising the degree of penetration of the water
15 column in the image presented.

16 A example of this approach is illustrated on the
17 screen now. This is a Landsat 7 image of Scarborough
18 Shoal. The left-hand image before you is designed to
19 maximise penetration of the water, and therefore shows
20 those shallow subsurface features in close proximity
21 to the surface of the water, whereas the right-hand
22 image is intended to show only features that are above
23 high tide. And in the context of Scarborough Shoal,
24 that is a minimal amount, since there are only
25 a scattering of half a dozen features -- small
26 rocks -- which are above high tide on that feature.

1 Third, we used the digital elevation model -- or
2 DEM -- component of Landsat 8 satellite imagery to
3 conduct a three-dimensional advanced mapping and image
4 analysis exercise. This precision mapping technique
5 was also used to produce optically-derived bathymetry.

6 On screen now is a depiction of this technique in
7 action. There we have a close-up image of a Landsat 8
8 image for Barque Canada Reef, with shaded relief,
9 contours draped on, and an interpreted normal baseline
10 at the seaward edge of the reef feature, which is
11 depicted by a purple line on the image in front of
12 you.

13 Based on this methodology, I can confirm the
14 following findings.

15 First, that of the 49 insular features in regard
16 to which the Tribunal requested further information,
17 22 features meet the requirements for being considered
18 an island, in keeping with Article 121(1) of the
19 Convention. These are displayed on the map on screen,
20 and they are also listed in the report. As I noted
21 earlier, we do not consider it appropriate to treat
22 any of these features as anything other than
23 an Article 121(3) "rock".

24 Second, the following 18 features depicted on the
25 screen now were determined to be low-tide elevations.
26 These are also listed in the report.

1 Third, we identified seven features which we
2 consider to be potential insular features -- that is,
3 potentially above the high-tide mark -- but the
4 available evidence was insufficiently conclusive.
5 These features are shown on the map on the screen now,
6 and are likewise listed in my report.

7 This group of features predominantly consists of
8 reefs and shoals that are reported as being submerged
9 or awash at high tide, but there may be individual or
10 small groups of rocks or very small islets which are
11 visible above the high-tide mark. However, analysis
12 of best high-resolution satellite imagery of these
13 features proved to be inconclusive in confirming
14 whether any parts of these features indeed do emerge
15 above the high-tide mark.

16 In short, if parts of these features do emerge
17 above high tide, they must be so small that they are
18 indetectable using high-resolution satellite imagery.
19 It follows from this that, in our view, this means
20 that these features can be considered, at most, to be
21 categorised as Article 121(3) "rocks".

22 Finally, the report identified two features that
23 are entirely and permanently submerged under water,
24 namely Macclesfield Bank and Reed Bank.

25 In conclusion, our findings are consistent not
26 only with the unanimous view of multiple hydrographic

1 authorities, but also with the recently acquired EOMAP
2 satellite imagery and analysis that Professor Sands
3 presented to you yesterday.

4 Mr President, distinguished members of the
5 Tribunal, my profound thanks to you for the
6 opportunity to address you. This concludes my
7 presentation to you this morning. Thank you.

8 **THE PRESIDENT:** Thank you very much.

9 (10.15 am)

10 **First-round submissions by PROFESSOR BOYLE**

11 **PROFESSOR BOYLE:** Mr President, members of the
12 Tribunal, it is an honour to appear before you once
13 more on behalf of the Philippines. You have listened
14 patiently to my colleagues talking about rocks, the
15 nine-dash line, historic rights, maritime
16 entitlements. In this speech I will invite you to
17 turn your attention to the damage that China has done
18 to the marine environment, and more specifically to
19 the complex ecosystem of coral reefs, biodiversity,
20 and the living resources of the South China Sea. This
21 is, I believe, the first case to address the scope and
22 application of Part XII of UNCLOS on the merits. As
23 such, it gives you a unique opportunity to amplify and
24 interpret the framework that was negotiated in the
25 1970s, when international environmental law was still

1 an infant.

2 It is an obvious truism that life on earth does
3 not exist in isolation - species interact with each
4 other and with their physical environment in order to
5 survive and to grow. The term "ecosystem" describes
6 this interaction. Ecosystem is defined by Article 2
7 of the Convention on Biological Diversity in these
8 terms:

9 "a dynamic complex of plant, animal and
10 micro-organism communities and their non-living
11 environment interacting as a functional unit."

12 In summary, our case is that China has damaged
13 that ecosystem and, if unchecked, its activities will
14 continue to pose a significant threat to the marine
15 environment of the South China Sea, and of all of the
16 states which border that Sea.

17 May I remind you that Submission 11 in the
18 Philippines' Memorial reads follows:

19 "China has violated its obligations under the
20 Convention to protect and preserve the marine
21 environment at Scarborough Shoal and Second Thomas
22 Shoal."

23 Our claim in this respect is that:

24 "China's toleration, encouragement of and failure
25 to prevent environmentally destructive fishing
26 practices violate its duty ... to protect and preserve

1 the marine environment."¹

2 We say that China has allowed its fishermen to
3 harvest coral, giant clams, turtles, sharks and other
4 threatened or endangered species which inhabit the
5 reefs; that it has allowed them to use dynamite to
6 kill fish and destroy coral, and to use cyanide to
7 harvest live fish.

8 Submission 12(b), which I will also be dealing
9 with, concerns the marine environmental effects of
10 land creation and construction activities on Mischief
11 Reef.² It is convenient to deal with both of these
12 claims in this speech. I will also address the
13 questions posed by the Tribunal in sections I(H) and
14 I(I)(2) of the Annex sent to the Parties on
15 10th November.

16 Let me stress right at the outset that in our view
17 the obligation of China to protect and preserve the
18 marine environment is not dependent on deciding which
19 Party, if any, has sovereignty or sovereign rights or
20 jurisdiction over Scarborough Shoal or Second Thomas
21 Shoal or Mischief Reef. What matters is whether China
22 has jurisdiction or control over the harmful fishing
23 practices, the land creation and the construction
24 activities which threaten the marine environment at

¹ Memorial of the Philippines (hereinafter "MP"), para 7.35.

² See *id.*, paras. 6.108-6.113.

1 those locations and elsewhere in the South China Sea.
2 We say that it does, and I will come back to that
3 point later in this speech.

4 Mr President, members of the Tribunal, if at the
5 conclusion of this case you do decide, as we have
6 argued, that any of these disputed features are part
7 of the Philippines' EEZ or its continental shelf, then
8 our case on the marine environment could be put
9 differently. It would resemble the responsibility of
10 Iraq for environmental damage and lost natural
11 resources arising out of its illegal invasion and
12 occupation of Kuwait. The illegality in this case, of
13 course, would be the violation of Article 77 with
14 respect to destruction of coral reefs and the
15 harvesting of giant clams or other sedentary species,
16 and the violation of the Philippines' sovereign rights
17 with respect to Chinese fishing in the EEZ. States
18 are, of course, responsible for the violation of their
19 international obligations,³ and that includes those
20 obligations with respect to natural resources and the
21 environment, and the damage caused by illegal
22 construction and unauthorised fishing. In his speech
23 yesterday, Professor Sands has already laid out the

³ See International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Articles 1 ("Responsibility of a State for its internationally wrongful acts") and 2 ("Characterization of an act of a State as internationally wrongful"). Supplemental Documents, Vol. VI, Annex LA-287.

1 elements of that case, and I will not repeat them.

2 I will therefore focus on the alternative thesis that
3 China has violated its obligations to protect and
4 preserve the marine environment.

5 The South China Sea is home to one of the largest
6 and most productive coral reef ecosystems in the
7 world.⁴ Second Thomas Shoal, Mischief Reef and
8 Scarborough Shoal are, of course, part of that coral
9 reef system. Geologically, they are submerged
10 seamounts on which coral reefs have formed over many
11 thousands of years. Most coral reefs remain low-tide
12 elevations, but in the South China Sea the build-up of
13 sand has turned some of them into sandy cays above sea
14 level; but, as you have just heard, not very many.

15 In his first expert report, Professor Kent
16 Carpenter describes how the area stretching eastwards
17 from Malaysia through the South China Sea towards New
18 Guinea and the Solomon Islands is home to what he says
19 is the "greatest concentration of marine life on the
20 planet".⁵ He goes on to explain in his report how:

21 "the central Philippines is well established as

⁴ See Kent E. Carpenter, Ph.D., *Eastern South China Sea Environmental Disturbances and Irresponsible Fishing Practices and their Effects on Coral Reefs and Fisheries* (22 Mar. 2014) (hereinafter "Carpenter Report"), pp. 3-9. MP, Vol. VII, Annex 240; K.E. Carpenter & L.M. Chou, *Environmental Consequences of Land Reclamation Activities on Various Reefs in the South China Sea* (hereinafter "Carpenter & Chou Report") (14 November 2015), pp. 3 & 26. Supplemental Documents, Vol. II, Annex 699.

⁵ Carpenter Report, p. 4. MP, Vol. VII, Annex 240.

1 the one place in the world with more species of marine
2 life per unit area than [are found in] any other place
3 on Earth." And he refers to the waters near the
4 Philippines as "the global epicentre of marine
5 biodiversity".⁶ The tropical rainforests of the
6 Amazon region would perhaps be an apt terrestrial
7 analogy.⁷

8 Professor Carpenter also points out that the
9 Spratly Islands and Scarborough Shoal have:

10 "an extreme diversity of coastal fishes and a high
11 percentage of ... seagrasses, corals, giant clams,
12 marine turtles and many other marine groups."⁸

13 Some of these species are on IUCN's Red List of
14 threatened species, including the giant clams taken by
15 Chinese fishermen. Their loss, he says:

16 "results in a reduction in the structure of the
17 reef and reduces its ability to support life."⁹

18 The importance of coral reefs to marine ecosystems
19 cannot be overstated. It is explained in a paper by
20 Professors Moberg and Folke, which is reproduced as
21 Annex 262(bis) in the Philippines' Supplemental

⁶ *Id.*, p. 4.

⁷ M. Spalding et al., *World Atlas of Coral Reefs* (2001), p. 27.
Supplemental Documents, Vol. III, Annex 713.

⁸ Carpenter Report, p. 4. MP, Vol. VII, Annex 240. See also Carpenter and
Chou Report, pp. 26-7.

⁹ Carpenter Report, p. 6.

1 Documents.¹⁰

2 In summary, the professors make the following
3 points. They say that:

- 4 • Coral reefs create favourable conditions for
5 the growth of sea-grasses and mangrove
6 ecosystems.
- 7 • They function as important spawning, nursery,
8 breeding and feeding areas for fish stocks
9 and other marine species.
- 10 • They enhance the productivity of plankton and
11 marine organisms on which commercially
12 important fish stocks feed.
- 13 • They sustain other species that regulate and
14 maintain the productivity of the marine
15 ecosystem.
- 16 • They go on to point out that coral reefs have
17 biogeochemical effects: they precipitate
18 about half the annual calcium input of the
19 oceans, and they help detoxify waste
20 products.
- 21 • They also note that they assist in monitoring
22 changes in the state of the marine
23 environment and climate change.
- 24 • Finally, they point out that ocean currents

¹⁰ See generally F. Moberg and C. Folke, "Ecological goods and services of coral reef ecosystems", *Ecological Economics*, Vol. 29, No. 2 (1999). Supplemental Documents, Vol. III, Annex 710.

1 and the life-cycles of marine species create
2 a high degree of interconnectivity between
3 the different ecosystems throughout the South
4 China Sea and the Philippine archipelago; and
5 this, they point out, helps replenish
6 fisheries and reef species across the entire
7 region. Professor Carpenter will have more
8 to say on this later this morning.

9 In their most recent report, which you will find
10 at tab 4.4 in your bundle, Professors Carpenter and
11 Chou explain that:

12 "[t]he loss of seven major reef features to land
13 creation within 1.5 years will have a huge impact on
14 the ecological integrity of not only the Spratly reefs
15 but also of the South China Sea."¹¹

16 The Tubbataha World Heritage Site in the Sulu Sea,
17 which is to the east of Palawan, is rather similar to
18 the reef systems of the eastern South China Sea.¹²
19 Damage to these reef systems is thus equivalent,
20 in effect, to damaging a World Heritage Site.

21 What, then, has China done with these reefs?
22 Well, China has carried out or tolerated various
23 activities that are significantly harmful to this

¹¹ See Carpenter and Chou Report, p.26.

¹² Convention Concerning the Protection of the World Cultural and Natural Heritage (16 Nov. 1972), entered into force 17 Dec. 1975. Hearing on Merits, Annex LA-310.

1 marine environment. Yesterday, you heard
2 Mr Loewenstein describe the land creation and
3 construction activity at Mischief Reef and elsewhere
4 in the South China Sea. I'm sure you will recall the
5 pictures that he showed, and how graphically they
6 illustrated the scale of China's land creation.
7 Carpenter and Chou list the harmful environmental
8 effects in greater detail in their second report.
9 Millions of tons of rock and sand have been dredged
10 from the seabed and deposited on shallow reefs.¹³
11 Land creation on this massive scale inevitably
12 destroys that part of the reef.¹⁴ Even where the reef
13 itself is not directly destroyed, the sedimentation
14 caused by these very large-scale works and the
15 disturbance of the seabed may eventually smother the
16 coral, depriving it of sunlight and the ability to
17 feed and grow.¹⁵ And adjacent reefs may also be
18 affected.¹⁶ There will be long term and more
19 widespread effects on the marine ecosystem and
20 biological diversity.¹⁷

21 Mr President, the Annex of Issues asks about the

¹³ See Carpenter and Chou Report, p. 11.

¹⁴ See *id.*, p. 24.

¹⁵ See Carpenter and Chou Report, pp. 24-5 & 28-9.

¹⁶ See *id.*, pp. 32-34.

¹⁷ See *id.*, pp. 26-38.

1 "specific environmental effects of China's
2 installations at Mischief Reef". In answering that
3 question, I can do no better than refer you to the
4 expert reports by Professors Carpenter and Chou. They
5 address this question in more detail and with far more
6 authority than I can do; I am, after all, only
7 a professor of international law. But
8 Professor Carpenter will follow me to the podium and
9 he will be available, as indicated by Mr Reichler, to
10 answer any questions the Tribunal may wish to put to
11 him.

12 I might perhaps add one caveat. For obvious
13 reasons, the Philippines is unable to investigate
14 conditions at Mischief Reef. It cannot send
15 scientists to investigate and report. There are no
16 independent observers on which to draw. But we can
17 draw the obvious inferences about the harm that
18 large-scale land creation and construction activities
19 will cause, especially when carried out on fragile
20 coral reefs, and so can the Tribunal draw those
21 inferences.

22 You will see on the screen now two satellite
23 photos of sedimentation caused by land creation works
24 at Mischief Reef. The light blue areas that you see
25 to the left in both pictures are the sedimentation
26 caused by dredging. I think in that picture it's the

1 light blue area surrounding the dredger which is the
2 evidence of sedimentation.

3 As I've indicated, of course, we cannot show you
4 the precise effects of that sedimentation on the reef;
5 we simply do not have access, we do not have photos of
6 the reef itself. But we can show -- and the pictures
7 do show -- the obvious disturbance of the seabed and
8 the water column. In his statement later this
9 morning, I expect that Professor Carpenter will
10 reiterate the harm caused by that sedimentation on
11 fragile reefs and their ecosystem.

12 Blast fishing by Chinese fishermen also damages
13 coral reefs, and the evidence for this activity is set
14 out in the Memorial.¹⁸ It is carried out by dropping
15 explosives onto a reef.¹⁹ It has been estimated that
16 a bottle bomb containing half a kilogram of explosive
17 will shatter all of the coral reef structure within
18 just over a metre radius from the reef. It is
19 estimated that a gallon-sized drum filled with
20 explosive will reduce the coral reef to rubble within
21 a 5-metre radius,²⁰ and the killing zone for fish and

¹⁸ Memorial, para. 6.58.

¹⁹ E. J. Goodwin, *International Environmental Law and the Conservation of Coral Reefs* (2011), p. 17. Supplemental Documents, Vol. III, Annex 718; D. Souter & O. Linden, "The health and future of coral reef systems", *Ocean & Coastal Management* Vol. 43 (2000), p. 664. Supplemental Documents, Vol. III, Annex 712.

²⁰ S. Jennings and N. Poulmin, "Impacts of Fishing on Tropical Reef Ecosystems", *Ambio: A Journal of the Human Environment*, Vol. 25, No. 1 (Feb. 1996), p. 45. Supplemental Documents, Vol. II, Annex 708.

1 invertebrates will be much wider.

2 Blast fishing enables coral to be harvested for
3 sale on the tourist market. It is indiscriminate and
4 wasteful of fish stocks and sedentary species, but its
5 impact is more complex than that, because the
6 biodiversity of coral reefs is due in part to their
7 complex topography. So if you destroy the topography,
8 you destroy the habitat, and you thus reduce the
9 biodiversity.²¹

10 Chinese fishermen have also been using cyanide and
11 other poisons. This practice is driven by the demand
12 for live fish from the aquarium trade and from
13 restaurants.²² Again, the evidence for this activity
14 is set out at Annex 240 of the Memorial: it's
15 Professor Carpenter's first report.

16 The use of organic or cyanide-based poisons stuns
17 the fish, which can then be harvested live. The
18 practice obviously encourages unsustainable catch
19 levels, and it may also kill or injure non-target
20 species. And the target species themselves may not
21 actually survive transit to their intended
22 destination. So the use of cyanide results in the

²¹ Carpenter Report, pp. 14-15. MP, Vol. VII, Annex 240.

²² E. J. Goodwin, *International Environmental Law and the Conservation of Coral Reefs* (2011), p. 18. Supplemental Documents, Vol. III, Annex 718; D. Bryant, et al., World Resources Institute, *Reefs at Risk: A Map-based Indicator of Threats to the World's Coral Reefs* (1998), p. 15. Supplemental Documents, Vol. II, Annex 709.

1 loss of coral if it is sprayed into the reef and the
2 coral is then broken apart to extract the fish.²³

3 Finally, paragraphs 6.51 to 6.57 of the Memorial
4 detail the evidence of Chinese harvesting of giant
5 clams, turtles and other endangered or protected
6 species at Scarborough Shoal. Giant clams in
7 particular are important elements of the reef system
8 in the South China Sea. The harvesting of all of
9 these species further damages the coral reef
10 ecosystem.²⁴ Fish stocks will suffer, endangered
11 species will be further depleted, again biodiversity
12 will be reduced, the marine environment will be
13 harmed.²⁵

14 We say that all of this violates the basic rules
15 and principles set out in Part XII of the Law of the
16 Sea Convention, starting with Articles 192 and 194.
17 The Tribunal asked a number of questions in its annex
18 of 10th November about Articles 192 and 194, and I am
19 now going to endeavour to answer them.

20 It is our case that Articles 192 and 194 require
21 states parties to do five things, and I think they are
22 the same five things I indicated in my last appearance

²³ Carpenter Report, p. 15. MP, Vol. VII, Annex 240.

²⁴ Memorial, para. 6.58.

²⁵ See Carpenter Report, pp. 14-22. MP, Vol. VII, Annex 240; S. Jennings and N. Poulmin, "Impacts of Fishing on Tropical Reef Ecosystems", *Ambio: A Journal of the Human Environment*, Vol. 25, No. 1 (Feb. 1996) , p. 44. Supplemental Documents, Vol. II, Annex 708.

1 before you in July: firstly, to protect and preserve
2 marine ecosystems, including coral reefs; secondly, to
3 ensure sustainable use of biological resources, which
4 those coral reefs represent; thirdly, to protect and
5 preserve endangered species found on the reefs;
6 fourthly, to apply a precautionary approach in all of
7 these respects; and finally, to consult and cooperate
8 with the relevant coastal states on the protection and
9 preservation of the biological resources, the
10 ecosystems and the marine environment at Scarborough
11 Shoal, Second Thomas Shoal, Mischief Reef and all the
12 other reef systems in the South China Sea.

13 Article 192 of course provides that:

14 "States have the obligation to protect and
15 preserve the marine environment."

16 It covers areas within national jurisdiction,
17 including the territorial sea, and areas beyond
18 national jurisdiction, including the high seas. In
19 short, Article 192 requires states, among other
20 things, to take measures to conserve marine living
21 resources and preserve the ecological balance of the
22 oceans as a whole.²⁶

²⁶ *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), Advisory Opinion of 1 February 2011*, ITLOS Reports 2011, para. 148. Supplemental Documents, Vol. VI, Annex LA-243. See also United Nations Convention on the Law of the Sea 1982: A Commentary, Vol. 4 (M. Nordquist, et al., eds., 2002), pp. 3-12. Supplemental Documents, Vol. VI, Annex LA-281.

1 Articles 194(1) and 194(2) elaborate the general
2 obligation by requiring parties to control marine
3 pollution and prevent pollution damage to other states
4 from activities under their jurisdiction or control.
5 In the present case, sedimentation resulting from
6 Chinese land-creation activities has created
7 pollution. It is pollution because it has deleterious
8 effects on "living resources and marine life",
9 including the health of coral reefs. It thus fits the
10 definition of "pollution" in Article 1(1)(4) of the
11 Convention.²⁷ Article 194(3)(a) specifically requires
12 states to take additional measures to:

13 "... minimize to the fullest possible extent ...
14 the release of toxic, noxious or harmful substances."

15 The use of cyanide and dynamite by Chinese
16 fishermen rather self-evidently falls into that
17 category.

18 But Article 194 is not limited to the prevention
19 of pollution. Article 194(5) goes on to provide that:

20 "[t]he measures taken in accordance with this Part
21 shall include those necessary to protect and preserve
22 rare or fragile ecosystems as well as the habitat of

²⁷ UNCLOS, Art. 1(1)(4) ("pollution of the marine environment' means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.")

1 depleted, threatened or endangered species and other
2 forms of marine life." We would suggest that reading
3 Articles 194(3) and 194(5) together, it follows that
4 the marine ecosystem must be protected from the
5 harmful effects of land creation, construction
6 activities, and the use of cyanide and dynamite for
7 fishing.

8 The recent award of an arbitral tribunal in the
9 *Chagos* arbitration confirms that Article 194(5) covers
10 the conservation and preservation of marine
11 ecosystems, including coral reefs. The tribunal in
12 that case found that:

13 "Article 194 is ... not limited to measures aimed
14 strictly at controlling pollution and extends to
15 measures focused primarily on conservation and the
16 preservation of ecosystems."²⁸

17 Let me then explain each of my five points in more
18 detail. My first proposition is that China has
19 an obligation to protect and preserve marine
20 ecosystems, including the coral reefs in question in
21 this case. Coral reefs are, as I explained a few
22 moments ago, of course, a vitally important part of

²⁸ *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*, Award, UNCTLOS Annex VII Tribunal (18 Mar. 2015) (hereinafter "*Chagos Arbitration*"), para 538. Hearing on Jurisdiction, Annex LA-225. See also *id.*, para. 320.

1 the marine ecosystem.²⁹

2 Does this claim fit the terms of Article 194(5)?

3 Yes. Coral reefs are always fragile. Some species of
4 coral taken from Scarborough Shoal are rare.³⁰ They
5 provide a habitat for many species, some of which --
6 including giant clams, turtles and sharks -- are
7 depleted, threatened or endangered.³¹ The so-called
8 "branching coral" extracted by Chinese fishermen at
9 Scarborough Shoal is the typical habitat of crabs,
10 shrimps and smaller reef fish on which larger fish
11 species feed. Destroying this form of coral reduces
12 the ability of the reef to support viable fish
13 stocks.³² Creating artificial islands out of coral
14 reefs is the worst possible way to treat these
15 fundamental ecological building blocks. It will
16 destroy or smother the reef; you saw the pictures
17 yesterday. Destroy the reef and you destroy the
18 ecosystem. And we say that all of that constitutes
19 a violation of Articles 192 and 194.

20 Our second proposition is that the living resource
21 which coral reefs represent must be used sustainably.

²⁹ See Carpenter Report, p. 15. MP, Vol. VII, Annex 240; Carpenter and Chou Report, pp. 26-29.

³⁰ Notably blue coral. See Carpenter Report, p. 10. MP, Vol. VII, Annex 240.

³¹ *Id.*, pp. 19-24.

³² *Id.*, p. 14.

1 The notion of sustainable use is inherent in
2 Article 194(5): to protect and preserve fragile
3 ecosystems necessarily implies that any legitimate use
4 must be non-exhaustive. As early as the *Bering Sea Fur*
5 *Seals Arbitration*, the need to conserve living
6 resources was recognised.³³ Similarly in the
7 *Icelandic Fisheries* case, the ICJ referred *inter alia*
8 to the "conservation and development of the fishery
9 resources",³⁴ while in the *Pulp Mills* case it used the
10 term "optimum and rational utilization" in respect of
11 a shared watercourse.³⁵ Underlying all of these
12 phrases is a concern for the balanced and sustainable
13 use of natural resources.

14 That's also reflected in Article 2 of the
15 Biodiversity Convention, which defines sustainable use
16 as:

17 "use ... in a way and at a rate that does not lead
18 to long-term decline of biological diversity"³⁶

³³ *Award between the United States and the United Kingdom relating to the Rights of Jurisdiction of United States in the Bering's Sea and the Preservation of Fur Seals* (15 Aug. 1893), XXVIII UNRIAA pp. 263 & 270. Supplemental Documents, Vol. VI, Annex LA-245.

³⁴ *Fisheries Jurisdiction (United Kingdom v Iceland)*, Merits, Judgment, ICJ Reports 1974, para. 77. MP, Vol. XI, Annex LA-8.

³⁵ *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, ICJ Reports 2010, para. 175. Supplemental Documents, Vol. VI, Annex LA-240 ("The Court considers that the attainment of optimum and rational utilization requires a balance between the Parties' rights and needs to use the river for economic and commercial activities on the one hand, and the obligation to protect it from any damage to the environment that may be caused by such activities, on the other.").

³⁶ See also United Nations Environment Programme, Conference of the Parties to the Convention on Biological Diversity, *Decision Adopted by the*

1 The UN Fish Stocks Agreement also refers to:

2 "measures to ensure the long-term sustainability
3 of straddling fish stocks and highly migratory fish
4 stocks."³⁷

5 We would suggest that both of these instruments
6 are relevant when interpreting UNCLOS.

7 Blast fishing and the use of cyanide are obviously
8 wasteful and unsustainable, for all the reasons
9 already given. They are also contrary to the FAO's
10 Code of Conduct for Responsible Fishing,³⁸ and the
11 Code of Conduct is one of those generally accepted
12 international rules and standards which inform the
13 interpretation of the relevant articles of the
14 Convention. We say that the use of these harmful
15 fishing techniques on any significant scale violates
16 the conservation requirements of Articles 61 and 119
17 of UNCLOS when employed beyond the territorial sea,
18 but we would also say that China has a comparable
19 obligation to control the use of these techniques in
20 the territorial sea by virtue of Articles 192 and 194.

Conference of the Parties to the Convention on Biological Diversity and its Seventh Meeting, UN Doc. UNEP/CBD/COP/DEC/VII/12 (13 Apr. 2004), Annex II, para. 1. Supplemental Documents, Vol. VI, Annex LA-255.

³⁷ Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 2167 UNTS 3 (4 Aug. 1995), entered into force 11 Dec. 2001, Art. 5(a). Supplemental Documents, Vol. VI, Annex LA-267.

³⁸ UN Food and Agriculture Organization, *Code of Conduct for Responsible Fisheries* (31 Oct. 1995), para. 8.4.2. Supplemental Documents, Vol. VI, Annex LA-253 (providing that "States should prohibit dynamiting, poisoning and other comparable destructive fishing practices.").

1 Our third proposition is that the sustainable use
2 of biological resources implicit in Article 194(5)
3 includes an obligation to protect and preserve
4 threatened and endangered species. Giant clams are
5 listed as a species under threat in Appendix II of the
6 CITES Convention,³⁹ and they are also on IUCN's
7 Red List.⁴⁰ We say that the appendices of the CITES
8 Convention are generally accepted international rules
9 and standards that, again, should inform the
10 interpretation and application of Articles 192 and
11 194.

12 The Tribunal did ask, in its Annex of Issues:

13 "Whether the Philippines alleges a violation of
14 the Convention with respect to Chinese fishing
15 activities at Scarborough Shoal other than during the
16 incidents in and around May 2012."

17 The events referred to in paragraphs 6.51 to 6.57
18 of the Memorial all took place in or before
19 April 2012. So I think the answer to the question
20 must therefore be: yes.

21 Fourthly, although the point is relevant only for
22 the sake of completeness, the precautionary approach
23 as endorsed in Principle 15 of the Rio Declaration is

³⁹ United Nations Environment Programme, *Convention on International Trade in Endangered Species of Wild Fauna and Flora: Appendices I, II, and III* (5 Feb. 2015), Appendix II, p. 34 (listed as *Tridacnidae*). Supplemental Documents, Vol. V, Annex 811.

⁴⁰ See Carpenter Report, p. 5. MP, Vol. VII, Annex 240.

1 also an important element of sustainable utilisation,
2 because it addresses the key question of uncertainty.
3 The jurisprudence supports the conclusion that
4 Articles 192 and 194 must be interpreted
5 accordingly.⁴¹

6 But I should stress that in the context of this
7 case, we place no reliance on the precautionary
8 approach. In our view, we do not need to. There is
9 no uncertainty. The risks are obvious.

10 The obligations created by Articles 192 and 194
11 are, of course, not absolute. States are only
12 required to take appropriate measures. They must, in
13 other words, act with due diligence. The case law has
14 identified various elements of that obligation,
15 including the "adoption of reasonably appropriate
16 rules and measures", "a certain level of vigilance in
17 their enforcement", and "the exercise of
18 administrative control applicable to public and
19 private operators".⁴²

⁴¹ See Vienna Convention on the Law of Treaties (23 May 1969), 1155 UNTS 332, entered into force 27 Jan. 1980, Art. 31(3)(c). MP, Vol. XI, Annex LA-77; and *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, ICJ Reports 2010, para. 164. Supplemental Documents, Vol. VI, Annex LA-240; *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, Advisory Opinion of 1 February 2011, ITLOS Reports 2011, para. 131. Supplemental Documents, Vol. VI, Annex LA-243.

⁴² See *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, ICJ Reports 2010, paras. 197 & 223. Supplemental Documents, Vol. VI, Annex LA-240. See also *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, Advisory Opinion of 1

1 The relevant Chinese legislation in this case
2 appears to be the Marine Environment Protection Law of
3 1999.⁴³ Mr President, members of the Tribunal, you
4 will find the full text of that law at tab 4.5 in your
5 folder. This law applies to all sea areas under the
6 jurisdiction of the People's Republic of China.⁴⁴ It
7 establishes a comprehensive system for regulating and
8 controlling marine pollution, and for maintaining
9 an ecologically balanced marine environment.

10 Articles 2, 20, and 26 are the most immediately
11 relevant. I am not going to read them out, but will
12 simply observe that what they envisage appears to be
13 a reasonably strict and comprehensive protection for
14 ecologically sensitive sea areas, coral reefs and
15 islands.

16 So the Chinese authorities do have power, under
17 their own law, to achieve what Articles 192 and 194 of
18 UNCLOS require, including the power to adopt further
19 regulations, and to take the necessary measures to
20 ensure that land creation and construction work and
21 fishing practices do not destroy coral reefs or
22 pollute the marine environment or alter the ecological

February 2011, ITLOS Reports 2011, para. 117 & 120. Supplemental Documents, Vol. VI, Annex LA-243.

⁴³ See People's Republic of China, *Marine Environment Protection Law of The People's Republic of China* (25 Dec. 1999). Supplemental Documents, Vol. I, Annex 614.

⁴⁴ *Id.*, Art. 2.

1 balance.

2 How then can we explain the clear evidence of
3 ecological destruction on the vast scale that we have
4 seen in this case? This is destruction which, on the
5 face of it, cannot be squared with China's own law.
6 Whatever its laws and regulations may provide, China
7 has changed the fundamental ecology of the South China
8 Sea, probably forever. The destruction caused by land
9 creation that you saw yesterday is deliberate, it is
10 irreparable, and it may not even be in Chinese waters.
11 But that is not all.

12 China is, of course, a flag state for the fishing
13 vessels concerned, and flag states have an obligation
14 to monitor and enforce compliance with their laws by
15 all vessels flying their flag.⁴⁵ The facts set out in
16 the Memorial show that China has not even attempted to
17 do so. The use of dynamite and cyanide by Chinese
18 fishermen is widespread; coral has been extracted;
19 giant clams, turtles and endangered species have been
20 caught. And Chinese fisheries enforcement vessels not
21 only do not stop these practices, but actively
22 support, protect and facilitate them. This evidence,
23 Mr President, members of the Tribunal, simply does not

⁴⁵ See UNCLOS, Article 94; *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, *Advisory Opinion of 2 April 2015*, ITLOS Reports 2015, para. 138. Supplemental Documents, Vol. VI, Annex LA-244.

1 correspond to the vigilance in enforcement or
2 administrative control or monitoring envisaged by the
3 ICJ in the *Pulp Mills* case or by the Tribunal on the
4 Law of the Sea in the *Advisory Opinion on Activities*
5 *in the Area*. Indeed, it does not demonstrate
6 vigilance or diligence of any kind.

7 China is not responsible for the actions of its
8 fishermen, but it is responsible for its own failure
9 to control their illegal and damaging activities.

10 I do not need to remind members of this Tribunal that
11 in its most recent *Advisory Opinion*, the Tribunal on
12 the Law of the Sea held that:

13 "It follows from the provisions of article 94 of
14 the Convention that as far as fishing activities are
15 concerned, the flag State, in fulfilment of its
16 responsibility to exercise effective jurisdiction and
17 control ... must adopt the necessary administrative
18 measures to ensure that fishing vessels flying its
19 flag are not involved in activities which will
20 undermine the flag State's responsibilities under the
21 Convention in respect of the conservation and
22 management of living resources."⁴⁶

23 The Tribunal, at paragraph 119, goes on to say:

24 "If such violations nevertheless occur and are

⁴⁶ *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), Advisory Opinion of 2 April 2015*, ITLOS Reports 2015, para. 119. Supplemental Documents, Vol. VI, Annex LA-244.

1 reported by other States, the flag State is obliged to
2 investigate and, if appropriate, take any action
3 necessary to remedy the situation."⁴⁷

4 So, for all of those reasons, we therefore say
5 that at Scarborough Shoal, Second Thomas Shoal and
6 Mischief Reef, and at other reefs throughout the South
7 China Sea, China has singularly failed to protect and
8 preserve the marine environment, the fragile
9 ecosystems, and the habitat of depleted, threatened or
10 endangered species from damage, and it has thereby
11 violated Articles 192 and 194, and most specifically
12 Article 194(5).

13 Mr President, the Annex of Issues asks the
14 Philippines to address:

15 "The nature and scope of the obligation pursuant
16 to Article 206 of the Convention to carry out
17 an environmental impact assessment."

18 This important question merits a reasonably full
19 answer because it goes to the heart of what we say
20 China has not done.

21 Article 206 requires states parties to carry out
22 an environmental impact assessment:

23 "whenever activities under their jurisdiction or
24 control may cause substantial pollution of or
25 significant and harmful changes to the marine

⁴⁷ *Id.*

1 environment."

2 It is not limited to activities which may cause
3 transboundary harm to the other states; it covers the
4 marine environment as a whole. The broad scope of
5 Article 206 was confirmed by the Seabed Disputes
6 Chamber in its *Advisory Opinion on the*
7 *Responsibilities of States with Respect to Activities*
8 *in the Area*. In that judgment, the Chamber cited the
9 ICJ's judgment in the *Pulp Mills* case,⁴⁸ and it then
10 went on to say:

11 "The [ICJ]'s reasoning in a transboundary context
12 may also apply to activities with an impact on the
13 environment in an area beyond the limits of national
14 jurisdiction; and the Court's references to 'shared
15 resources' may also apply to resources that are the
16 common heritage of mankind."⁴⁹

17 We submit that the logic of this conclusion
18 applies equally to large-scale construction activities
19 on fragile coral reefs in the South China Sea. The
20 land creation and construction activities on the scale
21 and character of those undertaken by China at Mischief
22 Reef and elsewhere clearly fall fairly and squarely

⁴⁸ *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, ICJ Reports 2010, para. 204. Supplemental Documents, Vol. VI, Annex LA-240.

⁴⁹ *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, Advisory Opinion of 1 February 2011, ITLOS Reports 2011, para. 148. Supplemental Documents, Vol. VI, Annex LA-243.

1 within the terms of Article 206. They pose an obvious
2 risk of significant and harmful changes to the marine
3 environment.

4 In its *Pulp Mills* judgment, the International
5 Court concluded -- and I will read out this passage
6 because it is important:

7 "it is for each State to determine in its domestic
8 legislation or in the authorization process for the
9 project, the specific content of the environmental
10 impact assessment required in each case, having regard
11 to the nature and magnitude of the proposed
12 development and its likely adverse impact on the
13 environment as well as to the need to exercise due
14 diligence in conducting such an assessment."⁵⁰

15 The Court's formulation in this paragraph requires
16 careful reading. It does not say that the content of
17 an EIA is for the state to decide in its sole
18 discretion. On the contrary, what it says is that
19 an EIA must have regard to "the nature and magnitude
20 of the proposed development and its likely adverse
21 impact on the environment".

22 In saying that, the International Court was
23 reflecting the arguments of counsel for both parties
24 in this case. And what counsel referred to, and what

⁵⁰ *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, ICJ Reports 2010, para. 205. Supplemental Documents, Vol. VI, Annex LA-240.

1 I believe the court was reflecting, is the views of
2 the International Law Commission, expressed in its
3 commentary to the 2001 Articles on Prevention of
4 Transboundary Harm, and that commentary contains the
5 following explanation. I think the court's statement
6 needs to be read in conjunction with the ILC
7 commentary to get the full picture of what the content
8 of an EIA should be. Here's what the commentary says:

9 "(7) The specifics of what ought to be the content
10 of assessment is left to the domestic laws of the
11 State conducting such assessment. But for the
12 purposes of Article 7, however, such an assessment
13 *should contain an evaluation of the possible*
14 *transboundary harmful impact of the activity.* In
15 order for the States likely to be affected to evaluate
16 the risk to which they might be exposed, they need to
17 know what possible harmful effects that activity might
18 have on them."

19 They go on to say in the next paragraph:

20 "(8) The assessment *should include the effects of*
21 *the activity not only on persons and property, but*
22 *also on the environment of other States."*

23 Also on the environment of other states. And they
24 conclude:

25 "The importance of the protection of the
26 environment, independently of any harm to individual

1 human beings or property is clearly recognized."⁵¹

2 That's the ILC's commentary.

3 It is apparent from that commentary that whatever
4 national law may or may not require, international law
5 requires, at a minimum, that an EIA assess possible
6 effects on people and property and the environment of
7 other states. And if national law says nothing on the
8 subject, if it does not ensure that such an assessment
9 is carried out, for whatever reason, there is
10 inevitably a breach of the obligation to do
11 a transboundary EIA. *Mutatis mutandis*, and taking into
12 account Article 194(5), an EIA for the purposes of
13 Article 206 of UNCLOS must at a minimum, we would
14 argue, assess possible effects on the marine
15 environment,⁵² including:

- 16 • the marine ecosystem of the South China Sea,
- 17 • the coral reefs at issue in this case,
- 18 • the biodiversity and sustainability of living

⁵¹ International Law Commission, "International Liability for Injurious Consequences Arising Out Of Acts Not Prohibited By International Law (Prevention of Transboundary Harm From Hazardous Activities)", in *Report of the International Law Commission on the work of its Fifty-third session (23 April-1 June and 2 July-10 August 2001)*, UN Doc. GAOR A/56/10 (2001), p. 405. Supplemental Documents, Vol. VI, Annex LA-254 (emphasis added). Article 7 provides that "Any decision in respect of the authorization of an activity within the scope of the present articles shall, in particular, be based on an assessment of the possible transboundary harm caused by that activity, including any environmental impact assessment." See *id.*, p. 402.

⁵² *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, Advisory Opinion of 1 February 2011, ITLOS Reports 2011, para. 148. Supplemental Documents, Vol. VI, Annex LA-243.

1 resources there, and

2 • endangered species.

3 There is simply no evidence that China has carried
4 out such an EIA. In our view, there is plainly
5 a breach of Article 206.

6 Mr President, happily that brings me to the final
7 section of my speech, which is about the obligation to
8 consult and to cooperate. In our view, China has
9 entirely failed to consult and cooperate with the
10 Philippines and other relevant states in the
11 protection and preservation of the biological
12 resources, ecosystems and marine environment of
13 Scarborough Shoal, Second Thomas Shoal, Mischief Reef
14 and all the other reef systems in the South China Sea.

15 Article 197 of UNCLOS requires states to cooperate
16 both globally and regionally for the protection and
17 preservation of the marine environment, and that
18 applies equally to the South China Sea as it applies
19 to other regional seas. In doing so, the states
20 concerned may of course take into account
21 "characteristic regional features". We would suggest
22 that in the South China Sea those characteristic
23 regional features include the fundamental biological
24 and ecological importance and the fragile nature of
25 the coral reef ecosystem of that sea.

26 The obligations implicit in Article 197 are spelt

1 out in greater detail by Article 123. This provision
2 applies only to enclosed or semi-enclosed seas, but
3 the South China Sea clearly fits that
4 characterisation. Article 123 refers to cooperation
5 with respect to living resources, protection and
6 preservation of the marine environment and scientific
7 research.

8 The Tribunal on the Law of the Sea has on three
9 occasions held that:

10 "the duty to co-operate is a fundamental principle
11 in the prevention of pollution of the marine
12 environment under Part XII of the Convention and
13 general international law and that rights arise
14 therefrom which the Tribunal may consider appropriate
15 to preserve under Article 290."⁵³

16 In the *Mox Plant* case and the *Land Reclamation*
17 case, the parties were thus ordered to cooperate, to
18 consult, to exchange information, and to monitor or
19 assess the risks and effects of their activities.
20 Similarly, in the *Southern Bluefin Tuna* case, the
21 tribunal emphasised the need for greater cooperation
22 to ensure conservation and optimum utilisation, and it

⁵³ See *The MOX Plant Case (Ireland v United Kingdom)*, *Provisional Measures*, Order of 3 December 2001, ITLOS Reports 2001, para. 82. MP, Vol. XI, Annex LA-39; *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore)*, *Provisional Measures*, Order of 8 October 2003, ITLOS Reports 2003, para. 92. MP, Vol. XI, Annex LA-41; *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, *Advisory Opinion of 2 April 2015*, ITLOS Reports 2015, para. 140. Supplemental Documents, Vol. VI, Annex LA-244.

1 ordered the parties to resume negotiations for that
2 purpose "without delay".⁵⁴

3 The fundamental importance of co-operation is
4 recognised in other contexts. In *Pulp Mills*, the ICJ
5 reiterated:

6 "that it is by co-operating that the States
7 concerned can ... manage the risks of damage to the
8 environment that might be created by the plans
9 initiated by one or other of them, so as to prevent
10 the damage in question"⁵⁵

11 The ILC commentary to its Draft Articles on
12 Prevention of Transboundary Harm also states that:

13 "[t]he principle of cooperation between States is
14 essential in designing and implementing effective
15 policies to prevent significant transboundary harm or
16 ... to minimize the risk thereof."⁵⁶

17 A particular feature of these articles is the

⁵⁴ *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan)*, Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, para. 78 & operative para. (e). Annex LA-37(bis).

⁵⁵ *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, ICJ Reports 2010, para. 77. Supplemental Documents, Vol. VI, Annex LA-240. See also United Nations Environment Programme, *Governing Council Approval of the Report of the Intergovernmental Working Group of Experts on Natural Resources Shared by Two or More States*, UN Doc. GC.6/CRP.2 (19 May 1978), reprinted in 17 I.L.M. 1091 (1978), p. 1094. Supplemental Documents, Vol. VI, Annex LA-284.

⁵⁶ International Law Commission, "International Liability for Injurious Consequences Arising Out Of Acts Not Prohibited By International Law (Prevention of Transboundary Harm From Hazardous Activities)", in *Report of the International Law Commission on the work of its Fifty-third session (23 April-1 June and 2 July-10 August 2001)*, UN Doc. GAOR A/56/10 (2001), p. 396. Supplemental Documents, Vol. VI, Annex LA-254.

1 continuing character of that obligation to cooperate,
2 even after a project has come into operation.⁵⁷

3 What can we say about Chinese cooperation on
4 matters of environmental protection in the South China
5 Sea? There is very little evidence of it. There are
6 cursory references in the 2002 DOC.⁵⁸ The FAO
7 Asia-Pacific Fisheries Commission performs essentially
8 technical functions in regard to the South China Sea
9 and other relevant areas within its jurisdiction, but
10 it has adopted no measures for the conservation of
11 anything.⁵⁹ There is no regional seas agreement for
12 the South China Sea.

13 There is a UNEP Regional Seas Programme for East
14 Asia, which includes the South China Sea,⁶⁰ and China
15 and the Philippines are participants.⁶¹ The revised

⁵⁷ See especially *id.*, pp. 418-22, Arts, 11 & 12 & commentary. See also *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, ICJ Reports 2010, paras. 266 & 281. Supplemental Documents, Vol. VI, Annex LA-240.

⁵⁸ Association of Southeast Asian Nations, *Declaration on the Conduct of Parties in South China Sea* (4 Nov. 2002), para. 6. MP, Vol. V, Annex 144.

⁵⁹ See, e.g., Agreement for the Establishment of the Asia-Pacific Fishery Commission (as amended Oct. 1996), entered into force June 1997, Art. III, para. 3. Hearing on Merits, Annex LA-321.

⁶⁰ United Nations Environment Programme, "Regional Seas Programmes: East Asian Seas", available at <http://www.unep.org/regionalseas/programmes/unpro/eastasian/default.asp#> (accessed 11 Nov. 2015). Supplemental Documents, Vol. IV, Annex 802. The Programme is co-ordinated by COBSEA. See United Nations Environment Programme, Coordinating Body on the Seas of East Asia, "About COBSEA", available at <http://www.cobsea.org/aboutcobsea/background.html> (accessed 11 Nov. 2015). Supplemental Documents, Vol. IV, Annex 803.

⁶¹ See United Nations Environment Programme, Coordinating Body on the Seas of East Asia, "About COBSEA", available at <http://www.cobsea.org/aboutcobsea/background.html> (accessed 11 Nov. 2015). Supplemental Documents, Vol. IV, Annex 803. The full membership includes

1 action plan agreed in 1994 covers, *inter alia*,
2 rehabilitation of vital ecosystems, restoration of
3 ecologically or economically important species and
4 communities, the establishment of a viable network of
5 marine protected areas and an environmental impact
6 assessment.⁶² According to the programme's website:

7 "[t]he main components of the East Asian Seas
8 Action Plan are assessment of the effects of human
9 activities on the marine environment, control of
10 coastal pollution, [the] protection of mangroves,
11 seagrasses and coral reefs, and waste management."⁶³

12 The website goes on to say that the programme:

13 "promotes compliance with existing environmental
14 treaties and is based on member country goodwill."⁶⁴

15 China's current activities in the South China Sea
16 do not resemble the environmental priorities set out
17 here. In the contested parts of the South China Sea,
18 there are no marine protected areas, no areas
19 designated as vulnerable marine ecosystems, no

Cambodia, China, Indonesia, Malaysia, Philippines, Republic of Korea, Singapore, Thailand and Vietnam.

⁶² United Nations Environment Programme, Coordinating Body on the Seas of East Asia, *Action Plan for the Protection and Sustainable Development of the Marine and Coastal Areas of the East Asian Region*, UN Doc. UNEP(OCA)/EAS IG5/6, Annex IV (1994), paras. 9-11; 24; & 28. Supplemental Documents, Vol. V, Annex 809.

⁶³ See United Nations Environment Programme, Coordinating Body on the Seas of East Asia, "About COBSEA", available at <http://www.cobsea.org/aboutcobsea/background.html> (accessed 11 Nov. 2015). Supplemental Documents, Vol. IV, Annex 803.

⁶⁴ *Id.*

1 evidence of serious restraints on illegal fishing.
2 There is precious little evidence of the promised
3 goodwill.

4 But regional cooperation on environmental
5 protection and sustainable use of living resources is
6 not simply a matter of goodwill. China has a legal
7 obligation under UNCLOS, and under general
8 international law, to cooperate in the protection and
9 preservation of the marine environment. It has done
10 nothing to give effect to that obligation, or to its
11 commitments under other non-binding instruments. On
12 the contrary, its own behaviour towards the
13 Philippines, and towards other states bordering the
14 South China Sea, has been aggressive, and it has
15 sought to exclude others, rather than to cooperate
16 with them. If the duty to cooperate is a fundamental
17 principle under Part XII of the Convention -- and
18 there is no reason to be believe that it is not --
19 then it is equally fundamental in the South China Sea.
20 China shows no sign of understanding that simple
21 point. Here, too, it has simply ignored the
22 applicable provisions of the Convention.

23 Mr President, members of the Tribunal,
24 Submissions 11 and 12(b) of the Philippines' Memorial
25 are, in our submission, substantiated by the evidence
26 presented in the Memorial and by the expert reports

1 from Professors Carpenter and Chou. They show that
2 China has violated its obligations under Articles 192
3 and 194 of the Law of the Sea Convention to protect
4 and preserve the marine environment. It has also
5 violated its obligation to cooperate under
6 Articles 123 and 197, and its obligation under
7 Article 206 to carry out an environmental impact
8 assessment before commencing land creation and
9 construction work. It has neither complied with nor
10 sought to enforce its own marine environmental
11 protection law, and it has made no effort to control
12 the harmful activities of its fishermen. This is
13 simply not the behaviour of a party applying the 1982
14 Convention in good faith.

15 Mr President, that concludes my submissions on the
16 marine environment. Unless you or your colleagues
17 have any questions, I would ask you to call
18 Professor Kent Carpenter to the podium.

19 **THE PRESIDENT:** Thank you very much. There is a question
20 from Judge Wolfrum.

21

1 (11.03 am)

2

Tribunal questions

3 **JUDGE WOLFRUM:** Thank you, Mr President.

4 Professor Boyle, considering the last statement
5 you referred to from China that there are no rules for
6 the protection of certain species, et cetera, taking
7 this into account, you have said that Chinese
8 fishermen took giant clams, destroyed coral, used
9 explosives, et cetera.

10 What hard facts do you have that this has been
11 taking place? You said at the beginning there is
12 a caveat: there was no fact-finding you could
13 undertake in this region. But still you must present
14 to us something, that we know that what you qualified
15 as illegal fishing, illegally taking parts of the sea,
16 marine biomass, and destroying the coral, so that we
17 find a factual basis for invoking Articles 192 and
18 194, et cetera.

19 Thank you, Professor Boyle.

20 **PROFESSOR BOYLE:** Judge Wolfrum, I think what I said in
21 my speech was that the evidence -- of course, there's
22 a range of different activities here: there's the
23 blast fishing, there's the use of cyanide, there's the
24 construction activity, there's the harvesting of
25 sedentary and endangered species.

1 Leaving aside the construction activity, which
2 I think is in a different category, the evidence for
3 all of the other three is in fact set out in the
4 Memorial and in Professor Carpenter's reports. If you
5 wish, we can of course review that and provide
6 a summary for you on Monday.

7 **JUDGE WOLFRUM:** Okay, that would be sufficient. Sure,
8 you referred to that. But please focus on the facts,
9 so that the facts are clearly in front of us on the
10 table. Thank you.

11 **PROFESSOR BOYLE:** I'm sure we will be able to do that.

12 **THE PRESIDENT:** Thank you very much. Any other
13 questions? No.

14 Well, there are no other questions, and it is now
15 11 o'clock. So we will break for tea, and then after
16 that we will call Professor Carpenter.

17 **PROFESSOR BOYLE:** Okay. Thank you Mr President.

18 **(11.05 am)**

19 **(A short break)**

20 **(11.25 am)**

21 **PROFESSOR KENT CARPENTER (called)**

22 **THE PRESIDENT:** Professor Carpenter, it is exactly the
23 same as I told Mr Schofield. And I would ask you,
24 please, to make the declaration which is in front of
25 you.

1 **PROFESSOR CARPENTER:** I solemnly declare upon my honour
2 and conscience that I will speak the truth, and that
3 my statement will be in accordance with my sincere
4 belief.

5 **THE PRESIDENT:** Thank you very much. You may now
6 proceed.

7 **(11.26 am)**

8 **Statement by PROFESSOR CARPENTER**

9 **PROFESSOR CARPENTER:** Good morning, Mr President and
10 members of the Tribunal. It is an honour to appear
11 before you as a expert witness.

12 I am Dr Kent Carpenter, professor in biological
13 sciences at Old Dominion University in Norfolk,
14 Virginia. I also serve as manager of the Marine
15 Biodiversity Unit and Global Marine Species Assessment
16 of the International Union for Conservation of Nature,
17 the IUCN. I studied marine biodiversity and coral
18 reef ecology in Southeast Asia. I have spent many
19 years studying the coral reefs in the Philippine
20 archipelago, and I speak Tagalog.

21 I prepared two reports in connection with these
22 proceedings. I reaffirm the conclusion of both
23 reports.

24 My first report, entitled "Eastern South China Sea
25 Environmental Disturbances and Irresponsible Fishing

1 Practices and their Effects on Coral Reefs and
2 Fisheries", was submitted to accompany the Memorial of
3 the Philippines and included as Annex 240. It
4 highlighted the interconnectivity between the
5 different ecosystems of the South China Sea, and the
6 important role that the Spratly reefs play within this
7 interconnected ecosystem as home to a high diversity
8 of marine life, including a number of threatened
9 species. The report demonstrated that this
10 interconnectivity means that environmental damage to
11 coral reefs in the Spratlys is likely to spread within
12 and beyond the South China Sea.

13 My second report was co-authored by Professor Loke
14 Ming Chou, who recently retired from his position as
15 professor at the Department of Biological Sciences at
16 the National University of Singapore. The focus of
17 Dr Chou's scholarship has been coral reef biology,
18 conservation and related issues, including in the
19 South China Sea.

20 Our joint report, "Environmental Consequences of
21 Land Reclamation Activities on Various Reefs in the
22 South China Sea", was included among the supplemental
23 documents recently provided to the Tribunal as
24 Annex 699. We concluded that the dredging of the
25 seabed and the building of artificial islands on at
26 least seven coral reefs has caused grave harm to the

1 marine environment, both locally to the individual
2 reefs directly subject to these activities and
3 systematically due to the reefs' importance to the
4 health of the overall South China Sea ecosystem.

5 I would like to describe in a little more detail
6 some of the main conclusions reached in both reports.

7 The South China Sea region is home to coral reefs
8 of some of the greatest diversity of species in the
9 world. The image you see is an illustration of the
10 "Coral Triangle" that includes the eastern part of the
11 South China Sea. The Coral Triangle has the highest
12 concentration of corals, marine fishes, mangroves,
13 seagrasses, and most of the tropical invertebrate
14 groups of sea species. Among them are named species
15 that are listed by the International Union for
16 Conservation of Nature as threatened with extinction.

17 The Philippines is at the apex of the Coral
18 Triangle, and it is acknowledged as having the world's
19 highest concentration and variety of species of marine
20 life per unit area. As the global epicentre of marine
21 biodiversity, the waters around the Philippines are
22 one of the world's most valuable natural resources.

23 The life-sustaining reef topography that we find
24 in the east South China Sea today formed over many
25 millions of years. The fragile coral reefs ecosystems
26 have been in equilibrium with the processes of wind

1 and waves for many thousands of years. The fact that
2 most features of this region are shallow reefs and
3 islands with very low to negligible vertical relief is
4 a testimony to the forces of the weather in this
5 region and the constant action of living corals to
6 shape the reefs themselves.

7 The ocean currents in the region have lead to
8 a high level of interconnectivity between the South
9 China Sea's different ecosystems. This results in
10 a connection of marine life from the coral reefs in
11 the Spratlys and Scarborough Shoal toward the inner
12 seas of the Philippine archipelago. The consequence
13 of this connectivity is that environmental damage
14 occurring on reefs that diminishes parent populations
15 of fishes, corals and other marine animals and plants
16 will influence the number of recruits of these animals
17 to the Greater Philippine archipelago. This will
18 damage both the sustainability of the fisheries and
19 the ability of the coral reefs and other marine
20 communities to sustain productivity and high
21 biodiversity and recover from disturbances.

22 Abrupt man-made alterations to shallow reef
23 features, such as the construction and artificial
24 island-building that China has done on seven coral
25 reefs in the Spratlys, directly impacts the
26 functioning of these delicate reefs and alters the

1 topography that has taken thousands of years to form.
2 The recent process of island-building undertaken by
3 China has resulted in very significant damage to this
4 complex coral reef ecosystem.

5 The total destruction of a large swathe of reef
6 structures through demolition and burying and landfill
7 is a catastrophic disturbance of the reef. The
8 wholesale removal and destruction of coral reef
9 habitat by the direct destruction and replacement of
10 the shallow portions of the reef ecosystem with
11 manmade structures removes vital components of
12 available reef habitat that have functioned as
13 a single ecosystem for many generations of reef
14 inhabitants. This causes dramatic reductions in
15 populations and local extinction of prominent fishes
16 and invertebrates.

17 This is of particular concern because there are
18 a number of species listed as threatened with
19 extinction in the South China Sea. The reduction of
20 reef habitat threatens many species that rely on coral
21 reefs as living space during all or part of their life
22 history.

23 The direct ecosystem harm of reef removal and
24 replacement with manmade islands can be multiplied
25 many times over by the wider effects of sediment
26 plumes caused by island building. The coral organisms

1 that coral reef ecosystems are built around are
2 sedentary organisms that cannot escape or actively
3 remove the large amounts of sediments that dredging
4 produces. This sediment cloud covers large areas of
5 the reefs, smothers the coral, and results in
6 widespread destruction of the reef. This in turn
7 dramatically reduces overall primary productivity and
8 topography of the reef, limiting its ability to
9 sustain life.

10 Recovery from these severe disturbances is
11 uncertain. Reef recovery is highly variable in the
12 best of circumstances. Here, demolition and burial
13 and landfill has resulted in the total destruction of
14 large swathes of reef structures that destabilise the
15 reef substrate and negatively impact the potential for
16 recovery. Reefs that have been smothered by
17 sedimentation are unlikely to ever recover if unstable
18 sediments remain in place, because reef building
19 requires hard substrate -- that is, solid
20 foundation -- to recruit and thrive.

21 The environmental damage China has caused is not
22 limited to its construction of artificial
23 installations and islands. Fishing vessels from China
24 have also engaged in the extraction of vulnerable and
25 endangered species from Scarborough Shoal and Second
26 Thomas Shoal. These species include rare corals,

1 giant clams, marine turtles, sharks and live reef
2 fish. Based on the evidence that I reviewed, Chinese
3 nationals have also used destructive fishing
4 techniques such as dynamite fishing, as well as the
5 use of poisons such as cyanide. Dynamite and cyanide
6 fishing are considered among the most highly
7 destructive of all fishing methods.

8 It is my sincere conclusion that China's actions
9 have caused grave harm to the South China Sea marine
10 environment. The potentially irreversible damage to
11 the Spratly reef system will have serious
12 repercussions for the highly interconnected and
13 interdependent South China Sea ecosystem.

14 Mr President and distinguished members of the
15 Tribunal, thank you for your kind attention. This
16 concludes my presentation.

17 **THE PRESIDENT:** Thank you very much indeed.

18 Professor Boyle.

19 **(11.36 am)**

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

21 **PROFESSOR BOYLE:** Mr President, members of the Tribunal,

22 I can now turn finally to Submission 13, in which the
23 Philippines alleges that:

24 "China has breached its obligations under the
25 Convention by operating its law enforcement vessels in

1 a dangerous manner, causing serious risk of collision
2 to Philippine vessels navigating in the vicinity of
3 Scarborough Shoal."

4 Essentially our argument is that Chinese vessels
5 have violated Articles 94(4) and 94(5) of UNCLOS, read
6 in conjunction with the 1972 Convention on the
7 International Regulations for Preventing Collisions at
8 Sea.⁶⁵

9 The incidents which form the basis of the
10 Philippines' claims are set out fully in
11 paragraphs 6.114 to 6.127 of the Memorial. But to
12 summarise, a series of near collisions took place on
13 28th April and 26th May 2012 between Chinese and
14 Philippine vessels, and a collision was only avoided
15 by the emergency manoeuvres of the Philippine ships.
16 The Chinese vessels were operated by two government
17 agencies: the Chinese Marine Surveillance, otherwise
18 known as "CMS", and the Fisheries Law Enforcement
19 Command, that I will simply call "FLEC". At tab 4.9
20 in your folders you will find photos of the Chinese
21 vessels referred to in my speech. I think you will
22 find all of them in there.

23 We don't have precise coordinates for each
24 incident, but the available information shows that

⁶⁵ Convention on the International Regulations for Preventing Collisions at Sea (hereinafter "COLREGS"), 1050 UNTS 18 (20 Oct. 1972), entered into force 15 July 1977. MP, Vol. XI, Annex LA-78.

1 they took place in the territorial sea of Scarborough
2 Shoal. That said, it is important to stress at the
3 outset that the location is irrelevant to the claims
4 presented here, because the Philippines is arguing
5 that China has violated its obligations as a flag
6 state, and that the relevant rules of international
7 law are applicable on that basis, regardless of where
8 the ships were located at any particular point in
9 time.

10 There are three parts to the argument. I will
11 deal first with the legal basis of Submission 13.
12 Secondly, I will show how the behaviour of the Chinese
13 vessels amounted to a violation of the collision
14 regulations. Then finally, I will explain how China's
15 failure to exercise effective jurisdiction and control
16 over its vessels amounts to a violation of the
17 Convention on the Law of the Sea.

18 Your annex of 10th November posed a number of
19 questions concerning Submission 13. My intention is
20 to answer all of them in the course of giving this
21 speech, but I won't necessarily identify which
22 question I am answering at any particular point.
23 I think you will find by the end of the speech that
24 I have dealt with all of them.

25 The principal legal basis of Submission 13 is
26 Article 94 of UNCLOS. In its recent *Fisheries*

1 *Advisory Opinion*, the Tribunal on the Law of the Sea
2 held that:

3 "[t]he Convention contains provisions concerning
4 general obligations which are to be met by the flag
5 state in all marine areas regulated by the
6 Convention."

7 And it went on to specify that:

8 "[t]hese general obligations are set out in
9 articles 91, 92 and 94 of the Convention."⁶⁶

10 So it follows from that that China has obligations
11 under the Convention when its own vessels are operated
12 in the territorial sea of Scarborough Shoal or
13 anywhere else. Which state has sovereignty over that
14 territorial sea is irrelevant for those purposes.

15 For the sake of clarity, Article 21 of UNCLOS is
16 also irrelevant, and the Philippines is not alleging
17 a violation of Article 21.

18 Article 94(1) of the Convention requires the flag
19 state to:

20 "effectively exercise its jurisdiction and control
21 in administrative, technical and social matters over
22 ships flying its flag."

23 Subsequent paragraphs of that article indicate

⁶⁶ *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, ITLOS, *Advisory Opinion of 2 April 2015*, para. 111. Hearing on Jurisdiction, Annex LA-224. See also *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 3 (M. Nordquist, et al., eds., 2002), p. 152. Annex LA-146(bis).

1 what this means. In particular, Article 94(3)(c)
2 requires the flag state to:

3 "take such measures for ships flying its flag as
4 are necessary to ensure safety at sea with regard,
5 *inter alia*, to ... the prevention of collisions."

6 What are these measures? Paragraph 4(c) of
7 Article 94 goes on to specify that the flag state
8 shall take the necessary steps to ensure that:

9 "the master, officers and, to the extent
10 appropriate, the crew are fully conversant with and
11 required to observe the applicable international
12 regulations concerning the safety of life at sea, the
13 prevention of collisions ... and the maintenance of
14 communications by radio."

15 The reference to "applicable international
16 regulations" in Article 94 incorporates the
17 regulations annexed to the 1972 Convention on the
18 International Regulations for Preventing Collisions.
19 Both China and the Philippines are parties to this
20 Convention. So the conclusion is that China must
21 therefore ensure that vessels flying its flag are
22 "required to observe" the regulations set out in the
23 1972 Convention.

24 If there were any doubt in the matter, that
25 conclusion is further reinforced by Article 94(5) of
26 UNCLOS, which places a duty on the flag state to:

1 "conform to generally accepted international
2 regulations, procedures and practices and to take any
3 steps which may be necessary to secure their
4 observance."

5 The scope of the term "generally accepted
6 international regulations, procedures and practices"
7 is the subject of some debate. No doubt several
8 members of the panel, including also myself, have
9 written on that question. But happily, there's no
10 need to enter into that discussion here. With 156
11 contracting parties, representing 98.59% of global
12 tonnage,⁶⁷ there can be little doubt that the 1972
13 Convention and its regulations are generally accepted
14 for the purposes of Article 94.

15 Indeed, the 1972 Convention is one of the most
16 widely accepted treaties concluded under the auspices
17 of the International Maritime Organization. According
18 to one leading authority on marine law, it provides
19 "a universal system of sea traffic rules", whose
20 Collision Regulations "have been introduced into the
21 national law of every shipping nation in the world".⁶⁸

22 I might say that they also resemble entirely the rules
23 of the air, with which I have some familiarity in

⁶⁷ International Maritime Organization, *IMO - the International Maritime Organization: What it is, What it does, How it works* (2014), p. 9. Supplemental Documents, Vol. IV, Annex 797.

⁶⁸ William Tetley, *International Maritime and Admiralty Law* (2002) , p. 237. Supplemental Documents, Vol. VI, Annex LA-282.

1 a different context. But on this basis, any breach of
2 the 1972 Convention and the regulations amounts to
3 a breach of Article 94 of UNCLOS.

4 Article 94 -- to deal with one possible
5 argument -- makes no distinction between government
6 ships and non-government ships. Rather, the text
7 simply refers in general terms to "ships flying
8 [a state's] flag". So the obligation imposed by
9 Article 94 extends to all ships, including vessels in
10 government service, and including those operated by
11 the CMS and FLEC.

12 The Collision Regulations themselves also apply
13 expressly to "all vessels",⁶⁹ and the term "vessel" is
14 described as:

15 "every description of water craft ... used or
16 capable of being used as a means of transportation on
17 water."⁷⁰

18 The application of those regulations to government
19 ships is further confirmed by the inclusion of special
20 rules with respect, *inter alia*, to "signal lights or
21 whistle signals for ships of war",⁷¹ to "vessel[s]
22 engaged in the launching or recovery of aircraft",⁷²

⁶⁹ COLREGS, Rule 1(a). MP, Vol. XI, Annex LA-78.

⁷⁰ COLREGS, Rule 3(a). MP, Vol. XI, Annex LA-78.

⁷¹ COLREGS, Rule 1(c). MP, Vol. XI, Annex LA-78.

⁷² COLREGS, Rule 3(g)(iv). MP, Vol. XI, Annex LA-78.

1 or to "vessel[s] engaged in minesweeping
2 operations".⁷³ These would, obviously, typically be
3 government or military vessels.

4 Unlike other treaties, which recognise that
5 special rules may have to apply to government ships,⁷⁴
6 there is therefore no exclusion in the 1972 Convention
7 or its regulations for warships or other ships in
8 governmental non-commercial service. And this makes
9 sense. It accords with the basic purpose of the
10 regulations, which is to achieve as widespread and
11 uniform a practice in relation to safety of navigation
12 as possible. There would be no point having different
13 rules on collision for warships and commercial ships,
14 any more than there would be for military aircraft and
15 commercial airliners.

16 Turning now to the second part of my argument, our
17 case is that the Chinese vessels involved in the
18 incidents of 28th April and 26th May 2012 violated the
19 International Regulations for the Prevention of
20 Collisions at Sea.

21 These regulations are legally binding rules, each
22 specifying the particular action that vessels "shall"

⁷³ COLREGS, Rule 3(g)(v). MP, Vol. XI, Annex LA-78.

⁷⁴ See, e.g., International Convention for the Safety of Life at Sea, 1974 ("SOLAS"), 1184 UNTS 2 (1 Nov. 1974), entered into force 25 May 1980, Chapter V, Regulation 1. Supplemental Documents, Vol. VI, Annex LA-258. See also International Convention for the Prevention of Pollution from Ships ("MARPOL"), 1340 UNTS 184 (2 Nov. 1973), entered into force 2 Oct. 1983, Art. 3(3). MP, Vol. XI, Annex LA-80.

1 take in the prescribed circumstances. Rule 2(b) does
2 recognise that there may be:

3 "special circumstances, including the limitations
4 of the vessels involved, which may make a departure
5 from [the] Rules necessary to avoid immediate danger."

6 But the inclusion of this exception does not
7 undermine the otherwise mandatory nature of the
8 regulations, nor does it appear relevant in the
9 present case.

10 The regulations are regularly applied by national
11 courts in determining civil claims and criminal
12 charges arising from collisions,⁷⁵ and national courts
13 have taken the view that the exception in Rule 2(b)
14 should be interpreted in a strict sense.⁷⁶ So the
15 regulations can be considered as mandatory, and they
16 set an obligatory standard against which to judge the
17 actions of all vessels when navigating at sea.

18 China has itself relied on the International
19 Collision Regulations in its own diplomatic practice.

⁷⁵ See, e.g., *Crowley Marine Services Inc. v Maritrans Inc.*, 530 F.3d 1169 (9th Cir. 2008), 1177. Supplemental Documents, Vol. VI, Annex LA-292 ("[L]ike the other rules of the COLREGs that employ the word 'shall,' Rule 17(b) is mandatory... This interpretation of the word 'shall' is consistent with our earlier opinion in *Crowley I*, that the Allegiance, as the overtaking vessel, despite the coordinated nature of the tug escort, was required to abide by the compulsory COLREGS Rules 8(e) and 13(a), which also use the term 'shall'").

⁷⁶ *Crowley Marine Services Inc. v Maritrans Inc.*, 447 F.3d 719 (9th Cir. 2006), 725. Supplemental Documents, Vol. VI, Annex LA-291. ("By its terms, Rule 2 limits 'special circumstance[s]' to those circumstances 'which may make departure... necessary to avoid immediate danger.' In other words, vessels may justify departure from the COLREGS in order to avoid immediate danger, but not for more generic special circumstances".).

1 Following a collision between a vessel called the
2 *Ernst Thaelmann*, a vessel flying the flag of the then
3 Soviet Union, and a Chinese fishing vessel on
4 3rd March 1971, China invoked a previous version of
5 the Collision Regulations, and it claimed the accident
6 was:

7 "entirely caused by the fact that [the] Soviet
8 ship failed to observ[e] the internationally
9 established rules on the prevention of collisions of
10 sea vessels."⁷⁷

11 Exactly the same could be said about the Chinese
12 vessels which violated the current rules during the
13 incidents that occurred in the vicinity of Scarborough
14 Shoal in 2012. The essence of these claims is
15 explained in the expert report by
16 Professor Craig Allen which is contained in Annex 239
17 of the Philippine Memorial.⁷⁸ Professor Allen
18 identifies several rules which were breached by the
19 Chinese vessels on these two dates.

20 Firstly, he argues that there is a violation of
21 Rule 8, which provides that:

22 "[a]ny action taken to avoid collision shall ... be
23 positive, made in ample time, and with due regard to

⁷⁷ See Jeanette Greenfield, *China's Practice in the Law of the Sea* (1992), pp. 113-14. Supplemental Documents, Vol. II, Annex 701.

⁷⁸ Allen Report, pp. 4-5. MP, Vol. VII, Annex 239.

1 the observance of good seamanship."

2 The language of this rule suggests that it should
3 be characterised as an obligation of conduct, rather
4 than one of result.⁷⁹ In other words, it is not
5 concerned with attributing responsibility in cases of
6 actual collision; what it is concerned with is
7 ensuring that steps are taken by ships in order to
8 avoid the risk of collision.⁸⁰ That proposition is
9 supported by national court decisions. The US Court
10 of Appeals for the Second Circuit has held, for
11 example, in a case called *Ocean SS v United States*,
12 the court said:

13 "it must always be remembered that it is the risk
14 of collision, not the collision itself, that masters
15 must avoid."⁸¹

16 The fact that no collision actually occurred
17 between the Chinese and Philippine vessels does not
18 diminish in any way the conclusion that the Chinese
19 vessels on 28th April and 26th May 2012 violated
20 Rule 8. Far from taking positive action to avoid

⁷⁹ See *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, Advisory Opinion of 1 February 2011, ITLOS Reports 2011, para. 110. Supplemental Documents, Vol. VI, Annex LA-243.

⁸⁰ Allen Report, p. 4. MP, Vol. VII, Annex 239.

⁸¹ *Ocean S.S. Co. of Savannah v United States*, 38 F.2d 782 (2d Cir. 1930), [784]. Supplemental Documents, Vol. VI, Annex LA-288 (approved in *Esso Standard Oil Co. v Oil Screw Tug Maluco I*, 332 F.2d 211 (4th Cir. 1964), 214. Supplemental Documents, Vol. VI, Annex LA-290).

1 a collision, the evidence showed that the Chinese
2 vessels actually increased the risk.

3 Let me illustrate this point by describing the
4 relevant actions of these vessels. The first
5 violation of Rule 8 took place at 9 o'clock in the
6 morning on 28th April 2012, when the Chinese vessel
7 FLEC-310 intentionally closed at high speed to within
8 600 yards of the Philippine vessel *Pampanga*,
9 a Philippine coast guard vessel. 15 minutes later,
10 the same Chinese vessel for a second time undertook
11 a similar dangerous manoeuvre in relation to another
12 Philippine coast guard vessel, the BRP *Edsa II*,
13 passing within 200 yards of the Philippine vessel.⁸²

14 Similar observations can be made concerning the
15 actions of the three Chinese vessels involved in the
16 incident on 26th May 2012 -- that's CMS-71, FLEC-303
17 and CMS-84 -- all of which undertook dangerous
18 manoeuvres in which the Chinese vessels passed
19 Philippine vessels at high speed at a distance of
20 100 yards or less.⁸³

21 Perhaps the most flagrant violation of Rule 8
22 occurred later in the day on 26th May in the basin of
23 Scarborough Shoal when the Philippine vessel MCS 3008

⁸² These incidents are described in paragraphs 6.125-6.126 of the Memorial of the Philippines.

⁸³ These incidents are described in paragraphs 6.121-6.123 of the Memorial of the Philippines.

1 narrowly avoided a collision with the Chinese vessel
2 FLEC-306, which appeared determined to ram it.⁸⁴

3 None of the manoeuvres that I have described, and
4 which are set out in more detail in the Memorial, can
5 be described as taking positive and timely action to
6 avoid a collision. What these incidents demonstrate
7 is a deliberate violation of Rule 8.

8 Chinese vessels involved in these incidents also
9 breached Rule 6, which provides that:

10 "[e]very vessel shall at all times proceed at
11 a safe speed so that she can take proper and effective
12 action to avoid collision and be stopped within
13 a distance appropriate to the prevailing circumstances
14 and conditions."

15 The collision regulations do not specify what is
16 a safe speed; that is going to depend on the
17 circumstances of each case. One would obviously have
18 to look at the visibility, the traffic density, the
19 manoeuvrability of the vessel, the state of the wind,
20 sea and current, and any other navigational hazards.⁸⁵

21 But you don't have to be a sailor to appreciate
22 that manoeuvring in close proximity to other vessels
23 at speeds up to 22 knots cannot be considered safe.

⁸⁴ This incident is described in paragraph 6.124 of the Memorial of the Philippines.

⁸⁵ See COLREGS, Rule 6(a). MP, Vol. XI, Annex LA-78.

1 As emphasised in the expert report of Professor
2 Allen,⁸⁶ the failure to proceed at a safe speed was
3 aggravated in this case by the size of the Chinese
4 vessels compared with their rather smaller Philippine
5 counterparts. And the wake created by the manoeuvres
6 of the Chinese ships caused an additional threat to
7 those Philippines vessels.

8 The third breach of the rules occurred during the
9 first incident on 26th May, when the Chinese vessel
10 CMS-71 breached Rule 15 of the Collision Regulations.
11 Rule 15 provides that:

12 "[w]hen two power-driven vessels are crossing so
13 as to [involve] a risk of collision, the vessel which
14 has the other on her ... starboard ... shall keep out
15 of the way and shall, if the circumstances of the case
16 admit, avoid crossing ahead of the other vessel."

17 That's rather a complex piece of wording, and it's
18 actually the same as the rules that apply to aircraft,
19 and there is an infinitely simpler way to put it: in
20 the right, on the right. In other words, it's the
21 vessel on the left that should turn away.

22 As described in paragraphs 6.116 to 6.117 of the
23 Philippine Memorial, CMS-71 approached the Philippine
24 vessel MCS 3008 at speed from the left and attempted
25 to cross MCS 3008. So as the Chinese vessel was

⁸⁶ Allen Report, p. 4. MP, Vol. VII, Annex 239.

1 approaching from the port side, it should have avoided
2 crossing ahead of the Philippine vessel. That's what
3 the rules would require.

4 That's reinforced by Rule 16, which provides that:

5 "[e]very vessel which is directed ... to keep out
6 of the way of another vessel shall, so far as
7 possible, take early and substantial action to keep
8 well clear."

9 In this instance, the Chinese vessel increased
10 speed and did the exact opposite of what is required
11 by the rules.

12 Not only did the Chinese vessels commit violations
13 of the technical rules contained in the collision
14 regulations, they also violated the so-called "good
15 seamanship rule" found in Rule 2(a) of those rules,
16 which provides that:

17 "[n]othing in these Rules shall exonerate any
18 vessel, or the owner, master or crew thereof, from the
19 consequences of any neglect to comply with these Rules
20 or of the neglect of any precaution which may be
21 required by the ordinary practice of seamen."

22 This rule supplements the more technical rules,
23 and it has been described by one leading author on
24 maritime law as playing a gap-filling role.⁸⁷ It

⁸⁷ *Marsden on Collisions at Sea* (S. Gault, et al. eds. 13th ed., 2003), p. 173. Supplemental Documents, Vol. VI, Annex LA-283.

1 could therefore be an entirely separate ground for
2 establishing a breach of the regulations.

3 It would be difficult to describe the behaviour of
4 the Chinese vessels as being a practice required by
5 the ordinary practice of seamen, so in this case the
6 actions of the Chinese vessels fell far short of what
7 would be required. And as noted by Professor Allen in
8 his expert report:

9 "intentionally endangering another vessel through
10 high-speed 'blocking' or harassment maneuvers
11 constitutes [in his view] a flagrant disregard of the
12 tenets of good seamanship."⁸⁸

13 Professor Allen also notes, it is worth
14 emphasising here, that we are not dealing with
15 negligent actions on the part of part of the Chinese
16 vessels, but with intentional, deliberate behaviour
17 that demonstrated a reckless disregard for the safety
18 of Philippine ships.⁸⁹

19 Is there any possible defence that China could
20 make to these claims? The short answer is: no. There
21 are no "special circumstances" to make the exception
22 in Rule 2(b) applicable. Far from avoiding immediate
23 danger, the actions of the Chinese vessels increased
24 it. Nor does the nature of the vessels as government

⁸⁸ 24 Allen Report, p. 4. MP, Vol. VII, Annex 239.

⁸⁹ *Id.*, p. 6. MP, Vol. VII, Annex 239.

1 ships charged with carrying out law enforcement
2 functions alter that conclusion. As I have previously
3 explained, the Collision Regulations leave no doubt
4 that they apply to government vessels.

5 Moreover, even if they were engaged in legitimate
6 policing operations, government vessels are required
7 to respect rules relating to safety at sea. In the
8 *Saiga (No. 2)* case, the Tribunal on the Law of the Sea
9 held that actions of law enforcement vessels must take
10 into account "[c]onsiderations of humanity", and "all
11 efforts should be made to ensure that life is not
12 endangered".⁹⁰ In this case, we would submit that the
13 conduct of the FLEC and CMS vessels cannot be said to
14 conform to these basic international standards.

15 That brings me then to the question why these
16 navigation incidents violate China's obligations under
17 Article 94 of the Law of the Sea Convention.

18 In most circumstances, Article 94 does not require
19 a flag state to guarantee that all of its vessels
20 comply with the applicable regulations, wherever they
21 are. Rather, Article 94 requires a flag state to take
22 the measures necessary "to ensure" that:

23 "the master, officers and ... crew are fully

⁹⁰ *The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v Guinea)*, Judgment of 1 July 1999, ITLOS Reports 1999, para. 155-56. MP, Vol. XI, Annex LA-36 (confirmed in the *The M/V "Virginia G" Case (Panama/Guinea-Bissau)*, Judgment of 14 April 2014, ITLOS Reports 2014, para. 359. Hearing on Jurisdiction, Annex LA-223).

1 conversant with and required to observe [those]
2 regulations."

3 This language indicates a due diligence
4 obligation.

5 As noted by the Seabed Disputes Chamber in their
6 *Advisory Opinion on Activities in the Area*, the
7 obligation "to ensure" is:

8 "an obligation to deploy adequate means, to
9 exercise best possible efforts, to do the utmost, to
10 obtain [the] result."⁹¹

11 This reading of Article 94 was confirmed by the
12 tribunal in the 2015 *Fisheries Advisory Opinion*
13 referred to earlier.⁹²

14 However, these are government vessels, so the flag
15 state is not only able to exercise legislative and
16 enforcement jurisdiction over those vessels, as it can
17 do with privately owned vessels flying its flag, but
18 it can also exercise operational control: it can give
19 them instructions, it can give them operating rules.
20 Indeed, from the perspective of state responsibility,
21 the actions of government vessels owned and controlled

⁹¹ See *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, *Advisory Opinion of 1 February 2011*, ITLOS Reports 2011, para. 110. Supplemental Documents, Vol. VI, Annex LA-243.

⁹² *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, ITLOS, *Advisory Opinion of 2 April 2015*, para. 146. Hearing on Jurisdiction, Annex LA-224.

1 by a government agency are, for that reason, directly
2 attributable to the state.⁹³

3 The Chinese vessels involved in the incidents in
4 question were controlled by CMS and FLEC, both of
5 which are governmental agencies. So China was in
6 a position to ensure that these vessels fully complied
7 with the Collision Regulations, yet it failed to do
8 so. This omission puts it, we would submit, in breach
9 of Article 94. It does not matter whether the actions
10 were carried out under official orders from the
11 Chinese government. Article 7 of the International
12 Law Commission's Articles on State Responsibility make
13 it clear that:

14 "[t]he conduct of an organ of a State or of
15 a person or entity empowered to exercise elements of ...
16 governmental authority shall be considered an act of
17 the State under international law if the organ, person
18 or entity acts in that capacity, even if it exceeds
19 its authority or contravenes instructions."

20 China has not denied the allegations of
21 "provocative and extremely dangerous manoeuvres",⁹⁴

⁹³ See International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001), Articles 4 ("Conduct of organs of a State") and 5 ("Conduct of persons or entities exercising elements of governmental authority"). Supplemental Documents, Vol. VI, Annex LA-287.

⁹⁴ Note Verbale from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (12) PG-239 (25 May 2012). MP, Vol. VI, Annex 211.

1 protests made by the Philippines. Its response to
2 those protests simply ignores the request by the
3 Philippines that China "instruct its ships to observe
4 the Convention on the International Regulations for
5 Preventing Collision".⁹⁵

6 Instead, China's only reaction was to reassert its
7 territorial claims, and to point the finger of blame
8 at the Philippines for allowing its vessels into these
9 water[s] in the first place. This reply falls well
10 short of what one would expect from a flag state
11 complying with its obligations under Article 94. Nor
12 does it seem that the Chinese even contemplated taking
13 any action to remedy the situation.

14 So, even from the perspective of a due diligence
15 standard, the actions of China, we would submit, fall
16 far short of what Article 94 requires of a flag state.

17 Mr President, members of the Tribunal, let me
18 conclude. The Chinese Government has displayed
19 a deliberate disregard for international law on the
20 safety of maritime navigation. The Chinese vessels
21 involved in the incidents which took place in the
22 vicinity of Scarborough Shoal on 28th April and
23 26th May 2012 committed a number of violations of the
24 applicable collision regulations. For that reason,

⁹⁵ 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. 12-1222 (30 Apr. 2012), p. 1. MP, Vol. VI, Annex 209.

1 China has breached its obligations under Article 94 of
2 the Law of the Sea Convention to ensure that its law
3 enforcement vessels observe those International
4 Regulations on the Prevention of Collisions.

5 Mr President, members of the Tribunal, that
6 concludes the Philippines argument on Submission 13.
7 I'm grateful to you this morning for your patience in
8 listening to me. Unless you have any further
9 questions, I would ask you to call Professor Oxman to
10 the podium.

11 **THE PRESIDENT:** Thank you very much. I think we don't
12 have any questions at the moment, so we will call
13 Professor Oxman to the podium now. Thank you.

14 **(12.03 pm)**

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

16 **PROFESSOR OXMAN:** Mr President, distinguished members of
17 the Tribunal, it is an honour to return to the podium
18 this morning. I plan to address Submissions 14 and
19 15, as well as certain jurisdictional issues.

20 I note at the outset that the specific items
21 listed in Submission 14 all relate to Second Thomas
22 Shoal. But the words "among other things" preceding
23 the list make clear that the list is not exhaustive.
24 Unfortunately, events have made it necessary to
25 consider other actions that aggravate and extend the

1 dispute, including those with respect to which the
2 Philippines reserved its rights in these proceedings
3 in its letter of 30th July 2014⁹⁶ to which the
4 Tribunal's Award on Jurisdiction adverts.⁹⁷

5 Mr President, as the Permanent Court of
6 International Justice observed, it is:

7 "... [a] principle universally accepted by
8 international tribunals ... that the parties to a case
9 must abstain from any measure capable of exercising
10 a prejudicial effect in regard to the execution of the
11 decision to be given and, in general, not allow any
12 step of any kind to be taken which might aggravate or
13 extend the dispute."⁹⁸

14 This principle is commonly invoked in the context
15 of provisional measures. But there is nothing in the
16 Law of the Sea Convention or international law that
17 limits the principle's application to provisional
18 measures, that requires a party to seek provisional
19 measures in order to invoke the principle, or that
20 restricts application of the principle only to the
21 limited circumstances in which it may be appropriate

⁹⁶ *Letter from Francis H. Jardeleza, Solicitor General of the Republic of the Philippines, to Judith Levine, Registrar, Permanent Court of Arbitration (30 July 2014), SWSP, Vol. VII, Annex 446.*

⁹⁷ Award on Jurisdiction (29 Oct. 2015), para. 53.

⁹⁸ *Electricity Company of Sofia and Bulgaria (Belgium v Bulgaria), Provisional Measures, Order, 1939, P.C.I.J., Series A/B, No. 79 (5 Dec. 1939), p. 199. MP, Vol. XI, Annex LA-61.*

1 to prescribe provisional measures.

2 Article 279 of the Convention requires the parties
3 to settle disputes by peaceful means in accordance
4 with Article 2, paragraph 3 of the Charter of the
5 United Nations. Article 300 prohibits abuse of
6 rights.

7 Aggravation and extension of the dispute is
8 inconsistent with both articles. The United Nations
9 General Assembly's Friendly Relations Declaration,
10 which is at tab 4.10 of your folders, specifically
11 refers to the duty to refrain from aggravating the
12 situation in the context of the principle that states
13 shall settle their international disputes by peaceful
14 means.⁹⁹

15 In the November 2002 Declaration of Conduct, which
16 is at tab 4.11 of your folders, the signatories
17 similarly undertook "to exercise self-restraint in the
18 context of activities that would complicate or
19 escalate disputes or affect peace and stability" in
20 the South China Sea.¹⁰⁰

21 Articles 279 and 300 of the Convention apply
22 independently of the means chosen to settle the

⁹⁹ UN General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, UN Doc. A/RES/25/2625 (24 Oct. 1970), Part 1. Supplemental Documents, Vol. VI, Supplemental Documents, Vol. VI, Annex LA-247.

¹⁰⁰ *Declaration on the Conduct of Parties in South China Sea* (4 Nov. 2002), para. 5. MP, Vol. V, Annex 144.

1 dispute. But they operate with particular force once
2 a dispute has been submitted to arbitration or
3 adjudication. In that event, aggravation or extension
4 of the dispute prejudices not only the rights of the
5 parties and international relations, but the integrity
6 of the adjudicative process and the ability of the
7 Tribunal to render effective relief.

8 Notwithstanding what were, in the court's words,
9 the "understandable preoccupations" of the United
10 States "with respect to the well-being of its
11 nationals held hostage in its embassy for over five
12 months", the International Court of Justice stated
13 that the rescue attempt undertaken by the United
14 States while the court was in the course of preparing
15 its judgment in the *United States Diplomatic and*
16 *Consular Staff* case:

17 "... is of a kind calculated to undermine respect
18 for the judicial process in international
19 regulations."¹⁰¹

20 In this regard, the International Court of Justice
21 recalled its order indicating that no action was to be
22 taken by either party that might aggravate the tension
23 between the two countries.¹⁰²

¹⁰¹ *United States Diplomatic and Consular Staff in Tehran (United States v Iran)*, Merits, Judgment, ICJ Reports 1980, para. 93. SWSP, Vol. XII, Annex LA-175.

¹⁰² *Id.*

1 The behaviour that constitutes an aggravation or
2 extension of the dispute may also constitute a breach
3 of other duties. But that need not be the case. In
4 the *Diplomatic and Consular Staff* case, the judgment
5 makes clear that the question of the legality of the
6 United States' rescue operation was not before the
7 court.¹⁰³

8 Accordingly, the act that constitutes
9 an aggravation or extension of the dispute need not
10 arise from a breach of any substantive duty under the
11 Convention. From this it follows that restrictions on
12 jurisdiction over disputes arising from those duties
13 are irrelevant. The disrespect for the process itself
14 is the gravamen of the breach of duty.

15 Jurisdictional constraints, such as those in
16 Articles 297 and 298 of the Convention, have no
17 relevance to the question of acts that aggravate and
18 extend a dispute that is before a court or tribunal.
19 The question of the status and entitlements, if any,
20 generated by a feature is not relevant to the question
21 of the Tribunal's jurisdiction to determine whether
22 China's activities at that feature aggravated or
23 extended the dispute.

24 Since 1999, following China's seizure of Mischief
25 Reef, the Philippines had maintained a peaceful and

¹⁰³ *Id.*, para. 94.

1 continuous presence at Second Thomas Shoal by
2 deploying a small detachment of sailors and marines to
3 the *Sierra Madre*, an old naval ship that was run
4 aground there. Second Thomas Shoal is 104 miles west
5 of Palawan. It is completely submerged at high
6 tide.¹⁰⁴ A copy of the description of the shoal from
7 the *Atlas* submitted by the Philippines is contained in
8 your folders at tab 4.12.

9 Beginning on 11th April 2013, after the dispute
10 was submitted to the Tribunal, the Chinese Foreign
11 Ministry repeatedly summoned the Philippine ambassador
12 to insist that the Philippines remove its presence
13 from Second Thomas Shoal. The Philippines thereafter
14 learned of the presence of at least three Chinese
15 government vessels in the vicinity of the Second
16 Thomas Shoal. To the knowledge of the Philippines, no
17 such vessels had ever deployed to the shoal before.¹⁰⁵

18 On 9th May 2013, the Philippines sent the first of
19 several diplomatic notes protesting China's actions at
20 Second Thomas Shoal.¹⁰⁶ Notwithstanding these
21 protests, China continued to deploy vessels to Second
22 Thomas Shoal, although in reduced numbers.

¹⁰⁴ SWSP, Vol. II, pp. 162-164.

¹⁰⁵ Memorial, paras. 3.59-3.60.

¹⁰⁶ *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. 13-1585 (9 May 2013). MP, Vol. VI, Annex 217.

1 Then on 9th March 2014, China blocked the
2 Philippines from approaching the shoal. On that
3 occasion, two Chinese coastguard vessels chased away
4 two civilian vessels chartered by the Philippine Navy
5 that were on their way to Second Thomas Shoal to
6 deliver food, water and other essential supplies to
7 the Philippine personnel stationed there, and to
8 conduct a rotation of personnel.¹⁰⁷

9 In a May 2013 interview broadcast on Chinese
10 television, one of China's senior military officials,
11 Major General Zhang Zhaozhong, explained that China
12 was employing what he called a "cabbage strategy" at
13 Second Thomas Shoal.¹⁰⁸ This was a technique it had
14 used successfully in taking over two other features in
15 the South China Sea, Mischief Reef and Scarborough
16 Shoal. Pursuant to the "cabbage strategy", China
17 would seal and control a maritime feature by
18 surrounding it with fishing administration vessels,
19 marine surveillance ships and navy warships until the
20 feature is, to use the general's words, "wrapped layer
21 by layer like a cabbage". General Zhang continued:

22 "If we carry out the 'cabbage' strategy, you will
23 not be able to send food and drinking water onto the

¹⁰⁷ Memorial, paras. 3.59 - 3.66.

¹⁰⁸ "China Boasts of Strategy to 'Recover' Islands Occupied by Philippines", *China Daily Mail* (28 May 2013). MP, Vol. X, Annex 325.

1 islands. Without the supply for one or two weeks, the
2 troopers stationed there will leave the islands on
3 their own. Once they have left, they will never be
4 able to come back."¹⁰⁹

5 In other words, China's denial of access to Second
6 Thomas Shoal forms part of a deliberate policy of
7 physically expelling the Philippines and its nationals
8 from disputed features and the surrounding waters.
9 That constitutes a paradigm of aggravation and
10 extension of the dispute. And China expressly retains
11 the option to continue this.

12 In July 2015, the Philippines announced that it
13 would be making repairs to the hull of the
14 *Sierra Madre*. In response, China's Foreign Ministry
15 said that:

16 "China reserves the right to take further
17 actions."¹¹⁰

18 Chinese Coast Guard and other vessels continue to
19 patrol the waters around Second Thomas Shoal, and the
20 Philippines takes special measures to avoid those
21 patrols in order to deliver supplies and rotate
22 personnel.

¹⁰⁹ *Id.*

¹¹⁰ Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Hua Chunying's Remarks on the Philippines' Reinforcing a Military Vessel Illegally "Grounded" on China's Ren'ai Jiao* (15 July 2015), para. 90. Supplemental Documents, Vol. I, Supplemental Documents, Vol. I, Annex 630.

1 Mr President, all of this occurred while the
2 dispute was before this Tribunal.

3 What's more, the context is made clear by China's
4 assertion, in a public document delivered to members
5 of the Tribunal, that the submission of this dispute
6 to arbitration "cannot be taken as a friendly act",
7 and will "further complicate the bilateral
8 relations".¹¹¹ It is made clear by China's direct
9 warning on 28th June of this year that:

10 "If the Philippine side once again invades the
11 waters and airspace of the Nansha Islands stationed by
12 the Chinese side, the Chinese side will take all
13 necessary defensive measures ..."

14 And that:

15 "... the Philippines side must bear all the
16 consequences arising therefrom."¹¹²

17 Finally, it is made clear by the tone and content
18 of the extraordinary statement issued by China on the
19 day following the Tribunal's Award on Jurisdiction.¹¹³

20 China has also greatly intensified its programme

¹¹¹ China's Position Paper, para. 90. SWSP, Vol. VIII, Annex 467.

¹¹² *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), p. 2. Supplemental Documents, Vol. II, Supplemental Documents, Vol. II, Annex 689.

¹¹³ See generally Ministry of Foreign Affairs of the People's Republic of China, *Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines* (30 Oct. 2015). Supplemental Documents, Vol. I, Supplemental Documents, Vol. I, Annex 649.

1 of building artificial islands and installations since
2 the commencement of the arbitration. Mr Loewenstein
3 yesterday showed what has been done at Mischief Reef,
4 Subi Reef and Fiery Cross Reef. In tabs 3.13, 3.16
5 and 3.18 to 3.22 of your folders, he placed satellite
6 imagery images showing the progression of
7 island-building and construction at these reefs, as
8 well as Gaven Reef, Johnson South Reef, Cuarteron Reef
9 and McKennan (Hughes) Reef.

10 In addition, the new expert report submitted by
11 Professors Carpenter and Chou contains a wealth of
12 information on China's artificial island-building
13 since this dispute was submitted to arbitration.¹¹⁴
14 The report indicates that:

15 "... it appears that reclamation has not stopped,
16 although it may have slowed and there is an increase
17 in activities focused on the large-scale construction
18 of permanent infrastructure on the artificial
19 islands."¹¹⁵

20 It also states that:

21 "The loss of seven major reef features ... within
22 1.5 years will have a huge impact on the ecological
23 integrity of not only the Spratlys reefs but also the

¹¹⁴ K.E. Carpenter & L.M. Chou, *Environmental Consequences of Land Reclamation Activities on Various Reefs in the South China Sea* (14 Nov. 2015), pp. 8-23. Supplemental Documents, Vol. II, Supplemental Documents, Vol. II, Annex 699.

¹¹⁵ *Id.*, p. 23.

1 South China Sea." ¹¹⁶

2 Professor Carpenter elaborated on the
3 environmental damage in his statement this morning.

4 Mr President, after thousands of years of
5 development, these coral reefs are no longer in the
6 condition in which they were found at the time this
7 dispute was submitted to arbitration. The Tribunal's
8 capacity to render effective relief has been
9 prejudiced. The direct evidence of the natural state
10 of these features, which is relevant to several issues
11 in this case, has been destroyed or covered over, and
12 this following China's rejection of a site visit by
13 the Tribunal. The rights of the Philippines have been
14 impaired. The marine environment has been damaged.
15 China has presented the Tribunal with a *fait accompli*
16 of unprecedented proportions.

17 Mr President, there can be no doubt that these
18 actions constitute an aggravation and extension of the
19 dispute. We respectfully submit that they merit
20 a stern response. China should not be permitted to
21 benefit from them. Its actions form a significant
22 part of the context of the other issues in this case.

23 Mr President, as I indicated earlier, Articles 297
24 and 298 do not apply to aggravation and extension of
25 the dispute. But even if they did, it would make no

¹¹⁶ *Id.*, p. 26.

1 difference. In this connection, I turn now to the
2 issues identified by the Tribunal that refer at
3 various points to the exceptions for military
4 activities and law enforcement activities set out in
5 Article 298(1)(b) of the Convention.

6 We believe that the application of this provision
7 should focus on the nature and purpose of the
8 activity. Our views are developed more fully in our
9 earlier written and oral pleadings.¹¹⁷ I will here
10 limit myself to a few points that are pertinent to the
11 issues identified by the Tribunal.

12 A convenient starting point for the enquiry may be
13 the nature of the state organ that is conducting the
14 activity. Absent evidence to the contrary, it is
15 reasonable to proceed on the basis that activities
16 that are carried out by a law enforcement or other
17 civilian organs of a state are not to be regarded as
18 military in character. The reverse, however, is not
19 true. Many states also use naval and other military
20 units for law enforcement purposes, or for
21 infrastructure and other civilian projects.¹¹⁸ The
22 Chinese Constitution expressly so provides with
23 respect to the People's Liberation Army.¹¹⁹

¹¹⁷ Memorial, para. 7.148; SWSP, para. 9.5; Jurisdictional Hearing Tr. (Day 2), p. 76.

¹¹⁸ Jurisdictional Hearing Tr. (Day 2), p. 81-82; (Day 3), p. 54.

¹¹⁹ *Id.*, (Day 2), p. 82.

1 Article 298(1)(b) distinguishes between military
2 activities and law enforcement activities. Law
3 enforcement activities are excluded only in the
4 specific instances provided for in the two paragraphs
5 of Article 297 to which Article 298(1)(b) refers.
6 Accordingly, it is necessary to draw a distinction
7 between military and law enforcement activities,
8 whether or not the activity is conducted by a naval
9 vessel or other military unit.

10 In this regard we note that implementation of
11 legal restrictions on entry is typically a law
12 enforcement activity. China has not asserted
13 otherwise regarding its attempts to prevent access to
14 Second Thomas Shoal or other features. In any event,
15 as previous noted, Article 298 is not relevant to
16 Submission 14.

17 Political, legal and strategic objectives do not
18 in themselves render an activity military. Nor does
19 the desire to solidify a claim to a feature render the
20 means chosen military.

21 The presence of a military garrison or a warship
22 does not render the activity being protected
23 a military activity. Fortifications and military
24 garrisons have long been used to protect civilian
25 ports. Naval vessels have long been used to protect
26 other vessels.

1 Since ancient times, much of the world's
2 infrastructure has been built to accommodate both
3 civilian and military uses. Mixed-use projects are
4 not subject to the exclusion for military activities.
5 The construction of a port or airfield to be used for
6 civilian and military purposes is not excluded,
7 whether or not naval or military units participate in
8 the construction.

9 China's occasional use of naval or military units
10 in this case falls within one or more of the
11 situations that I have outlined above, namely a law
12 enforcement activity, or an activity by those
13 protected by the naval or military unit, or
14 a mixed-use project. Accordingly, the military
15 activities exclusion does not apply.

16 In addition, China has not only declined to invoke
17 the military activities exception in its Position
18 Paper, it has repeatedly emphasised, in public
19 statements and diplomatic communications, the
20 non-military nature of its artificial island-building
21 and construction activities in the Spratly Islands.¹²⁰
22 The furthest China has gone in suggesting a possible
23 military function for the facilities it is
24 constructing in the Spratly Islands is to intimate

¹²⁰ See, e.g., Memorial, para. 7.151; SWSP, Vol. 1, paras. 10.2-10.3; Jurisdictional Hearing Tr. (Day 3), p. 48-51; 53; 55-57.

1 possible mixed uses, while emphasising that the uses
2 will be mainly civilian.¹²¹

3 Two months ago, at a press conference with
4 President Obama, President Xi Jinping stated, with
5 reference to China's construction activities in the
6 Spratly Islands:

7 "... China does not intend to pursue
8 militarization."¹²²

9 It is useful in this regard to recall the
10 importance that the International Court of Justice
11 attached to a public statement of intention by the
12 head of state of a non-participating party.¹²³

13 There are significant political, legal and other
14 consequences to characterising activities as
15 "military". The state that conducts the activities
16 determines the policies that inform the nature and
17 purpose of its activities. That state has superior
18 access to information relevant to their nature and
19 purpose, and that state is in the best position to
20 evaluate the consequences of characterising its

¹²¹ Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Lu Kang's Remarks on Issues Relating to China's Construction Activities on the Nansha Islands and Reefs* (16 June 2015). Hearing on Jurisdiction, Annex 579. See also Jurisdictional Hearing Tr. (Day 3), pp. 53-54.

¹²² United States, The White House, Office of the Press Secretary, *Press Release: Remarks by President Obama and President Xi of the People's Republic of China in Joint Press Conference* (25 Sept. 2015), p. 2. Supplemental Documents, Vol. I, Supplemental Documents, Vol. I, Annex 664.

¹²³ *Nuclear Tests (Australia v France)*, Judgment, ICJ Reports 1974, paras. 51-52. MP, Vol. XI, Annex LA-7.

1 activities as military.

2 When that State repeatedly insists on the civilian
3 rather than military character of the activity, when
4 the other party to the case has not contested these
5 assurances, and when the effect is solely to proceed
6 without regard to an exclusion from jurisdiction that
7 the respondent chose not to invoke in its
8 comprehensive objections to jurisdiction,¹²⁴ it would
9 seem reasonable for a tribunal to proceed in that
10 manner; and this quite apart from the other reasons
11 for reaching exactly the same conclusion.

12 Fisheries enforcement is, of course, a law
13 enforcement activity, whether or not a naval vessel is
14 standing by or otherwise participating in the
15 activity. Fisheries enforcement is excluded from
16 jurisdiction only when it is conducted by the coastal
17 state in its own exclusive economic zone.

18 The Award on Jurisdiction has already determined
19 that the exclusion does not apply to the territorial
20 sea.¹²⁵ The exclusion also does not apply if the
21 waters in which the enforcement activity took place
22 are not part of the exclusive economic zone because

¹²⁴ See generally China's Position Paper. SWSP, Vol. VIII, Annex 467. See also Letter from H.E. Ambassador Chen Xu, Embassy of the People's Republic of China in The Hague, to H.E. Judge Thomas A. Mensah (6 Feb. 2015), para. 1. SWSP, Vol. VIII, Annex 470 ("This Paper *comprehensively* explains why the Arbitral Tribunal established at the request of the Philippines ... manifestly has no jurisdiction over the case.") (emphasis added).

¹²⁵ Award on Jurisdiction (29 October 2015), paras. 395, 406.

1 the coastal state enjoys no entitlement to
2 an exclusive economic zone in those waters.
3 In addition, the exclusion does not apply as between
4 two coastal states where they have overlapping
5 entitlements to an exclusive economic zone.

6 In sum, Mr President, the military activities and
7 the law enforcement exceptions in Article 298(1)(b) do
8 not apply to any of the Philippines' submissions in
9 this case.

10 Mr President, let me turn now to Submission 15.
11 The Award on Jurisdiction directs the Philippines to
12 clarify the content and narrow the scope of that
13 submission. The Philippines has accordingly revised
14 Submission 15 to read as follows:

15 "China shall respect the rights and freedoms of
16 the Philippines under the Convention, shall comply
17 with its duties under the Convention, including those
18 relevant to the protection and preservation of the
19 marine environment in the South China Sea, and shall
20 exercise its rights and freedoms in the South China
21 Sea with due regard to those of the Philippines under
22 the Convention."

23 The focus of this submission is prospective. It
24 is clear from the record in this case that there have
25 been significant, persistent and continuing violations
26 by China of the Philippines' rights under the

1 Convention. Its statements and conduct in this regard
2 provide ample justification for ordering China to
3 respect the rights and freedoms of the Philippines in
4 the future, and to honour its environmental
5 obligations.

6 The submission also anticipates particular issues
7 that may arise as between the parties. The Law of the
8 Sea Tribunal has given broad application to the
9 requirement of "due regard" as one of the basic
10 organising principles of the Law of the Sea under the
11 Convention. The tribunal in the *Mauritius v United*
12 *Kingdom* arbitration has done the same.¹²⁶ We hope that
13 this Tribunal will do so as well. The Tribunal might,
14 of course, provide further elaboration in light of
15 China's actions.

16 Mr President, the record in this case demonstrates
17 that China regards its entitlements in the South China
18 Sea as excluding those of the Philippines and other
19 states. It has systematically sought to prevent
20 Philippine fishing or hydrocarbon activities in areas
21 within 200 miles of the Philippines.¹²⁷ At the same
22 time, it has proceeded -- without Philippine
23 consent -- to conduct its own activities within

¹²⁶ *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*, Award, UNCLOS Annex VII Tribunal (18 Mar. 2015), paras. 293, 518-536, 540. Hearing on Jurisdiction, Annex LA-225. See also, *Bangladesh/Myanmar*, paras 471-476. MP, Vol. XI, Annex LA-43.

¹²⁷ Memorial, paras. 6.16-6.38.

1 200 miles of the Philippines. The only evidence of
2 a request for Philippine consent is for marine
3 scientific research in an area that China does not
4 claim.¹²⁸

5 This record of behaviour, which has intensified
6 since the dispute was submitted to arbitration, is
7 particularly unsettling in light of the Tribunal's
8 invitation in the Annex of Issues to address the
9 hypothesis that one or more of the small insular
10 features claimed by China might be entitled to
11 an exclusive economic zone and continental shelf under
12 paragraph 2 of Article 121.

13 Mr President, I will address this hypothesis only
14 as such: a hypothesis. I do so only because the
15 Tribunal has requested the Philippines to comment on
16 it. But let me be clear at the outset: it is our firm
17 view that the situation hypothesised does not arise.
18 As Mr Reichler showed yesterday, there is no basis for
19 determining that any of the tiny Spratly features
20 generates an entitlement to an exclusive economic zone
21 or continental shelf. All of the evidence and all of
22 the jurisprudence is to the contrary.

23 Mr President, the object and purpose of
24 paragraph 3 of Article 121 is to avoid perverse
25 effects of the major extensions of coastal state

¹²⁸ See Memorial, para. 4.31 & Figure 4.6.

1 jurisdiction beyond the territorial sea. Not only the
2 foresight of the framers of the Convention, who were
3 well aware of the geometric formula Πr^2 , but the
4 experience since the conclusion of the Convention,
5 makes clear what those perverse effects are.

6 There are three principal perverse effects:
7 irrational encroachment on the sovereign rights of
8 coastal states as well as the global commons;
9 dangerous amplification of sovereignty disputes over
10 tiny insular features that would otherwise command no
11 such attention; and gratuitous harm to the environment
12 occasioned by efforts to solidify claims. No sound
13 interpretation or application of the Convention could
14 countenance such effects.

15 To envisage any entitlement to an exclusive
16 economic zone and continental shelf generated by the
17 tiny insular features of the Spratlys would
18 necessarily require concomitant constraints that would
19 avoid those perverse effects. To achieve that, the
20 constraints, by one means or another, would have to
21 bring us back to the same stable and just outcome as
22 that provided by paragraph 3 of Article 121.

23 The record in this case affords the Philippines
24 reason to fear that it would face, within the entire
25 area of any hypothetical 200-mile entitlement
26 generated by one of the tiny insular features in the

1 Spratlys, a situation in which the Philippines and its
2 nationals would be able to benefit from the natural
3 resources of substantial parts of its exclusive
4 economic zone and continental shelf entitlements, if
5 at all, only on terms dictated by China. It would
6 perpetuate and potentially freeze in another form
7 precisely the danger, disputes and instability that
8 China currently exploits as it pleases.

9 Let me demonstrate the effect, Mr President, with
10 a series of drawings on the screen, and in your
11 folders at tab 4.13.

12 On the screen is a schematic representation of
13 a state with a coastline that is 400 nautical miles or
14 741 kilometres long. We now add a 12-mile territorial
15 sea. We now add a 200-mile exclusive economic zone
16 and continental shelf.

17 Now let us suppose that there is a tiny island off
18 the coast under the sovereignty of another state. For
19 ease of analysis, we can place it 212 miles off the
20 coast. This tiny island generates a territorial sea
21 of 12 miles.

22 Now let us suppose three things: first, that this
23 tiny island is not governed by paragraph 3 of
24 Article 121, and accordingly is entitled to
25 an exclusive economic zone and continental shelf under
26 paragraph 2 of that article; second, that there is no

1 delimitation; and third, that the state that is
2 sovereign over the tiny island asserts and exercises
3 all of its exclusive sovereign rights and jurisdiction
4 in all of the 200-mile zone generated by that tiny
5 island, without regard to the entitlement of the other
6 state.

7 Mr President, this is the result.

8 If the tiny feature is located far inside
9 a semi-enclosed sea, the same impact might well be
10 felt by more than one state.

11 Mr President, this turns decades of jurisprudence
12 on its head. What the case law teaches is that the
13 tiny insular features of the Spratlys generate no
14 entitlement to an exclusive economic zone or
15 continental shelf that is opposable to the Philippines
16 or, I might add, the other states whose coasts
17 surround the South China Sea.

18 What is shown in this slide is precisely the
19 opposite. It cannot be what the law provides pending
20 delimitation. An earlier draft of paragraph 3 of
21 Articles 74 and 83 once referred to the use of
22 an equidistance line as an objective means to manage
23 and stabilise the situation pending delimitation.¹²⁹

24 The reference was eliminated in part because coastal

¹²⁹ See UN Conference on the Law of the Sea III, *Informal Composite Negotiating Text*, UN Doc. A/CONF.62/WP.10 (15 July 1977), paras. 74(3), 83(3). MP, Vol. XI, Annex LA-108.

1 states with small foreign islands off their coast felt
2 that even that was excessive, and could discourage
3 just and peaceful resolution of the matter. The irony
4 here is that the risk facing the Philippines is much
5 worse than that.

6 What is shown on the screen is surely beyond the
7 pale of plausibility; a patent abuse of right. Even
8 leaving open this possibility would discourage
9 peaceful resolution of the dispute and endanger
10 justice. When a powerful state attempts to impose
11 this very result by massive landfill operations and by
12 intimidation designed to discourage any resource
13 activity by the other party or its nationals and
14 licensees, the need for legal constraints is evident.

15 There are no obstacles to the Tribunal finding
16 jurisdiction to address these problems. To be sure,
17 the Tribunal could not proceed to delimit any areas of
18 overlapping entitlements, given China's invocation of
19 Article 298's exclusion in respect of sea boundary
20 delimitation. But the Tribunal would retain
21 jurisdiction in respect of the rights and obligations
22 of the parties in the area of overlap pending such
23 a delimitation.

24 As we pointed out in the Memorial, paragraph 3 of
25 Articles 74 and 83 is not a delimitation provision to

1 which Article 298(1)(a) applies.¹³⁰ Rather, the
2 paragraph invites the structuring of a binding code of
3 conduct pending delimitation of overlapping
4 entitlements. As such, that paragraph 3 is a specific
5 manifestation of the obligation to settle disputes
6 peacefully, set forth in Article 279, and of the
7 prohibition on abuse of rights set forth in
8 Article 300. Paragraph 1(a) of Article 298 does not
9 apply to those articles either; they are not
10 specifically mentioned, and they are not delimitation
11 provisions.

12 Since delimitation of the area is unlikely, given
13 the record of China's behaviour, a declaration of the
14 parties' respective rights and obligations in any area
15 of overlapping entitlements that may be found to exist
16 would be essential for the establishment and
17 maintenance of legal order and the avoidance of risks
18 to international peace and security. Still more would
19 such a declaration be required in the current
20 situation.

21 China and the ASEAN states have been unable, for
22 at least the past 13 years, to agree on a code of
23 conduct for the reservation of their respective
24 rights, respect for the rule of law, including the
25 Convention, and minimisation of the risk of armed

¹³⁰ Memorial, para. 6. 277

1 conflict. The current prospects for reaching such
2 an agreement with China do not appear to be bright.
3 We have seen all too clearly, in the past year and
4 a half, the chaos and insecurity that result from
5 unilateral actions in the absence of a precisely
6 defined legal order.

7 In this regard it is important to bear in mind
8 that, in terms of its practical effects on the parties
9 and on the region, reaching a negative jurisdictional
10 decision as a consequence of a finding of
11 an entitlement would be the functional equivalent of
12 finding the entitlement on the merits and failing to
13 address the very serious problems this finding
14 creates.

15 Assuming the Tribunal found jurisdiction to
16 address the problems created by a hypothetical finding
17 of entitlement, the substantive challenges that would
18 be posed are formidable. A facially equal declaration
19 would not eliminate the perverse effects that
20 Article 121(3) was designed to avoid; it could well
21 exacerbate them. Such a declaration would almost
22 inevitably result in a situation that is manifestly
23 unjust in the geographic and geopolitical context of
24 this case, namely a situation in which China would be
25 able to block, throughout the area of overlapping
26 entitlements, the implementation of rules or the

1 conduct of activities that are not to its liking.

2 Let us consider, for example, a constraint rooted
3 in the *Guyana v Suriname* award¹³¹ or the *Ghana*
4 *v Côte d'Ivoire* provisional measures order,¹³² to the
5 effect that neither party may engage in any drilling
6 without the consent of the other. This would mean
7 that the Philippines would be unable to develop the
8 natural resources of the seabed and subsoil except on
9 terms agreeable to China in the entire area within
10 200 miles of a tiny insular feature that comprises
11 less than half a square kilometre and that has no
12 civilian population.

13 To avoid this manifestly unjust outcome, we must
14 recognise that the hypothesis of extended entitlement
15 for such tiny features is the cause of the problem; it
16 is not the solution. To solve that problem, we need
17 to find means to avoid all of the perverse effects of
18 according extended jurisdiction to a tiny high-tide
19 feature, both as between the parties and in the region
20 that is affected by any decision to accord
21 a hypothetical entitlement.

22 To do so, a declaration regulating conduct pending

¹³¹ *Guyana v Suriname*, Merits, Award of the Arbitral Tribunal (17 Sept. 2007), para. 467. MP, Vol. XI, Annex LA-56.

¹³² *Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and Côte d'Ivoire in the Atlantic Ocean, Provisional Measures, Order of 25 April 2015*, ITLOS Reports 2015, para. 89. Supplemental Documents, Vol. VI, Annex LA-297.

1 delimitation would need to prohibit, in form and in
2 fact, the exercise beyond the territorial sea of
3 sovereign rights or jurisdiction generated by any
4 insular feature of the Spratly Islands. This,
5 Mr President, would be a very circuitous route,
6 fraught with the risks of instability and injustice
7 occasioned by a hypothesis of overlapping
8 entitlements, simply to arrive at a stable and just
9 equilibrium that could be achieved with far less
10 difficulty by other means.

11 We respectfully submit that the dilemma posed by
12 permitting overlapping entitlements in the
13 circumstances of this case is best avoided by
14 recognising that none of the tiny insular features in
15 the Spratlys generates entitlement to an exclusive
16 economic zone or continental shelf. As my colleagues
17 have shown, that result is entirely consistent with
18 the language of Article 121(3), as well as its object
19 and purpose. Such a determination by this Tribunal
20 would firmly elevate the rule of law, promote
21 restoration of order, reduce the risk of armed
22 conflict, and remove perverse legal incentives for
23 intensification of disputes and gratuitous damage to
24 the environment.

25 Indonesia, Malaysia and Vietnam have made clear,
26 in word and deed, that they share the conviction that

1 such an approach would further peace, stability, and
2 justice in the region. There is no state in the
3 world, save China, that proposes an entitlement
4 greater than 12 nautical miles for any of the Spratly
5 features. And even China has not indicated which, if
6 any, of these features falls outside Article 121(3).

7 Mr President, the Philippines has no doubts about
8 the nature and entitlement of these tiny insular
9 features. The Philippines submits, and believes it
10 has demonstrated, that none of them is capable of
11 sustaining human habitation or economic life of its
12 own. The evidence overwhelmingly supports such
13 a finding. No question of overlapping exclusive
14 economic zones or continental shelves arises. No
15 doubt about the Tribunal's jurisdiction exists. We
16 respectfully urge the Tribunal to find that
17 paragraph 3 of Article 121 precludes the assertion of
18 entitlement to an exclusive economic zone or
19 continental shelf in respect of any of the insular
20 features of the Spratlys.

21 Mr President, this concludes our presentations for
22 this morning. We thank the Tribunal for its kind
23 attention, and look forward to the opportunity to
24 respond on Monday to any questions or requests for
25 elaboration that the Tribunal may consider useful.

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

1 Professor Oxman.

2 Judge Pawlak has a question.

3 (12.51 pm)

4 **Tribunal questions**

5 **JUDGE PAWLAK:** Professor, it was a very interesting
6 statement, and I was very impressed by the facts you
7 have put to us. But I would like to know: is there
8 any objective way to check what really is going on on
9 those seven features of the South China Sea where
10 China is doing their land reclamation works?

11 The Minister of Foreign Affairs of China, in the
12 quoted statement of 6th August this year, stated that
13 the land reclamation activity there has been
14 completed. Do you have or could you present to us
15 some objective information on that? You said that the
16 activity has slowed down. How far can we go with the
17 reality of today? Thank you very much.

18 **PROFESSOR OXMAN:** Absolutely. I was quoting the expert
19 report in saying that the activity has slowed down;
20 I have not been out there to observe it myself. But
21 I will be very happy to respond to that with such
22 information as we may have that informed that
23 statement in the expert report.

24 **THE PRESIDENT:** Thank you very much, Professor Oxman. It
25 means that, as you stated yourself, this brings us to

1 the end of the first round of the hearing. The second
2 round will take place on Monday. So we will adjourn
3 now and come back on Monday. Thank you very much.

4 (12.53 pm)

5 (The hearing adjourned until 10.00 am
6 on Monday, 30th November 2015)