

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 4

Monday, 30<sup>th</sup> 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**

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BETWEEN:

**THE REPUBLIC OF THE PHILIPPINES**

-and-

**THE PEOPLE'S REPUBLIC OF CHINA**

---

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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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Monday, 30th November 2015

(10.01 am)

**THE PRESIDENT:** As agreed previously, we shall hold the second round of the hearing today. The Philippines will conclude its remarks and presentations, and answer the questions which were given to them by the Tribunal on Friday.

Please go ahead.

(10.01 am)

**Second-round submissions by MR REICHLER**

**MR REICHLER:** Thank you, Mr President. Good morning to you. Good morning, members of the Tribunal. We appear before you today to answer your questions posed during the first round, and on 27th November. We are deeply grateful for these questions and the opportunity to address your concerns, and to provide further information that might be helpful to you in your deliberations.

The order of presentation will be as follows.

I will begin by answering the question that Judge Pawlak put to me in the first round, and then I will provide the Philippines' answers to your questions 13, 14 and 15, which address the interpretation and application of Article 121(3) of the Convention.

I will be followed by Professor Schofield, who will

1 answer all twelve of the questions you have put to  
2 him. The next speaker will be Professor Sands, who  
3 will answer questions 6, 16, 17 and 18. He will be  
4 followed by Professor Oxman, who will answer  
5 questions 11 and 26.

6 Following the lunch break, Mr Martin will answers  
7 questions 7, 8, 12 and 19, and Mr Loewenstein will  
8 answer questions 1, 2, 3, 5, 10 and 24. They will be  
9 followed by Professor Carpenter, who will answer all  
10 22 of the questions you have put to him. The last  
11 counsel to speak will be Professor Boyle, who will  
12 answer questions 9 and 21 through 25. He will be  
13 followed by the Honourable Secretary of Foreign  
14 Affairs, Mr Albert del Rosario. The Agent of the  
15 Philippines, Solicitor General Florin Hilbay, will  
16 then formally close the Philippines' case.

17 I begin with our answer to Judge Pawlak's  
18 question, which is listed as number 4 in the annex to  
19 your letter of 27th November.

20 Mr President, Judge Pawlak asked me to comment on  
21 the statement of 6th August 2015 by the Foreign  
22 Minister of China, "in the context of the Philippines'  
23 remarks about the nature and source of China's  
24 claims". I am pleased to do so.

25 The Foreign Minister's statement was submitted by  
26 the Philippines as Annex 634. We consider it



1       pertinent to some of the issues in these proceedings.  
2       But it only addresses a few of them, and is certainly  
3       not a full or comprehensive statement of China's  
4       position in regard to the South China Sea. In this  
5       regard, it is certainly not the merits equivalent of  
6       China's 7th December 2014 Position Paper, in which it  
7       set forth its objections to jurisdiction and  
8       admissibility of all of the Philippines' claims.

9               Indeed, the summary provided by the Chinese  
10       Foreign Ministry -- which is what Annex 634 is --  
11       states that the minister's statement was "an impromptu  
12       response ... refuting the groundless accusations from  
13       the Philippines and Japan", made only during the  
14       Foreign Ministers' Meetings at the East Asian Summit  
15       and ASEAN Regional Forum.<sup>1</sup>

16              The key point is that there is nothing in this  
17       statement that is inconsistent with China's claim of  
18       sovereign rights and jurisdiction within the nine-dash  
19       line, as I and other counsel for the Philippines  
20       described it last week. In particular, the Foreign  
21       Minister made clear that China does not claim full  
22       sovereignty over all the waters within the nine-dash  
23       line. He said, in particular:

24              "China always maintains that countries enjoy

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<sup>1</sup> Ministry of Foreign Affairs of the People's Republic of China, *Wang Yi on the South China Sea Issue At the ASEAN Regional Forum* (6 Aug. 2015). Supplemental Documents, Vol. I, Annex 634.

1 freedom of navigation and overflight in the South  
2 China Sea in accordance with international law."

3 And he distinguished between China's claims of  
4 sovereignty on the one hand, and its "lawful rights  
5 and interests" on the other. As to the latter, which  
6 China claims as "historic rights", he asserted:

7 "Our claim over rights in the South China Sea has  
8 long been in existence."<sup>2</sup>

9 Judge Pawlak correctly observed that this  
10 particular statement does not include a reference to  
11 the "nine-dash line" *per se*.<sup>3</sup> However, in our view,  
12 that omission cannot reasonably be interpreted as  
13 an abandonment by China of its claim of "historic  
14 rights" within the nine-dash line. By its conduct,  
15 China still demonstrates that only it may exercise  
16 jurisdiction, and exploit the resources, within that  
17 line.

18 Official Chinese statements subsequent to that of  
19 the Foreign Minister confirm that this remains China's  
20 position. We have collected some of these for you at  
21 tab 5.1. For example:

- 22 • On 15th September 2015, Chinese Vice Admiral  
23 Yuan Yubai, a commander of the People's  
24 Liberation Army Navy's fleet, told

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<sup>2</sup> *Id.*

<sup>3</sup> Hearing on Merits, Tr. (Day 1), p. 15:18-10.

1 a international conference: "... 'the South  
2 China Sea, as the name indicates, is a sea  
3 area that belongs to China' and has done so  
4 since the Han Dynasty in 206 B.C."<sup>4</sup>

- 5 • On 27th October 2015, Foreign Ministry  
6 spokesperson Lu Kang declared at his regular  
7 press conference: "The Chinese side has  
8 stressed on many occasions that China has  
9 indisputable sovereignty over the Nansha  
10 Islands and their adjacent waters. China's  
11 sovereignty and relevant rights over the  
12 South China Sea have been formed over the  
13 long course of history and upheld by  
14 successive China governments ... The Chinese  
15 side is steadfast in safeguarding its  
16 territorial sovereignty and security as well  
17 as lawful and justified maritime rights and  
18 interests."<sup>5</sup>

- 19 • On 30th October 2015, China issued  
20 a "Statement of the Ministry of Foreign  
21 Affairs on the Award on Jurisdiction and  
22 Admissibility of the South China Sea

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<sup>4</sup> Jeff Smith, "The US-China South China Sea Showdown", *The Diplomat* (21 Oct. 2015), available at <http://thediplomat.com/2015/10/the-us-china-south-china-sea-showdown/>. Hearing on Merits, Annex 838.

<sup>5</sup> Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Lu Kang's Regular Press Conference on October 27, 2015* (27 Oct. 2015). Supplemental Documents, Vol. I, Annex 643.

1 Arbitration by the Arbitral Tribunal  
2 Established at the Request of the Republic  
3 of the Philippines". The statement  
4 reiterated what has been China's consistent  
5 position since 7th May 2009, in language  
6 very similar to that of its *notes verbales*  
7 of that date: "China has indisputable  
8 sovereignty over the South China Sea Islands  
9 and the adjacent waters. China's  
10 sovereignty and relevant rights in the South  
11 China Sea, formed in the long historical  
12 course, are upheld by successive Chinese  
13 Governments, reaffirmed by China's domestic  
14 laws on many occasions, and protected under  
15 international law, including the *United*  
16 *Nations Convention on the Law of the*  
17 *Sea ...*"<sup>6</sup>

18 In short, the Foreign Minister's statement of  
19 6th August 2015 did not change in any respect China's  
20 claim of historic rights in the South China Sea within  
21 the nine-dash line. The evidence confirms that the  
22 position remains as we described it last week, and in

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<sup>6</sup> 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), para. I. Supplemental Documents, Vol. I, Annex 649 (emphasis added).

1       our written pleadings.

2               I now turn to question 13. In that question, the  
3 Tribunal asked the Philippines whether, in its view:

4               "... the conditions for giving no effect, except  
5 for a territorial sea, to a high-tide feature in the  
6 delimitation of an exclusive economic zone/continental  
7 shelf boundary [are] identical to the conditions for  
8 determining a high-tide feature to be a 'rock' for the  
9 purposes of Article 121(3)."

10              The Tribunal then goes on to observe:

11              "In other words, there seems to be a confusion  
12 between entitlement and delimitation as far as this  
13 issue is concerned."<sup>7</sup>

14              Well, Mr President, my first response is: "Ouch!"  
15 I was the speaker who mentioned that, although this is  
16 not a delimitation case, the jurisprudence on  
17 delimitation involving very small insular features  
18 could be helpful in guiding the Tribunal through its  
19 interpretation of Article 121(3). You might recall  
20 that I said we had been very careful to avoid mention  
21 of delimitation in our prior pleadings, before your  
22 jurisdiction was confirmed; and that, having finally  
23 mentioned it, no trapdoor opened beneath my feet.

24              I might have spoken too soon. If I did cause

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<sup>7</sup> Questions for the Philippines to Address in the Second Round, Question 13.

1 confusion, I apologise, and I am grateful for the  
2 opportunity to clarify.

3 First, as we have always maintained, entitlement  
4 and delimitation are two very different concepts. But  
5 I needn't elaborate on this. The Tribunal itself has  
6 already recognised the clear distinction, in its Award  
7 on Jurisdiction and Admissibility at paragraphs 155  
8 to 157.

9 Second, Article 121(3) is about entitlements. It  
10 is not about delimitation. It provides that the  
11 entitlement of an insular feature to an EEZ and  
12 continental shelf is dependent on its capacity to  
13 sustain human habitation or economic life of its own.  
14 We say, as Mr Martin explained last week, this means  
15 that to generate such entitlement, a given feature  
16 must be capable of sustaining both human habitation  
17 and economic life of its own.<sup>8</sup> This is correct, we  
18 believe, because of grammatical construction -- the  
19 double negative -- and because of logic. Human  
20 habitation and economic life go together;  
21 a sustainable habitation of human beings is supported,  
22 *inter alia*, by economic activity.

23 But in applying Article 121(3) to the features at  
24 issue in this case, you need not agree with us that  
25 the two conditions are cumulative. That is because

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<sup>8</sup> See Hearing on Merits, Tr. (Day 2), pp. 83-88.

1 the features in the Spratlys are incapable of meeting  
2 either of these two conditions. In other words, even  
3 if the word "or" is disjunctive, all of the Spratly  
4 high-tide features are still "rocks" within the  
5 meaning of Article 121(3).

6 This includes the two largest of those features,  
7 Itu Aba and Thitu. Neither is capable of sustaining  
8 human habitation; nor is either one capable of  
9 sustaining economic life of its own. Both features  
10 are therefore "rocks" without entitlement to an EEZ or  
11 continental shelf. And you do not need to consider  
12 the delimitation jurisprudence, or any matter  
13 pertaining to delimitation, to reach this conclusion.

14 I will say more about this, and about Itu Aba in  
15 particular, in a few moments, when I provide the  
16 Philippines' answer to question 15.

17 However, with your permission, I will try to do  
18 a better job today of explaining why we consider the  
19 jurisprudence involving small insular features to be  
20 pertinent. It is not the basis for our argument on  
21 entitlement of the Spratly features. That argument is  
22 based entirely on the application of Article 121(3) to  
23 the evidence concerning the capacity of those features  
24 to sustain human habitation or economic life.  
25 Nevertheless, we do say that there may be something  
26 useful to be found in the jurisprudence.

1           The object of delimitation in the EEZ and  
2           continental shelf, as set forth in Articles 74 and 83,  
3           is to achieve an equitable solution.<sup>9</sup> In applying  
4           those provisions to very small insular features,  
5           especially over the last 20 years, international  
6           courts and tribunals have most frequently determined  
7           that the equitable solution mandated by the Convention  
8           requires that they be enclaved within their  
9           territorial sea limits of 12 miles.

10           This is true not only for features with the same  
11           size and conditions as Itu Aba, as in the *Nicaragua*  
12           *v Colombia* case,<sup>10</sup> but also for considerably larger  
13           features that unquestionably do sustain human  
14           habitation and economic life, like St Martin's  
15           Island<sup>11</sup> and Abu Musa.<sup>12</sup> We made the point, which we  
16           consider beyond any serious argument, that in any  
17           future delimitation that might be performed by a duly  
18           constituted tribunal, applying the Convention,  
19           features like Itu Aba and Thitu, as well as the other

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<sup>9</sup> See UNCLOS, Arts. 74(1), 83(1).

<sup>10</sup> *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Merits, Judgment, ICJ Reports 2012, para. 237-38. MP, Vol. XI, Annex LA-35.

<sup>11</sup> *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment of 14 March 2012, ITLOS Reports 2012, paras. 318 & 337. MP, Vol. XI, Annex LA-43.

<sup>12</sup> *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment of 14 March 2012, ITLOS Reports 2012, paras. 318 & 337. MP, Vol. XI, Annex LA-43.



1 even smaller Spratly features, would without question  
2 be confined within 12-mile enclaves.<sup>13</sup>

3 This, we submit, is worthy of your consideration  
4 when Article 121(3) is interpreted in light of its  
5 object and purpose. It is our submission that  
6 Article 121(3) was inserted into the 1982 Convention  
7 precisely as a consequence of the drafters' belief  
8 that it would be unjustifiable and inequitable to  
9 allow tiny and insignificant features, which just  
10 happen to protrude above water at high tide, to  
11 generate huge maritime entitlements to the prejudice  
12 of other proximate coastal states with lengthy  
13 coastlines and significant populations, or to the  
14 prejudice of the global commons beyond national  
15 jurisdiction. We say, simply, that the true object  
16 and purpose of Article 121(3) should be borne in mind  
17 by the Tribunal when it interprets and applies that  
18 article in the context of this case.

19 Indeed, to contemplate that tiny Itu Aba should  
20 generate the same entitlement as the major Philippine  
21 island of Palawan, which has a coast 740 kilometres  
22 long and a population of more than three-quarters of  
23 a million,<sup>14</sup> such that virtually the entire EEZ and

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<sup>13</sup> Hearing on Merits, Tr. (Day 2), p. 127.

<sup>14</sup> Republic of the Philippines, Philippine Statistics Authority, *Population and Annual Growth Rates for The Philippines and Its Regions, Provinces, and Highly Urbanized Cities Based on 1990, 2000, and 2010 Censuses* (2010). Supplemental Documents, Vol. I, Annex 607.

1 continental shelf of Palawan is overlapped by that of  
2 Itu Aba, strikes us as inherently inequitable. In our  
3 view, such a result would defeat the object and  
4 purpose of Article 121(3).

5 But I repeat: you do not need to consider the  
6 jurisprudence on delimitation to come to this  
7 conclusion, because Itu Aba is not capable of  
8 sustaining human habitation or economic life of its  
9 own, as I will come to shortly; it is a "rock" under  
10 Article 121(3), based on the plain meaning of the  
11 text, even without recourse to its object and purpose.

12 Mr President, I turn next to our answer to  
13 question 14. In question 14, the Tribunal again  
14 refers to my remarks of last week, in which I asserted  
15 that the Philippines considers Article 121(3) to  
16 impose "an objective test on the status of a feature  
17 as a rock or island". That was a quote from the  
18 question. The Tribunal then asks that we comment on  
19 a passage written by Professor Schofield in 2012, in  
20 which he described Article 121(3) as "ambiguous" and  
21 lacking "an objective test".<sup>15</sup>

22 I suspect that Professor Schofield will have  
23 something to say about this himself when he addresses  
24 you this morning in order to respond to the questions

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<sup>15</sup> Clive Schofield, "Island Disputes and the 'Oil Factor' in the South China Sea Disputes", *Current Intelligence*, Vol. 4, No. 4 (2012), p. 4. Hearing on Merits, Annex 829.

1 that you posed directly to him. As for the  
2 Philippines, we stand by our characterisation of  
3 Article 121(3) in the first round. We say it does  
4 provide for an "objective test" of whether a feature  
5 is a "rock". But it would probably be worthwhile for  
6 me to elaborate a bit on what we mean by "objective".

7 My precise words last week were:

8 "The question of whether a feature is capable of  
9 sustaining human habitation is a matter for objective  
10 determination, not assertion, or subjective (and  
11 self-serving) appreciation."<sup>16</sup>

12 What we mean by this is that the sustainability of  
13 human habitation is to be determined based on facts  
14 that are objectively determined on the basis of the  
15 evidence. Does the feature provide the basic  
16 necessities for the life of a group of human beings  
17 over an appreciable period of time? Does it, for  
18 example, have a sufficient supply of potable water?  
19 Does it have naturally occurring sources of food that  
20 are sufficient to nourish such a community? Does it  
21 have soil to facilitate food production? Is there  
22 an indigenous population? Have any human settlements,  
23 for the purpose of actually inhabiting the feature and  
24 creating a community, ever been established? What is  
25 the nature of the existing human presence, if any?

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<sup>16</sup> Hearing on Merits, Tr. (Day 2), pp. 109-10.

1 Are the current occupants, if any, able to survive  
2 based on local sources, or are they dependent for  
3 their survival on delivery of necessities from  
4 outside?

5 In our submission, these questions are to be  
6 answered based on the actual evidence that is before  
7 you, not on the basis of self-serving or subjectively  
8 determined assessments by a state that makes  
9 a grandiose claim for an oversized maritime  
10 entitlement or on other such subjective factors. This  
11 is what we mean by objective determination, and we  
12 believe that this is what Article 121(3) calls for.

13 As you will see in our response to question 15,  
14 which I will now provide, we apply these objective  
15 factors to the determination of whether Itu Aba, which  
16 is the focus of your question 15, qualifies as  
17 a "rock" under Article 121(3).

18 Mr President, as you know, it is customary for  
19 counsel, in answering questions put by the Tribunal,  
20 to begin by reciting or at least summarising the  
21 question. With your permission, I will not follow  
22 that practice in answering your question 15. It is  
23 appropriately a long question, reflecting an apparent  
24 interest in the subject. It consists of nearly 1,000  
25 words, separated into six parts. It would probably  
26 take up more of your valuable time for me to read it

1 than to answer it. So I will proceed directly to the  
2 answer.

3 Each of the six parts of question 15 is centred on  
4 a different excerpt from the scientific and legal  
5 literature on the Spratlys, and on Itu Aba in  
6 particular. Each one suggests -- but no more than  
7 that -- that there could be fresh water on Itu Aba, or  
8 that there could be soil in which food-producing  
9 plants might be able to grow. The Philippines is  
10 asked to comment on these statements from the  
11 literature.

12 In effect, Mr President, the Tribunal's question  
13 asks: Do these statements contradict the evidence  
14 applied by the Philippines, which is now before you,  
15 and which shows that there is no naturally occurring  
16 potable water on Itu Aba, that there is no naturally  
17 occurring soil that could sustain agricultural  
18 production and, consequently, that Itu Aba cannot  
19 sustain human habitation or economic life of its own?

20 The answer to that fundamental question is: No.  
21 There is nothing cited in question 15 -- or anywhere  
22 else in the literature, I might add -- that  
23 contradicts the evidence supplied by the Philippines,  
24 including the expert report prepared by

1 Professors Schofield and Prescott,<sup>17</sup> or that should  
2 cause you any hesitation in concluding, on the basis  
3 of that evidence, that Itu Aba is a "rock" under  
4 Article 121(3) because it is, as shown, incapable of  
5 sustaining human habitation or economic life of its  
6 own.

7 I think it would be most helpful to the Tribunal  
8 for me to review the statements from the literature  
9 that you cited in reverse order, starting with the  
10 sixth and final one, on page 7 of your questions.  
11 This is an excerpt from Annex 254 of the Philippines'  
12 Memorial. It is a report of a 1994 study of Itu Aba  
13 entitled "The Flora of Taipingtao (Abu Itu Island)".  
14 It is at tab 5.2, and its most pertinent parts will be  
15 highlighted on your screens. The report was  
16 co-authored by three botanists from the National  
17 Taiwan University in Taipei.<sup>18</sup> I quoted from it  
18 during my presentation last Wednesday. Due to time  
19 constraints, I was not able then to give it all the  
20 attention it deserves, but I will do so now.

21 Let me call your attention first to this statement  
22 at page 2 of the report:

23 "The field collections were made by Tseng-Chieng

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<sup>17</sup> See generally C. Schofield, et al., An Appraisal of the Geographical Characteristics and Status of Certain Insular Features in the South China Sea (Mar. 2015). SWSP, Vol. IX, Annex 513.

<sup>18</sup> T-C Huang, et. al., "The Flora of Taipingtao (Aba Itu Island)", Taiwaniana, Vol. 39, No. 1-2, p. 1 (1994). MP, Vol. VII, Annex 254.

1 Huang, Shin-Fan Huang and Kuo-Chen Yang" those are the  
2 three authors--"during April 19 to 23, 1994."

3 This is important. This report is based on  
4 an actual field inspection in Itu Aba itself. The  
5 authors are firsthand eyewitnesses. Moreover, they  
6 are not mere casual observers, or even mere  
7 international lawyers. They are scientists trained in  
8 observation.

9 This preceding sentence is also important:

10 "To date, no botanical inventory has been  
11 undertaken for the flora of this island."<sup>19</sup>

12 This 1994 study, then, is the first of its kind.

13 Who was the sponsor of this study? This is  
14 reported at page 6 in the final paragraph, under the  
15 heading "Acknowledgments":

16 "The botanical expedition was funded by the  
17 Council of Agriculture, Executive Yuan, Republic of  
18 China."

19 This was the Government of Taiwan. In other  
20 words, the authors had no incentive to undermine any  
21 of Taiwan's claims in regard to Itu Aba.

22 With these elements in mind, the next sentence  
23 from the report, from the very first page, acquires  
24 particular significance:

25 "The underground water is salty and unusable for

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<sup>19</sup> *Id.*, p. 2.

1 drinking."

2 That is exactly what the Philippines has advised  
3 you, based on the actual evidence we have submitted.  
4 There is no potable water. Drinkable water by itself  
5 may not be a sufficient condition to sustain human  
6 habitation, but it is certainly a necessary one.  
7 Itu Aba does not satisfy it.

8 Also significant is this sentence:

9 "The island is an atoll consisting of a tropical  
10 reef covered with sandy coral and shell."<sup>20</sup>

11 That is: no topsoil. That, too, is exactly what  
12 the Philippines has already shown you. Without  
13 tillable soil, there is no agricultural production  
14 sufficient to sustain human habitation. Itu Aba fails  
15 this objective condition too.

16 The Taiwanese report describes most of the  
17 naturally-occurring vegetation on the feature as  
18 "strand plants".<sup>21</sup> We looked up what that means.  
19 These are plants that grow in sand and, unlike human  
20 beings, thrive on salt water. The technical  
21 definition of "strand" is:

22 "the narrow littoral marine zone including beach,  
23 foredune, and remaining sandy habitat up to the edge

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<sup>20</sup> *Id.*, p. 1.

<sup>21</sup> *Id.*



1 of stabilized dune or inland vegetation."<sup>22</sup>

2 Strand plants are reported to grown in:

3 "[b]each sand [which] has a low capacitance to  
4 retain water and is nutrient-poor, with little organic  
5 matter. Surface sand, which experiences rapid wet-dry  
6 episodes, is a stressful environment for plant  
7 roots...."<sup>23</sup>

8 It follows that there is neither fresh water  
9 suitable for drinking on Itu Aba, nor any naturally  
10 occurring vegetation sufficient to support human  
11 habitation, and there is no soil to facilitate  
12 agricultural production. This is a rock. Firsthand  
13 eyewitness reporting from technical experts funded by  
14 the Government of Taiwan leaves no doubt about this.

15 The excerpt from the report quoted in question 15  
16 concludes with a list of nine plant species that the  
17 authors observed on this feature. This is followed by  
18 the bracketed comment, presumably supplied by the  
19 Tribunal:

20 "[At least three of these species bear edible  
21 fruits]."

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<sup>22</sup> "Strand", *Coral Reef Info*, available at [http://www.coralreefinfo.com/coralglossary/glossary\\_s.htm](http://www.coralreefinfo.com/coralglossary/glossary_s.htm) (accessed 28 Nov. 2015), p. 8. Hearing on Merits, Annex 852.

<sup>23</sup> "Physical Properties of Strand", *The Mildred E. Mathias Botanical Garden*, available at <http://www.botgard.ucla.edu/html/botanytextbooks/worldvegetation/strand/physicalpropertiesofstrand.html> (accessed 28 Nov. 2015). Hearing on Merits, Annex 853.

1           We looked them up too. The three are: first,  
2           *Pipturus argenteus*--which produces a small edible  
3           berry which the Government of Australia describes as  
4           "minute", "consumed occasionally by children", and  
5           only "in times of shortage"; second, *Cayratia*  
6           *trifolia*--which also produces a small berry but is  
7           considered by the Government of Australia to be a weed  
8           that is "unlikely to tolerate continuous cultivation";  
9           and third, *Pandanus tectorius*, whose fruit, according  
10          to the same source, is not eaten but sucked for its  
11          juice.<sup>24</sup>

12           In what quantity are these plants found? On  
13          page 2, under the heading "General Vegetation", first  
14          paragraph, the authors provide a list of what they  
15          call "the main tree components" on Itu Aba. None of  
16          the three species I just described is mentioned as  
17          a main tree component. One of them,  
18          *Pandanus tectorius*, is listed separately as a "less  
19          abundant tree species". Another, *Pipturus argenteus*,  
20          is listed in a still less frequently occurring  
21          category described as "scattered". The third species,

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<sup>24</sup> A. Waiter & C. Sam, *Fruits of Oceania* (2002), available at [http://aciar.gov.au/files/node/578/mn85\\_pdf\\_45615.pdf](http://aciar.gov.au/files/node/578/mn85_pdf_45615.pdf), pp. 222-223. Hearing on Merits, Annex 843; "Cayratia trifolia", in *Weeds of Upland Crops in Cambodia* (2009), available at [http://aciar.gov.au/files/node/11477/mn141\\_weeds\\_of\\_upland\\_crops\\_in\\_cambodia\\_khmer\\_tr\\_19691.pdf](http://aciar.gov.au/files/node/11477/mn141_weeds_of_upland_crops_in_cambodia_khmer_tr_19691.pdf), pp. 216-218. Hearing on Merits, Annex 846; A. Waiter & C. Sam, *Fruits of Oceania* (2002), available at [http://aciar.gov.au/files/node/578/mn85\\_pdf\\_45615.pdf](http://aciar.gov.au/files/node/578/mn85_pdf_45615.pdf). Hearing on Merits, Annex 843.

1 as I said, is described as not suitable for  
2 cultivation.

3 None of this suggests, even remotely, that these  
4 infrequently occurring and scattered plants are  
5 capable of providing enough nutrition to sustain even  
6 a small human habitation. The evidence does not allow  
7 such a conclusion. In contrast with Itu Aba, there is  
8 more to eat on other features. West York, as  
9 I mentioned last week, has coconut trees.<sup>25</sup> That,  
10 however, does not make it capable of sustaining human  
11 habitation, as the Philippines knows from its own  
12 military occupation of the feature.

13 The report includes an appendix, which is  
14 identified as a "Check List" of plants that the  
15 authors found on Itu Aba.<sup>26</sup> It includes both native  
16 plants and non-native plants that have been introduced  
17 and cultivated by the Taiwanese forces stationed on  
18 the feature.<sup>27</sup> It does not identify any of the plants  
19 we have been discussing as food-producing. To the  
20 contrary, the only plants indicated as fruit-bearing  
21 are denoted as non-native. There is no information as  
22 to their number. As I mentioned last week, the  
23 evidence shows that such limited cultivation as occurs

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<sup>25</sup> See SWSP, Vol. II, p. 200.

<sup>26</sup> T-C Huang, et. al., "The Flora of Taipingtao (Aba Itu Island)",  
Taiwania, Vol. 39, No. 1-2, p. 7 (1994). MP, Vol. VII, Annex 254.

<sup>27</sup> *Id.*

1 is performed by Taiwanese military personnel in their  
2 spare time. There are no farmers engaged in any  
3 agricultural production. The evidence thus  
4 demonstrates that Itu Aba has no capacity to generate  
5 sustenance for human habitation, and that it has no  
6 economic life.

7 That explains why there was no human settlement on  
8 the feature from the beginning of time until World  
9 War II. It was unsettled for all those millennia  
10 because it has always been considered incapable of  
11 sustaining any such settlement. During the  
12 19th century, British vessels observed very small,  
13 very primitive and temporary encampments of fishermen  
14 sojourning on some of the high-tide Spratly features,  
15 but there was never any kind of actual settlement, let  
16 alone a lasting one. The fishermen left few, if any,  
17 traces of their short-lived presence. Their inability  
18 to settle on Itu Aba only confirms the feature's  
19 uninhabitability.

20 The Japanese were the first to use the feature as  
21 a military base, during World War II. As both  
22 Mr Loewenstein and I described last week, after the  
23 war, in 1946, the Republic of China established  
24 a small military garrison there, for the sole purpose  
25 of asserting sovereignty over the feature. This was  
26 abandoned in 1949, when the Chinese Nationalist

1 government fled the mainland and installed itself on  
2 Taiwan. The Taiwanese authorities re-established  
3 a military garrison on Itu Aba in 1956, and have  
4 maintained it -- from outside -- ever since.<sup>28</sup> That  
5 garrison, as the evidence shows without contradiction,  
6 is entirely dependent for its very survival on regular  
7 delivery of all the essentials of life from Taiwan.  
8 These facts do not demonstrate that the feature is  
9 capable of sustaining human habitation. They  
10 demonstrate the opposite.

11 Mr President, with this conclusive evidence in  
12 mind, I can respond to the other parts of question 15  
13 more succinctly.

14 The next-to-last or fifth statement quoted in your  
15 question is from a 2012 article co-authored by  
16 Professor Schofield and D.K. Wang. To summarise its  
17 contents, the authors state in regard to  
18 Article 121(3):

19 "As to the element of 'human habitation', water  
20 supply might be one of the most important factors in  
21 clarifying the situation. This is because the  
22 existence of fresh water is an important indication  
23 that human habitation could be sustained...."<sup>29</sup> The

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<sup>28</sup> See SWSP, Vol. II, pp. 74-75.

<sup>29</sup> See C. Schofield & D. Wang, "The Regime of Islands under the United Nations Convention on the Law of the Sea: Implications for the South China Sea", in *Maritime Energy Resources in Asia: Legal Regimes and Cooperation*,

1 Philippines does not disagree. The statement  
2 continues:

3 "According to reports, there are two islands that  
4 could supply fresh water for daily use..."

5 The authors identify them as Itu Aba (or  
6 Tai-pin-dao), and Thitu (or Pagasa).<sup>30</sup>

7 The key words here are "[a]ccording to reports"  
8 and "could supply". The authors do not claim direct  
9 knowledge of whether fresh water exists on Itu Aba or  
10 Thitu. Moreover, no reports are cited. There is no  
11 citation to any source for their statement. It  
12 certainly does not constitute evidence -- or even  
13 an opinion by the two authors -- that there is fresh  
14 water on Itu Aba, let alone potable water sufficient  
15 to sustain human habitation. Professor Schofield will  
16 address you this morning in regard to this article,  
17 and other articles that he has published prior to  
18 these proceedings, in response to your questions to  
19 that effect.

20 Mr President, we have diligently searched and  
21 analysed all the literature we could find on Itu Aba  
22 and the other Spratly features in several languages.  
23 We could not find one constituting or citing direct

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NBR Reports, No. 37 (C. Schofield ed., Feb. 2012), p. 76. Hearing on Merits, Annex 825.

<sup>30</sup> *Id.*

1 evidence of potable water on Itu Aba. The most  
2 authoritative evidence is the firsthand report of the  
3 officially sponsored Taiwanese botanic mission to  
4 Itu Aba conducted in 1994, which concluded that:

5 "The underground water is salty and unusable for  
6 drinking."<sup>31</sup>

7 In our submission, that evidence, which is  
8 unchallenged, settles the matter.

9 Mr President, last week I read to you from the  
10 Taiwanese Government's own publications regarding the  
11 status of Itu Aba. These are very recent  
12 publications, from December 2014, July 2015 and the  
13 last day of October 2015, which, from their timing and  
14 content, can only be intended to influence the award  
15 in this case.<sup>32</sup> In other words, we can assume that  
16 Taiwan has put its best foot forward in justifying  
17 a claim that Itu Aba merits an EEZ and continental  
18 shelf. So we should pay particular attention that  
19 what Taiwan has said about water on Itu Aba. This is  
20 it:

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<sup>31</sup> T-C Huang, et. al., "The Flora of Taipingtao (Aba Itu Island)",  
Taiwania, Vol. 39, No. 1-2, p. 1 (1994). MP, Vol. VII, Annex 254.

<sup>32</sup> Ministry of the Interior of the Republic of China, *A Frontier in the South China Sea: Biodiversity of Taiping Island, Nansha Islands* (Dec. 2014); Ministry of Foreign Affairs of the Republic of China (Taiwan), *Statement on the South China Sea* (7 July 2015). Supplemental Documents, Vol. I, Annex 656; Ministry of Foreign Affairs of the Republic of China (Taiwan), *ROC government reiterates its position on South China Sea issues* (31 Oct. 2015), para. 3. Supplemental Documents, Vol. I, Annex 657.

1 "Itu Aba has groundwater wells ..." <sup>33</sup>

2 That's all. There is no assertion that the water  
3 is fresh, or suitable for drinking, or available in  
4 sufficient supply to support human habitation. There  
5 is no contradiction of the conclusion reached by the  
6 three Taiwanese botanists in 1994.

7 In addition to official government statements,  
8 Taiwan has published two books.<sup>34</sup> The references to  
9 the water supply can be found only on a single page of  
10 one of them, which consists solely of two photographs  
11 and their captions. The page with these two  
12 photographs is on your screens now, and it is also at  
13 tab 5.3.

14 You will note that Taiwan describes these  
15 photographs as depicting a "Skimming Well".<sup>35</sup> We  
16 looked that up too. According to the United States  
17 Department of Agriculture:

18 "[a] skimming well is a technique employed with  
19 an intention to extract relatively freshwater from the  
20 upper zone of the fresh-saline aquifer. The skimming

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<sup>33</sup> Ministry of Foreign Affairs of the Republic of China (Taiwan), *Statement on the South China Sea* (7 July 2015), para. 3. Supplemental Documents, Vol. I, Annex 656.

<sup>34</sup> See Ministry of the Interior of the Republic of China, *A Frontier in the South China Sea: Biodiversity of Taiping Island, Nansha Islands* (Dec. 2014); and Ministry of the Interior of the Republic of China, *Compilation of Historical Archives on the Southern Territories of the Republic of China* (July 2015).

<sup>35</sup> Ministry of the Interior of the Republic of China, *Compilation of Historical Archives on the Southern Territories of the Republic of China* (July. 2015), p. 233.



1 wells are [a] low discharge ... cluster of wells  
2 drawing groundwater from relatively shallow depth."<sup>36</sup>

3 Taiwan thus confirms what its official botanic  
4 mission to Itu Aba found in 1994:

5 "The underground water is salty and unusable for  
6 drinking."<sup>37</sup>

7 Here is a closer look at one of these photographs,  
8 which is one of the actual wells, the only one  
9 depicted by Taiwan. Perhaps you will forgive me,  
10 Mr President, if I say that this reminds me of the  
11 stories my grandparents used to tell of their lives in  
12 an impoverished village in a remote corner of the  
13 Austro-Hungarian Empire, before they left for America.  
14 They had a facility that resembled this one in the  
15 yard behind their small house. Like this one, it too  
16 had a door that they could close behind them. To  
17 them, that made it indoor plumbing, and helped them  
18 feel superior to their even poorer neighbours. In  
19 Australia, a similar structure would be called  
20 a "dunny", which I'm sure your distinguished technical  
21 expert can explain.

22 On account of what you see here, Taiwan claims

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<sup>36</sup> ICARDA/USDA, "Skimming Well Technologies for Sustainable Groundwater Management", available at [http://uaf.edu.pk/directorates/water\\_management/brochures/Skimming%20Well%20\(English\)%20brochure.pdf](http://uaf.edu.pk/directorates/water_management/brochures/Skimming%20Well%20(English)%20brochure.pdf) (accessed 28 Nov. 2015). Hearing on Merits, Annex 854.

<sup>37</sup> C Huang, et. al., "The Flora of Taipingtao (Aba Itu Island)", Taiwania, Vol. 39, No. 1-2, p. 1 (1994). MP, Vol. VII, Annex 254.

1 a 200-mile exclusive economic zone and continental  
2 shelf; that is, more than 126,000 [square] nautical  
3 miles of surrounding sea and seabed.

4 Certainly the Taiwanese troops on Itu Aba could  
5 not survive from whatever it is that this facility  
6 produces. That is why Taiwan built two modern  
7 desalination facilities in 1993. And that constitutes  
8 further proof that there is no naturally occurring  
9 water on the feature that is suitable for drinking,  
10 much less sustaining human habitation.

11 I will continue to review the statements excerpted  
12 in question 15 in reverse order. The fourth one is  
13 from an article by Professor Schofield and  
14 Robert Beckman. I will refer only to the last  
15 sentence:

16 "Of the 12 largest islands in the Spratlys, Taiwan  
17 occupies Itu Aba (Taiping Island) the largest island  
18 and the only one reported to have a source of fresh  
19 water ..."<sup>38</sup>

20 This is no different than the statement from the  
21 article co-authored by Professor Schofield and Mr Wang  
22 which we reviewed earlier. It is not even  
23 an assertion that there is fresh water on Itu Aba,

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<sup>38</sup> R. Beckman & C. Schofield, "Defining EEZ Claims from Islands: A Potential South China Sea Change", *International Journal of Marine and Coastal Law*, Vol. 29, No. 2 (2014), pp. 210-211. Hearing on Merits, Annex 833.

1 much less evidence of that. It states only that  
2 "[a]ccording to reports", Itu Aba "could supply fresh  
3 water".<sup>39</sup> It does not say by whom, or when, the  
4 putative reports were made. There is no citation to  
5 any source. Professor Schofield will explain what was  
6 intended.

7 Mr President, I will take the next two excerpts  
8 together because they are, in effect, one and the  
9 same. The third statement quoted is from an article  
10 by Professor McManus, a marine biologist, and two  
11 Taiwanese colleagues. The article was written in  
12 support of the Government of Taiwan's proposal that  
13 the Spratlys be converted into a marine park.<sup>40</sup> In  
14 other words, the features are better suited to  
15 something other than human habitation or economic  
16 activity. The second statement, from an article by  
17 B. Milligan, merely repeats the statement by  
18 Professor McManus *et al*, citing that article.<sup>41</sup>

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<sup>39</sup> See C. Schofield & D. Wang, "The Regime of Islands under the United Nations Convention on the Law of the Sea: Implications for the South China Sea", in *Maritime Energy Resources in Asia: Legal Regimes and Cooperation*, NBR Reports, No. 37 (C. Schofield ed., Feb. 2012), p 76. Hearing on Merits, Annex 825.

<sup>40</sup> See generally John W. McManus, et al., "Toward Establishing a Spratly Islands International Marine Peace Park: Ecological Importance and Supportive Collaborative Activities with an Emphasis on the Role of Taiwan", *Ocean Development and International Law* Vol. 41, No. 3 (2010). Hearing on Merits, Annex 827.

<sup>41</sup> Ben Milligan, "The Australia-Papua New Guinea Torres Strait Treaty: a model for co-operative management of the South China Sea?", in *Beyond Territorial Disputes in the South China Sea* (R. Beckman et al., eds. 2013), p. 283, fn. 84. Hearing on Merits, Annex 837.

1 Milligan in fact writes about an entirely different  
2 subject, the Torres Strait, and the statement of his  
3 citing McManus *et al* appears only in footnote.

4 What McManus and his Taiwanese colleagues say is  
5 that on some of the Spratly features wells have been  
6 dug and fresh water has been obtained.<sup>42</sup> He does not  
7 identify which features, nor does he provide evidence  
8 in support. This seems to be a fairly common  
9 oversight: vague and unconfirmed "reports" of the  
10 possible presence of water on certain features have  
11 occasionally appeared, without any of the authors  
12 having undertaken to find the original source and  
13 determine whether it is based on direct observation or  
14 other reliable evidence. This is not to criticise  
15 their scholarship. In all of these cases, the  
16 references to the possible presence of water have been  
17 made in passing, in regard to matters tangential to  
18 the authors' central theme, and which the authors  
19 appear to have determined to be unnecessary to  
20 confirm.

21 So it is with McManus. Without indicating whether  
22 he or his colleagues ever visited Itu Aba, he writes:  
23 "Thirteen islands, including Taiping Island ..."—that

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<sup>42</sup> John W. McManus, et al., "Toward Establishing a Spratly Islands International Marine Peace Park: Ecological Importance and Supportive Collaborative Activities with an Emphasis on the Role of Taiwan", *Ocean Development and International Law* Vol. 41, No. 3 (2010), p. 271. Hearing on Merits, Annex 827.

1 is, Itu Aba--"have terrestrial vegetation that  
2 indicates a significant degree of soil formation."<sup>43</sup>

3 That is a *non sequitur*. Terrestrial vegetation is  
4 one thing; the presence of soil is another. The  
5 vegetation on Itu Aba consists mainly of strand  
6 plants, as we have seen; that is, plants that grow on  
7 sandy beaches, absent soil. The official Taiwanese  
8 botanic mission to Itu Aba in 1994 confirmed this. As  
9 you have seen, its report states:

10 "The island is an atoll consisting of a tropical  
11 reef covered with sandy coral and shell."<sup>44</sup>

12 That is, no soil. Perhaps McManus's problem is  
13 that he is a professor of marine biology. He is  
14 apparently not a specialist on land, nor on its  
15 components.

16 There has never been evidence of soil on Itu Aba.  
17 The 1994 mission to the feature confirmed what the  
18 British Admiralty observed in 1938. I read an excerpt  
19 from it last week, describing both Itu Aba and Thitu,  
20 from Annex 377. It is up on your screens now:

21 "Surface loose fine sand broken coral and thin  
22 crust of conglomerate coral sand ..."<sup>45</sup>

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<sup>43</sup> *Id.*

<sup>44</sup> T-C Huang, et. al., "The Flora of Taipingtao (Aba Itu Island)",  
Taiwania, Vol. 39, No. 1-2, p. 1 (1994). MP, Vol. VII, Annex 254.

<sup>45</sup> *Message* from H.M.S. "Herald", United Kingdom, to British Admiralty (27  
Apr. 1938). SWSP, Vol. III, Annex 377.

1 The report also states:

2 "These islands [are] only sandy cays consolidated  
3 by growth of trees and scrub."<sup>46</sup>

4 Again, there is no soil.

5 This brings me to the final statement quoted in  
6 Question 15, which is the first one listed. It is  
7 another one from Professor Beckman, writing in 2013:

8 "Itu Aba, the largest island and the only one with  
9 a natural water source, is occupied by Taiwan."<sup>47</sup>

10 Mr President, I think you already know what I am  
11 going to say about this. Professor Beckman does not  
12 claim to have direct knowledge, and he cites no source  
13 for this statement. As I have mentioned, despite  
14 extensive diligence, we have been unable to find such  
15 a source, or any other evidence of drinkable water.  
16 The most authoritative evidence is the 1994 report by  
17 the official Taiwanese scientific mission to Itu Aba,  
18 and it is entirely to the contrary:

19 "The underground water is salty and unusable for  
20 drinking."<sup>48</sup>

21 As Professor Schofield will explain, neither he  
22 nor Professor Beckman were aware of this Taiwanese

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<sup>46</sup> *Id.*

<sup>47</sup> Robert Beckman, "International law, UNCLOS and the South China Sea", in *Beyond Territorial Disputes in the South China Sea* (R. Beckman et al., eds. 2013), p. 48. Hearing on Merits, Annex 831.

<sup>48</sup> T-C Huang, et. al., "The Flora of Taipingtao (Aba Itu Island)", *Taiwania*, Vol. 39, No. 1-2, p. 1 (1994). MP, Vol. VII, Annex 254.

1 report, nor had they made a detailed study of the  
2 feature, when they co-edited the book in which his  
3 article and Professor Beckman's appeared.

4 Mr President, please forgive me for stating the  
5 obvious, but this is a legal proceeding. The task of  
6 the Tribunal is of course to apply the law -- in this  
7 case Article 121(3) -- to the facts. And the facts  
8 must be based on evidence, not mere assertion or  
9 unidentified reports whose existence and reliability  
10 cannot be confirmed. Evidence cannot consist of  
11 rumour or speculation, or second- or third- or fifth-  
12 or tenth-hand repetition of what someone somewhere  
13 might have said, especially when we don't know who  
14 that was, or whether he or she was a reliable source  
15 in the first place. Rather, in a court of law or  
16 before an arbitral tribunal, the source of the  
17 observation must be identifiable, and must be deemed  
18 authoritative and credible by the tribunal. Otherwise  
19 it is not evidence.

20 Fortunately, we do have such an impeccable source  
21 in this case. The source is the one that was  
22 technically proficient -- indeed, expert -- and that  
23 engaged in direct observation in 1994. If there were  
24 any reason to suspect that Taiwanese scientific  
25 mission of bias, it would be a bias in favour of  
26 Taiwan, not the Philippines. Both the observations

1 and the conclusions were officially sponsored. They  
2 are not only of the highest level of authority and  
3 credibility, but they can be considered a form of  
4 admission against interest on the part of Taiwan.  
5 Under well-established jurisprudence, including  
6 *Nicaragua v United States* -- a case I never get tired  
7 of citing -- this makes them "of particular probative  
8 value".<sup>49</sup>

9 This evidence is not only compelling, it is  
10 unchallenged. As we have seen, the upshot of Taiwan's  
11 public relations effort to portray Itu Aba as  
12 a feature deserving entitlement to a 200-mile maritime  
13 zone on its own is only the remarkably weak statement  
14 that it has "groundwater wells".<sup>50</sup> That statement  
15 omits more than it says. It omits even the assertion  
16 that the wells produce fresh water. It omits  
17 characterising the water as suitable for drinking. It  
18 omits any reference to its capacity to support or  
19 sustain human habitation. In its book, published for  
20 the purpose of advocating enhanced status for the  
21 feature, all Taiwan can show is a "skimming well";<sup>51</sup>

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<sup>49</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment, ICJ Reports 1986, p. 41, para. 64. MP, Vol. XI, Annex LA-15.

<sup>50</sup> Ministry of Foreign Affairs of the Republic of China (Taiwan), *Statement on the South China Sea* (7 July 2015), para. 3. Supplemental Documents, Vol. I, Annex 656.

<sup>51</sup> Ministry of the Interior of the Republic of China, *Compilation of Historical Archives on the Southern Territories of the Republic of China* (July 2015), p. 233.



1       which, as we have said, is an admission that the water  
2       on Itu Aba is too salty to drink. That corroborates  
3       what the Taiwanese scientific mission directly  
4       observed in 1994.

5             Mr President, no further corroboration is needed,  
6       but there is more if you would like to see it.  
7       Professor Chiang Huang-chih, one of Taiwan's  
8       pre-eminent authorities on law of the sea, who teaches  
9       public international law and law of the sea at the  
10      National University of Taiwan, and is the author of  
11      *International Law and Taiwan* and *Introduction to*  
12      *Public International Law and Law of the Sea*, published  
13      an article in April 2015 which said this about  
14      Itu Aba:

15            "There is no oil or food on the island. There  
16      used to be fresh water, but after decades of  
17      over-extraction there is nothing left and water must  
18      be imported from Taiwan. All necessities, except  
19      sunlight and air, have to be supplied from outside the  
20      island."<sup>52</sup>

21            In closing, I would like to recite a statement  
22      from one of the articles by Professor Schofield about  
23      which the Tribunal has enquired in its questions.

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<sup>52</sup> Chiang Huang-chih, "Itu Aba claim a distracting waste", *Taipei Times* (27 Nov. 2015), available at <http://www.taipeitimes.com/News/editorials/archives/2015/04/02/2003614945>, p. 1. Hearing on Merits, Annex 839.

1       However, the statement I will read was not quoted in  
2       the Tribunal's questions, but it follows immediately  
3       upon the quoted excerpt. It was written in 2013,  
4       before Professor Schofield was consulted by the  
5       Philippines:

6             "It is also worth observing that none of the  
7       disputed islands boasts an indigenous population or  
8       longstanding history of habitation, only what are  
9       essentially garrisons of government personnel, and  
10      this can be regarded as a pertinent factor when  
11      considering the question of whether a feat is capable  
12      of sustaining 'human habitation' in accordance with  
13      Article 121(3)."<sup>53</sup>

14            Mr President, Professor Schofield is joined in  
15      this view by Judge Anderson:

16             "[A]n official or military presence, serviced from  
17      the outside, does not establish that the feature is  
18      capable of sustaining human habitation or has  
19      an economic life of its own."

20            Another sage commentator, quoted by Professor  
21      Beckman in one of the articles the Tribunal has  
22      referenced, explains:

23             "[T]he requirement of human habitation is not

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<sup>53</sup> Clive Schofield, "What's at Stake in the South China Sea?: Geographical and Geopolitical Considerations", in *Beyond Territorial Disputes in the South China Sea* (R. Beckman et al., eds. 2013), p. 23. Hearing on Merits, Annex 832.

1 fulfilled by the presence of soldiers ... If an island  
2 should be attributed large areas of maritime  
3 jurisdiction because it is reasonable to allow its  
4 indigenous inhabitants to exploit and preserve the  
5 area because they seem best suited to do so, huge  
6 areas of maritime jurisdiction should not apply to  
7 islands where there is no such population."<sup>54</sup>

8 Mr President, in the Philippines' view, this is  
9 a correct reading of Article 121(3). It is highly  
10 significant, we submit, that our view is shared not  
11 only by these distinguished commentators but by  
12 Vietnam, which stations its own troops on twelve  
13 Spratly features, as well as by Malaysia and  
14 Indonesia.

15 Mr President, you in particular will have no  
16 difficulty recalling the *Bangladesh/Myanmar* case, in  
17 which Myanmar initially claimed a full entitlement for  
18 tiny Oyster Island -- all 0.02 square kilometres of  
19 it -- on the ground that more than 2,000 military  
20 personnel were stationed there. Myanmar ultimately  
21 withdrew the claim, and ITLOS gave the feature no  
22 effect.<sup>55</sup> But this is a good example of what a bad

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<sup>54</sup> Marius Gjetnes, "The Spratlys: Are They Rocks or Islands?", *Ocean Development and International Law*, Vol. 32, No. 2 (2001), p. 200. Supplemental Documents, Vol. III, Annex 717.

<sup>55</sup> *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment of 14 March 2012, ITLOS Reports 2012, paras. 318 & 337. MP, Vol. XI, Annex LA-43.

1 policy it would be to interpret Article 121(3)'s  
2 conditions as satisfied merely by the stationing of  
3 military forces. States would be tempted to install  
4 soldiers on every minuscule feature that sticks above  
5 the water at high tide, in order to claim vast amounts  
6 of maritime space. We respectfully submit that this  
7 cannot be what was intended by the words "sustain  
8 human habitation".

9 It is also worth recalling in this regard that it  
10 is only Taiwan, a non-state entity, that claims  
11 a 200-mile entitlement for Itu Aba itself. And even  
12 then, Taiwan's claim is of very recent vintage. Our  
13 research discovered no claim by Taiwan to a 200-mile  
14 maritime zone for Itu Aba before 7th July 2015--that  
15 is, more than two years after the critical date when  
16 this arbitration was commenced, and on the eve of the  
17 hearings on Jurisdiction.<sup>56</sup>

18 What we did find was evidence to the contrary. In  
19 November 2005, the US State Department published  
20 a monograph on its Limits in the Seas series regarding  
21 "Taiwan's Maritime Claims". We have included it at  
22 tab 5.4. It confirms that Taiwan made no claim as of  
23 that date -- 2005 -- to an EEZ or continental shelf  
24 for Itu Aba.

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<sup>56</sup> Ministry of Foreign Affairs of the Republic of China (Taiwan), *Statement on the South China Sea* (7 July 2015), para. 3. Supplemental Documents, Vol. I, Annex 656.

1           According to the monograph, no. 127 in the series,  
2           and Article 2 of Taiwan's 1998 Law on the Exclusive  
3           Economic Zone and Continental Shelf, Taiwan declared  
4           an EEZ measuring "200 nautical miles from the baseline  
5           of the territorial sea".<sup>57</sup> This is significant  
6           because Taiwan still does not appear to have any  
7           baselines for Itu Aba, as it has for other South China  
8           Sea features, such as Macclesfield Bank and the  
9           Pratas Islands.<sup>58</sup>

10           According to Article 5 of Taiwan's 1998 Law on the  
11           Territorial Sea and the Contiguous Zone, as annexed to  
12           the monograph:

13           "The baseline and outer limits of the territorial  
14           sea of the Republic of China shall be decided by the  
15           Executive Yuan and may be promulgated in parts."<sup>59</sup>

16           No baseline has been decided in respect of  
17           Itu Aba, a fact that is confirmed by an attachment to  
18           Taiwan's 1999 Notice to Mariners, which provides that:

19           "baselines for the Spratly Islands 'shall be  
20           determined in the future' ".<sup>60</sup>

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<sup>57</sup> U.S. Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, "Taiwan's Maritime Claims", *Limits in the Seas*, No. 127 (15 Nov. 1995), Annex 3, Article 2 available at <http://www.state.gov/documents/organization/57674.pdf>. Hearing on Merits, Annex 824.

<sup>58</sup> *Id.*, pp. 10-15.

<sup>59</sup> *See id.*, Annex I, Article 5.

<sup>60</sup> *See id.*, p. 10, fn. 23.

1           There is no record that this has ever been done.  
2           Accordingly, the evidence indicates that Taiwan  
3           first claimed a 200-mile entitlement for Itu Aba in  
4           response to this arbitration, almost two and a half  
5           years after it commenced, in July 2015, in  
6           contradiction of its own law, which claims an EEZ and  
7           continental shelf only from coasts for which baselines  
8           have been decided by the Executive Yuan. The Tribunal  
9           can draw its own conclusions about the authenticity of  
10          Taiwan's newly minted claim.

11          The People's Republic of China, in contrast, has  
12          made no such claim. Even as of today, it has not  
13          declared an EEZ for Itu Aba itself. It has not stated  
14          that Itu Aba falls outside the restrictions of  
15          Article 121(3). In fact, its repeated statements on  
16          the meaning of Article 121(3) -- which I reviewed with  
17          you last week -- are consistent only with the  
18          classification of Itu Aba as a rock. For example,  
19          both the PRC and Taiwan officially regard the much  
20          larger Diaoyu Islands (or Senkaku Islands) in the East  
21          China Sea as rocks.

22          It is noteworthy, therefore, that although China  
23          has made many official statements about the specific  
24          issues raised by the Philippines in these  
25          proceedings -- including in the Foreign Minister's  
26          statement of 6th August 2015 to which Judge Pawlak

1 referred -- it has never, not even once, declared that  
2 Itu Aba is an island, not a rock, under Article 121.  
3 This, in our view, is a telling omission. China's  
4 decision to absent itself from these hearings cannot  
5 justify a contrary finding. In light of all the  
6 evidence that is before you, it is China's burden --  
7 and a heavy one at that -- to come forward with proof  
8 that Itu Aba is more than a rock.

9 Mr President, the evidence that is before you  
10 establishes the certitude of the following  
11 propositions: (1) there is no fresh water on Itu Aba  
12 suitable for drinking or capable of sustaining a human  
13 settlement; (2) there is no natural source of  
14 nourishment on the feature capable of sustaining  
15 a human settlement; (3) there is no soil on Itu Aba  
16 capable of facilitating any kind of agricultural  
17 production that could sustain human habitation; (4)  
18 there has never been a population on the feature that  
19 is indigenous to it; (5) excluding military garrisons,  
20 there has never been human settlement of any kind on  
21 Itu Aba; (6) there was not even a military occupation  
22 prior to World War II; (7) the Taiwanese troops that  
23 are garrisoned at Itu Aba are entirely dependent for  
24 their survival on supplies from Taiwan, and apart from  
25 sunlight and air, they derive nothing they need from  
26 the feature itself; (8) no economic activity has been

1 or is performed on Itu Aba.

2 Mr President, the Philippines submits that on the  
3 basis of this evidentiary record, there is only one  
4 conclusion that can properly be drawn: Itu Aba does  
5 not have the capacity to sustain either human  
6 habitation or economic life of its own. The evidence  
7 shows that Itu Aba meets neither of these criteria.  
8 It permits no other conclusion. Therefore, we say,  
9 the record requires that you find that the feature  
10 generates no entitlement to an EEZ or continental  
11 shelf under Article 121(3).

12 Mr President, members of the Tribunal, I have now  
13 discharged the responsibilities conferred on me by the  
14 Agent of the Philippines in regard to providing  
15 answers to your questions. I thank you once again for  
16 your kind courtesy and patient attention, and I ask  
17 that you invite Professor Schofield to the podium;  
18 perhaps, if you are so inclined, after a coffee break.

19 **THE PRESIDENT:** Thank you very much. Indeed I think we  
20 will ask Professor Schofield to come, but we have to  
21 break somewhere. So when he comes in, I will have to  
22 explain to him that he will not have the whole time.

23 **MR REICHLER:** Mr President, that's very kind. Professor  
24 Schofield is here, and he has advised that us that he  
25 can divide his presentation into two parts, and that  
26 he might be able to conclude the first part within



1 15 minutes. So if you would prefer, he could deliver  
2 the first part now, and complete his presentation  
3 after the break; really as you prefer.

4 **THE PRESIDENT:** Yes, I think that would be the best  
5 arrangement, yes.

6 **MR REICHLER:** Thank you very much.

7 (11.13 am)

8 **PROFESSOR CLIVE SCHOFIELD (called)**

9 **PROFESSOR SCHOFIELD:** Mr President, good morning. I am  
10 in your hands to an extent, in that I made  
11 a declaration before my presentation last week. I am  
12 happy to make that declaration again or simply  
13 proceed.

14 **THE PRESIDENT:** I don't think you need to make the  
15 declaration again. I think the declaration you made  
16 earlier will still stand.

17 **PROFESSOR SCHOFIELD:** Very good.

18 (11.14 am)

19 **Responses to Tribunal questions by PROFESSOR SCHOFIELD**

20 **PROFESSOR SCHOFIELD:** Mr President, distinguished members  
21 of the Tribunal, good morning. I am pleased to appear  
22 before you again to address the questions that you  
23 have directed to me concerning the report that  
24 I prepared with Professor Prescott and also with  
25 Mr van de Poll.

26 Your first question is essentially: does size  
27 matter -- or rather, did size matter to me -- in the

1 categorisation of the insular features in the South  
2 China Sea? I can be clear on this point. Size was  
3 not dispositive to our conclusions. As you observed,  
4 and as I stated in my previous publications, the  
5 drafters of the Convention excluded the size of land  
6 area as a criterion in the determination of the status  
7 of insular features.

8 That said, it is my opinion that size is  
9 a pertinent factor in the assessment of whether  
10 a feature is an island entitled to an exclusive  
11 economic zone and a continental shelf, or whether it  
12 is a "rock" under Article 121(3). I take this view  
13 because the physical extent of an insular feature,  
14 particularly when taken in the context of its  
15 geographical location, does bear on whether it can  
16 sustain human habitation or an economic life of its  
17 own. In many instances, a negligible physical  
18 dimension will preclude the possibility of a feature  
19 being able to sustain human habitation or an economic  
20 life associated with it, because of the limited space  
21 and resources for habitation and economic life. In  
22 that sense, therefore, size does constitute one  
23 element in the assessment of whether a particular  
24 insular feature meets the conditions of  
25 Article 121(3).

26 Your questions 2, 3 and 4, and also question 9,

1 concern a number of my past academic publications.

2 Question 2 asks whether the criteria of human  
3 habitation and economic life set out in Article 121(3)  
4 are disjunctive or conjunctive. The answer to your  
5 question is that in our report we treated them as  
6 disjunctive. An insular feature, therefore, would  
7 need only to fulfil one of these criteria for it to  
8 not be classified as a "rock". It bears emphasis,  
9 however, that regardless of whether the criteria are  
10 disjunctive or conjunctive, the features that we have  
11 classified as "rocks" under Article 121(3) in our view  
12 do not meet either of these criteria.

13 In this respect, our interpretation of this aspect  
14 of Article 121(3) adopted a different approach from  
15 that presented by Mr Martin last week. Mr Martin  
16 argued that the construction of the provision equates  
17 to a cumulative requirement as a matter of legal  
18 interpretation, rather than the scientific and  
19 geographical interpretation and approach that we have  
20 adopted. It is of course for the Tribunal to  
21 determine, as a matter of legal interpretation,  
22 whether the two conditions are cumulative or not. As  
23 I stated, for the purposes of our report and its  
24 conclusions, we treated them as disjunctive.

25 You asked about Swallow Reef. In our report we  
26 noted that:

1            "... viable economic activity associated with the  
2 island is considered to be questionable."

3            We concluded that Swallow Reef meets the  
4 requirements of Article 121(1), as it is a naturally  
5 formed area of land surrounded by water and above  
6 water at high-tide level.

7            Although charting authorities predominantly depict  
8 Swallow Reef as a drying reef, and potentially  
9 therefore a low-tide elevation, the *Sailing Directions*  
10 associated with those charts indicate the presence of  
11 rocks which range from between 1.5 up to 3 metres  
12 above the high-tide level at the eastern end of the  
13 feature. Further, satellite imagery and aerial  
14 photography dating from the 1980s indicates the  
15 presence of small sand cays on the feature, as you  
16 will be able to see on the screen now. In its natural  
17 state, therefore, in our view Swallow Reef would  
18 qualify as an Article 121(3) "rock".

19            The natural conditions of Swallow Reef have  
20 altered significantly as a result of engineering works  
21 subsequent to the photos and the imagery on the screen  
22 now, and the feature has been greatly expanded, as you  
23 will now see. It is true that Swallow Reef now has  
24 some vegetation and is occupied, but its inhabitants  
25 are understood to be predominantly government and  
26 military personnel. Additionally, there is a small

1 tourist resort on the island. Those present on the  
2 island rely on materials brought in from the mainland,  
3 and economic activity that takes place there is  
4 dependent on its altered state. There is no evidence  
5 that the feature has potable water, save for the  
6 production of water through desalination processes.

7 We therefore take the view that even in its  
8 current modified state, it would be appropriate to  
9 treat this feature as an Article 121(3) "rock".

10 The same holds true in regard to other occupied  
11 features in the Spratly Islands, such as West York  
12 Island. This meets the requirements of Article 121(1)  
13 but it fails the requirements of Article 121(3).  
14 Those persons stationed there are entirely reliant on  
15 supplies provided from outside, and I am not aware of  
16 any evidence of economic activity in a meaningful  
17 sense that has been undertaken there now or in the  
18 past.

19 I reach the same conclusion in relation to  
20 Itu Aba, the largest feature in the Spratly Islands.  
21 At first glance, Itu Aba and one or two of the other  
22 partially vegetated and occupied features may appear  
23 as though they might be able to escape the net of  
24 Article 121(3). However, on closer examination, they  
25 cannot, because they lack the key requirement for full  
26 island status, namely the presence of civilian

1 populations, the availability of potable water, and  
2 the existence of agricultural or economic activity.  
3 Not coincidentally, they are also rather small.

4 That is why we reached the conclusion, from  
5 a scientific and geographic perspective, and having  
6 regard for the conditions set out in Article 121(3),  
7 that Itu Aba is most appropriately treated as  
8 an Article 121(3) "rock".

9 As regards your question of our focus on  
10 "indigenous" inhabitation, this term was employed to  
11 distinguish between government and military personnel  
12 on the one hand, who are serviced entirely from  
13 outside, and a civilian population or community tied  
14 to the feature in question on the other hand. The  
15 intent was not to mean "indigenous" in the sense of  
16 "native" or "aboriginal". Another way to express this  
17 is to ask whether there is a human settlement on the  
18 feature consisting of people who have chosen to reside  
19 there of their own accord or, by contrast,  
20 an occupation by military forces and government  
21 personnel for official purposes other than normal  
22 habitation.

23 Question 3 might perhaps be reframed as "Does  
24 water matter?" or, more precisely, whether the  
25 availability of potable or fresh water on a particular  
26 feature matters in its classification. Without

1 drinkable water, it would be difficult -- if not  
2 impossible -- for a feature to sustain human  
3 habitation.

4 In preparing our report, we were aware of  
5 unconfirmed reports of the possibility of fresh water  
6 being available on Itu Aba. We concluded on the basis  
7 of the evidence that we reviewed that it would be  
8 appropriate to treat the feature of Itu Aba as  
9 a "rock" under Article 121(3) because it is doubtful  
10 that there is a supply of fresh water there; and if  
11 there is, it would be extremely limited in its supply  
12 and questionable in terms of its quality, such that it  
13 would be inadequate to sustain human habitation.

14 This view is supported by the firsthand report  
15 following the scientific expedition to Itu Aba  
16 organised by the Taiwanese authorities in 1994. This  
17 report indicates that the water available on the  
18 island was "salty and unusable for drinking".<sup>61</sup> My  
19 co-authors and I became aware of this scientific  
20 report in the course of preparing our study for the  
21 proceedings.

22 Further, we note that the "Compilation of the  
23 Historical Archives of the Southern Territories of the  
24 Republic of China" includes the photo that you have

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<sup>61</sup> T-C Huang, et. al., "The Flora of Taipingtao (Aba Itu Island)",  
Taiwania, Vol. 39, No. 1-2, p. 1 (1994). MP, Vol. VII, Annex 254.

1 already seen of the "skimming well". This was defined  
2 earlier. It is a common practice on coral islands to  
3 try and extract potable water from the fresh water  
4 lens underlying such features. Mr Reichler has  
5 already shown you a photo of the skimming well  
6 published by the Taiwanese authorities.

7 It has also been reported that two desalination  
8 plants have been installed on Itu Aba. There would be  
9 little need for such facilities were potable water  
10 readily available on the island.

11 Turning to question 4, which concerns whether my  
12 position on Itu Aba has evolved and changed over time,  
13 and on what basis, I wish to make clear that I have  
14 not changed my view. In the 1996 article that you  
15 refer to in question 4, I describe Itu Aba as  
16 an "island" because it is one. That is, Itu Aba meets  
17 the requirements of Article 121(1), in that it is  
18 a naturally formed area of land surrounded by water,  
19 and above water at high tide.

20 Here it is also worth observing that just because  
21 a given feature's toponym, its place name, includes  
22 a term such as "island" or "rock", this does not  
23 necessarily make it so. Several of the smallest and  
24 most inhospitable features among the Spratly Islands  
25 group also bear the name "island". These include  
26 Flat Island and Loaita Island. They are still rocks,



1       regardless of being called "islands".

2           I remain of the view that Itu Aba is an "island"  
3       within the meaning of 121(1) of the Convention; and  
4       that also it is a "rock" within the meaning of  
5       Article 121(3).

6           As regards the assessment of Itu Aba in the  
7       referenced 2013 publication, my view also remains  
8       unchanged. I said there that Itu Aba "may  
9       conceivably" be considered a fully fledged island.  
10       That is true. Under a very broad interpretation of  
11       Article 121(3), Itu Aba could potentially be viewed as  
12       a feature capable of generating an exclusive economic  
13       zone and a continental shelf. But it is one thing to  
14       assert what one considers to be possible, and quite  
15       another to form a settled view. Reports concerning  
16       Itu Aba are mixed, to say the least. Access to the  
17       feature is impossible. Having now more fully examined  
18       the facts, and had the opportunity to review material  
19       that was not available to me back in 2013, it is my  
20       firm belief that Itu Aba is an Article 121(3) "rock".

21           In my writings, I have referred to Article 121(3)  
22       as "ambiguous". By that, I mean that it is subject to  
23       interpretation, which -- until now -- I am not aware  
24       that any court or tribunal has definitively provided.  
25       As a geographer, it would certainly facilitate my work  
26       if this Tribunal were to provide such a definitive

1 interpretation, and to identify objective factors --  
2 like those mentioned by Mr Reichler -- that can be  
3 used to differentiate or distinguish between "islands"  
4 capable of generating an exclusive economic zone and  
5 continental shelf, and "rocks" which may not.

6 At this point, Mr President, I have reached  
7 something of a natural break, and I am in your hands  
8 concerning whether it is appropriate to pause for  
9 a moment.

10 **THE PRESIDENT:** Yes, I think this is a very convenient  
11 point where we can pause and then come back.

12 **PROFESSOR SCHOFIELD:** Thank you very much.

13 **THE PRESIDENT:** Thank you.

14 (11.29 am)

15 (A short break)

16 (11.48 am)

17 **THE PRESIDENT:** Professor Schofield, please continue.

18 **PROFESSOR SCHOFIELD:** Thank you very much, Mr President.

19 Mr President, distinguished members of the  
20 Tribunal, I have reached question 5 among the  
21 questions that you posed to me. This relates to the  
22 satellite imagery that was used in the preparation of  
23 my report with Professor Prescott and Mr van de Poll.

24 As noted in my report, a variety of satellite  
25 images, including ones of high and more moderate  
26 resolution, were used to assess the insular features

1 of the South China Sea. Highest resolution imagery  
2 was oriented towards those features that other  
3 evidence, including charting authorities and sailing  
4 directions, suggested were above high-tide features.

5 For the features noted in your question number 5,  
6 the imagery that was used was predominantly derived  
7 from Landsat TM7 imagery, which has a 14.25-metre  
8 resolution, meaning that the positional accuracy on  
9 the ground is of the order of plus or minus 25 metres'  
10 horizontal accuracy. Alternatively, using the  
11 panchromatic band for the same satellite imagery, the  
12 resolution on the ground is somewhat improved to of  
13 the order of between plus or minus 15 to 20 metres on  
14 the ground. While the imagery was at a lower  
15 resolution than that acquired for the analysis of what  
16 we determined to be the above-high-water features, it  
17 was the best that was available to me at that time.

18 Moreover, it is worth noting that the satellite  
19 images that I relied upon have a far higher scale than  
20 that which is available through reference to the  
21 largest-scale nautical charting of the South China  
22 Sea. This imagery proved especially valuable in the  
23 classification of features, especially when aligned  
24 with other sources of evidence, such as the multiple  
25 charts and sailing directions which we have already  
26 noted and referred to. It is also the case here, and

1       pertinent to note, that these charting authorities and  
2       sailing directions are predominantly consistent and in  
3       accord with one another. I would therefore  
4       respectfully suggest that the characterisation in the  
5       question of the imagery used as being "poor" or  
6       "imprecise" is not correct.

7               While it would have been ideal to have had access  
8       to higher-resolution (for example, sub-metre-level  
9       accuracy) satellite imagery for all of the features  
10       that exist in the South China Sea, it is worth  
11       pointing out that even had that been possible, the  
12       challenge highlighted in your question would still  
13       remain. Especially small features, such as isolated  
14       rocks and pinnacles, or coral heads that are barely  
15       above the high-tide mark, might still not be  
16       discernible even using the highest-resolution  
17       satellite imagery. This is particularly the case  
18       since, according to the International Court of  
19       Justice, there is no minimum size for a feature that  
20       fulfils the terms of Article 121(1).

21               In terms of how "serious" this limitation is, it  
22       should be recalled that the satellite imagery analysis  
23       employed in our report is only one source of  
24       information. Although some limitations do exist in  
25       relation to that imagery, it is nevertheless extremely  
26       useful, especially when used in conjunction with other

1 sources of information such as nautical charting and  
2 sailing directions.

3 Question 6 concerns the satellite imagery used in  
4 our report further. Five sub-questions are posed, and  
5 I will address them in turn.

6 First, the Tribunal asks:

7 "Do the Red-Green-Blue bands include the use of  
8 the panchromatic band?"

9 While I did have access to the panchromatic band  
10 in the preparation of my report, with respect to the  
11 multi-spectral image analysis conducted for our  
12 report, the answer to your question is: no.

13 As noted in our report, this type of analysis  
14 employs different combinations of three of the red,  
15 green and blue (R+G+B) of the six available bands that  
16 are provided by the satellite image. These six bands  
17 display varying spectral signatures, and in particular  
18 we used bands 1 to 5 and band 7. The panchromatic  
19 band 8 was not used because it is delivered at  
20 a different pixel resolution. Additionally, band 6,  
21 which is thermal in character, was not relevant to  
22 this type of analysis.

23 The second element to your question 6 is:

24 "Could you quantify the vertical accuracy of your  
25 image-based analysis?"

26 For Landsat TM7 imagery, the answer is that the

1 vertical accuracy is better than plus or minus  
2 15 metres root mean square error (RMSE) and of the  
3 order of plus or minus 12 metres with respect to  
4 Landsat TM8 imagery. This degree of potential error  
5 is obviously substantial. With respect to the higher  
6 resolution Digital Globe-sourced imagery that we  
7 employed, sourced from the Worldview-1 and Worldview-2  
8 satellites, the estimated vertical error is of the  
9 order of 1.7 metres.

10 Still, even using high-resolution imagery, these  
11 uncertainties do exist with respect to the vertical  
12 component in the satellite imagery. The conclusion  
13 that can be drawn from this is that based on the  
14 satellite imagery alone, it is not possible to confirm  
15 that particular features are above or below high  
16 water, or indeed above or below low water. One cannot  
17 rely on the satellite imagery alone. This is why, as  
18 noted in our report, satellite imagery was never used  
19 in isolation in the analysis of features in our  
20 report.

21 Satellite imagery that was acquired and analysed  
22 in the report was therefore complemented by other  
23 sources of hydrographic and other geographic  
24 information, including the nautical charting and the  
25 sailing directions. Nonetheless, I maintain that the  
26 satellite imagery gathered for our report proved to be

1       invaluable in enhancing our understanding of the  
2       geographical characteristics of the insular features  
3       that we have assessed.

4             Thirdly, I am asked:

5             "With respect to Digital Globe-sourced material,  
6       which specific satellites were used for each feature?"

7             Multiple images were used for the features  
8       identified in our report as being above-high-tide  
9       features, where the concentration of the imagery  
10       sourced from Digital Globe rested. These images were  
11       sourced from both Worldview-1 and Worldview-2  
12       satellites. The former satellite delivers imagery at  
13       a resolution of 0.55 metres, while the latter has  
14       a resolution of better than 1.85 metres.

15            Fourthly, the Tribunal asks:

16            "In terms of orthorectification, was this supplied  
17       by the satellite provider? Or, if not, what process  
18       was used?"

19            The source images were orthorectified exports from  
20       the satellite provider. These were then georectified  
21       to be accurate to various resulting pixel resolutions  
22       for those used in our study. Consequently, all should  
23       have an accuracy of plus or minus 2.0 metres.

24            Fifth and finally among the sub-questions, a query  
25       is raised concerning what satellite imagery is  
26       considered to be high or indeed low resolution. As

1 noted in our report, again a variety of satellite  
2 image was used, and this imagery spans times and  
3 resolutions. On the lower end of the scale are the  
4 Landsat TM7 and TM8 imagery, including the digital  
5 elevation model (DEM) component which delivers the  
6 optically derived bathymetry capability, and there the  
7 resolution is of the order of plus or minus 30 metres.  
8 These low-resolution satellite images were, however,  
9 complemented by assessment of 0.5-metre and 1.85-metre  
10 resolution Worldview-1 and 2 imagery, with an accuracy  
11 of plus or minus 2.0 metres, and these images can be  
12 regarded as being of high resolution.

13 In question 7, the Tribunal asks:

14 "With respect to EOMAP, what tidal assessment was  
15 made to determine lowest astronomical tide?"

16 For these images, EOMAP uses lowest astronomical  
17 tide which was determined by the predicted models  
18 sourced from the United Kingdom Hydrographic  
19 Organisation -- that is the UKHO -- Admiralty's  
20 *TotalTide*. That provides a model of nearby predicted  
21 tidal stations, the nearest of which in the Spratly  
22 Islands being North Danger Reef. Here it can be noted  
23 that the United Kingdom Admiralty is  
24 a world-recognised hydrographic charting authority.

25 EOMAP used spatial interpolation techniques from  
26 the closest station in order to create the tidal



1 model. EOMAP interpolated all the tidal values for  
2 the specific date and time of the satellite image  
3 acquisition.

4 The related question 8 concerns EOMAP also, with  
5 the Tribunal posing the question:

6 "What is the vertical error in EOMAP's analysis?"

7 The vertical accuracy related to EOMAP's analysis  
8 is in the range of 0.5 metres, with a CE90 degree of  
9 confidence; that is, a circular error at 90%  
10 confidence in terms of spatial location error.

11 Turning to question 9, it is true that there has  
12 been a trend in the treatment of islands in maritime  
13 delimitation, in my estimation. International courts  
14 and tribunals have accorded insular features,  
15 especially small and isolated ones, a reduced or zero  
16 effect. That said, this practice did not have any  
17 bearing on our assessment of the insular features we  
18 examined in our report.

19 Question 10 concerns our analysis of Subi Reef.  
20 Subi Reef is a low-tide elevation. On this key issue,  
21 there is no difference of view between the conclusion  
22 expressed in my report and that of the Philippines.  
23 Further, the legal status of Subi Reef has not been  
24 changed by China's extensive artificial  
25 island-building activities.

26 The issue is whether Subi Reef falls wholly or

1 partially within 12 nautical miles of  
2 an above-high-tide feature and it could therefore be  
3 used as part of a territorial sea baseline of  
4 whichever state is ultimately determined to have  
5 sovereignty over that above high-tide feature.

6 The obvious candidate as a high-tide feature in  
7 the vicinity of Subi Reef is Thitu Island, on screen  
8 now as a contextual view. As you can see, however,  
9 Thitu Island is just beyond 12 nautical miles from  
10 Subi Reef. Were Thitu Island the only  
11 above-high-water feature in this area, it would follow  
12 that Subi Reef could not be used as part of the  
13 baseline and therefore could not generate  
14 a 12-nautical-mile territorial sea.

15 There are, however, to the north and northwest of  
16 Thitu Island a number of reefs, one of which has been  
17 given the name Sandy Cay, which I will come back to in  
18 a moment or two. In our analysis of the satellite  
19 imagery, we identified a sand bar among this reef  
20 system to the north and northwest of Thitu Island,  
21 which is incidentally located just to the east of the  
22 feature that is reported to bear the name Sandy Cay.  
23 In our judgment, based on the available information,  
24 it appeared that that sand bar may remain above high  
25 water. And it is circled on the image on screen.  
26 Evidence provided by charting and sailing directions

1 on this point was, however, mixed.

2 A 12-nautical-mile line defined from the  
3 interpreted low-water line around that potentially  
4 above-high-water feature shows that Subi Reef may fall  
5 just within the 12-mile arc generated, hence our  
6 categorisation of Subi Reef as being wholly or very  
7 partially within the territorial limit in our  
8 categorisation in our report.

9 I do note that the Philippines takes the view that  
10 Subi Reef is located beyond the 12-mile limit from any  
11 above-high-tide feature. Here, if you will forgive  
12 me, I will offer you a traditional academic  
13 explanation and response, and that is that more  
14 research is needed.

15 I understand that in light of the uncertainty that  
16 we have highlighted here, and that you have also  
17 identified in your question last Friday, the  
18 Philippines has today commissioned new EOMAP imagery  
19 and analysis of the features to the north and  
20 northwest of Thitu Island. I am advised that the  
21 results of this fresh analysis will be furnished to  
22 the Tribunal as soon as they are received from EOMAP.  
23 And that, I would hope and anticipate, would clarify  
24 with a high degree of certainty whether or not  
25 Subi Reef does indeed fall wholly or partially within  
26 12 nautical miles of an above-high-water feature.

1           Turning to Sandy Cay, the feature of that name in  
2 this vicinity is located to the northwest of Thitu  
3 Island and a little way to the west of the feature  
4 that we identified as potentially having a small sand  
5 bar on it. This feature name appears on the  
6 United States NGA chart 93061B, dated  
7 16th October 1976, and this is on screen for you now.  
8 You can see with the arrow there is a small feature,  
9 and potentially an above-high-tide feature, called  
10 "Sandy Cay". However, on a more recent US NGA chart,  
11 no. 93044 dated 26th May 1984, the toponym "Sandy Cay"  
12 is absent. Similarly, there is no indication of any  
13 above-high-water feature of any of the string of reefs  
14 located to the north and northwest of Thitu Island.  
15 In our report, our assessment of the feature labelled  
16 as "Sandy Cay" on the 1976 US chart was that no part  
17 of the feature was above high water.

18           Question 11 concerns my research approach on  
19 charting issues. While the availability of charting  
20 from the United Kingdom in particular was used at the  
21 early stage of our analysis, this was supplemented by  
22 other sources, including the charting from the  
23 authorities which I mentioned in my statement last  
24 week. In this context, I had access to the  
25 comprehensive *Atlas* prepared by the Philippines

1 earlier this year in the writing of my own report.<sup>62</sup>

2 Here it is worth emphasising that the charts and  
3 supporting documentation, such as the sailing  
4 directions, represent a good starting point for  
5 assessment of the insular features of the South China  
6 Sea. The broad unanimity of charting authorities,  
7 including those of the United States and of Japan,  
8 I think is significant.

9 In short, the nautical charts and the sailing  
10 directions tell the very same story. This can in  
11 large part be explained not only by the harmonisation  
12 of the symbols and the methods of chart-making that  
13 are applicable to all national hydrographic offices  
14 thanks to the influence of the International  
15 Hydrographic Organization (the IHO). It is also the  
16 case that where once hydrographic survey information  
17 was treated as being highly sensitive and secret, and  
18 was closely held by different countries, this is not  
19 the case now.

20 The shared interest of all national charting  
21 agencies in safety of navigation and safety of life at  
22 sea means that it is now commonplace for charting  
23 authorities to share hydrographic information. These  
24 factors have led to an enhanced shared understanding  
25 among hydrographic agencies, charting agencies, of the

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<sup>62</sup> See SWSP, Vol. II.

1 relevant bathymetric and hydrographic information  
2 related to the features of the South China Sea and the  
3 particular area that we are dealing with, and, in  
4 a sense, a convergence of view among those charting  
5 authorities.

6 Finally, I come to question 12, in which you ask  
7 about our assessment of the two features that make up  
8 what are called Gaven Reefs or Gaven Reef. As the  
9 Tribunal notes, our analysis of high-resolution  
10 satellite imagery suggested the presence of several  
11 small islets located on Gaven Reefs, and these  
12 potentially could stand above high water. These are  
13 illustrated on the satellite image, circled on the  
14 satellite image for your attention on screen.

15 The counterpoint to this is that the nautical  
16 charting produced by China, the Philippines, the  
17 United States, the United Kingdom, are all consistent  
18 in indicating that Gaven Reefs are low-tide  
19 elevations. You can see a selection of excerpts from  
20 those relevant charting agencies on screen now, and  
21 they are all in agreement, using similar symbols and  
22 colours to depict the same message that this is  
23 a low-tide elevation.

24 Concerning the *Sailing Directions*, the Tribunal  
25 raised a particular query concerning those produced by  
26 the United States. Specifically the Tribunal requests

1 that I "address the implications" of the United States  
2 *Sailing Directions*, as well as the United States  
3 Defense Mapping Agency chart no. 93043, "insofar as  
4 those sources refer to the presence of a white sand  
5 dune approximately 2 metres above water at high tide".  
6 I am happy to elaborate on this point.

7 First, I respectfully submit that this is not what  
8 the US materials indicate, because the words "at high  
9 tide" are missing from the United States *Sailing*  
10 *Directions*. The relevant passage in the *Sailing*  
11 *Directions* reads as follows:

12 "Gaven Reefs ... is comprised of two reefs which  
13 cover at [high water] and lie 7 miles [west] and  
14 8.5 miles [west-northwest], respectively, of Namyit  
15 Island. They are the [southwest] dangers of Tizard  
16 Bank. The [north] of the two reefs is marked by  
17 a white sand dune about 2m high."<sup>63</sup>

18 I submit that the first sentence of this  
19 description of Gaven Reefs is critical. They "cover  
20 at HW", at high water. That is, they are entirely  
21 submerged at high tide. The implication here is that  
22 the subsequent mention of the "white sand dune about  
23 2m high" relates to the appearance of this feature at  
24 low tide, not high.

25 The conclusion in our report was that on the

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<sup>63</sup> See SWSP, Vol. II, p. 57.

1 balance of the available evidence, and particularly on  
2 the basis of the consistent depictions and  
3 descriptions of the features as low-tide elevations in  
4 the charting and supported by the sailing directions  
5 of multiple states, these two features -- or one  
6 feature, if we count them together -- the Gaven Reefs  
7 are low-tide elevations.

8 In our report we noted that, given the conflicting  
9 evidence, it was difficult to determine conclusively  
10 the status of the features on this reef.

11 I highlighted this issue to the Philippines team, and  
12 this has led to the Philippines commissioning further  
13 research on these features by way of EOMAP imagery and  
14 analysis. I understand that Professor Sands will  
15 elaborate on this shortly. I can report that the  
16 EOMAP analysis which I have seen offers clear  
17 confirmation that Gaven Reefs are low-tide elevations.  
18 That is my concluded view.

19 Mr President, distinguished members of the  
20 Tribunal, this brings me to the end of my  
21 presentation. My sincere thanks for the opportunity  
22 to address you.

23 **THE PRESIDENT:** Thank you very much indeed. **(Pause)**

24 I will now call on Professor Sands.

25 **(12.12 pm)**

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



1 **PROFESSOR SANDS:** Mr President, members of the Tribunal,  
2 it is my privilege to appear before you in this second  
3 round of the Philippines' oral arguments to address  
4 four questions posed by members of the Tribunal that  
5 fall within the scope of my submissions last week.  
6 They will address the entitlements of maritime  
7 features, and China's violations of the Philippines'  
8 sovereign rights in the EEZ.

9 I will address a question from last Wednesday  
10 morning; and then question 16, on the status of Gaven  
11 Reef under the Convention; and then questions 17 and  
12 18, which relate to Submissions 8 and 9.

13 Judge Wolfrum, last Wednesday morning you asked  
14 a question that caused me a minor perturbation. You  
15 suggested that I had used the words "land reclamation  
16 activities", which I thought I had not done, and  
17 indeed I did not do, upon checking.<sup>64</sup> I was very  
18 careful to refer to "island-building". And I used  
19 that expression precisely to avoid the kind of  
20 confusion that might arise if one sought to equate  
21 what China is doing with what the reasonable people of  
22 the Netherlands do in densely populated areas when  
23 they seek to extend their land mass.

24 The Philippines submits that what China is doing  
25 in the South China Sea is indeed properly described as

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<sup>64</sup> Hearing on the Merits, Edited Transcript, Day 2, p. 55, lines 13 to 17.

1 "island-building". "Land reclamation" assumes that  
2 a pre-existing land mass exists and is then extended,  
3 which is not the case here. As the Oxford Learner's  
4 Dictionary puts it, "land reclamation" is:

5 "... the process of turning land that is naturally  
6 too wet or too dry into land that is suitable to be  
7 built on [or] farmed ..."<sup>65</sup>

8 China is creating land where none has existed, and  
9 that is a very different activity.

10 In any event, and irrespective of terminology, the  
11 question rightly asks how the Philippines would treat  
12 such "activities on low-tide elevations which are in  
13 the 12-nautical-mile belt of the coast".<sup>66</sup> Our answer  
14 to that admirably focused question is clear: land  
15 reclamation (or whatever one wishes to call it) on  
16 a low-tide elevation does not and cannot change the  
17 status of that feature under the Convention.<sup>67</sup> This  
18 is because of the requirement, which is common to both  
19 Articles 13(1) and 121(1), that maritime features must  
20 be "naturally formed". A low-tide elevation  
21 artificially extended by land reclamation or  
22 island-building retains its status as a low-tide

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<sup>65</sup> See "Reclamation", *Oxford Learner's Dictionary*, available at <http://www.oxfordlearnersdictionaries.com/definition/english/reclamation> (accessed 28 Nov. 2015). Hearing on Merits, Annex 859.

<sup>66</sup> Hearing on the Merits, Edited Transcript, Day 2, p. 56, lines 3-8.

<sup>67</sup> *Ibid.*, p. 44, line 14 to p. 55, line 4.

1 elevation, but only in relation to that part that is  
2 naturally formed.

3 This follows from the first sentence of  
4 Article 13. As you can see on the screens, the  
5 language there refers to a "naturally formed area of  
6 land". Those words plainly exclude what might be  
7 called "unnaturally formed" land, which is what we  
8 have in this case.

9 The second sentence of Article 13(1) applies  
10 "[w]here a low-tide elevation is situated wholly or  
11 partly [beyond 12 miles] from the mainland or  
12 an island", and it provides that it is "that  
13 elevation" which may be used as a basepoint. The  
14 words "that elevation" refer to the low-tide elevation  
15 defined in the first sentence of Article 13(1); that  
16 is to say, an elevation that is "naturally formed".<sup>68</sup>  
17 Unnatural formations, we say, count for nothing.

18 In your question, Judge Wolfrum, you used the  
19 example of the Netherlands, making the point that:

20 "... nobody has ever argued that the land gained  
21 from the sea is not part of the Dutch territory."<sup>69</sup>

22 We spent some time over this fine weekend looking  
23 into the question of reclamation in the Netherlands.

24 And here I use the word "reclamation" because it does

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<sup>68</sup> UNCLOS, Article 13.

<sup>69</sup> Hearing on the Merits, Edited Transcript, Day 2, p. 55 lines, 18-22.

1 describe the situation, which is completely different  
2 from that of the South China Sea, as you will now see  
3 on a map.

4 The map on your screens depicts Dutch land  
5 reclamation since the 18th century. You will notice  
6 that the vast majority of activity is landward of the  
7 Dutch coastline; that is to say, it is internal land  
8 reclamation that does not seek to extend Dutch  
9 territory into the territorial sea, let alone seek to  
10 reclaim land at a distance of 500 miles from the  
11 Netherlands. It transforms internal waters, that are  
12 already under the sovereignty of the coastal state  
13 under Article 2(1) of the Convention, into land.

14 There is also a different sort of Dutch activity  
15 which extends the Dutch land mass seaward. The  
16 largest reclamation project of this kind that we could  
17 find is the Maasvlakte 2 project, which extends the  
18 Port of Rotterdam. In our view, this type of land  
19 reclamation is governed by Article 11 of the  
20 Convention, by which:

21 "... the outermost permanent harbour works which  
22 form an integral part of the harbour system are  
23 regarded as forming part of the coast."<sup>70</sup>

24 This provision of course was considered by the  
25 International Court in the *Black Sea* case, where it

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<sup>70</sup> UNCLOS, Article 11.

1 had to determine whether the seaward end of Sulina  
2 Dyke, a manmade structure, could be used as a  
3 basepoint in that case. The International Court found  
4 "no convincing evidence ... that [the] dyke serves any  
5 direct purpose in port activities", and as a result  
6 the seaward end of the dyke was disregarded by the  
7 court for the purposes of the delimitation.<sup>71</sup>

8 It is therefore conceivable that, provided the  
9 Maasvlakte 2 extension "serves [a] direct purpose" in  
10 the port activities of Rotterdam, it could  
11 theoretically be used as a basepoint in accordance  
12 with Article 11. But of course in this case we are  
13 not concerned in any way with basepoints; you are not  
14 called upon to fix any basepoints.

15 The Dutch situation is not in any way comparable  
16 with what is going on in this case. In all the places  
17 where China has undertaken island-building, there was  
18 no land, no ports, no population, and indeed nothing  
19 that can properly be described as "territory" to begin  
20 with. As your question suggests at its end, you  
21 really cannot compare the two: the land territory of  
22 the Netherlands on the one hand, and a low-tide  
23 elevation situated about 500 miles from the land  
24 territory of China on the other.

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<sup>71</sup> *Maritime Delimitation in the Black Sea (Romania v Ukraine)*, Merits, Judgment, ICJ Reports 2009, paras. 138-139. MP, Vol. XI, Annex LA-33.

1           The academic commentary on this subject, we say,  
2           is completely consistent and supportive of the  
3           Philippines' position. Artificially enlarging  
4           an Article 121(3) rock cannot transform it into  
5           a fully fledged island entitled to an EEZ and  
6           continental shelf. We refer to one notable authority  
7           who says, to take his words, that Article 121(3):

8           "... would not allow a state to expand the area of  
9           a rock and make it habitable and economically viable  
10          by artificial extension."<sup>72</sup>

11          I turn to question 16, which pertains to Gaven  
12          Reef, just described by Professor Schofield, a feature  
13          that we say is a low-tide elevation within the meaning  
14          of Article 13 of the Convention. You have just heard  
15          Professor Schofield tell you that he agrees with the  
16          Philippines that Gaven Reef is indeed a low-tide  
17          elevation, and he has addressed you on the relevant  
18          parts of his report and the recent high-resolution  
19          satellite imagery.

20          Before turning to the US *Sailing Directions* and  
21          the chart identified by the Tribunal, might I make  
22          an observation of a general nature?

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<sup>72</sup> International Law Commission, "260th Meeting" (2 July 1954), in *Yearbook of the International Law Commission 1954*, Vol. I (1954), p. 93. Hearing on Merits, Annex LA-308; B. Kwiatkowska and A. H.A. Soons, "Entitlement to Maritime Areas of Rocks Which Cannot Sustain Human Habitation or Economic Life of their Own", *Netherlands Yearbook of International Law*, Vol. 21 (1990), p. 169. MP, Vol. XI, Annex LA-132.

1           As I explained on Wednesday morning, Gaven Reef  
2       lies 200.1 miles from Palawan -- that is to say, just  
3       beyond the limit of the Philippines' EEZ -- and it is  
4       only 6.3 miles from Namyit Island, a small rock under  
5       Article 121(3), a rock which is occupied by Vietnam.<sup>73</sup>  
6       The close proximity of Gaven Reef to Namyit Island  
7       triggers the second sentence of Article 13(1), and  
8       this means that Gaven Reef can be used as a basepoint  
9       for the purpose of measuring the outer limit of the  
10      12-mile territorial sea of Namyit Island.<sup>74</sup> Even if,  
11      hypothetically, Gaven Reef is above water at high  
12      tide -- and we say it is not -- and falls within the  
13      definition of a "rock" in Article 121(3), it would  
14      only be entitled to a 12-mile territorial sea, but no  
15      more than that.

16           The crucial point is that regardless of its status  
17      under the Convention, whether as a low-tide elevation  
18      under the second sentence of Article 13(1) or as  
19      a rock under Article 121(3), the entitlement generated  
20      as a result of Gaven Reef's status would not change.  
21      As a low-tide elevation, Gaven Reef would extend the  
22      12-mile territorial sea of Namyit. In the  
23      alternative, ignoring all the evidence to the  
24      contrary, if we imagine that Gaven Reef is a rock, it

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<sup>73</sup> Hearing on the Merits, Edited Transcript, Day 2, p. 31, lines 7-14.

<sup>74</sup> *Ibid.*, p. 34, lines 1-19.

1 would be entitled to a 12-mile territorial sea of its  
2 own. Because there is no other low-tide elevation  
3 within 12 miles, in either case the spatial extent of  
4 the entitlement generated by Gaven Reef would be  
5 identical, and it would not be entitled to an EEZ or  
6 continental shelf.

7 The Tribunal's question invites the Philippines to  
8 address the implications of the US *Sailing Directions*  
9 and US chart no. 93043:

10 "... insofar as [they] refer to the presence of  
11 a white sand dune approximately 2 metres above the  
12 water at high tide." <sup>75</sup>

13 As Professor Schofield has noted, we see the words  
14 "above water at high tide" at the end of the  
15 Tribunal's question. But after reviewing the *Sailing*  
16 *Directions* and the chart, we submit that a proper  
17 reading does not provide evidence of the existence of  
18 "a white sand dune" that is "above ... water at high  
19 tide". <sup>76</sup>

20 Taking the US *Sailing Directions* first, the  
21 relevant passage is on your screens. <sup>77</sup> It is true

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<sup>75</sup> Letter from the Permanent Court of Arbitration to the Parties dated 27 November 2015, Annex A - Questions for the Philippines to Address in Second Round, Question 16 (emphasis added).

<sup>76</sup> *Ibid.*

<sup>77</sup> United States National Geospatial-Intelligence Agency, Pub. 161 *Sailing Directions (Enroute), South China Sea and The Gulf of Thailand* (13th ed., 2011) (MP, Annex 233).



1 that there is a reference to a white sand dune, and  
2 the third sentence says that it is 2 metres high. But  
3 the *Sailing Directions* does not say that the sand dune  
4 is "above water at high tide"; in fact, it says the  
5 opposite. The first sentence states without ambiguity  
6 that both reefs are covered by water at high tide.  
7 The white sand dune mentioned in the third sentence is  
8 properly read as a reference to its situation at less  
9 than high water.

10 Both the Philippines and Chinese *Sailing*  
11 *Directions* support this interpretation. The  
12 Philippine *Coast Pilot* explains that Gaven Reefs  
13 "cover at [high water]", and the Chinese *Sailing*  
14 *Directions* states explicitly that, "these rocks are  
15 all submerged by seawater".<sup>78</sup> And these are the  
16 words, we say, that dominate.

17 I turn to US chart no. 93043, referred to in the  
18 Tribunal's question. You can see it on your screens.  
19 You can now see the datum for the chart; it is  
20 highlighted. This is based on a Japanese survey  
21 undertaken in 1936 and 1937. As to the heights --  
22 this is significant -- these are expressed in "metres

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<sup>78</sup> Philippine National Mapping and Resource Information Agency, *Philippine Coast Pilot* (6th ed., 1995) (MP, Annex 231); Navigation Guarantee Department of the Chinese Navy Headquarters, *China Sailing Directions: South China Sea* (A103) (2011) (SWSP, Annex 232(bis)) (emphasis added).

1 above mean sea level".<sup>79</sup> Mean sea level is not the  
2 same as high tide; it is a lower level. It cannot  
3 therefore be concluded on the basis of this chart --  
4 an old chart of about 80 years of age -- that any part  
5 of Gaven Reef is above water at high tide.

6 Mr President, we have already pointed out that  
7 under Article 5 of the 1982 Convention, "large-scale  
8 charts officially recognised by the coastal State" is  
9 the prescribed means by which the breadth of the  
10 territorial sea is measured.<sup>80</sup> In the case of Gaven  
11 Reef, as Professor Schofield has pointed out, official  
12 charts of the Philippines, China, the UK, Vietnam,  
13 Japan, Russia and the US are all in agreement: it is  
14 a low-tide elevation. But for final proof, let's just  
15 turn to the EOMAP analysis for confirmation of this.

16 On your screens, you can see the US chart referred  
17 to by the Tribunal in its question and, in the red  
18 circle on the left-hand side, the small protrusion  
19 1.9 metres in height on the northeast edge of the  
20 northern reef. You can see a small black triangle  
21 with purple numbering in brackets.

22 On the right side of your screens, you can see the  
23 EOMAP analysis alongside, and this is at lowest

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<sup>79</sup> United States Defense Mapping Agency, Chart No. 93043 (Tizard Bank South China Sea), 1950. Annex NC51.

<sup>80</sup> Hearing on the Merits, Edited Transcript, Day 2, p. 41, lines 9-16.

1 astronomical tide. In the right-hand corner, just  
2 above the orange, you can see depicted a small  
3 protrusion, which is between 0.5 and 1 metre above  
4 water, in exactly the same location. It is very, very  
5 tiny, but in the middle of that red circle on the  
6 right-hand side is a tiny orange pinprick, and that is  
7 the feature that is referred to on the chart 93043.

8 This is Gaven Reef at high water. As you can see  
9 now in blue, the EOMAP analysis shows that the small  
10 protrusion is no longer above water. That is the  
11 final confirmation we say that you need that this is  
12 a low-tide elevation. This image is at tab 5.5.

13 Mr President, members of the Tribunal, the charts,  
14 the *Sailing Directions* and the satellite imagery  
15 relating to Gaven Reef are all consistent. Properly  
16 interpreted, we say the evidence as a whole  
17 conclusively demonstrates that no part of Gaven Reef  
18 is above water at high tide. There is, therefore,  
19 before you no evidence to show that any part of Gaven  
20 Reef is above water at high tide. Without such  
21 evidence, you are not in a position to conclude  
22 differently than all the evidence you have before you.  
23 Gaven Reef is, as we have said previously, properly to  
24 be characterised as a low-tide elevation.

25 This takes me to question 17, which asks whether  
26 Article 56(2) of the 1982 Convention would require the

1 Philippines to respect China's "historic rights",  
2 assuming such rights to exist and assuming that they  
3 predate the Convention. That assumption is  
4 a significant one, and one that is not supported by  
5 the facts or the law: China has no "historic rights"  
6 in the Philippines' EEZ, as we set out last week.<sup>81</sup>

7 Let's assume, however, contrary to all the  
8 evidence before you and all the law that is before  
9 you, that *quod non* China did have "historic rights"  
10 that predated the 1982 Convention. As we set out in  
11 our Memorial at paragraphs 4.28 to 4.80, such rights  
12 could not in any event supersede the terms of the  
13 Convention.<sup>82</sup>

14 The limits on the rights that may be exercised in  
15 the EEZ are fully and comprehensively set out in  
16 Part V of the Convention by means that are universally  
17 accepted and reflect rules of general international  
18 law.<sup>83</sup> There is no provision of Part V that allows  
19 any so-called "historic rights" to be there claimed or  
20 exercised.

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<sup>81</sup> Hearing on the Merits, Edited Transcript, Day 1, p. 12, line 4 to p. 97, line 22; Hearing on the Merits, Edited Transcript, Day 2, p. 1, line 10 to p. 13, line 10.

<sup>82</sup> MP, paras. 4.28-4.80.

<sup>83</sup> MP, para. 4.42; *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Merits, Judgment, ICJ Reports 2012, paras. 118, 139, 174, 177, 182. MP, Vol. XI, Annex LA-35; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*, Merits, Judgment, ICJ Reports 2001, p. 91, paras. 167, 185, 195, 201. MP, Vol. XI, Annex LA-26.

1           This is apparent by comparing the texts of  
2           Article 2(3) in Part II of the Convention, which  
3           applies to the territorial sea and contiguous zone,  
4           with that of Article 56(2), which governs the EEZ. As  
5           you can see on the screens, Article 2(3) provides  
6           that:

7           "The sovereignty over the territorial sea is  
8           exercised subject to this Convention and to other  
9           rules of international law."

10          Now contrast this with the text of Article 56(2),  
11          which provides that, in exercising rights and  
12          performing duties:

13          "... the coastal State shall have due regard to  
14          the rights and duties of other States and shall act in  
15          a manner compatible with the provisions of this  
16          Convention."

17          The two provisions are different, and they are  
18          different for a reason. In accordance with  
19          Article 2(3), sovereignty over the territorial sea is  
20          "subject to", *inter alia*, "other rules of  
21          international law". With regard to the words "subject  
22          to the Convention", Part II of the Convention includes  
23          references to "so-called 'historic' bays", in  
24          Article 10(6), and "historic title", in Article 15, in  
25          relation to delimitation of the territorial sea. By  
26          contrast, Part V makes no reference at all to

1 "historic title" or rights or claims of a "historic"  
2 nature.

3 With regard to the words "and other rules of  
4 international law" in Article 2(3), where the drafters  
5 wanted to incorporate "other rules of international  
6 law", they did so expressly. See, for example,  
7 Article 87(1), where those words are included in  
8 relation to high seas freedoms; and see Article 58(3),  
9 where the laws and regulations of the coastal state in  
10 the EEZ are to be exercised "in accordance with the  
11 Convention and other rules of international law  
12 insofar as they are not incompatible with [Part V]".

13 Article 56(2), on the other hand, makes the rights  
14 and obligations of the coastal state in the EEZ, and  
15 Part V more generally, subject to "the provisions of  
16 the Convention" only. There's no reference in 56(2)  
17 to "other rules of international law" because Part V  
18 of the Convention, like Part VI relating to the  
19 continental shelf, is a comprehensive regulatory  
20 regime.

21 It is also important to note the broader context  
22 in which the obligation to have "due regard to the  
23 rights and duties of other States" in 56(2) appears.  
24 The obligation to have "due regard" in 56(2) is not  
25 a reference to rights and duties of other states in  
26 general, but rather a reference to the specific rights

1 and duties set out in Article 58. These do not  
2 include fishing rights.

3 Article 55 of the Convention is also instructive.  
4 It provides that:

5 "... the rights and jurisdiction of the coastal  
6 State and the rights and freedoms of other States are  
7 governed by the relevant provisions of this  
8 Convention."<sup>84</sup>

9 Again, there is no mention made of "other rules of  
10 international law". This is because, we say, Part V  
11 does not incorporate a reference to any rules or  
12 obligations beyond those in the Convention itself.

13 Article 62(3), which is also in Part V of the  
14 Convention, refers to access to the EEZ of one state  
15 by nationals of other states that have "habitually  
16 fished" in the EEZ of the coastal state. This is one  
17 of a non-exhaustive list of factors to be taken into  
18 account by the coastal state in considering whether to  
19 give other states access to the natural resources in  
20 the EEZ. The requirement to "take into account"  
21 habitual fishing is strictly limited in the manner  
22 prescribed by 62(3). There is a world of difference  
23 between China's claim to so-called "historic rights",  
24 on the one hand, and "habitual fishing" on the other.

25 To interpret 56(2) as China might wish -- that is,

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<sup>84</sup> UNCLOS, Article 55.

1 to allow unsubstantiated and wholly novel "historic  
2 rights" -- would be to read into the Convention rights  
3 (and obligations) the drafters plainly decided to  
4 exclude. Moreover, it would have the perverse effect  
5 of rendering superfluous the reference to nationals  
6 that have "habitually fished" in Article 62(3).

7 Finally, for the avoidance of all doubt, the  
8 question of whether the rights of the coastal state in  
9 the EEZ might be subject to historic fishing rights  
10 has been considered and rejected by the International  
11 Court of Justice -- at least by a Chamber -- in the  
12 *Gulf of Maine* case.<sup>85</sup> The case predates the entry  
13 into force of the 1982 Convention, but the Chamber  
14 carefully examined the Convention's provisions on the  
15 EEZ, which it found to be "consonant" with general  
16 international law.<sup>86</sup>

17 The United States argued that it had historic  
18 fishing rights -- a claim that is far narrower than  
19 the claim apparently now made by China -- and that  
20 those rights prevailed over Canada's 200-mile  
21 exclusive fisheries zone. However, the Chamber ruled  
22 that although the waters in question had previously  
23 been "freely open" to US fishermen, Canada's 200-mile

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<sup>85</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)*, Judgment, ICJ Reports 1984. MP, Vol. XI, Annex LA-12.

<sup>86</sup> *Ibid.*, para. 94.



1 fishery zone had "radically altered" the situation,  
2 and:

3 "... the area was transformed into a situation of  
4 legal monopoly to the extent that the localities in  
5 question became legally part of [Canada's] exclusive  
6 fishery zone."<sup>87</sup>

7 Any notion of US historic fishing rights was not  
8 compatible with the regime established by Part V of  
9 the 1982 Convention. If the limited US historic  
10 fishing rights are not compatible with Canada's EEZ  
11 rights, then China's far more far-reaching so-called  
12 "historic rights" cannot possibly be compatible with  
13 the Philippines' sovereign rights in the EEZ.

14 Finally, question 18 addresses the Philippines'  
15 ninth submission: China's failure to prevent its  
16 nationals and vessels from exploiting the living  
17 resources in the Philippines' EEZ. China's purported  
18 grant of rights to its nationals and vessels to fish  
19 in this EEZ is plainly contrary to its obligations  
20 under the 1982 Convention.<sup>88</sup> The Tribunal's question  
21 goes to the scope of the duty imposed on a flag state  
22 under the 1982 Convention, and the consequences of  
23 non-compliance.

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<sup>87</sup> *Ibid.*, para. 235.

<sup>88</sup> MP, p. 272; SWSP, paras. 5.7; 9.13; Hearing on Jurisdiction and Admissibility, Final Amended Transcript, Day 2, pp. 140-141; Hearing on the Merits, Edited Transcript, Day 2, p. 160, line 7 to p. 162, line 4.

1           With regard to the scope of the obligation, the  
2           Philippines is asked to indicate how much due  
3           diligence China is "obliged to exercise".<sup>89</sup> As  
4           I explained last week, China has an obligation:

5           "... acting in good faith, to take measures  
6           necessary to prevent [its] nationals from exploiting  
7           the living resources in the EEZ of another State  
8           party."<sup>90</sup>

9           The scope of the duty encompasses actions that  
10          are, as we put it:

11          "... reasonably necessary to give full effect to  
12          the exclusive rights of the coastal state conferred by  
13          Article 56."<sup>91</sup>

14          The Tribunal's question appears to acknowledge --  
15          rightly, we say -- that under the Convention the flag  
16          state is obliged to exercise a measure of due  
17          diligence in ensuring that vessels under its control  
18          do not exploit the living resources of another state's  
19          EEZ. The first two questions put to ITLOS in the  
20          recent *Fisheries Advisory Opinion* are particularly  
21          instructive on this issue.<sup>92</sup>

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<sup>89</sup> Letter from the Permanent Court of Arbitration to the Parties dated 27 November 2015, Annex A - Questions for the Philippines to Address in Second Round, Question 18.

<sup>90</sup> Hearing on the Merits, Edited Transcript, Day 2, p. 160, lines 16-18.

<sup>91</sup> *Ibid.*, p. 161, lines 11-13.

<sup>92</sup> *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, ITLOS, Advisory Opinion of 2 April 2015. Annex LA-224.

1           The *Fisheries Advisory Opinion* recognises that the  
2 coastal state bears the "responsibility for the  
3 conservation and management of living resources" in  
4 the EEZ.<sup>93</sup> Under Article 61 of the Convention, it is  
5 the coastal state that determines the allowable catch;  
6 and only if it does not have the capacity to harvest  
7 the entire allowable catch is it required, pursuant to  
8 Article 62, to give other states access to any  
9 surplus.

10           ITLOS determined that the coastal state has:

11           "... the primary responsibility for taking the  
12 necessary measures to prevent, deter and eliminate IUU  
13 fishing."<sup>94</sup>

14           However, ITLOS emphasised that this "does not  
15 release other states from their obligations".<sup>95</sup> ITLOS  
16 advised that, firstly, Article 62(4):

17           "... imposes an obligation on States to ensure  
18 that their nationals engaged in fishing activities in  
19 the [EEZ] of a coastal State comply with the ... terms  
20 and conditions established in its laws and  
21 regulations."<sup>96</sup>

22           And secondly, it follows from Articles 58(3),

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<sup>93</sup> *Ibid.*, para. 104.

<sup>94</sup> *Ibid.*, para. 106.

<sup>95</sup> *Ibid.*, para. 108.

<sup>96</sup> *Ibid.*, para. 123.

1 62(4) and 192 of the Convention that:

2 "... flag States are obliged to take the necessary  
3 measures to ensure that their nationals and vessels  
4 flying their flag are not engaged in IUU fishing  
5 activities."<sup>97</sup>

6 Taking these findings and applying them to the  
7 present dispute, we say that China has  
8 a responsibility to ensure that its nationals and  
9 vessels do not engage in fishing within the  
10 Philippines' EEZ. In the *Fisheries Opinion*, ITLOS  
11 adopted the definition of "responsibility to ensure"  
12 set out in the *Advisory Opinion* it had given on  
13 *Activities in the Area*.<sup>98</sup> In that case, the ITLOS  
14 Seabed Disputes Chamber held that:

15 "The sponsoring State's obligation 'to ensure'  
16 is..."

17 And these are the crucial words:

18 "... an obligation to deploy adequate means, to  
19 exercise best possible efforts, to do the utmost, to  
20 obtain this result. To utilize the terminology  
21 current in international law, this obligation may be  
22 characterized as an obligation 'of conduct' and not  
23 'of result', and as an obligation of 'due diligence'.

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<sup>97</sup> *Ibid.*, para. 124.

<sup>98</sup> *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. Annex LA-243.

1           "The notions of obligations 'of due diligence' and  
2 obligations 'of conduct' are connected. This emerges  
3 clearly from the Judgment of the ICJ in the *Pulp Mills*  
4 [case] ..."<sup>99</sup>

5           ITLOS has held that while the nature of the laws,  
6 regulations and measures to be adopted are to be left  
7 to the flag state, there is:

8           "... [an] obligation to include in them  
9 enforcement mechanisms to monitor and secure  
10 compliance with these laws and regulations.  
11 Sanctions ... must be sufficient to deter  
12 violations ..."<sup>100</sup>

13           In the context of environmental pollution, in his  
14 submissions Professor Boyle referred last week to the  
15 "vigilance" standard set by the ICJ in *Pulp Mills* and  
16 the "due diligence" obligation enumerated by the ITLOS  
17 Chamber in the *Advisory Opinion on Activities in the*  
18 *Area*.<sup>101</sup> Those standards, we say, are equally  
19 applicable to China's obligation under the Convention  
20 to prevent its vessels and nationals from fishing in  
21 the Philippines' EEZ.

22           Instead of adopting measures to prevent fishing,

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<sup>99</sup> *Ibid.*, paras 110-111.

<sup>100</sup> *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, ITLOS, Advisory Opinion of 2 April 2015, para. 138. Annex LA-224.

<sup>101</sup> Hearing on the Merits, Edited Transcript, Day 3, p. 33, lines 6-12.

1 Chinese authorities have actively encouraged illegal  
2 and unregulated fishing by Chinese vessels in the  
3 Philippines' EEZ.<sup>102</sup> In circumstances in which China  
4 has explicitly authorised its own vessels to engage in  
5 fishing activities in the EEZ of the Philippines, it  
6 simply cannot be said that China has "deployed  
7 adequate means" to prevent such fishing activity. Nor  
8 can it be said that China has "exercise[d] best  
9 possible efforts" to prevent illegal and unregulated  
10 fishing activities. And it certainly cannot be said  
11 that China has done "the utmost, to obtain [the]  
12 result" that its vessels shall not fish in the  
13 Philippines' EEZ.

14 Turning to the consequences of non-compliance,  
15 I can be brief. Professor Boyle has already explained  
16 that China is not *per se* responsible for the actions  
17 of its fishermen, "but it is responsible for its own  
18 failure to control their illegal and damaging  
19 activities".<sup>103</sup> Having authorised its fishermen to  
20 fish in the waters of the Philippines' EEZ -- you will  
21 recall the references last week to the so-called

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<sup>102</sup> MP, paras. 1.49; 3.26; 3.59-3.67; 4.90; 5.62; 5.65; 6.36-6.37; 6.63-6.65

<sup>103</sup> Hearing on the Merits, Edited Transcript, Day 3, p. 33, lines 13-15. 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 February 2011, ITLOS Reports 2011, para. 146. Annex LA-243.

1 "cabbage strategy"<sup>104</sup> -- China cannot possibly claim  
2 that it is not responsible for a failure to control  
3 the activities of those fishermen.

4 ITLOS has determined that the ILC Draft Articles  
5 on State Responsibility reflect general rules of  
6 international law that are relevant to determine to  
7 what extent the flag state is to be held liable for  
8 illegal and unregulated fishing activities by vessels  
9 sailing under its flag. By authorising these fishing  
10 activities, China has failed to take any measures to  
11 meet its obligations to ensure that its fishermen and  
12 vessels do not engage in illegal and unregulated  
13 fishing. It has committed internationally wrongful  
14 acts, and it is internationally responsible for those  
15 acts.<sup>105</sup> By reference to the rule reflected in  
16 Article 30 of the ILC Articles, China is under  
17 an obligation to cease its wrongful acts and to offer  
18 appropriate assurances and guarantees of  
19 non-repetition.

20 Mr President, members of the Tribunal, I thank you  
21 for your kind attention. That concludes my  
22 submissions. I hope it deals fully with the questions  
23 posed, but of course if there are more questions, we

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<sup>104</sup> Hearing on the Merits, Edited Transcript, Day 3, p. 80, lines 19 to page 81, line 22.

<sup>105</sup> Draft Article of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts, Article 1.

1 stand ready to provide further assistance.

2 **THE PRESIDENT:** Thank you very much. Thank you very much  
3 indeed. So we will now call on Professor Oxman.

4 **(12.44 pm)**

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

6 **PROFESSOR OXMAN:** Thank you, Mr President. It is  
7 an honour to appear again before this distinguished  
8 Tribunal.

9 Today I propose to address the question posed by  
10 Judge Wolfrum at the end of my speech on the first  
11 day. This will be followed by the responses to  
12 questions 11 and 26. There are therefore several  
13 natural breaks where I can stop if we decide to break  
14 for lunch.

15 Mr President, at the end of my speech last  
16 Tuesday, Judge Wolfrum raised the question of whether  
17 I meant to say that the Law of the Sea Convention  
18 excludes all claims to control the sea that are not  
19 permitted by the Convention. The answer is: yes.  
20 Judge Wolfrum noted that I had already indicated some  
21 reasons for reaching that conclusion, and I will  
22 therefore limit myself to just a few observations.

23 The preamble of the Convention opens with the  
24 statement of the desire to settle "all" issues of the  
25 law of the sea. It then refers to the establishment  
26 "through this Convention" of "a legal order for the



1 seas and oceans". The reference to a single legal  
2 order in that context is evident on its face. The  
3 preamble concludes with the statement that:

4 "matters not regulated by this Convention continue  
5 to be governed by the rules and principles of general  
6 international law."

7 The members of the Tribunal will not be surprised  
8 to learn that many countries would have preferred no  
9 general reference to international law at all. They  
10 compromised on this text because the legal validity of  
11 all claims to control the sea is regulated by the  
12 Convention.

13 In this connection, Article 293 provides that only  
14 rules of international law that are not incompatible  
15 with the Convention may be applied. It follows from  
16 this that prior claims, even if they were at one time  
17 permitted by rules of international law, do not  
18 survive if those claims, and therefore the rules  
19 permitting such claims, are incompatible with the  
20 Convention.

21 The uncertainty and disputes surrounding prior  
22 claims to control the sea were at the heart of the  
23 decision to undertake the negotiation of a new and  
24 comprehensive Convention on the Law of the Sea. The  
25 question that Judge Wolfrum poses was at the forefront  
26 of everyone's mind. The purpose of the Convention was

1 to provide a definitive and widely accepted legal  
2 basis for determining the extent, if any, to which all  
3 claims to control the sea, whether prior or  
4 subsequent, are lawful. And it did so; in  
5 extraordinary detail, I might add. None of the  
6 parties that made well-known claims that were  
7 contested prior to the conclusion of the Convention  
8 has taken any other position. The Latin American  
9 parties to the Convention, some of which had 200-mile  
10 territorial sea claims, have adjusted or reinterpreted  
11 their prior claims to conform to the Convention.<sup>106</sup>  
12 Indonesia and the Philippines, both of which had prior  
13 claims with respect to their archipelagos, have done  
14 likewise with respect to their archipelagic claims.

15 China itself made quite clear that it regarded the  
16 Law of the Sea Convention as setting forth a new order  
17 for the seas that was to replace the preceding order  
18 that China regarded as unfair to developing  
19 countries.<sup>107</sup> Many developing countries shared that  
20 point of view for procedural reasons, namely that they

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<sup>106</sup> See generally Hugo Caminos, "Harmonization of Pre-Existing 200-Mile Claims in the Latin American Region with the United Nations Convention on the Law of the Sea and Its Exclusive Economic Zone" in *University of Miami Inter-American Law Review*, Vol. 30, No. 9 (1998). MP, Vol. XI, Annex LA-138.

<sup>107</sup> UN Conference on the Law of the Sea III, Plenary, *191st Meeting*, UN Doc. A/CONF.62/SR.191 (9 Dec. 1982), paras. 18-26. Supplemental Documents, Vol. VI, Annex LA-250; UN Conference on the Law of the Sea III, Second Committee, *25th Meeting* UN Doc. A/CONF.62/SR.25 (2 July 1974), paras. 11-22. Supplemental Documents, Vol. VI, Annex LA-295.

1 had had a limited -- if any -- ability to influence  
2 the content and development of the prior law of the  
3 sea, as well as for substantive reasons, namely that  
4 the content of the prior law did not adequately  
5 reflect their interests. These factors made  
6 developing countries particularly sceptical of claims  
7 based on history.

8 This is what China said at the critical formative  
9 session of the Conference in 1974:

10 "[T]he Asian, African and Latin American peoples  
11 had long suffered from aggression and plunder at the  
12 hands of the colonialists and imperialists and,  
13 accordingly, their determination to see a territorial  
14 sea established together with an exclusive economic  
15 zone up to 200 nautical miles was entirely proper and  
16 reasonable."<sup>108</sup>

17 China went on to state that even the proposal to  
18 allow foreign states to fish within the exclusive  
19 economic zone where the coastal state did not harvest  
20 100% of the allowable catch, in China's words, "made  
21 no sense".<sup>109</sup> Quite to the contrary, China proposed  
22 that:

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<sup>108</sup> U.N. Conference on the Law of the Sea III, Second Committee, *Summary records of the 24th Meeting*, U.N. Doc. A/CONF.62/C.2/SR.24 (1 Aug. 1974), para. 1. Hearing on Merits, Annex LA-324. See also *id.* ("Their position, which reflected an irreversible trend of the times, had won widespread support; even the two super-Powers had had to recognize in words the concept of economic zone.")

<sup>109</sup> *Id.*, para. 2.

1            "[t]he coastal State should be permitted to decide  
2 whether foreign fishermen were allowed to fish in the  
3 areas under its jurisdiction by virtue of bilateral or  
4 regional agreements, but it should not be obliged to  
5 grant other States any such rights."<sup>110</sup>

6            China continued:

7            "To place restrictions on coastal State  
8 sovereignty over the resources of the economic zone or  
9 on coastal State jurisdiction was to deny the  
10 'exclusive' nature of that zone and was absolutely  
11 impermissible."<sup>111</sup>

12           Mr President, there was not the slightest  
13 intimation in this or any other articulation of  
14 China's position during the negotiation of the  
15 Convention that any qualification of the exclusive  
16 sovereign rights of the coastal state over the natural  
17 resources of the exclusive economic zone, on the  
18 grounds of historic rights or otherwise, was  
19 contemplated. In China's words, this was "absolutely  
20 impermissible".<sup>112</sup>

21           No one, Mr President -- not China or anyone  
22 else -- suggested that we reach back to ancient  
23 empires as a source of rights to the sea. In the view

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*, para. 6.

<sup>112</sup> *Id.*

1 of the overwhelming majority of states, the purpose of  
2 the Convention was to discard the privileges of  
3 empire, not to perpetuate them.

4 The position that the Convention is the exclusive  
5 basis for determining the legality of claims to  
6 control the sea is clearly reflected in its final  
7 clauses. I might note that the final clauses were  
8 negotiated under the direct authority of the president  
9 of the Conference, with the participation of senior  
10 representatives of states.

11 Article 309 prohibits reservations. Article 310  
12 permits a state to reinterpret prior claims in order  
13 to conform to the Convention, but that is all. An  
14 Article 310 declaration may not purport to exclude or  
15 modify the legal effect of the provisions of the  
16 Convention in their application to that state, as the  
17 International Court of Justice in the *Black Sea* case  
18 explains with very swift dispatch.<sup>113</sup> Under Article  
19 311, even claims that may have been consistent with  
20 the 1958 Conventions, or with other prior agreements,  
21 are superseded in the event of inconsistency between  
22 the prior agreements and the Law of the Sea  
23 Convention.

24 These final clauses, Mr President, would be devoid

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<sup>113</sup> *Maritime Delimitation in the Black Sea (Romania v Ukraine)*, Merits, Judgment, ICJ Reports 2009, p. 78, para. 42. MP, Vol. XI, Annex LA-33.

1 of sense if prior claims to control the sea were not  
2 superseded by the Convention.

3 Before concluding my response to Judge Wolfrum's  
4 question, let me add that I am not here addressing  
5 rights and duties arising from the *jus ad bellum* and  
6 the *jus in bello*, which have classically been regarded  
7 as forming a separate body of law that supplants  
8 ordinary peacetime rules. The relationship between  
9 the two bodies of law is a complex one, in general and  
10 in the particular context of the Convention on the Law  
11 of the Sea, as Judge Wolfrum himself makes clear in  
12 his seminal essay on the subject.<sup>114</sup>

13 In question 11, the Tribunal invites the  
14 Philippines to address whether China participated in  
15 the formation of the international law of the sea from  
16 the 15th century up to the beginning of the  
17 20th century and the implications, if any, of China's  
18 role during this period of development for  
19 international law.

20 China's influence over the formation of the modern  
21 international law of the sea during the 500 years in  
22 question was significantly limited by three factors.

23 First, for much of that period, China

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<sup>114</sup> See generally Rüdiger Wolfrum, "Military Activities on the High Seas: What Are the Impacts of the UN Convention on the Law of the Sea?", in *The Law of Armed Conflict: Into the Next Millennium, International Law Studies* (Schmitt et al., eds. 2003). Hearing on Merits, Annex LA-327.

1 intentionally cut itself off from maritime trade and  
2 communications, thus effectively withdrawing itself  
3 from the process of shaping international maritime  
4 law. Of course we all know that at the start of the  
5 15th century, China's position is illustrated by the  
6 decisions of the Emperor to send Admiral Zheng He on  
7 a series of cruises along the western edge of the  
8 South China Sea and well beyond.<sup>115</sup> But shortly after  
9 Zheng He's voyages, China's maritime activities were  
10 suppressed, and that continued for the remaining two  
11 centuries of the Ming Dynasty.<sup>116</sup> Indeed, it is  
12 reported that "much of the Chinese fleet [was] burned  
13 or destroyed" shortly after Zheng He's last voyage.<sup>117</sup>

14 When the Qing Dynasty came to power, it continued  
15 to suppress China's maritime activities. The closure  
16 of the coast from 1662 to 1683 severed the trade links  
17 between Guangdong and the countries of Southeast Asia.  
18 An interlude of openness followed from 1684 to 1759,  
19 only to be reversed in 1760 when the government  
20 restricted all relations with western traders to the  
21 port of Guangzhou, otherwise known as Canton.<sup>118</sup>

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<sup>115</sup> See SWSP, Vol. 1, para. A13.7.

<sup>116</sup> See *id.*, para. A13.9.

<sup>117</sup> Andrew Targowski, "The Myths and Realities of the Clash of Western and Chinese Civilizations in the 21st Century", *Comparative Civilizations Review*, No. 67 (Fall 2012), p. 80. Hearing on Merits, Annex 830.

<sup>118</sup> See SWSP, Vol. 1, para. A13.37.

1           To the extent that Chinese practice can be said to  
2 influence the development of international law during  
3 this period, it is clear that China exercised  
4 navigation rights both officially, by virtue of the  
5 voyages of Zheng He, and unofficially by Chinese  
6 merchants, as illustrated by the trading routes shown  
7 on maps such as the map from about 1608 that was  
8 acquired by John Selden.<sup>119</sup> A copy of that map is at  
9 tab 5.6 in your folders.

10           Second, beginning in the 17th century, navigation  
11 in the seas off China was increasingly dominated by  
12 European powers, especially those with colonies in the  
13 area. China's freedom of action in that period was  
14 itself challenged. This persisted through the  
15 19th century and early 20th century. Thus, for  
16 example, China was not an active participant in the  
17 extensive efforts by the western powers to suppress  
18 piracy in the South China Sea.<sup>120</sup>

19           The third factor is that the development of modern  
20 international law in general during that 500-year  
21 period was dominated by the major European powers.

22           This of course poses very profound questions of  
23 intertemporal law and the relationship between the

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<sup>119</sup> *The Selden Map of China [East Asian Shipping Routes]* (China, c. 1608). SWSP, Vol. VI, Annex M30.

<sup>120</sup> See SWSP, Vol. 1, para. A13.32.



1 development of modern international law and  
2 imperialism. But what we do know is that during this  
3 500-year period, China did not claim or exercise  
4 control over the vast reaches of the South China Sea.  
5 Mr Loewenstein made that clear last week.

6 We also know that by the end of the 19th and the  
7 beginning of the 20th century, China was influenced by  
8 the prevailing understanding of the international law  
9 of the sea. The Chinese representatives supported the  
10 3-mile limit at the Hague Codification Conference in  
11 1930.<sup>121</sup> At a meeting of the International  
12 Law Commission in 1952, Mr Shushi Hsu of China  
13 indicated that his early training had been based on  
14 the principle of the three-mile limit, although he no  
15 longer believed that that limit was required by  
16 international law.<sup>122</sup> It is interesting that Mr Hsu  
17 even voted against the articles on the continental  
18 shelf in 1953 because, in his view:

19 "[the] submarine area or continental shelf,  
20 together with the superjacent water and air-space,  
21 formed [a] part of the high seas, and was therefore  
22 not subject to the sovereign rights of coastal

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<sup>121</sup> Tommy T.B. Koh, "The Origins of the 1982 Convention on the Law of the Sea," *Malaya Law Review*, Vol. 29 (1987), p. 7. Supplemental Documents, Annex 808, p. 7.

<sup>122</sup> International Law Commission, "166th Meeting" (17 July 1952), in *Yearbook of the International Law Commission 1952*, Vol. I (1952), p. 158, para. 54. Hearing on Merits, Annex LA-306.

1 States." <sup>123</sup>

2 In a broader sense, the question posed by the Tribunal  
3 goes to the heart of the reasons why the overwhelming  
4 majority of developing countries and newly independent  
5 countries favoured the negotiation of a new  
6 comprehensive Convention on the Law of the Sea that  
7 would prevail over everything that had gone before  
8 that was incompatible with the new legal order.  
9 Consistently with its position throughout the  
10 negotiation of the Convention, this point was  
11 underscored by the representative of the People's  
12 Republic of China in his statement at the signing  
13 session in Montego Bay in December 1982. He stated  
14 that the new Convention has:

15 "brought about a change in the former situation,  
16 in which the old law of the sea served only the  
17 interests of a few big Powers." <sup>124</sup>

18 The Philippines trusts, Mr President, that this  
19 change will endure.

20 Mr President, this might be an appropriate point  
21 to break, and I will then finish after lunch.

22 **THE PRESIDENT:** I think so, yes. Thank you very much.

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<sup>123</sup> International Law Commission, "197th Meeting" (18 June 1953), in *Yearbook of the International Law Commission 1953*, Vol. I (1953), p. 79, para. 75. Hearing on Merits, Annex LA-307.

<sup>124</sup> UN Conference on the Law of the Sea III, Plenary, *191st Meeting*, UN Doc. A/CONF.62/SR.191 (9 Dec. 1982), para. 21. Supplemental Documents, Vol. VI, Annex LA-250.

1 I think that this is a convenient point to break for  
2 lunch. Thank you. So you will come back after lunch  
3 and continue?

4 **PROFESSOR OXMAN:** Yes, sir, with your permission.

5 **THE PRESIDENT:** Yes. Thank you.

6 (1.01 pm)

7 (Adjourned until 2.30 pm)

8 (2.30 pm)

9 **THE PRESIDENT:** You may proceed, please.

10 **PROFESSOR OXMAN:** Thank you very much, Mr President.

11 Mr President, question 26 observes that the  
12 Philippines discussed the "military activities"  
13 exception in Article 298 in terms of what would not  
14 constitute "military activities", and invites the  
15 Philippines to elaborate a positive definition.  
16 Mr President, permit me to assure the Tribunal that  
17 this is what we were endeavouring to do by removing  
18 what does not form part of the concept, although quite  
19 clearly we lack the skill of Michelangelo.

20 This is the first case in which the "military  
21 activities" exception may be addressed. It is  
22 unlikely to be the last. Our focus has been on the  
23 issues posed in this case.

24 To be sure, the provisions of various treaties  
25 limiting military activities give us some idea of the  
26 kinds of activities that may be involved, but we have

1 to bear in mind that these treaties have objectives  
2 that differ from that of the "military activities"  
3 exception in Article 298. The relevant provisions of  
4 these treaties were reviewed in my discussion of  
5 Article 298(1)(b) during the hearing on  
6 jurisdiction,<sup>125</sup> and they can be found in tabs 5.7 to  
7 5.9 of your folder.

8 Most of the international law on the subject of  
9 military activities of course arises in the context of  
10 the *jus ad bellum* and the *jus in bello*. The issues  
11 posed by Article 298 are of another sort. They  
12 nevertheless bear some connection to the *jus in bello*,  
13 in the sense that one would ordinarily expect military  
14 activities to be conducted by units of the armed  
15 forces of a state that are identified as such; and  
16 they bear some connection to the *jus ad bellum*, in the  
17 sense that one would ordinarily expect military  
18 activities to be designed with a view to the  
19 objectives identified in Chapter VII of the Charter of  
20 the United Nations, with particular attention to  
21 Articles 42 and 51.

22 But that said, these affirmative benchmarks rooted  
23 in established international law, like any other, are  
24 general and potentially misleading. They tell us  
25 something, but not everything that we need to know.

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<sup>125</sup> Jurisdictional Hearing Tr. (Day 2), pp.82-83.

1 In particular, they are not tailored to the specific  
2 context in which the issues arise under the  
3 Convention, namely the scope of an optional exception  
4 to a basic principle that is central to the object and  
5 purpose of the Convention: the compulsory arbitration  
6 or adjudication of disputes concerning the  
7 interpretation or application of the Convention.

8 We believe that the context requires that the  
9 nature and purpose of the activity be military, to the  
10 exclusion of other activities or purposes that are  
11 more than purely incidental. This requirement of  
12 exclusivity is what invites us to examine what is not  
13 included.

14 To this end, bearing in mind the issues posed in  
15 this case, we have identified three categories that  
16 are not exclusively military, whether or not they are  
17 carried out by a military unit, and that therefore are  
18 outside the scope of the exception for military  
19 activities.

20 One such category is law enforcement activities.  
21 Article 298(1)(b) itself distinguishes between  
22 military activities and law enforcement activities.  
23 In addition, Article 33, Article 60(4) and Article 73  
24 of the Convention treat as law enforcement activities  
25 the types of activities undertaken by China to  
26 restrict access by Philippine vessels. China's use of

1 its own law enforcement vessels, with only episodic  
2 appearance of naval vessels, confirms that.

3 Another category that is not part of the "military  
4 activities" exception is mixed-use projects. This  
5 flows directly from the requirement that the nature  
6 and purpose of the activity must be military, to the  
7 exclusion of all other activities and purposes that  
8 are more than purely incidental. The involvement of  
9 military units in construction projects does not  
10 change their nature or purpose. The Chinese Defence  
11 Ministry itself has stated:

12 "Exercising to the full their advantageous  
13 conditions in human resources, equipment, technology  
14 and infrastructure, the armed forces contribute to the  
15 building of civilian infrastructure and other  
16 engineering construction projects."<sup>126</sup>

17 A third category involves the situation in which  
18 a military unit is used to protect other activities.  
19 That is irrelevant to the characterisation of the  
20 activities being protected.

21 There is an additional consideration that in  
22 itself, in our view, should be dispositive. The  
23 respondent in a case is not required to object to  
24 jurisdiction. There is ordinarily no difficulty with

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<sup>126</sup> Ministry of National Defense of the People's Republic of China, "National Defense Policy", *China's National Defense in 2010, White Paper* (2 April 2011), Section II. Hearing on Jurisdiction, Annex 577.

1 the obligation of the respondent to set forth its  
2 objections to jurisdiction in a timely manner, as  
3 contemplated by Article 20 of the Rules of Procedure  
4 in this case. But when the respondent does not  
5 appear, the requirement in Article 9 of Annex VII that  
6 the tribunal satisfy itself that it has jurisdiction  
7 over the dispute places additional burdens on both the  
8 tribunal and the applicant. Those burdens have  
9 unquestionably been carried with satisfaction by the  
10 Tribunal's procedural orders and probing questions at  
11 various stages of the proceedings in this case, and we  
12 of course hope in our written and oral pleadings and  
13 responses as well.

14 In that light, in the light of everything that has  
15 now occurred in these proceedings, when President  
16 Xi Jinping, just two months ago, gives public  
17 assurances that militarisation is not intended by  
18 China's construction activities in the Spratly  
19 Islands;<sup>127</sup> when China's consistent position in  
20 diplomatic communications and public statements for  
21 years has been that its activities are exclusively or  
22 primarily for law enforcement and other civilian

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<sup>127</sup> 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. 18. Supplemental Documents, Vol. I, Annex 664.

1 purposes;<sup>128</sup> when China's assurances have not been  
2 contested by the Philippines; when China has in fact  
3 interposed in these proceedings what it characterises  
4 as "comprehensive" objections to jurisdiction,<sup>129</sup>  
5 including objections under Article 298 itself, and  
6 when those objections do not invoke the optional  
7 military activities exception, Mr President, that  
8 surely should be enough.

9 Mr President, this concludes my remarks. I thank  
10 the Tribunal for its kind attention. It has been  
11 a great honour to appear before you and your  
12 distinguished colleagues on behalf of the Republic of  
13 the Philippines in an endeavour that we all trust will  
14 advance the rule of law in the South China Sea, and  
15 indeed in all the seas and oceans of the world.

16 Mr President, we ask that you now call Mr Martin  
17 to the lectern, if there are no questions.

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

19 Professor Oxman, and I have the great pleasure to call  
20 now Mr Martin.

21 **(2.39 pm)**

22 **Second-round submissions by MR MARTIN**

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<sup>128</sup> 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.

<sup>129</sup> 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).



1 **MR MARTIN:** Mr President, members of the Tribunal, good  
2 afternoon. This afternoon I will respond to  
3 questions 7, 8, 12 and 19, all of which relate to  
4 traditional Philippine fishing at Scarborough Shoal.  
5 I hope you won't mind if, for convenience, I take some  
6 of them slightly out of order.

7 Last Wednesday, Judge Wolfrum asked about the  
8 reference to traditional fishing rights in  
9 Article 51(1) of the Convention. In particular, he  
10 asked us to compare "the relationship between  
11 Articles 2(3) and 51(1)".<sup>130</sup> This was included as  
12 question 7 among the questions distributed to us last  
13 Friday.

14 The short answer is that the Philippines considers  
15 there to be no direct relationship between  
16 Articles 2(3) and 51(1).

17 As we explained last Wednesday, Article 2(3)  
18 obliges coastal states to respect rules of general  
19 international law in their exercise of sovereignty in  
20 the territorial sea, and general international law  
21 recognises the duty to respect traditional fishing  
22 rights.

23 Article 551(1) is very different. It relates to  
24 the regime of archipelagic waters, a new development  
25 in the Law of the Sea Convention. Article 51(1) is

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<sup>130</sup> Hearing on Merits, Tr. (Day 2), p. 188.

1       thus a novel provision that applies only within this  
2       new legal regime. It provides, *inter alia*:

3               "Without prejudice to article 49, an archipelagic  
4       State shall respect existing agreements with other  
5       States and shall recognize traditional fishing rights  
6       and other legitimate activities of the immediately  
7       adjacent neighbouring States in certain areas falling  
8       within the archipelagic waters."

9               According to the *Virginia Commentary*,  
10      Article 51(1):

11              "... deals with the special case in which the  
12      traditional fishing rights of immediately adjacent  
13      neighbouring States are to be recognised by  
14      an archipelagic state in certain areas of its  
15      archipelagic waters."<sup>131</sup>

16              The underlying rationale for this provision was  
17      that prior to UNCLOS III, the concepts of  
18      "archipelagic States" and "archipelagic waters" did  
19      not exist. The application of these new concepts  
20      meant that ocean space that had previously been high  
21      seas could now be enclosed by archipelagic baselines  
22      and subject to the sovereignty of the archipelagic  
23      state. This gave rise to the possibility that  
24      pre-existing rights might be extinguished. To avoid

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<sup>131</sup> *United Nations Convention on the Law of the Sea 1982: A Commentary*,  
Vol. 2 (M. Nordquist, et al., eds., 2002), p. 452, para. 51.7(a). Hearing  
on Merits, Annex LA-145(ter).

1 this, Article 51(1) provided that a limited category  
2 of rights, which included traditional fishing rights,  
3 would survive the transformation of high seas into  
4 archipelagic waters.<sup>132</sup>

5 Insofar as Article 2(3) relate to the territorial  
6 sea, the regime of which has a much deeper history, it  
7 is obviously very different. There is thus no direct  
8 analogy between Articles 2(3) and 51(1).

9 Pertinent is the contrast between Articles 2(3)  
10 and 49(3). Article 49 concerns the legal status of  
11 archipelagic waters. Paragraph 4 provides that the  
12 archipelagic state's sovereignty there "is exercised  
13 subject to this Part", full stop. The reference to  
14 "this Part", of course, is to Part IV.

15 Article 2(3), in contrast, provides that a coastal  
16 state's sovereignty in the territorial sea "is  
17 exercised subject to this Convention and to other  
18 rules of international law". There is thus in  
19 Article 2 an express *renvoi* to general international  
20 law that is absent from Article 49.

21 That said, Article 51(1) is important in two  
22 respects. First, it constitutes an express  
23 recognition of the existence, and underscores the  
24 importance, of traditional fishing by the nationals of

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<sup>132</sup> *United Nations Convention on the Law of the Sea 1982: A Commentary*,  
Vol. 2 (M. Nordquist, et al., eds., 2002), pp. 448-454. Hearing on Merits,  
Annex LA-145(ter) and needs pp. 448-454.

1 the immediately adjacent coastal states.

2 Second, it confirms that when the Convention's  
3 drafters wanted to preserve traditional fishing in the  
4 context of the new legal regimes they created, they  
5 say so, and they did so explicitly. They also made  
6 clear to what extent such prior uses were or were not  
7 protected.

8 In the case of the EEZ, for example, Article 62(3)  
9 contains a much more stringent limitation on the  
10 protection afforded to prior fishing than  
11 Article 51(1). As I discussed last Wednesday, and  
12 Professor Sands said again this morning, Article 62(3)  
13 provides only that in giving access to its EEZ to  
14 other coastal states, the coastal state has to take  
15 into account, among other things:

16 "... the need to minimize economic dislocation in  
17 States whose nationals have habitually fished in the  
18 zone."<sup>133</sup>

19 Put simply, except only to the extent that they  
20 are specifically preserved in the Convention, prior  
21 fishing rights were superseded by the new rights  
22 coastal states acquired under UNCLOS. The same is not  
23 true in the territorial sea.

24 In question 19, the Tribunal asked whether the  
25 Philippines alleges that China's interference with

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<sup>133</sup> See Hearing on Merits, Tr. (Day 2), p. 174.

1 traditional Filipino fishing breaches Article 279 of  
2 the Convention and Article 2(3) of the UN Charter.

3 The answer here is: yes.

4 Last Wednesday, we focused principally on  
5 Article 2(3) as the basis for our claim, because the  
6 delivery of the *Chagos* award after we submitted our  
7 Memorial substantially clarified the meaning and scope  
8 of Article 2(3).<sup>134</sup>

9 Last week, we also mentioned Article 300 and the  
10 duty of good faith.<sup>135</sup> The Philippines considers  
11 Article 279 a manifestation of one aspect of the duty  
12 of good faith in international relations. It requires  
13 China and the Philippines to:

14 "... settle any dispute between them concerning  
15 the interpretation or application of this Convention  
16 by peaceful means, in accordance with Article 2,  
17 paragraph 3 of the Charter of the United Nations."

18 Article 2(3) of the UN Charter, in turn, requires  
19 states to:

20 "... settle their international disputes by  
21 peaceful means in such a manner that international  
22 peace and security, and justice, are not

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<sup>134</sup> See *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*, Award, UNCLOS Annex VII Tribunal (18 Mar. 2015), para. 514. Hearing on Jurisdiction, Annex LA-225.

<sup>135</sup> Hearing on Merits, Tr. (Day 2), p. 186.

1       endangered."<sup>136</sup>

2           China's obstruction of traditional fishing by  
3       Filipinos in and around Scarborough Shoal plainly  
4       "endangers justice" within the meaning of the Charter  
5       and the Convention.

6           China first declared a territorial sea of 12 miles  
7       around the Zhongsha Islands, of which it nominally  
8       considered Scarborough Shoal a part, in 1958.<sup>137</sup> I say  
9       "nominally" because it is not entirely clear when  
10      China first adopted that position. Scarborough is  
11      fully 168 miles from Macclesfield Bank and is not  
12      labelled in the 1947 depiction of the nine-dash line.

13          A 1956 official map of the PRC contains an inset  
14      labelled "*woguo nanhai zhudao*", or "Our Country's  
15      Islands in the South Sea".<sup>138</sup> On the left are the  
16      Xisha or Paracel Islands. In the middle are the  
17      Zhongsha Islands, highlighted now in yellow. Far  
18      away, and unlabelled in the original map, is  
19      Scarborough Shoal, which is just 119 miles from the  
20      coast of Luzon. The first official map of the PRC  
21      that labels what China calls "Huangyan Dao" dates only

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<sup>136</sup> Charter of the United Nations (26 June 1945), Art. 2(3). SWSP, Vol. XII, Annex LA-181.

<sup>137</sup> See Embassy of the People's Republic of China in the Republic of the Philippines, *Ten Questions Regarding Huangyan Island* (15 June 2012), p. 1. MP, Vol. V, Annex 120.

<sup>138</sup> China Cartographic Publishing House, *Hanging Map of the People's Republic of China* (1956). MP, Vol. II, Annex M4.

1 to 1971.<sup>139</sup>

2 In any event, China did nothing in 1958 to disturb  
3 traditional fishing by Filipinos, which by then had  
4 been ongoing for decades, if not for centuries. Nor  
5 did it take any such steps for another 54 years. Only  
6 in April 2012 did it first intervene to prevent  
7 Filipino fishermen from pursuing their traditional  
8 livelihoods.

9 In our view, China's own longstanding practice in  
10 what it now claims as territorial sea creates  
11 an obligation, both under Article 279 and general  
12 international law, not to endanger justice by altering  
13 the status quo to the detriment of a well-established  
14 prior use. China has permitted the use of Scarborough  
15 Shoal for Philippine traditional fishing for a long  
16 period of time. Its sudden disruption of that  
17 longstanding prior use plainly endangers justice,<sup>140</sup>  
18 particularly since Scarborough Shoal has no  
19 inhabitants and the Philippines is the only nearby  
20 coastal state.

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<sup>139</sup> China Cartographic Publishing House, *Map of the People's Republic of China* (1971). MP, Vol. II, Annex M5.

<sup>140</sup> See *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, Judgment, ICJ Reports 1969, para. 88. MP, Vol. XI, Annex LA-4 ("Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable."); *Continental Shelf (Tunisia v Libyan Arab Jamahiriya)*, Judgment, ICJ Reports 1982, para. 71. MP, Vol. XI, Annex LA-10 ("Equity as a legal concept is a direct emanation of the idea of justice").

1           At question 12, the Tribunal asked for more  
2 information concerning fishing at Scarborough Shoal  
3 and the Spratly Islands during the 19th and early  
4 20th century. It also asked about the share of the  
5 fishermen from the Philippines in these activities.  
6 This is a subject on which the available documentary  
7 material is less than abundant.

8           With respect to Scarborough Shoal, the Philippines  
9 has provided the material available to it. The  
10 Philippines attributes the relative lack of  
11 information to the remoteness of the region,  
12 particularly in pre-modern times, and the limited and  
13 small-scale nature of the activity of Filipino  
14 fishermen.

15           What the Philippines can say with confidence,  
16 however, is that the fishing grounds at the shoal  
17 appear to have traditionally been treated as a sort of  
18 *de facto res communis*. As I discussed last Wednesday,  
19 Scarborough Shoal has six coral boulders protruding  
20 above water at high tide. Although technically  
21 amenable to a claim of sovereignty, nobody appears to  
22 have attached much value to it as such, at least until  
23 recent years. Fishermen not only from the  
24 Philippines, but also Hong Kong, Taiwan and the  
25 Chinese mainland, and even Vietnam, have regularly



1       fished there for as long as anyone can remember.<sup>141</sup>

2           China's newly discovered claim to a territorial  
3       sea around Scarborough Shoal should not be permitted  
4       to disrupt this situation, which has long existed  
5       without interruption or even protest.

6           With respect to the Spratlys, the situation is  
7       similar. The historical materials in the record  
8       contain references to fishermen from various states,  
9       including China, fishing in the waters around the  
10      islands, reefs and cays during the 19th and early  
11      20th century.<sup>142</sup> Such information as there is,  
12      however, is very general in nature. It thus does not  
13      allow any conclusions as to the relative share of the  
14      fishermen from various countries.

15          Finally, Mr President, I turn to Judge Pawlak's  
16      question to me concerning where in the record the  
17      exchange between the Philippines and China about

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<sup>141</sup> Affidavit of Mr. Richard Comandante (12 Nov. 2015), Q38-A40. Supplemental Documents, Vol. II, Annex 693; Affidavit of Mr. Tolomeo Forones (12 Nov. 2015), Q8-A10. Supplemental Documents, Vol. II, Annex 694; Affidavit of Mr. Miguel Lanog (12 Nov. 2015), Q13-A13, Q17-A18. Supplemental Documents, Vol. II, Annex 695; Affidavit of Mr. Jowe Legaspi (12 Nov. 2015), Q18-A20. Supplemental Documents, Annex 696; Affidavit of Mr. Crispen Talatagod (12 Nov. 2015), Q7-A11. Supplemental Documents, Vol. II, Annex 697; Affidavit of Mr. Cecilio Taneo (12 Nov. 2015), Q16-A20. Supplemental Documents, Vol. II, Annex 698.

<sup>142</sup> "Navigation in the China Sea", *Nautical Magazine and Naval Chronicle for 1867* (21 Sept. 1867), pp. 698, 702. SWSP, Vol. IV, Annex 388; United Kingdom, Hydrographic Department, *The China Sea Directory*, Vol. II (1879), pp. 68-69. SWSP, Vol. IV, Annex 389; U.S. Hydrographic Office, *Asiatic Pilot: Sunda Strait and the Southern Approaches to China Sea with West and North Coasts of Borneo and Off-Lying Dangers*, Vol. V (1915), p. 378. SWSP, Vol. IV, Annex 395; United Kingdom, Hydrographic Department, *China Sea Pilot*, Vol. I (1st ed., 1937), pp. 115-116. SWSP, Vol. IV, Annex 397.

1 referring their dispute over Scarborough Shoal to  
2 ITLOS can be found. This was included by the Tribunal  
3 as question 8.

4 The Philippines' 26th April 2012 note proposing to  
5 bring the matter to ITLOS can be found at Annex 207.<sup>143</sup>  
6 China's 29th April 2012 note rejecting that proposal  
7 just three days later can be found at Annex 208.<sup>144</sup>

8 Mr President, Judge Cot, Judge Pawlak,  
9 Professor Soons, Judge Wolfrum, thank you all very  
10 much for your kind attention today and throughout  
11 these hearings. It has been my privilege to appear  
12 before you. Unless there are questions, I would ask  
13 that you invite Mr Loewenstein to the lectern.

14 **THE PRESIDENT:** Thank you very much, Mr Martin. I don't  
15 think there are any questions for you. We are very  
16 grateful to you for your presentation, and I will now  
17 call on Mr Loewenstein.

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<sup>143</sup> *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 12-1137 (26 Apr. 2012). MP, Vol. VI, Annex 207.

<sup>144</sup> *Note Verbale* from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Philippines, No. (12) PG-206 (29 Apr. 2012). MP, Vol. VI, Annex 208.

1 (2.54 pm)

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

3 **MR LOEWENSTEIN:** Mr President, members of the Tribunal,  
4 good afternoon. I will answer questions 1, 2, 3, 5,  
5 10 and 24.

6 I begin with question 1. This invites the  
7 Philippines to elaborate on its answer to the question  
8 posed by Judge Wolfrum on Tuesday in regard to the  
9 respective roles of Taiwan and the People's Republic  
10 of China in the Spratlys, and whether one can  
11 distinguish between Taiwan and the People's Republic  
12 of China.

13 It is the Philippines' view that not only can one  
14 distinguish between the Taiwanese authorities and the  
15 People's Republic of China, one must do so. The  
16 former, under the title of the Republic of China,  
17 governed China from 1912 until October 1949. The  
18 People's Republic of China has governed China ever  
19 since.

20 Thus, as of October 1949, the People's Republic of  
21 China has been China's sole legitimate governing  
22 authority. As a consequence, any acts undertaken --  
23 or statements made -- by representatives or organs of  
24 the Republic of China after October 1949, which had  
25 established itself in Taiwan, cannot, as a matter of  
26 law, be attributable to China. In particular, as

1 Mr Reichler discussed this morning, the Taiwanese  
2 authorities' sudden and recent claim of  
3 a 200-nautical-mile entitlement for Itu Aba cannot be  
4 legally attributed to China.

5 Mr President, I turn now to question 2.

6 Judge Pawlak asked the Philippines to address the  
7 legal basis for China's claim that it recovered  
8 sovereignty over what it calls the Nansha Islands  
9 after Japan's occupation during the Second World War,  
10 taking into account the comments of China's Minister  
11 of Foreign Affairs, Mr Wang Li, on 6th August 2015.

12 On that occasion, Mr Wang stated as follows:

13 "Seventy years ago, pursuant to the Cairo  
14 Declaration and the Potsdam Proclamation, China  
15 lawfully recovered the Nansha and Xisha Islands ..."

16 That is, the Paracels:

17 "... which were illegally occupied by Japan and  
18 resumed exercise of sovereignty. As a matter of fact,  
19 the military vessels China used in recovering the  
20 islands were provided by the United States, an Allied  
21 Nation."<sup>145</sup>

22 With the greatest of respect, Foreign Minister  
23 Wang is mistaken. Neither the Cairo Declaration nor  
24 the Potsdam Proclamation provide a legal basis for

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<sup>145</sup> Ministry of Foreign Affairs of the People's Republic of China, *Wang Yi on the South China Sea Issue At the ASEAN Regional Forum* (6 Aug. 2015). Supplemental Documents, Vol. I, Annex 634.

1 China's assertion of sovereignty over the islands of  
2 the South China Sea, much less historic rights to the  
3 waters or seabed beyond those features' territorial  
4 seas.

5 The Cairo Declaration arose out of the Cairo  
6 Conference, a series of meetings in November and  
7 December 1943 between United States President Franklin  
8 Delano Roosevelt, British Prime Minister Winston  
9 Churchill, and Generalissimo Chiang Kai-shek of China.  
10 The resulting Declaration addressed certain political  
11 commitments related to the Allied effort to defeat  
12 Japan, and the establishment of principles concerning  
13 the contemplated post-war order.

14 In the pertinent part, the Cairo Declaration  
15 states:

16 "The several military missions have agreed upon  
17 future military operations against Japan."<sup>146</sup>

18 It then continues:

19 "The three Great Allies are fighting this war to  
20 restrain and punish the aggression of Japan. They  
21 covet no gain for themselves and have no thought of  
22 territorial expansion. It is their purpose that Japan  
23 shall be stripped of all the islands in the Pacific  
24 which she has seized or occupied since the beginning  
25 of the First World War in 1914, and that all the

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<sup>146</sup> Cairo Declaration (1 Dec. 1943). Hearing on Merits, Annex LA-333.

1 territories Japan has stolen from the Chinese, such as  
2 Manchuria, Formosa and the Pescadores, shall be  
3 restored to the Republic of China. Japan will also be  
4 expelled from all other territories which she has  
5 taken by violence and greed."<sup>147</sup>

6 There was no reference to the Spratlys in the  
7 list of territory to be restored to China.

8 The Cairo Declaration was followed by the Potsdam  
9 Proclamation, which was announced by United States  
10 President Harry S Truman, Prime Minister Churchill and  
11 Generalissimo Chiang on 26th July 1945. It states:

12 "The terms of the Cairo Declaration shall be  
13 carried out and Japanese sovereignty shall be limited  
14 to the islands of Honshu, Hokkaido, Kyushu, Shikoku  
15 and such minor islands as we determine."<sup>148</sup>

16 Again, no reference is made to the Spratlys, let  
17 alone their attribution to China.

18 Accordingly, the Cairo Declaration and Potsdam  
19 Proclamation do not provide a legal basis upon which  
20 Chinese sovereignty over the South China Sea islands  
21 can be established. Further, as academic commentary  
22 has observed in respect of both documents:

23 "... as statements of common foreign policy goals,

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<sup>147</sup> *Id.*

<sup>148</sup> Proclamation Defining Terms for Japanese Surrender ("Potsdam Proclamation") (26 July 1945) Hearing on Merits, Annex LA-334.

1 the Declarations did not legally bind the States of  
2 the declaring governments."<sup>149</sup>

3 And, I would add, even if they were legally  
4 binding as between signatories -- which they are  
5 not -- they could not bind non-signatories, such as  
6 France, which maintained its own claims to several  
7 features in the Spratlys. The ICJ held in *Nicaragua*  
8 *v Colombia* that:

9 "It is a fundamental principle of international  
10 law that a treaty between two States cannot, by  
11 itself, affect the rights of a third State."<sup>150</sup>

12 The fact that the Cairo Declaration in particular  
13 did not commit the South China Sea islands to China  
14 sovereignty is hardly surprising. Neither Britain nor  
15 the United States -- the only signatories other than  
16 China itself -- regarded China as having sovereignty  
17 over those features, particularly in light of the  
18 claims that had been asserted by France.

19 As I mentioned during the first round, France  
20 claimed various of these islands. For example, in  
21 1930, Lieutenant Delattre, commander of the French  
22 naval warship *Malicieuse*, made the following  
23 declaration:

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<sup>149</sup> Björn Ahl, "Taiwan", in *Max Planck Encyclopedia of Public International Law* (June 2008), para. 13. Hearing on Merits, Annex LA-330.

<sup>150</sup> *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Merits, Judgment, ICJ Reports 2012, para. 227. MP, Vol. XI, Annex LA-35.

1           "Today, the thirteenth day of April, nineteen  
2           hundred thirty, Palm Sunday, I took possession of  
3           Spratly Island ... and the small islands belonging to  
4           the Spratly group, in the name of France. As a sign  
5           thereof, I had the French flag flown over Spratly  
6           Island and I had it saluted with a salvo of 21 cannon  
7           shots."<sup>151</sup>

8           Another declaration, made by the commander of  
9           the *Laperouse* on 10th April 1933, declared French  
10          sovereignty over Itu Aba.<sup>152</sup>

11          These declarations, as well as others claiming  
12          additional South China Sea islands in the name of  
13          France, may be found at tab 6.2.<sup>153</sup>

14          On 26th July 1933, France's Ministry of Foreign  
15          Affairs published in the Official Journal of the  
16          French Republic a notice stating that the French Navy  
17          had occupied Spratly Island, Amboyna Cay, Itu Aba,  
18          North Danger Reef, Loaita and Thitu. The notice  
19          stated that:

20          "[These] islands and islets henceforth come under

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<sup>151</sup> French Republic, Indochina Hydrographic Mission, *Procès-Verbal* (13 Apr. 1930). SWSP, Vol. III, Annex 358.

<sup>152</sup> French Republic, Indochina Hydrographic Mission, *Procès-Verbal* (10 Apr. 1933). SWSP, Vol. III, Annex 366.

<sup>153</sup> French Republic, Indochina Hydrographic Mission, *Procès-Verbal* (7 Apr. 1933). SWSP, Vol. III, Annex 365; French Republic, Indochina Hydrographic Mission, *Procès-Verbal* (10 Apr. 1933). SWSP, Vol. III, Annex 366; French Republic, Indochina Hydrographic Mission, *Procès-Verbal* (11 Apr. 1933). SWSP, Vol. III, Annex 367; French Republic, Indochina Hydrographic Mission, *Procès-Verbal of Taking Possession of Thi-Tu Island* (12 Apr. 1933). SWSP, Vol. III, Annex 368.



1 French sovereignty."<sup>154</sup>

2 This was followed, on 21st December 1933, by  
3 a decree by the governor of the French colony of  
4 Cochin China in Saigon stating that the islands listed  
5 in the 26th July 1933 notice:

6 "... shall be attached to [the colony's] Baria  
7 Province."<sup>155</sup>

8 The Tribunal will recall that during this period,  
9 China made no claims south of the Paracels. Indeed,  
10 as I mentioned last week, on 29th September 1932, less  
11 than a year before France publicised its claim to  
12 these Spratly features, China informed France by  
13 diplomatic note that the Paracels:

14 "... form the southernmost part of Chinese  
15 territory."<sup>156</sup>

16 The British accepted France's claims in the  
17 Spratlys, albeit reluctantly. Britain's reluctance,  
18 however, had nothing to do with any claim by China.  
19 It concerned British's own desire to maintain claims  
20 to Spratly Island and Amboyna Cay, both of which had

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<sup>154</sup> Republic of France, Ministry of Foreign Affairs, "Notice relating to the occupation of certain islands by French naval units", *Official Journal of the French Republic* (26 July 1933), at 7837. MP, Vol. VI, Annex 159.

<sup>155</sup> French Republic, Governor of Cochin China, *Decree* (21 Dec. 1933), reprinted in Monique Chemillier-Gendreau, *Sovereignty over the Paracel and Spratly Islands*. SWSP, Vol. III, Annex 352.

<sup>156</sup> *Note Verbale* from the Legation of the Republic of China in Paris to the Ministry of Foreign Affairs of France (29 Sept. 1932), reprinted in Monique Chemillier-Gendreau, *Sovereignty over the Paracel and Spratly Islands* (2000). MP, Vol. VI, Annex 171.

1        been subjected to various British administrative acts  
2        since the 1870s.<sup>157</sup> This prompted considerable  
3        internal consultations, including with the legal  
4        officers, who advised that the claims were not  
5        sufficiently strong that Britain could be confident in  
6        prevailing should the matter be tested in  
7        an arbitration with France.<sup>158</sup>

8            Among the reasons that Britain could not claim the  
9        features as dependencies of its colony in Borneo was  
10       that they were too far away:<sup>159</sup> 206 nautical miles in  
11       the case of Amboyna and 271 nautical miles in the case  
12       of Spratly Island. It is thus not surprising that  
13       Britain gave no consideration to any conceivable claim  
14       by China, since the closest point in China is much  
15       farther away: 643 miles and 584 miles, respectively.

16           Although Britain accepted that France likely had  
17       a superior claim to its own in regard to the features  
18       over which France had formally proclaimed sovereignty,  
19       Britain considered the remaining islands to be *terra*  
20       *nullius*.<sup>160</sup> Thus, when, in 1938, Britain surveyed  
21       several Spratly features, it proceed unilaterally only

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<sup>157</sup> SWSP, Vol. II, pp. 14, 176.

<sup>158</sup> See *Memorandum* from the Legal Advisers of the Foreign Office, United Kingdom (10 Nov. 1931), p. 10. SWSP, Vol. III, Annex 359.

<sup>159</sup> *Letter* from Foreign Office, United Kingdom, to the Law Officers of the Crown, United Kingdom (29 July 1932), para. 4. SWSP, Vol. III, Annex 361.

<sup>160</sup> See *Memorandum* from the Legal Advisers of the Foreign Office, United Kingdom (10 Nov. 1931), p. 9. SWSP, Vol. III, Annex 359.

1 on features not claimed by France and obtained consent  
2 from France before surveying French-claimed  
3 features.<sup>161</sup>

4 A memorandum from Britain's Undersecretary of  
5 State for Foreign Affairs to the Committee of Imperial  
6 Defence concerning "Islands in the South China Seas"  
7 dated 27th April 1938 -- that is, shortly before the  
8 outbreak of hostilities that led to the Cairo  
9 Declaration -- makes Britain's commitment to  
10 protecting the French sovereignty claim particularly  
11 clear.<sup>162</sup> The memorandum addresses what "armed  
12 support" it might "afford to the French Government in  
13 the event of the Japanese Government taking forcible  
14 measures to deny French sovereignty" over the South  
15 China Sea islands that France had claimed in its  
16 public notice.<sup>163</sup> In that regard, the Undersecretary  
17 observed that "French sovereignty over these islands"  
18 had been asserted since 1933.<sup>164</sup>

19 It is not surprising, therefore, that the Cairo  
20 Declaration signed by Prime Minister Churchill gave no  
21 indication whatsoever that the South China Sea islands  
22 were committed to China.

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<sup>161</sup> United Kingdom, Foreign Office, "Islands in the South China Sea" (27 April 1938), p. 2. SWSP, Vol. III, Annex 378.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*, p. 1.

<sup>164</sup> *Id.*

1           For its part, the United States -- the Cairo  
2           Declaration's other non-Chinese signatory -- also  
3           desired to protect France's sovereignty claim. On  
4           17th May 1939, upon being informed by Japan that it  
5           now claimed the South China Sea islands, the United  
6           States responded by diplomatic note that Japan's  
7           claims were inconsistent with the fact that:

8           "In 1933 the Government of the United States was  
9           informed by the French Government of its claim to  
10          sovereignty over certain islands situated along the  
11          western side of the area described in the Japanese  
12          memorandum."<sup>165</sup>

13          Given France's claims, the United States  
14          considered this to be a bilateral dispute between  
15          France and Japan. The United States did not consider  
16          any putative rights of China to be implicated.<sup>166</sup> The  
17          United States informed Japan that it was aware that  
18          France had recently proposed that:

19          "... the difference between France and Japan on  
20          the subject of the sovereignty of the islands be  
21          submitted to the Permanent Court of Arbitration at the  
22          Hague."<sup>167</sup>

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<sup>165</sup> *Note Verbale* from the Secretary of State of the United States to the Ambassador of Japan to the United States (17 May 1939), in *Papers relating to the Foreign Relations of the United States, Japan: 1931-1941*, Vol. 2 (1943). MP, Vol. VI, Annex 173.

<sup>166</sup> *Telegram* from Embassy of the United States in Paris to the Department of State of the United States (5 Apr. 1939), p. 2. SWSP, Vol. III, Annex 382.

<sup>167</sup> *Id.*

1           The United States endorsed that bilateral  
2 solution.

3           In any event -- and here is the crucial point --  
4 even if, *quod non*, the Cairo Declaration or the  
5 Potsdam Proclamation could somehow be construed as  
6 recognising Chinese sovereignty over certain islands  
7 in the South China Sea, they did not recognise any  
8 rights beyond the adjacent belts of territorial sea.  
9 Neither document made any reference to maritime zones,  
10 let alone maritime rights beyond the territorial sea.

11          At the time, the concept of exclusive economic  
12 rights beyond the territorial sea had not yet  
13 developed. The Truman Proclamation on the continental  
14 shelf had not yet been made, and the concept of  
15 exclusive economic rights in the superjacent waters  
16 beyond the territorial sea lay even farther in the  
17 future.

18          Against this background, we submit, it is  
19 impossible to conclude that the Cairo Declaration or  
20 the Potsdam Proclamation recognised or restored the  
21 sovereignty of China over the South China Sea's  
22 insular features, much less historic rights beyond the  
23 territorial sea. Rather, the reality is as  
24 I described it last week: China had no historic rights  
25 within the nine-dash line, neither under UNCLOS nor  
26 under general international law.

1           Mr President, I turn now to question 5, which  
2 I hope you will permit me to answer out of order as it  
3 concerns the post-war settlement with Japan and would  
4 thus be appropriate to address now.

5           The question asks the Philippines to address  
6 Article 2 of the Treaty of San Francisco, and in  
7 particular whether the reference to Japan's  
8 renunciation of its claims to the Spratlys and  
9 Paracels has the legal consequence that the claim or  
10 title falls back to whoever occupied this feature  
11 before. Question 5 further invites the Philippines to  
12 address the legal consequences if the Spratly Islands  
13 were *terra nullius* after being renounced by Japan.

14           As to whether, upon renunciation, sovereignty over  
15 the features falls to the occupying power, the answer  
16 is: No. General international law is clear that  
17 renunciation does not have this effect. The arbitral  
18 tribunal in *Eritrea v Yemen* explained that in such  
19 circumstances, sovereignty remains indeterminate  
20 *pro tempore* until the matter is resolved. Here is  
21 what the tribunal held:

22           "... in 1923 Turkey renounced title to those  
23 islands over which it had sovereignty until then.  
24 They did not become *res nullius* -- that is to say,  
25 open to acquisitive prescription -- by any state,  
26 including any of the High Contracting Parties

1 (including Italy). Nor did they automatically revert  
2 (insofar as they had ever belonged) to Yemen.  
3 Sovereign title over them remained indeterminate  
4 *pro tempore*."

5 The Tribunal then held that the:

6 "Indeterminacy could be resolved by 'the parties  
7 concerned' at some stage in the future -- which must  
8 mean by present (or future) claimants *inter se*. That  
9 phrase is incompatible with the possibility that  
10 a single party could unilaterally resolve the matter  
11 by means of acquisitive prescription."<sup>168</sup>

12 The holding in *Eritrea v Yemen* applies with  
13 particular force in regard to Japan's renunciation to  
14 rights over the South China Sea islands, where there  
15 were multiple competing claimants, and many of the  
16 features might have been *terra nullius* even before the  
17 Second World War.

18 Indeed, as I have already mentioned, in 1951, at  
19 the time of the San Francisco Treaty's conclusion  
20 there was no occupying power on any island in the  
21 Spratlys, Itu Aba included. And even if, *quod non*,  
22 the Republic of China could somehow be construed as  
23 having constructively occupied Itu Aba without  
24 maintaining any physical presence there, this would

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<sup>168</sup> *Eritrea v Yemen*, First Stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute), Award (9 Oct. 1998), para. 165. MP, Vol. XI, Annex LA-48.

1 not matter because by 1951, when the San Francisco  
2 Treaty was concluded, the now Taiwan-based Republic of  
3 China had ceased being legally capable of acting on  
4 China's behalf.

5 With general international law in mind, we can now  
6 turn to the relevant text of the San Francisco Treaty,  
7 which is Article 2(f). It provides that:

8 "Japan renounces all right, title and claim to the  
9 Spratly Islands and to the Paracel Islands."

10 As is plain, Japan's renunciation is not  
11 accompanied by any indication of which state now  
12 possesses title.

13 The fact that Japan's renunciation of rights,  
14 title and claims in regard to the Spratlys was not  
15 accompanied by assigning sovereignty to any other  
16 State was deliberate. As the United Kingdom observed  
17 in an internal memorandum dated 24th October 1950  
18 concerning the future of the Spratlys:

19 "... the dominant consideration in the disposal of  
20 these Islands is their strategic importance. From  
21 that point of view we should not object to the  
22 ownership of the Islands by France, but we should not  
23 wish their ownership to go to Japan, the Philippines,  
24 Nationalist China or, particularly, the Central



1 People's Government of China."<sup>169</sup>

2 In light of these competing claims, the memorandum  
3 concluded that:

4 "Our view on the disposal of the Islands is,  
5 therefore ... that any attempt either by ourselves or  
6 the French at this time to settle the question of the  
7 disposal of the Islands could only have the effect of  
8 focusing international attention on them with probably  
9 undesirable political results, unaccompanied by any  
10 compensating strategic advantages."<sup>170</sup>

11 Finally, were there any remaining question as to  
12 whether Japan's renunciation of the Spratlys in the  
13 Treaty of San Francisco recognised Chinese sovereignty  
14 over them, it is dispelled by France's concurrent  
15 diplomatic exchanges with Japan. Upon the conclusion  
16 of the April 28th 1952 Peace Treaty between Japan and  
17 the Republic of China,<sup>171</sup> which recognised that by  
18 Article 2 of the San Francisco Treaty, Japan had  
19 renounced all claims to the Spratlys, Japan clarified,  
20 through an exchange of notes with France on the same  
21 day, that this was not intended to recognise Chinese

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<sup>169</sup> *Memorandum* from United Kingdom Foreign Office to the United Kingdom Commonwealth Relations Office, No. F.2591/39 (24 Oct. 1950), para. 2. Hearing on Merits, Annex 822.

<sup>170</sup> *Id.*, para. 5.

<sup>171</sup> Treaty of Peace between the Republic of China and Japan, 138 UNTS 3 (28 Apr. 1952), entered into force 5 Aug. 1952. MP, Vol. XI, Annex LA-73.

1 sovereignty over those features.<sup>172</sup>

2 Mr President, I turn now to question 3, and the  
3 question posed to me by Judge Cot on Tuesday.

4 The chronology requested by the Tribunal is found  
5 at tab 6.4. As you can see, from 1920 until the end  
6 of World War II, no feature of the Spratlys was  
7 occupied by any state or entity for any purpose,  
8 although, as I have said, France and the UK made  
9 sovereignty claims with respect to some of them.

10 The Japanese military occupied Itu Aba and various  
11 other features during the war. After the defeat of  
12 Japan, all of these features reverted to their prior  
13 unoccupied states. In 1946, the armed forces of the  
14 Republic of China briefly occupied Itu Aba, but no  
15 other features in the Spratlys. They then abandoned  
16 Itu Aba, which remained unoccupied until Taiwanese  
17 military forces arrived in 1956. However, as we have  
18 seen, by that time they could no longer act on behalf  
19 of China.

20 On Wednesday, Mr Reichler provided a list of all  
21 the high-tide Spratly features identifying which  
22 state's military occupies them, and the date of  
23 initial occupation.

24 Mr President, I turn now to question 10, which

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<sup>172</sup> See *Telegram* from Embassy of France in Japan to the Ministry of Foreign Affairs of France, No. 1071 (30 May 1952). Hearing on Merits, Annex 823.

1 refers to Foreign Minister Wang's 6th August 2015  
2 statement that China had completed what he called  
3 China's "land reclamation" work by the end of  
4 June 2015, and invites the Philippines response.

5 To begin with, Professor Sands has made clear that  
6 the Philippines does not accept the characterisation  
7 of China's actions as being "land reclamation". It is  
8 properly characterised as artificial island-building.

9 Regardless, Foreign Minister Wang did not provide  
10 any evidence to show that China had ceased by the end  
11 of June; nor, as far as the Philippines is aware, have  
12 any other Chinese officials. The evidence indicates  
13 otherwise. This includes satellite imagery which  
14 establishes that China's activities continued after  
15 the end of June 2015.<sup>173</sup>

16 On the screen is a satellite image of part of  
17 Subi Reef taken on 3rd September 2015; that is,  
18 a month after Foreign Minister Wang announced that  
19 work had been completed in June. Multiple dredgers  
20 are in operation. Here is a dredger, its pipeline,  
21 and the pile of debris on the reef to which the  
22 pipeline extends. Here is another dredger, and its  
23 pipeline leading to the same debris pile.

24 Now consider recent developments at Mischief Reef.

25 The left-hand satellite image was taken on

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<sup>173</sup> All images in response to Question 10 are collected at Tab 6.6.

1 8th September 2015. A sizeable body of water lies  
2 between a seawall and newly created land. You can get  
3 a sense of scale from the numerous recently  
4 constructed buildings that appear as tiny squares and  
5 rectangles, and from the vessels in the foreground.  
6 Compare this with the image on the right. This shows  
7 the same area five weeks later, on 19th October 2015.  
8 What had been water is now dry land.

9 Now let's zoom out on the same 19th October image  
10 for a wider perspective. You can see the large  
11 adjacent area where it appears that China intends to  
12 create more land behind the seawall that is under  
13 construction. The area that appears designated for  
14 this landfill extends for approximately  
15 1.4 kilometres.

16 The seawalls that will enclose this new land do  
17 not prevent sediment from spilling into the sea and on  
18 to any submerged reef that may still remain. You can  
19 see this in the image now on your screen, which was  
20 taken at Mischief Reef on 19th October. The sediment  
21 plume extends for 325 metres.

22 Mr President, in addition to building artificial  
23 islands, China is engaged in a substantial effort to  
24 build on top of them. Indeed, the artificial islands  
25 can be fairly described as major construction sites.  
26 I have pointed out a few of the buildings that have

1        been constructed, which represent only a small  
2        fraction of those built in recent months. Supporting  
3        infrastructure is also being built with great speed.

4            Consider the image on the left. This shows part  
5        of Mischief Reef on 8th September 2015. Now consider  
6        the same location less than six weeks later, on  
7        19th October. An aircraft runway is being built.

8            This is also happening at Subi Reef. On the left  
9        is part of Subi Reef on 3rd September 2015. On the  
10       right is the same location on 6th November. Between  
11       those dates, China built a runway. An oblique  
12       photograph taken on 14th October 2015 allows it to be  
13       seen in detail.

14           Mr President, these are significant projects. The  
15        images now on the screen consider China's runway at  
16        Subi Reef with one of the principal runways at  
17        Schiphol Airport. The Schiphol runway is 3,250 metres  
18        long. The Subi runway is the same length. This is  
19        long enough to accommodate any commercial aircraft,  
20        including an Airbus A380. The difference is that the  
21        runway at Subi is being built on a low-tide elevation  
22        in the middle of the South China Sea.

23           Mr President, we now come to question 24. This  
24        asks the Philippines to clarify whether China's more  
25        recent activities at Mischief Reef form part of the  
26        factual matrix underpinning the Philippines' claims

1 set out in its Submission 12.

2 The answer is: yes. Although China's activities  
3 at Mischief Reef prior to the submission of the  
4 Memorial breached its obligations under the  
5 Convention, the Philippines considers the more recent  
6 events at Mischief to form an essential part of the  
7 factual matrix underpinning the claims it has asserted  
8 in Submission 12.

9 Mr President, that concludes my answers to the  
10 Tribunal's questions. Thank you very much for your  
11 kind attention. Unless the Tribunal has further  
12 questions, I ask that you invite Professor Carpenter  
13 to the podium.

14 **THE PRESIDENT:** Thank you very much, Mr Loewenstein.

15 There is a question from Judge Wolfrum.

16 **(3.24 pm)**

17 **Tribunal questions**

18 **JUDGE WOLFRUM:** Thank you, Mr Loewenstein, for your  
19 interesting responses to questions 1 and 2. We could  
20 now continue on the interpretation of the Potsdam  
21 Proclamation, but I will refrain from doing so.  
22 I have only one small question.

23 You established in answering question 1 that after  
24 the Government of the Republic of China referred to  
25 that move to Taiwan, it cannot act on behalf of China.  
26 I accept that. But can the People's Republic of China

1 issue acts which are of legal relevance in  
2 international law for Taiwan, the Republic of China?  
3 This question -- perhaps I didn't hear it -- was not  
4 addressed, and that might be of interest. Thank you.

5 **MR LOEWENSTEIN:** Thank you very much, Judge Wolfrum. In  
6 view of the importance of this question and the  
7 delicate nature of issues concerning Taiwan, I would  
8 beg your indulgence for permission to consider the  
9 question and provide a further answer.

10 **JUDGE WOLFRUM:** Certainly so. Thank you.

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

12 **THE PRESIDENT:** Thank you very much, Mr Loewenstein.  
13 There is another question.

14 **JUDGE PAWLAK:** It was very interesting historical  
15 background you have presented to us. But if  
16 I understand your point, your point is that after the  
17 Cairo Declaration, the Potsdam Proclamation and the  
18 San Francisco Treaty, the Paracel Islands and the reef  
19 features were *terra nullius*. Is that so?

20 **MR LOEWENSTEIN:** As I suggested in my answer, the  
21 response under general international law is that in  
22 any event the appropriate way of determining  
23 sovereignty is for it to be determined at a subsequent  
24 event, on a subsequent occasion. As with the response  
25 to Judge Wolfrum's question, I would request your  
26 indulgence for an opportunity to provide a more full

1 response on a subsequent occasion.

2 **JUDGE PAWLAK:** Thank you very much, but still I am not  
3 convinced about that. Thank you.

4 **THE PRESIDENT:** My understanding is that you will expand  
5 on this one also later.

6 **MR LOEWENSTEIN:** Yes.

7 **THE PRESIDENT:** Thank you very much. Well, in that case,  
8 may I now call on Professor Carpenter.

9 (3.28 pm)

10 **PROFESSOR KENT CARPENTER (called)**  
11 **Responses to Tribunal questions by PROFESSOR CARPENTER**

12 **PROFESSOR CARPENTER:** Mr President, members of the  
13 Tribunal, good afternoon. I will answer the questions  
14 that the Tribunal has asked me. I will begin with  
15 questions 1 through 5, which relate to the existence  
16 of transboundary harm through impact on biodiversity  
17 and the ecosystem.

18 Question 1 asks me to elaborate on the scope of  
19 the effect that changes to Scarborough Shoal and the  
20 Spratly reefs will have on the ability of these  
21 features to serve as an "upstream" source of larvae,  
22 or a means to replenish fisheries and reef life  
23 throughout the South China Sea. It also asks me to  
24 address the potential availability of other sources of  
25 biological replenishment in the region.

26 The ocean currents, weather patterns and distinct  
27 life-cycles of marine species in the South China Sea



1 create a high degree of interconnectivity between the  
2 ecosystems of the region. The Spratly reefs, in  
3 particular, are a highly interconnected ecosystem.  
4 The interconnectivity of this region is influenced by  
5 weather patterns during the two monsoon seasons, ocean  
6 currents, the type and diversity of species in the  
7 reefs, and the range of marine larval dispersal.

8 These two figures show the connectivity within the  
9 South China Sea during the spring and fall monsoon  
10 seasons. The warm reddish colours indicate a higher  
11 degree of connectivity or probability that larvae of  
12 coral species will travel to another part of the South  
13 China Sea.

14 During the spring monsoon season, Scarborough  
15 Shoal and the western part of the Spratlys are highly  
16 connected to the reefs near southern Palawan, as  
17 indicated by the red areas in the figure.

18 During the fall monsoon, the area of the eastern  
19 part of the Spratlys is highly connected to the inner  
20 seas of the Philippines west of Mindoro, as indicated  
21 by the very dark red areas. The monsoon seasons not  
22 only affect the frequency of reef connectivity, they  
23 also affect the direction of the currents.

24 As question 1 noted, Scarborough Shoal and the  
25 Spratly reefs serve as an "upstream" source of larvae,  
26 or a means to replenish fisheries and reef life

1 throughout the South China Sea and the Philippines.  
2 As we have seen this past week, seven reefs in the  
3 Spratlys have been almost completely destroyed.  
4 Although it is impossible to estimate the precise  
5 magnitude of the scope of the effect of this  
6 destruction, I will simply repeat what I said last  
7 week: it is catastrophic.

8 These reefs were home to a great diversity of  
9 species. They have now been severely impacted. The  
10 loss is almost certainly permanent for some parts of  
11 the reef, and likely will last for decades for other  
12 parts. Due to the highly interconnected nature of  
13 this region, the seven reefs that were once a vibrant  
14 source of biological replenishment no longer  
15 contribute to this process.

16 Further, the environmental damage at Scarborough  
17 Shoal and the Spratly reefs will negatively impact the  
18 Greater Philippine archipelago, especially southern  
19 Palawan and the northern reefs of Borneo. This will  
20 damage the sustainability of the fisheries and the  
21 resilience of coral reefs throughout the region.

22 Question 1 also asks if there are other sources of  
23 replenishment in the region. While the South China  
24 Sea is highly interconnected with its ecosystem, that  
25 interconnectedness is self-contained. This means that  
26 there is very little chance of larval replenishment

1 from outside the region.

2 This map illustrates that the eastern South China  
3 Sea is highly interconnected with the western part of  
4 the Philippines and the northern part of Borneo. The  
5 warm colours show the relative intensity of the  
6 connectivity. Around this area of high connectivity  
7 are lines that represent barriers to the dispersal of  
8 larvae because of prevailing ocean currents. The  
9 darker the line, the stronger the barrier.

10 What this model demonstrates is that environmental  
11 damage within the eastern South China Sea will spread  
12 within the area displayed, but is unlikely to spread  
13 beyond -- or far beyond -- the barriers illustrated by  
14 the darkest lines. For the same reason, there is  
15 little possibility for a "rescue effect" from outside  
16 the area that is impacted by the damage.

17 Question 2 and question 5 are related and ask  
18 about the extent and scope of the effects of  
19 island-building on adjacent reef systems. The effects  
20 include both the immediate area of dredging and  
21 island-building and the other reefs in the Spratly  
22 reef system.

23 With respect to reefs that are immediately  
24 adjacent to dredging, the obvious impact on the reef  
25 is the dredging of the sea floor that pulverised the  
26 corals and reef area. I cannot give a precise

1 estimate of the reef area pulverised by the dredging  
2 of the sea floor, although it is clearly extensive.

3 I can, however, illustrate the extent of damage  
4 caused by plumes of sediment around Mischief Reef,  
5 just as an example. This figure shows waters around  
6 and within the lagoon of Mischief Reef prior to  
7 dredging, showing typical deep blue, very clear water.  
8 Photosynthesising corals thrive in this clear water  
9 since they rely on the penetration of the sun.  
10 Mischief Reef's lagoon supports a thriving coral  
11 community throughout most of the bottom, which is  
12 typical of oceanic reefs of this type.

13 This figure shows a large sediment plume after  
14 dredging begins. Each of the lighter blue areas  
15 around the edges of the reefs and in the lagoon show  
16 the extent of the sedimentation plume. This will bury  
17 and kill nearly all the corals under the plume, since  
18 the extent of dredging is extensive and the duration  
19 is over weeks or months.

20 This is the extent of the plume more than a month  
21 after the dredging began. The longest extent of the  
22 plume within the lagoon extends the entire length, or  
23 8.5 kilometres. This means that nearly all, if not  
24 all, of the coral reefs within the lagoon were  
25 destroyed by the plume.

26 This is a satellite image of Mischief Reef on

1 19th October 2015. You can see sediment plumes  
2 extending far out to sea, including most of the reef  
3 facing outward, which is the most productive and  
4 biodiverse part of the reef. The extent of damage  
5 indicates that all the reef area near the shallow reef  
6 zones are almost certainly completely covered with  
7 sediment. This means the corals will almost all die.

8 If you zoom in on the easternmost tip of the  
9 artificial island, you can see that a sediment plume  
10 persists around the newly built island. This sediment  
11 plume represents continued leaching of the sediment  
12 over the reef, completely covering corals in the  
13 adjacent reef areas in and out of the lagoon and the  
14 remaining shallow reef.

15 If you zoom in on the northern part of the reef,  
16 you see sediment plumes indicating that newly added  
17 sediments are continuing to cover the corals in the  
18 immediately adjacent reef areas, despite the  
19 reinforcement of the shoreline evident from the  
20 addition of dark gravel, which is represented by the  
21 dark line at the outer edge of the artificial island.

22 With regard to the influence of island-building  
23 activities on the other reefs of the Spratly reef  
24 group, I stated in my answer to question 1 that the  
25 reduction in populations on Mischief Reef will  
26 influence the recruitment of larvae in other parts of

1 the eastern South China Sea. The dredging activity at  
2 Mischief Reef and the other six reefs is likely to  
3 almost completely cover the corals, and therefore  
4 mostly destroy these reefs.

5 This, in turn, will dramatically reduce the number  
6 of fishes and other invertebrates on these reefs.  
7 Therefore, the source of recruitment of larvae of  
8 corals and other reef invertebrates and reef fishes  
9 from the destroyed reefs will mostly be unavailable to  
10 replenish other populations in the Spratly reef system  
11 and the western central Philippines. Question 8 will  
12 address the duration of this impact, which is likely  
13 to be on a decadal scale.

14 Question 3 asks me to elaborate with examples as  
15 to how the removal of giant clams can be detrimental  
16 to the functioning of the ecosystem.

17 Giant clams are similar to corals in that can they  
18 have symbiotic algae that help them grow, live long,  
19 and attain sizes that contribute to the topography of  
20 the reef. For example, measurement of the shell  
21 length of giant clams estimated to be 20 years old  
22 ranged from 42 centimetres to around 93 centimetres  
23 depending on the location and depth where the clam  
24 grew.

25 These massive organisms contribute to the overall  
26 growth and maintenance of the reef structure itself.

1 They contribute a large mass of calcium carbonate that  
2 has taken many years to form. Additionally, similar  
3 to corals, giant clams provide a mass and diversity of  
4 topography to the reef. Many species of fishes and  
5 invertebrates rely on this topography as a refuge.

6 Question 4 asks: based on the expected harm  
7 outlined in my report, do I consider that it would  
8 lead to the extinction of species, and what would  
9 I consider the likelihood of this to be?

10 The answer is that the science of extinction risk  
11 is uncertain with respect to exact calculations of  
12 likelihood of extinction because of the wide range of  
13 life history and ecological characteristics of  
14 species. At present, all we can do is the look at the  
15 symptoms that were exhibited in species that did go  
16 extinct and look for these same symptoms in other  
17 species. We assign a category of risk based on the  
18 magnitude of the symptom.<sup>174</sup> "Vulnerable" is  
19 a category indicating likelihood of extinction;  
20 "endangered" is a higher likelihood; and "critically  
21 endangered" is the highest likelihood.

22 Questions 6 and 7 relate to whether endangered  
23 species have been extracted.

24 Question 6 asks if there are any turtle species in  
25 the region that are not considered endangered or

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<sup>174</sup> See Annex 240.

1 threatened. The answer is: no. There are five  
2 species of marine turtles in this region, and they are  
3 considered either critically endangered, endangered or  
4 vulnerable to extinction, according to the IUCN  
5 Red List of threatened species. Marine turtles as  
6 a group have the highest percentage of threatened  
7 species of all major groups of marine species.

8 Question 7 asks if the evidence indicates the  
9 extent of shark fishing allegedly conducted by Chinese  
10 nationals. The evidence presented to me was  
11 a photograph of a fishing vessel that had been  
12 apprehended with a variety of species, including  
13 sharks. Therefore, there was no indication of the  
14 extent of this fishing activity.

15 The second part of question 7 asks: what volume of  
16 shark fishing would I consider over-exploitation? My  
17 answer is that fishing in general, and sharks in  
18 particular, are already considered over-exploited in  
19 this region.<sup>175</sup> Since many sharks that occur in the  
20 region are threatened with extinction, extracting  
21 sharks without a management plan would not be  
22 responsible fishing.

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<sup>175</sup> V. Christensen, et. al., "Fisheries Impact on the South China Sea Large Marine Ecosystem: A Preliminary Analysis Using Spatially-Explicit Methodology", in *Assessment, Management and Future Directions for Coastal Fisheries in Asian Countries*, WorldFish Center Conference Proceedings, No. 67 (G. Silvestre, et al., eds. 2003). Hearing on Merits, Annex 844; N.K. Dulvy, et al., "Extinction risk and conservation of the world's sharks and rays", *eLife* (21 Jan. 2014). Hearing on Merits, Annex 849.



1           Questions 8 to 13 relate to Chinese activities and  
2           the need for an environmental impact assessment.

3           Question 8 asks: how accurate do I consider my  
4           understanding of the scope and nature of China's  
5           island-building activities, since I cite secondary  
6           sources, including online sources?

7           Based on the satellite imagery that is available,  
8           I am very confident of my evaluation of the basic  
9           extent and scope of Chinese activities. The satellite  
10          imagery is very clear in this respect, and the online  
11          sources confirm our interpretation. In addition,  
12          since submitting our report, an independent scientific  
13          evaluation of this activity has been made available  
14          that further strengthens our interpretation of the  
15          satellite imagery and leads me to conclude that the  
16          initial evaluation of impacts may have been  
17          understated.

18          A report by Dr John McManus, professor of marine  
19          biology and fisheries at the University of Miami,  
20          estimates this reef damage.<sup>176</sup> McManus calculated from  
21          satellite imagery that the recent reef building by  
22          China completely destroyed 12.82 square kilometres of

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<sup>176</sup> John McManus, "Presentation at Panel on Security and Development in the South China Sea, Promoting Sustainable Usage of Oceans", YouTube Video (19 Oct. 2015), available at <https://www.youtube.com/watch?v=tNbkrnvPYlQ> (2:45). Hearing on Merits, Annex 836; John McManus, "Offshore coral reef damage, overfishing and paths to peace in the South China Sea", *The South China Sea: An International Law Perspective*, Conference Papers (6 Mar. 2015). Hearing on Merits, Annex 850.

1 coral reefs by filling them. Our GIS calculation  
2 presented in earlier testimony is very close, at  
3 13.62 square kilometres. McManus estimated the reef  
4 area totally destroyed from channel-building by PRC  
5 was an additional 1.38 square kilometres, for a total  
6 of 14.2 square kilometres of coral reefs completely  
7 destroyed by recent activity.

8 McManus further estimates that PRC dredging has  
9 impacted an additional 79.2 square kilometres of  
10 shallow reef area. This is the area that is affected  
11 by the plume, and I estimate that most of this area is  
12 severely damaged based on the satellite imagery.

13 Question 9 asks about statements made by Chinese  
14 governmental officials that suggest that China has  
15 "taken into full account issues of ecological  
16 preservation" and "followed strict environmental  
17 protection standards".

18 I have only found one Chinese government source  
19 besides these statements that discusses the  
20 environmental impact of China's island-building  
21 activities. This document is titled "Construction  
22 Work at Nansha Reefs Will Not Harm Oceanic  
23 Ecosystems". It was published by China State Oceanic  
24 Administration.<sup>177</sup> The report is of a little more than

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<sup>177</sup> China State Oceanic Administration, "Construction Work at Nansha Reefs Will Not Harm Oceanic Ecosystems" (18 June 2015), available at [http://www.soa.gov.cn/xw/hyyw\\_90/201506/t20150618\\_38598.html](http://www.soa.gov.cn/xw/hyyw_90/201506/t20150618_38598.html). Hearing on Merits, Annex 821.

1 500 words long, and is available at tab 6.9. It  
2 concludes:

3 "... the ecological impact on the coral reefs is  
4 partial, temporary, controllable, and recoverable."<sup>178</sup>

5 This conclusion is not consistent with my  
6 observation and analysis, nor with those by  
7 Professor McManus.

8 With all due respect, China's assertions about the  
9 environmental impact of island-building activities and  
10 the conclusion of this report are contrary to  
11 everything that we know about coral reef ecology and  
12 conservation.

13 If in fact the Chinese Government did undertake  
14 a scientific evaluation of the ecological effects of  
15 their proposed island-building activities, they must  
16 have proceeded with the full knowledge that this  
17 activity would have had catastrophic effects on the  
18 reefs. I cannot imagine a coral reef biologist would  
19 conclude otherwise.

20 The effects of dredging on coral reefs is very  
21 well understood. I see absolutely no evidence from  
22 the satellite imagery that any effective measures were  
23 taken to preserve the ecological environment.

24 Instead, full-scale dredging went ahead, with the  
25 obvious catastrophic effect on the coral reef.

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<sup>178</sup> *Id.*

1 I agree within the conclusions of Dr McManus, who  
2 concludes that this type of direct manmade activity:

3 "... constitutes the most rapid nearly permanent  
4 loss of coral reef area in human activity."<sup>179</sup>

5 Question 10 asks to what extent extraction of  
6 corals would be required before it would start having  
7 detrimental environmental effects.

8 Corals grow slowly, and a recent review indicated  
9 that plate-like corals grow as slow as 1.1 millimetre  
10 per year, while the very fastest-growing branching  
11 corals only grow up to 93 millimetres per year.

12 Corals provide topography that allows fishes and other  
13 invertebrates to survive. These refuges attract  
14 fishes and invertebrates because they help avoid  
15 predators.

16 Any removal of a coral head large enough to house  
17 a fish or any invertebrate, many of which are less  
18 than a centimetre or less in size, would have  
19 an adverse effect on the carrying capacity of the reef  
20 and would take a substantial amount of time to regrow.  
21 Corals are also a source of food for some reef  
22 inhabitants. Almost any extraction of corals will  
23 have a negative environmental impact, and this ranges  
24 from small to very large, depending upon the amount of

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<sup>179</sup> John McManus, "Offshore coral reef damage, overfishing and paths to peace in the South China Sea", *The South China Sea: An International Law Perspective*, Conference Papers (6 Mar. 2015). Hearing on Merits, Annex 850.

1 coral extracted.

2 The Philippines' Memorial details many occasions  
3 when Chinese nationals were caught with extracted  
4 corals, and on one occasion 15 tonnes of endangered  
5 coral were confiscated. Over an extended period, this  
6 will cause a significant environmental impact.

7 Question 11 asks to what extent extraction of  
8 giant clams would be required before it would start  
9 having a detrimental effect.

10 Extraction of a single giant clam will reduce the  
11 carrying capacity of the reef for fishes and  
12 invertebrates. These structures attract other  
13 organisms as a potential refuge from predation. The  
14 more you extract, the greater the reduction in the  
15 carrying capacity, and the greater the environmental  
16 effect.

17 The Philippine Memorial details many occasions  
18 when Chinese fishermen were apprehended with recently  
19 extracted giant clams at Scarborough Shoal, and on one  
20 occasion confiscated 16 tons of giant clams. Over  
21 an extended period, this level of extraction will  
22 cause a large environmental effect.

23 Questions 12 and 13 are interrelated, and I will  
24 answer these questions together. Question 12 asks  
25 about the sediment-rejection capabilities of corals  
26 and the extent of dredging activity that is required

1 before it would generate enough sediment to smother  
2 corals. Question 13 asks at what point turbidity  
3 starts having a negative impact on corals.

4 Fortunately, there is a very rich scientific  
5 literature, dating back several decades, that examines  
6 dredging effects on corals. Even more fortunate is  
7 that there is a recent review of this literature by  
8 a very prominent group of mostly Dutch coral  
9 biologists.<sup>180</sup>

10 Dredging damages and destroys coral, to the extent  
11 they are found on the sections of the ocean floor in  
12 the path of the dredgers. Dredging activities are  
13 detrimental to coral in that it destroys coral through  
14 the dredging process, primarily from covering and  
15 smothering corals, and from light reduction from  
16 turbidity in the water.

17 As you will imagine, the response of corals is  
18 highly varied depending on the species. Since there  
19 are over 500 species of coral in the South China  
20 Sea,<sup>181</sup> it is difficult to generalise. However,  
21 Erftemeijer *et al* (2013) conceptualise the effect of  
22 dredging in this image now displayed across a wide

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<sup>180</sup> P.L.A. Erftemeijer, et al., "Environmental Impacts of Dredging and Other Sediment Disturbances on Corals: A Review", *Marine Pollution Bulletin*, Vol. 64, No. 9 (2012). Hearing on Merits, Annex 847.

<sup>181</sup> D. Huang, et al., "Extraordinary Diversity of Reef Corals in the South China Sea", *Marine Biodiversity*, Vol. 45, No. 2 (2015). Hearing on Merits, Annex 848.

1 range of coral species.

2 This diagram shows that generally, as the  
3 intensity of the two main stressors -- sedimentation  
4 and turbidity -- increases and the duration of these  
5 stressors increases, the response of corals ranges  
6 from no effect to mortality. Of course, any coral  
7 directly impacted by a dredger head would die.

8 In my review of the satellite images, I would  
9 judge that, in areas that China has dredged, most of  
10 the immediate reef area experienced a high intensity  
11 of sedimentation and turbidity stressors for at least  
12 several weeks, if not months. Consequently, with very  
13 high intensity and extended duration, coral mortality  
14 was most likely. For the immediate reef area,  
15 I predict that mortality of corals was nearly  
16 complete.

17 In addition to the immediate reef area,  
18 sedimentation that was suspended from dredging would  
19 settle on corals downstream from the dredging. If  
20 this sedimentation stays in place on the coral for  
21 an extended period of time, as the diagram shows, even  
22 a moderate to high level of intensity of stressor, it  
23 results in mortality of the coral. Extended  
24 sedimentation exposure can lead to mortality to  
25 portions of coral tissue, even if the entire coral is  
26 not killed. Many corals with immediate sub-lethal

1 effects die in the long term.

2 Questions 14 and 15 relate to whether the  
3 ecosystem around Scarborough Shoal and Second Thomas  
4 Shoal constitute rare and fragile ecosystems.

5 Question 14 asks if I am aware of ecosystems in  
6 the ocean similar to that around Scarborough Shoal and  
7 Second Thomas Shoal. These two shoals are similar to  
8 the other reefs and shoals of the Spratlys and  
9 dissimilar to other reefs around the world in many  
10 respects.

11 Scarborough Shoal and Second Thomas Shoal are  
12 considered oceanic reefs. There are many oceanic  
13 reefs around the world, but the biological make-up of  
14 the reefs in the Spratlys and the eastern South China  
15 Sea are unique in that they represent an assemblage of  
16 species found nowhere else in the world. The  
17 uniqueness of this region is embodied in its  
18 recognition as a separate large marine ecosystem.<sup>182</sup>

19 The only reef system I know of that closely  
20 resembles the oceanic reefs of the Spratlys and  
21 Scarborough Shoal is Tubbataha Reef in the Sulu Sea,  
22 east of Palawan. Tubbataha Reef was declared a World  
23 Heritage Site because of its spectacular assemblage of

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<sup>182</sup> D. Pauly & V. Christensen, "Stratified Models of Large Marine Ecosystems: A General Approach and an Application to the South China Sea", in *Large Marine Ecosystems: Stress, Mitigation, and Sustainability* (K. Sherman, et al., eds., 1993). Hearing on Merits, Annex 840.



1 biodiversity. The scientists who have visited both  
2 Tubbataha Reef and the Spratlys report that each of  
3 the reef features in the Spratlys is roughly  
4 equivalent in terms of the spectacular biodiversity of  
5 Tubbataha.

6 Question 15 asks how I would describe the  
7 endurance of the reef and species around Scarborough  
8 Shoal and Second Thomas Shoal compared to other  
9 ecosystems in the ocean. In general, coral reefs are  
10 considered fragile ecosystems because of the  
11 dependence of the ecosystem on the complex symbiotic  
12 relationship of corals and algae. If this symbiosis  
13 is disturbed, the corals may die. This leads to  
14 a disruption of the coral reef ecosystem.

15 Many of the species of corals of the South China  
16 Sea are threatened with extinction, and corals  
17 themselves are at a heightened risk of extinction  
18 because of climate change and ocean acidification.  
19 I consider Scarborough Shoal and Second Thomas Shoal  
20 to belong to one of the most fragile marine ecosystems  
21 globally.

22 Question 16 relates to whether China has taken all  
23 necessary measures to prevent harm in areas where it  
24 exercises sovereign rights (assuming that China has  
25 such rights in the relevant areas). It asks, given  
26 the nature and characteristics of the ecosystem in the

1 relevant areas, whether there are less detrimental  
2 measures available to exploit the resources of the  
3 marine environment.

4 There are many less detrimental measures that  
5 could be practised to avoid harm. These include:  
6 a management plan that determines safe levels of  
7 exploitation; and guidelines for use of minimally  
8 destructive reef fishing methods, such as  
9 hook-and-line, biodegradable fish traps, and  
10 spearfishing without the use of SCUBA or hookah.

11 Fishermen should be informed of the types of  
12 threatened species in the area and given protocols to  
13 return threatened species to the wild in the case of  
14 accidental capture. Use of dynamite and cyanide  
15 should be prohibited and enforced, as should  
16 extraction of coral and giant clams. Adherence to the  
17 FAO Fishing Code of Conduct should be monitored and  
18 enforced.

19 Questions 17 and 18 relate to whether China has  
20 taken all necessary measures to prevent or mitigate  
21 harm. Question 17 asks what measures can be taken to  
22 encourage recovery of the reefs, given that the  
23 prospect of recovery for coral reefs, once destroyed,  
24 is uncertain and unlikely. Question 18 refers to our  
25 report, which indicates that a number of the reefs in  
26 the Spratlys have been permanently destroyed, and asks

1 if there are any measures which can be adopted to  
2 mitigate the damage and harm caused to the  
3 environment. The concepts of recovery and mitigation  
4 are very closely related in conservation biology.  
5 I will therefore answer these questions together.

6 The McManus report indicates that these reefs may  
7 not recover for decades. I concur with this  
8 assessment. The reefs with extensive island-building  
9 activity will never be the same. As mentioned  
10 previously, the continuing sedimentation plumes from  
11 these artificial reefs indicate instability that could  
12 continue to harm surrounding reefs for a very long  
13 time.

14 Mitigating this harm may involve somehow  
15 dismantling the artificial islands in a way that the  
16 sediments are discharged into deep water, where they  
17 would do less environmental harm than on the reefs  
18 themselves. Another possibility would be to somehow  
19 reinforce the islands so that sedimentation plumes  
20 would cease to leak from the islands. This action may  
21 help reefs recover more quickly, but it may also pose  
22 other problems because hardened shoreline structures  
23 can encourage shoreline erosion, which would defeat  
24 the purpose. These issues of recovery and mitigation  
25 involve complex engineering that I am not qualified to  
26 express a view on.

1 Mr President, I have about six or seven more  
2 minutes of answering questions. I believe this is the  
3 time when a coffee break is typically taken. At your  
4 discretion, I could either stop at this point and  
5 continue on with another six or seven minutes when we  
6 return, or I could continue.

7 **THE PRESIDENT:** Please continue.

8 **PROFESSOR CARPENTER:** Thank you, Mr President.

9 Okay. Then I will finish by answering  
10 questions 19 to 22.

11 Question 19 asks me to elaborate on the effects of  
12 cyanide on the marine environment, including the scope  
13 of such effects. Cyanide is a very strong poison that  
14 prevents cells from using oxygen for respiration and  
15 also inhibits photosynthetic activity.<sup>183</sup> When marine  
16 animals come into contact with cyanide in solution,  
17 they undergo respiratory distress and can quickly die.  
18 Corals expel their symbiotic algae and may eventually  
19 die.

20 Cyanide fishing occurs generally at two scales:  
21 one is for capturing ornamental fish for the aquarium  
22 fish industry; and the other is for capturing large  
23 reef fish, such as groupers, for the live reef fish

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<sup>183</sup> R.J. Jones & O. Hoegh-Guldberg, "Effects of Cyanide on Coral Photosynthesis: Implications for Identifying the Cause of Coral Bleaching and for Assessing the Environmental Effects of Cyanide Fishing", *Marine Ecology Progress Series*, Vol. 177 (1999). Hearing on Merits, Annex 842.

1 food trade.<sup>184</sup>

2 In the ornamental trade, cyanide is sprayed into  
3 the water, partially incapacitating a target fish.  
4 The effects are localised, but repeated applications  
5 have cumulative effects, and fishing often involves  
6 breaking corals to extract hiding fish.

7 The use of cyanide to capture large reef fish  
8 generally involves dumping large quantities (a drum or  
9 more) on to the reef and waiting for large fishes to  
10 swim to the surface in distress, where they are  
11 scooped up with nets and taken to clean water to  
12 recuperate, so they remain live and enter the live  
13 reef fish food trade. The large release of cyanide  
14 causes large swathes of destruction on the reef, with  
15 many non-target fishes, invertebrates and corals being  
16 killed in the process.

17 The extent of this destruction is on the order of  
18 tens of square metres of reefs.<sup>185</sup> The Philippine  
19 Memorial indicates that Chinese fishermen were  
20 apprehended with both stocks of cyanide and large live  
21 groupers and other reef fishes.

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<sup>184</sup> R.J. Jones & A.L. Steven, "Effects of cyanide on corals in relation to cyanide fishing on reefs", *Marine Freshwater Research*, Vol. 48 (1997). Hearing on Merits, Annex 841; K. Warren-Rhodes, et al., "Marine Ecosystem Appropriation in the Indo-Pacific: A Case Study of the Live Reef Fish Food Trade", *Ambio: A Journal of the Human Environment*, Vol. 32, No. 7 (Nov. 2003). Hearing on Merits, Annex 845.

<sup>185</sup> R.J. Jones & A.L. Steven, "Effects of cyanide on corals in relation to cyanide fishing on reefs", *Marine Freshwater Research*, Vol. 48 (1997). Hearing on Merits, Annex 841.

1           Question 20 asks me to elaborate on the effects of  
2           the use of explosives for fishing and blasting for  
3           construction on the marine environment. Localised  
4           effects of blast-fishing include killing a large  
5           number of fishes and a coral destruction blast zone of  
6           from 0.5 to 1.5 metres from the blast epicentre. This  
7           pulverises coral into rubble.

8           The cumulative effect of blast-fishing in some  
9           areas is documented to be up to 300-square-metre  
10          rubble zones where active coral growth often does not  
11          return for many years because of the unstable rubble  
12          substrate covering the reef. Blast-fishing reduces  
13          the topography of the reef, which in turn reduces the  
14          carrying capacity of the reef for fishes and  
15          invertebrates that are attracted to vertical relief as  
16          a refuge from predators.

17          Question 21 asks for an elaboration of the process  
18          of construction activities on a reef causing a shift  
19          from coral-based to algal-based community.

20          The shift from a coral-based to an algal-based  
21          community typically involves some form of coral  
22          destruction and reduction in herbivorous fishes.<sup>186</sup>  
23          These two elements lead to the proliferation of fleshy  
24          algae or seaweed on the reef because herbivorous

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<sup>186</sup> C.H. Ainsworth & P.J. Mumby, "Coral-algal phase shifts alter fish communities and reduce fisheries production", *Global Change Biology* (9 July 2014). Hearing on Merits, Annex 851.

1 fishes are not abundant enough to reduce algal cover  
2 by grazing. Because algae grow faster than corals,  
3 they out-compete for the hard substrate that is  
4 required for both coral and seaweed attachment on the  
5 reef.

6 In construction areas, coral is often reduced on  
7 the hard substrate from blasting or clearing  
8 activities, and this is often accompanied by  
9 a reduction in fishes, either as a byproduct of  
10 construction or from an increase in fishing from  
11 construction workers or new inhabitants of the  
12 construction. Phase shifts favouring algae can be  
13 further promoted if new inhabitants in the  
14 construction area contribute to nutrient enrichment  
15 that fertilises algal growth from pollution or  
16 run-off.

17 Finally, question 22 asks for an elaboration on  
18 the effects that a shift from a coral-based to  
19 an algal-based community would have.

20 A phase shift from a coral-based to algal-based  
21 community will change the accompanying fish  
22 community.<sup>187</sup> The reduction in hard topography from  
23 loss of corals leads to a reduced biodiversity of fish  
24 communities that typically have smaller body sizes

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<sup>187</sup> C.H. Ainsworth & P.J. Mumby, "Coral-algal phase shifts alter fish communities and reduce fisheries production", *Global Change Biology* (9 July 2014). Hearing on Merits, Annex 851.

1 than fishes in mature coral reef communities. This  
2 typically reduces dramatically the number of resident  
3 fishes that are targeted and favoured in fisheries.

4 Mr President and distinguished members of the  
5 Tribunal, thank you for your kind attention. This  
6 concludes my presentation.

7 **THE PRESIDENT:** Thank you very much, Professor Carpenter,  
8 that will be all. So I will now give the floor to  
9 Mr Reichler.

10 **MR REICHLER:** Thank you very much, Mr President.

11 I apologise for delaying the coffee break; it will not  
12 be long. I simply want to thank you and the members  
13 of the Tribunal for your indulgence in allowing us  
14 a few moments to give some thought and consultation in  
15 respect of the two very pertinent questions that were  
16 asked at the conclusion of Mr Loewenstein's  
17 presentation, and I would just like to assure the  
18 Tribunal that we will be prepared to provide answers  
19 to both questions immediately upon our return from the  
20 break, if that is your pleasure.

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

22 So we will now have a short break for coffee. We  
23 will come back at about 4.20.

24 (4.09 pm)

(A short break)

26 (4.29 pm)



1 **THE PRESIDENT:** Yes, Mr Reichler, please go ahead.

2 (4.29 pm)

3 **Answers to Tribunal questions by MR REICHLER**

4 **MR REICHLER:** Yes, good afternoon again, Mr President,  
5 members of the Tribunal.

6 Judge Wolfrum asked: can the People's Republic of  
7 China issue acts which are of legal relevance in  
8 international law for Taiwan, the Republic of China?  
9 The answer: the Philippines recognises the People's  
10 Republic of China as the *de jure* government of China,  
11 including all of its territorial components. It is  
12 for the People's Republic of China to determine  
13 whether its own laws and regulations apply to its  
14 entire territory or to specific regions of the  
15 country. The People's Republic of China is the only  
16 government of China recognised diplomatically by the  
17 Republic of the Philippines.

18 In response to the question of Judge Pawlak, we  
19 wish to emphasise at the outset of our answer that  
20 regardless of which state, if any, received  
21 sovereignty over any of the Spratly Islands upon  
22 Japan's renunciation of its claims, that would only --  
23 it could only -- shed light on who might have  
24 sovereignty over the high-tide features themselves,  
25 and by extension their territorial seas. It would  
26 have no relevance to any claim in respect of maritime

1 areas, whether based on the Convention or even general  
2 international law beyond those territorial seas.

3 As we have repeatedly said, especially in our  
4 written pleadings and during the July hearings, this  
5 case is not about which state has sovereignty over  
6 land features. The claims that are before you in the  
7 form of the Philippines' submissions concern only  
8 entitlements to maritime areas beyond the territorial  
9 seas of these features, and to the sovereign rights  
10 and jurisdiction in those maritime areas. As we have  
11 said -- and the Tribunal has agreed in its award of  
12 29th October -- these entitlement claims can be  
13 decided irrespective of which state has sovereignty  
14 over the disputed insular features.

15 Accordingly, it is the Philippines' position that  
16 the question of which state has sovereignty over the  
17 features since World War II is beyond the scope of the  
18 Philippines' claims and -- as the Tribunal itself  
19 appears to have said in its award of 29th October --  
20 beyond the Tribunal's jurisdiction.

21 That said, it is the Philippines' submission that  
22 the historical record shows that there is no factual  
23 or legal basis to conclude that Japan's renunciation  
24 of its claims to the Spratly features conveyed title  
25 in any form to China. Indeed, the record shows that  
26 the Allied powers took great care to make sure that

1 Japan's renunciation did not convey title to China,  
2 and in fact it did not.

3 This statement of the Philippines' position is  
4 without prejudice to our longstanding position that  
5 the question of sovereignty over insular features that  
6 constitute islands because they are above water at  
7 high tide is not part of the Philippines' claims, is  
8 not part of this case, and may be beyond the  
9 Tribunal's jurisdiction.

10 Mr President, members of the Tribunal, thank you  
11 very much for allowing us this opportunity to answer  
12 these two most interesting questions. I would be  
13 grateful if the Tribunal would now invite  
14 Professor Boyle to address you.

15 **THE PRESIDENT:** Thank you very much indeed for the  
16 further clarification that you have given. We will  
17 take that into account.

18 I now call on Professor Boyle.

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

20 **(4.35 pm)**

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

22 **PROFESSOR BOYLE:** Mr President, in this final submission  
23 by our legal team, I have been asked to answer  
24 questions 9, 20 to 23, and 25, and I will do so in  
25 that order.

26 Judge Wolfrum asked in question 9 for:

1            "... a review of the factual evidence in the  
2 record underpinning Professor Carpenter's report and  
3 the Philippines' environmental claims."

4            We understood this to refer to the evidence  
5 regarding destructive fishing practices, given  
6 Judge Wolfrum's reference to "illegal fishing,  
7 illegally taking parts of the sea, marine biomass, and  
8 destroying the coral", but if the question was  
9 intended to refer more broadly to the environmental  
10 impact of dredging and construction works, then  
11 I would respectfully refer you to  
12 Professor Carpenter's testimony and to his reports.

13           The evidence for destructive fishing practices is  
14 laid out in paragraphs 6.50 to 6.65 of the Memorial.  
15 It consists in information gathered from reports  
16 produced by Philippine fisheries enforcement vessels,  
17 by the armed forces and in court cases, as well as  
18 diplomatic correspondence between the Parties. These  
19 various reports detail incidents occurring between  
20 1998 and 2012 at Scarborough Shoal, and also in 2013  
21 at Second Thomas Shoal.

22           In particular, the evidence describes an incident  
23 at Scarborough Shoal in April 2012 involving the  
24 large-scale collection of corals, giant clams and

1 "assorted endangered species".<sup>188</sup> According to  
2 a Chinese Ministry of Foreign Affairs spokesman,  
3 Chinese vessels from FLEC and CMS were present to:

4 "... protect the safety and legitimate fishing  
5 activities of Chinese fishermen and Chinese  
6 vessels."<sup>189</sup>

7 Further reports from April 2012 also describe more  
8 incidents involving the taking of coral and removal of  
9 giant clams at Scarborough Shoal. And in addition the  
10 reports discuss various instances between 1998 and  
11 2006 in which Chinese vessels were discovered in the  
12 vicinity of Scarborough Shoal in possession of  
13 corals,<sup>190</sup> sea turtles,<sup>191</sup> sharks<sup>192</sup> and giant clams.<sup>193</sup>

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<sup>188</sup> *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 12-0894 (11 Apr. 2012), p. 2. MP, Vol. VI, Annex 205.

<sup>189</sup> Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Liu Weimin's Regular Press Conference on April 12, 2012* (12 Apr. 2012). MP, Vol. V, Annex 117.

<sup>190</sup> *Memorandum* from Assistant Secretary of the Department of Foreign Affairs, Republic of the Philippines, to the Secretary of Foreign Affairs of the Republic of the Philippines (23 Mar. 1998), p. 1. MP, Vol. III, Annex 29; *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. 2000100 (14 Jan. 2000), p. 2. MP, Vol. VI, Annex 186; *Situation Report* from Col. Rodrigo C. Maclang, Philippine Navy, to Chief of Staff, Armed Forces of the Philippines, No. 004-18074 (18 Apr. 2000), p. 1. MP, Vol. III, Annex 41; *Memorandum* from Willy C. Gaa, Assistant Secretary of Foreign Affairs, Republic of the Philippines to Secretary of Foreign Affairs, Republic of the Philippines (14 Feb. 2001), p. 1. MP, Vol. III, Annex 45; Office of Asian and Pacific Affairs, Department of Foreign Affairs, Republic of the Philippines, *Apprehension of Four Chinese Fishing Vessels in the Scarborough Shoal* (23 Feb. 2001), pp. 2-3. MP, Vol. III, Annex 46; *Memorandum* from Perfecto C. Pascual, Director, Naval Operation Center, Philippine Navy, to The Flag Officer in Command, Philippine Navy (11 Feb. 2002). MP, Vol. III, Annex 49; *Letter* from Victorino S. Hingco, Vice Admiral, Philippine Navy, to Antonio V. Rodriguez, Assistant Secretary, Office of Asia and Pacific Affairs, Department of Foreign Affairs, Republic of the Philippines (26 Mar. 2002), p. 1. MP, Vol. III, Annex 50; *Report* from Lt. Commander Angeles, Philippine Navy, to Flag Officer in Command, Philippine Navy, No. N2E-F-1104-012 (18 Nov. 2004),

1 Again, there were reports between 1998 and 2002 in  
2 which Chinese fishing vessels were inspected or  
3 apprehended in possession of explosives and cyanide to  
4 be used for fishing.<sup>194</sup>

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pp. 1, 10-15. MP, Vol. III, Annex 55; Report from Commanding Officer, NAVSOU-2, Philippine Navy, to Acting Commander, Naval Task Force 21, Philippine Navy, No. NTF21-0406-011/NTF21 OPLAN (BANTAY AMIANAN) 01-05 (9 Apr. 2006), pp. 5-6. MP, Vol. III, Annex 59.

<sup>191</sup> Memorandum from Assistant Secretary of the Department of Foreign Affairs, Republic of the Philippines, to the Secretary of Foreign Affairs of the Republic of the Philippines (23 Mar. 1998), p. 1. MP, Vol. III, Annex 29; Office of Asian and Pacific Affairs, Department of Foreign Affairs, Republic of the Philippines, *Apprehension of Four Chinese Fishing Vessels in the Scarborough Shoal* (23 Feb. 2001), pp. 2-3. MP, Vol. III, Annex 46; Memorandum from Perfecto C. Pascual, Director, Naval Operation Center, Philippine Navy, to The Flag Officer in Command, Philippine Navy (11 Feb. 2002). MP, Vol. III, Annex 49.

<sup>192</sup> Office of Asian and Pacific Affairs, Department of Foreign Affairs, Republic of the Philippines, *Apprehension of Four Chinese Fishing Vessels in the Scarborough Shoal* (23 Feb. 2001), pp. 2-3. MP, Vol. III, Annex 46.

<sup>193</sup> Memorandum from Josue L. Villa, Embassy of the Republic of the Philippines in Beijing, to the Secretary of Foreign Affairs of the Republic of the Philippines (21 May 2001), p. 10. MP, Vol. III, Annex 48; Memorandum from Perfecto C. Pascual, Director, Naval Operation Center, Philippine Navy, to The Flag Officer in Command, Philippine Navy (11 Feb. 2002). MP, Vol. III, Annex 49; Letter from Victorino S. Hingco, Vice Admiral, Philippine Navy, to Antonio V. Rodriguez, Assistant Secretary, Office of Asia and Pacific Affairs, Department of Foreign Affairs, Republic of the Philippines (26 Mar. 2002), p. 1. MP, Vol. III, Annex 50; Report from CNS to Flag Officer in Command, Philippine Navy, File No. N2D-0802-401 (1 Sept. 2002), p. 1. MP, Vol. III, Annex 52; Report from Lt. Commander Angeles, Philippine Navy, to Flag Officer in Command, Philippine Navy, No. N2E-F-1104-012 (18 Nov. 2004), pp. 1, 10-15. MP, Vol. III, Annex 55; Report from Commanding Officer, NAVSOU-2, Philippine Navy, to Acting Commander, Naval Task Force 21, Philippine Navy, No. NTF21-0406-011/NTF21 OPLAN (BANTAY AMIANAN) 01-05 (9 Apr. 2006), p. 2. MP, Vol. III, Annex 59.

<sup>194</sup> *People of the Philippines v Wuh Tsu Kai, et al*, Criminal Case No. RTC 2362-I, Decision, Regional Trial Court, Third Judicial Region, Branch 69, Iba, Zambales, Philippines (29 Apr. 1998), p. 1. MP, Vol. III, Annex 31; *People of the Philippines v Zin Dao Guo, et al*, Criminal Case No. RTC 2363-I, Decision, Regional Trial Court, Third Judicial Region, Branch 69, Iba, Zambales, Philippines (29 Apr. 1998), p. 1. MP, Vol. III, Annex 32; Memorandum from Josue L. Villa, Embassy of the Republic of the Philippines in Beijing, to the Secretary of Foreign Affairs of the Republic of the Philippines (21 May 2001), p. 10. MP, Vol. III, Annex 48; Memorandum from Perfecto C. Pascual, Director, Naval Operation Center, Philippine Navy, to The Flag Officer in Command, Philippine Navy (11 Feb. 2002). MP, Vol. III, Annex 49; Report from CNS to Flag Officer in Command, Philippine Navy, File No. N2D-0802-401 (1 Sept. 2002), p. 1. MP, Vol. III, Annex 52.

1           Then finally, at Second Thomas Shoal the evidence  
2           of harmful fishing practices dates from May 2013, and  
3           it is found in a report from Philippine personnel  
4           stationed on a ship at that feature. They observed  
5           the gathering of coral and giant clams,<sup>195</sup> and  
6           a Philippine air patrol photographed one of the  
7           vessels, which hopefully you can see on your screen  
8           now; it is also at tab 6.10. You can see there a ship  
9           loaded with what are identifiably giant clams and  
10          coral.

11          Question 20 asks whether the Philippines wishes to  
12          amend Submissions 11 and 12(b) to include  
13          environmental damage at locations other than  
14          Scarborough Shoal, Second Thomas Shoal and Mischief  
15          Reef, and the answer is: yes, we do.

16          The Philippines requests the Tribunal's permission  
17          to amend Submission 11 so that it would now cover  
18          violation of China's obligations to protect and  
19          preserve the marine environment at Cuarteron Reef,  
20          Fiery Cross Reef, Johnson Reef, McKennan (Hughes)  
21          Reef, Gaven Reef and Subi Reef, in addition to the  
22          existing claims with respect to Scarborough Shoal and  
23          Second Thomas Shoal. The Agent will indicate the  
24          precise wording of the revised Submission 11 in his

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<sup>195</sup> Armed Forces of the Philippines, Near-occupation of Chinese vessels of Second Thomas (Ayungin) Shoal in the early weeks of May 2013 (May 2013), p. 3. MP, Vol. IV, Annex 94.

1 speech following me. No amendment of Submission 12(b)  
2 with respect to Mischief Reef is necessary.

3 Question 21 invites the Philippines to elaborate  
4 on the interpretation of Article 192 of the Convention  
5 and it asks whether the article is simply declaratory  
6 of customary international law or whether it  
7 establishes an independent obligation that goes beyond  
8 custom.

9 Mr President, I might perhaps say that it is now  
10 30 years since I first published my first-ever article  
11 on the Law of the Sea Convention, Article 192, so it  
12 is a pleasure to return to these questions.

13 Article 192 is the first articulation of a general  
14 obligation to protect and preserve the marine  
15 environment.<sup>196</sup> In the words of the UNCLOS commentary:

16 "... article 192 is the culmination of a process  
17 of adopting increasingly broad measures in different  
18 types of international instruments relating to marine  
19 environmental issues ..."<sup>197</sup>

20 And I would submit that it is today to be treated  
21 as declaratory of customary international law for the  
22 following reasons.

23 Most importantly, the two formative declarations

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<sup>196</sup> *United Nations Convention on the Law of the Sea 1982: A Commentary*,  
Vol. 4 (M. Nordquist, et. al., eds., 2002), p. 36. MP, Vol. XI, Annex  
LA-147(bis).

<sup>197</sup> *Id.*



1 on international environmental law both recognise that  
2 states have an obligation not to cause damage to the  
3 environment of other states or of areas beyond  
4 national jurisdiction. Principle 21 of the 1972  
5 Stockholm Declaration on the Human Environment<sup>198</sup> was  
6 reiterated with minor amendments by Principle 2 of the  
7 1992 Rio Declaration on Environment and Development,<sup>199</sup>  
8 and it has also been reiterated by other Rio and  
9 post-Rio instruments.<sup>200</sup>

10 To remind you, Rio Principle 2 provides,  
11 *inter alia*, that:

12 "States have ... the responsibility to ensure that  
13 activities within their jurisdiction or control do not  
14 cause damage to the environment of other states or of

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<sup>198</sup> UN Conference on the Human Environment, *Declaration of the United Nations Conference on the Human Environment*, UN Doc. A/CONF.48/14/Rev.1 (16 June 1972), Principle 21. MP, Vol. XI, Annex LA-63.

<sup>199</sup> UN Conference on Environment and Development, *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26/Rev 1 (Vol. I) (1993), principle 2. Supplemental Documents, Vol. VI, Annex LA-251.

<sup>200</sup> See Convention on Biological Diversity, 1760 UNTS 79 (5 June 1992), entered into force 29 Dec. 1993, Art. 3. MP, Vol. XI, Annex LA-82; United Nations Framework Convention on Climate Change, 1771 UNTS 107 (9 May 1992), entered into force 21 Mar. 1994, preamble. Supplemental Documents, Vol. VI, Annex LA-261; Convention to combat desertification in those countries experiencing serious drought and/or desertification, particularly in Africa, 1954 UNTS 3 (14 Oct. 1994), entered into force 26 Dec. 1996, preamble. Supplemental Documents, Vol. VI, Annex LA-266; Stockholm Convention on Persistent Organic Pollutants, 2256 UNTS 119 (22 May 2001), entered into force 17 May 2004, preamble. Supplemental Documents, Vol. VI, Annex LA-273; International Tropical Timber Agreement (2006), 2797 UNTS 006 (27 Jan. 2006), entered into force 7 Dec. 2011, preamble. Supplemental Documents, Vol. VI, Annex LA-275; U.N. General Assembly, *Non-Legally Binding Instrument on all Types of Forests*, U.N. Doc. A/RES/62/98 (31 Jan. 2008), preamble. Hearing on Merits, Annex LA-309.

1        *areas beyond the limits of national jurisdiction.*"<sup>201</sup>

2            You will, I'm sure, recall that in its *Advisory*  
3        *Opinion on the Legality of the Threat or Use of*  
4        *Nuclear Weapons*, and in later cases, the International  
5        Court has held that:

6            "The existence of the general obligation of states  
7        to ensure that activities within their jurisdiction  
8        and control respect *the environment of other states or*  
9        *of areas beyond national control* is now part of the  
10       corpus of international law relating to the  
11       environment."<sup>202</sup>

12           Articles 192 and 194 of the 1982 UN Convention  
13        apply this general obligation more specifically to the  
14        protection and preservation of the marine environment,  
15        but they also go further. Articles 192 and 194(1) are  
16        applicable to the marine environment as an integrated  
17        whole.<sup>203</sup> Properly understood, they impose

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<sup>201</sup> UN Conference on Environment and Development, *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26/Rev 1 (Vol. I) (1993), principle 2. Supplemental Documents, Vol. VI, Annex LA-251 (emphasis added).

<sup>202</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, para. 29. Hearing on Merits, Annex LA-298 (emphasis added). See also *Case Concerning The Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, para 53. Hearing on Merits, Annex LA-299; and with respect to transboundary harm, *Arbitration Regarding the Iron Rhine ("IJzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, Award (24 May 2005), reprinted in XXVII U.N.R.I.A.A. 35, paras. 222-223. Hearing on Merits, Annex LA-303; *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, ICJ Reports 2010, para. 101. Supplemental Documents, Vol. VI, Annex LA-240; *The Indus Waters Kishenganga Arbitration (Pakistan v. India)*, Partial Award (18 Feb. 2013), para. 448. Hearing on Merits, Annex LA-305.

<sup>203</sup> UN Conference on Environment and Development, *Agenda 21* (3-14 June 1992), para. 17.1. MP, Vol. XI, Annex LA-65.

1 an obligation on all states -- including China -- to  
2 take appropriate measures to protect not only the  
3 marine environment of other states and the marine  
4 environment of areas beyond national jurisdiction, but  
5 also -- and this is the important point -- to protect  
6 *their own marine environment*, including their own  
7 territorial sea, their own exclusive economic zone and  
8 their own continental shelf.

9 Now, the reason for this different approach in the  
10 Convention is obvious. If states do not first protect  
11 their own waters, they will not be able to control  
12 pollution or other forms of environmental damage  
13 spreading to other areas of the marine environment  
14 beyond their own jurisdiction.<sup>204</sup>

15 The view that the normative provisions of UNCLOS  
16 as a whole are today to be treated as customary  
17 international law is too widely held by states parties  
18 and non-parties alike to require further iteration.  
19 Regional seas agreements reflect this view and they  
20 have been a significant means of implementing  
21 Article 192 and other provisions of Part XII, even  
22 before the entry into force of the Convention itself.  
23 The state practice that is evident in these agreements  
24 is thus another reason why Article 192, and Part XII  
25 as a whole, can reasonably be regarded today as

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<sup>204</sup> See in particular UNCLOS, Arts. 207 and 208.

1 declaratory of customary international law on the  
2 marine environment.<sup>205</sup>

3 You have asked about the interpretation and scope  
4 of Article 192. Article 192 serves as an overarching  
5 chapeau to the whole of Part XII of UNCLOS, the part  
6 concerned with "Protection and Preservation of the  
7 Marine Environment". You may not necessarily think  
8 that from reading Part XII because most of its  
9 provisions are, undoubtedly, largely concerned with  
10 controlling pollution of the sea from various sources.  
11 But that said, Articles 194(5), 196 and 237 in  
12 particular take a broader environmental perspective.  
13 The very general wording of Article 192 thus

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<sup>205</sup> Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution (24 Apr. 1978). Hearing on Merits, Annex LA-311; Convention for the Protection of the Marine Environment and Coastal Area of the South-East Pacific (12 Nov. 1981), entered into force 1986. Hearing on Merits, Annex LA-313; Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of West and Central African Region (23 Mar. 1981), entered into force 5 Aug. 1984. Hearing on Merits, Annex LA-312; Regional Convention for the Conservation of the Red Sea and the Gulf of Aden (14 Feb. 1982), entered into force 20 Aug. 1985. Hearing on Merits, Annex LA-314; Convention for the Protection and Development of the Marine Environment of the Wider Caribbean, 1506 U.N.T.S. 157 (24 Mar. 1983), entered into force 11 Oct. 1986. Hearing on Merits, Annex LA-315; Convention for the Protection, Management, and Development of the Marine and Coastal Environment of East Africa (21 June 1985), entered into force 30 May 1996. Hearing on Merits, Annex LA-316; Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (25 Nov. 1986), entered into force 22 Aug. 1990. Hearing on Merits, Annex LA-317; Convention for the Protection of the Marine Environment and Coastal Region of the Mediterranean (10 June 1995), entered into force 9 July 2004. Hearing on Merits, Annex LA-319; Convention for the Protection of the Marine Environment of the North-East Atlantic, 2354 U.N.T.S. 67, (22 Sept. 1992), entered into force 25 Mar. 1998. Hearing on Merits, Annex LA-318; Convention on the Protection of the Marine Environment of the Baltic Sea Area (9 Apr. 1992), entered into force 17 Jan. 2000. Supplemental Documents, Vol. VI, Annex LA-260; Convention for Cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific (18 Feb. 2002). Hearing on Merits, Annex LA-323.

1 emphasises that Part XII applies to the marine  
2 environment as a whole, in all of its ecological  
3 dimensions, and not simply to pollution of the sea.

4 It is that broader environmental perspective which  
5 was emphasised during the Rio Conference, in  
6 particular in Agenda 21 of that conference report.  
7 Agenda 21, Chapter 17 refers to "International law, as  
8 reflected in the provisions of the ... Convention on  
9 the Law of the Sea",<sup>206</sup> and Chapter 17 starts from the  
10 premise that UNCLOS provides:

11 "... the international basis upon which to pursue  
12 the protection and sustainable development of the  
13 marine and coastal environment and its resources  
14 ..."<sup>207</sup>

15 Unlike Part XII of UNCLOS, however, the focus of  
16 Chapter 17 of Agenda 21 is more broadly on the  
17 prevention of environmental degradation and the  
18 protection of ecosystems.<sup>208</sup>

19 Agenda 21 can legitimately be taken into account

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<sup>206</sup> UN Conference on Environment and Development, *Agenda 21* (3-14 June 1992), para. 17.1. MP, Vol. XI, Annex LA-65 (emphasis added).

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* See also R. Falk & H. Elver, "Comparing Global Perspectives: The 1982 UNCLOS and the 1992 UNCED", in *Order for the Oceans at the Turn of the Century* (D. Vidas & W. Østreng, eds., 1999), p. 145. Hearing on Merits, Annex LA-325; Alexander Yankov, "The Law of the Sea Convention and Agenda 21: Marine Environment Implications", in *International Law and Sustainable Development* (A. Boyle & D. Freestone, eds., 1999), p. 271. Hearing on Merits, Annex LA-326; Yoshifumi Tanaka, "Zonal and Integrated Management Approaches to Ocean Governance: Reflections on a Dual Approach in International Law of the Sea", *International Journal of Marine and Coastal Law*, Vol. 19, No. 4 (2004), p. 483. Hearing on Merits, Annex LA-328.

1 when interpreting or implementing the Convention.<sup>209</sup>

2 It has had the effect of legitimising and encouraging  
3 legal developments based on the new perspective set  
4 out there.<sup>210</sup> In the words of one former FAO official,  
5 it illustrates how "a more conceptually sophisticated"  
6 focus on protection of the marine environment has  
7 evolved out of Part XII.<sup>211</sup> And as one former judge of  
8 the Hamburg tribunal has observed:

9 "It is hard to conceive of the development of the  
10 modern law of the sea and the emerging international  
11 law of the environment in ocean-related matters  
12 outside the close association and interplay between  
13 UNCLOS and Agenda 21."<sup>212</sup>

14 Question 21 also asks for an elaboration of the

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<sup>209</sup> 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. See International Law Commission, Draft Articles on the Law of Treaties with Commentaries, in *Report of the International Law Commission on the work of its eighteenth session* (4 May-19 July 1966), in *Yearbook of the International Law Commission*, Vol. II (1966), commentary to draft Article 27, at para. (16). SWSP, Vol. XII, Annex LA-184.

<sup>210</sup> See, e.g., OSPAR Convention; Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 1936 UNTS 269 (17 Mar. 1992), entered into force 6 Oct. 1996. Supplemental Documents, Vol. VI, Annex LA-262; Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean (10 June 1995), entered into force, 12 Dec. 1999. Hearing on Merits, Annex LA-320; Protocol Concerning Pollution from Land-based Sources and Activities to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (6 Oct. 1999), entered into force 13 Aug. 2010. Hearing on Merits, Annex LA-322.

<sup>211</sup> R. Falk & H. Elver, "Comparing Global Perspectives: The 1982 UNCLOS and the 1992 UNCED", in *Order for the Oceans at the Turn of the Century* (D. Vidas & W. Østreng, eds., 1999), p. 153. Hearing on Merits, Annex LA-325.

<sup>212</sup> Alexander Yankov, "The Law of the Sea Convention and Agenda 21: Marine Environment Implications", in *International Law and Sustainable Development* (A. Boyle & D. Freestone, eds., 1999), p. 272. Hearing on Merits, Annex LA-326.

1 significance of the Convention on Biological Diversity  
2 in informing the content of Article 192 and how this  
3 compares to Article 194(5).

4 The Law of the Sea Convention of course makes no  
5 reference to biological diversity; the words are not  
6 there. A decade later, the Rio Conference adopted the  
7 Convention on Biological Diversity, whose provisions  
8 are intended to promote conservation and sustainable  
9 use of terrestrial and marine biodiversity.

10 So international law on conservation of marine  
11 living resources and protection and preservation of  
12 the marine environment today is not the exclusive  
13 preserve of either treaty. Each agreement is plainly  
14 relevant for the purpose of interpreting and  
15 implementing the other. Principles of international  
16 environmental law, including those concerned with  
17 conservation and sustainable use of natural resources,  
18 must also be taken into account when interpreting  
19 UNCLOS in the same way that they have been when  
20 interpreting other treaties.<sup>213</sup>

21 Now, the Philippines does not suggest that the  
22 Convention on Biological Diversity has been wholly

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<sup>213</sup> *The Indus Waters Kishenganga Arbitration (Pakistan v. India)*, Partial Award (18 Feb. 2013), para. 452. Hearing on Merits, Annex LA-305; Case Concerning The Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, paras. 112 & 140. Hearing on Merits, Annex LA-299; Pulp Mills on the River Uruguay (Argentina v Uruguay), Judgment, ICJ Reports 2010, paras. 64-65, 204-05. Supplemental Documents, Vol. VI, Annex LA-240.

1 incorporated into UNCLOS, still less that there is  
2 a dispute about compliance with the Convention on  
3 Biological Diversity by China. Its point is a simple  
4 one: that protection and preservation of the marine  
5 environment should be interpreted to include  
6 protection and preservation of biological diversity.<sup>214</sup>

7 Article 2 of the Convention on Biological  
8 Diversity defines that concept in these terms. It  
9 says:

10 "*Biological diversity*" means the variability  
11 among living organisms from all sources, including,  
12 *inter alia*, terrestrial, marine and other aquatic  
13 ecosystems and the ecological complexes of which they  
14 are part ..."

15 And it goes on to say:

16 "... *this includes diversity within species,*  
17 *between species and of ecosystems.*"<sup>215</sup>

18 I think that's probably the key point in that  
19 definition: "diversity within species, between species  
20 and of ecosystems".

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<sup>214</sup> In its *Shrimp-Turtle* decision, for example, the WTO Appellate Body referred *inter alia* to the 1992 Rio Declaration on Environment and Development, the 1982 UNCLOS, the 1973 CITES Convention, the 1979 Convention on Conservation of Migratory Species and the 1992 Convention on Biological Diversity in order to determine the present meaning of "exhaustible natural resources" in the GATT. *Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the WTO Appellate Body, Doc. No. WT/DS58/AB/R (12 Oct. 1998), paras. 130-131. SWSP, Vol. XII, Annex LA-178.

<sup>215</sup> Convention on Biological Diversity, 1760 UNTS 79 (5 June 1992), entered into force 29 Dec. 1993, Art. 2. MP, Vol. XI, Annex LA-82 (emphasis added).



1           The UN Agreement on Straddling and Highly  
2           Migratory Fish Stocks proceeds from the assumption  
3           that the Law of the Sea Convention already imposes on  
4           coastal states and states fishing on the high seas  
5           an obligation to protect "biodiversity in the marine  
6           environment".<sup>216</sup> So does Agenda 21.<sup>217</sup> Put simply,  
7           that is the nub of the Philippines' argument with  
8           respect to biodiversity in this case.

9           We argue that Article 192 and other pertinent  
10          articles of Part XII are engaged whenever activities  
11          are undertaken or permitted which may adversely affect  
12          the diversity of ecosystems or diversity within or  
13          between species. And given the fundamental importance  
14          of coral reefs to the ecology of the South China Sea,  
15          any large-scale destruction of those reefs will  
16          necessarily damage biodiversity throughout the South  
17          China Sea, as Professor Carpenter's evidence shows.<sup>218</sup>

18          We submit that UNCLOS Part XII provides an appropriate

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<sup>216</sup> 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. Supplemental Documents, Vol. VI, Annex LA-267("In order to conserve and manage straddling fish stocks and highly migratory fish stocks, coastal States and States fishing on the high seas shall, *in giving effect to their duty to cooperate in accordance with the Convention*: ... (g) protect 'biodiversity in the marine environment.'").

<sup>217</sup> UN Conference on Environment and Development, *Agenda 21* (3-14 June 1992), paras. 17.7, 17.85. MP, Vol. XI, Annex LA-65.

<sup>218</sup> K.E. Carpenter & L.M. Chou, *Environmental Consequences of Land Reclamation Activities on Various Reefs in the South China Sea* (14 Nov. 2015), pp. 26-27. Supplemental Documents, Vol. II, Annex 699.

1 legal order with which to address the damage or the  
2 risk of future damage.

3 This view of Article 192 differs from  
4 Article 194(5) only insofar as the latter is narrower.  
5 Article 194(5) refers to "rare or fragile" ecosystems,  
6 and the habitat of "depleted, threatened or endangered  
7 species". The coral reefs in this case are indeed  
8 "rare or fragile", as I argued on Thursday,<sup>219</sup> and the  
9 species at risk are in some cases "depleted,  
10 threatened or endangered"; most notably the giant  
11 clams, turtles and other species identified by  
12 Professor Carpenter in his testimony a few minutes  
13 ago. So Submissions 11 and 12(b) could be decided on  
14 that basis alone: that there is a violation of  
15 Article 194(5).

16 But to focus only on rare or fragile ecosystems or  
17 threatened, depleted or endangered species would be to  
18 miss the point of the Convention on Biological  
19 Diversity, namely that diversity itself is a key value  
20 to be protected, including diversity within the  
21 relevant ecosystem. In that connection, I would  
22 simply draw your attention to the preamble to the  
23 Convention on Biological Diversity, and specifically  
24 the first ten recitals. You will find a copy at  
25 tab 6.8 in your bundle.

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<sup>219</sup> Hearing on Merits, Tr. (Day 3), p. 26.

1           Ecosystems or species can easily be wiped out by  
2           development, even if they are not rare or fragile or  
3           endangered. The objective of the Convention on  
4           Biological Diversity, as its preamble makes clear, is  
5           to protect and preserve them before they reach that  
6           state. Thus the fundamental point of the Convention  
7           is not adequately captured by a narrow reading of the  
8           specific wording of Article 194(5).

9           In our view, a coherent and comprehensive  
10          understanding of the present law on protection and  
11          preservation of the marine environment requires you to  
12          give a broader reading to Article 192, the one that we  
13          advocate here; in other words, that it includes  
14          protection and preservation of biodiversity. That, in  
15          our view, is a point which is relevant to Part XII as  
16          a whole, not simply to Article 192, and it underpins  
17          our Submissions 11 and 12(b).

18          Question 22 asks whether the Philippines is aware  
19          of any experts from China or elsewhere publishing  
20          views about the environmental impact of China's  
21          activities or its toleration of activities which are  
22          contrary to or differ from those of the Philippines.

23          Well, Mr President, I can assure you that the  
24          sleepy eyes you see in the second row of our legal  
25          team are partly as a result of their diligence in  
26          searching the internet for English and

1 Chinese-language publications that address the  
2 environmental impact of China's activities. It has  
3 unfortunately been one of those pieces of research  
4 that all PhD students are familiar with at some point:  
5 they spend weeks researching something, and they find  
6 nothing. Apart from a brief statement from the State  
7 Oceanic Administration, to which I will refer in  
8 a moment, there is nothing. Given the problems of  
9 access to the features occupied by China, and its  
10 approach to the activities it is undertaking,  
11 including a rather expedited timeframe, this should  
12 not be surprising.

13 Question 23 invites the Philippines to comment on  
14 a statement given by Mr Ouyang Yujing,  
15 director-general of the Department of Boundary and  
16 Ocean Affairs of the Ministry of Foreign Affairs of  
17 the People's Republic of China. The statement makes,  
18 I think, six assertions.

19 First, he says the construction projects  
20 undertaken in the South China Sea have "gone through  
21 a science-based evaluation and assessment, with equal  
22 importance given to construction and protection".<sup>220</sup>  
23 Second, he says full account was taken of ecological  
24 preservation and fishery protection. Third, he claims

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<sup>220</sup> Embassy of the People's Republic of China in Canada, *An Interview on China's Construction Activities on the Nansha Islands and Reefs* (27 May 2015). Hearing on Merits, Annex 820.

1 that strict environmental standards and requirements  
2 were followed in the construction process. Fourth, he  
3 says that "effective measures" were taken to preserve  
4 the ecological environment. Fifth, there is a promise  
5 to step up ecological monitoring of the reefs, islands  
6 and waters. And finally, he claims that the  
7 Convention on Biological Diversity and the CITES  
8 Convention will be strictly observed.

9 This is a statement that is unaccompanied by any  
10 supportive evidence. If there has been  
11 a science-based evaluation, it has not been made  
12 public; it has not been communicated to the  
13 Philippines or to "the competent international  
14 organizations", as required by Articles 205 and 206 of  
15 the Convention. We say that that failure is itself  
16 conclusive evidence of a violation of these articles.  
17 Even without appearing in these proceedings, China  
18 could easily have made its evaluation available to the  
19 Tribunal directly or in some other way. It has not  
20 been slow to publicise its views on other matters, so  
21 why has it not produced the evaluation?

22 The only reasonable inference to be drawn from  
23 what is missing is that it does not exist. Had China  
24 appeared in these proceedings, it could not possibly  
25 or plausibly have asserted the evidence of an EIA  
26 without producing the relevant document. The Tribunal

1 cannot allow its non-appearance to exempt China from  
2 the normal burden of proof that attaches to any  
3 assertion of fact in inter-state proceedings.

4 But, Mr President, after some very dedicated  
5 research by our legal team over the weekend, we have  
6 now located a short article from the State Oceanic  
7 Administration briefly describing the techniques  
8 allegedly employed to mitigate the environmental  
9 effects of the Chinese construction works.<sup>221</sup> You will  
10 find a copy of that short article at tab 6.9 in your  
11 folder. You could miss it quite easily because it is  
12 only a page long. It does not claim to be a summary  
13 of anything bigger.

14 It is certainly nothing like the multi-volume EIA  
15 which Uruguay deposited in the *Pulp Mills* case,<sup>222</sup>  
16 which is currently still weighing down an entire  
17 bookshelf in my library. China's dredging and  
18 construction in the South China Sea is a much bigger  
19 project than the Uruguayan pulp mill and the  
20 environmental risks are comparably greater, and  
21 a comparably more extensive EIA would be warranted.

22 More importantly, this document describes the

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<sup>221</sup> See China State Oceanic Administration, "Construction Work at Nansha Reefs Will Not Harm Oceanic Ecosystems" (18 June 2015), available at [http://www.soa.gov.cn/xw/hyyw\\_90/201506/t20150618\\_38598.html](http://www.soa.gov.cn/xw/hyyw_90/201506/t20150618_38598.html). Hearing on Merits, Annex 821.

<sup>222</sup> See *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Merits, Counter-Memorial of Uruguay (20 July 2007), Vols. VI & VII. Hearing on Merits, Annex LA-301.

1 construction project in some detail, but you will see  
2 that it makes no attempt to assess the impact on the  
3 marine environment in general, or on the ecosystem and  
4 biological diversity of the reefs in particular. It  
5 simply asserts in its conclusions that:

6 "The construction work on the Nansha reefs  
7 stresses ecological protection. Many protection  
8 measures were adopted in the stages of planning,  
9 design and construction ... [T]he ecological impact on  
10 the coral reefs is partial, temporary, controllable  
11 and recoverable."<sup>223</sup>

12 Well, you've just heard Professor Carpenter's  
13 evidence and you have, I think, seen the photographs  
14 for yourselves. You can draw your own conclusions.

15 This pseudo-evaluation meets none of the  
16 requirements for an EIA set out by the International  
17 Court in the *Pulp Mills* case.<sup>224</sup> It is plainly not  
18 an EIA. In these circumstances, the Philippines  
19 maintains its position that China has not conducted  
20 an environmental impact assessment as required by  
21 Article 206 in respect of its land creation and  
22 construction activities at Mischief Reef, or anywhere

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<sup>223</sup> China State Oceanic Administration, "Construction Work at Nansha Reefs Will Not Harm Oceanic Ecosystems" (18 June 2015), available at [http://www.soa.gov.cn/xw/hyyw\\_90/201506/t20150618\\_38598.html](http://www.soa.gov.cn/xw/hyyw_90/201506/t20150618_38598.html). Hearing on Merits, Annex 821.

<sup>224</sup> *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, ICJ Reports 2010, para. 205. Supplemental Documents, Vol. VI, Annex LA-240.

1 else in the South China Sea.

2 For the third and fourth statements by Mr Yujing  
3 to be given any credence would, I think, again require  
4 some effort by China to identify the relevant  
5 environmental standards and protective measures they  
6 claim have been taken. It is not obvious, looking at  
7 the photos, what they would be. It has not made any  
8 attempt to identify those measures. All we have here  
9 are assertions, unsupported by any evidence.

10 Finally, the last item in his statement.  
11 Compliance with the Biological Diversity Convention  
12 and the CITES Convention simply is not in issue in  
13 these proceedings. What matters is whether the  
14 requirements of Part XII of UNCLOS have been met.

15 That brings me to question 25, which asks whether  
16 the Philippines alleges that Chinese land reclamation  
17 at Subi Reef, Fiery Cross Reef, Gaven Reef, Johnson  
18 Reef, Cuarteron Reef and McKennan (Hughes) Reef  
19 constitutes a violation of the Convention, other than  
20 a duty not to aggravate the dispute pending  
21 litigation; and, if so, which provisions of the  
22 Convention.

23 The answer to this question is: yes, we do so  
24 allege. The relevant provisions of the Convention are  
25 those identified on Thursday afternoon in my  
26 environmental speech; that is, Articles 123, 192, 194,



1 197 and 206. In addition, it is now clear -- as  
2 explained a few moments ago -- that there is also  
3 a violation of Article 205.

4 Everything alleged in respect of dredging and  
5 construction activities at Mischief Reef in  
6 Submission 12(b), in our Memorial and in our oral  
7 presentations applies equally to Subi Reef, Fiery  
8 Cross Reef, Gaven Reef and Johnson Reef and Cuarteron  
9 Reef and Hughes Reef. It's exactly the same case with  
10 exactly the same evidence. We did not have that  
11 evidence when we drafted the Memorial; we do have it  
12 now.

13 Mr President, members of the Tribunal, that  
14 concludes my answers to your questions. This has  
15 been, I think I might say, a most remarkable case,  
16 probably one of the most remarkable there has ever  
17 been on the law of the sea. For my part, it has been  
18 a real privilege to represent the Philippines and to  
19 appear before you all. As they say on the BBC, thank  
20 you for listening.

21 Unless you have any questions, I would ask you to  
22 call Secretary del Rosario to the podium.

23 **THE PRESIDENT:** Well, Professor Boyle it looks like there  
24 is no question for you. So we will invite the  
25 Minister for Foreign Affairs to the podium.

26 (5.03 pm)

1                   **Concluding remarks by MINISTER DEL ROSARIO**

2   **MINISTER DEL ROSARIO:** Mr President, distinguished  
3       members of the Tribunal, good afternoon. Before our  
4       Agent, the Honourable Solicitor General, presents our  
5       final submissions, it is my honour to respectfully  
6       address you one last time in this Great Hall of  
7       Justice.

8           When I first had the privilege of appearing before  
9       you in July, it was at the beginning of the hearings  
10      on jurisdiction. We did not know then whether or not  
11      we would ever reach this point. The Philippines,  
12      however, never doubted this Tribunal's jurisdiction.  
13      But there are some who could not believe that the  
14      Arbitral Tribunal would have the courage to apply the  
15      law to a country like China.

16           There are those who think the rule of law in  
17      international relations does not apply to great  
18      powers. We reject that view. International law is  
19      the great equaliser among states. It allows small  
20      countries to stand on an equal footing with more  
21      powerful states. Those who think "might makes right"  
22      have it backwards. It is exactly the opposite, in  
23      that right makes might.

24           That is why, in January 2013, we confidently put  
25      our fate in the hands of this Tribunal and the  
26      compulsory dispute resolution mechanisms of UNCLOS.

1 With your wise guidance, we have come a long way.

2 Mr President, distinguished members of the  
3 Tribunal, the 29th October Award on Jurisdiction is  
4 a remarkable document. It will not only stand the  
5 test of time, it will be a model for ages. It is  
6 remarkable in many ways, most especially for its moral  
7 strength. It is a compelling rebuke to those who  
8 doubt that international justice does exist and will  
9 prevail.

10 I say this not just as the Secretary of Foreign  
11 Affairs of the Philippines, but also as a global  
12 citizen. It is not just the fate of the Philippines  
13 that rests in your hands. I note the presence of the  
14 distinguished observers from Australia, Indonesia,  
15 Japan, Malaysia, Singapore, Thailand and Vietnam, and  
16 I thank them for their presence. Other countries too  
17 are watching to see what this Tribunal will do.

18 It is fitting that these hearings are ending as  
19 2015 itself draws to a close. This year marks the  
20 70th anniversary of the United Nations. That great  
21 institution is an expression of the best in us. It is  
22 unfortunate that it took one of the saddest episodes  
23 in human history to create it. Yet those of us who  
24 lived through that episode also remember the hopes for  
25 a new chapter in our common history. We dared to  
26 envision a future of enduring peace, shared prosperity

1 and a new era of collaboration.

2 Two centrepieces of that new order were: the  
3 sovereign equality of all states; and the commitment  
4 to settle disputes peacefully. The sovereign equality  
5 of states is enshrined in the first substantive  
6 provision of the UN Charter, Article 2(1). The  
7 obligation to settle disputes by peaceful means  
8 appears subsequently in Article 2(3).

9 Mechanisms for the compulsory settlement of  
10 disputes were also a critical part of this new order.  
11 Article 33(1) specifically mentions arbitration and  
12 judicial settlement. And of course the Charter also  
13 gave birth to the International Court of Justice.

14 I am proud to say that the Philippines was among  
15 the original 51 signatories of the UN Charter. That  
16 was true for China as well.

17 When we started this arbitration, the Philippines  
18 was fulfilling one of its most solemn duties, which is  
19 to settle international disputes peacefully. The  
20 Tribunal knows that our disputes with China in the  
21 South China Sea have, for a very long time,  
22 complicated our relationship. Most recently, tensions  
23 have risen dramatically. Unable to resolve these  
24 disputes ourselves, we thus turned to this arbitration  
25 to provide all parties a durable, rules-based  
26 solution.

1           China has said it considers the initiation of this  
2 arbitration to be "an unfriendly act". We disagree.  
3 In 1982, the US General Assembly adopted the Manila  
4 Declaration on the Peaceful Settlement of  
5 International Disputes between States, which declared  
6 that recourse to the judicial settlement of disputes:

7           "... should not be considered an unfriendly act  
8 between States."

9           This year is also the 40th anniversary of the  
10 establishment of diplomatic relations between the  
11 Philippines and the People's Republic of China. Since  
12 1975, economic and political ties between our two  
13 countries have grown. We view China as a valued  
14 friend, and it is precisely to preserve that  
15 friendship that we initiated this arbitration.

16           We believe this arbitration benefits everyone.  
17 For China, it will define and clarify its maritime  
18 entitlements. For the Philippines, it will clarify  
19 what is ours, specifically our fishing rights, rights  
20 to resources, and rights to enforce our laws within  
21 our EEZ. And for the rest of the international  
22 community, it will help ensure peace, security,  
23 stability and freedom of navigation and overflight in  
24 the South China Sea.

25           We also believe that this arbitration will be  
26 instructive for other states to consider the dispute

1 settlement mechanism under UNCLOS as an option for  
2 resolving disputes in a peaceful manner.

3 Mr President, distinguished members of the  
4 Tribunal, the Philippines more than anyone is mindful  
5 of the fact that your October Award on Jurisdiction  
6 was not the end of the story. Several jurisdictional  
7 questions were joined to these hearings on the merits.  
8 We trust that last week, and again today, our counsel  
9 have resolved any lingering jurisdictional concerns  
10 you may have.

11 In our view, the Tribunal's jurisdiction could not  
12 be clearer with respect to declaring that China's  
13 claim to "historic rights" in the areas encompassed by  
14 the nine-dash line is inconsistent with UNCLOS.  
15 Mr Reichler showed last Tuesday that the historic  
16 rights that China claims are very different from  
17 a claim to historic title that might be precluded from  
18 jurisdiction under Article 298.

19 On the substance of the matter, Professor Oxman  
20 and Mr Loewenstein showed that the regimes of the  
21 continental shelf and exclusive economic zone under  
22 UNCLOS, and even general international law, plainly  
23 exclude China's claim of "historic rights" within the  
24 nine-dash line.

25 Mr President, I am not a lawyer. But in my mind,  
26 when the Convention says that the Philippines' rights

1 in its continental shelf exist *ipso facto* and  
2 *ab initio*, and do not depend on occupation, that means  
3 that there is no room for China's claim. And when the  
4 Convention speaks of an "exclusive" economic zone,  
5 I take "exclusive" to mean exclusive. That means it  
6 is ours. And what is our is ours, not China's.

7 On Wednesday morning, Professor Sands showed why  
8 we so desperately need your guidance. With  
9 an assertiveness that is growing with every passing  
10 day, China is preventing us from carrying out even the  
11 most basic exploration and exploitation activities in  
12 areas where only the Philippines can possibly have  
13 rights.

14 The preamble to the UN Charter states:

15 "WE THE PEOPLES OF THE UNITED NATIONS DETERMINED  
16 ...

17 "to establish conditions under which justice and  
18 respect for the obligations arising from treaties and  
19 other sources of international law can be maintained,  
20 and

21 "to promote social progress and better standards  
22 of life in larger freedom ..."

23 China is failing on both counts, Mr President. It  
24 is failing to respect the obligations arising from  
25 treaties, specifically UNCLOS. It is also interfering  
26 with the Philippines' sovereign duty to promote the

1 social progress of our people and our efforts to  
2 achieve a better standard of life for all Filipinos.

3 China is not just interfering with the progress of  
4 the Filipino people; China's unilateral actions and  
5 the atmosphere of intimidation they have created are  
6 also trampling upon the rights and interests of the  
7 peoples of Southeast Asia and beyond.

8 China's massive island-building campaign shows its  
9 utter disregard for the rights of other states and for  
10 international law. China started this a year after  
11 the Philippines initiated the arbitration. It is  
12 intent on changing unilaterally the status quo in the  
13 region, imposing China's illegal nine-dash line claim  
14 by fiat and presenting this Tribunal with  
15 a *fait accompli*.

16 China's island-building not only undermines  
17 regional stability, but also the rule of law. It is,  
18 moreover, inflicting massive environmental damage on  
19 the most diverse marine environment in the world.  
20 China has intentionally created one of the biggest  
21 emerging environmental disasters in the world,  
22 Mr President.

23 Yet the stakes are still greater. The  
24 Convention's "Constitution for the Oceans" is itself  
25 at risk. No state, no matter how powerful, should be  
26 allowed to claim an entire sea as its own and to use



1 force or the threat of force in asserting that claim.  
2 No state should be permitted to write and rewrite the  
3 rules in order to justify its expansionist agenda. If  
4 that is allowed, the Convention itself will be deemed  
5 useless. Power, Mr President, will have prevailed  
6 over reason and the rule of law will have been  
7 rendered meaningless.

8 We trust that our counsel have made it equally  
9 clear that there is no issue of overlapping  
10 entitlements beyond 12 miles in the South China Sea.  
11 Mr Reichler and Professor Schofield showed that there  
12 is no feature in the Spratly Islands that can sustain  
13 human habitation or an economic life of its own.  
14 There is, therefore, no feature that can generate  
15 an EEZ or continental shelf. Mr Reichler called  
16 Itu Aba a "'Potemkin' island".

17 Since there are no overlapping entitlements beyond  
18 12 miles, the Tribunal is free to rule that China's  
19 actions at Mischief Reef, at Second Thomas Shoal and  
20 elsewhere violate the Philippines' sovereign rights  
21 and jurisdiction.

22 Last Thursday, Professor Oxman made clear what the  
23 practical consequences of deciding that even a single  
24 feature in the Spratly Islands generates entitlement  
25 beyond 12 miles would be. China regards its  
26 entitlements in the South China Sea as excluding those

1 of the Philippines and of Vietnam, Malaysia, Indonesia  
2 and Brunei as well. It has absolutely no regard for  
3 the entitlements of other states. China is also more  
4 than willing to use force and the threat of force to  
5 enforce its perceived entitlements, even where it has  
6 none.

7 If the Tribunal found that China has a potential  
8 entitlement to 200 miles on the basis of a speck of  
9 broken coral and sand in the middle of the South China  
10 Sea, it would effectively hand China the "golden key"  
11 that Mr Martin referred to last Wednesday. The  
12 Filipino people would only be able to benefit from the  
13 natural resources of our EEZ and continental shelf on  
14 China's terms, if at all. In the real world, that  
15 would mean not at all.

16 It would also perpetuate in another form the same  
17 disputes, the same danger and the same instability  
18 that China currently exploits without restraint. And  
19 this time it would be much worse: the possibility of  
20 a just solution obtained through arbitration will have  
21 been exhausted. We will have no other legal avenue of  
22 confronting China's unlawful conduct.

23 Mr Martin and Professor Oxman showed that the very  
24 purpose of Article 121(3) is to prevent such perverse  
25 results by denying tiny islands expanded maritime  
26 zones. The need for clear and definitive legal

1 constraint is obvious. And it is to you,  
2 Mr President, members of the Tribunal, to whom we  
3 confidently entrust the task of providing the  
4 necessary constraint.

5 Mr President, distinguished members of the  
6 Tribunal, if I may say so, there is no greater  
7 contribution to international peace and security the  
8 Tribunal could make than to decide that none of the  
9 features in the Spratly Islands is capable of  
10 generating any entitlement beyond 12 miles. The  
11 unjustifiable encroachment on the sovereign rights of  
12 other states, as well as the global commons, would be  
13 avoided. The importance of the sovereignty disputes  
14 over these tiny bits of land would be reduced in  
15 importance. They would cease to be a *casus belli*.  
16 And the inexcusable harm to the environment resulting  
17 from efforts to solidify expansionist maritime claims  
18 would be diminished.

19 Mr President, distinguished members of the  
20 Tribunal, we recognise that the Tribunal's mission is  
21 in fact judicial. The Tribunal must decide the claims  
22 on the basis of the facts and the law, in this case  
23 UNCLOS. We submit that on that basis alone, the  
24 Tribunal must sustain all of the Philippines' claims,  
25 especially in regard to the maritime entitlements of  
26 the Parties and the exclusive sovereign rights and

1 jurisdiction of the Philippines within 200 miles of  
2 its coasts, except for the 12-mile territorial seas  
3 around the disputed insular features.

4 That said, the Tribunal's mandate to achieve  
5 justice is not carried out in a vacuum. Judges and  
6 arbitrators are not expected to be oblivious to the  
7 realities on the ground. UNCLOS is the United Nations  
8 Convention on the Law of the Sea. The object and  
9 purpose of the Charter, as well as those of the  
10 Convention, are far from irrelevant. These purposes  
11 include the maintenance and strengthening of  
12 international peace and security. Nothing would  
13 contribute more to these objectives than the  
14 Tribunal's finding that China's rights and obligations  
15 are neither more nor less than those established by  
16 UNCLOS, and that the entitlements of the tiny insular  
17 features it claims are limited to 12 miles.

18 Finding otherwise would gravely undermine these  
19 same objectives. It would leave the Philippines and  
20 its ASEAN neighbours in worse straits than when we  
21 embarked on this arbitral voyage. It would convert  
22 the nine-dash line, or its equivalent in the form of  
23 exaggerated maritime zones for tiny, uninhabitable  
24 features, into a Berlin Wall of the sea: a giant fence  
25 owned by and excluding everyone but China itself.

26 We are confident that you will interpret and apply

1 the law in a way that produces a truly just solution.  
2 That is the best way -- indeed, the only way -- to  
3 craft a legal solution that truly promotes peace,  
4 security and good neighbourliness in the South China  
5 Sea.

6 Mr President, distinguished members of the  
7 Tribunal, all that remains for me to do is to say  
8 thank you.

9 First, I wish to thank our counsel. The  
10 Philippines could not have entrusted this case, our  
11 fate, to more skilled, principled and determined  
12 professionals. I know they share the Philippines'  
13 firm conviction about the need to uphold the  
14 international rule of law as the bedrock of peace,  
15 order and stability in our world.

16 Second, I wish to thank the most able personnel of  
17 the Permanent Court of Arbitration, who have provided  
18 all of us with diligent assistance that has made these  
19 proceedings run so smoothly. We know none of this  
20 would have been possible without them.

21 Finally, Mr President, distinguished members of  
22 the Tribunal, on behalf of our President, Benigno S  
23 Aquino III, on behalf of myself, and on behalf of all  
24 the Filipino people, I wish to humbly thank you for  
25 the care, dedication, wisdom and courage with which  
26 you have conducted these proceedings. We confidently

1 entrust our fate, the fate of the region and indeed  
2 the fate of the Convention to you. We know that in  
3 your capable hands, the rule of law will not be  
4 reduced to the quaint aspiration of a time now past,  
5 but rather will be accorded the primacy that the  
6 founders of the United Nations and the drafters of  
7 UNCLOS envisioned.

8 Mr President, distinguished members of the  
9 Tribunal, we proffer to you once again our deepest  
10 gratitude. May I now ask that you kindly invite the  
11 Honourable Solicitor General to the lectern to present  
12 the final submissions of the Philippines.

13 **THE PRESIDENT:** Thank you very, very much, Mr Secretary,  
14 and thank you for those kind words from you. I now  
15 invite the Agent and Solicitor General of the  
16 Philippines to the podium.

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(5.25 pm)

**Final submissions by SOLICITOR GENERAL HILBAY**

**SOLICITOR GENERAL HILBAY:** Mr President, esteemed members of the Tribunal, it is an honour for me to appear before you once more to read the Philippines' final submissions into the record. Before I do, let me just echo the deep appreciation expressed by the Honourable Secretary of Foreign Affairs a few moments ago.

Mr President, members of the Tribunal, the Philippines' final submissions. On the basis of the facts and law set forth in the written and oral pleadings, the Philippines respectfully asks the Tribunal to adjudge and declare that:

A. The Tribunal has jurisdiction over the claims set out in Section B of these submissions, which are fully admissible, to the extent not already determined to be within the Tribunal's jurisdiction and admissible in the Award on Jurisdiction and Admissibility of 29th October 2015.

B. (1) China's maritime entitlements in the South China Sea, like those of the Philippines, may not extend beyond those expressly permitted by the United Nations Convention on the Law of the Sea;

(2) China's claims to sovereign rights jurisdiction, and to "historic rights" with respect to

1 the maritime areas of the South China Sea encompassed  
2 by the so-called "nine-dash line" are contrary to the  
3 Convention and without lawful effect to the extent  
4 that they exceed the geographic and substantive limits  
5 of China's maritime entitlements expressly permitted  
6 by UNCLOS;

7 (3) Scarborough Shoal generates no entitlement to  
8 an exclusive economic zone or continental shelf;

9 (4) Mischief Reef, Second Thomas Shoal, and  
10 Subi Reef are low-tide elevations that do not generate  
11 entitlement to a territorial sea, exclusive economic  
12 zone or continental shelf, and are not features that  
13 are capable of appropriation by occupation or  
14 otherwise;

15 (5) Mischief Reef and Second Thomas Shoal are part  
16 of the exclusive economic zone and continental shelf  
17 of the Philippines;

18 (6) Gaven Reef and McKennan Reef (including Hughes  
19 Reef) are low-tide elevations that do not generate  
20 entitlement to a territorial sea, exclusive economic  
21 zone or continental shelf, but their low-water line  
22 may be used to determine the baseline from which the  
23 breadth of the territorial sea of Namyit and Sin Cowe,  
24 respectively, is measured;

25 (7) Johnson Reef, Cuarteron Reef and Fiery Cross  
26 Reef generate no entitlement to an exclusive economic



1 zone or continental shelf;

2 (8) China has unlawfully interfered with the  
3 enjoyment and exercise of the sovereign rights of the  
4 Philippines with respect to the living and non-living  
5 resources of its exclusive economic zone and  
6 continental shelf;

7 (9) China has unlawfully failed to prevent its  
8 nationals and vessels from exploiting the living  
9 resources in the exclusive economic zone of the  
10 Philippines;

11 (10) China has unlawfully prevented Philippine  
12 fishermen from pursuing their livelihoods by  
13 interfering with traditional fishing activities at  
14 Scarborough Shoal;

15 (11) China has violated its obligations under the  
16 Convention to protect and preserve the marine  
17 environment at Scarborough Shoal, Second Thomas Shoal,  
18 Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson  
19 Reef, Hughes Reef and Subi Reef;

20 (12) China's occupation of and construction  
21 activities on Mischief Reef

22 (a) violate the provisions of the Convention  
23 concerning artificial islands, installations and  
24 structures;

25 (b) violate China's duties to protect and preserve  
26 the marine environment under the Convention; and

1           (c) constitute unlawful acts of attempted  
2 appropriation in violation of the Convention;

3           (13) China has breached its obligations under the  
4 Convention by operating its law enforcement vessels in  
5 a dangerous manner, causing serious risk of collision  
6 to Philippine vessels navigating in the vicinity of  
7 Scarborough Shoal;

8           (14) Since the commencement of this arbitration in  
9 January 2013, China has unlawfully aggravated and  
10 extended the dispute by, among other things:

11           (a) interfering with the Philippines' rights of  
12 navigation in the waters at, and adjacent to, Second  
13 Thomas Shoal;

14           (b) preventing the rotation and resupply of  
15 Philippine personnel stationed at Second Thomas Shoal;

16           (c) endangering the health and wellbeing of  
17 Philippine personnel stationed at Second Thomas Shoal;  
18 and

19           (d) conducting dredging, artificial  
20 island-building and construction activities at  
21 Mischief Reef, Cuarteron Reef, Fiery Cross Reef,  
22 Gaven Reef, Johnson Reef, Hughes Reef and Subi Reef;  
23 and

24           (15) China shall respect the rights and freedoms  
25 of the Philippines under the Convention, shall comply  
26 with its duties under the Convention, including those

1 relevant to the protection and preservation of the  
2 marine environment in the South China Sea, and shall  
3 exercise its rights and freedoms in the South China  
4 Sea with due regard to those of the Philippines under  
5 the Convention.

6 Mr President, esteemed members of the Tribunal,  
7 thank you and good evening.

8 (5.32 pm)

9 **Closing remarks by THE PRESIDENT**

10 **THE PRESIDENT:** I thank the Solicitor General and Agent  
11 of the Philippines. I shall shortly declare this  
12 hearing closed, but before I do so, allow me to make  
13 a few remarks about the next steps in the proceedings.

14 As I mentioned in my opening remarks, the Tribunal  
15 is conscious of its duty under Article 5 of Annex VII  
16 to the Convention to "assure each party a full  
17 opportunity to be heard and to present its case". The  
18 Tribunal has kept China updated on all developments in  
19 the arbitration. The Registry of the Tribunal, the  
20 PCA, has been delivering to the Chinese Embassy copies  
21 of the transcripts of this hearing, a copy of the  
22 judges' folder handed to us by the Philippines, as  
23 well as materials received from the Philippines.

24 The Parties have until 9th December 2015 to review  
25 and submit corrections to the transcript. In due  
26 course, the reviewed and corrected transcripts will be

1 made available to the observers and to the public via  
2 the PCA's website.

3 The Philippines will have until 18th December 2015  
4 to submit any written answers to any of the  
5 arbitrators' questions or to amplify any oral answers  
6 that they have given in writing.

7 Article 25(2) of the Rules of Procedure, which  
8 deals with a party's failure to appear or to make  
9 submissions, provides that the Tribunal may take:

10 "... [whatever steps] it may consider necessary,  
11 within the scope of its powers under the Convention,  
12 its Annex VII, and these Rules, to afford to each of  
13 the Parties a full opportunity to present its case."

14 In line with this provision, the Arbitral Tribunal  
15 has decided to provide China with the opportunity to  
16 comment in writing by 1st January 2016 on anything  
17 said during the hearing and any subsequent written  
18 answers which may be filed by the Philippines by  
19 18th December 2015, as I have already said.

20 As the Tribunal now enters its deliberations, the  
21 Tribunal is conscious of its duty to conduct the  
22 proceedings "to avoid unnecessary delay and expense  
23 and to provide a fair and efficient process".

24 The Tribunal will issue its final award on the  
25 merits and any remaining issues of jurisdiction and  
26 admissibility after a review of the material which has

1       been put before us. If at any point during this work  
2       the Tribunal comes to the conclusion that it would  
3       benefit from further information or clarification from  
4       the Parties, it will be in contact with them.

5               Finally, I would like to say some words of thanks  
6       on behalf of the Tribunal.

7               First, we are very grateful to the court reporter,  
8       Mr Trevor McGowan, and the technical support provided  
9       by the IFS team.

10              Second, I would like to convey the Tribunal's  
11       gratitude to the Registrar, Judith Levine, her  
12       colleague Garth Schofield and their team from the  
13       Permanent Court of Arbitration: Nicola Peart, Philipp  
14       Kotlaba, Julia Solana, Iuliia Samsonova and Gaelle  
15       Chevalier.

16              Thirdly, I would like to thank Grant Boyes, the  
17       expert appointed by the Tribunal to assist us  
18       throughout this phase of the proceedings.

19              Fourthly, I wish to express the Tribunal's  
20       appreciation to Professors Schofield and Carpenter for  
21       their presentations and for their willingness to  
22       answer our questions today.

23              Fifthly, I wish to express our thanks to the  
24       observer delegations for their presence and for the  
25       interest that they have shown in the proceedings.

26              Finally, I wish to thank the distinguished

1 representatives of the Philippines for their oral and  
2 written submissions, which we have found most helpful.

3 I now have the great pleasure to declare this  
4 hearing closed, and I wish everyone a safe return  
5 journey home, wherever they are going. Thank you very  
6 much indeed. That brings us to the end of the  
7 hearing.

8 **(5.39 pm)**

9 **(The hearing concluded)**