

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

PCA Case No. 2013-19

Permanent Court of Arbitration
Peace Palace
The Hague
The Netherlands

Day 1

Tuesday, 7th July 2015

Hearing on Jurisdiction and Admissibility

Before:

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

BETWEEN:

THE REPUBLIC OF THE PHILIPPINES

-and-

THE PEOPLE'S REPUBLIC OF CHINA

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

The People's Republic of China was not represented.

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Participants may not have been present for the entire hearing.

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Tuesday, 7th July 2015

(2.32 pm)

THE PRESIDENT: Good afternoon. The hearing on jurisdiction and admissibility is now open. This arbitration, which was commenced by the Republic of the Philippines, is against the People's Republic of China, under the United Nations Convention on the Law of the Sea.

My name is Thomas Mensah and I am the Presiding Arbitrator in this case. I am joined on the bench by my co-arbitrators, and they are: Judge Rüdiger Wolfrum and Judge Jean-Pierre Cot to my left, and Judge Stanislaw Pawlak and Professor Alfred Soons to my right.

Also assisting us are senior counsel from the Permanent Court of Arbitration. On the right end is Ms Judith Levine, who serves as the registrar in this case, and her colleague Mr Garth Schofield on the left end.

On behalf of the Arbitral Tribunal, I welcome the distinguished representatives of the Philippines. Before asking the Agent to introduce his delegation, I note that no delegation appears on behalf of the People's Republic of China.

The Chinese Government has adhered to the position

1 that it neither accepts nor participates in these
2 proceedings. It has reiterated this position in *notes*
3 *verbales*, in public statements, in its Position Paper
4 "on the Matter of Jurisdiction" dated
5 7th December 2014, and in two letters to members of
6 the Arbitral Tribunal from the Chinese Ambassador to
7 the Kingdom of the Netherlands, His Excellency Mr Chen
8 Xu, on 6th February 2015, and most recently on
9 1st July 2015.

10 The Chinese Government has also made it clear that
11 its statements, documents and the letters of the
12 ambassador "shall by no means be interpreted as
13 China's participation in the arbitral proceeding in
14 any form".

15 In line with its duty under Article 5 of Annex VII
16 to the Convention to "assur[e] to each party a full
17 opportunity to be heard and to present its case", the
18 Arbitral Tribunal has kept China updated on all
19 developments in the arbitration and stated that it is
20 open to the People's Republic of China to participate
21 in these proceedings at any stage.

22 Article 9 of Annex VII to the Convention provides
23 that:

24 "Absence of a party or failure of a party to
25 defend its case shall not constitute a bar to the
26 proceedings. Before making its award, the arbitral

1 tribunal must satisfy itself not only that it has
2 jurisdiction over the dispute but also that the claim
3 is well founded in fact and law."

4 For the reasons set out in Procedural Order No. 4
5 of 21st April 2015, the Arbitral Tribunal has
6 considered the communications by China to constitute,
7 in effect, a plea concerning jurisdiction. The
8 Arbitral Tribunal decided to bifurcate the proceedings
9 by holding this preliminary hearing on the Arbitral
10 Tribunal's jurisdiction and the admissibility of the
11 Philippines' claims before proceeding, if necessary,
12 to a hearing on the merits.

13 Notwithstanding its decision that China's
14 communications effectively constitute a plea
15 concerning jurisdiction, the Arbitral Tribunal
16 continues to have a duty pursuant to Article 9 of
17 Annex VII to the Convention to satisfy itself that it
18 has jurisdiction over the dispute. Accordingly, the
19 Arbitral Tribunal will consider possible issues of
20 jurisdiction and admissibility even if they are not
21 addressed in China's Position Paper.

22 On 23rd June 2015, the Arbitral Tribunal sent
23 a letter to the parties with guidance as to issues to
24 address in connection with this hearing. That list
25 was not intended to be exhaustive of the issues that
26 may be raised during the hearing. The Philippines

1 therefore is free to structure its argument as it
2 considers most appropriate and to address any issues
3 as to jurisdiction or admissibility.

4 In addition, the Arbitral Tribunal may pose
5 further questions to the Philippines during the
6 hearing, which the Philippines may choose to answer at
7 any time during the hearing, which is scheduled to
8 close next Monday.

9 Before handing over to the Agent of the
10 Philippines, I acknowledge, on behalf of the Tribunal,
11 the presence of distinguished representatives of
12 interested states who are here as observers to watch
13 and listen to the proceedings. The presence of
14 representatives from Malaysia, the Republic of
15 Indonesia, the Socialist Republic of Vietnam, the
16 Kingdom of Thailand and Japan shows that this case is
17 a matter of great interest in the region.

18 Incidentally, the Embassy of Brunei in Brussels has
19 also indicated its interest in the hearings.

20 You have all received the provisional hearing
21 schedule that we will be following. We plan to have
22 a coffee break of 15 minutes at around 4.00 pm during
23 the afternoon sessions and 11.30 am during the morning
24 sessions.

25 May I respectfully ask you to turn your phones to
26 silent, and to refrain from taking photographs or

1 recordings.

2 Unless there are other housekeeping matters that
3 the Philippines would like to raise, I propose that we
4 begin, and I hand the floor over to the Agent of the
5 Philippines to introduce his distinguished delegation
6 and open the oral argument.

7 Mr Solicitor General, Agent, the floor is yours.

8 Thank you.

9 (2.40 pm)

10 **First-round submissions by SOLICITOR GENERAL HILBAY**

11 **SOLICITOR GENERAL HILBAY:** Mr President, distinguished
12 members of the Tribunal, it is an honour for me to
13 speak before you, and a great privilege to act as the
14 Agent of the Republic of the Philippines in these
15 proceedings.

16 On behalf of the Filipino people and our
17 delegation from all three departments of our
18 government, let me begin by expressing our deep
19 appreciation for the great care and attention you have
20 devoted to this case. It is undeniable from the
21 detailed and probing questions that the Tribunal has
22 asked us, both in December 2014 and again two weeks
23 ago, that you fully appreciate the significance of
24 this case to the Philippines.

25 The Philippines is mindful of the fact that the

1 Tribunal's task has been complicated by China's
2 non-appearance. We deeply appreciate the steadfast
3 impartiality with which you have managed those
4 difficulties, while at the same time taking care to
5 ensure the Philippines is not prejudiced by China's
6 absence. We place our full trust in you, confident in
7 the knowledge that the Tribunal will make its
8 determination in accordance with the law.

9 Mr President, as the Agent of the Republic of the
10 Philippines, my principal task today is to introduce
11 our speakers and tell you the order of presentations
12 to follow the rest of this afternoon and tomorrow.
13 I hope you will not be disappointed to learn that we
14 do not intend to use the additional session you kindly
15 held in reserve on Thursday morning.

16 Following me to the podium this afternoon will be
17 the Honourable Secretary of Foreign Affairs, Mr Albert
18 del Rosario. Secretary del Rosario will explain the
19 importance of this case to the Philippines, and
20 provide our views on the claims the Philippines has
21 submitted for decision. He will also discuss the many
22 and prolonged efforts the Philippines has made to
23 resolve its maritime disputes with China, and tell you
24 what led to the Philippines' decision to institute
25 these proceedings in 2013.

26 Following Secretary del Rosario, Mr Paul Reichler

1 will address the Tribunal's jurisdiction to rule on
2 China's claim to "historic rights" in maritime areas
3 beyond the limits of its potential entitlements under
4 UNCLOS. Mr Reichler will show you that the 1982
5 Convention was intended as a comprehensive
6 constitution for the oceans, to settle all matters
7 relating to the law of the sea. As such, it
8 supersedes any claim to sovereign rights of any kind
9 beyond the limits allowed by the Convention. In the
10 course of his comments, Mr Reichler will also make
11 clear that there are very real legal disputes between
12 the parties in respect of their maritime entitlements
13 in the South China Sea. These are the disputes the
14 Philippines has brought before you.

15 We expect that Mr Reichler's comments will take us
16 to the coffee break.

17 After the break, Professor Philippe Sands will
18 demonstrate why none of the Philippines' submissions
19 raises a question of sovereignty over land territory
20 that might fall outside the Tribunal's jurisdiction.

21 Professor Bernard Oxman will conclude today's
22 presentations by showing that none of the Philippines'
23 submissions falls within the jurisdictional exclusion
24 of Article 298(1)(a)(i) concerning the interpretation
25 or application of Articles 15, 74 or 83 relating to
26 sea boundary delimitations. Professor Oxman will also

1 explain how your determination of the potential
2 maritime entitlements of the parties will serve to
3 narrow the disputes between them, reduce tensions, and
4 facilitate the diplomatic resolution of those issues
5 that lie outside your jurisdiction; namely,
6 sovereignty over small maritime features and the
7 delimitation of maritime boundaries.

8 Tomorrow morning we will begin with Mr Lawrence
9 Martin, who will demonstrate that all the
10 jurisdictional requirements in Articles 281, 282 and
11 283 are satisfied. In so doing, he will show that
12 there is no merit to China's objections based on the
13 2002 ASEAN Declaration on the Code of Conduct in the
14 South China Sea, the Treaty of Amity and Cooperation
15 in Southeast Asia, or any joint statements issued by
16 the Philippines and China.

17 Professor Alan Boyle will then show that the
18 Tribunal has jurisdiction over the Philippines'
19 submissions with respect to China's violations of its
20 duties to protect and preserve the marine environment
21 under Articles 192 and 194 of the Convention, over
22 China's construction of artificial islands, and over
23 the Philippines submission relating to China's
24 interference with its fishing rights in the vicinity
25 of Scarborough Shoal. Nothing in Article 297 operates
26 to bar your jurisdiction over any of these or any

1 other of the Philippines' claims.

2 Mr Reichler will then return to explain why there
3 is no impediment to the Tribunal's exercise of
4 jurisdiction under the part of Article 298(1)(a)(i)
5 that precludes jurisdiction in matters involving
6 historic bays or titles, because China neither claims
7 nor plausibly could claim that the South China Sea is
8 its historic bay, or that it enjoys historic titles
9 beyond the limits of its 12-mile territorial sea.

10 After that, Professor Oxman will return to
11 demonstrate that none of the disputes raised by the
12 Philippines falls within the jurisdictional exception
13 of Article 298(1)(b). These disputes do not concern
14 military activities. They also do not concern law
15 enforcement activities in an EEZ that could plausibly
16 be claimed by China.

17 Finally, Professor Sands will conclude the
18 Philippines' presentation in tomorrow afternoon's
19 session with a summation of our case on jurisdiction,
20 taking care that all Chinese objections or potential
21 objections to jurisdiction have been refuted, and all
22 questions put by the Tribunal have been answered.

23 It is our estimate that we will conclude all of
24 our presentations by the break in tomorrow afternoon's
25 session.

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

1 for your kind attention. I ask that you call
2 Secretary del Rosario to the podium.

3 **THE PRESIDENT:** Thank you very much indeed. May I now
4 call Secretary of State del Rosario to come to the
5 podium. Thank you.

6 (2.48 pm)

7 **First-round submissions by SECRETARY DEL ROSARIO**

8 **SECRETARY DEL ROSARIO:** Mr President, distinguished
9 members of the Tribunal, it is a great honour to
10 respectfully appear before you on behalf of my
11 country, the Republic of the Philippines. It is
12 indeed a special privilege to do so in a case that has
13 such importance to all Filipinos and, if I may add, to
14 the rule of law in international relations.

15 Mr President, the Philippines has long placed its
16 faith in the rules and institutions that the
17 international community has created to regulate
18 relations among states. We are proud to have been
19 a founding member of the United Nations and an active
20 participant in that indispensable institution. Its
21 organs, coupled with the power of international law,
22 serve as a great equaliser among states, allowing
23 countries such as my own to stand on an equal footing
24 with wealthier, more powerful states.

25 Nowhere is this more true, Mr President, than with

1 respect to the progressive development of the law of
2 the sea, which culminated in the adoption of the Law
3 of the Sea Convention in 1982. That instrument, which
4 has rightly been called a "constitution for the
5 oceans",¹ counts among its most important achievements
6 the establishment of clear rules regarding the
7 peaceful use of the seas, freedom of navigation,
8 protection of the marine environment and, perhaps most
9 importantly, clearly defined limits on the maritime
10 areas in which states are entitled to exercise
11 sovereign rights and jurisdiction.

12 These are all matters of central significance to
13 the Philippines. Indeed, given our lengthy coastline,
14 our status as an archipelagic state and our seafaring
15 tradition, the rules codified in the law of the sea
16 have always had particular importance for the
17 Philippines. The Philippines is justifiably proud of
18 the fact that it signed the Convention on the day it
19 was opened for signature on 10th December 1982; and we
20 were one of the first states to submit its instrument
21 of ratification, which we did on 8th May 1984.

22 The Philippines has respected and implemented its
23 rights and obligations under the Convention in good

¹ UN Conference on the Law of the Sea, *185th Meeting*, UN Doc.

A/CONF.62/PV.185 (26 Jan. 1983), para. 47. MP, Vol. XI, Annex LA-116.

1 faith. This can be seen in the amendment of our
2 national legislation to bring the Philippines'
3 maritime claims into compliance with the Convention,
4 by converting our prior straight baselines into
5 archipelagic baselines in conformity with Articles 46
6 and 47, and by providing that the maritime zones of
7 the Kalayaan Island Group and Scarborough Shoal in the
8 South China Sea would be consistent with Article 121.

9 The Philippines took these important steps,
10 Mr President, because we understand and accept that
11 compliance with the rules of the Convention is
12 required of all states parties.

13 I mentioned a moment ago the equalising power of
14 international law. Perhaps no provisions of the
15 Convention are as vital to achieving this critical
16 objective as Part XV. It is these dispute resolution
17 provisions that allow the weak to challenge the
18 powerful on an equal footing, confident in the
19 conviction that principles trump power; that law
20 triumphs over force; and that right prevails over
21 might.

22 Mr President, allow me to respectfully make it
23 clear: in submitting this case, the Philippines is not
24 asking the Tribunal to rule on the territorial
25 sovereignty aspect of its disputes with China. We are
26 here because we wish to clarify our maritime

1 entitlements in the South China Sea, a question over
2 which the Tribunal has jurisdiction. This is a matter
3 that is most important not only to the Philippines,
4 but also to all coastal states that border the South
5 China Sea, and even to all the states parties to
6 UNCLOS. It is a dispute that goes to the very heart
7 of UNCLOS itself. Our very able counsel will have
8 much more to say about this legal dispute over the
9 interpretation of the Convention during the course of
10 these oral hearings. But in my humble layman's view,
11 the central legal dispute in this case can be
12 expressed as follows.

13 For the Philippines, the maritime entitlements of
14 coastal states -- to a territorial sea, exclusive
15 economic zone and continental shelf, and the rights
16 and obligations of the states parties within these
17 respective zones -- are established, defined and
18 limited by the express terms of the Convention. Those
19 express terms do not allow for -- in fact they
20 preclude -- claims to broader entitlements or
21 sovereign rights or jurisdiction over maritime areas
22 beyond the limits of the EEZ or continental shelf. In
23 particular, the Convention does not recognise, or
24 permit the exercise of, so-called "historic rights" in
25 areas beyond the limits of the maritime zones that are
26 recognised or established by UNCLOS.

1 Sadly, China disputes this, Mr President, in both
2 word and deed. It claims that it is entitled to
3 exercise sovereign rights and jurisdiction, including
4 the exclusive right to the resources of the sea and
5 seabed far beyond the limits established by the
6 Convention, based on so-called "historic rights" to
7 these areas. Whether these alleged "historic rights"
8 extend to the limits generally established by China's
9 so-called "nine-dash line", as appears to be China's
10 claim, or whether they encompass a greater or
11 a narrower portion of the South China Sea, the
12 indisputable fact, and the central element of the
13 legal dispute between the parties, is that China has
14 asserted a claim of historic rights to vast areas of
15 the sea and seabed that lie far beyond the limits of
16 the EEZ and continental shelf entitlements under the
17 Convention.

18 In fact, China has done much more, Mr President,
19 than to simply claim these alleged "historic rights".
20 It has acted forcefully to assert them by exploiting
21 the living and non-living resources in the areas
22 beyond the UNCLOS limits, while forcibly preventing
23 other coastal states, including the Philippines, from
24 exploiting the resources in the same areas, even
25 though the areas lie well within 200 miles of the
26 Philippines coast and, in many cases, hundreds of

1 miles beyond any EEZ or continental shelf that China
2 could plausibly claim under the Convention.

3 The legal dispute between the Philippines and
4 China over China's claim to and exercise of alleged
5 "historic rights" is a matter following under the
6 Convention, and particularly Part XV, regardless of
7 whether China is claiming that historic rights are
8 recognised under the Convention or allowable under the
9 Convention because they are not precluded by it.

10 China has made both arguments in its public
11 statements. But it makes no difference for purposes
12 of characterisation of this dispute as one calling for
13 the interpretation or application of the Convention.

14 The question raised by the conflicting positions
15 of the Philippines and China boils down to this: are
16 maritime entitlements to be governed strictly by
17 UNCLOS, thus precluding claims of maritime
18 entitlements based on "historic rights"? Or does the
19 UNCLOS allow a state to claim entitlements based on
20 "historic" or other rights even beyond those provided
21 for in the [Convention] itself?

22 As our counsel will explain, Mr President, any
23 recognition of such "historic rights" conflicts with
24 the very character of UNCLOS and its express
25 provisions concerning the maritime entitlements of
26 coastal states. This calls indisputably for the

1 proper interpretation of the fundamental nature of the
2 Convention.

3 China's assertion and exercise of its alleged
4 rights in areas beyond its entitlements under UNCLOS
5 have created significant uncertainty and instability
6 in our relations with China and in the broader region.
7 In this respect, I note the presence here today of
8 representatives of Vietnam, Malaysia, Indonesia,
9 Thailand and Japan to observe these critical
10 proceedings.

11 Mr President, China has claimed "historic rights"
12 in areas that are beyond 200 miles from its mainland
13 coasts or any land feature over which it claims
14 sovereignty, and within 200 miles of the coasts of the
15 Philippines' main islands, and exploited the resources
16 in these areas, while preventing the Philippines from
17 doing so. It has therefore, in the Philippines' view,
18 breached the Convention by violating Philippine
19 sovereign rights and jurisdiction.

20 China has pursued its activities in these disputed
21 maritime areas with overwhelming force. The
22 Philippines can only counter by invoking international
23 law. That is why it is of fundamental importance to
24 the Philippines, and, we would submit, for the law of
25 rule in general, for the Tribunal to decide where and
26 to what limit China has maritime entitlements in the

1 South China Sea; where and to what limit the
2 Philippines has maritime entitlements; where and to
3 what extent the parties' respective entitlements
4 overlap, and where they do not. None of this,
5 Mr President, requires or even invites the Tribunal to
6 make any determinations on questions of land
7 sovereignty or delimitation of maritime boundaries.

8 The Philippines understands that the jurisdiction
9 of this Tribunal convened under UNCLOS is limited to
10 questions that concern the law of the sea. With this
11 in mind, we have taken great care to place before you
12 only claims that arise directly under the Convention.
13 As counsel for the Philippines will discuss at some
14 length in the coming days, we have, in essence,
15 presented five principal claims which are as follows:

16 -- First, that China is not entitled to exercise
17 what it refers to as "historic rights" over the
18 waters, seabed and subsoil beyond the limits of its
19 entitlements under the Convention;

20 -- Second, that the so-called "nine-dash line" has
21 no basis whatsoever under international law insofar as
22 it purports to define the limits of China's claim to
23 "historic rights";

24 -- Third, that the various maritime features
25 relied upon by China as a basis upon which to assert
26 its claims in the South China Sea are not islands that

1 generate entitlement to an exclusive economic zone or
2 continental shelf. Rather, some are "rocks", within
3 the meaning of Article 121(3); others are low-tide
4 elevations; and still others are permanently
5 submerged. As a result, none are capable of
6 generating entitlements beyond 12 miles, and some
7 generate no entitlements at all. China's recent
8 massive reclamations activities cannot lawfully change
9 the original nature and character of these features;

10 -- Fourth, that China has breached the Convention
11 by interfering with the Philippines' exercise of its
12 sovereign rights and jurisdiction; and

13 -- Fifth, that China has irreversibly damaged the
14 regional marine environment, in breach of UNCLOS, by
15 its destruction of coral reefs in the South China Sea,
16 including areas within the Philippines' EEZ, by its
17 destructive and hazardous fishing practices, and by
18 its harvesting of endangered species.

19 Mr President, the Philippines is committed to
20 resolving its dispute with China peacefully and in
21 accordance with international law. For over two
22 decades we diligently pursued that objective,
23 bilaterally, regionally and multilaterally. I will
24 not here take this Tribunal through the Philippines'
25 painstaking and exhaustive diplomatic efforts, which
26 are set out in detail in our written pleadings.

1 I will, however, mention a few representative
2 examples, if I may.

3 As far back as August 1995, after China seized and
4 built structures on Mischief Reef -- a low-tide
5 elevation located 126 nautical miles from the
6 Philippine island of Palawan and more than 600
7 nautical miles from the closest point on China's
8 Hainan Island -- the Philippines sought to address
9 China's violation of its maritime rights
10 diplomatically. During those exchanges, the
11 Philippines and China agreed that the dispute should
12 be resolved in accordance with UNCLOS. As the then
13 Chinese Vice Minister for Foreign Affairs,
14 Mr Tang Jiaxuan, stated two years later during
15 bilateral negotiations, China and the Philippines
16 should:

17 "... approach the disputes on the basis of
18 international law, including the United Nations
19 Convention on the Law of the Sea, particularly its
20 provisions on the maritime regimes like the exclusive
21 economic zone."²

22 The mutual acceptance that the Philippines'

² Department of Foreign Affairs of the Republic of the Philippines, *Press Release No. 69: RP, PRC To Convene Working Group for Talks on South China Sea* (28 May 1997), p. 2. MP, Vol. III, Annex 26.

1 disputes with China must be resolved in accordance
2 with UNCLOS was also reflected in a joint communiqué
3 issued in July 1998 upon completion of bilateral
4 discussions between my predecessor, Foreign Secretary
5 Domingo Siazon, and China's Foreign Minister
6 Tang Jiaxuan. The communiqué recorded that:

7 "The two sides exchanged views on the question of
8 the South China Sea and reaffirmed their commitment
9 that the relevant disputes shall be settled peacefully
10 in accordance with established principles of
11 international law, including the United Nations
12 Convention on the Law of the Sea."³

13 Regrettably, neither the bilateral exchanges
14 I have mentioned, nor any of the great many subsequent
15 exchanges, proved capable of resolving the impasse
16 caused by China's intransigent insistence that China
17 alone possesses maritime rights in virtually the
18 entirety of the South China Sea, and that the
19 Philippines must recognise and accept China's
20 sovereignty before meaningful discussion of other
21 issues could take place.

22 The Philippines has also been persistent in

³ Government of the Republic of the Philippines and Government of the People's Republic of China, *Joint Press Communiqué: Philippines-China Foreign Ministry Consultations (29-31 July 1998)*, para. 4. MP, Vol. VI, Annex 183.

1 seeking a diplomatic solution under the auspices of
2 ASEAN. This has proven no more successful than our
3 bilateral efforts, Mr President. In fact China has
4 insisted that ASEAN cannot be used to resolve any
5 territorial or maritime disputes concerning the South
6 China Sea, and that such issues can only be dealt with
7 in bilateral negotiations.

8 ASEAN and China have yet to conclude a binding
9 code of conduct in the South China Sea. The most that
10 has been achieved was the issuance in 2002 of
11 a "Declaration on the Conduct of Parties in the South
12 China Sea". Although that document recorded the
13 parties' commitment to work toward the establishment
14 of a code of conduct in the South China Sea, China's
15 intransigence in the 13 years of subsequent
16 multilateral negotiations has made that goal nearly
17 unattainable.

18 Nonetheless, Mr President, the 2002 DOC is
19 significant in at least one important respect. The
20 ASEAN Member States and China undertook therein to:

21 "... resolve their territorial and jurisdictional
22 disputes by peaceful means, without resorting to the
23 threat or use of force, through friendly consultations
24 and negotiations by sovereign states directly
25 concerned, in accordance with universally recognised
26 principles of international law, including the 1982 UN

1 Convention on the Law of the Sea."⁴

2 In so doing, the Declaration encouraged those
3 states, should they prove unable to resolve their
4 disputes through consultations or negotiations, to do
5 so in accordance with the Convention, which includes,
6 of course, the dispute resolution procedures under
7 Part XV.

8 Mr President, over the years, China's position and
9 behaviour have become progressively more aggressive
10 and disconcerting. Outside observers have referred to
11 this as China's "salami-slicing" strategy: that is,
12 taking little steps over time, none of which
13 individually is enough to provoke a crisis. Chinese
14 military officials themselves have referred to this as
15 its "cabbage" strategy⁵: peeling one layer off at
16 a time. When these small steps are taken together,
17 however, they reflect China's effort to slowly
18 consolidate *de facto* control throughout the South
19 China Sea.

20 Two more recent incremental steps caused the
21 Philippines to conclude that it had no alternative

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

⁵ "China Boasts of Strategy to 'Recover' Islands Occupied by Philippines", *China Daily Mail* (28 May 2013). MP, Vol. X, Annex 325.

1 other than to invoke compulsory procedures entailing
2 a binding decision. The first was China's transmittal
3 of its nine-dash line claim to the United Nations in
4 2009, after which it prevented the Philippines from
5 carrying out long-standing oil and gas development
6 projects in areas that are well inside the
7 Philippines' 200-mile EEZ and continental shelf.

8 Secondly, in 2012, China forcefully expelled
9 Philippine fishermen from the maritime areas around
10 Scarborough Shoal, where the Filipino fishermen have
11 for generations been fishing without so much as
12 a protest from China.

13 These and other acts by China caused the
14 Philippines to conclude that continued diplomatic
15 efforts, whether bilateral or multilateral, would be
16 futile, and that the only way to resolve our maritime
17 disputes was to commence the present arbitration.

18 Subsequent events, including China's acceleration
19 of massive land reclamation activities, which it has
20 undertaken -- and continues to undertake -- in blatant
21 disregard of the Philippines' rights in its EEZ and
22 continental shelf, and at tremendous cost to the
23 maritime environment in violation of UNCLOS, only
24 serve to reconfirm the need for judicial intervention.

25 Mr President, I would like to conclude by
26 conveying my country's deepest appreciation for the

1 considerable time and attention you have devoted to
2 these proceedings. The case before you is of the
3 utmost importance to the Philippines, to the region
4 and to the world. In our view, it is also of utmost
5 significance to the integrity of the Convention and to
6 the very fabric of the "legal order for the seas and
7 oceans"⁶ that the international community so
8 painstakingly crafted over many years.

9 Mr President, if China can defy the limits placed
10 by the Convention on its maritime entitlements in the
11 South China Sea, and disregard the entitlements of the
12 Philippines under the Convention, then what value is
13 there in the Convention for small states parties as
14 regards their bigger, more powerful and better-armed
15 neighbours? Can the Philippines not invoke Part XV to
16 challenge China's activities as violations of its
17 obligations and the Philippines' rights, considering
18 that the Philippines' claims call for a mere
19 interpretation and application of the Convention, and
20 do not fall within any of the jurisdictional
21 exclusions of Articles 297 or 298?

22 Mr President, if the Philippines cannot invoke
23 Part XV, then what remains of the obligation regarding
24 judicial settlement of disputes that was such a key

⁶ UNCLOS, Preamble, p. 25.

1 elements of the comprehensive package that made the
2 Convention acceptable to all state parties?

3 We understand, Mr President, that in the exercise
4 of its collective wisdom and judgment, this body has
5 decided to bifurcate the proceedings and to limit
6 these current hearings to the issue of jurisdiction.
7 In this respect, we shall explain in full how our case
8 falls squarely within the jurisdiction of this
9 Tribunal, to the end that justice and fair play may
10 prevail, and the Tribunal would recognise its
11 jurisdiction over the case and allow the Philippines
12 to present the actual merits of our position.

13 In the Philippines' view, it is not just the
14 Philippines' claim against China that rest in your
15 capable hands; Mr President, it is the spirit of
16 UNCLOS itself. That is why, we submit, these
17 proceedings have attracted so much interest and
18 attention. And we call on the Tribunal to kindly
19 uphold the Convention and enable the rule of law to
20 prevail.

21 I humbly thank you, Mr President and distinguished
22 members of this Tribunal. May I now ask that the
23 Philippines' counsel, Mr Paul Reichler, be called to
24 the podium.

25 **THE PRESIDENT:** Thank you very much, Secretary. I now
26 call upon Mr Paul Reichler to make the submission on

1 the behalf of the applicant. Thank you.

2 (3.19 pm)

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

4 **MR REICHLER:** Mr President, members of the Tribunal, good
5 afternoon. It is an honour for me to appear before
6 such a distinguished panel of international jurists.
7 The Republic of the Philippines, which I am proud to
8 represent in these proceedings, could not have hoped
9 for a more eminent and highly qualified Tribunal than
10 this one.

11 And it is a good thing too, Mr President, because
12 the issues that are raised in this case require
13 resolution by a tribunal of the highest order. It
14 would be an understatement to say that this is
15 an important case. The Secretary of Foreign Affairs,
16 a statesman of great vision and courage, has
17 eloquently explained the significance of this case to
18 the Philippines, to the other states that border the
19 South China Sea, and indeed to all states parties to
20 UNCLOS. How you rule in this case will not only
21 resolve the specific legal disputes between the
22 Philippines and China that have been placed before you
23 in these proceedings.

24 Beyond this, by clearly defining the parties'
25 legal rights and obligations in regard to one another,

1 you will immeasurably help them to narrow their
2 differences and facilitate the resolution of the other
3 issues that divide them, and which deeply affect
4 regional peace and security.

5 But even beyond this, how you rule in this case
6 will inevitably have a major impact on the 1982
7 Convention itself. That is because the central legal
8 dispute that has been brought before you requires you,
9 in a very real sense, to determine what the Convention
10 is.

11 The essence of the dispute is this: China claims
12 that it has "historic rights" in the South China Sea
13 which it says are enshrined in its national law and
14 general international law, and which exist outside the
15 scope of the Convention. It says that these "historic
16 rights" not only entitle it to exclusive sovereign
17 rights and jurisdiction far beyond the limits of the
18 maritime zones established by the Convention; but,
19 even more, that its historic rights supersede and, in
20 effect, nullify the rights of other states, including
21 the Philippines, in zones where they do have
22 entitlements under the Convention.

23 China's position, which it has stated publicly on
24 numerous occasions, and which is reflected in its
25 practice, is positively opposed by the Philippines.
26 The Philippines considers UNCLOS to be the sole source

1 of maritime entitlements, rights and obligations, such
2 that the Convention precludes and renders unlawful
3 claims based on purported "historic rights" that are
4 incompatible with the Convention's express terms.

5 This is a dispute, therefore, not only over the
6 parties' respective maritime entitlements in the South
7 China Sea, but also over the very object and purpose
8 of the Convention. Is UNCLOS, as its framers
9 described it, the comprehensive legal framework that
10 governs the world's oceans and seas, superseding both
11 national and pre-existing law in regard to the matters
12 it regulates? Or, does the Convention allow the states
13 parties to derogate from its terms, and ignore the
14 obligations and rights established thereunder, on the
15 basis of purported "historic rights" that are said to
16 have their source outside the Convention, and to exist
17 independently of it?

18 Mr President, your task in resolving this most
19 important of disputes is not made any easier by
20 China's decision not to appear before you. As two
21 distinguished ITLOS judges wrote in their joint
22 separate opinion in the *Arctic Sunrise* case:

23 "The non-appearing party not only weakness its own
24 position concerning the legal dispute but also hampers
25 the other party to pursue its rights and interests in
26 the legal discourse of the proceedings in question.

1 But above that it hinders the work of the
2 international court or tribunal in question."⁷

3 In these circumstances, Mr President, we recognise
4 that counsel for the Philippines bear a special
5 responsibility. It is our duty, especially in a case
6 of this significance where only one party is present,
7 to extend to you our fullest cooperation, and to
8 facilitate the performance of your task as best we
9 can, by furnishing you with clear evidence of the
10 parties' conflicting claims, direct responses to the
11 challenges to your jurisdiction that China has raised,
12 or might have raised; and answers to your questions
13 that are as complete and helpful as possible. We hope
14 you feel that we have lived up to our responsibilities
15 thus far, in our written pleadings. We give you our
16 unequivocal commitment to do so during these oral
17 hearings as well.

18 Because it falls to me to be the first of the
19 Philippines' counsel to speak, I will begin, conscious
20 of the commitment I have undertaken on behalf of our
21 entire team, by calling your attention to the
22 submissions that the Philippines has presented in this

⁷ *The "Arctic Sunrise" Case (Netherlands v Russia), Request for the prescription of provisional measures, Order of 22 November 2013, Joint Separate Opinion of Judge Wolfrum and Judge Kelly, ITLOS Reports 2013, para. 5. MP, Vol. XI, Annex LA-47.*

1 case, and to show how they arise under the 1982
2 Convention, which specific articles they call upon you
3 to interpret or apply, and the existence of legal
4 disputes between the Philippines and China.

5 Let me begin with the first two. You will see
6 them, and the rest of the Philippines' submissions, at
7 tab 1.1 of your folders.

8 What the Philippines seeks in these two
9 submissions is a declaration that the maritime
10 entitlements, rights and obligations of the
11 Philippines and China are precisely those that are
12 specified in the 1982 Convention, neither more nor
13 less; and that claims of entitlements or rights not
14 grounded in the Convention itself, such as China's
15 claims covering vast areas of the South China Sea
16 which are not based on the Convention but on purported
17 "historic rights", are precluded by the Convention,
18 contrary to it, and therefore not in conformity with
19 international law.

20 The first two submissions, therefore, call upon
21 the Tribunal to interpret the Convention, and in so
22 doing, answer the following questions: do Articles 2
23 and 3 with respect to the territorial sea, 55 through
24 57 with respect to the EEZ, 76 and 77 with respect to
25 the continental shelf, and 121 respect to islands,
26 establish the limits of the maritime zones in which

1 coastal states may exercise sovereignty, sovereign
2 rights or jurisdiction, and exploit the living and
3 non-living resources, as the Philippines claims? Or,
4 may a coastal state declare and exercise sovereignty,
5 sovereign rights or jurisdiction, to the exclusion of
6 other states, beyond the limits of these zones,
7 including inside the limits of another state's EEZ and
8 continental shelf, based on purported "historic
9 rights" not grounded in the Convention, as China
10 claims?

11 These questions are embedded in the Philippines'
12 first two submissions, because this case is first and
13 foremost about the dispute between the Philippines and
14 China in regard to their respective maritime
15 entitlements in the South China Sea. As the
16 Honourable Secretary of Foreign Affairs has said,
17 these submissions do not call upon the Tribunal to
18 address any question of sovereignty over land
19 territory. Professor Sands will explain this further
20 this afternoon. Nor do these submissions call upon
21 the Tribunal to delimit any maritime boundaries, as
22 Professor Oxman will make clear. To the contrary, the
23 Philippines' first two submissions call upon you only
24 to determine the maritime entitlements of the parties
25 under the Convention, the limits to which they extend,
26 where they overlap and where they do not.

1 There should be no doubt, Mr President, that your
2 Tribunal has jurisdiction here. These are matters
3 that plainly fall under the Convention and call for
4 interpretation or application of its specific
5 articles. The interpretation and application of those
6 articles are disputed by China and the Philippines.
7 This, we submit, is the very definition of a legal
8 dispute arising under the Convention. Let us now
9 examine it in more detail.

10 This is a map of the South China Sea showing the
11 nine-dash line that China brought to the world's
12 attention in 2009. China did so in notes objecting to
13 a joint submission by Malaysia and Vietnam to the
14 Commission on the Limits of the Continental Shelf, and
15 to a separate submission made by Vietnam. This is the
16 same map that was attached to the notes asserting
17 China's objections. Those notes stated:

18 "China has indisputable sovereignty over the
19 islands in the South China Sea and the adjacent
20 waters, and enjoys sovereign rights and jurisdiction
21 over the relevant waters as well as the seabed and
22 subsoil thereof (see attached map)."⁸

⁸ *Note Verbale* from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/17/2009 (7 May 2009). MP, Vol. VI, Annex 191; *Note Verbale* from the Permanent Mission of the People's Republic of China to the United Nations

1 The notes and map are at tab 1.2 of your folders.

2 As you can see, the nine-dash line extends far
3 beyond the limits of China's maritime entitlements
4 under UNCLOS. It cuts through and cuts off areas
5 where the Philippines and other coastal states have
6 maritime entitlements under the Convention.
7 Specifically it purports to extend China's sovereign
8 rights and jurisdiction in these areas to within
9 39 miles of the island of Luzon, and within 34 miles
10 of the island of Palawan. Across the South China Sea,
11 it extends China's purported sovereign rights to
12 within 24 miles of Malaysia, within 75 miles of
13 Indonesia, and within 50 miles of the coast of
14 Vietnam, all of which have sent representatives to
15 attend these hearings.

16 To be sure, the wording of China's 2009 note,
17 taken by itself, leaves some question over the purpose
18 of the nine-dash line, although the line would appear
19 to represent the outer limits of the maritime areas
20 over which China's note was claiming sovereign rights
21 and jurisdiction. While China has still not
22 officially clarified this language, what is perfectly
23 clear from China's subsequent statements and conduct

to the Secretary-General of the United Nations, No. CML/18/2009 (7 May 2009). MP, Vol. VI, Annex 192.

1 is that China claims "historic rights" in vast areas
2 of the South China Sea far beyond the limits of its
3 entitlements under Articles 3, 57, 76 and 121 of the
4 Convention, and that these alleged "historic rights"
5 exist, according to China, within the limits of the
6 nine-dash line.

7 At times, China has claimed that UNCLOS itself is
8 the source of the "historic rights" that it claims.
9 On 21st June 2011, for example, General Hong Liang,
10 Deputy Director of the Asian Department of China's
11 Ministry of Foreign Affairs, expressed the position in
12 diplomatic discussions with the Philippines that:

13 "While [the Philippines] has legal rights under
14 UNCLOS, China has 'historical rights' which are
15 acknowledged under UNCLOS."⁹

16 General Hong stated further:

17 "UNCLOS also has a provision that historic rights
18 cannot be denied and should be respected. UNCLOS is
19 there and the parties can use any clause that is
20 useful to support its claim."¹⁰

21 Three months later, on 15th September 2011, the

⁹ *Memorandum* from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-064-2011-S (21 June 2011), para. 8. MP, Vol. IV, Annex 72.

¹⁰ *Id.*, p. 6.

1 official spokesperson for China's Foreign Ministry
2 explained that in China's view its "historic rights"
3 to the waters and seabed of the South China Sea
4 supersede any entitlements other coastal states may
5 have under UNCLOS:

6 "China's sovereignty, rights and relevant claims
7 over the South China Sea have been formed in the long
8 course of history and upheld by the Chinese
9 government ... The UN Convention on the Law of the Sea
10 does not entitle any country to extend its exclusive
11 economic zone or continental shelf to the territory of
12 another country, and it does not restrain or deny
13 a country's right which is formed in history and
14 abidingly upheld."¹¹

15 The following year, in August 2012, the Deputy
16 Director of China's National Institute for South China
17 Sea Studies, which was created by and comes under
18 China's State Council, explained that China claims
19 sovereign rights, including rights to oil and gas
20 extraction and to fishing, in "all the waters within
21 the nine-dash line".¹²

¹¹ See Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Jiang Yu's Regular Press Conference on September 15, 2011* (16 Sept. 2011), p. 2. MP, Vol. V, Annex 113.

¹² Jane Perlez, "China Asserts Sea Claim with Politics and Ships", *New York Times* (11 Aug. 2012), p. 3. MP, Vol. X, Annex 320.

1 On 8th February 2014 China's official Foreign
2 Ministry spokesperson, responding to a journalist's
3 question, defended the nine-dash line as consistent
4 with China's historic rights under international law.

5 **"Q:** [United States] Assistant Secretary of State
6 Daniel Russel reportedly said in congressional
7 testimony on February 5 that 'any use of the
8 "nine-dash line" by China to claim maritime rights
9 would be inconsistent with international law', urging
10 China to clarify or adjust its position. What is
11 China's comment?

12 **"A:** China's rights and interests in the South
13 China Sea are formed in history and protected by
14 international law."¹³

15 All of the Chinese statements from which I have
16 read are at tab 1.3 of your folders.

17 Mr President, the Philippines has consistently
18 objected to China's claims.¹⁴ In direct contradiction
19 of China's assertion of "historic rights" to exclusive
20 jurisdiction and exploitation of resources beyond the

¹³ Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Hong Lei's Statement Regarding Comments by an Official of the United States Department of State on the South China Sea* (8 Feb. 2014). MP, Vol. V, Annex 131.

¹⁴ MP, paras. 3.41-3.67.

1 limits established by the Convention, the Philippines
2 has repeatedly insisted: first, that the maritime
3 entitlements of the states parties to UNCLOS are
4 defined entirely by the Convention; second, that there
5 is no acceptance within the Convention of so-called
6 "historic rights" in maritime areas beyond the limits
7 expressly established in Articles 3, 57, 76 and 121;
8 and third, that the Convention, by regulating this
9 very subject matter, precludes the recognition or
10 exercise of any such rights as may have previously
11 existed under general international law.

12 Of the various Philippine official statements to
13 this effect cited in the Memorial, I call your
14 attention in particular to this one, from a *note*
15 *verbale* of 5th April 2011. China's claim, "as
16 reflected in the so-called 9-dash line map":

17 "... would have no basis under international law,
18 specifically UNCLOS. With respect to these areas,
19 sovereignty and jurisdiction or sovereign rights, as
20 the case may be, necessarily appertain or belong to
21 the appropriate coastal or archipelagic State -- the
22 Philippines -- to which these bodies of water as well
23 as seabed and subsoil are appurtenant, either in the
24 nature of Territorial Sea, or 200[-mile] Exclusive
25 Economic Zone or Continental Shelf in accordance with

1 Articles 3, 4, 55, 57 and 76 of UNCLOS."¹⁵

2 You can find this at tab 1.4 of your folders.

3 The existence of this legal dispute over the scope
4 and meaning of the Convention is plain enough from the
5 parties' official statements, but it is just as plain
6 from China's actions. Since 2009, China has enacted
7 and applied laws and regulations which it has
8 enforced, covering all areas within the nine-dash
9 line, based on its claim of "historic rights". These
10 actions are described in the Memorial, so there is no
11 need to burden you by reciting them all here.

12 Instead, I will simply refer you to paragraphs 4.11
13 through 4.17. But I will show you two clear examples
14 that can readily be illustrated on maps.

15 This map, which is at tab 1.5 of your folders,
16 depicts what the state-owned China National Offshore
17 Oil Corporation called the "Locations for Part of Open
18 Blocks in Waters under Jurisdiction of the People's
19 Republic of China Available for Foreign Cooperation in
20 the Year of 2012". As is evident from the map, the
21 nine open blocks are bounded in the west by the
22 nine-dash line. The coordinates provided by CNOOC

¹⁵ *Note Verbale* from the Permanent Mission of the Republic of the Philippines to the United Nations to the Secretary-General of the United Nations, No. 000228 (5 Apr. 2011), p. 3. MP, Vol. VI, Annex 200.

1 confirm that all are at least partially within
2 200 miles of Vietnam's coast, and most of the blocks
3 are well beyond 200 miles from any land feature over
4 which China claims sovereignty.¹⁶ This shows that the
5 "historic rights" claimed by China exceed its
6 entitlements under UNCLOS and extend up to the
7 nine-dash line.

8 That is also Vietnam's interpretation of China's
9 position. In its December 2014 statement submitted to
10 the Tribunal, Vietnam explained that it had protested
11 what it considered China's assertion that "the nine
12 [oil] blocks situated within the 'nine-dash line' are
13 in waters under China's jurisdiction".¹⁷ Vietnam's
14 position, to the contrary, is that:

15 "... the nine blocks lie entirely within the
16 exclusive economic zone and continental shelf of

¹⁶ See China National Offshore Oil Corporation, *Press Release: Notification of Part of Open Blocks in Waters under Jurisdiction of the People's Republic of China Available for Foreign Cooperation in the Year of 2012* (23 June 2012), p. 5. MP, Vol. V, Annex 121.

¹⁷ Socialist Republic of Viet Nam, *Statement of the Ministry of Foreign Affairs of the Socialist Republic of Viet Nam Transmitted to the Arbitral Tribunal in the Proceedings Between the Republic of the Philippines and the People's Republic of China* (14 Dec. 2014), para. 4(i). SWSP, Vol. VIII, Annex 468.

1 Viet Nam."¹⁸

2 Vietnam's dispute with China is therefore similar
3 to that of the Philippines. Significantly in this
4 regard, Vietnam has formally advised the Tribunal that
5 it "has no doubt that the Tribunal has jurisdiction in
6 these proceedings".¹⁹

7 Across the South China Sea, this map, which is at
8 tab 1.6 of your folders, shows the locations where
9 China has sought permission from the Philippines to
10 conduct marine scientific research. All of these
11 locations are on the Philippine side of the nine-dash
12 line. We do not have records showing where else China
13 purported to conduct marine scientific research, but
14 what is clear from this map is that China did not
15 consider it necessary to seek permission from the
16 Philippines to conduct marine scientific research in
17 areas inside the nine-dash line, even in areas within
18 200 miles from the Philippines' coast.

19 Mr President, the relationship between China's
20 claim of "historic rights" beyond those established by

¹⁸ *Id.*

¹⁹ Socialist Republic of Viet Nam, *Statement of the Ministry of Foreign Affairs of the Socialist Republic of Viet Nam Transmitted to the Arbitral Tribunal in the Proceedings Between the Republic of the Philippines and the People's Republic of China* (14 Dec. 2014), para. 1. SWSP, Vol. VIII, Annex 468.

1 the 1982 Convention, and the nine-dash line, was
2 explained by Judge Gao in his article in the
3 January 2013 edition of the American Journal of
4 International Law. We accept that Judge Gao's
5 explanation of China's position is not an official
6 one, but it is nevertheless, we submit, worthy of your
7 attention. Judge Gao stated that the nine-dash line
8 has more than one meaning:

9 "First, it represents the title to the island
10 groups that it encloses. In other words, within the
11 nine-dash line in the South China Sea, China has
12 sovereignty over the islands and other insular
13 features, and has sovereignty, sovereign rights and
14 jurisdiction -- in accordance with UNCLOS -- over the
15 waters and seabed and subsoil adjacent to those
16 islands and insular features. *Second, it preserves*
17 *Chinese historic rights in fishing, navigation and*
18 *such other maritime activities as oil and gas*
19 *development in the waters and on the continental shelf*
20 *surrounded by the line.*"²⁰

21 In the same article, Judge Gao made even clearer
22 that the "historic rights" claimed by China in areas

²⁰ Z. Gao and B.B. Jia, "The Nine-Dash Line in the South China Sea: History, Status, and Implications", *American Journal of International Law*, Vol. 107, No. 1 (2013), pp. 123-124. MP, Vol. X, Annex 307 (emphasis added).

1 surrounded by the nine-dash line are beyond those
2 provided in the Convention:

3 "In addition to these rights conferred by UNCLOS,
4 China can assert historic rights within the nine-dash
5 line -- under Article 14 of its 1998 law on the EEZ
6 and the continental shelf -- in respect of fishing,
7 navigation, and exploration and exploitation of
8 resources."²¹

9 We say, Mr President, that regardless of what
10 China's national legislation provides; first,
11 international law recognises no rights in respect of
12 fishing, navigation, exploration and exploitation of
13 resources beyond those rights conferred by UNCLOS;
14 second, that China certainly has no such rights in
15 maritime areas where the Philippines alone enjoys
16 entitlements under the Convention; and third, that
17 China has no exclusive rights of this nature in areas
18 where, under the Convention, the maritime entitlements
19 of the Philippines and China overlap.

20 So now, if you will, let us take a look at where
21 the parties' maritime entitlements under the
22 Convention do exist, where they overlap, where they do
23 not, and how they are impacted by China's claim of
24 "historic rights" within the nine-dash line.

²¹ *Id.*, pp. 109-110.

1 These matters may be best appreciated by looking
2 at the northern half and southern half of the South
3 China Sea separately. This is the northern half.

4 To this map, we will first add a depiction of the
5 maritime entitlements claimed by the Philippines,
6 excluding entitlements generated by disputed insular
7 features. In strict conformity with UNCLOS, the
8 Philippines claims a 12-mile territorial sea under
9 Article 3, a 200-mile EEZ under Article 57, and
10 a 200-mile continental shelf under Article 76.²²

11 To this depiction, we now add the entitlements of
12 China under the same articles of UNCLOS. The
13 Philippines accepts that China has 200-mile
14 entitlements from its mainland coast and from Hainan
15 Island, and we assume *quod non*, for purposes of these
16 proceedings, that China has sovereignty over the
17 Paracel Islands, and that at least one of those
18 features may generate a 200-mile entitlement.

19 You can see that there are large areas where only
20 the Philippines has maritime entitlements under
21 UNCLOS, and areas where the only entitlements under
22 the Convention are China's, as well as areas where the
23 parties' entitlements overlap with one another.

24 We have now enclaved Scarborough Shoal within

²² Memorial, paras. 3.10-3.11.

1 12 miles. This is a disputed feature. Each of the
2 parties claims sovereignty over it. Because parts of
3 it protrude slightly above water at high tide, as you
4 can see here, we accept that it is a rock; that is,
5 a land feature. Because sovereignty over Scarborough
6 Shoal is not at issue in these proceedings, we have
7 here enclaved it within 12 miles. This shows that the
8 Philippines has maritime entitlements under UNCLOS on
9 all sides of the enclave, and that the Philippines'
10 entitlements are not overlapped by any entitlement
11 that China could claim under the Convention.

12 The Philippines' third submission addresses the
13 status of Scarborough Shoal under Article 121 of the
14 Convention, and seeks confirmation that it is indeed
15 a rock and does not generate an entitlement beyond
16 12 miles. This confirmation is required in order to
17 establish precisely where the Philippines enjoys
18 maritime entitlements that are not overlapped, or not
19 potentially overlapped, by China's entitlements.

20 It is the Philippines' position that the map as
21 shown now depicts the maritime entitlements of the two
22 parties under the 1982 Convention, save for the
23 question of which state enjoys entitlements within
24 12 miles of Scarborough Shoal, and the potential
25 entitlements of third states such as Vietnam. We say,
26 in the areas where the parties' entitlements do not

1 overlap, UNCLOS vests each state in its respective
2 area with sovereign rights and jurisdiction, and that
3 neither state may derogate from the sovereign rights
4 of the other state in the area where that other state
5 alone enjoys those rights under the Convention.

6 However, this seemingly unassailable point is
7 disputed by China. By virtue of its claim of
8 "historic rights" in vast areas of the South China Sea
9 beyond 200 miles from its coast, or from any island
10 over which it claims sovereignty, China asserts for
11 itself exclusive rights to exploit the living and
12 non-living resources, and the right to prevent other
13 states, including the Philippines, from doing so, even
14 in areas where the Philippines alone has maritime
15 entitlements under the Convention. The map and
16 photographs of Scarborough Shoal are in your folders
17 at tab 1.7.

18 Mr President, the dispute between the parties over
19 their respective maritime entitlements is just as
20 apparent in the southern half of the South China Sea.
21 Here, there are two different disputes over
22 entitlements. The Philippines claims a 200-mile EEZ
23 and continental shelf from Palawan. China claims
24 a 200-mile entitlement for the Spratly Islands, over

1 all of which it claims sovereignty.²³ As you can see,
2 almost all of the Philippines' entitlement in this
3 part of the sea is overlapped by China's 200-mile
4 claim in regard to the Spratlys. The Philippines
5 disputes China's claim to a 200-mile entitlement for
6 the Spratly features because, in our view, none of
7 them is entitled to an EEZ or continental shelf under
8 the Convention.

9 The character of certain of these features under
10 Articles 13 and 121 of the Convention is the subject
11 of the Philippines' fourth, sixth and seventh
12 submissions. And these submissions raise the first
13 dispute in this part of the South China Sea: what is

²³ *Note Verbale* from the Permanent Mission of the People's Republic of China to the Secretary-General of the United Nations, No. CML/8/2011 (14 Apr. 2011) (*italics omitted*) (*emphasis added*). MP, Vol. VI, Annex 201. China made this claim in the context of responding to the Philippines' *Note Verbale* of 5 April 2011 protesting the legality of China's nine-dash line. See also *Memorandum* from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-070-2014-S (7 Mar. 2014), para. 4. MP, Vol. IV, Annex 98 (reporting on a meeting between Minister Evangeline Jimenez-Ducrocq of the Philippines Embassy in Beijing and the Representative Xiao Jianguo of the Department of Boundary and Ocean Affairs of the Chinese Ministry of Foreign Affairs in which Mr. Xiao stated: "we claim territorial sea, EEZ, and continental shelf from the Nansha Islands, and any overlapping claims we can engage in delimitation".).

1 the character of the features identified in these
2 submissions, and what is their entitlement under the
3 Convention? As we believe we have shown in our
4 written pleadings, some of them are low-tide
5 elevations under Article 13, while the others are
6 rocks under Article 121(3).

7 As we have also shown in our written response to
8 the Tribunal's questions of December 2014, only
9 a handful of the remaining Spratly features, not
10 mentioned in our submissions, are above water at high
11 tide, and even the largest of those comprises no more
12 than 0.4 square kilometres. None is capable of
13 sustaining human habitation or economic life of its
14 own. Thus, none is entitled to more than a 12-mile
15 territorial sea.

16 As Professor Sands will explain, the Philippines'
17 submissions do not call upon the Tribunal to determine
18 who is sovereign over any of these features. The
19 Philippines asks only that you determine their
20 character -- that is, whether they are low-tide
21 elevations or islands; and, if the latter, whether
22 they are rocks -- and their maritime entitlements
23 under the Convention. This calls for your
24 interpretation and application of Articles 13 and 121
25 of the Convention, and, as such, it presents a legal
26 dispute that we say plainly falls within your

1 jurisdiction.

2 Here are the Spratly Islands with 12-mile enclaves
3 around those features that remain above water at high
4 tide. In the Philippines' view, these are the proper
5 entitlements of the features under the Convention.
6 Even assuming, *quod non*, that for purposes of these
7 hearings all of the Spratlys belong to China, there
8 are still large areas where the 12-mile entitlements
9 generated by these features do not overlap the
10 200-mile entitlements attributed to Palawan, and where
11 the Philippines therefore alone enjoys sovereign
12 rights and jurisdiction under the Convention.

13 You can now see the effects of China's claim of
14 "historic rights" beyond those provided for in the
15 Convention in the area surrounded by the nine-dash
16 line. The Philippines' maritime entitlements under
17 the Convention in this part of the South China Sea all
18 but disappear. China's claim leaves the Philippines
19 with barely 34 miles between the nine-dash line and
20 Palawan in which to exercise its truncated
21 jurisdiction, fish and explore for oil. This, of
22 course, has given rise to the second dispute between
23 the parties in the southern sector. You can see
24 clearly why, given China's insistence on this claim
25 and its willingness to enforce it, the Philippines had
26 little choice but to commence these proceedings. To

1 claim that there is no dispute or no legal dispute
2 between the Philippines and China simply is
3 unsustainable. This map is at tab 1.8 of your
4 folders.

5 With your indulgence, Mr President, let us now
6 look at one last map, which is at tab 1.9, to see how
7 China's "historic rights" claim impacts the South
8 China Sea as a whole, both northern and southern
9 sectors.

10 The waters and seabed where China claims "historic
11 rights", where allegedly only China has sovereign
12 rights and jurisdiction, and only China may exploit
13 the living and non-living resources, is shown in pink.
14 For China, there are no overlapping entitlements in
15 this area. According to China, its "historic rights"
16 supersede and extinguish the entitlements that the
17 Philippines enjoys and that Malaysia, Indonesia and
18 Vietnam enjoy under UNCLOS. We say, in opposition, it
19 is UNCLOS that prevails against China's "historic
20 rights" claim. This is the principal legal dispute at
21 the heart of this case.

22 To be perfectly clear, the dispute is not over the
23 nine-dash line *per se*; it is over China's claim to
24 "historic rights" in the waters and seabed of the
25 South China Sea, beyond the maritime areas to which it
26 can lawfully claim entitlement under the Convention.

1 Whether those far-removed areas where China claims
2 "historic rights" are in fact delineated by the
3 nine-dash line, as China's statements and practice
4 strongly show, or whether these purported historic
5 rights fall somewhere short of or extend beyond that
6 line, the central and indisputable elements of this
7 case are these:

8 (1) Based on its alleged "historic rights", China
9 claims jurisdiction and the exclusive right to exploit
10 the living and non-living resources in areas of the
11 South China Sea that lie beyond the limits of its
12 entitlements under Articles 3, 57, 76 and 121 of the
13 Convention;

14 (2) The areas where China claims "historic rights"
15 include those in which the Philippines alone is
16 entitled to exercise sovereign rights and jurisdiction
17 under the Convention, as well as areas in which the
18 parties' entitlements under the Convention overlap;

19 (3) In the exercise of its so-called "historic
20 rights", China has prevented the Philippines from
21 exercising or enjoying the rights and jurisdiction
22 conferred on it by the Convention, and has, to
23 injurious effect, cast a cloud over the Philippines'
24 legal rights and its ability to enjoy them,
25 discouraging Philippine fishermen from engaging in
26 their livelihood and dissuading foreign investors from

1 carrying out oil and gas exploration activities within
2 200 miles from the Philippine coast where China's
3 "historic rights" are claimed; and

4 (4) There is plainly a legal dispute between the
5 parties over whether China enjoys such "historic
6 rights" as it claims, or whether its maritime
7 entitlements in the South China Sea, like those of the
8 Philippines, are defined and limited by the provisions
9 of the 1982 Convention.

10 Mr President, these issues can only be resolved
11 through interpretation and application of the
12 Convention. As such, we submit there is no credible
13 argument that the Tribunal lacks jurisdiction in
14 regard to this fundamental dispute.

15 Mr President, it is now 4 o'clock, the time you
16 have indicated would be appropriate to take a coffee
17 break. I have somewhere between 10 and 12 minutes
18 left in my remarks. I will be guided by your
19 preference as to whether I should continue, or whether
20 you believe this would be the appropriate time for the
21 afternoon break.

22 **THE PRESIDENT:** I think it would be the appropriate time
23 for the afternoon break, and we shall listen to you
24 after we come back.

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

26 **THE PRESIDENT:** Thank you.

1 (4.02 pm)

2 (A short break)

3 (4.22 pm)

4 **THE PRESIDENT:** Mr Reichler.

5 **MR REICHLER:** Thank you, Mr President. Good afternoon
6 again, and I hope you and your colleagues on the
7 Tribunal had a pleasant break.

8 Mr President, one of the more dangerous arguments
9 that has been made, not by China itself, but on its
10 behalf by certain sympathetic academics, is that the
11 dispute cannot be said to have arisen under the
12 Convention because the Convention makes no provision
13 for "historic rights", and that they therefore exist
14 outside the Convention and beyond the jurisdiction of
15 a Part XV Tribunal. This view suffers from two fatal
16 defects: first, it has been contradicted by China
17 itself; and second, it reflects a fundamental
18 misunderstanding of the nature and scope of the
19 Convention, and of its very essence.

20 As indicated by the official Chinese statements
21 I have already quoted, China has, on occasion,
22 expressed the view that its purported "historic
23 rights" are "acknowledged under UNCLOS", and that
24 UNCLOS "has a provision that historic rights cannot be
25 denied and should be respected". In other words,
26 China itself has taken the position that the parties

1 disagree about the proper interpretation of UNCLOS; to
2 wit, whether the Convention acknowledges and requires
3 respect for "historic rights" or not.

4 But an even more dispositive response to the
5 assertion that "historic rights" exist outside the
6 Convention is the one provided by Ambassador Tommy
7 Koh, speaking as President of the Third United Nations
8 Conference on the Law of the Sea, at the final session
9 in Montego Bay in December 1982. In his words, the
10 conference achieved its "fundamental objective of
11 producing a comprehensive constitution for the oceans
12 which will stand the test of time".²⁴

13 Ambassador Koh's remarks reflected the framers'
14 view that the Convention was intended to be
15 comprehensive in all areas of its coverage. The
16 preamble affirms that the Convention was intended "to
17 settle, in a spirit of mutual understanding and
18 cooperation, all issues relating to the law of the
19 sea", and that the only matters that "continue to be
20 governed by the rules and principles of general
21 international law" are those that are "not regulated
22 by this Convention".

23 Without question, maritime entitlements, including

²⁴ UN Conference on the Law of the Sea, *185th Meeting*, UN Doc.

A/CONF.62/PV.185 (26 Jan. 1983), para. 47. MP, Vol. XI, Annex LA-116.

1 sovereign rights and jurisdiction, and access to
2 living and non-living resources, are regulated by the
3 Convention, including by the particular articles
4 I have been citing. In regard to such matters, those
5 articles cover the waterfront, so to speak.

6 Therefore, a state party may not invoke alleged
7 "historic rights" under general international law that
8 derogate from the entitlements, rights or obligations
9 the Convention expressly establishes.

10 In fact, Mr President, as you well know, the issue
11 of historic rights arose at the Third UN Conference on
12 the Law of the Sea in the discussions about
13 traditional fishing in the EEZ. The question debated
14 was whether a coastal state had an obligation to grant
15 access to the fishing vessels of other states that had
16 traditionally fished in the area. The result, in
17 Article 62, paragraph 3, was only a modest coastal
18 state duty to take such traditional fishing practices
19 into account, among other factors, in granting access
20 to its EEZ. There is no suggestion whatever of any
21 preservation or reservation of "historic fishing
22 rights", or rights to oil and gas, or any other
23 "historic rights" such as China now claims in the
24 South China Sea.

25 We say that whether China's alleged "historic
26 rights" under general international law are in

1 conflict with the provisions of the 1982 Convention,
2 or are preserved by them, is plainly a matter calling
3 for interpretation or application of the Convention;
4 and, as such, it necessarily falls within your
5 jurisdiction. Surely it cannot be outside your
6 competence, as a Part XV Tribunal, to hear disputes
7 that call for you to determine the relationship
8 between the Convention and general international law
9 on matters that are addressed and regulated by the
10 Convention.

11 At this stage of the proceedings, Mr President,
12 that is all that you and your fellow members of the
13 Tribunal have to decide; that is, whether there is
14 a dispute between the parties concerning the
15 interpretation or application of the Convention. You
16 do not have to determine now, at the jurisdictional
17 phase, whether the Philippines' interpretation of the
18 Convention is correct, as we believe it is. That will
19 be your task at the merits phase.

20 The Philippines submits that your jurisdiction to
21 decide this matter of UNCLOS interpretation could not
22 be any clearer. But, should you harbour any doubt --
23 and we say there is cause for none -- regarding the
24 nature and extent of China's "historic rights" claim,
25 then we say, at the very least, that this matter would
26 not then be one of an exclusively preliminary

1 character, and would therefore, in such case, be
2 appropriate to join to the merits and to resolve at
3 that stage of the proceedings.

4 For the Philippines, it is not only appropriate
5 that you exercise your jurisdiction to resolve these
6 disputes; it is vital that you do so. It is, of
7 course, the duty of any international court or
8 tribunal to resolve disputes that fall within its
9 competence. Here, we shudder to think what the
10 consequences would be if this Tribunal were to decide
11 against performing this duty.

12 If China, or any other state, can avoid
13 adjudication of a claim of "historic rights" that has
14 no basis in the Convention, on the very ground that it
15 has no basis in the Convention, but arises under
16 general international law, then what would be left of
17 the "constitution for the oceans", of the
18 comprehensive regulatory regime for the seas that the
19 drafters said they had created? How many other states
20 might, like China, belatedly discover that they have
21 "historic" or other rights in the world's oceans that
22 are not mentioned in, and therefore not precluded by,
23 UNCLOS?

24 Not to take jurisdiction over this dispute is, in
25 effect, to interpret the Convention in China's favour,
26 because your dismissal of the case would leave China's

1 "historic rights" claim standing, and impose no legal
2 obstacle to China's ongoing enforcement of that claim,
3 even in maritime areas where the Convention confers
4 entitlement only and exclusively on the Philippines.

5 In contrast, by taking jurisdiction over the
6 Philippines' submissions, especially insofar as they
7 challenge China's purported "historic rights" in areas
8 beyond its UNCLOS entitlements, including China's
9 claim that its "historic rights" supersede those that
10 the Convention confers on the Philippines and other
11 coastal states, you will enable yourselves to
12 determine whether the Convention is allowed to fulfil
13 its intended object and purpose as a comprehensive
14 regulatory framework for the world's oceans; or
15 whether it is easily circumvented by powerful states
16 with the will and means to do so, on the basis of
17 nothing more than a simple, self-serving and
18 unilateral assertion of alleged "rights" that have no
19 legal foundation.

20 The Philippines asks only that you exercise the
21 responsibility conferred on you by Part XV, namely to
22 interpret and apply the Convention where a dispute
23 exists between two states parties over the
24 interpretation or application of its provisions, and
25 in this way not only contribute to the resolution of
26 the disputes before you, but -- equally important --

1 ensure respect for the Convention itself and for the
2 rule of law.

3 Mr President, we say that your jurisdiction is
4 clear in regard to all of the Philippines'
5 submissions, not only those addressed to China's claim
6 of historic rights. I have spent my time until now
7 addressing your jurisdiction in regard mainly to the
8 first two submissions. If you will kindly allow me to
9 turn back to those submissions at tab 1, you will see
10 that your jurisdiction in regard to submissions 5, 8
11 and 9 follows from the arguments I have presented.
12 They are a consequence of your finding that you have
13 jurisdiction to determine the limits of the parties'
14 maritime entitlements under the Convention, including
15 where their entitlements overlap and where they do
16 not.

17 Submission 5 calls upon you to determine that
18 certain low-tide features lie within the maritime
19 zones of the Philippines but not of China. They do,
20 if you agree with the Philippines' submissions on the
21 character of these features and the consequences that
22 has for where the parties have maritime entitlements.

23 Submissions 8 and 9 address the lawfulness of
24 China's actions in areas in which only the Philippines
25 is entitled to exercise jurisdiction and rights under
26 the Convention. Again, if you have jurisdiction to

1 determine where the parties have entitlements under
2 the Convention, as we say you do, you have
3 jurisdiction to determine whether and where one of
4 them has violated the sovereign rights of the other.

5 Submissions 3, 4, 6 and 7, to which I referred
6 earlier, call upon you to interpret Article 13 or 121
7 of the Convention, and determine whether the specific
8 features identified in those submissions are low-tide
9 elevations or islands; and, if they are islands,
10 whether they are rocks under Article 121(3). All of
11 those features mentioned in our submissions, except
12 Scarborough Shoal, are in the Spratlys, where China
13 claims a 200-mile entitlement, and which the
14 Philippines disputes. Thus, there is a legal dispute
15 over the status and entitlement of these features, and
16 this requires your interpretation and application of
17 Articles 13 and 121. Your jurisdiction is thus
18 clearly established in regard to these submissions as
19 well.

20 Mr President, I have covered this afternoon our
21 submissions 1 through 9. My colleagues will show that
22 you also have jurisdiction over the remaining
23 submissions, 10 through 14, involving China's
24 interference with certain Philippine fishing rights,
25 failure to protect and preserve the marine
26 environment, construction of artificial islands,

1 operations of law enforcement vessels in a dangerous
2 manner, and aggravation of these disputes during the
3 course of this arbitration.

4 In so doing, Professor Sands, Professor Oxman,
5 Professor Boyle and Mr Martin will also show that none
6 of the objections to jurisdiction advanced by China in
7 its December 2014 Position Paper, or in its public
8 statements, or any other objections which it could
9 have advanced, has any merit; and that none of the
10 jurisdictional exclusions of Article 297 or 298 can
11 prevent the exercise of your jurisdiction over any of
12 the Philippines' submissions. Finally, by the time we
13 conclude tomorrow afternoon, we will have taken care
14 that all of the questions posed by the Tribunal on
15 23rd June of this year are answered, hopefully to your
16 complete satisfaction.

17 Mr President, members of the Tribunal, this
18 concludes my presentation this afternoon. I thank you
19 for your kind courtesy and patient attention, and
20 I ask that you call my good friend Professor Sands to
21 the podium.

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

23 I now have the pleasure of calling on Professor Sands
24 to address the Tribunal.

25 **(4.38 pm)**

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

1 **PROFESSOR SANDS:** Mr President, members of the Tribunal,
2 it is a really great honour for me to appear before
3 you in this important matter on behalf of the Republic
4 of the Philippines.

5 My task is to address China's first objection to
6 the Tribunal's jurisdiction, as set out in its
7 Position Paper of December 7th 2014. China says in
8 that paper that "the subject matter of the
9 Philippines' claims is in essence one of territorial
10 sovereignty over several maritime features in the
11 South China Sea, which is beyond the scope of the
12 Convention and does not concern the interpretation or
13 application of the Convention".²⁵

14 Let us be very clear. The Philippines' case is,
15 in essence -- if it is "in essence" about anything --
16 about the character of certain features; it is not
17 about territorial sovereignty.²⁶ None of our
18 submissions require the Tribunal to express any view

²⁵ People's Republic of China, *Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines* (7 Dec. 2014) (hereinafter "China's Position Paper"), para. 3, Supplemental Written Submissions of the Philippines (hereinafter "SWSP"), Vol. VIII, Annex 467.

²⁶ See *inter alia*, Memorial of the Philippines (hereinafter "MP"), Vol. I, paras 1.16; 1.26; 2.11; 2.13; 4.19; 5.1; 5.116; 7.12; 7.14; SWSP, Vol. I, paras. 6.2; 6.7; 26.6-26.24.

1 at all as to the extent of China's sovereignty over
2 land territory, or that of any other state. Moreover,
3 the Tribunal is not called upon to express any view as
4 to whether the sovereignty over islands or other land
5 territory would fall within its jurisdiction: it can
6 decide all of the matters in dispute that are the
7 subject of the Philippines' application without
8 touching on such matters of sovereignty at all.

9 Now, China's Position Paper argues that the
10 Philippines' case is to be broken down in what it
11 calls three "categories", and it says that each of
12 these categories is "beyond the scope of the
13 Convention"; each of these categories doesn't concern
14 the application and interpretation of the Convention.
15 For that reason, I am bound to say that the
16 Philippines does not agree with this
17 recharacterisation and categorisation of our claims:
18 they are not beyond the scope of the Convention.
19 I will deal with each of the three "categories" in
20 turn.

21 The first category identified by China is in
22 relation to the Philippines' assertion that China's
23 claim to "'historic rights' to the waters, seabed and
24 subsoil within the 'nine-dash line' beyond the limits
25 of its entitlements under the Convention is

1 inconsistent with the Convention".²⁷ The Philippines
2 requests that the Tribunal rule that China's claim to
3 sovereign rights, jurisdiction and "historic rights"
4 are "without lawful effect to the extent that they
5 exceed the geographic and substantive limits of
6 China's maritime entitlements under UNCLOS".²⁸

7 Mr Reichler has already shown you that you do have
8 jurisdiction over the Philippines' claims in this
9 regard because those claims reflect a legal dispute
10 that arises under, and calls for the interpretation
11 and application of, the 1982 Convention. Yet China
12 says that you can only make a determination of this
13 issue by first determining the extent of China's
14 territorial sovereignty over disputed insular features
15 in the South China Sea. We say that claim is simply
16 wrong.

17 The claim, the argument, is premised on three
18 foundations. First, China asserts that there is what
19 it calls a "general principle of international law
20 that sovereignty over land territory is the basis for
21 the determination of maritime rights",²⁹ and that "the
22 land dominates the sea", and it cites a significant

²⁷ China's Position Paper, para. 8, SWSP, Vol. VIII, Annex 467.

²⁸ MP, Vol. I, p. 271, Submission 2.

²⁹ China's Position Paper, para. 11, SWSP, Vol. VIII, Annex 467.

1 number of ICJ decisions, including *North Sea*
2 *Continental Shelf*, *Qatar v Bahrain*, and *Nicaragua v*
3 *Honduras*.³⁰

4 Now, we are in perfect agreement with the notion
5 that the land does indeed dominate the sea.³¹ But it
6 is equally the case that the absence of land also
7 dominates the sea: if you have no land, you have no
8 entitlement. This is made crystal-clear by the
9 Convention, and in particular its provisions on
10 islands and rocks in Article 121, and in respect of
11 low-tide elevations in Article 13. These are the
12 provisions of UNCLOS, and of international law, that
13 dictate the maximum maritime entitlement that each of
14 these features generates, and it does so by reference
15 to the character and nature of the feature.

16 The first step in the process of determining
17 a maritime entitlement must necessarily -- and
18 logically -- be to determine the character and nature
19 of a particular feature: is it an island, or is it
20 a rock, or is it a low-tide elevation? If it is
21 an island, then it can be entitled to a territorial
22 sea and EEZ and continental shelf; if it is a rock, it
23 may have a territorial sea; if it is a low-tide

³⁰ *Ibid.*

³¹ MP, para. 4.73.

1 elevation, it generates no maritime entitlements of
2 its own at all.

3 The determination of whether a particular feature
4 is an island, or a rock, or a low-tide elevation, does
5 not require any prior determination of which state has
6 sovereignty over the feature. The fact that state A
7 or state B or state C or state Z has sovereignty over
8 a particular feature is entirely irrelevant to the
9 question of its characterisation. The fact that two
10 or more states may dispute the matter of sovereignty
11 over a feature -- assuming that there can be
12 sovereignty at all -- is entirely irrelevant to its
13 characterisation.

14 I can illustrate in a different way. This Great
15 Hall is now shared by two institutions: the PCA and
16 the International Court of Justice. They share this
17 podium. If there is a dispute as to who owns the
18 podium, it is completely irrelevant for the
19 characterisation of this item as a podium whether it
20 is owned by the PCA or the ICJ. It doesn't become
21 a tree if it is owned by the PCA or a table if it is
22 owned by the ICJ. It is a podium. And the same thing
23 goes with land, low-tide elevations, rocks and
24 islands.

25 Now, the second argument that is made by China
26 relates to the words in the fourth paragraph of the

1 Convention's preamble. China says there are words in
2 that preamble which provide that there must be "due
3 regard for the Sovereignty of all States", and that
4 that is a prerequisite for the application of the
5 Convention to determine the rights of states
6 parties.³² China takes this modest preambular
7 language to mean that any court or tribunal acting
8 under Part XV is somehow precluded from exercising
9 jurisdiction in circumstances in which a difference
10 may exist between litigating States as regards some
11 issue of sovereignty.

12 **Tribunal questions**

13 **JUDGE WOLFRUM:** Professor Sands, may I interrupt you for
14 just a brief moment?

15 **PROFESSOR SANDS:** Please, sir, yes.

16 **JUDGE WOLFRUM:** I don't know whether it's an appropriate
17 point. But may I take you back to the Philippines'
18 first submission. It says:

19 "China's maritime entitlements in the South China
20 Sea, like those of the Philippines, may not extend
21 beyond those permitted by the United Nations
22 Convention..."

23 Right?

24 Now, you have made the argument that you can deal

³² China's Position Paper, para. 12, SWSP, Vol. VIII, Annex 467.

1 with these maritime features -- islands, rocks,
2 whatever -- without touching upon the question of
3 sovereignty. I have listened very carefully to that.
4 But in the moment I would like you perhaps to address
5 the question whether it is not a matter of logic under
6 your first submission to first establish whether
7 China's maritime entitlements go beyond, and only then
8 come to what you are talking about in the moment.

9 I hope I made myself clear.

10 **PROFESSOR SANDS:** Sir, you have made yourself very clear.

11 I am going to exercise some restraint in responding,
12 because I want to make sure that I have understood the
13 question correctly, and I also want to make sure that
14 I come back to it after I have finished what I have to
15 say and melded it, if it is satisfactory, with what
16 Mr Reichler had to say, so that I can make sure that
17 Mr Reichler and I are completely speaking to the same
18 language in relation to these matters. I'd also,
19 I think, like to read your words very carefully in the
20 transcript, if that's okay. But I've noted the
21 question, and the question will be responded to first
22 thing tomorrow morning, at the latest.

23 Can I turn then to the third argument on the first
24 "category" of the Philippines' claims. We are accused
25 by China in engaging in what they call a "cunning
26 packaging" exercise in relation to our case, and what

1 they say is that we have drafted things in order to
2 make it appear that our claims are covered by the
3 interpretation or application of the Convention so
4 that they are not concerned with sovereignty over
5 certain maritime features.³³

6 Now, the curiosity about this argument is that
7 China itself recognises -- and has done for nearly
8 20 years, since August 1995 -- that although the
9 dispute between the two states raises matters of
10 territorial sovereignty, which we do not deny, "some
11 issues in our dispute can be settled in accordance
12 with UNCLOS."³⁴ So there is a recognition that it is
13 possible to decouple and to unpackage the totality of
14 the issues.

15 In this sense at least, there is agreement between
16 the parties that their differences in the South China
17 Sea are complex and multifaceted. One aspect
18 certainly concerns sovereignty over insular features
19 in the South China Sea, but that issue is not before
20 this Tribunal, not directly and not indirectly. This
21 dispute concerns other matters -- and this touches on

³³ *Ibid.*, para. 14.

³⁴ Government of the Republic of the Philippines, *Transcript of Proceedings Republic of the Philippines-People's Republic of China Bilateral Talks* (10 Aug. 1995), p. 3. MP, Vol. VI, Annex 181. See MP, Vol. I, para. 3.28.

1 your question, sir -- that plainly do fall within your
2 jurisdiction. Let me explore that a little bit
3 further.

4 It is by now very well established in
5 international case law that a dispute may have
6 different elements, and that doesn't preclude some
7 elements from falling within jurisdiction. In the
8 *Tehran Hostages* case for example, before the
9 International Court of Justice, Iran argued that the
10 United States had "confined" its case to the "question
11 of 'the hostages of the American Embassy in Tehran'",
12 yet that was "only a marginal and secondary aspect of
13 an overall problem, one ... that ... cannot be studied
14 separately ..." ³⁵ So Iran argued that the dispute
15 submitted to the court by the United States could not
16 be divorced from the proper total context.

17 That argument, as we know, was firmly rejected by
18 the court. ³⁶ The court held that there was nothing to
19 prevent it from exercising jurisdiction over a dispute
20 "merely because that dispute has other aspects,

³⁵ *United States Diplomatic and Consular Staff in Tehran (United States v Iran)*, Merits, Judgment, ICJ Reports 1980, paras. 35-36. SWSP, Vol. XII, Annex LA-175. See also SWSP, Vol. I, para. 26.9-26.10.

³⁶ *United States Diplomatic and Consular Staff in Tehran (United States v Iran)*, Merits, Judgment, para. 36, SWSP, Vol. XII, Annex LA-175.

1 *however important*".³⁷ We say that conclusion is
2 equally applicable in the present case. The fact that
3 a dispute may exist on issues of territorial
4 sovereignty cannot, "*however important*", as such be
5 a bar to the Tribunal's jurisdiction over other
6 matters.

7 The approach of the International Court to
8 multidimensional disputes has been followed in
9 numerous cases. We can take two examples. In
10 *Nicaragua v United States*, this time it was the turn
11 of the United States to raise a similar argument to
12 that raised by Iran in the *Tehran Hostages* case. The
13 court found on the facts that, although the Nicaraguan
14 claim was indeed part of the wider Contadora Process,
15 as the United States argued, it was not prevented from
16 exercising its "separate [function] under the ...
17 Statute of the Court".³⁸

18 More recently, in the case of *Macedonia v Greece*,
19 the court's jurisdiction was founded on the Interim
20 Accord of September 1995, a bilateral treaty between

³⁷ *Ibid.* (emphasis added).

³⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, p. 431, para. 105-106, MP, Vol. XI, Annex LA-13.

1 the two parties.³⁹ Macedonia's case was that Greece
2 had acted in breach of Article 11 of the Interim
3 Accord by vetoing its accession to NATO. Under the
4 terms of Article 21(2) of the Accord, the court was
5 precluded from exercising jurisdiction over the
6 difference between the parties as to the name of the
7 applicant. One of Greece's jurisdictional
8 objections -- not dissimilar to that of China -- was,
9 as you can see at tab 1.10, that:

10 "... the Court cannot address the Applicant's
11 claims without pronouncing on the question of the
12 non-resolution of the name difference since this would
13 be the only reason upon which the Respondent would
14 have objected to the Applicant's admission to NATO."⁴⁰

15 The court rejected that argument. As you can see
16 at tab 1.11, the International Court concluded that:

17 "The fact that there is a relationship between the
18 dispute submitted to the Court and the name difference
19 does not suffice to remove that dispute from the
20 Court's jurisdiction. The question of the alleged
21 violation of the obligation set out in Article 11,

³⁹ *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v Greece)*, Judgment of 5 December 2011, ICJ Reports 2011, p. 644. Hearing on Jurisdiction, Annex LA-221.

⁴⁰ *Ibid.*, para. 32.

1 paragraph 1, is distinct from the issue of which name
2 should be agreed upon ... Only if the Court were
3 called upon to resolve specifically the name
4 difference, or to express any views on this particular
5 matter, would the exception under Article 21,
6 paragraph 2, come into play ..."⁴¹

7 That reasoning we say is impeccable and it is
8 right, and it is applicable to this case.

9 As with these three cases that I have just cited,
10 the dispute that the Philippines has chosen to bring
11 to the Tribunal is distinct from the issue of
12 sovereignty, concerning the interpretation and
13 application of the Convention in respect of the
14 characterisation of certain features, for example. It
15 does not require this Tribunal to make any prior
16 determination as to who does or does not have
17 sovereignty over land territory with respect to
18 particular features.

19 We say that China has mischaracterised the claims
20 that the Philippines has brought before this Tribunal.
21 Our position is that, even if China has sovereignty --
22 and this gets closer to your question -- over all of
23 the insular features -- which of course we say is not
24 the case -- its claim to "historic rights" within the

⁴¹ *Ibid.*, para. 37.

1 area encompassed by the nine-dash line exceeds the
2 limits of its entitlements under the Convention.

3 Mr President, at this juncture it is appropriate
4 for me to address another case, and it too is to be
5 distinguished from the present one. In *Mauritius v*
6 *United Kingdom*, Mauritius sought to challenge the
7 United Kingdom's declaration and purported
8 establishment of a marine protected area around the
9 Chagos Archipelago, and Mauritius made two principal
10 submissions, as will be known to anyone who has read
11 the award: first, that the United Kingdom was not
12 entitled to declare a MPA around the Chagos
13 Archipelago because the UK is not "the coastal State"
14 in relation to Chagos. But Mauritius's second
15 submission was independent of the question of
16 sovereignty: the MPA was incompatible with the United
17 Kingdom's obligations under the Convention.

18 An arbitral tribunal constituted under Annex VII of
19 the Convention found unanimously that it did have
20 jurisdiction over Mauritius's second submission,
21 although it ruled by the narrowest of minorities that
22 it did not have jurisdiction over Mauritius's first
23 submission.

24 The tribunal approached the question of
25 jurisdiction over Mauritius's first submission by
26 asking itself two questions, which are set out at

1 tab 1.12:

2 "... first, what is the nature of the dispute
3 encompassed in Mauritius' First Submission? Second,
4 to the extent that the Tribunal finds the Parties'
5 dispute to be, at its core, a matter of territorial
6 sovereignty, to what extent does Article 288(1) permit
7 a tribunal to determine issues of disputed land
8 sovereignty as a necessary precondition to
9 a determination of rights and duties in the adjacent
10 sea?"⁴²

11 In answer to that first question, by a majority of
12 three to two, the tribunal adopted the view that
13 Mauritius's first submission was to be:

14 "... properly characterised as relating to land
15 sovereignty over the Chagos Archipelago."⁴³

16 The tribunal held, also by a margin of three to
17 two, the second question in the negative. We have set
18 it out at tab 1.13:

19 "... where a dispute concerns the interpretation
20 or application of the Convention, the jurisdiction of
21 a court or tribunal pursuant to Article 288(1) extends
22 to making such findings of fact or ancillary

⁴² *Mauritius v United Kingdom*, Award of 18 March 2015, para. 206. Hearing on Jurisdiction, Annex LA-225.

⁴³ *Ibid.*, para. 212.

1 determinations of law as are necessary to resolve the
2 dispute presented to it ... Where the 'real issue in
3 the case' and the 'object of the claim' ... do not
4 relate to the interpretation or application of the
5 Convention, however, an incidental connection between
6 the dispute and some matter regulated by the
7 Convention is insufficient to bring the dispute, as
8 a whole, within the ambit of Article 288(1)."⁴⁴

9 The tribunal went on to find -- and you will see
10 it at tab 1.14 -- that it did "not categorically
11 exclude that in some instances a minor issue of
12 territorial sovereignty could indeed be ancillary",
13 but that was not the situation in that case. The
14 Tribunal therefore ruled it did not have jurisdiction
15 to address Mauritius's first submission.⁴⁵

16 But for present purposes, there are two crucial
17 elements that distinguish the Philippines' claims from
18 Mauritius's case. First, Mauritius was requesting the
19 tribunal to "resolve specifically"⁴⁶ its dispute with
20 the United Kingdom as to whether it -- the United

⁴⁴ *Ibid.*, para. 220.

⁴⁵ *Ibid.*, para. 221.

⁴⁶ *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v Greece)*, Judgment of 5 December 2011, para. 37. Hearing on Jurisdiction, Annex LA-221.

1 Kingdom -- was a "coastal State" within the meaning of
2 the Convention. Mauritius characterised its first
3 submission in this way:

4 "The UK does not have sovereignty over the Chagos
5 Archipelago, is not 'the coastal State' for the
6 purposes of the Convention, and cannot declare
7 an 'MPA' or other maritime zones in this area."⁴⁷

8 Mauritius and the UK were in agreement that in
9 order to address Mauritius's first submission, the
10 tribunal in that case was required to make a prior
11 determination as to which state had sovereignty over
12 the archipelago, and hence there was extensive
13 argument about what had happened in 1965 and
14 subsequently, and of course the key principle, the
15 right of self-determination.

16 You can see very clearly that this case is
17 manifestly and obviously different. There is nothing
18 that you have read in the pleadings to address the
19 question of which state does or does not have
20 sovereignty over a particular insular feature, and the
21 Tribunal is not asked to -- and does not need to --
22 make any determination as to sovereignty over any
23 island or any rock in order to determine the maritime

⁴⁷ *Mauritius v United Kingdom*, Memorial of Mauritius, 1 August 2012, para.
1.3(i). Hearing on Jurisdiction, Annex 581.

1 entitlements of that feature.

2 As regards low-tide elevations, they form part of
3 the seabed and subsoil: within the territorial sea of
4 the coastal state -- that is to say, up to 12 nautical
5 miles -- they are subject to the sovereignty of the
6 coastal state; but beyond 12 nautical miles, they are
7 subject to the sovereign rights of the coastal state
8 within the limits of the EEZ and continental shelf;
9 and beyond those limits, they form part of the common
10 heritage of mankind. To determine whether
11 a particular feature is a low-tide elevation does not
12 require you to determine which state, if any, has
13 sovereignty or sovereign rights over it.

14 Now, there is a second difference between the two
15 cases. Unlike Mauritius's first submission, the
16 Philippines' claim is concerned solely with the
17 interpretation and application of the Convention. In
18 this way, the Philippines' case is directly analogous
19 to Mauritius's second submission, and that submission
20 was framed in the following way by Mauritius:

21 "Independently of the question of sovereignty, the
22 'MPA' is fundamentally incompatible with the rights
23 and obligations provided for by the Convention. This
24 means that, even if the UK were entitled in principle
25 to exercise the rights of a coastal State, *quod non*,
26 the purported establishment of the 'MPA' is unlawful

1 under the Convention."⁴⁸

2 In its award of 18th March this year, the
3 tribunal, as I mentioned, found unanimously that it
4 had jurisdiction over this part of Mauritius's case.⁴⁹
5 And we say that, in exactly the same way, this
6 Tribunal has jurisdiction over the entirety of the
7 Philippines' claims, which are directly analogous. To
8 paraphrase the *Mauritius-UK* tribunal, the Philippines'
9 case is that, even if China were entitled in principle
10 to exercise the rights of a coastal state, *quod non*,
11 in regard to some or all of the disputed insular
12 features, China's claim of "historic rights" beyond
13 its entitlements under the Convention, or of
14 a 200-mile EEZ for the Spratly Islands, are unlawful
15 under the Convention.

16 That approach, we say, is confirmed by the text of
17 Article 288(1) of the Convention, which provides that:

18 "A court or tribunal referred to in article 287
19 shall have jurisdiction over any dispute concerning
20 the interpretation or application of this
21 Convention ..."⁵⁰

⁴⁸ *Ibid.*, para. 1.3(ii).

⁴⁹ *Mauritius v United Kingdom*, Award of 18 March 2015, paras. 283-323.
Hearing on Jurisdiction, Annex LA-225.

⁵⁰ UNCLOS, Article 288(1).

1 And we say, Mr President, "any" means any. The
2 question therefore arises: what is the dispute between
3 the parties? In our submission, it concerns the
4 interpretation and application of various provisions
5 of the Convention, but in particular Articles 13 and
6 121, as well as Articles 56, 57, 76 and 77.

7 In order to interpret and apply those provisions,
8 the Tribunal is bound to ask itself another question:
9 do we have to make any prior determination as to
10 an issue of sovereignty? And the answer to that
11 question, we say, is absolutely plain: no, you do not.
12 You are free and able to interpret and apply those
13 provisions to the facts of this case, without having
14 to determine which state, if any, has sovereignty over
15 any disputed insular feature.

16 That is presumably why Vietnam has informed the
17 Tribunal that it considers that this Tribunal does
18 have jurisdiction, and that there is no impediment to
19 the exercise of such jurisdiction. For it knows -- as
20 the Tribunal is bound itself to recognise -- that
21 absolutely nothing you decide on the matters that the
22 Philippines has put before you will have any
23 consequence for the matters of sovereignty of any
24 state in respect of land or insular territory within
25 the meaning of the Convention.

26 I turn to the second category of the Philippines'

1 claims which China has identified as being problematic
2 in its Position Paper, namely the claim on the part of
3 the Philippines that "China's claim to entitlements of
4 200 nautical miles and more, based on certain rocks,
5 low-tide elevations and submerged features in the
6 South China Sea, is inconsistent with the Convention".
7 In support of that attack, China makes three
8 arguments.

9 First, it argues that the nature and entitlements
10 of maritime features in the South China Sea "cannot be
11 considered in isolation of sovereignty".⁵¹ China says
12 that:

13 "... without determining the sovereignty over
14 a maritime feature, it is impossible to determine
15 whether maritime claims based on that feature are
16 consistent with the Convention."⁵²

17 China has provided no comprehensible
18 explanation -- and I say this with the greatest
19 respect to China -- as to why this might be so. We
20 are simply unable to understand the basis for what is
21 nothing more than an assertion.

22 The status or classification under the Convention
23 of a particular maritime feature -- whether it be

⁵¹ China's Position Paper, paras. 15-18, SWSP, Vol. VIII, Annex 467.

⁵² *Ibid.*, para. 16.

1 an island or a rock on the one hand, or a low-tide
2 elevation on the other hand -- is plainly a law of the
3 sea matter; it is plainly one that concerns the
4 interpretation and application of the Convention.
5 Whether a given maritime feature is a low-tide
6 elevation or a rock or an island capable of generating
7 entitlements to an EEZ and a continental shelf is also
8 plainly a matter that gives rise to a legal dispute
9 under the Convention, and it has done so, and it can
10 be resolved by interpreting and applying Articles 13
11 and 121 of the Convention.

12 To what extent does the question of who has
13 sovereignty over a particular feature impact that
14 exercise? We say: not at all. There is nothing in
15 the language of Articles 13 or 121 to suggest that
16 a determination of the status of a feature is in any
17 way dependent upon a prior determination of
18 sovereignty. Articles 13 and 121 require the physical
19 and geographical characteristics of the feature in
20 question to be assessed and determined, and that is
21 an exercise that is to be carried out by reference
22 exclusively to objective criteria. Who has
23 sovereignty -- which is a matter governed by
24 international law concerning the acquisition of land
25 territory -- is distinct from and cannot have any
26 bearing as to the question of whether feature X is or

1 is not a rock or an island, for example.

2 As regards our submissions 3 to 7, the feature
3 will be -- or will not be -- a rock or an island or
4 a low-tide elevation wholly irrespective of whether it
5 is Chinese or Vietnamese or Philippine, for example.
6 It necessarily follows that the maritime entitlement
7 generated by any maritime feature is also not
8 dependent upon a determination, whether prior or
9 otherwise, of sovereignty over that feature.

10 The Tribunal has also enquired more recently
11 whether the Philippines' claims in submissions 5, 8
12 and 9 are dependent upon a prior determination of
13 sovereignty over any disputed feature with a possible
14 entitlement to an exclusive economic zone overlapping
15 that claimed by the Philippines. The answer is that
16 they are not, and we have cited here the footnote
17 reference to our second written submission where that
18 is set out in some detail.⁵³

19 Let us turn by way of illustration to look at the
20 example of a low-tide elevation. The existence of
21 sovereignty or sovereign rights is, we say, a question
22 of the law of the sea, in the sense that it is
23 determined by the maritime zone in which it happens to
24 be located. In this way, the determination that

⁵³ SWSP, para. 12.1.

1 a feature is a low-tide elevation does not implicitly
2 include a determination as to whether that feature may
3 be subject to a claim of territorial sovereignty,
4 since (1) that determination is entirely distinct from
5 the question of its location, and (2) it is the
6 location and not the characterisation of the feature
7 that determines whether it is subject to a claim of
8 national sovereignty.

9 Let's illustrate this with a single example. On
10 the screen you ought now to see the appropriately
11 named Mischief Reef, which lies more than 12 miles
12 from any land or insular territory. As we home in on
13 Mischief Reef -- and you can see it in a little more
14 detail now on the screen -- you can see alongside the
15 photograph how it is treated in all the relevant
16 maritime charts: on the left, British, American and
17 Philippine; and on the right, Chinese and others. All
18 of these charts recognise that Mischief Reef is to be
19 treated as a low-tide elevation. The Japanese chart
20 does the same thing; the Russian chart does the same
21 thing.

22 China says that in order to determine the status
23 of that feature, you must first determine who has
24 sovereignty over it. Well, with great respect, that
25 is wrong. As a low-tide elevation, it is part of the
26 seabed and the subsoil. And since it is located more

1 than 12 miles from land or an island, we say that the
2 issue of sovereignty cannot arise. But -- and this is
3 the crucial point -- we say you just don't have to
4 express any view at all as to sovereignty. All we ask
5 you to do at the merits phase is determine the
6 character of the feature. And we are at a loss to
7 understand on what basis it could be said that you can
8 only determine the character of a feature, recognised
9 by six nautical charts as a low-tide elevation that
10 lies beyond 12 miles from another insular feature,
11 having first determined the matter of sovereignty,
12 which is something we say you can't do, and don't need
13 to do in this case.

14 Yes?

15 **Tribunal questions**

16 **JUDGE WOLFRUM:** Professor Sands, on this particular
17 feature, if I am not totally mistaken, there is
18 a reference to this feature in the Presidential
19 Decree 1596 of the Philippines, and I wonder whether
20 you are taking nationally the same approach you are
21 presenting to us at the moment. It may take a while,
22 if you look into that Presidential Decree. Thank you.

23 **PROFESSOR SANDS:** That one I am definitely going to park,
24 and come back to, until I have had a chance to look at
25 the decree. But we have noted the question, and of

1 course we will come back to that question and are very
2 grateful for it.

3 This may also be an opportune moment to address
4 a couple of points addressed by the Tribunal in its
5 recent list of issues. You invited us to address
6 whether -- in relation to submissions 4 and 6 -- the
7 identification of vertical datum necessary to
8 determine the status of the feature is dependent upon
9 a prior determination of sovereignty over the feature.
10 The answer, we say, is that it is not. There is no
11 requirement under the Convention to have regard to any
12 particular charts to determine the status of
13 a feature; and in any event, in this case all the
14 charts point in the same direction. And we have made
15 clear that the Philippines has no objection to this
16 Tribunal placing reliance upon the Chinese charts
17 which we have referred to in our written pleadings.

18 Relatedly, you have asked us to address whether
19 Article 5's requirement that the low water line as the
20 normal baseline should be a line drawn on charts
21 officially recognised by the coastal state, and
22 whether that raises an issue of admissibility on any
23 aspect of the Philippines case. We say it does not.
24 That provision, Article 5, is located in a section
25 entitled "Limits of the Territorial Sea", and it only
26 comes into play after a feature has been

1 characterised, since it is its character and location
2 that will determine whether it can generate
3 an entitlement to a territorial sea at all, and it is
4 only then that a normal baseline might be drawn. So
5 Article 5 will be inapplicable for a low-tide
6 elevation that lies beyond 12 miles of any land or
7 insular territory. Again, just to be clear and to
8 confirm on this, for these purposes the Philippines
9 has no objection to the use of Chinese charts, if the
10 Tribunal considers it necessary to draw baselines
11 around any particular feature, although we say it is
12 not so necessary.

13 I turn to China's second argument in relation to
14 our second category of claims. China says that the
15 Philippines has "dissected" the Spratly Islands (which
16 it calls the "Nansha Islands"), and that we have
17 engaged in this act of dissection to "distort the
18 nature and scope of the China-Philippines dispute in
19 the South China Sea". And it says that:

20 "... to determine China's maritime entitlements
21 based on the Nansha Islands under the Convention, all
22 maritime features ... must be taken into account."⁵⁴

23 What China says is that we have "deliberately
24 excluded" the largest "island" occupied by China,

⁵⁴ China's Position Paper, paras. 19-22, SWSP, Vol. VIII, Annex 467.

1 Itu Aba, and that we have been mischievous in doing
2 this.⁵⁵

3 To be very realistic, the basis upon which the
4 Philippines selected nine maritime features is
5 explained fully in the Memorial.⁵⁶ There are more
6 than 750 features in the Spratly Islands, and possibly
7 this Tribunal may want to engage in the exercise --
8 which would last a very lengthy period of time, having
9 regard to a similar experience in the case of Slovenia
10 and Croatia on a huge number of different matters --
11 but we felt it would simply be unmanageable and
12 unreasonable for the Philippines to request the
13 Tribunal to determine the nature of so many features,
14 and we said so.

15 So we have asked the Tribunal to rule only on
16 those features that are occupied or controlled by
17 China, on the basis that this would assist in the
18 resolution of differences as to the entitlements
19 generated by all the other features. Once we've got
20 your award, we can apply your award to all the other
21 features. So we have not "deliberately excluded"
22 anything for any malign purpose; we have simply tried
23 to be pragmatic in relation to what is doable in

⁵⁵ China's Position Paper, para. 22, SWSP, Vol. VIII, Annex 467.

⁵⁶ MP, Vol. I, para. 5.57.

1 a reasonable period of time. And that was motivated,
2 for right or for wrong, to assist the Tribunal.

3 Itu Aba, which is the largest feature in the
4 Southern Sector, has been occupied by the authorities
5 in Taiwan since 1946. It is no more than 0.43 square
6 kilometres in size. It has no permanent population.
7 It provides no water suitable for drinking, and it
8 does not provide a meaningful amount of agricultural
9 produce. It is similar in nature to Colombia's
10 Serrana Cay, which is also roughly 0.4 square
11 kilometres in size. In fact, Serrana Cay is 10 metres
12 in height, and there there is a well to supply water
13 for visiting fishermen and law enforcement officers.
14 In the case of *Nicaragua v Colombia*, although the
15 International Court found it unnecessary to decide
16 whether to apply Article 121 of the Convention to
17 Serrana Cay, it granted this feature no more than
18 a 12-nautical mile territorial sea.⁵⁷

19 But in any event, Itu Aba has not been
20 "deliberately excluded" by the Philippines, as China
21 puts it. Our written pleadings do address the largest
22 features in the Spratlys, including Itu Aba, Thitu and

⁵⁷ *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Merits, Counter Memorial of the Republic of Colombia (11 Nov. 2008), MP, Vol. XI, Annex LA-32. See MP, Vol. I, paras. 5.110-5.112.

1 West York. And we have demonstrated that the features
2 in the Spratly area are "rocks" within the meaning of
3 Article 121 of the Convention, so that none is capable
4 of generating an entitlement to any EEZ or continental
5 shelf.

6 At the Tribunal's request, the Philippines has
7 also provided additional information on these features
8 in its response to your Question 20 from
9 December 2014.⁵⁸ And our position is simple: if the
10 largest of the Spratly features is incapable of
11 generating an EEZ and continental shelf entitlement,
12 then it is most unlikely that any of the other
13 750 features will be able to do so. So there is no
14 dissection on our part, and no distortion on our part.

15 As a third point, China contends that whether or
16 not a low-tide elevation can be appropriated is
17 "plainly a question of territorial sovereignty", "not
18 a question concerning the interpretation or
19 application of the Convention".⁵⁹ And we noted that
20 the Tribunal has raised this issue in its Request for
21 Further Written Argument, Question 18 of which invited
22 the Philippines:

⁵⁸ MP, Vol. I, paras. 1.47 and 5.96-5.114; SWSP, Vol. I, pp. 117-119; SWSP, Vol. II.

⁵⁹ China's Position Paper, paras. 23-29, SWSP, Vol. VIII, Annex 467.

1 "... to address whether, as a matter of
2 international law, low-tide elevations constitute
3 territory and are subject to appropriation ..." ⁶⁰

4 Specifically, Question 6 invites the Philippines
5 to address:

6 "(i) whether a determination that a feature
7 constitutes a low-tide elevation which implicitly
8 involve a determination as to whether that feature may
9 be subject to a claim of territorial sovereignty or
10 appropriation/acquisition; and (ii) the relevance, if
11 any, to the exceptions to jurisdiction under
12 Article 298(1)(a) of the Convention." ⁶¹

13 Now, these two questions, which expand on China's
14 first preliminary objection are addressed rather fully
15 in the Philippines' Supplemental Written Submission.
16 In summary, as to whether a low-tide elevation
17 constitutes land territory and is subject to
18 appropriation or acquisition, we say that it is
19 crystal-clear from the consistent body of case law on
20 this matter that the answer to that question is no. ⁶²

⁶⁰ Request for Further Written Argument by the Philippines Pursuant to Article 25(2) of the Rules of Procedure, 16 December 2014, Question 18.

⁶¹ *Ibid.*, Question 6.

⁶² See SWSP, Vol. I, paras. 18.1-18.9; *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Merits, Judgment, ICJ Reports 2012, MP, Vol. XI, Annex LA-35.

1 China argues to the contrary in its Position
2 Paper, and it quotes from paragraph 205 of the
3 International Court of Justice judgment in *Qatar v*
4 *Bahrain*, which you will have at tab 1.16:

5 "International treaty law is silent on the
6 question whether low-tide elevations can be considered
7 'territory'. Nor is the Court aware of a uniform and
8 wide State practice which might have given rise to
9 a customary rule which unequivocally permits or
10 excludes the appropriation of low-tide elevations."⁶³

11 Now, we regret very much that, in reliance on this
12 passage, China, no doubt by inadvertence, failed to go
13 to the very next paragraph of the court's judgment,
14 which you have at tab 1.17, and I quote in full:

15 "The few existing rules do not justify a general
16 assumption that low-tide elevations are territory in
17 the same sense as islands. It has never been disputed
18 that islands constitute terra firma, and are subject
19 to the rules and principles of territorial
20 acquisition; the difference in effects which the law
21 of the sea attributes to islands and low-tide
22 elevations is considerable. It is thus not

⁶³ China's Position Paper, para. 25, citing *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*, Merits, Judgment, ICJ Reports 2001, p. 91, para. 205, MP, Vol. XI, Annex LA-26.

1 established that in the absence of other rules and
2 legal principles, low-tide elevations can, from the
3 viewpoint of the acquisition of sovereignty, be fully
4 assimilated with islands or other land territory."⁶⁴

5 And the court then went on to find that:

6 "A low-tide elevation, therefore, as such does not
7 generate the same rights as islands or other
8 territory..."

9 And that:

10 "... it is irrelevant whether the coastal State
11 has treated such a low-tide elevation as its property
12 and carried out some governmental acts with regard to
13 it; it does not generate a territorial sea."⁶⁵

14 As a result of these findings, the court
15 disregarded entirely, in that case, all low-tide
16 elevations for the purpose of drawing an equidistance
17 line between the parties.⁶⁶

18 Now, China's Position Paper also refer to the
19 International Court's ruling in *Nicaragua v Colombia*
20 that "low-tide elevations cannot be appropriated".

⁶⁴ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*, Merits, Judgment, ICJ Reports 2001, p. 91, para. 206, MP, Vol. XI, Annex LA-26.

⁶⁵ *Ibid.*, para. 207.

⁶⁶ *Ibid.*, para. 209.

1 And that, of course, is a ruling that is obviously
2 very unhelpful to China's case, and we say very
3 helpful to ours and to our jurisdiction claim. China
4 claims that the ICJ failed "to point to any legal
5 basis for this ... statement".⁶⁷ And again, they
6 might have wanted to read on in the judgment, and they
7 will see that the court referred to its decision in
8 *Qatar v Bahrain*. And indeed, *Nicaragua v Colombia* is
9 pertinent because it confirms that low-tide elevations
10 beyond 12 nautical miles cannot be appropriated as
11 territory by any state, and no measure of occupation
12 or control can establish sovereignty over such
13 features.⁶⁸

14 What is clear from the wording of Article 13 of
15 the Convention and the relevant case law is that only
16 low-tide elevations within the territorial sea may be
17 subject to the sovereignty of a state. Pursuant to
18 Article 2(2) of the Convention, sovereignty over the
19 territorial sea expressly includes the seabed and
20 subsoil, of which a low-tide elevation is a part.

21 A low-tide elevation outside the territorial sea may

⁶⁷ China's Position Paper, para. 25, citing *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Merits, Judgment, ICJ Reports 2012, para. 26, MP, Vol. XI, Annex LA-35.

⁶⁸ See SWSP, Vol. I, paras. 18.2 and 18.7.

1 not be subject to the sovereignty of any state, and,
2 as I have said, cannot generate maritime entitlements.
3 In *Malaysia/Singapore* the ICJ made this clear:

4 "... a low-tide elevation belongs to the State in
5 the territorial waters in which it is located."⁶⁹

6 Low-tide elevations beyond 12 nautical miles form
7 part of the seabed, sovereign rights over which do not
8 depend upon occupation or control. And so it follows
9 that no state can have sovereignty over a low-tide
10 elevation unless it is located within 12 nautical
11 miles from an island or land territory over which it
12 has sovereignty.

13 As to the Tribunal's question on the implications
14 that flow from determining whether a feature is
15 a low-tide elevation, and the relevance, if any, of
16 Article 298(1)(a) of the Convention, the Philippines
17 has again provided, we hope, a full answer in our
18 Supplemental Written Submission,⁷⁰ and I can very
19 briefly summarise. Whether or not a feature is
20 a low-tide elevation is to be determined by reference
21 to Article 13(1) of the Convention, and this is

⁶⁹ *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Merits, Judgment, ICJ Reports 2008, paras. 295-299. MP, Vol. VI, Annex LA-31.

⁷⁰ SWSP, Vol. I, paras. 6.1-6.10.

1 a matter that falls within the Tribunal's jurisdiction
2 under Article 288(1). Article 298(1)(a) applies only
3 to the conciliation of delimitation disputes, and is
4 not applicable or otherwise relevant to the present
5 dispute.

6 In exercising its function under Article 288(1) to
7 interpret and apply Article 13(1) of the Convention,
8 the Tribunal's determination may incidentally have
9 an impact on the distinct and separate question as to
10 whether a low-tide elevation beyond the limit of the
11 territorial sea is or is not susceptible to
12 acquisition or appropriation. But this does not mean
13 that the Tribunal is precluded from interpreting and
14 applying Article 13(1), or Article 76 or Article 77 of
15 the Convention. Part XV tribunals have routinely made
16 determinations with regard to low-tide elevations, the
17 incidental result of which is that sovereignty over
18 that feature vests in one or another state. That is
19 precisely what happened, for example, in *Bangladesh v*
20 *India*.⁷¹

21 Yet China asserts that:

22 "... no international judicial or arbitral body

⁷¹ *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v India)*, Award, UNCLoS Annex VII Tribunal (7 July 2014), para. 191. SWSP, Vol. XII, Annex LA-179.

1 has ever applied the Convention to determine the
2 maritime rights derived from a maritime feature before
3 sovereignty over that feature is decided."⁷²

4 No. With great respect, that is wrong. In
5 *Bangladesh v India*, an Annex VI arbitral tribunal
6 delimited the territorial sea between Bangladesh and
7 India in the Bay of Bengal -- some of us had the
8 pleasure of going there -- pursuant to Article 15 of
9 the Convention. As an incidental result of that
10 delimitation, a disputed low-tide elevation known by
11 some as South Talpatty was attributed to India, much
12 to the chagrin of the lawyers of Bangladesh, of whom
13 I was one. The tribunal's decision therefore
14 determined which state had sovereignty over the waters
15 and seabed and subsoil in which South Talpatty was
16 said to be located.

17 In the present case, none of the Philippines'
18 claims involve any such concurrent consideration of
19 sovereignty. The 298 exception only applies in
20 relation to:

21 "... disputes concerning the interpretation or
22 application of articles 15, 74 and 83 relating to sea
23 boundary delimitations, or those involving historic

⁷² *Ibid.*, para. 18.

1 bays or titles ..."⁷³

2 This is not such a dispute. Whatever implications
3 do or do not flow from a determination by the Tribunal
4 under Article 13(1) of the Convention cannot affect
5 your jurisdiction, and are without consequence for it.
6 Any argument to the contrary would undermine -- it
7 would gut, actually -- the effectiveness of the
8 Part XV compulsory dispute settlement mechanism.
9 Again, I refer to the Supplemental Written
10 Submission.⁷⁴

11 Mr President, this brings me to the third and
12 final "category" of claims described by China in its
13 Position Paper, and on this point I will be brief.
14 China's description of the Philippines' third
15 "category" of claims is that "China's assertion and
16 exercise of rights in the South China Sea have
17 unlawfully interfered with the sovereign rights,
18 jurisdiction and rights and freedom of navigation that
19 the Philippines enjoys and exercises under the
20 Convention". China argues that the premise of these
21 claims:

22 "... must be that the spatial extent of the
23 Philippines' maritime jurisdiction is defined and

⁷³ UNCLOS, Article 298(1)(a).

⁷⁴ SWSP, Vol. I, paras. 6.2-6.7.

1 undisputed, and that China's actions have encroached
2 upon such undefined areas ... Until and unless the
3 sovereignty over the relevant maritime features is
4 ascertained and maritime delimitation completed, this
5 category of claims of the Philippines cannot be
6 decided upon."⁷⁵

7 Well, it's variations on an earlier theme. But
8 again China has misconstrued the Philippines' case,
9 and in fact it has entirely missed the point. The
10 Philippines' claims pertaining to China's unlawful
11 conduct are premised on China's maximum permissible
12 entitlement under the Convention, even assuming that
13 it, **quod non**, has sovereignty over all disputed
14 insular features. If a state has no entitlement, real
15 or hypothetical, there can be no basis upon which it
16 can assert sovereign rights and jurisdiction.

17 This part of the Philippines' claim, like all of
18 the Philippines' submissions, is made entirely
19 regardless of sovereignty, and entirely without
20 prejudice to China's territorial assertions, or indeed
21 the territorial assertions of any other state.
22 China's assumption that a tribunal acting under
23 Part XV has no jurisdiction to rule on matters of
24 sovereign rights or the interference with rights of

⁷⁵ China's Position Paper, para. 27, SWSP, Vol. VIII, Annex 467.

1 navigation in disputed waters is wholly unsupported
2 and wholly unsubstantiated.

3 I should also add that China's objection to this
4 "category" of the Philippines' case does not address
5 the areas where China's claim to potential
6 entitlements might not exceed the limits permitted
7 under the Convention. For instance, three of the
8 Philippines' submissions -- submissions 10, 11 and
9 13 -- challenge China's actions in the territorial sea
10 around the Scarborough Shoal. And we take note of the
11 fact that China's Position Paper does not deny that
12 the Tribunal has jurisdiction over those claims.

13 Mr President, that brings to a close my answer to
14 China's first preliminary objection to jurisdiction.
15 We say the objection is wholly misguided and based on
16 a wholesale mischaracterisation of the Philippines'
17 claims. The Philippines has not invited the Tribunal,
18 directly or indirectly, to adjudicate on China's
19 claims of sovereignty over any island or rock, or the
20 claims of any other state. What we do is invite this
21 Tribunal simply to determine the character of certain
22 features: island, rock or low-tide elevation. That
23 process of arbitral determination plainly falls within
24 your jurisdiction, and it does not require you to
25 express any view whatsoever on which state does or
26 does not have sovereignty over any particular feature,

1 even if it may have consequences with respect to the
2 maritime entitlements of any such feature, which is
3 an entirely distinct matter.

4 Mr President, members of the Tribunal, I thank you
5 for your very kind attention. I think it may already
6 have been signalled to you that, in light of the time
7 of day and the tropical heat in this room -- for
8 a person who lives in London anyway! -- we will
9 propose to stop for today and resume with my good
10 friend Professor Oxman tomorrow morning at 10 o'clock.

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

12 Professor Sands. We will take your advice and decide
13 to forego the rest of the evening. So we will break
14 now, and then listen to you tomorrow morning. Thank
15 you very much.

16 **(5.35 pm)**

17 **(The hearing adjourned until 10.00 am the following day)**