

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

PCA Case No. 2013-19

Permanent Court of Arbitration
Peace Palace
The Hague
The Netherlands

Day 1

Tuesday, 24th November 2015

Hearing on the Merits and Remaining Issues
of Jurisdiction and Admissibility

Before:

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

BETWEEN:

THE REPUBLIC OF THE PHILIPPINES

-and-

THE PEOPLE'S REPUBLIC OF CHINA

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

The People's Republic of China was not represented.

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Participants may not have been present for the entire hearing.

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1

2

Tuesday, 24th November 2015

3 (2.31 pm)

4

Opening remarks by THE PRESIDENT

5 **THE PRESIDENT:** Good afternoon. The hearing on the
6 merits and remaining issues of jurisdiction and
7 admissibility is now open in the arbitration commenced
8 by the Republic of the Philippines against the
9 People's Republic of China under the United Nations
10 Convention on the Law of the Sea.

11 My name is Thomas A Mensah and I am the presiding
12 arbitrator in this case. I am joined on the bench, to
13 my left, by my co-arbitrators Judge Rüdiger Wolfrum
14 and Judge Jean-Pierre Cot, and, to my right, by Judge
15 Stanislaw Pawlak and Professor Alfred Soons.

16 Also at the table assisting us are senior legal
17 counsel from the Permanent Court of Arbitration. On
18 the left is Mr Garth Schofield, and on the right end
19 Ms Judith Levine, who serves as registrar in this
20 case.

21 Seated next to the registrar is Mr Grant Boyes,
22 the independent technical expert appointed in
23 accordance with Article 24 of the Rules of Procedure
24 of the Tribunal. His function is to assist the
25 Tribunal as necessary in the course of the

1 arbitration.

2 On behalf of the Tribunal as a whole, I welcome
3 the distinguished representatives of the Philippines.

4 Before asking the Agent to introduce his
5 delegation, I will note that no delegation appears
6 today on behalf of the People's Republic of China. As
7 we know, China has already indicated that it does not
8 accept and is not participating in this arbitration.

9 The Chinese Government has adhered to the position
10 of neither accepting nor participating in the arbitral
11 proceedings. It has reiterated this position in *notes*
12 *verbales*, in public statements, in its Position Paper
13 "on the Matter of Jurisdiction" dated
14 7th December 2014, and in letters to the Tribunal from
15 the Chinese Embassy in the Kingdom of the Netherlands.

16 Nonetheless, in line with the duty under Article 5
17 of Annex VII to the Convention to "assure each party
18 a full opportunity to be heard and to present its
19 case", the Tribunal has kept China updated on all
20 developments in the arbitration and stated that it
21 remains open to the People's Republic of China to
22 participate in these proceedings at any stage. The
23 Chinese Embassy will accordingly receive a daily
24 transcript of this hearing and copies of any documents
25 presented during the hearing.

26 Article 9 of Annex VII to the Convention provides

1 that:

2 "... absence of a party or failure of a party to
3 defend its case shall not constitute a bar to the
4 proceedings. Before making its award, the arbitral
5 tribunal must satisfy itself not only that it has
6 jurisdiction over the dispute but also that the claim
7 is well founded in fact and in law."

8 On 29th October 2015, the Tribunal issued its
9 Award on Jurisdiction and Admissibility. The Tribunal
10 found in the operative part that:

11 (a) The Tribunal was properly constituted in
12 accordance with Annex VII to the Convention;

13 (b) China's non-appearance in these proceedings
14 does not deprive the Tribunal of jurisdiction;

15 (c) The Philippines' act of initiating the
16 arbitration did not constitute an abuse of process;

17 (d) There is no indispensable third party whose
18 absence deprives the Tribunal of jurisdiction;

19 (e) The 2002 China-ASEAN Declaration on Conduct of
20 the Parties in the South China Sea, certain joint
21 statements of the Parties, the Treaty of Amity and
22 Cooperation in Southeast Asia and the Convention on
23 Biological Diversity do not preclude, under
24 Articles 281 or 282 of the Convention, recourse to the
25 compulsory settlement of dispute procedures available
26 under Section 2 of Part XV of the Convention;

1 (f) The Parties have exchanged views as required
2 by Article 283 of the Convention;

3 (g) The Tribunal has jurisdiction to consider the
4 Philippines' Submissions nos. 3, 4, 6, 7, 10, 11 and
5 13, subject to certain conditions noted in
6 paragraphs 400, 401, 403 and 404 of the Award on
7 Jurisdiction;

8 (h) A determination of whether the Tribunal has
9 jurisdiction to consider the Philippines' Submissions
10 nos. 1, 2, 5, 8, 9, 12, and 14 would involve
11 consideration of issues that do not possess
12 an exclusively preliminary character, and accordingly
13 the Tribunal has reserved its consideration of its
14 jurisdiction to rule on Submissions no. 1, no. 2,
15 no. 5, no. 8, no. 9, no. 12 and no. 14 to the merits
16 phase of the proceedings;

17 (i) Finally, the Tribunal directed the Philippines
18 to clarify the content and narrow the scope of its
19 Submission no. 15, and reserved its consideration of
20 its jurisdiction over that submission to the merits
21 phase.

22 On 10th November 2015, the Tribunal sent a letter
23 to the Parties with guidance as to the 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 this hearing.

1 The Philippines is, therefore, free to structure
2 its arguments as it considers most appropriate, and to
3 address the Tribunal on any issue concerning the
4 merits of its claims or concerning the questions of
5 jurisdiction or admissibility deferred by the Tribunal
6 in its recent Award on Jurisdiction for further
7 consideration.

8 Prior to the hearing, the Philippines was granted
9 leave to file certain additional documentary and
10 testimonial evidence. The Philippines has also been
11 granted leave to present the views of two experts,
12 Professor Clive Schofield and Professor Kent
13 Carpenter.

14 The Tribunal would like to hear statements from
15 each of these experts on Thursday. So we will hear
16 them on Thursday. The Tribunal will then pose
17 questions, if necessary, to these experts on Friday
18 morning, and we will expect answers to the questions
19 that we pose from them during the second round of the
20 hearing on Monday.

21 On Friday morning, the Tribunal will present to
22 the Philippines in writing any outstanding questions
23 for the Philippines to address during the second round
24 on Monday. Additionally, throughout the hearing,
25 individual members of the Tribunal may pose questions
26 for the Philippines to answer, either at the time or

1 at the close of the hearing, which will be on Monday.

2 Before handing the floor to the Agent of the
3 Philippines, on behalf of the Tribunal, I also
4 acknowledge the presence of distinguished
5 representatives of interested states parties who are
6 here in the capacity of observers. They are:
7 Australia, the Republic of Indonesia, Japan, Malaysia,
8 Singapore, the Kingdom of Thailand and the Socialist
9 Republic of Vietnam.

10 Transcripts of this hearing will be made available
11 on the PCA's website once the Parties have been given
12 an opportunity to review them.

13 You have received the provisional hearing schedule
14 that we will be following. We plan to have a coffee
15 break of 15 minutes at around 4.00 pm during the
16 afternoon sessions and 11.30 am during the morning
17 session.

18 May I please ask you to turn your phones to
19 silent, and to refrain from taking photographs or
20 recordings during the hearing sessions.

21 Unless there are any other housekeeping matters
22 that the Philippines would like to raise, I propose
23 that we begin, and I will hand over the floor to the
24 Agent of the Philippines first to introduce his
25 distinguished delegation, and then to open the oral
26 arguments.

1 Mr Solicitor General, you have the floor.

2 (2.43 pm)

3 **Introductory remarks by SOLICITOR GENERAL HILBAY**

4 **SOLICITOR GENERAL HILBAY:** Mr President, distinguished
5 members of the Tribunal, it is an honour for me to
6 appear before you once again, and a great privilege to
7 act as Agent of the Republic of the Philippines in
8 these proceedings.

9 On behalf of the Filipino people and our
10 delegation, I would like to begin by expressing our
11 deepest appreciation for the attention that you have
12 devoted to this case. We have studied your Award on
13 Jurisdiction and Admissibility of 29th October 2015,
14 and are immensely grateful for the careful
15 consideration and thoughtfulness that are so evident
16 throughout.

17 We would like to thank you as well for the list of
18 issues set out in the annex to the Tribunal's letter
19 of 10th November 2015 that you invited the Philippines
20 to address. We have reflected upon them, and I can
21 assure you that each of the Tribunal's questions will
22 be answered during our opening submissions.

23 Mr President, my principal task today is to
24 describe the order of presentation that the
25 Philippines will follow during the first round. The

1 presentation will consist of four parts.

2 During this afternoon's session, the Philippines
3 will address China's unlawful assertion of history
4 rights within the nine-dash line. Mr Paul Reichler
5 will begin by describing the nature of that claim, and
6 will demonstrate that China is claiming the exclusive
7 right to the living and non-living resources beyond
8 the limits of its entitlements under the 1982 United
9 Nations Convention on the Law of the Sea. He will
10 also demonstrate that China's claim of historic rights
11 is not a claim of historic title, and is therefore
12 unaffected by the provisions of Article 298(1)(a).
13 There is, therefore, no impediment to your
14 jurisdiction in regard to the submissions of the
15 Philippines that address China's claim.

16 Mr. Reichler will be followed by Professor Bernard
17 Oxman, who will demonstrate the unlawfulness of
18 China's claim to historic rights, showing that such
19 claims do not survive the Convention. Mr Andrew
20 Loewenstein will conclude the session by showing that
21 even assuming *arguendo* that historic rights could
22 exist after the Convention, China has no such rights
23 because it does not satisfy any of the requirements
24 for historic rights under general international law.

25 During tomorrow morning's session, the Philippines
26 will present its submissions in regard to the

1 entitlements of the maritime features over which China
2 claims sovereignty. Our counsel -- Professor Philippe
3 Sands, Mr Larry Martin and Mr Reichler -- will
4 demonstrate that the nine features identified in the
5 Philippines' submissions, whose status we have asked
6 the Tribunal, to determine are either low-tide
7 elevations that generate no maritime entitlements or
8 rocks under Article 121(3) that do not generate an EEZ
9 or continental shelf. Our counsel will also
10 demonstrate that none of the other features in the
11 Spratly group -- that is, those other than the ones
12 identified in our submissions -- is entitled to an EEZ
13 or continental shelf under the Convention either.

14 Tomorrow's afternoon session will be devoted to
15 China's violation of the rights of the Philippines
16 under the Convention, in three different respects:
17 first, the Philippines' rights and jurisdiction in
18 regard to the living and non-living resources in its
19 exclusive economic zone and continental shelf; second,
20 China's unlawful prevention of Filipino fishermen from
21 engaging in traditional fishing activities at
22 Scarborough Shoal; and third, China's unlawful
23 construction of an artificial island and installations
24 and structures at Mischief Reef, which is a low-tide
25 elevation located on the continental shelf of the
26 Philippines and within its 200-nautical-mile exclusive

1 economic zone. Professor Sands, Mr Martin and
2 Mr Loewenstein will address the Tribunal during that
3 session.

4 Finally, in the fourth session, on Thursday
5 morning, our counsel, Professor Alan Boyle and
6 Professor Oxman, will demonstrate that China has
7 breached its environmental obligations under the
8 Convention, has violated the Convention on the
9 International Regulations for Preventing Collisions at
10 Sea by engaging in dangerous navigational practices,
11 and has unlawfully aggravated and extended the dispute
12 by its extensive land creation activities and
13 environmental depredations at various features in the
14 southern part of the South China Sea.

15 Mr President, attending the hearing are two of the
16 Philippines' technical experts.

17 Professor Kent Carpenter is a professor of
18 biological sciences at Old Dominion University, in
19 Norfolk, Virginia, United States, and the manager of
20 the IUCN Global Marine Species Assessment. He is the
21 author of the expert report dated 22nd March 2014 that
22 addresses the damage caused by China to the South
23 China Sea's marine environment, and the co-author,
24 with Professor Loke Ming Chou, of the supplemental
25 expert report that the Philippines submitted on 19th
26 November 2015, which addresses the environmental

1 consequences of China's artificial island-building
2 efforts that postdate Professor Carpenter's initial
3 report.

4 Also attending the hearing is Professor Clive
5 Schofield. He is Director of Research at the
6 Australian Centre for Ocean Resources and Security at
7 the University of Wollongong, in Australia, and the
8 co-author, with Professor Victor Prescott, of the
9 expert report dated March 2015 that addresses the
10 status of all 45 maritime features in the South China
11 Sea mentioned in the Tribunal's request for further
12 written argument of 16th December 2014.

13 The Philippines is pleased to place Professor
14 Carpenter and Professor Schofield at the Tribunal's
15 disposition to answer any questions it may have in
16 regard to their expert reports, either directly or
17 through our counsel.

18 Mr President, thank you for your courteous
19 attention. I ask you that you invite Mr Reichler to
20 the podium to begin the Philippines' presentation on
21 our Submissions 1 and 2, which directly address
22 China's historic rights claim.

23 **THE PRESIDENT:** Mr Reichler, please.

24

1 (2.51 pm)

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

3 **MR REICHLER:** Mr President, members of the Tribunal, good
4 afternoon. It is an honour for me to appear before
5 you again in these proceedings, as counsel to the
6 Republic of the Philippines. I will address you today
7 on the merits of the Philippines' Submissions 1 and 2,
8 as well as the Tribunal's jurisdiction in regard to
9 those submissions, which it joined to the merits in
10 its award of 29th October 2015.

11 That award is the starting point for my
12 presentation today. It is instructive for at least
13 four reasons.

14 First, the Tribunal found that there is a dispute
15 between the two Parties in regard to the subject
16 matter of Submissions 1 and 2:

17 "In the Tribunal's view, the Philippines'
18 Submissions no. 1 and 2 reflect a dispute concerning
19 the source of maritime entitlements in the South China
20 Sea and the interaction of China's claimed 'historic
21 rights' with the provisions of the Convention."¹

22 Second, the Tribunal ruled that the Parties'
23 dispute over the source of maritime entitlements in
24 the South China Sea, and over China's claimed

¹ Award on Jurisdiction (29 October 2015), para. 164.

1 "historic rights", calls for the interpretation and
2 application of the Convention. The Tribunal found, in
3 reference to the Parties' diplomatic correspondence
4 between 7th May 2009 and 14th April 2011, that:

5 "... a dispute is readily apparent in the text and
6 context of this exchange: from the map depicting
7 a seemingly expansive claim to maritime entitlements,
8 to the Philippines' argument that maritime
9 entitlements are to be derived from 'geological
10 features' and based solely on the Convention, to
11 China's invocation of 'abundant historical and legal
12 evidence' and rejection of the contents of the
13 Philippines' Note as 'totally unacceptable'. The
14 existence of a dispute over these issues is not
15 diminished by the fact that China has not clarified
16 the meaning of the nine-dash line or elaborated on its
17 claim to historic rights."²

18 The Tribunal continued:

19 "Nor is the existence of a dispute concerning the
20 interpretation or application of the Convention
21 vitiated by the fact that China's claimed entitlements
22 appear to be based on an understanding of historic
23 rights existing independently of, and allegedly
24 preserved by, the Convention. A dispute concerning
25 the interaction of the Convention with another

² Award on Jurisdiction (29 October 2015), para. 167.

1 instrument or body of law, including the question of
2 whether rights arising under another body of law were
3 or were not preserved by the Convention, is
4 unequivocally a dispute concerning the interpretation
5 and application of the Convention."³

6 Third, the Tribunal found that each of the
7 Philippines' first two submissions:

8 "... directly requests the Tribunal to determine
9 the legal validity of any claim by China to historic
10 rights in the South China Sea."

11 Fourth, the Tribunal determined that it was not
12 barred from exercising jurisdiction in regard to
13 Submissions 1 and 2 by Article 298's exclusion of
14 disputes relating to sea boundary delimitations. But
15 it joined to the merits the same article's exclusion
16 of disputes relating to "historic bays or titles", on
17 the ground that its jurisdiction:

18 "... would be dependent on the nature of any such
19 historic rights and whether they are covered by [that]
20 exclusion from jurisdiction."

21 This, then, is the context in which the
22 Philippines is now called upon to advance its
23 Submissions 1 and 2 on the merits, and to address the
24 remaining jurisdictional question regarding these
25 submissions. We will do so in the following manner.

³ Award on Jurisdiction (29 October 2015), para. 168.

1 I will discuss the nature of China's historic
2 rights claims, and the Tribunal's jurisdiction
3 concerning them. In so doing, I will show (1) that
4 China's historic rights claims are claims of sovereign
5 rights and jurisdiction, rather than claims of
6 sovereignty; (2) that these purported "historic
7 rights" are primarily rights to the exclusive
8 enjoyment of the living and non-living resources in
9 the areas where such rights are said to exist; and (3)
10 that these areas -- of water and seabed -- extend as
11 far as China's nine-dash line, that is, well beyond
12 the limits of any maritime zones to which China may be
13 entitled under the Convention.

14 According to China, its rights in these distant
15 areas of sea and seabed are not derived from the
16 Convention, but from what is purported to be history,
17 and are said to be preserved by the Convention even if
18 they do not come within it.

19 That is the nature of China's so-called "historic
20 rights". As such, they bear no relation to "historic
21 bays or titles"; and Article 298's jurisdictional
22 exclusion of disputes relating to "historic bays or
23 titles" has no application to these proceedings.
24 There can thus be no doubt of the Tribunal's
25 jurisdiction to rule on the validity of China's
26 "historic rights" claims.

1 Before I elaborate further on these two themes --
2 the nature of China's "historic rights" claims and the
3 Tribunal's jurisdiction to rule on them -- and set out
4 the Philippines' responses on the issues identified by
5 the Tribunal at items I(A)(1) and II(A) of the "Annex
6 of Issues" attached to the letter that the Parties
7 received on 10th November 2015, I should point out
8 that my colleagues, not I, will address the legal
9 validity of China's historic rights claims.

10 That task will fall in the first instance to
11 Professor Oxman, who will follow me to the podium and
12 show that China's historic rights claims are both
13 inconsistent with and barred by the Convention, whose
14 object and purpose is precisely to distinguish and
15 prevent the assertion of such claims. He will
16 demonstrate that China's claims to historic rights in
17 waters and seabed beyond its express entitlements
18 under UNCLOS are therefore legally invalid.

19 Following Professor Oxman, Mr Loewenstein will
20 show that even if, *quod non*, a claim of historic
21 rights could be made in areas where no such
22 entitlements are provided by the Convention, based on
23 general international law, China's claim would still
24 be legally invalid because it fails to satisfy any of
25 the three essential conditions for the existence of
26 historic rights: (1) open, notorious and effective

1 exercise of authority; (2) continuity of such
2 exercise; and (3) acquiescence by other states.

3 I turn now to the nature of the historic rights
4 that China claims, including our responses to item
5 I(A)(1) of the "Annex of Issues". In accordance with
6 the Tribunal's award, this is a "merits
7 determination". I will therefore review the evidence
8 that is before you.

9 I begin at tab 1.1, with China's *notes verbales* of
10 7th May 2009, in which, for the first time, China
11 publicly claimed maritime rights and jurisdiction
12 extending to the limits of the nine-dash line:

13 "China has indisputable sovereignty over the
14 islands in the South China Sea and the adjacent
15 waters, and enjoys sovereign rights and jurisdiction
16 over the relevant waters as well as the seabed and
17 subsoil thereof (see attached map)."⁴

18 As the Tribunal has observed, China's *notes* are
19 not entirely devoid of ambiguity.⁵ However, some
20 meaningful observations can still be made.

21 First, the Chinese *notes* claim both sovereignty,
22 on the one hand, and sovereign rights and

⁴ *Note Verbale* from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/17/2009 (7 May 2009). MP, Vol. VI, Annex 191; *Note Verbale* from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/18/2009 (7 May 2009). MP, Vol. VI, Annex 192.

⁵ See Award on Jurisdiction (29 Oct. 2015), para. 160.

1 jurisdiction, on the other.

2 Second, sovereignty is claimed in respect of "the
3 islands in the South China Sea and the adjacent
4 waters".⁶

5 Third, by contrast, sovereign rights and
6 jurisdiction are claimed in a separate and independent
7 clause, following a comma and the conjunction "and";
8 and the claim is made not in respect of "the adjacent
9 waters", but of "the relevant waters". The same
10 grammatical construction is employed in the China
11 text.

12 The *notes*, therefore, draw a distinction between
13 "the adjacent waters", which are "adjacent" to
14 islands, as to which China claims "sovereignty", and
15 "the relevant waters", which, unless they are intended
16 to be synonymous with "the adjacent waters", which
17 seems unlikely, can only lie beyond them, as to which
18 China claims sovereign rights and jurisdiction, not
19 sovereignty. The immediate reference to the attached
20 map strongly suggests that "the relevant waters"
21 extend as far as the nine-dash line.

22 This is illustrated in the map now on your

⁶ *Note Verbale* from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/17/2009 (7 May 2009). MP, Vol. VI, Annex 191; *Note Verbale* from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/18/2009 (7 May 2009). MP, Vol. VI, Annex 192.

1 screens, which is also at tab 1.2. In the
2 Philippines' view, the most logical way to construe
3 China's language is as an assertion of sovereignty
4 over the islands of the South China Sea and their
5 "adjacent waters", or territorial seas; and a claim of
6 sovereign rights and jurisdiction -- short of
7 sovereignty -- in the waters that lie between the
8 territorial seas claimed by China and the nine-dash
9 line. China's subsequent diplomatic correspondence
10 and official statements, as well as its conduct, fully
11 support this reading of its claims.

12 In particular, Chinese spokespersons have been
13 consistent in distinguishing between China's claims of
14 "sovereignty" in the South China Sea, on the one hand,
15 and its claims of "relevant rights", on the other.
16 Examples abound. We have collected seven of them for
17 you at tab 1.3, and I will review some of those now.

18 On 9th December 2014, two days after China's
19 Foreign Ministry published its Position Paper setting
20 forth its objections to the Tribunal's jurisdiction in
21 this case, the ministry's spokesperson, Hong Lei,
22 declared:

23 "China's sovereignty over the South China Sea *and*
24 *claims to the relevant rights* were formed over the
25 long course of history, and have been consistently

1 upheld by successive Chinese Governments."⁷

2 This was repeated by the same official
3 spokesperson on several occasions, including
4 12th December 2014⁸ and 11th March 2015.⁹

5 On 30th May 2015, a different Foreign Ministry
6 spokesperson, Hua Chunying, reacted to the United
7 States' criticisms of the nine-dash line by once again
8 distinguishing between China's sovereignty and its
9 other "rights and interests":

10 "In disregard of history, jurisprudence and facts,
11 the US side made inappropriate remarks on China's
12 sovereignty *as well as rights and interests* in the
13 South China Sea."¹⁰

14 On 29th June 2015, the same Foreign Ministry
15 spokesperson, in criticising the position of the
16 Philippines, explained:

⁷ Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on December 9, 2014* (9 Dec. 2014). Supplemental Documents, Vol. I, Annex 620 (emphasis added).

⁸ Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Hong Lei's Remarks on Vietnam's Statement on the Chinese Government's Position Paper on Rejecting the Jurisdiction of the Arbitral Tribunal Established at the Request of the Philippines for the South China Sea Arbitration* (12 Dec. 2014). Supplemental Documents, Vol. I, Annex 621.

⁹ Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on March 11, 2015* (11 Mar. 2015). Supplemental Documents, Vol. I, Annex 623.

¹⁰ Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Hua Chunying's Remarks on US Defense Secretary Carter's Speech Relating to the Issue of the South China Sea at the Shangri-La Dialogue* (30 May 2015). Supplemental Documents, Vol. I, Annex 626 (emphasis added).

1 "[T]he Philippines launched baseless accusations
2 against China's dotted line in the South China Sea in
3 order to negate China's sovereignty *and relevant*
4 *rights*."¹¹

5 On 8th July 2015, while the oral hearings on
6 jurisdiction were in progress, the Ministry's
7 spokesperson insisted, at a press conference:

8 "China's sovereignty *and relevant claims of rights*
9 in the South China Sea are formed in the long course
10 of history based on international legal grounds."¹²

11 As a final example, on 30th October 2015, the
12 Chinese Foreign Ministry issued a formal statement in
13 response to the Tribunal's Award on Jurisdiction on
14 the previous day. In language virtually identical to
15 the *notes verbales* of 7th May 2009, the Ministry said:

16 "China has indisputable sovereignty over the South
17 China Sea and the adjacent waters."¹³

18 Full stop. Then:

¹¹ Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Hua Chunying's Remarks on the Philippines' Playing up and Airing of a Documentary on the South China Sea Issue* (29 June 2015). Supplemental Documents, Vol. I, Annex 628 (emphasis added).

¹² Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on July 8, 2015* (8 July 2015). Supplemental Documents, Vol. I, Annex 629 (emphasis added).

¹³ Ministry of Foreign Affairs of the People's Republic of China, *Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines* (30 Oct. 2015), para. I. Supplemental Documents, Vol. I, Annex 649.

1 "China's sovereignty *and relevant rights* in the
2 South China Sea, formed in the long historical course,
3 are upheld by successive Chinese governments,
4 reaffirmed by Chinese laws on many occasions, and
5 protected under international law including the United
6 Nations Convention on the Law of the Sea ..."¹⁴

7 The statement goes on to refer both to China's
8 "territorial sovereignty and maritime rights and
9 interests". Here again, as it has done throughout the
10 six-year period since the first two *notes verbales*
11 were sent, China draws a distinction between its
12 sovereignty over islands and waters adjacent to them,
13 and its so-called "relevant rights" or "interests" in
14 the waters and seabed beyond.

15 The distinction is also reflected in China's
16 conduct during this period. Two facts stand out above
17 all others in respect of the waters within the
18 nine-dash line but more than 12 miles from any insular
19 feature over which China claims sovereignty.

20 First, China has asserted the exclusive right to
21 exploit the living and non-living resources in those
22 maritime areas, and has acted to prevent neighbouring

¹⁴ Ministry of Foreign Affairs of the People's Republic of China, *Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines* (30 Oct. 2015), para. I. Supplemental Documents, Vol. I, Annex 649 (emphasis added).

1 states, especially the Philippines and Vietnam, from
2 exploiting those resources. I refer you to, among
3 other Chinese acts, the ban on fishing activities in
4 large areas of the South China Sea, within the
5 nine-dash line, which is described at paragraphs 6.30
6 to 6.35 of the Philippines' Memorial; the objection to
7 and interference with the Philippines' oil exploration
8 activities off the coast of Palawan, including at
9 Reed Bank, on the ground that these areas are within
10 the nine-dash line, as detailed at paragraphs 3.45 to
11 3.50, 4.33, and 6.16 to 6.28 of the Memorial; and the
12 designation and offering of oil blocks by China's
13 national offshore petroleum company extending to the
14 limits of the nine-dash line in waters well within
15 200 miles of the Vietnamese coast,¹⁵ discussed at
16 paragraph 4.11 of the Memorial, and Vietnam's emphatic
17 protest.¹⁶

18 A recent example of China's assertion of exclusive
19 jurisdiction over the resources within the nine-dash
20 line is China's *note verbale* to the Philippines of
21 6th July 2015, about which Judge Wolfrum enquired at
22 the oral hearings on jurisdiction. To recall the

¹⁵ See Memorial, paras. 3.46-3.50, 4.11, 4.33, 6.16-6.28, 6.30-6.35.

¹⁶ 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 language from that note:

2 "The Chinese side does not accept and firmly
3 opposes the groundless protests and accusation of the
4 Philippine side, and hereby requests the Philippine
5 side to earnestly respect China's territorial
6 sovereignty, sovereign rights and jurisdiction, and to
7 educate its own fishermen, so that they can strictly
8 abide by the fishing moratorium of South China Sea
9 issued by the Chinese government and administrative
10 management of China's law-enforcing authorities. The
11 Chinese law-enforcing authorities will strengthen
12 their maritime patrols and other law-enforcing
13 actions, investigate and punish the relevant fishing
14 vessels and fishermen who violate the fishing
15 moratorium, in accordance with the law."¹⁷

16 Yet, at the same time China asserts its exclusive
17 right to manage and enjoy the resources within the
18 nine-dash line, it insists, in contrast, that it fully
19 respects freedom of navigation, and related principles
20 of international law, within this area, as well as
21 freedom of overflight.¹⁸ This has been underscored by

¹⁷ Note Verbale from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (15)PG-229 (6 July 2015). Hearing on Jurisdiction, Annex 580.

¹⁸ See, e.g., Permanent Mission of the People's Republic of China to the United Nations, *Statement by H.E. Ambassador Wang Min, Head of the Chinese Delegation at the 25th Meeting of States Parties to the UN Convention on the Law of the Sea* (12 June 2014). Supplemental Documents, Vol. I, Annex 617; Ministry of Foreign Affairs of the People's Republic of China, *Vice Foreign Minister Zhang Yesui Makes Stern Representations to US over US Naval Vessel's Entry into Waters near Relevant Islands and Reefs of China's*

1 President Xi Jinping himself. On 25th September 2015,
2 just two months ago, President Xi stated at a joint
3 press conference with President Barack Obama at the
4 White House:

5 "We're committed to respecting and upholding the
6 freedom of navigation and overflight that countries
7 enjoy according to international law."¹⁹

8 This is at tab 1.4 of your folders.

9 China's Foreign Ministry made the same point in
10 its 7th December 2014 Position Paper, also at tab 1.4:

11 "It should be particularly emphasized that China
12 always respected the freedom of navigation and
13 overflight enjoyed by all States in the South China

Nansha Islands (27 Oct. 2015). Supplemental Documents, Vol. I, Annex 645; Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Lu Kang's Regular Press Conference on October 27, 2015* (27 Oct. 2015). Supplemental Documents, Vol. I, Annex 643; People's Republic of China, Ministry of National Defense, *Defense Ministry's regular press conference on Oct. 29* (29 Oct. 2015). Supplemental Documents, Vol. I, Annex 648; Ministry of Foreign Affairs of the People's Republic of China, *Wang Yi: The Chinese side adheres to five commitments on the South China Sea Issue* (4 Aug. 2015). Supplemental Documents, Vol. I, Annex 633; Ministry of Foreign Affairs of the People's Republic of China, *Wang Yi on the South China Sea Issue At the ASEAN Regional Forum* (6 Aug. 2015). Supplemental Documents, Vol. I, Annex 634; Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on June 9, 2015* (9 June 2015). Supplemental Documents, Vol. I, Annex 627; Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on September 18, 2015* (18 Sept. 2015). Supplemental Documents, Vol. I, Annex 638; Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on November 3, 2015* (3 Nov. 2015). Supplemental Documents, Vol. I, Annex 652; Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on November 5, 2015* (5 Nov. 2015). Supplemental Documents, Vol. I, Annex 653.

¹⁹ United States, The White House, Office of the Press Secretary, *Press Release: Remarks by President Obama and President Xi of the People's Republic of China in Joint Press Conference* (25 Sept. 2015). Supplemental Documents, Vol. I, Annex 664.

1 Sea in accordance with international law."²⁰

2 Chinese government representatives have given
3 similar assurances since then. On 27th October 2015,
4 Vice Foreign Minister Zhang Yesui stated:

5 "The Chinese side respects and safeguards the
6 freedom of navigation and over-flight in the South
7 China Sea to which all countries are entitled under
8 international law, but stands firmly against the harm
9 caused by any country to China's sovereignty and
10 security under the cloak of navigation and overflight
11 freedom. There has been and will be no obstruction to
12 navigation and overflight freedom in the South China
13 Sea."²¹

14 The Chinese Defence Ministry expressed the same
15 position on 29th October 2015.²² And on
16 5th November 2015, Foreign Ministry spokesperson
17 Hua Chunying stated:

18 "The Chinese side respects and safeguards all
19 countries' freedom of navigation and overflight

²⁰ 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. 28. SWSP, Vol. VIII, Annex 467.

²¹ Ministry of Foreign Affairs of the People's Republic of China, *Vice Foreign Minister Zhang Yesui Makes Stern Representations to US over US Naval Vessel's Entry into Waters near Relevant Islands and Reefs of China's Nansha Islands* (27 Oct. 2015). Supplemental Documents, Vol. I, Annex 645.

²² People's Republic of China, Ministry of National Defense, *Defense Ministry's regular press conference on Oct. 29* (29 Oct. 2015). Supplemental Documents, Vol. I, Annex 648.

1 guaranteed by international law. As long as it is the
2 genuine practice of navigation freedom through real
3 international shipping lanes, we will in no way oppose
4 it."²³

5 These facts, evidenced by Chinese actions as well
6 as its official statements and reassurances, make
7 manifest two fundamental points: (1) that China claims
8 the sole right to exploit the living and non-living
9 resources in the so-called "relevant waters" bounded
10 by the nine-dash line, to the exclusion of other
11 coastal states; and (2) that China's claim in this
12 area is not one of actual sovereignty, but of
13 sovereign rights and jurisdiction. That is, China
14 claims sovereignty only over islands and waters
15 directly adjacent to them; beyond those "adjacent"
16 waters, China's claim is for exclusive entitlement to
17 the living and non-living resources, out to the limit
18 of the nine-dash line, within which it claims that it
19 respects freedom of navigation according to
20 international law.

21 This is precisely the interpretation of China's
22 claim offered by Judge Gao and Professor Jia Bing Bing
23 in their article on the nine-dash line in the
24 January 2013 issue of the *American Journal of*

²³ Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on November 5, 2015* (5 Nov. 2015). Supplemental Documents, Vol. I, Annex 653.

1 *International Law*, as well as by other distinguished
2 Chinese legal scholars. According to Judge Gao and
3 Professor Jia, the nine-dash line has three meanings:

4 "First, it represents the title to the island
5 groups that it encloses. In other words, within the
6 nine-dash line in the South China Sea, China has
7 sovereignty over the islands and other insular
8 features, and has sovereignty, sovereign rights and
9 jurisdiction -- in accordance with UNCLOS -- over the
10 waters and seabed and subsoil adjacent to those
11 islands and insular features. *Second, it preserves*
12 *Chinese historic rights in fishing, navigation and*
13 *such other marine activities as oil and gas*
14 *development in the waters and on the continental shelf*
15 *surrounded by the line.* Third, it is likely to allow
16 for such residual functionality as to serve as
17 potential maritime delimitation lines."²⁴

18 We are not here concerned with the third meaning,
19 since the question of maritime delimitation is not
20 before this Tribunal. What is significant though for
21 present purposes is the distinction between the first
22 and second meanings of the nine-dash line. The first
23 is sovereignty over islands and their adjacent waters;
24 that is, their territorial seas. The second is

²⁴ 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. 123-24. MP, Vol. X, Annex 307 (emphasis added).

1 historic rights to living and non-living resources, as
2 well as navigation, in the other waters bounded by the
3 line.

4 These purported rights are expressly said to exist
5 in maritime areas beyond the limits of those
6 established by the Convention. As Judge Gao and
7 Professor Jia explain:

8 "In addition to these rights conferred by UNCLOS,
9 China can assert historic rights within the nine-dash
10 line -- under Article 14 of its 1998 law on the EEZ
11 and the continental shelf -- in respect of fishing,
12 navigation, and exploration and exploitation of
13 resources."²⁵

14 China has said repeatedly that the maritime rights
15 it claims in the South China Sea, beyond those
16 expressly conferred by UNCLOS, are derived from
17 history, and constitute what China calls its "historic
18 rights". The first official Chinese reference to such
19 "historic rights" came in 1998, as Judge Gao and
20 Professor Jia indicated, in Article 14 of the 1998 Act
21 on the Exclusive Economic Zone and the Continental
22 Shelf. Article 14 stated that the provisions of the
23 Act:

24 "... shall not affect the historic rights of the

²⁵ Z. Gao and B.B. Jia, "The Nine-Dash Line in the South China Sea: History, Status, and Implications", *American Journal of International Law*, Vol. 107, No. 1 (2013), pp. 109-10. MP, Vol. X, Annex 307.

1 People's Republic of China."²⁶

2 The Act did not specify what those historic rights
3 were or where they were located, and it did not refer
4 to any earlier invocations of those rights. In fact,
5 there is no public record that, prior to the 1998 Act,
6 the People's Republic of China ever claimed "historic
7 rights" in any part of the South China Sea. Nor is
8 there any evidence that the Republic of China, between
9 1912 or 1949, or its predecessor, the Qing Dynasty
10 that ruled from 1644 to 1912, ever claimed "historic
11 rights" of any kind in respect of the waters or seabed
12 of the South China Sea.²⁷

13 Shortly after the 1998 Act was promulgated,
14 however, eminent Chinese legal scholars began to
15 interpret Article 14's reference to "the historic
16 rights of the People's Republic of China". For
17 example, Professor Zou Keyuan wrote, in a 2000 article
18 entitled *Maritime Legislation of Mainland China and*
19 *Taiwan*:

20 "The legal definition and implications of [the
21 dashed line] are still controversial, but generally
22 the line is regarded as indicating the ownership of
23 islands within the line, *although the wording*

²⁶ People's Republic of China, *Exclusive Economic Zone and Continental Shelf Act* (26 June 1998), Art. 14. MP, Vol. V, Annex 107.

²⁷ See SWSP, para. A13.52. See also *id.*, paras. 13.2-13.14; A13.1-13.54.

1 '*historic rights*' may imply more than this."²⁸

2 This early view was shared by Professors Li
3 Jinming and Li Dexia who wrote that:

4 "The [1998] Law does not ... interpret the precise
5 meaning of the phrase '*historic rights*', but we can
6 imagine that it is related to the historic rights of
7 the region within the dotted line of the South China
8 Sea."²⁹

9 Professor Zou elaborated in a 2001 article
10 entitled *Historic Rights in International Law and in*
11 *China's Practice*, in which he wrote that Article 14 of
12 China's 1998 Act:

13 "... can be interpreted to mean that certain ...
14 areas to which China's historic rights are claimed go
15 beyond the 200 nautical mile limit."

16 According to Professor Zou, China's claim is one
17 of sovereign rights beyond China's 200-mile EEZ and
18 continental shelf that are "exclusive for the purpose
19 of development of the natural resources in the areas",
20 but are short of complete sovereignty.³⁰

21 In a 2012 article, entitled *China's U-Shaped Line*

²⁸ Y. Song and Z. Keyuan, "Maritime Legislation of Mainland China and Taiwan: Developments, Comparison, Implications, and Potential Challenges for the United States", *Ocean Development and International Law*, Vol. 31, No. 4 (2000), p. 318. MP, Vol. XI, Annex LA-143 (emphasis added).

²⁹ L. Jinming and L. Dexia, "The Dotted Line on the Chinese Map of the South China Sea: A Note", *Ocean Development & International Law*, Vol. 34, No. 3-4 (2003), p. 293. MP, Vol. VIII, Annex 275.

³⁰ *Id.*, p. 160.

1 *in the South China Sea Revisited*, Professor Zou wrote
2 that China's *notes verbales* of 7th May 2009
3 represented:

4 "... the first time that China had officially used
5 the U-shaped line in defending its claims in the South
6 China Sea."³¹

7 He linked the line directly to Article 14 of the
8 1998 Act:

9 "It is generally agreed that this section is
10 connected to China's claim to the South China Sea
11 within the U-shaped line. However, instead of using
12 the term 'historic waters', China wisely chose the
13 more softened term 'historic rights'."

14 This reflected, according to Professor Zou,
15 China's position that its "historic rights" claims
16 were equivalent to EEZ and continental shelf rights,
17 as distinguished from sovereignty.³²

18 Professor Nong Hong, who now serves as executive
19 director of the Chinese Government's recently
20 established think tank in the United States, the
21 Institute for China-America Studies, and whose mission
22 is to explain China's positions and policies in regard

³¹ Zou Keyuan, "China's U-Shaped Line in the South China Sea Revisited", *Ocean Development and International Law*, Vol. 43, No. 1 (2012), p. 23. Supplemental Documents, Vol. III, Annex 719.

³² Zou Keyuan, "China's U-Shaped Line in the South China Sea Revisited", *Ocean Development and International Law*, Vol. 43, No. 1 (2012), p. 21. Supplemental Documents, Vol. III, Annex 719.

1 to the South China Sea, has given a similar
2 interpretation of China's claim. In her statement of
3 15th May 2012 entitled *Interpreting the U-Shaped Line*
4 *in the South China Sea*, she observes that China's
5 "historic rights" within the limits of the nine-dash
6 line are "fishing rights, navigation rights and
7 priority rights of resource development";³³ not
8 sovereignty.

9 These explanations of the nine-dash line, and
10 China's purported "historic rights" within it, are not
11 only based on but [are] consistent with the text of
12 Article 14 of the 1998 Act. In respect of the
13 "historic rights" of the People's Republic of China,
14 the Chinese text uses these words, on the screen and
15 at tab 1.5.

16 Mr President, I am not going to read this in
17 Chinese. You may recall my difficulties in doing so
18 in July. While the Tribunal was most generous to me
19 during my struggles, my teammates were not as
20 sympathetic. The unkindest cut of all came from my
21 colleague Mr Martin, who speaks fluent Mandarin, so it

³³ Hong Nong, "Interpreting the U-Shape Line in the South China Sea", *China-US Focus Digest* (15 May 2012). Supplemental Documents, Vol. III, Annex 730. Other distinguished Chinese legal scholars also agree that the nine-dash line delimits a "historic rights" zone, within which China alone may engage in "economic exploitation, scientific exploration and research, environmental conservation, and the construction of artificial islands and installations over all of the waters within the U-shaped line, on the basis of historic Chinese dominance." See Chris P.C. Chung, "Drawing the U-Shaped Line: China's Claim in the South China Sea, 1946-1974", *Modern China* (11 Aug. 2015), p. 1. Supplemental Documents, Vol. III, Annex 721.

1 is Mr Martin to whom I will turn for help now.

2 In respect of the historic rights of the PRC,
3 Article 14 refers to "*li shi xing quan li*". The first
4 three words, "*li shi xing*", mean "historic". The last
5 two words, "*quan li*", are legal rights short of title.

6 By contrast, Articles 15 and 298 of UNCLOS speak
7 of "historic title", not "historic rights". The
8 Chinese words for "historic title" are, as you see
9 before you, "*li shi xing suo you quan*". Again, the
10 first three words for "historic" are the same, "*li shi*
11 *xing*". But the last three words, "*suo you quan*", are
12 different: they mean "title" or "ownership". These
13 are the words that appear in Articles 15 and 298 of
14 UNCLOS as the counterpart of the English words
15 "historic title".³⁴

16 With my thanks to Mr Martin, I will return to the
17 Chinese text of the Convention and the words it uses
18 to convey title or ownership, as distinguished from
19 the words it uses to signify rights short of
20 sovereignty, in a few moments.

21 Before getting there, I would like to call the
22 Tribunal's attention to a non-Chinese source of
23 interpretation of the nine-dash line and China's
24 claims. This is a source identified in the materials

³⁴ See People's Republic of China, *Exclusive Economic Zone and Continental Shelf Act* (26 June 1998), Art. 14 (Chinese version). MP, Vol. V, Annex 107.

1 that the Tribunal sent to the Parties on 10th November
2 and invited the Philippines to comment upon at these
3 hearings. It is the US State Department's publication
4 of 5th December 2014, no. 143 in its *Limits in the*
5 *Seas* series.³⁵

6 In that monograph, the State Department offers
7 three possible interpretations of the nine-dash line:
8 first, as a mere line of allocation, asserting only
9 a claim of sovereignty to the islands and other
10 insular features that it surrounds;³⁶ second, as
11 a national boundary;³⁷ and third, as what it calls
12 a "historic claim" of either "sovereignty over the
13 maritime space ('historic waters' or 'historic title')
14 or, alternatively, some lesser set of rights
15 ('historic rights') to the maritime space".³⁸

16 In the view of the Philippines, neither of the
17 first two interpretations is at all tenable. Whatever
18 might have been the original intention of the Republic
19 of China in 1947, when the first edition of the
20 nine-dash line was published internationally, it
21 ceased to be a mere line of allocation certainly as of

³⁵ US Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, "China: Maritime Claims in the South China Sea", *Limits in the Seas*, No. 143 (5 Dec. 2014). Supplemental Documents, Vol. I, Annex 661.

³⁶ *Id.*, pp. 11-14.

³⁷ *Id.*, pp. 14-15.

³⁸ *Id.*, p. 15.

1 2009, when China began to claim rights in all the
2 waters and seabed, in addition to the islands, within
3 that line. That has unambiguously been China's
4 position ever since, even if there has been some
5 uncertainty about the nature of those maritime rights
6 claimed within the line.

7 Nor is it logical today to regard the nine-dash
8 line as a national boundary. China has made this
9 clear since at least 2014, with its repeated
10 assertions -- which I have quoted to you this
11 afternoon -- that it recognises and respects the
12 freedom of navigation and overflight that
13 international law requires within the line. It is
14 just not plausible that China, as zealous as it has
15 been to safeguard its own sovereignty, would recognise
16 freedom of navigation and overflight of all countries
17 in these waters if it considered them to lie within
18 its national boundary.

19 A close reading of the monograph indicates that,
20 notwithstanding its commendable caution in
21 interpreting China's position, the State Department
22 itself understands that the nine-dash line reflects
23 a claim distinct from and beyond one of sovereignty
24 over islands and adjacent waters, and that the claim
25 also encompasses "historic rights" to the maritime
26 areas within the line. The possibility that China

1 might be claiming "historic waters" or "historic
2 title" -- that is, sovereignty -- is dismissed by the
3 monograph on several grounds. In particular:

4 "[A] comprehensive study on historic waters
5 published in 2008 did not even discuss China's dashed
6 line, nor has the dashed line been identified in U.S.
7 Government compendiums of historic waters claims in
8 the public domain."

9 Further:

10 "The text and drafting history of the Convention
11 make clear that, apart from a narrow category of
12 near-shore 'historic' bays (Article 10) and 'historic
13 title' in the context of territorial sea boundary
14 delimitation (Article 15), the modern international
15 law of the sea does not recognize history as the basis
16 for maritime jurisdiction."³⁹

17 This leads, of course, to the conclusion that
18 China's claim within the nine-dash line is one of
19 historic "rights"; that is, a set of "rights" short of
20 "title" or sovereignty.

21 This is consistent with what China itself actually
22 claims. In the Philippines' view, there is no reason
23 not to take China at its word that it claims "historic
24 rights", as distinguished from "historic title", in
25 the waters and seabed within the nine-dash line that

³⁹ *Id.*, p. 19.

1 lie beyond the islands and adjacent waters over which
2 it claims sovereignty.

3 China's emphasis on its so-called "historic
4 rights" has been frequent and consistent. There are
5 numerous evidentiary sources for this, as cited in the
6 Philippines' Memorial at paragraphs 4.32 to 4.35.
7 I will highlight three of them in particular, which
8 you can find at tab 1.6.

9 The first is a 21st June 2011 *démarche* by General
10 Hong Liang, deputy director general of the Asia
11 department of China's Ministry of Foreign Affairs,
12 made to the Philippine Embassy in Beijing. According
13 to General Hong:

14 "While the Philippines has legal rights under
15 UNCLOS, China also has '*historical rights*' which are
16 acknowledged under UNCLOS. *Historical rights* cannot
17 be denied and must be respected."⁴⁰

18 General Hong elaborated:

19 "China's nine-dash line claim and map is based on
20 the 1948 declaration by the Kuomintang government.
21 UNCLOS also has a provision that *historic rights*
22 cannot be denied and should be respected. UNCLOS is
23 there, and the parties can use any clause that is

⁴⁰ *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 (emphasis added).

1 useful to support its claim ... China understands that
2 the Philippine claim is based on its 200 mile EEZ.
3 China hopes, however, that its *historic rights* in the
4 [South China Sea] be respected by the Philippines."⁴¹

5 The second source is a statement by the
6 spokesperson for China's Foreign Ministry at a press
7 conference on 15th September 2011:

8 "China's sovereignty, rights and relevant claims
9 over the South China Sea have been formed in the long
10 course of history and upheld by the Chinese
11 government ... The UN Convention on the Law of the Sea
12 does not ... restrain or deny a country's right which
13 is formed in history and abidingly upheld."⁴²

14 The third source is a more recent statement by the
15 spokesperson for China's Foreign Ministry, Hua
16 Chunying, on 29th June 2015:

17 "The Chinese people have started using and
18 developing the South China Sea back to the Han Dynasty
19 under the reign of Emperor Wu in the 2nd Century B.C.
20 China's sovereignty and relevant rights in the South
21 China Sea are gradually formed in the long course of
22 history, and consistently upheld by successive Chinese
23 Governments. In 1948, the Chinese government

⁴¹ *Id.*, p. 6 (emphasis added).

⁴² 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). MP, Vol. V, Annex 113.

1 officially published the dotted line in a bid to
2 reaffirm China's sovereignty and relevant rights,
3 which have existed long before the drawing of the
4 line."⁴³

5 Mr President, from all of the evidence that is now
6 before the Tribunal, representative elements of which
7 I have reviewed, the following conclusions can be
8 drawn in regard to the nature of China's claim of
9 "historic rights" in the South China Sea.

10 First, as I have said, China's claim of "historic
11 rights" is not a claim of sovereignty or title to any
12 maritime area. It is a claim of rights short of
13 sovereignty. To be sure, China claims sovereignty
14 over islands in the South China Sea and their adjacent
15 waters, which is consistent with and reflective of
16 a claim of territorial sovereignty over islands and
17 sovereignty over their respective territorial seas.
18 But that is not what China claims under the rubric of
19 "historic rights". What China claims under that
20 rubric is an exclusive entitlement to the living and
21 non-living resources in all the waters and seabed
22 enclosed within the nine-dash line.

23 Second, China claims that its "historic rights"

⁴³ Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Hua Chunying's Remarks on the Philippines' Playing up and Airing of a Documentary on the South China Sea Issue* (29 June 2015). Supplemental Documents, Vol. I, Annex 628.

1 exist in the waters and seabed within the nine-dash
2 line, not only beyond the territorial sea of any
3 island over which it may be sovereign, but beyond the
4 200-mile limits of any EEZ or continental shelf to
5 which it might be entitled under the Convention.

6 Third, China claims that its "historic rights" are
7 derived from history and the application of general
8 international law, rather than from the textual
9 provisions of the Convention itself. In China's view,
10 although its "historic rights" exist outside the
11 Convention, they are recognised and preserved by it,
12 or are at least compatible with it.

13 This being the nature of the "historic rights"
14 claimed by China, I can now turn to the jurisdictional
15 question that the Tribunal has joined to the merits,
16 and address whether, given the nature of China's
17 claim, it falls within Article 298's exclusion from
18 jurisdiction of claims concerning "historic bays or
19 titles". In so doing, I will provide the Philippines'
20 responses to item II(A) of the "Annex of Issues"
21 received from the Tribunal on 10th November.

22 The specific question raised by the Tribunal in
23 its award of 29th October is whether China's claim of
24 "historic rights" is covered by the exclusion from
25 jurisdiction over "historic bays or titles" in
26 Article 298. The answer is: no. The jurisdictional

1 exclusion in Article 298 has no application to China's
2 "historic rights" claim, given the nature of that
3 claim.

4 China's "historic rights" claim pertains neither
5 to "historic bays" nor to "historic titles". A claim
6 that a body of water is a historic bay is a claim of
7 sovereignty, as is a claim of historic title.

8 A historic bay is one that may be treated as internal
9 waters under Article 10 of the Convention, that is, as
10 subject to the sovereignty of the coastal state.

11 Historic title, which is mentioned only in Article 15
12 on delimitation of the territorial sea (apart from its
13 appearance in Article 298) is exactly that: title
14 equivalent to sovereignty.

15 But that is not what China claims within the
16 nine-dash line in respect of the waters and seabed
17 beyond the islands and their territorial seas. The
18 "historic rights" claimed by China in those areas do
19 not include title or full ownership; they fall
20 substantially short of it. They do not, for example,
21 allow China to impede freedom of navigation, to impose
22 a regime of innocent passage, or to deny overflights.

23 China understands very well what a "historic bay"
24 is. In its 1958 Declaration on the Territorial Sea,
25 China designated the Bohai Sea along its northeast

1 coast as "inland waters".⁴⁴ In a 1959 "explanatory
2 pamphlet", China explained that it was claiming the
3 Bohai Sea as "historic bay".⁴⁵ Significantly, China
4 has claimed no other historic bays, in the South China
5 Sea or anywhere else.

6 China also understands "historic title". In the
7 1958 Declaration on the Territorial Sea, China claimed
8 the Qiongzhou Strait, which separates mainland China
9 from Hainan and connects the South China Sea to the
10 Gulf of Tonkin, as "inland waters".⁴⁶ The explanatory
11 pamphlet states that:

12 "Historically, it has always been under Chinese
13 sovereign jurisdiction and an inseparable component of
14 Chinese territory."⁴⁷

15 No such claim has ever been made by China in
16 respect of any of the waters of the South China Sea.

17 This may explain why the China has never contended
18 that the Tribunal lacks jurisdiction based on
19 Article 298's exclusion of disputes concerning

⁴⁴ People's Republic of China, *Declaration of the Government of the People's Republic of China on China's Territorial Sea* (4 Sept. 1958), in *Collection of the Sea Laws and Regulations of the People's Republic of China* (3rd ed. 2001), p. 197, para. 2. MP, Vol. V, Annex 103.

⁴⁵ Fu Zhu, *Regarding the Issue of Territorial Waters of China* (1959), pp. 18-19. SWSP, Vol. VIII, Annex 485.

⁴⁶ People's Republic of China, *Declaration of the Government of the People's Republic of China on China's Territorial Sea* (4 Sept. 1958), in *Collection of the Sea Laws and Regulations of the People's Republic of China* (3rd ed. 2001), p. 197, para. 2. MP, Vol. V, Annex 103.

⁴⁷ Fu Zhu, *Regarding the Issue of Territorial Waters of China* (1959), p. 21. SWSP, Vol. VIII, Annex 485.

1 "historic bays or titles". This is an especially
2 notable omission in light of China's invocation of the
3 same sentence of Article 298 in support of its
4 argument, elaborated in the Position Paper of
5 7th December 2014, that the Tribunal lacks
6 jurisdiction over the Philippines' submissions because
7 of that article's exclusion of disputes concerning the
8 delimitation of sea boundaries.⁴⁸ If China also
9 believed that, under the same sentence of the same
10 article, jurisdiction were precluded by the exclusion
11 of disputes concerning "historic bays or title", it
12 seems unlikely that it would have declined to say so,
13 in its Position Paper or anywhere else.

14 In the circumstances, (1) where China's statements
15 and actions demonstrate that its "historic rights"
16 claim is not a claim to "historic bays or historic
17 title"; (2) where China itself does not characterise
18 its claim as one of "historic bays or historic title";
19 and (3) where China chose not to invoke Article 298's
20 exclusion of disputes concerning "historic bays or
21 historic title" in its Position Paper setting forth
22 its objections to the Tribunal's jurisdiction, the
23 only reasonable conclusion to be drawn is that the
24 Philippines' Submissions 1 and 2 do not raise
25 a dispute concerning "historic bays or historic

⁴⁸ See China's Position Paper, para. 86. SWSP, Vol. VIII, Annex 467.

1 title", and there is no bar in Article 298 to the
2 Tribunal's jurisdiction over either of these
3 submissions.

4 The Philippines considers, therefore, that there
5 would be absolutely no basis, in the circumstances,
6 for the Tribunal to attribute to China either a claim
7 in respect to "historic bays or historic title" that
8 it has never made, or an argument for the application
9 of Article 298 to the Philippines' submissions that it
10 chose not to advance in its Position Paper objecting
11 to jurisdiction.

12 Mr President, it is normally up to the Respondent
13 State to assert any applicable jurisdictional
14 exclusions under Articles 297 or 298 as affirmative
15 defences. China cannot be excused from this burden by
16 virtue of its refusal to formally or physically
17 appear, especially where it has caused its Position
18 Paper to be delivered to the members of the Tribunal
19 as a statement of its objections to your jurisdiction,
20 and chosen not to assert an objection based on
21 "historic bays or historic title". To the contrary,
22 China's silence in this regard is best understood as
23 an admission that the exclusion has no application in
24 this case.

25 Moreover, even if China were to have characterised
26 its claim as one of "historic title", for purposes of

1 invoking Article 298 -- which it has never done --
2 that would not be the end of the story. Article 298
3 is not a self-judging provision, and there is no
4 reason why it should be so interpreted. Indeed, if it
5 were, all manner of arbitrable disputes could be
6 avoided simply by intonation of its magic words. This
7 cannot be what the drafters of Part XV intended,
8 especially when they made it plain, in Article 288(4),
9 that in the event of a dispute over a tribunal's
10 jurisdiction, it is the tribunal itself that decides
11 the matter.

12 The conclusion that this is not a case concerning
13 historic titles is further underscored both by the
14 text of the Convention and the *travaux préparatoires*.
15 These are analysed extensively in our written
16 pleadings, specifically the Philippines' Memorial at
17 paragraphs 4.38 to 4.54, and our Supplemental
18 Submission in Response to the Tribunal's Written
19 Questions at paragraphs 7.1 to 7.26. The matter was
20 also addressed in my presentation during the oral
21 hearings on jurisdiction, on 8th July, at pages 62 to
22 72 of the transcript.⁴⁹ So I will not burden the
23 Tribunal with another full presentation on the meaning
24 of "historic title" under the Convention. I will
25 offer only a summary of the main points this

⁴⁹ See Jurisdictional Hearing Tr. (Day 2), pp. 62-72.

1 afternoon.

2 First, the Convention refers to historic title in
3 only two places: Article 15 on delimitation of the
4 territorial sea; and Article 298, which refers back to
5 Article 15. This is significant.

6 As both the text of the Convention and the *travaux*
7 make clear, "historic title" is a concept that applies
8 only to waters directly appurtenant to the coast that
9 lie within the limits of the territorial sea, and not
10 beyond. In the UN Secretariat's now-classic 1962
11 study on *Juridical Regime of Historic Waters,*
12 *Including Historic Bays,* it was observed that historic
13 title involves a claim by a state over "waters
14 adjacent to its coasts",⁵⁰ based on the continuous
15 exercise of sovereignty over the area for
16 a considerable time with acquiescence of other
17 states.⁵¹ The Secretariat's study also concluded
18 that:

19 "A claim to 'historic waters' is a claim by
20 a State, based on an historic title, to a maritime
21 area as part of its national domain; it is a claim to
22 sovereignty over the area ..."

23 And:

⁵⁰ United Nations, Secretary General, *Juridical Regime of Historic Waters, Including Historic Bays*, UN Doc No. A/CN.4/143 (9 Mar. 1962), para. 33. MP, Vol. XI, Annex LA-89.

⁵¹ *Id.*, paras. 80, 85.

1 "... the authority continuously exercised by the
2 State in the area must be ... sovereignty."⁵²

3 When the regime of historic waters evolved, there
4 were no maritime zones recognised beyond the
5 territorial sea. Accordingly, only two types of
6 maritime space were amenable to a claim of "historic
7 title" or sovereignty: those that could be assimilated
8 to internal waters, like historic bays, and the
9 territorial sea.⁵³

10 The drafting history of the 1982 Convention also
11 confirms that, consistent with the 1962 study, the
12 drafters understood "historic title" to be a narrow
13 concept applicable only to near-shore waters, that is,
14 internal waters or territorial sea, over which the
15 coastal state exercised sovereignty. From the outset
16 of, and throughout, the Third UN Conference on the Law
17 of the Sea, the item "historic waters" was included as
18 a sub-item of the topic "Territorial Sea".⁵⁴ The
19 Convention's negotiating history thus makes clear that
20 the concept of "historic waters or title" applies only
21 to near-shore areas that may be assimilated to
22 internal waters -- like historic bays or estuaries --

⁵² *Id.*, para. 87.

⁵³ *Id.*, paras. 160-167.

⁵⁴ See UN Conference on the Law of the Sea III, *Statement of activities of the Conference during its first and second sessions*, UN Doc. A/CONF.62/L.8/REV.1 (17 Oct. 1974), p. 97. SWSP, Vol. XII, Annex LA-196.

1 or territorial sea, which have been subject to
2 a coastal state sovereignty.

3 Of all the proposals on historic waters, including
4 historic title, summarised in the 1974 Main Trends
5 Working Paper, the only ones that were ultimately
6 incorporated into the final text of the Convention are
7 in Article 10(6), which refers to "historic bays", and
8 Article 15, which refers to "historic title" in the
9 context of "Delimitation of the Territorial Sea
10 between States with Opposite or Adjacent Coasts".
11 This is the only reference to "historic title" in the
12 entire Convention, outside Article 298. And
13 significantly, it is in Part II, Section 2, "Limits of
14 the Territorial Sea". This confirms that "historic
15 titles" are not understood to exist beyond those
16 limits.

17 As we have seen, China's claim of "historic
18 rights" pertains to maritime areas beyond the limits
19 of any territorial sea that it claims or to which it
20 may be entitled. Rather, "historic rights" are
21 claimed by China in respect of waters and seabed lying
22 between the outer territorial sea limits and the
23 nine-dash line. As a consequence, these claims cannot
24 fall within Article 298's exclusion of disputes
25 relating to "historic title".

26 Lastly, the Convention itself draws a clear

1 distinction between historic title on the one hand,
2 and rights short of title on the other. This is true
3 in all the official languages, as we discussed in
4 July, especially the Chinese. This time I will try to
5 do without Mr Martin.

6 In Articles 15 and 298 of the Chinese text, as you
7 see on the screen, the words for historic title are
8 "*li shi xing suo you quan*". The same words for title,
9 "*suo you quan*", are also used in other articles of the
10 Convention that refer expressly to title, namely
11 Article 1 of Annex III and Article 12(4) of Annex IV.
12 In addition, Article 92(1), the English version of
13 which refers to "ownership", uses the same Chinese
14 words, "*suo you quan*", that are used for "title",
15 demonstrating that "title" and "ownership" are used
16 interchangeably in the Chinese text of the Convention.

17 It is thus absolutely clear that what are excluded
18 by Article 298 are disputes relating to *li shi xing*
19 *suo you quan*, historic title, not disputes relating to
20 *li shi xing quan li*, historic rights. Indeed, there
21 is no reference anywhere in the Convention, let alone
22 Article 298, to "historic rights". The two words
23 never appear together in any of the Convention's
24 articles or annexes.

25 Plainly, there is no jurisdictional exclusion for
26 disputes concerning "historic rights" as distinguished

1 from "historic titles". The Philippines'
2 Submissions 1 and 2, which are directed exclusively at
3 China's claim of "historic rights" in the waters and
4 seabed encompassed by the nine-dash line, and which do
5 not raise any dispute about "historic titles", are
6 therefore outside the scope of Article 298's
7 jurisdictional exclusions.

8 To summarise, the Article 298 exclusion applies
9 only to claims of historic bays or title under the
10 Convention. The exclusion is inapplicable here:

11 -- because China claims historic rights, not
12 historic bays or title, and the exclusion applies only
13 to historic bays or historic title;

14 -- because the exclusion applies only to the
15 substantive provisions that use the same terms, namely
16 "historic bays" in Article 10 and "historic title" in
17 Article 15, neither of which is relevant to this case;

18 -- because the term "historic bays or title" in
19 Article 298 refers only to near-shore areas of sea
20 that are susceptible to a claim of sovereignty by the
21 immediately adjacent coastal state, and not to claims
22 extending to the vast reaches of a semi-enclosed sea
23 bordered by many states;

24 -- because the exclusion for historic bays or
25 titles is linked by a cross-reference in the text to
26 the immediately preceding exclusion for delimitation

1 disputes under Articles 15, 74 and 83, and applies
2 only to such delimitation disputes;

3 -- because this link is confirmed by the *travaux*
4 *préparatoires*, including the fact that the ultimate
5 text of Article 298(1)(a) emerged from a working group
6 whose sole mandate was delimitation of maritime
7 boundaries in the territorial sea between states with
8 opposite or adjacent coasts;⁵⁵

9 -- and finally, because an exclusion from
10 jurisdiction for claims of historic rights
11 incompatible with the Convention would undermine the
12 object and purpose of the Convention, including both
13 its dispute settlement and its substantive provisions.

14 Mr President, this completes my remarks concerning
15 the nature of China's "historic rights" claims, and
16 the Tribunal's jurisdiction over the Philippines'
17 Submissions 1 and 2. I thank you for your generous
18 patience and kind courtesy, and ask that you call to
19 the podium my distinguished colleague Professor Oxman;
20 perhaps, if you prefer, after coffee.

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

22 I think we will take coffee before we call
23 Professor Oxman.

24 So we will break now for 15 minutes and take
25 coffee, and then as soon as we come back we will

⁵⁵ MP, para. 7.139.

1 invite Professor Oxman to the podium. Thank you very
2 much.

3 (15.59 pm)

4 (A short break)

5 (4.22 pm)

6 **THE PRESIDENT:** Professor Oxman, it is your turn. So you
7 can proceed, please.

8 **PROFESSOR OXMAN:** Thank you, Mr President.

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

10 **PROFESSOR OXMAN:** Mr President, distinguished members of
11 the Tribunal, it is indeed an honour to appear again
12 before you.

13 My topic this afternoon is the lawfulness of
14 China's claim to the South China Sea beyond its
15 entitlements under the United Nations Convention on
16 the Law of the Sea.

17 China justifies its claim with repeated assertions
18 of purported historic rights whose precise nature and
19 foundation it declines to specify. But the effect of
20 China's assertions is real. China's claim not only
21 encroaches on the entitlements of the Philippines and
22 other coastal states under the Convention; it purports
23 to supersede them. With ever-increasing intensity,
24 China is denying the Philippines and others the quiet
25 enjoyment of their rights that the law is supposed to

1 provide.

2 China's asserted historic rights purportedly exist
3 apart from and in derogation of the Convention.
4 Chinese scholars maintain that this is implicit in the
5 reservation of China's historic rights in Article 14
6 of its 1998 Law on the Exclusive Economic Zone and the
7 Continental Shelf, to which Mr Reichler just
8 adverted.⁵⁶ But it is also apparent from China's
9 official communications.

10 Mr Reichler referred to China's two *notes verbales*
11 to the Secretary-General in 2009, and I would like to
12 do so with some slight additions at this point. As we
13 all recall, the map showing the nine-dash line is
14 appended to those *notes*, and those *notes* assert
15 historic rights that extend far beyond China's
16 maritime entitlements under the Convention.⁵⁷ They
17 are attached, including the map, at tab 1.1 in your

⁵⁶ See Z. Gao and B.B. Jia, "The Nine-Dash Line in the South China Sea: History, Status, and Implications", *American Journal of International Law*, Vol. 107, No. 1 (2013), pp. 109-110, 123-124. MP, Vol. X, Annex 307; Y. Song and Z. Keyuan, "Maritime Legislation of Mainland China and Taiwan: Developments, Comparison, Implications, and Potential Challenges for the United States", *Ocean Development and International Law*, Vol. 31, No. 4 (2000), p. 318. MP, Vol. XI, Annex LA-143; L. Jinming and L. Dexia, "The Dotted Line on the Chinese Map of the South China Sea: A Note", *Ocean Development & International Law*, Vol. 34, No. 3-4 (2003), p. 293. MP, Vol. VIII, Annex 275; Zou Keyuan, "Historic Rights in International Law and in China's Practice", *Ocean Development & International Law*, Vol. 32, No. 2 (2001), pp. 160, 161. MP, Vol. XI, Annex LA-144.

⁵⁷ *Note Verbale* from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/17/2009 (7 May 2009). MP, Vol. VI, Annex 191; *Note Verbale* from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/18/2009 (7 May 2009). MP, Vol. VI, Annex 192.

1 folder.

2 The reference to the attached map in China's *notes*
3 appears immediately after the assertion of "sovereign
4 rights and jurisdiction over the relevant waters as
5 well as the seabed and subsoil thereof". The
6 rationale for that position appears immediately
7 following the reference to the map:

8 "The above position is consistently held by the
9 Chinese Government and is widely known by the
10 international community."

11 The same view is restated in more explicit terms
12 in China's *note verbale* to the UN Secretary-General in
13 April 2011:

14 "China's sovereignty and related rights and
15 jurisdiction in the South China Sea are supported by
16 abundant historical and legal evidence."⁵⁸

17 China's assertion of historic rights apart from
18 and in derogation of the Convention was made explicit
19 by its Foreign Ministry later in 2011, when the
20 Foreign Ministry contended that, "China's sovereignty,
21 rights and relevant claims over the South China Sea
22 have been formed in the long course of history and
23 upheld by the Chinese government", and that the United
24 Nations Convention on the Law of the Sea "does not

⁵⁸ *Note Verbale* from the Permanent Mission of the People's Republic of China to the Secretary-General of the United Nations, No. CML/8/2011 (14 Apr. 2011), p. 2. MP, Vol. VI, Annex 201.

1 restrain or deny a country's right which is formed in
2 history and abidingly upheld".⁵⁹ This bears
3 repeating. China contends that the Convention "does
4 not restrain or deny a country's right which is formed
5 in history and abidingly upheld."

6 It is evident that China regards all of the seabed
7 and subsoil within the nine-dash line as subject to
8 research, exploration and exploitation with, but only
9 with, China's authorisation.

10 In July 2011, China protested the Philippines'
11 offer for exploration and development of petroleum
12 blocks in Areas 3 and 4,⁶⁰ which are shown in the map
13 at tab 1.7 in your folder. China called for immediate
14 withdrawal of both areas from the bidding offer. It
15 ignored the fact that these two areas are well within
16 200 miles of the Philippine coast.⁶¹

17 China evidently does not believe that its own
18 maritime claims are subject to similar constraints.
19 In 2012, the state-owned China National Offshore Oil
20 Corporation published a map showing available open

⁵⁹ 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.

⁶⁰ *Note Verbale* from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (11)PG-202 (7 July 2011). MP, Vol. VI, Annex 202.

⁶¹ Memorial, para. 6.27.

1 blocks.⁶² That map is at tab 1.8 in your folder. All
2 of the blocks are at least partially within 200 miles
3 of Vietnam's coast, and a significant part of them are
4 beyond 200 miles from any land feature over which
5 China claims sovereignty.

6 In a widely reported incident in the spring of
7 2014, the same state company deployed a giant oil
8 drilling rig within 200 miles of Vietnam's coast.

9 As illustrated at tab 1.9 in your folder, China
10 has also ordered suspensions of foreign fishing, in
11 its words, "in most parts of the South China Sea".⁶³
12 And on this map it is the shaded area where China
13 ordered suspension of foreign fishing.

14 China's claims extend to areas located well within
15 200 miles of the Philippine coast. As illustrated at
16 tab 1.10 in your folder, in the northern sector, one
17 of the dashes identifying China's claim is only
18 39 miles from the Philippine island of Luzon. Luzon
19 has an area of over 104,000 square kilometres and
20 a population of over 48 million.⁶⁴

⁶² 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. 2. MP, Vol. V, Annex 121.

⁶³ MP, paras. 6.30-6.31.

⁶⁴ See Republic of the Philippines, Philippine Statistics Authority, *Population and Annual Growth Rates for The Philippines and Its Regions, Provinces, and Highly Urbanized Cities Based on 1990, 2000, and 2010 Censuses* (2010). Supplemental Documents, Vol. I, Annex 607.

1 In the southern sector, as illustrated at tab 1.11
2 in your folder, one of the dashes identifying China's
3 claim is only 34 miles from the Philippine island of
4 Palawan. Palawan has an area of over 14,000 square
5 kilometres and a population of over 700,000.⁶⁵

6 As illustrated at tab 1.12 in your folder, the
7 total area of the Philippine 200-mile zone that is to
8 be found within the nine-dash line, south of 200 miles
9 from the mainland and Taiwan, and beyond 12 miles from
10 any of the tiny offshore high-tide elevations claimed
11 by China, is over 381,000 square kilometres.

12 Even if, for the sake of argument, one were to
13 imagine what the situation would be if the three
14 largest of the tiny high-tide elevations claimed by
15 China in the Spratlys were to generate jurisdiction to
16 200 miles -- which they cannot -- it is evident, as
17 illustrated at tab 1.13 in your folder, that very
18 substantial parts of the Philippine exclusive economic
19 zone in the northern sector would still be consumed by
20 the Chinese claim of historic rights beyond the arcs
21 around those three tiny features. The total area of
22 the Philippine exclusive economic zone that is within
23 the nine-dash line, but beyond 200 miles from the
24 three largest high-tide elevations claimed by China in
25 the Spratlys, would be over 204,000 square kilometres.

⁶⁵ *Id.*

1 China's claims affect all the states along whose
2 coasts the nine-dash line is drawn. The Memorial sets
3 forth the texts of the notes of Indonesia,⁶⁶
4 Malaysia,⁶⁷ the Philippines⁶⁸ and Vietnam⁶⁹ rejecting
5 the maritime claims set forth in China's 2009 *notes*
6 *verbales* and reaffirming their own sovereign rights in
7 those areas.

8 Mr President, China's claim poses two basic
9 questions regarding international law. First, did
10 international law accept such assertions of historic
11 rights over such a vast area prior to the advent of
12 the Law of the Sea Convention? Second, are such vast
13 assertions of right compatible with the Convention?
14 The answer to both questions is: no.

15 As members of the Tribunal may recall, albeit not
16 from personal experience, in the period of formation
17 of modern international law, Portugal and Spain
18 purported to divide between them the vast seas off
19 Africa, Asia and the Americas. These claims were

⁶⁶ *Note Verbale* from the Permanent Mission of the Republic of Indonesia to the United Nations to the Secretary-General of the United Nations, No. 480/POL-703/VII/10 (8 July 2010), pp. 1-2. MP, Vol. VI, Annex 197.

⁶⁷ *Note Verbale* from the Permanent Mission of Malaysia to the United Nations to the Secretary-General of the United Nations, No. HA 24/09 (20 May 2009), p. 1. MP, Vol. VI, Annex 194.

⁶⁸ *Note Verbale* from the Permanent Mission of the Republic of the Philippines to the United Nations to the Secretary-General of the United Nations, No. 000228 (5 Apr. 2011), p. 1. MP, Vol. VI, Annex 200.

⁶⁹ *Note Verbale* from the Permanent Mission of the Socialist Republic of Vietnam to the United Nations to the Secretary-General of the United Nations, No. 86/HC-2009 (8 May 2009). MP, Vol. VI, Annex 193.

1 challenged by other states. Grotius wrote his great
2 work *Mare Liberum* in support of the Dutch challenge to
3 these claims, especially Portugal's claims to the seas
4 surrounding Asia.

5 The principle of the freedom of the seas outlined
6 by Grotius emerged triumphant in the ensuing debate.
7 That principle prevailed over prior claims and over
8 subsequent claims.

9 The idea that coastal states could nevertheless
10 exercise control over limited areas of the sea
11 immediately adjacent to their coasts also took hold.
12 This ultimately manifested itself in two closely
13 related concepts, namely those known today as the
14 "territorial sea" and "internal waters". For a long
15 period of time, coastal state control extended only to
16 very modest areas off the coast, namely the classic
17 breadth of one marine league or three nautical miles
18 for the territorial sea, and the enclosure of small
19 bays and mouths of rivers.

20 While such coastal state control entailed limited
21 derogations from the overarching principle of the
22 freedom of the seas, it did not derogate from the
23 basic underlying principle that the sea was not
24 subject to claims of control by distant states. The
25 derogation was for the benefit only of the immediately
26 adjacent coastal state. No other state could lawfully

1 assert such control.

2 The sea was subject only to two principles: the
3 principle of the freedom of the seas, which prohibits
4 appropriation by any state; and the principle of
5 control over a limited area by the immediately
6 adjacent coastal state, which prohibits appropriation
7 by any other state. China's claim of historic rights
8 over the vast reaches of the South China Sea is
9 inconsistent with both principles.

10 This is no exception to those principles rooted in
11 prescriptive title or otherwise. Grotius cannot be
12 understood as merely inviting Portugal to do a better
13 job of perfecting its claims to the seas off Asia.

14 Although theoretically explained as a form of
15 prescriptive title, claims to so-called "historic
16 bays" can be made only by the immediately adjacent
17 coastal state with respect to inshore waters. Their
18 function was to introduce some flexibility in the face
19 of restrictive traditional conceptions of the
20 configuration and maximum length of a closing line
21 across a juridical bay.

22 It is therefore not surprising that a number of
23 historic bays became juridical bays with the expansion
24 of the maximum length of the closing line to 24 miles

1 in the 1958 Territorial Sea Convention.⁷⁰ It is also
2 not surprising that the Gulf of Fonseca -- whose
3 status as a historic bay was confirmed by the
4 International Court of Justice some years ago --
5 satisfies the geometric criteria for a juridical bay
6 set forth in the Convention.⁷¹

7 Since the triumph of the principle of the freedom
8 of the seas in international law, the main differences
9 between states regarding the law of the sea have
10 centred on the precise means for accommodating the
11 freedom of the seas with the interests of the
12 immediately adjacent coastal state. But there has
13 been no deviation from the exclusion of other kinds of
14 claims over the sea.

15 Since the emergence of modern international law,
16 semi-enclosed seas have been, and remain, a principal
17 object of the universal rules of the law of the sea.
18 The seas off Asia were a principal object of Grotius's
19 writings regarding the freedom of the seas,⁷² and the
20 seas off England were the object of Selden's failed
21 rejoinder. In the 1893 Fur Seal Arbitration, the

⁷⁰ Convention on the Territorial Sea and Contiguous Zone, 516 UNTS 205 (29 Apr. 1958), entered into force 10 Sept. 1964, Art. 7(5). MP, Vol. XI, Annex LA-76.

⁷¹ See *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Merits, Judgment, ICJ Reports 1992, p. 241, para. 383. MP, Vol. XI, Annex LA-19.

⁷² See Hugo Grotius, *Mare Liberum* (1609) (J. B. Scott ed., 1916), p. 37. MP, Vol. XI, Annex LA-119.

1 United States failed in its assertion of
2 jurisdictional rights to control harvesting of seals
3 by foreign vessels in the Bering Sea beyond the
4 ordinary limits of territorial waters at that time.
5 A copy of the relevant language of the award is in
6 your folders at tab 1.14.⁷³ Part IX of the Law of the
7 Sea Convention makes clear that the rights of states
8 boarding enclosed and semi-enclosed seas are the same
9 as those applicable to all of the seas and oceans.

10 In short, from the time of Grotius through the
11 widespread acceptance of the United Nations Convention
12 on the Law of the Sea, international law has not
13 preserved, admitted or accepted claims to control vast
14 areas of the sea in derogation of either the freedom
15 of the seas or the rights of the immediately adjacent
16 coastal state.

17 This is evident in the development of
18 international law in response to the advent in the
19 20th century of the possibility of exploiting the
20 non-living resources of the seabed and subsoil beyond
21 the territorial sea.

22 The 1945 Truman Proclamation that originated the
23 legal doctrine of the continental shelf applied to the

⁷³ *Award between the United States and the United Kingdom relating to the Rights of Jurisdiction of United States in the Bering's Sea and the Preservation of Fur Seals* (15 Aug. 1893), XXVIII UNRIAA 263, pp. 267-69. Supplemental Documents, Vol. VI, Annex LA-245.

1 subsoil and seabed of the continental shelf contiguous
2 to the coasts of the United States.⁷⁴

3 The 1958 Convention on the Continental Shelf
4 expressly excludes the application to the continental
5 shelf of the rules and practices of states regarding
6 acquisition of sovereignty on land. It declares:

7 "The rights of the coastal State over the
8 continental shelf do not depend on occupation,
9 effective or notional, or on any express
10 proclamation."⁷⁵

11 The 1958 Convention goes on to state that the
12 rights of the coastal state:

13 "... are exclusive in the sense that if the
14 coastal State does not explore the continental shelf
15 or exploit its natural resources, no one may undertake
16 these activities, or make a claim to the continental
17 shelf, without the express consent of the coastal
18 State."⁷⁶

19 Both of these propositions were drawn from the
20 commentary of the International Law Commission that

⁷⁴ United States, Executive Order No. 9633, *Policy of the United States with Respect to the National Resources of the Subsoil and Sea Bed of the Continental Shelf* (28 Sept. 1945). Supplemental Documents, Vol. VI, Annex LA-289.

⁷⁵ Convention on the Continental Shelf, 499 UNTS 312 (29 Apr. 1958), entered into force 10 June 1964, Art. 2(3). MP, Vol. XI, Annex LA-74.

⁷⁶ *Id.*, Art. 2(2).

1 accompanied its 1956 articles,⁷⁷ and Article 77 of the
2 Law of the Sea Convention repeats both propositions.

3 As the International Court of Justice explained,
4 the rights of the coastal state:

5 "... exist *ipso facto* and *ab initio*, by virtue of
6 its sovereignty over the land."⁷⁸

7 The Declaration of Principles adopted by the
8 United Nations General Assembly in 1970 pronounces the
9 seabed and subsoil beyond the limits of national
10 jurisdiction to be the common heritage of mankind.⁷⁹

11 It goes on to declare:

12 "The Area shall not be subject to appropriation by
13 any means by States or persons, natural or juridical,
14 and no State shall claim or exercise sovereignty or
15 sovereign rights over any part thereof."⁸⁰

16 Article 137 of the Law of the Sea Convention
17 repeats and elaborates on this prohibition.

18 Mr President, the foregoing provisions, regarding
19 both the continental shelf and the area beyond, make

⁷⁷ International Law Commission, *Report of the International Law Commission Covering the Work of its Eighth Session*, UN Doc. A/3159 (4 July 1956), Art. 68 Commentary, paras. 2, 7. MP, Vol. XI, Annex LA-62.

⁷⁸ *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, Judgment, ICJ Reports 1969, para. 19. MP, Vol. XI, Annex LA-4.

⁷⁹ UN General Assembly, *Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction*, UN Doc. A/RES/25/2749 (12 Dec. 1970), paras. 4-5. Supplemental Documents, Vol. VI, Annex LA-248.

⁸⁰ *Id.*, para. 2.

1 it abundantly clear that insofar as China's claims of
2 historic rights relate to the seabed and subsoil of
3 the South China Sea beyond the limits of China's
4 entitlements under the Law of the Sea Convention, not
5 only is the exercise of such rights inconsistent with
6 the international law of the sea, but the claim itself
7 is expressly prohibited.

8 The law of the sea offers modest protections for
9 prior uses, be they historic or otherwise. Article 2,
10 paragraph 3 of the Convention affords the basis for
11 protecting traditional artisanal fisheries of the
12 local inhabitants in the territorial sea. Mr Martin
13 will elaborate on this later in the hearing.

14 In other situations, the Convention addresses with
15 careful specificity the nature of prior uses that are
16 protected, the nature of the protections, and the
17 areas in which such protections apply.

18 Some examples:

19 -- Where the geography otherwise permits the
20 establishment of straight baselines, the determination
21 of particular baselines may take into account economic
22 interests evidenced by long usage.⁸¹

23 -- The maintenance and replacement of existing
24 submarine cables, and certain other interests of
25 immediately adjacent neighbouring states, are

⁸¹ UNCLOS, Art. 7(5).

1 protected in archipelagic waters.⁸²

2 -- On the other hand, distant water fishing states
3 failed to obtain recognition in the exclusive economic
4 zone of historic fishing rights derived from prior
5 high seas fishing.⁸³ Article 62 requires that the
6 coastal state provide access, but access only to that
7 part of the allowable catch, if any, that is surplus
8 to the coastal state's own harvesting capacity in the
9 exclusive economic zone.⁸⁴ In providing such access,
10 the coastal state is merely required to take into
11 account, as one among all relevant factors, the need
12 to minimise economic dislocation in states whose
13 nationals have habitually fished in the zone.⁸⁵ And
14 foreign access to fisheries in the EEZ is subject to
15 regulatory and financial conditions established by the
16 coastal state.⁸⁶ The leader of the coastal state
17 group at the Law of the Sea conference, Ambassador
18 (later Foreign Minister) Jorge Castañeda of Mexico,
19 explained that coastal states want to choose the bride
20 with the largest dowry.

21 -- The Convention's prohibition on fishing for

⁸² UNCLOS, Arts 47(6), 51.

⁸³ See MP, paras. 4.47-4.50.

⁸⁴ UNCLOS, Art. 62(2).

⁸⁵ UNCLOS, Art. 62(3).

⁸⁶ UNCLOS, Art. 62(4).

1 anadromous stocks in waters beyond the outer limits of
2 exclusive economic zones is subject to a circumscribed
3 exception where necessary to minimise economic
4 dislocation in respect of fishing for such stocks.⁸⁷

5 -- And finally among these examples, Resolution II
6 adopted by the Law of the Sea Conference and the 1994
7 agreement regarding the implementation of Part XI⁸⁸
8 contain detailed provisions regarding a limited number
9 of specified pioneer investors in the area beyond the
10 limits of national jurisdiction.

11 There are no provisions in the Law of the Sea
12 Convention requiring the coastal state to protect
13 prior use of the natural resources of the continental
14 shelf. Sedentary species of the continental shelf are
15 excluded even from the limited duty of the coastal
16 state to provide access to the living resources of the
17 exclusive economic zone.⁸⁹ In a similar vein, it is
18 telling that while the delimitation provisions of both
19 the 1958 Territorial Sea Convention and the 1958
20 Continental Shelf Convention refer to equidistance and
21 special circumstance, only the former -- only the

⁸⁷ UNCLOS, Art. 66(3).

⁸⁸ UN Conference on the Law of the Sea III, *Final Act of the Third United Nations Conference on the Law of the Sea*, UN Doc. A/CONF.62/121 (27 Oct. 1982). Supplemental Documents, Vol. VI, Annex LA-249; UN General Assembly, *Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, UN Doc. A/RES/48/263 (17 Aug. 1994). Supplemental Documents, Vol. VI, Annex LA-252.

⁸⁹ UNCLOS, Art. 68.

1 Territorial Sea Convention -- adds a reference to
2 historic title.

3 The modest protections for prior uses set forth in
4 the Law of the Sea Convention make clear the extent of
5 China's overreaching claims of historic rights to
6 control vast areas of the South China Sea illustrated
7 by the nine-dash line.

8 Mr President, allow me to make a further simple
9 point of profound significance. The entirety of the
10 South China Sea is accounted for and is fully governed
11 by the regimes set forth in the Law of the Sea
12 Convention. Where its provisions intend to permit
13 assertions of control in derogation of otherwise
14 applicable rules, they say so.

15 Article 10 of the Convention expressly admits of
16 derogations from the rights and freedoms of other
17 states in the limited case of historic bays.
18 Article 15 expressly admits of derogations from the
19 territorial sea entitlement of a neighbouring coastal
20 state in the limited case of historic title affecting
21 the delimitation of the territorial sea boundary
22 between two states. These two articles identify the
23 only permissible assertions of control in derogation
24 of otherwise applicable rules under the Convention.

25 Even if one considers the reference to history in
26 the definition of "archipelago" in Article 46 as

1 having an analogous quality, which I think is
2 doubtful, that provision is relevant only to the
3 definition of an archipelagic state and to the drawing
4 of archipelagic baselines by an archipelagic state.
5 Since the definition of an archipelagic state in
6 Article 46 is limited to states comprised exclusively
7 of islands, that provision is irrelevant to the
8 question of China's historic rights.

9 But even if that were not so, the geography of the
10 Spratly Islands is, as they say, not even in the
11 ballpark when it comes to satisfying the requirements
12 for drawing straight archipelagic baselines enclosing
13 archipelagic waters. The maximum ratio of water to
14 land specified in Article 47 is 9 to 1. The Spratly
15 Islands are scattered over an area of approximately
16 410,000 square kilometres, but their collective land
17 territory above water at high-tide covers no more than
18 five square kilometres.⁹⁰

19 Mr President, the 1962 UN Secretariat study on
20 historic waters, to which Mr Reichler just adverted,
21 concluded with respect to the 1958 Territorial Sea
22 Convention:

23 "... if the provisions of an article should be
24 found to conflict with an historic title to a maritime

⁹⁰ Supplemental Written Statement of the Philippines ("SWSP"), para 16.15; United States Central Intelligence Agency, "Spratly Islands", *CIA World Factbook* (28 May 2014). SWSP, Vol. IX, Annex 502.

1 area, and no clause is included in the article
2 safeguarding the historic title, the provisions of the
3 article must prevail as between the parties to the
4 Convention. This seems to follow a *contrario* from the
5 fact that Articles 7 and 12 ..."

6 Which are the equivalent of Articles 10 and 15 of
7 the Law of the Sea Convention:

8 "... have express clauses reserving historic
9 rights; articles without such a clause must be
10 considered not to admit an exception in favour of such
11 rights."⁹¹

12 In other words, to update this observation, even
13 if, *quod non*, other historic rights of control had at
14 one time existed, those historic rights would not have
15 survived as derogations from the sovereignty,
16 sovereign rights and high seas freedoms of other
17 states under the Law of the Sea Convention.

18 This conclusion, Mr President, I believe is
19 confirmed by Article 293 of the Convention, which
20 provides that rules of international law may be
21 applied only if they are not incompatible with the
22 Convention. It is further confirmed by the statement
23 in the preamble that limits the application of
24 international law to matters not regulated by the

⁹¹ United Nations, Secretary General, *Juridical Regime of Historic Waters, Including Historic Bays*, UN Doc. A/CN.4/143 (9 Mar. 1962), para. 75. MP, Vol. XI, Annex LA-89.

1 Convention, and by the restriction on reservations and
2 exceptions contained in Article 309. And of course
3 Article 310 makes clear that declarations or
4 statements regarding the harmonisation of a state's
5 laws or regulations with the Convention are permitted
6 only if they do not purport to exclude or to modify
7 the legal effect of the provisions of the Convention
8 in their application to that state.

9 During years of active participation in the
10 negotiation of the Law of the Sea Convention, China
11 was a vocal supporter of the demands of developing
12 coastal states for exclusive jurisdiction over the
13 natural resources in the EEZs and continental shelves
14 off their respective coasts, and China was
15 a consistent critic of attempts to limit the content
16 of that jurisdiction.⁹² China identified itself as
17 one of those developing coastal states.⁹³ It made no
18 attempt whatsoever to secure an exception protecting
19 historic claims of maritime rights of the kind that
20 are now at issue.

⁹² UN Conference on the Law of the Sea III, Plenary, *191st Meeting*, UN Doc. A/CONF.62/SR.191 (9 Dec. 1982), paras. 20-22. Supplemental Documents, Vol. VI, Annex LA-250; UN Conference on the Law of the Sea III, Second Committee, *25th Meeting* UN Doc. A/CONF.62/SR.25 (2 July 1974), paras. 13-14 & 19. Supplemental Documents, Vol. VI, LA-295.

⁹³ UN Conference on the Law of the Sea III, Plenary, *191st Meeting*, UN Doc. A/CONF.62/SR.191 (9 Dec. 1982), para. 25. Supplemental Documents, Vol. VI, Annex LA-250. UN Conference on the Law of the Sea III, Second Committee, *25th Meeting* UN Doc. A/CONF.62/SR.25 (2 July 1974), para. 19. Supplemental Documents, Vol. VI, LA-295.

1 China cannot be heard to invoke long history to
2 claim now what it did not claim then. Its assertion
3 of historic rights to the maritime areas of the South
4 China Sea, in derogation of the sovereign rights and
5 jurisdiction of other coastal states, made its
6 appearance in Chinese legislation and diplomatic
7 communications only after China and the Philippines --
8 as well as Brunei, Indonesia, Malaysia, Vietnam, and
9 many other states -- had become party to the Law of
10 the Sea Convention; and indeed, only after the
11 Convention came to be widely accepted as declaratory
12 of international law. There is, in fact, nothing
13 historic about China's maritime claim.

14 That claim is patently incompatible with the
15 rights of the Philippines and other states under the
16 Law of the Sea Convention and international law. It
17 is also patently incompatible with the object and
18 purpose of the Convention with respect to the
19 fundamental issue of claims to control the sea. The
20 Convention contains specific rules regarding the
21 nature and extent of such control: rules regarding
22 baselines, the 12-mile limit of the territorial sea,
23 the 24-mile limit of the contiguous zone, the 200-mile
24 limit of the EEZ and continental shelf, the precise
25 limits of the continental shelf where it extends
26 beyond 200 miles, and the entitlements of islands with

1 respect to the foregoing maritime zones.

2 The Convention leaves no room for assertions of
3 rights to control activities beyond those limits in
4 derogation of the sovereign rights of other coastal
5 states or the rights and freedoms of all states. That
6 indeed was the point of the very first judgment on the
7 merits of the International Tribunal for the Law of
8 the Sea in the *Saiga* case.⁹⁴

9 States that made prior claims inconsistent with
10 the Law of the Sea Convention were expected to, and
11 did, modify or reinterpret those claims to conform to
12 the Law of the Sea Convention. That is precisely the
13 point of Articles 309 and 310 of the Convention.

14 Mr President, to accept a concept of "historic
15 rights" running in parallel with, and in derogation
16 of, the Convention in the South China Sea would be to
17 lay the foundation for the unravelling of the
18 Convention, and with it the enfeeblement, if not the
19 demise, of the legal order that it constitutes.

20 For the reasons set forth today and in our written
21 pleadings, we submit that there is not now, and that
22 there has not been since the emergence of modern
23 international law, a legal basis for the claim of
24 historic rights asserted by China.

⁹⁴ *The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v Guinea)*, Judgment of 1 July 1999, ITLOS Reports 1999, paras. 110-36. MP, Vol. XI, Annex LA-36.

1 Mr President, this concludes my remarks this
2 afternoon. We would ask that you invite
3 Mr Loewenstein to the podium.

4 **THE PRESIDENT:** Professor Oxman, I think Judge Wolfrum
5 would like to ask a question.

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

7 **(4.59 pm)**

8 **Tribunal questions**

9 **JUDGE WOLFRUM:** Professor Oxman, I didn't want to
10 interrupt your speech, and therefore I put the
11 question at the end. In part you have answered my
12 question, but I will raise it anyway as a matter of
13 emphasis.

14 You said approximately ten minutes ago: these
15 claims raised by China are not only contrary to the
16 Convention but -- and I hope I quote correctly --
17 explicitly prohibited. These were your words.

18 My question is: do you mean to say that the Law of
19 the Sea Convention is comprehensive in the meaning
20 that it excludes anything else that is not enshrined
21 in the Convention? And I am referring to claims.
22 Therefore there is no claim permitted which is not
23 foreseen, so to speak, in the Convention.

24 If this is correct, is there any provision in the
25 Convention -- I could not find one, except perhaps

1 311. You referred to 309 and 310. 311(1) refers to
2 the Geneva Convention. This goes in that direction,
3 but does not deal with -- let's put it like this --
4 allegedly pre-established claims. If we had
5 a provision in 311, "This excludes any other claim
6 that's not in the Convention", that would be clear.
7 Such a provision is missing.

8 Was this issue discussed at the Law of the Sea
9 Conference? You should know best.

10 Thank you, Mr President, thank you.

11 **PROFESSOR OXMAN:** Mr President, if I may.

12 Judge Wolfrum, the quote to which you adverted at
13 the outset of your question was one in which I was
14 referring to the express language of the Convention in
15 the context of the seabed. The question which you
16 asked is a very profound question that goes beyond
17 that quote, and I think we would be happy to answer
18 the question and refer back to it on Monday, if that
19 is satisfactory.

20 **JUDGE WOLFRUM:** Okay, thank you.

21 **THE PRESIDENT:** Thank you very much Professor Oxman. So
22 who is coming next?

23 **PROFESSOR OXMAN:** Mr Loewenstein, if that's alright, sir.

24

1 (5.02 pm)

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

3 **MR LOEWENSTEIN:** Mr President, members of the Tribunal,
4 good afternoon. It is an honour to appear before you
5 on behalf of the Philippines.

6 I will show that even assuming, *quod non*, that any
7 historic rights could in theory continue to exist
8 after UNCLOS -- which, as Professor Oxman has
9 demonstrated, is not the case -- China has no such
10 rights within the nine-dash line because it does not
11 satisfy the requirements for historic rights under
12 general international law.

13 Before I start, I have taken note of the clock.
14 Since our submissions began a little later than
15 anticipated, I expect to conclude around 5.45 this
16 afternoon. If you would prefer me to finish at 5.30,
17 and complete my presentation tomorrow morning, I would
18 of course be pleased to do so. I am in your hands.

19 Mr President, perhaps the most telling indication
20 that China has no historic rights in the waters of the
21 South China Sea is that it first claimed the existence
22 of such rights on 7th May 2009. Before that date,
23 less than six years ago, it made no such claim. That
24 is when China transmitted its two *notes verbales* to
25 the United Nations claiming "sovereign rights and

1 jurisdiction over the relevant waters" and over the
2 "seabed and subsoil thereof", which China identified
3 as being located within the dashed line appearing on
4 the appended maps.⁹⁵ As Mr Reichler has explained,
5 those putative rights are based on China's alleged
6 historical relationship with the South China Sea, not
7 on rights accorded to coastal states by UNCLOS.

8 China's failure to assert any historical rights to
9 the waters of the South China Sea until this very
10 recent date betrays China's own awareness that the
11 claim lacks historical foundation, let alone satisfies
12 the requirements imposed by general international law.
13 Establishing historic rights requires prior of three
14 things: first, that a state exercised authority over
15 the area where it claims the historic rights; second,
16 that it exercised that authority continuously and for
17 a long period of time; and third, that other states
18 either acquiesced or failed to oppose those rights.⁹⁶

19 China comes nowhere close to satisfying any of
20 these requirements.⁹⁷ To the contrary, China never

⁹⁵ *Note Verbale* from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/17/2009 (7 May 2009). MP, Vol. VI, Annex 191; *Note Verbale* from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/18/2009 (7 May 2009). MP, Vol. VI, Annex 192.

⁹⁶ United Nations Secretary General, *Juridical Regime of Historic Waters, Including Historic Bays*, UN Doc No. A/CN.4/143 (9 Mar. 1962), para. 80. MP, Vol. XI, Annex LA-89.

⁹⁷ See Supplemental Written Submission of the Philippines ("SWSP"), para. 13.7.

1 exercised exclusive authority over the living and
2 non-living resources found in the 2 million square
3 kilometres enclosed by the nine-dash line, much less
4 continuously and over a long period. Nor have the
5 other littoral states ever acquiesced to China doing
6 so.

7 Mr President, any fair appraisal of the historical
8 record must acknowledge that for millennia the South
9 China Sea has served as an important resource and
10 navigation route for the diverse communities of
11 Southeast Asia. It was used in this manner not just
12 by vessels from what is now China, but also from the
13 various seafaring polities that lined the sea's
14 coasts, in present-day Vietnam, Malaysia, Indonesia,
15 Brunei and the Philippines. None of them -- which
16 included, in addition to China, such major powers as
17 Funan and Champa in Vietnam and Srivijaya in
18 Indonesia -- exercised sovereignty or sovereign rights
19 over the waters of the South China Sea or its insular
20 features, or claimed to do so.

21 For over 900 years, China made no claim to the
22 islands in the South China Sea, let alone special
23 rights to its waters. Rather, China continuously
24 defined itself as extending no farther south than the
25 island of Hainan.⁹⁸ That historical continuity goes

⁹⁸ See SWSP, para. 13.8.

1 back at least as far as the earliest map of China that
2 the Philippines has identified: a stone etching done
3 in 1136. It depicts China during the Southern Song
4 Dynasty.⁹⁹ As can be seen when the map is overlaid on
5 a map showing the geography of the South China Sea
6 region,¹⁰⁰ China extends only as far south as Hainan.

7 This remained the case during the Ming Dynasty,
8 which began in 1368. As you can see on the screen,¹⁰¹
9 the late 14th century map that bears the title
10 *Universal Map of the Great Ming Empire* also depicts
11 China as ending at Hainan.¹⁰²

12 These cartographic representations of China are
13 consistent with China's relationship to the South
14 China Sea -- or, more accurately, its lack thereof --
15 which generally involved attempts to avoid its
16 treacherous, rock-strewn waters. That is why the
17 voyages of the famous Chinese imperial admiral
18 Zheng He, between 1405 and 1433, hugged the western
19 edge of the South China Sea, rather than make any
20 attempt to traverse it.¹⁰³

⁹⁹ *Hua Yi Tu [Map of China and the Barbarian Countries]* (China, 1136 [c. 1933 rubbing]), available at <http://www.loc.gov/item/gm71005081/> (accessed 4 Mar. 2015). SWSP, Vol. VI, Annex M24; SWSP, para. A14.6.

¹⁰⁰ This is available at Tab 1.15.

¹⁰¹ This is available at Tab 1.16.

¹⁰² SWSP, para. A14.7; Author unknown or unavailable, *Da Ming Hun Yi Tu [Universal Map of Great Ming Empire]* (China, 1389?). SWSP, Vol. VI, Annex M25.

¹⁰³ MP, para. 2.24; SWSP, para. A13.3.

1 Indeed, unlike many of the other polities along
2 the South China Sea littoral, which made seafaring
3 a priority, China's relationship with navigation could
4 perhaps be best characterised as ambivalent. In that
5 regard, starting in the early 14th century, China
6 periodically imposed lengthy bans on long-range
7 navigation.¹⁰⁴ During the mid-15th century, for
8 instance, the Ming authorities suppressed maritime
9 activities, and in 1500 made it a capital offence to
10 build two-masted ships. In 1525, all such remaining
11 ships were ordered destroyed. In 1551, China defined
12 venturing out to sea in a multi-masted ship to be
13 an act of treason.¹⁰⁵

14 Given China's rejection of long range seafaring,
15 it is not surprising that a subsequent Ming Dynasty
16 map -- the Territorial Atlas of the Great Ming
17 Empire -- which was produced between 1547 and 1559,
18 does not claim the South China Sea or any of its
19 islands.¹⁰⁶ Rather, as you can see, China's southern
20 frontier is no different than the previous depictions:
21 it extends only to Hainan.

22 This is also confirmed by contemporaneous Chinese

¹⁰⁴ SWSP, para. A13.6.

¹⁰⁵ MP, para. 2.25.

¹⁰⁶ SWSP, para. A14.8. See also *Da Ming yu di tu [The Territorial Atlas of the Great Ming Empire]* (China, 1547 to 1559), available at <http://www.loc.gov/item/2002626776> (accessed 4 Mar. 2015). SWSP, Vol. VI, Annex M26. Available at Tab 1.17.

1 texts. As one scholar of Asian maritime history
2 observed about a Ming-era work entitled *Studies on the*
3 *Ocean East and West*:

4 "... the South China Sea Islands are absent, which
5 likely confirms that the central section of the [Sea]
6 was largely avoided by sailors and lay outside the
7 main trading routes."¹⁰⁷

8 China's self-definition as extending no further
9 than Hainan continued during the Qing Dynasty. Indeed
10 in 1717 China prohibited voyages through the South
11 China Sea, decreeing that merchants were forbidden to
12 navigate its waters to go to "places like Luzon [in
13 the Philippines] and Java [in present-day
14 Indonesia]".¹⁰⁸

15 The historical continuity of China's southernmost
16 boundary is reflected in the map of China's southern
17 Guangdong province that you can see on the screen.¹⁰⁹
18 This was produced in 1721 to 1722 as part of
19 a provincial atlas of China during the reign of the
20 Kangxi Emperor.¹¹⁰ It retains the now-familiar

¹⁰⁷ Ulises Granados, "The South China Sea and Its Coral Reefs During the Ming and Qing Dynasties: Levels of Geographical Knowledge and Political Control", *East Asia History*, Vol. 32/33 (Dec. 2006/Jan. 2007), p. 116. SWSP, Vol. X, Annex 537.

¹⁰⁸ Zheng Yangwen, *China on the Sea: How the Maritime World Shaped Modern China* (2012), pp. 211-212. MP, Vol. IX, Annex 303.

¹⁰⁹ Available at Tab 1.18.

¹¹⁰ *Huang yu quan lan fen sheng tu [The Kangxi provincial atlas of China]* (China, 1721 to 1722), available at <http://www.loc.gov/item/2002626779/> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M32.

1 depiction of China extending no farther than Hainan.
2 Professor Laura Hostetler, an expert on Chinese
3 cartography, explains that this "comprehensive atlas"
4 was based on a "survey [of] the entire empire".¹¹¹ It
5 is therefore significant that the atlas "does not
6 depict and makes no mention of regions beyond the
7 southern scope of the map (or empire)", that is,
8 beyond Hainan.¹¹²

9 The depiction of China's southern frontier
10 remained the same more than a century later. You can
11 see this in the 1842 map entitled the *Qing Empire's*
12 *Complete Map or All Under Heaven*.¹¹³ Once again China
13 extends no further south than Hainan.

14 The fact that China made no claims in the South
15 China Sea explains why it did not object to activities
16 carried out there by other states, including by the
17 Portuguese, Spanish, French and British. They began
18 arriving in the early 16th century and established
19 colonies in present-day Indonesia, Vietnam, Malaysia
20 and the Philippines. These are detailed at length in

¹¹¹ Laura Hostetler, "Early Modern Mapping at the Qing Court: Survey Maps from the Kangxi, Yongzheng, and Qianlong Reign Periods" in *Chinese History in Geographical Perspective* (Y. Du and J. Kyong-McClain, eds., 2013), p. 27. MP, Vol. X, Annex 308.

¹¹² 18 *Id.*, p. 25.

¹¹³ Li Zhaoluo & Yan Liu, *Huang chao yi tong yu di quan tu [Qing Empire's Complete Map of all Under Heaven]* (China, 1842), available at <http://www.loc.gov/item/gm71005054/> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M39. Available at Tab 1.19.

1 the written pleadings.¹¹⁴ I will mention only a few of
2 them.

3 During the 19th century, British hydrographers
4 surveyed and mapped the South China Sea and its
5 insular features, culminating in the publication by
6 the United Kingdom in 1888 of a chart showing the
7 principal reefs in the Spratlys.¹¹⁵ They also recorded
8 the widespread use of the South China Sea by vessels
9 of many nations. The East India Company's
10 hydrographer observed in 1805 that "vessels which
11 navigate on the South China Sea belong to different
12 countries", including, among others, the "Chinese
13 empire", and that the ships from these states "are
14 probably of greater magnitude and more valuable, than
15 any other commercial vessels used in other parts of
16 the globe".¹¹⁶ In 1877, Britain claimed two features
17 in the Spratlys: Spratly Island and Amboyna Cay.¹¹⁷
18 Neither claim was objected to by China.

19 The British were not alone in carrying out
20 activities in the South China Sea. Spain surveyed the

¹¹⁴ See MP, para. 2.26-2.35; SWSP, Vol. 1, paras. 13.9-13.10; A13.18-A13.33; A13.39-A13.43.

¹¹⁵ D. Hancox and V. Prescott, "A Geographical Description of the Spratly Islands and an Account of Hydrographic Surveys Amongst Those Islands", *IBRU Maritime Briefing*, Vol. 1, No. 6 (1995), p. 35. MP, Vol. VIII, Annex 256.

¹¹⁶ James Horsburgh, *Memoirs: Comprising the Navigation to and from China* (1805), p. 1. SWSP, Vol. XI, Annex 552.

¹¹⁷ *Letter* from Foreign Office, United Kingdom, to the Law Officers of the Crown, United Kingdom (29 July 1932), pp. 1-2. SWSP, Vol. III, Annex 361.

1 area, and its Directorate of Hydrography published
2 a pilot in 1879 describing numerous South China Sea
3 features. In 1883 Germany sent a military detachment
4 to the Spratlys to carry out survey work as well.¹¹⁸

5 Nor did China object to, or participate in, the
6 19th century multinational effort to suppress the
7 endemic piracy that plagued shipping in the South
8 China Sea. As one historian has observed:

9 "European maritime powers brought their naval
10 might to bear on the problem of piracy ...
11 [A] combination of colonial police work, maritime
12 steam power and shell-firing naval ordinance brought
13 an end to a thousand years of pirate domination in the
14 South China Sea."¹¹⁹

15 China played no role in these efforts.

16 Nothing of consequence had changed by the eve of
17 the 20th century, as you can see in the 1896 *Qing*
18 *Empire's Complete Map of All Provinces*.¹²⁰ This
19 confirms what all previous maps of China had shown:
20 imperial China claimed no territory or waters south of

¹¹⁸ Dieter Heinzig, *Disputed Islands in the South China Sea: Paracels - Spratlys - Pratas - Macclesfield Bank* (1976), p. 25. SWSP, Vol. IX, Annex 520.

¹¹⁹ Angus Konstam, *Piracy: The Complete History* (2008), p. 290. SWSP, Vol. X, Annex 538.

¹²⁰ Peilan Li, *Huang chao zhi sheng yu di quan tu [Qing Empire's Complete Map of All Provinces]* (China, 1896), available at <http://www.loc.gov/item/gm71005083/> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M45. Available at Tab 1.20.

1 Hainan. And it is consistent with the minimal Chinese
2 presence in the South China Sea during this period.
3 As a scholar observed in the *International Journal of*
4 *Maritime History*:

5 "Chinese participation by the end of the
6 19th century [in the junk trade was] limited to
7 activities other than transport, which was
8 increasingly in foreign hands."

9 Indeed, by 1870 the Chinese junk trade to the
10 Philippines "had ceased" altogether.¹²¹

11 Another historian sums up this way China's
12 relationship to the South China Sea from the Ming
13 Dynasty through the late Qing Dynasty, a period
14 lasting six and a half centuries:

15 "For the entire Ming until the late Qing, records
16 of government-sanctioned activities [in] the [South
17 China Sea] archipelagos are absent in Chinese sources,
18 representing a consistent silence in Chinese
19 historiography."¹²²

20 Mr President, that is the reality of the
21 situation.

¹²¹ Ulises Granados, "Modernization and Regionalism in South China: Notes on Coastal Navigation in Guangdong Province During the Late Nineteenth and Early Twentieth Century", *International Journal of Maritime History*, Vol. XXIV, No. 1 (June 2012), p. 110. SWSP, Vol. XI, Annex 545.

¹²² Ulises Granados, "The South China Sea and Its Coral Reefs During the Ming and Qing Dynasties: Levels of Geographical Knowledge and Political Control", *East Asia History*, Vol. 32/33 (Dec. 2006/Jan. 2007), p. 122. SWSP, Vol. X, Annex 537.

1 For confirmation, the Tribunal need only refer to
2 the historic records published by the Taiwanese
3 authorities. The Philippines did not request access
4 to Taiwan's internal files but, in preparing its
5 written pleadings, was able to draw upon a compilation
6 of archival material that Taiwan published in 1995.¹²³
7 The Philippines can now also make use of the July 2015

¹²³ See *Letter from Ministry of the Interior of the Republic of China to the Ministry of Foreign Affairs of the Republic of China* (9 Oct. 1946), reprinted in *Archival Compilation on South China Sea Islands by Ministry of Foreign Affairs*, Vol. 2, Doc. No. III(1):009 (Republic of China Ministry of Foreign Affairs Research & Planning Committee, ed.) (1995). SWSP, Vol. III, Annex 351; Republic of China, National Defense Committee Secretariat, *Statement of Opinions Based on Research of Military Relevance and Methods Regarding the Nine French-Occupied Islands* (1 Sept. 1933), reprinted in *Archival Compilation on South China Sea Islands by Ministry of Foreign Affairs*, Vol. 1, Doc. No. II(1):072 (Republic of China Ministry of Foreign Affairs Research & Planning Committee, ed.) (1995). SWSP, Vol. VIII, Annex 475; Republic of China, Republican Government Military Commission, *Letter Regarding the Current Conditions on Xisha Islands and Enhancement of Construction and Management* (31 Aug. 1937), reprinted in *Archival Compilation on South China Sea Islands by Ministry of Foreign Affairs*, Vol. 1, Doc. No. II(1):072 (Republic of China Ministry of Foreign Affairs Research & Planning Committee ed.) (1995). SWSP, Vol. VIII, Annex 477; *Letter from Ministry of the Foreign Affairs of the Republic of China to the Ministry of Interior and the Ministry of Defense of the Republic of China* (20 Sept. 1946), reprinted in *Archival Compilation on South China Sea Islands by Ministry of Foreign Affairs*, Vol. 2, Doc. No. III(1):006 (Republic of China Ministry of Foreign Affairs Research & Planning Committee, ed.) (1995). SWSP, Vol. VIII, Annex 478; Republic of China, Executive Yuan [Branch], *Order* (29 Sept. 1946), reprinted in *Archival Compilation on South China Sea Islands by Ministry of Foreign Affairs*, Vol. 2, Doc. No. III(1):007 (Republic of China Ministry of Foreign Affairs Research & Planning Committee, ed.) (1995). SWSP, Vol. VIII, Annex 479; *Letter from the Ministry of Foreign Affairs of the Republic of China to the Ministry of the Interior of the Republic of China* (1 Oct. 1946), reprinted in *Archival Compilation on South China Sea Islands by Ministry of Foreign Affairs*, Vol. 2, Doc. No. III(1):008 (Republic of China Ministry of Foreign Affairs Research & Planning Committee, ed.) (1995). SWSP, Vol. VIII, Annex 480; *Letter from Ministry of the Foreign Affairs of the Republic of China to the Ministry of Interior of the Republic of China* (1 Oct. 1946), reprinted in *Archival Compilation on South China Sea Islands by Ministry of Foreign Affairs*, Vol. 2, Doc. No. III(1):008 (Republic of China Ministry of Foreign Affairs Research & Planning Committee, ed.) (1995). SWSP, Vol. VIII, Annex 481; *Letter from the Embassy of the Republic of China in Paris to the Ministry of Foreign Affairs of the Republic of China* (20 Jan. 1947), reprinted in *Archival Compilation on South China Sea Islands by Ministry of Foreign Affairs*, Vol. 1, Doc. No. II(2):199 (Republic of China Ministry of Foreign Affairs Research & Planning Committee, ed.) (1995). SWSP, Vol. VIII, Annex 483.

1 *Compilation of Historical Archives on the Southern*
2 *Territories of the Republic of China* that the Tribunal
3 invited the Philippines to comment upon.

4 That collection was the result of considerable
5 research. The publication explains:

6 "The exhibition materials have been carefully
7 selected from among tens of thousands of items in
8 historical archives and official records, along with
9 maps, newspapers and photographs kept by various
10 agencies and institutions. The screening committee,
11 assembled by the Ministry of the Interior, was
12 composed of experts and scholars with expertise in
13 history, international law, and international
14 relations, and familiar with South China Sea affairs."

15 It then explains:

16 "In a series of meetings, the committee identified
17 the most critical, informative and inspirational
18 materials, as well as documents highlighting the
19 recent achievements of government agencies in the
20 management of South China Sea affairs."¹²⁴

21 It is therefore significant that, of the tens of
22 thousands of historical records these expertise
23 reviewed, they could not identify even a single
24 document -- not one -- that places China in any

¹²⁴ Taiwan Authority of China, Ministry of the Interior, *Compilation of Historical Archives on the Southern Territories of the Republic of China*, p. 16 (July 2015).

1 official capacity in the South China Sea prior to the
2 beginning of the 20th century. The few earlier
3 references all unsurprisingly refer to use of its
4 waters for fishing or navigation. That is why
5 President Ma wrote in his preface to Taiwan's
6 compilation that China's efforts to defend what he
7 calls its "sovereignty over the South China Sea
8 islands" date only to the "early 20th century".¹²⁵

9 Indeed, the compilation includes a timeline of key
10 events for China's sovereignty claim that summarises
11 the historic evidence. A translation prepared by the
12 Philippines is included at tab 1.21. It merits close
13 examination.

14 To begin with, the chronology starts in 1907.¹²⁶
15 In other words, the Taiwanese experts were unable to
16 identify any documents evidencing any official Chinese
17 activities in regard to any South China Sea feature
18 prior to the beginning of the 20th century. Even
19 then, the acts mentioned in the timeline that occurred
20 before the Second World War relate exclusively to the
21 Paracels and Pratas, the South China Sea's
22 northernmost features, located 325 and 570 nautical
23 miles from the nearest insular features in the
24 Spratlys, respectively.

¹²⁵ *Id.*, pp. 7-8.

¹²⁶ *Id.*, p. 17.

1 Those acts cannot be said to establish China's
2 claim on anything approaching firm ground. The
3 chronology's first reported event -- in 1907 --
4 concerns the presence of Japanese on the far northern
5 Pratas. The next two -- in 1910 and 1911 -- both
6 concern Chinese naval patrols in that vicinity.¹²⁷

7 Nothing else is reported to have occurred until
8 1921, when the Guangdong provincial government is said
9 to have authorised a merchant to develop phosphate
10 mining in the Paracels, although it is unclear whether
11 mining actually occurred.¹²⁸ The only concrete actions
12 China is reported to have physically undertaken on any
13 South China Sea island prior to the Second World War
14 was the construction of a meteorological observatory
15 and lighthouse on Pratas in 1925 and a joint
16 university-government agency site visit to the
17 Paracels in 1928.¹²⁹

18 The fact that China claimed no islands south of
19 the Paracels for at least the first several decades of
20 the 20th century is confirmed by a diplomatic note
21 that China sent to France on 29th September 1932. It
22 states that the Paracels "form the southernmost part

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

1 of Chinese territory".¹³⁰

2 Indeed, the earliest cartographic depiction of
3 a claim by China to any insular feature in the South
4 China Sea south of Hainan appears in its circa 1933
5 *New Provincial Map of the Republic of China*.¹³¹
6 Consistent with China's 1932 diplomatic note, the map
7 shows only the Paracels as pertaining to China. No
8 other islands in the South China Sea are depicted.

9 But China's claim even to the Paracels was
10 contested. A century earlier, in 1834, the rulers of
11 present-day Vietnam published a chart claiming them.
12 The following year, they erected a pagoda on one of
13 the islands. In the mid-19th century, Vietnam-based
14 authorities were reported to maintain revenue cutters
15 and a garrison in the Paracels to collect duty from
16 visitors, and to ensure protection of their
17 fishermen.¹³² In 1925, the Vietnamese royal court,
18 under French protection, claimed the Paracels as part
19 of its territory.¹³³

¹³⁰ *Note Verbale* from the Legation of the Republic of China in Paris to the Ministry of Foreign Affairs of France (29 Sept. 1932), reprinted in Monique Chemillier-Gendreau, *Sovereignty over the Paracel and Spratly Islands* (2000). MP, Vol. VI, Annex 171.

¹³¹ *Zhonghua min guo fen sheng xin tu [New Provincial Map of the Republic of China]* (China, c. 1933), available at <http://www.loc.gov/item/2006629696/> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M47. Available at Tab 1.22.

¹³² Charles Gutzlaff, "Geography of the Cochin-Chinese Empire", *Journal of the Royal Geographical Society of London*, Vol. 19 (1849), p. 93. SWSP, Vol. IX, Annex 516.

¹³³ Ulises Granados, "As China Meets the Southern Sea Frontier: Ocean Identity in the Making, 1902-1937", *Pacific Affairs*, Vol. 78, No. 3 (2005), p. 451. SWSP, Vol. X, Annex 535.

1 China only claimed islands south of the Paracels
2 for the first time in 1935, when it prepared a map
3 depicting various insular features in the Spratlys.¹³⁴
4 You can see a copy on the screen.¹³⁵ President Ma
5 refers to this map as "proclaiming sovereignty" over
6 these features "for the first time".¹³⁶

7 China did not make a corresponding claim to the
8 waters of the South China Sea. In that regard, the
9 map's title is significant: "Map of the South China
10 Sea Islands and Maritime Features". Plainly, China's
11 claim was to the islands depicted on the map. There
12 is no indication of any claim to rights of the waters
13 beyond the 3-mile territorial sea then allowed under
14 general international law. This is consistent with
15 China's contemporaneous legal position. As Ambassador
16 Tommy Koh has observed in his academic writing, China
17 advocated a 3-mile territorial sea during the Hague
18 Codification Conference of 1930.¹³⁷

19 In any event, China's claim to the South China Sea

¹³⁴ L. Jinming and L. Dexia, "The Dotted Line on the Chinese Map of the South China Sea: A Note", *Ocean Development & International Law*, Vol. 34, No. 3-4 (2003), p. 289. MP, Vol. VIII, Annex 275.

¹³⁵ Taiwan Authority of China, Ministry of the Interior, *Compilation of Historical Archives on the Southern Territories of the Republic of China*, p. 44 (July 2015). Available at Tab 1.23.

¹³⁶ Authority of China, Ministry of the Interior, *Compilation of Historical Archives on the Southern Territories of the Republic of China*, pp. 7-8 (July 2015).

¹³⁷ Tommy T.B. Koh, "The Origins of the 1982 Convention on the Law of the Sea," *Malaya Law Review*, Vol. 29 (1987), p. 7. Supplemental Documents, Vol. VI, Annex 808.

1 islands was theoretical, not real. As I mentioned,
2 the compilation of archival material published by the
3 Taiwanese authorities references no activities on any
4 islands other than the Paracels and Pratas, and none
5 at all in regard to the waters of the South China Sea.
6 The belated claim to the Spratlys was also
7 inconsistent with the activities undertaken by other
8 states. In 1927 and 1929, France surveyed several
9 Spratly features -- Triton Island, North Reef,
10 Lincoln Reef and Bombay Island¹³⁸ -- and in 1933
11 claimed sovereignty over Spratly Island, Amboyna Cay,
12 Itu Aba, North Danger Reef, Loaita and Thitu.¹³⁹ The
13 British Admiralty surveyed parts of the South China
14 Sea between 1931 and 1938, and in 1937 the HMS Herald
15 surveyed several of the larger Spratly features.¹⁴⁰

16 Further, a 1937 report submitted by the Republic
17 of China's Military Commission to its Ministry of
18 Foreign Affairs raised numerous facts that called into
19 question China's claim to the South China Sea islands,
20 including: that from 1921 to 1928, the Paracels had
21 been "managed by the Japanese"; that Japanese fishing

¹³⁸ Ulises Granados, "As China Meets the Southern Sea Frontier: Ocean Identity in the Making, 1902-1937", *Pacific Affairs*, Vol. 78, No. 3 (2005), p. 451. SWSP, Vol. X, Annex 535.

¹³⁹ Republic of France, Ministry of Foreign Affairs, "Notice relating to the occupation of certain islands by French naval units", *Official Journal of the French Republic* (26 July 1933), at 7837. MP, Vol. VI, Annex 159.

¹⁴⁰ SWSP, para. A13.43.

1 vessels would visit three or four times per month; and
2 that French naval warships were frequently present.¹⁴¹
3 The report also noted that France objected to China's
4 claim to the Paracels.¹⁴² Indeed, by the mid-1930s,
5 Japanese companies were claiming economic rights over
6 the Spratlys.¹⁴³ In 1937, Japan itself occupied part
7 of the Paracels.¹⁴⁴ By 1939, Japan had claimed all the
8 South China Sea features and had incorporated the
9 Spratlys into its jurisdiction.¹⁴⁵

10 Following Japan's defeat during the Second
11 World War, China sought to assert its claim to the
12 South China Sea islands, which, as I mentioned,
13 excepting Pratas and the Paracels, dated to only 1935.
14 But its efforts confirm the lack of China's historical
15 connection to any of those islands, which was so
16 tenuous that most did not even have Chinese names.

17 I refer you to tab 1.24. This is a translation of

¹⁴¹ Republic of China, Republican Government Military Commission, *Letter Regarding the Current Conditions on Xisha Islands and Enhancement of Construction and Management* (31 Aug. 1937), reprinted in *Archival Compilation on South China Sea Islands by Ministry of Foreign Affairs*, Vol. 1, Doc. No. II(1):072 (Republic of China Ministry of Foreign Affairs Research & Planning Committee, ed.) (1995), pp. 370-72. SWSP, Vol. VIII, Annex 477.

¹⁴² *Id.*, p. 372.

¹⁴³ See Ulises Granados, "As China Meets the Southern Sea Frontier: Ocean Identity in the Making, 1902-1937", *Pacific Affairs*, Vol. 78, No. 3 (2005), p. 450. SWSP, Vol. X, Annex 535.

¹⁴⁴ *Id.*, p. 459.

¹⁴⁵ *Note Verbale* from the Embassy of Japan in Washington to the United States Department of State (31 Mar. 1939), in *Papers relating to the Foreign Relations of the United States, Japan: 1931-1941*, Vol. 2 (1943), pp. 278-80. MP, Vol. VI, Annex 172.

1 a memorandum dated 1st October 1946 from the Republic
2 of China's Ministry of Foreign Affairs to its Ministry
3 of the Interior.¹⁴⁶ It includes the minutes of
4 a meeting of representatives from the Ministries of
5 Foreign Affairs, National Defence, and Interior, and
6 the military. The discussion concerned the "takeover
7 of South China Sea islands", including "how to name
8 the islands, reefs and beaches after takeover".¹⁴⁷
9 They decided that:

10 "The names of South China Sea islands, reefs and
11 beaches shall follow the western-translated names for
12 the time being ..."

13 And that:

14 "After takeover, [the Interior] Ministry shall
15 rename the islands and announce them for public
16 knowledge."¹⁴⁸

17 Tab 1.25 reproduces the table of South China Sea
18 features that resulted from this decision,¹⁴⁹ annotated

¹⁴⁶ *Letter from the Ministry of Foreign Affairs of the Republic of China to the Ministry of the Interior of the Republic of China (1 Oct. 1946), reprinted in Archival Compilation on South China Sea Islands by Ministry of Foreign Affairs, Vol. 2, Doc. No. III(1):008 (Republic of China Ministry of Foreign Affairs Research & Planning Committee, ed.) (1995), p. 764. SWSP, Vol. VIII, Annex 480.*

¹⁴⁷ *Id.*, p. 766.

¹⁴⁸ *Id.*, p. 767.

¹⁴⁹ *See Letter from Ministry of the Interior of the Republic of China to the Ministry of Foreign Affairs of the Republic of China (9 Oct. 1946), reprinted in Archival Compilation on South China Sea Islands by Ministry of Foreign Affairs, Vol. 2, Doc. No. III(1):009 (Republic of China Ministry of Foreign Affairs Research & Planning Committee, ed.) (1995), pp. 772-75. SWSP, Vol. III, Annex 351.*

1 to provide translations and transliterations of the
2 relevant parts. As you can see, a large number of
3 features are listed. The right-hand column provides
4 the name in English. The middle column gives what it
5 calls the "old name" in Chinese.

6 Only 14 features had an old Chinese name. For
7 most of the 14, the old Chinese name was actually
8 a transliteration of the name in English. And when it
9 came to bestowing "new names", a great many were given
10 transliterated or translated English names. Lord
11 Auckland Shoal was thus "*Ao ke lan sha*", and Mischief
12 Reef "*Mi-qi fu*". Gaven Reef was "*Ge wen*", and Amy
13 Douglas Reef "*A mi de ge la*". This raises an obvious
14 problem: on what basis does China purport to claim
15 historic rights for an area over which it had so
16 little involvement or connection that most of the
17 features had no Chinese names?

18 In fact China was fully aware that its new-found
19 claim to the South China Sea islands lacked historical
20 foundation. On 7th February 1947, the Ministry of
21 Foreign Affairs reported that researchers had been:

22 "... dispatched to various libraries to look up
23 the annals, books, and maps for records which indicate
24 that the Xisha Islands [or Paracels] belong to the
25 Republic of China."

26 **THE PRESIDENT:** Mr Loewenstein, are you planning to stop

1 somewhere in the middle?

2 **MR LOEWENSTEIN:** If you would prefer me to do, I would be
3 more than happy to.

4 **THE PRESIDENT:** You can continue tomorrow. But is it
5 a convenient time for you to break off?

6 **MR LOEWENSTEIN:** Perhaps in just one moment, once
7 I complete this thought, and then I would be more than
8 happy to break. That would be okay.

9 The Chinese researchers also researched the
10 archives of:

11 "... the Department of Education of the National
12 Central Library and the University of Nanking to
13 consult the (1) Guangdong General Gazetteer, (2)
14 Compilation of Ancient and Modern Books, (3) Annals of
15 the Unified Qing Dynasty, (4) Illustrated Book on
16 Guangdong, [and] (5) Governmental Gazetteer of
17 Qiongzhou Province."

18 The researchers turned up nothing. The ministry
19 reported that:

20 "All records and maps about national territory
21 suggested that the country extended to Qiongzhou
22 Island [or Hainan] in the south."¹⁵⁰

¹⁵⁰ *Telegram from Special Agent Office of the Ministry Foreign Affairs of the Republic of China in Pingjin to the Ministry of Foreign Affairs of the Republic of China (7 Feb. 1947), reprinted in Archival Compilation on South China Sea Islands by Ministry of Foreign Affairs, Vol. 1, Doc. No. II(2):248 (Republic of China Ministry of Foreign Affairs Research & Planning Committee, ed.) (1995), p. 514. SWSP, Vol. VIII, Annex 484.*

1 I would not like to answer it myself. But you may
2 perhaps consider it overnight. Thank you.

3 **MR LOEWENSTEIN:** Thank you very much, Judge Wolfrum. We
4 will be pleased to address that question tomorrow.

5 **THE PRESIDENT:** Judge Pawlak wants to ask a question too;
6 it being understood, of course, that the answer will
7 be given tomorrow.

8 **JUDGE PAWLAK:** You mentioned that China, after the Second
9 World War, was taking over, after Japanese occupation
10 of the area of South China Sea features, the whole
11 area. Do you have any documents to prove that? Is
12 there a protocol of that? Is there any document which
13 you can put that China took over? On what basis? The
14 Cairo Declaration or the Potsdam Proclamation, or the
15 other agreements with the Allied Forces and Commanders
16 of the South Pacific? So I would like to know on what
17 basis you say China took over. Thank you.

18 **MR LOEWENSTEIN:** Thank you very much. I will be pleased
19 to address that question as well tomorrow morning.

20 **THE PRESIDENT:** I'm sorry, but Judge Cot also wants to
21 ask a question.

22 **JUDGE COT:** My question is rather a factual one, and I'm
23 not sure that you are the one to answer or somebody
24 else, but I would like to put it.

25 I would like to know what the present situation is
26 in the Spratlys. As I understand it, the Taiwan

1 authorities were mainly concerned in particular with
2 the main island, Itu Aba, and were there until the
3 late 1990s. Where do we stand now? What is the
4 present situation in terms of occupation of the
5 Spratlys? That would be an interesting question. But
6 naturally not right away.

7 **MR LOEWENSTEIN:** Yes. That will be addressed in
8 a subsequent presentation.

9 **THE PRESIDENT:** Thank you very much. I think you now
10 have all the questions, and we will leave it to you to
11 determine when and how they should be answered.

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

13 **(5.35 pm)**

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