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

PCA Case No. 2013-19

Permanent Court of Arbitration
Peace Palace
The Hague
The Netherlands

Day 2 Wednesday, 8th July 2015

Hearing on Jurisdiction and Admissibility

Before:

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

BETWEEN:

THE REPUBLIC OF THE PHILIPPINES

-and-

THE PEOPLE'S REPUBLIC OF CHINA

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

The People's Republic of China was not represented.

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Participants may not have been present for the entire hearing.

INDEX

Wednesday, 8th July 2015

(10.01 am)

THE PRESIDENT: Good morning. Professor Sands, we were expecting to hear from Professor Oxman.

Response to Tribunal questions by PROFESSOR SANDS

PROFESSOR SANDS: Thank you sir. It's really just to show that we want to be responsive to the questions that you raised yesterday. I am going to take just a very short period just to respond to the two questions from Judge Wolfrum yesterday. I am very pleased to be able to do so. Good morning to all of you.

Judge Wolfrum, your first question related to the first submission of the Philippines, and I am just going to quote the relevant part of it:

"Now, you have made the argument that you can deal with these maritime features -- islands, rocks, whatever -- without touching upon the question of sovereignty. I have listened very carefully to that. But in the moment I would like you perhaps to address the question whether it is not a matter of logic under your first submission to first establish whether China's maritime entitlements go beyond, and only then come to what you are talking about at the moment.

"I hope I made myself clear."

You did indeed, sir, make yourself clear, and the answer on the part of the Philippines to your question, in simple terms, is: yes, it is indeed a matter of logic to proceed in that way. And if I may, I will very briefly elaborate.

We do agree that logically the first step in the task in which you are invited to engage would be to determine whether the provisions set forth in UNCLOS provide an exclusive basis for determining the maritime entitlements of the states parties. And in our submission, they do, with the consequence that entitlements to maritime areas under international law must be grounded in the rules of the Convention.

It follows from this that there can be no basis other than the Convention for claiming sovereign rights or jurisdiction over any other maritime area. So in this regard, we say it's of seminal importance that the Convention makes no reference to, and does not otherwise recognise, the concept of a "historic rights" basis for the exercise of sovereign rights or jurisdiction.

This first step logically comes before the second step, which would indeed then be to determine whether particular maritime features are islands, rocks or low-tide elevations, so as to determine whether they

give rise to entitlements in a specified maritime area.

Neither the first step nor the second step require the Tribunal to determine which state is sovereign over any such insular feature. And for the purposes of this case, we say that this Tribunal has jurisdiction to engage in both steps: this Tribunal has jurisdiction to determine both that there can be no entitlements beyond the limits established by the Convention, and it has jurisdiction to determine the characterisation of certain features for the purpose of determining maritime entitlements, if any.

Finally, just to be clear -- and as I explained yesterday -- the question of which state has sovereignty over a particular insular feature is, firstly, not raised by the Philippines in these proceedings; and, secondly, is entirely irrelevant to the characterisation of the feature or the entitlements it may have. Such matters, we say, fall to be determined by this Tribunal exclusively by interpretation and application of Articles 13 and 121, and other relevant provisions of the Convention.

So, in short, all of these matters fall within your jurisdiction, and there is no bar to the exercise of that jurisdiction.

In relation, sir, to your second question --

a most astute historical question, if we may say -- Presidential Decree 1956, which I will refer to as PD 1956, was enacted on 11th June 1978; that is before UNCLOS was adopted, and also six years before the Philippines' ratification of the Convention on 8th May 1984.

Under Philippine law, as a treaty lawfully entered into by the Philippines, UNCLOS is part of internal law, and it has the same status as national legislation.[1] And that means, to the extent that PD 1956 might be consistent with UNCLOS, PD 1956 is to be treated as having been effectively repealed by the Philippines' subsequent ratification of UNCLOS, under the principle of *lex posteriori derogat priori*.[2]

The Philippines has, however, also enacted domestic legislation in conformity with UNCLOS. On May 10th 2009, the Philippine Congress enacted Republic Act No. 9522, and that defined the archipelagic baselines in conformity with UNCLOS and other purposes. Among these other purposes is the characterisation of the Kalayaan Island Group, as constituted under Presidential Decree No. 1956, in conformity with Article 121 of UNCLOS.

The Philippines Supreme Court has affirmed the

[1] *Abbas v Commission on Elections*, G.R. No. 89651, 10 November 1989.

[2] *Id.*

constitutionality of RA 9522 in its 2011 judgment in the case of *Magallona v Ermita*.[3] The Supreme Court ruled in that case that the Philippine Congress's decision to classify the Kalayaan Island Group as a regime of islands under the Republic of the Philippines consistent with Article 121 of UNCLOS:

"... manifests the Philippine State's responsible observance of its *pacta sunt servanda* obligation under UNCLOS ..."

In other words, the Kalayaan Island Group, as constituted under PD 1956, has been classified by the Philippines as a regime of islands under Article 121 of UNCLOS. And in relation to your question, Mischief Reef falls within the Kalayaan Island Group.

Finally, just to be complete, Section 8 of Republic Act 9522 provides that:

"... all other laws, decrees, executive orders, rules and issuances inconsistent with this Act are hereby amended or modified accordingly."

In this way, therefore, PD 1956 is to be treated as having been amended by Republic Act 9522 to bring it into conformity with the 1982 Convention, to the extent that there is a conflict with it. And in that regard, to be clear, in conformity with Article 13 of UNCLOS, the Philippines regards Mischief Reef as

[3] *Magallona v Ermita*, G.R No. 187167, 16 August 2011.

a low-tide elevation.

For these reasons, the Philippines' submission that certain features in Spratly Islands are to be defined and characterised by reference to the 1982 Convention is fully consistent with current national law of the Philippines, which has long superseded the approach that was formally reflected in PD 1956. But we are very grateful to you for having raised that point, so that we can clarify. And for the convenience of the Tribunal, we will make available to the registrar later this afternoon copies of PD 1956, RA 9522, and the judgment of the Philippines Supreme Court in *Magallona v Ermita*.

On that note, I can end, Mr President, and invite you to invite my friend and colleague Mr Martin to the bar.

THE PRESIDENT: Thank you very much indeed. Did you say we should ask Mr Martin?

PROFESSOR SANDS: Yes, Mr Larry Martin of Foley Hoag in Washington; that Mr Martin.

THE PRESIDENT: Mr Martin, please.

(10.10 am)

First-round submissions by MR MARTIN

MR MARTIN: Thank you, Mr President, members of the Tribunal. Good morning. It is a true privilege for

me to appear before you this morning, and it is a special honour to do so on behalf of the Republic of the Philippines in a case of such exceptional importance.

My task this morning is to demonstrate that nothing in Articles 281, 282 or 283 of the Convention bars the Tribunal's jurisdiction over the Philippines' claims. In the course of my comments, I will address the issues the Tribunal raised in its 23rd June letter regarding these articles.

I will begin by showing that there is no legally binding agreement between the parties within the scope of Article 281 that prevents the Tribunal from exercising jurisdiction. After that, I will demonstrate that there is no agreement between the parties to submit their dispute to "a procedure that entails a binding decision" within the meaning of Article 282.

Finally, I will explain that the Philippines has more than met its obligation to exchange views with China under Article 283.

In regard to Article 281, China argues in its December 2014 Position Paper that:

"There exists an agreement between China and the Philippines to settle their disputes in the South China Sea through negotiations, and the Philippines is

debarred from unilaterally initiating compulsory arbitration."[4]

In China's view, this supposed agreement is reflected primarily, though not exclusively, in the 2002 Declaration of Conduct in the South China Sea. China's attempt to invoke the 2002 DOC fails in the first instance because that document does not, as China contends, constitute an agreement within the meaning of Article 281.

The text of Article 281, paragraph (1), which is in your folders at tab 2.1, provides:

"If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part ..."

That is Part XV:

"... apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure."

Before I go any further, Mr President, there is one aspect of China's attempt to rely on Article 281

[4] 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"), § III. SWSP, Vol. VIII, Annex 467.

that I think deserves the Tribunal's attention. In particular, by invoking Article 281 China implicitly -- but necessarily -- admits that the issues in this case constitute disputes concerning the interpretation or application of the Convention.

In order for Article 281 to bar jurisdiction, the parties must have agreed to seek settlement of the dispute -- that is, the "dispute concerning the interpretation or application of the Convention" -- by peaceful means of their own choice. If there is no dispute under the Convention, Article 281 does not apply. Thus, China's own argument turns on the premise that the issues before you constitute a dispute concerning the interpretation or application of the Convention.

In any event, Article 281 does not bar jurisdiction, because the DOC is not a legally binding agreement to settle disputes in any particular way. To the contrary, it is a political document only, a fact that China itself has admitted on numerous occasions.

In its 23rd June questions, the Tribunal asked about the applicable standards for determining the existence of a binding agreement under Article 281. In our view, that question must be answered by reference to the instrument's text, as well as the

circumstances of its adoption.[5] In this case, neither the text nor the history of the DOC suggest that it is -- or that it was intended to be -- legally binding.

A simple reading of the plain text -- which is in your folders at tab 2.2 -- compels the conclusion that the DOC was not intended to -- and does not -- create any legal rights or obligations. It is replete with aspirational and hortatory language. It bears no marks or language indicative of a binding agreement. It is notable that the substantive paragraphs are framed as something the parties "declare" rather than "agree". Moreover, they "reaffirm" their commitments to various goals, and express their "commitment" to various objectives. These are not the words of a legally binding agreement.

It is true that no special words are needed to create a legal obligation. Nevertheless, if the signatories intended to create legally binding obligations, that intention would come through clearly in the terms used. It does not. The failure to use more definitive language reflects the intent not to be

[5] *See Greece v Turkey*, p. 39, para. 96. MP, Vol. XI, Annex LA-9; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1994, p. 112, para. 27. MP, Vol. XI, Annex LA-21; *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012*, ITLOS Reports 2012, paras. 89, 93. MP, Vol. XI, Annex LA-43.

legally bound.

The history of the DOC further confirms that it is a political document, rather than a legally binding agreement to settle disputes in any particular way. The participating states were attempting to reach agreement on a legally binding code of conduct, but were unable to reach that goal. They settled instead for a more aspirational document. This fact is confirmed in paragraph 10 of the DOC, which specifically envisions the subsequent adoption of a legally binding code of conduct. The DOC was in effect a political stopgap measure, designed to help reduce tensions pending the yet-to-be-agreed code of conduct.

Lest there be any remaining doubt -- and we don't think there should be -- the statements of the signatory states, including China itself, conclusively dispel it. At tab 2.3 of your judges' folders, you will find a statement from China's Ministry of Foreign Affairs dating to 2000, two years before the conclusion of the DOC. In it, China made it clear that the instrument then under negotiation "will be a political document" -- a political document -- "instead of a legal document to solve specific

disputes".[6]

At tab 2.4 of your folders is another statement made ten years later, eight years after the DOC was signed. At the 16th ASEAN-China submit, the then Vice Premier of China's State Council characterised the DOC as "an important *political* agreement".[7]

And at tab 2.5 of your folders you will find a statement from July 2012, just six months before the Philippines filed this arbitration. In it, China's Ambassador to ASEAN again underscored his country's view that the DOC is "not [a] dispute settlement mechanism".[8] That is exactly the opposite of what China now contends.

The Philippines, for its part, has always agreed that the DOC is a non-binding political document. In a 2010 article, which you can find at tab 2.6 of your folders, the former Philippine Undersecretary of Foreign Affairs, who was ASEAN Secretary-General at the time the DOC was adopted, explained that the document was "reduced to a political declaration from

[6] Ministry of Foreign Affairs of the People's Republic of China, "Spokesperson's Comment on China-Asean Consultation" (30 Aug. 2000), p.1. SWSP, Vol. VIII, Annex 491.

[7] Ministry of Foreign Affairs of the People's Republic of China, *Remarks by H. E. Li Keqiang, Premier of the State Council of the People's Republic of China, at the 16th ASEAN-China Summit* (16 Oct. 2013), p. 2. MP, Vol. V, Annex 128 (emphasis added).

[8] "'We should find our own solutions'", *New Straits Times* (26 May 2012), p. 2. SWSP, Vol. XI, Annex 563.

the original envisioned legally binding 'code of conduct'".[9]

Also, the Meeting Report on the Third Meeting of the Working Group of ASEAN-China Senior Officials on the Code of Conduct, which is dated October 2000 and can be found at tab 2.7 of your folders, indicates that the parties were aware that they were developing "a political and not legal document [which] is not aimed at resolving disputes in the area".[10]

China cannot now be heard to contradict itself and claim the DOC is a legally binding agreement to settle disputes in any particular way, let alone one that operates to bar this Tribunal's jurisdiction.

Apart from the dispositive fact that the DOC is not a legally binding agreement, Article 281 does not bar jurisdiction because the DOC "does not exclude any further procedure" as that article would require.

In its December 2014 Position Paper, China argued that the DOC "obviously ha[s] ... the effect of excluding any means of third-party settlement".[11] Calling something "obvious", Mr President, does not

[9] Rodolfo Severino, "ASEAN and the South China Sea", *Security Challenges*, Vol. 6, No. 2 (2010), p. 45. MP, Vol. IX, Annex 293.

[10] Association of Southeast Asian Nations, *Report of the Third Meeting of the Working Group of ASEAN-China Senior Official Consultations on the Code of Conduct in the South China Sea* (11 Oct. 2000), para. 3.SWSP, Vol. VIII, Annex 498.

[11] China's Position Paper, para. 40. SWSP, Vol. VIII, Annex 467.

make it true. And, frankly speaking, we can see nothing in the terms of the DOC that even remotely, let alone obviously, appears to exclude third-party dispute settlement.

Paragraph 4 of the DOC specifically says that it should be read consistently with the Convention. This necessarily incorporates Part XV, which has been called "the pivot upon which the delicate equilibrium of the [Convention] must be balanced".[12] Indeed, paragraph 4 is not the only place the Convention is mentioned. To the contrary, the DOC repeatedly refers to it, including at paragraph 1 and also at paragraph 3.

In its 23rd June questions, the Tribunal asked the applicable standards for determining whether an agreement "exclude[s] any further procedure" under Article 281. In our view, the intent to exclude further procedures under UNCLOS must be evident from the terms of the agreement itself. This is consistent with the position stated in the *Virginia Commentary*, the relevant excerpt of which is included in your folders at tab 2.8. It states that for an agreement to fall within the scope of Article 281, it must:

"... specify that th[e] procedure shall be

[12] UN Conference on the Law of the Sea III, *Memorandum by the President of the Conference on document A/CONF.62/WP.9*, UN Doc. A/CONF.62/WP.9/ADD.1 (31 Mar. 1976), p. 122. MP, Vol. XI, Annex LA-106.

an exclusive one and that no other procedures (including those under Part XV) may be resorted to even if the chosen procedure should not lead to a settlement."[13]

There is nothing in the DOC that even comes close to meeting that requirement. China's Position Paper does not identify anything, because there isn't anything. In fact, paragraph 4 of the DOC actually incorporates -- not excludes -- the dispute resolution provisions of UNCLOS. It states that the participating states:

"... undertake to resolve their ... disputes by peaceful means ... in accordance with universally recognized principles of international law, including the 1982 Convention on the Law of the Sea."[14]

Left with nothing to support its argument in the text of the DOC, China's Position Paper is reduced to citing the award of the arbitral tribunal in the *Southern Bluefin Tuna* case for the proposition that the "absence of an express exclusion of any procedure ... is not decisive".[15]

The Philippines has shown in both its Memorial and

[13] *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 5 (M. Nordquist, et. al., eds., 2002), para. 281.5. MP, Vol. XI, Annex LA-148.

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

[15] China's Position Paper, para. 40. SWSP, Vol. VIII, Annex 467.

in its Supplemental Written Submission why that case is of no help to China. On this point, I think I can be mercifully brief by summarising the key points.

First, the Annex VII Tribunal's reasoning was inconsistent with ITLOS's reasoning in the same case. In its order on provisional measures, ITLOS took the view that Article 16 of the 1993 Convention for the Conservation of the Southern Bluefin Tuna, which Japan argued constituted an agreement excluding dispute settlement procedures under Part XV, did not exclude such procedures.[16]

Second, Judge Keith's forceful dissent from the majority's decision has better stood the test of time. It has been favoured in subsequent jurisprudence and academic commentary. Judge Keith emphasised that since Article 16 "does not say that disputes ... must not be referred to any tribunal or other third party for settlement", it did not operate to exclude dispute resolution.[17]

Because the DOC is not a binding agreement, and

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[16] *See Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan), Provisional Measures, Order of 27 August 1999*, ITLOS Reports 1999, para. 55. MP, Vol. XI, Annex LA-37 ("*Considering* that, in the view of the Tribunal, the fact that the Convention of 1993 applies between the parties does not preclude recourse to the procedures in Part XV, section 2, of the Convention on the Law of the Sea".).

[17] *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan)*, Award on Jurisdiction and Admissibility, Separate Opinion of Justice Sir Kenneth Keith, UNCLOS Annex VII Tribunal (4 Aug. 2000), para. 13. MP, Vol. XI, Annex LA-51.

does not "exclude any further procedure", Article 281 does not bar this Tribunal from exercising jurisdiction.

In its Memorial, the Philippines argued that even if the DOC were a binding agreement within the meaning of Article 281 (*quod non*), and even if it purported to exclude further procedures (also *quod non*), China still could not rely on it to avoid jurisdiction due to its own conduct in flagrant disregard of the undertakings it made in the DOC. In particular, the Philippines cited to China's expulsion of Philippine fishermen from Scarborough Shoal and its assumption of *de facto* control over Second Thomas Shoal as examples of China's violations of the DOC.[18] To these now can be added the far more grave violations represented by China's large-scale land reclamations on all of the features it occupies in the Spratly Islands.

The Philippines first brought these facts to the Tribunal's attention in July 2014 in a letter from then-agent, and current Supreme Court Justice, Francis Jardeleza.[19] That letter is reproduced in your folder at tab 2.9. It contains images of land reclamation activities at four features from spring

[18] Memorial, paras. 6.228-6.229.

[19] *Letter* from Francis H. Jardeleza, Solicitor General of the Republic of the Philippines, to Judith Levine, Registrar, Permanent Court of Arbitration (30 July 2014). SWSP, Vol. VIII, Annex 466.

2014: McKennan (Hughes) Reef, Johnson Reef, Gaven Reef and Cuarteron Reef. Projected on the screen is an image from the Philippines' June 2014 letter showing the status of China's land reclamation activities on Gaven Reef as of 6th March 2014.[20]

Since then, China has expanded and accelerated its land reclamation activities. At tab 2.10 of your folders, and projected on the screen, you can see an example of the progress that has been made at Gaven Reef. This image is dated 4th October 2014. The change in just seven months is extraordinary.

Just three weeks ago, China announced that it had nearly completed its large-scale reclamation project, and that it is preparing to "start the building of facilities" on the artificially constructed features.[21]

Mr President, I have no wish to burden the Tribunal on this issue. Members of the Tribunal may have read about China's activities in the international press. The key point here now is that China's vast land reclamation campaign is flagrantly inconsistent with the DOC.

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[20] *Id*.

[21] Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Lu Kang's Remarks on Issues Relating to China's Construction Activities on the Nansha Islands and Reefs* (16 June 2015), *available at* http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1273370.shtml.

Paragraph 5 of the DOC provides, in pertinent part:

"The Parties undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including among others, refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features and to handle their differences in constructive manner."[22]

The signatories thus expressly undertook to refrain "from action of inhabiting on the presently uninhabited" features. Although many of the features where China is conducting land reclamation activities previously housed small concrete structures, the current land reclamation activities have taken place on previously unoccupied parts of those features.

China's actions are also flagrantly inconsistent with its undertaking "to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability" in the region. Whatever else may be said about what China is doing, it is plainly not acting with self-restraint. Its conduct seriously complicates and escalates the disputes in the region, and constitutes

[22] Association of Southeast Asian Nations, *Declaration on the Conduct of Parties in South China Sea* (4 Nov. 2002), para. 5. MP, Vol. V, Annex 144.

a direct threat to peace and stability.

This distinguished Tribunal does not need me to tell it that it is a general principle of law that "a party which ... does not fulfil its own obligations cannot be recognized as retaining the rights which it claims to derive from the relationship".[23] China is hardly well placed to invoke the DOC as a basis on which to avoid this Tribunal's jurisdiction.

In addition to the DOC, China cites other instruments as precluding jurisdiction under Article 281. None of them does. China mentions in particular the Treaty of Amity and Cooperation,[24] which is in your folders at tab 2.11. Unlike the DOC, the treaty is a legally binding agreement to which both the Philippines and China are parties.

But the Treaty of Amity and Cooperation does not constitute an agreement to settle disputes in any particular manner. Articles 13 through 16 of the treaty identify the various means of settling disputes.[25] Article 13 refers to "friendly

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[23] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p. 46, para. 91. MP, Vol. XI, Annex LA-6.

[24] China's Position Paper, para. 54. SWSP, Vol. VIII, Annex 467 (citing Treaty of Amity and Cooperation in Southeast Asia, 1025 UNTS 319 (24 Feb. 1976), entered into force 15 July 1976 (hereinafter "Treaty of Amity and Cooperation"). SWSP, Vol. XII, Annex LA-185).

[25] Treaty of Amity and Cooperation, Arts. 13-16. SWSP, Vol. XII, Annex LA-185.

negotiations". Articles 14 through 16 refer to a certain set of procedures by which a high council, comprised of ministerial representatives from the parties, will "recommend" certain non-adversarial means of dispute resolution, but only if the disputing states agree.

Article 17 of the treaty then provides:

"Nothing in this Treaty ..."

Nothing in this treaty:

"... shall preclude recourse to the modes of peaceful settlement contained in Article 33(1) of the Charter of the United Nations. The High Contracting Parties which are parties to a dispute should be encouraged ..."

Encouraged:

"... to take initiatives to solve it by friendly negotiations before resorting to the other procedures provided for in the Charter of the United Nations."[26]

This language plainly cannot be read to mean that the parties have entered into a binding agreement to resolve their dispute by negotiation to the exclusion of other means. To the contrary, it makes it crystal-clear that the treaty does not "preclude recourse to the modes of peaceful settlement contained in Article 33(1) of the Charter", which of course

[26] *Id.*, Art. 17.

include arbitration.

In addition to the DOC and the Treaty of Amity and Cooperation, China's Position Paper also cites a number of bilateral statements that it says support the conclusion that the parties agreed to settle their disputes through consultation and negotiations to the exclusion of other means. None of these statements, whether taken individually or collectively, can be taken as a binding legal agreement to exclude other procedures.

Joint statements, like the ones China cites, are commonplace in international practice. They are at most aspirational and political in nature. No doubt states the world over, including states in this room, would be dismayed to learn that such statements give rise to binding legal obligations. In any event, there is absolutely nothing in the any of the statements China cites that even arguably purports to exclude compulsory procedures entailing a binding decision. Article 281 therefore does not apply to them.

Before concluding on the subject of Article 281, Mr President, I should just say that my friend Professor Boyle will be dealing with the interplay between that article and the Convention on Biological Diversity later today.

That brings me then to Article 282. Article 282 also does not prevent the Tribunal from exercising jurisdiction. Article 282 -- the text of which you can find at tab 2.12 of your folders -- provides in relevant part:

"If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed ... that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part ..."

Again, that's Part XV.

The Tribunal asked in its 23rd June questions about the applicable standard for determining whether an agreement provides "a procedure that entails a binding decision" within the meaning of Article 282. We say the only possible answer to this question is that the agreement must make express provision for a compulsory procedure that entails a binding decision. Such procedures can never be implied.

Here, there is no such express provision. Neither the DOC nor the Treaty of Amity and Cooperation, nor any other instrument for that matter, provides for "a procedure that entails a binding decision" such that Article 282 would have "that procedure ... apply

in lieu of the[se] proceedings". And even if it were conceptually possible, such an exclusive procedure could not even remotely be implied from these instruments. To the contrary, both the DOC and the Treaty of Amity specifically endorse the means of peaceful dispute resolution identified in Article 33(1) of the UN Charter.[27] There is absolutely nothing that could preclude arbitration proceedings under Part XV.

Mr President, I do not think I need to belabour this particular point any further. There is simply nothing in any of these documents that provides for compulsory procedures leading to a binding decision; and, not coincidentally, China's Position Paper makes no argument that there is.

Here again, Professor Boyle will deal with the interplay between Article 282 and the Convention on Biological Diversity later today.

That brings me then to my third and final subject for the day, Article 283, and whether or not the Philippines has met the requirement to exchange views with China. For the reasons I will now explain, the answer is "yes".

[27] *See* Association of Southeast Asian Nations, *Declaration on the Conduct of Parties in South China Sea* (4 Nov. 2002), para. 1. MP, Vol. V, Annex 144; Treaty of Amity and Cooperation, Art. 17. SWSP, Vol. XII, Annex LA-185.

At the outset, I should observe that the requirement in Article 283 is not a requirement to negotiate as such. Rather, it is only an obligation to exchange views. Moreover, the obligation has always been understood to impose a modest burden on disputing states. In the *Land Reclamation* case, for example, ITLOS found that the obligation to exchange views had been satisfied by Malaysia's mere transmission of diplomatic notes in which it (1) informed Singapore of its concerns about Singapore's activities, and (2) requested a meeting of senior officials of the two states, though that meeting never took place.[28]

In its 23rd June questions, the Tribunal asked whether Article 283 imposes an obligation to exchange views concerning the substance of the parties' dispute, the means by which the dispute will be settled, or both.

If I may say so, Mr President, this is a fascinating legal question. Prior to the award in the *Chagos Islands* case, we might have answered that Article 283 requires an exchange of views on the substance of the dispute. This could be inferred from

[28] *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore), Provisional Measures, Order of 8 October 2003*, ITLOS Reports 2003, para. 39. MP, Vol. XI, Annex LA-41. *See also id.*, para. 51.

the prior jurisprudence in which ITLOS and Annex VII tribunals found the article satisfied by virtue of the parties' exchanges of views on the substance of the dispute. Specific cases are cited in footnote to the speech.[29]

In the *Chagos* case, however, a very distinguished Annex VII tribunal unanimously determined that Article 283 "requires that the Parties engage in some exchange of views regarding the means to settle the dispute".[30] It based its decision on the unique wording of Article 283, which requires an "exchange of views regarding [the dispute's] settlement by negotiation or other peaceful means". The Philippines does not take issue with that interpretation of Article 283. The fact is, whether Article 283 requires an exchange of views on the means by which the dispute will be settled, the substance of the dispute, or both, the Philippines has met those requirements in this case.

With respect to the exchange of views on "the

[29] *See Arctic Sunrise Case (Kingdom of the Netherlands v Russian Federation), Provisional Measures, Order of 22 November 2013*, ITLOS Reports 2013, para. 74. MP, Vol. XI, Annex LA-45; *The M/V "Louisa" Case (Saint Vincent and the Grenadines v Kingdom of Spain), Provisional Measures, Order of 23 December 2010*, ITLOS Reports 2010, para. 60. MP, Vol. XI, Annex LA-42; *The MOX Plant Case (Ireland v United Kingdom), Provisional Measures, Order of 3 December 2001*, ITLOS Reports 2001, paras. 58-60. MP, Vol. XI, Annex LA-39.

[30] *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*, UNCLOS Annex VII Tribunal, Award (18 Mar. 2015) (hereinafter "*Chagos MPA Arbitration*"), para. 383.

means to settle the dispute", the Honourable Foreign Secretary in his comments yesterday already pointed to two exchanges in 1995 and 1998 that by themselves show this requirement to have been satisfied. The 1998 joint communiqué he cited, for example -- which you can find at tab 2.13 of your folders -- states:

"The two sides exchanged views ..."

Exchanged views:

"... on the question of the South China Sea and reaffirmed their commitment that the relevant disputes shall be settled ..."

The relevant disputes shall be settled:

"... peacefully in accordance with established principle of international law, including the United Nations Convention on the Law of the Sea."[31]

Mr President, I think it is fair to say that it would be hard to imagine a piece of evidence that more clearly shows that an exchange of views on the means to settle the dispute has taken place.

I would also bring your attention to the portion of China's December 2014 Position Paper relating to the parties' supposed agreement to settle disputes in the South China Sea through negotiations. Viewed

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

against the backdrop of the *Chagos* tribunal's interpretation of Article 283, it reads like one long admission that the obligation to exchange views on the means to settle the dispute has been satisfied. China views a series of bilateral statements, as well as the DOC and the Treaty on Amity and Cooperation, and concludes:

"... with regard to all the disputes between China and the Philippines in the South China Sea, including the Philippines' claims in this arbitration, the only means of settlement as agreed between the two sides is negotiations ..."[32]

The Philippines, of course, disputes the existence of any agreement as such. Yet China's assertion that there is such an agreement can only mean that there has been an exchange of views on what it calls the "means of settlement" for these disputes, including those submitted by the Philippines in this case.

In regard to the substance of their disputes, the record shows that the parties exchanged views on numerous occasions over many years. This is all reflected in the Memorial, the citations to which are provided in footnote. I will summarise briefly:

-- The parties have exchanged views regarding the legality of China's claim of "historic rights" in the

[32] China's Position Paper, para. 41. SWSP, Vol. VIII, Annex 467.

South China Sea, beyond the limits of its entitlements under UNCLOS, as reflected in China's nine-dash line;[33]

-- They have exchanged views regarding their maritime entitlements generated by the insular features in the South China Sea, including both Scarborough Shoal and the Spratly Islands;[34]

[33] *See, e.g., 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), pp. 2-4. MP, Vol. VI, Annex 200 (protesting China's claim made in its 7 May 2009 *notes verbales* that "sovereignty and jurisdiction over the waters around or adjacent to each" feature in the South China Sea must be "as provided for under the" Convention and that waters to which China could make a claim would be "determinable under UNCLOS, specifically under Article 121"); *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). MP, Vol. VI, Annex 201 (rejecting the contents of Annex 200 as "totally unacceptable" and asserting "indisputable sovereignty over the islands of the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof" and that "China's Nansha [Spratly] Islands are fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf"); *Memorandum* from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-070-2014-S (7 Mar. 2014), p. 2 MP, Vol. IV, Annex 98 (same).

[34] *See, e.g., Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 983577 (5 Nov. 1998), p. 2. MP, Vol. VI, Annex 185 (asserting that Mischief Reef is "a geographic feature that is permanently submerged under water"); *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 110885 (4 Apr. 2011), p. 2. MP, Vol. VI, Annex 199 (asserting that at "any relevant geological feature" in the Spratlys is entitled to "12 M territorial waters"); *Note Verbale* from the Department of Foreign Affairs of the Philippines to the Embassy of the People's Republic of China in Manila, No. 12-1030 (15 Apr. 2012). MP, Vol. VI, Annex 206 (indicating that Scarborough Shoal does not generate an EEZ); *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 12-1137 (26 Apr. 2012). MP, Vol. VI, Annex 207 (indicating that Scarborough Shoal does not generate an EEZ); *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 13-1585 (9 May 2013). MP, Vol. VI, Annex 217 (Second Thomas Shoal is "part of the seabed," *i.e.*, a low-tide elevation); *Note Verbale* from the Department of Foreign Affairs of the Philippines to the Embassy of the People's Republic of China in Manila, No. 14-0711 (11 Mar. 2014). MP, Vol. VI, Annex 221 (asserting "there are no insular features claimed by China in the South China Sea capable of generating any potential entitlement in the area where [Second Thomas

-- They have exchanged views on the Philippines' claims that China has unlawfully interfered with the Philippines' enjoyment of its sovereign rights and jurisdiction in its EEZ and continental shelf;[35]

-- They have exchanged views on China's actions to prevent Philippine fishermen from pursuing their traditional livelihood around Scarborough Shoal;[36]

Shoal] is located"); Government of the Republic of the Philippines and Government of the People's Republic of China, *Agreed Minutes on the First Philippines-China Bilateral Consultations on the South China Sea Issue* (10 Aug. 1995), p. 1. MP, Vol. VI, Annex 180 (claiming sovereign rights in "the Nansha (Spratlys) and their adjacent waters"); Government of the Republic of the Philippines, *Transcript of Proceedings Republic of the Philippines-People's Republic of China Bilateral Talks* (10 Aug. 1995), p. 3. MP, Vol. VI, Annex 181 (acknowledging that "dispute between China and the Philippines in the Nansha [Spratlys] ... includes to some extent the maritime jurisdiction issue"); Department of Foreign Affairs of the Republic of the Philippines, *Record of Proceedings: 10th Philippines-China Foreign Ministry Consultations* (30 July 1998). MP, Vol. VI, Annex 184 (stating Chinese view that Scarborough Shoal "is not a sand bank but rather an island," indicating an entitlement to an EEZ).

[35] *See, e.g., Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 110885 (4 Apr. 2011), p. 2. MP, Vol. VI, Annex 199 (stating that at most, "any relevant geological feature" in the Spratlys is entitled to "12 M territorial waters."); *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 (responding to the Philippines' offering of petroleum blocks stating that China "has indisputable sovereignty, sovereign rights and jurisdiction over the islands in South China Sea including Nansha [Spratly] Islands and its adjacent waters. The action of the Philippine Government has seriously infringed on China's sovereignty and sovereign rights"); "Philippines Must Learn Self-Restraint in South China Sea Disputes," *People's Daily* (1 Mar. 2012), p. 2. MP, Vol. V, Annex 115 (warning against Philippine oil exploration activity at Reed Bank).

[36] *See, e.g., Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 12-1137 (26 Apr. 2012). MP, Vol. VI, Annex 207 (protesting "China's assertion" of jurisdiction in the area of Scarborough Shoal and asking China to "respect the Philippines' sovereignty and sovereign rights under international law including UNCLOS"); *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-080-2012-S (24 May 2012). MP, Vol. IV, Annex 81 (reporting on discussions relating to fishing at Scarborough Shoal); *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-110-2012-S (26 July 2012). MP, Vol. IV, Annex 84 (same); Department of Foreign Affairs of the

-- They have exchanged views regarding the Philippines' claims that China has been destroying the maritime environment in the South China Sea;[37]

-- They have exchanged views regarding China's construction of artificial islands, especially within the Philippines' EEZ and continental shelf;[38]

-- They have exchanged views on China's operation of its law enforcement vessels in a dangerous manner;[39]

-- And they have exchanged views on actions taken by China that constitute an aggravation of the

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Republic of the Philippines, *Notes on the 18th Philippines-China Foreign Ministry Consultations* (19 Oct. 2012). MP, Vol. IV, Annex 85 (same).

[37] *See, e.g., Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 12-0894 (11 Apr. 2012), p. 2. MP, Vol. VI, Annex 205 (protesting extraction of endangered species from Scarborough Shoal); *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 2000100 (14 Jan. 2000), p. 2. MP, Vol. VI, Annex 186 (same).

[38] *See, e.g., Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 983577 (5 Nov. 1998), p. 2. MP, Vol. VI, Annex 185 (protesting construction of "illegal structures" at Mischief Reef); *Memorandum* from Ambassador of the Republic of Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-76-98-S (6 Nov. 1998). p.1. MP, Vol. III, Annex 33 (describing exchange of views regarding construction at Mischief Reef); Government of the Republic of the Philippines and Government of the People's Republic of China, *Agreed Minutes on the First Philippines-China Bilateral Consultations on the South China Sea Issue* (10 Aug. 1995), p. 1. MP, Vol. VI, Annex 180 (same); *Memorandum* from Undersecretary of Foreign Affairs of the Republic of the Philippines to the Ambassador of the People's Republic of China in Manila (6 Feb. 1995), p. 2. MP, Vol. III, Annex 17 (same).

[39] *See, e.g., Note Verbale* from the Department of Foreign Affairs of the Philippines to the Embassy of the People's Republic of China in Manila, No. 12-1222 (30 Apr. 2012). MP, Vol. VI, Annex 209 (protesting "provocative and extremely dangerous maneuvers"); *Note Verbale* from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (12) PG-239 (25 May 2012). MP, Vol. VI, Annex 211 (rejecting the Philippines' protest).

disputes that have been brought before you.[40]

In its 23rd June questions, the Tribunal asked -- assuming Article 283 requires an exchange of views on the substance of the parties' dispute -- "at what level of specificity must such an exchange of views occur", and whether the Philippines has sufficiently exchanged views "with respect to each of its specific, individual submissions".

Mr President, the award of the Annex VII tribunal in *Guyana v Suriname* sheds important light on these questions. The primary issue in that case was the delimitation of the parties' maritime boundary, a subject on which they had negotiated literally for decades. But Guyana's submissions also included a claim relating to Suriname's forcible eviction from the disputed area of an oil rig operated under licence from Guyana. Suriname objected to the tribunal's jurisdiction over this submission on the grounds that the two states had never exchanged views on that subject.

The tribunal rejected Suriname's challenge, holding:

[40] *See, e.g., Note Verbale* from the Department of Foreign Affairs of the Philippines to the Embassy of the People's Republic of China in Manila, No. 12-1222 (30 Apr. 2012). p. 1. MP, Vol. VI, Annex 209 (expressing concern over "provocative and extremely dangerous maneuvers"); *Note Verbale* from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (12) PG-239 (25 May 2012). p. 1. MP, Vol. VI, Annex 211 (rejecting the contents of Annex 209).

"The Parties have ... sought for decades to reach agreement on their common maritime boundary. The CGX incident ... may be considered incidental to the real dispute between the Parties. The Tribunal, therefore, finds that in the particular circumstances, Guyana was not under any obligation to engage in a separate set of exchanges of views with Suriname on issues of threat or use of force. These issues can considered as being subsumed within the main dispute."[41]

It is also useful to recall the manner in which the *Chagos Islands* tribunal addressed the issues arising under Article 283 with respect to Mauritius's fourth and final submission, which the tribunal characterised as follows:

"Mauritius claims that the MPA ..."

That is the marine protected area:

"... is incompatible with Articles 2(3) and 56(2) of the Convention, insofar as the Lancaster House Undertakings give Mauritius rights ..."

Principally historic fishing rights:

"... in the territorial sea and exclusive economic zone of the Chagos Archipelago."[42]

The record recounted by the tribunal reflected no

[41] *Guyana v Suriname*, Merits, Award of the Arbitral Tribunal (17 Sept. 2007), para. 410. MP, Vol. XI, Annex LA-56.

[42] *Chagos MPA Arbitration*, para. 261.

exchanges in which Mauritius specifically expressed the view that the MPA was inconsistent with Articles 2(3) and 56(2) by virtue of the UK's undertakings. To the contrary, Mauritius had only expressed generalised reservations about the MPA, and even then without ever referring to the Convention, much less specific provisions.

Nevertheless, the tribunal concluded that the requirement to exchange views on the substance of the dispute -- again, assuming that such a requirement existed -- was satisfied. It held:

"Mauritius engaged in negotiations with the United Kingdom regarding the steps that would be taken before an MPA might be declared ... Mauritius' decision that substantive negotiations could not continue in parallel with the United Kingdom's Public Consultation, or that negotiations did not warrant pursuing after the MPA was declared on 1 April 2010, did not violate any duty to negotiate in respect of the Parties' dispute."[43]

We think several general propositions can be extracted from the *Guyana* and *Chagos Islands* cases: (1) it is not necessary to exchange views on the substance of each and every submission *per se*; (2) as long as there has been an exchange of views on the

[43] *Id.*, para. 379.

general subject matter of the dispute, broadly construed, Article 283 is satisfied, both with respect to the main dispute as well as any incidental issues that are subsumed within it; and (3) relatedly, there is no need for an exchange of views to touch upon specific articles of the Convention. Indeed it is not even necessary that the Convention itself be mentioned in the course of the relevant exchanges.[44] Additional cases to support these propositions are cited in footnote.

These conclusions are fully consistent with the purposes of Article 283. As the tribunal stated in the *Chagos Islands* case, Article 283:

"... was intended to ensure that a state would not be taken entirely by surprise by the initiation of compulsory proceedings. It should be applied as such, but without an undue formalism as to the manner and precision with which views were exchanged and understood. In the Tribunal's view, Article 283 requires that a dispute have arisen with sufficient clarity that the Parties were aware of the issues in respect of which they disagreed."[45]

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[44] *See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* Preliminary Objections, Judgment, ICJ Reports 2011, p. 70 at p. 85, para. 30; see also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, p. 392 at pp. 428-429, para. 83.

[45] *Id.*, para. 382.

That standard is plainly met here. Given the long history of the parties' exchanges, there can be absolutely no doubt that "the Parties were aware of the issues in respect of which they disagreed"; and that China could not have been "taken entirely by surprise by the initiation of compulsory proceedings". The requirements of Article 283 were therefore entirely satisfied.

Mr President, members of the Tribunal, thank you very much for your kind attention. I ask that you call my friend Professor Oxman to the podium.

THE PRESIDENT: Thank you very much. We now ask Professor Oxman to come to the podium.

Tribunal questions

JUDGE WOLFRUM: Before you leave, I have a question to you, Mr Martin, concerning the DOC. You have argued that the DOC is not a legally binding instrument, going back to its history and its wording. But if you look at the content -- and you have highlighted that yourself -- there are many principles referred to in that DOC which are matters of at least customary international law, such as the obligation to settle disputes by peaceful means, for example.

Therefore, could you, additionally to what you said, address the question whether this DOC, together

with the references thereto later, estop the Philippines from bringing a case before an arbitral tribunal? It is certainly an issue which has not been touched on anywhere, therefore you shouldn't respond right away; you have plenty of time to respond thereto. Thank you.

MR MARTIN: Thank you, Judge Wolfrum, for that question. Entirely understood. As you have indicated, I think it would be appropriate for us -- since I am not speaking in my personal capacity -- to take our time to make sure that we answer that fully and appropriately, and we will do so in due course.

THE PRESIDENT: Thank you. We will take that under advisement. So we ask Professor Oxman to come in.

MR MARTIN: Thank you, Mr President.

(10.53 am)

First-round submissions by PROFESSOR OXMAN

PROFESSOR OXMAN: Mr President, members of this distinguished Tribunal, it is indeed an honour to appear before you on behalf of the Republic of the Philippines. I would like to add that it is a particular privilege to contribute to a process that we all trust will strengthen the rule of law in the oceans.

Mr President, at the outset, let me note what is

not at issue between the parties.

China acknowledges that it has accepted compulsory jurisdiction under Section 2 of Part XV of the Convention, and that the tribunal to which a dispute is submitted decides whether it has jurisdiction. This is evident in paragraphs 79 and 83 of China's Position Paper of 7th December 2014.

The Philippines acknowledges that in 2006, ten years after China consented to be bound by the Law of the Sea Convention, China exercised its option to exclude disputes referred to in Article 298 from compulsory jurisdiction. This is evident in paragraph 7 of the Notification and Statement of Claim submitting the dispute to arbitration under Section 2 of Part XV of the Convention.

China nevertheless invokes Article 298. In paragraph 74 of its Position Paper, China suggests that this is a novel situation.[46] But France invoked Article 298 in the *Grand Prince* case in 2001,[47] and Russia did so more recently in the *Arctic Sunrise* case.[48] What is novel about the present case -- or,

[46] 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. 74. SWSP, Vol. VIII, Annex 467.

[47] *Grand Prince Case (Belize v France), Application for Prompt Release, Judgment*, ITLOS Reports 2001, para. 60. MP, Vol. XI, Annex LA-38.

[48] *Arctic Sunrise Arbitration (Kingdom of the Netherlands v Russian Federation)*, Award on Jurisdiction, UNCLOS Annex VII Tribunal (26 Nov.

sadly, what was novel -- is that China is the first respondent to refuse to participate in proceedings instituted under the United Nations Convention on the Law of the Sea.

China has nevertheless set forth its jurisdictional objections in detail in its Position Paper which it has communicated to the members of this Tribunal. This morning I plan to address one of those objections, namely China's assertion that Article 298(1)(a) of the Law of the Sea Convention excludes jurisdiction over the dispute because it is "an integral part" of a delimitation dispute.

In doing so, I will elaborate on three reasons why that assertion should not be accepted. First, the dispute submitted to this Tribunal is not an integral part of a delimitation dispute. Second, China's objection is not supported by the text of Article 298(1)(a) or its context. Third, acceptance of the objection would impair the effectiveness of the Law of the Sea Convention.

Mr President, questions of maritime delimitation arise only in the context of overlapping entitlements of coastal states. Certain submissions of the Philippines relate only to breaches of duty by China,

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2014), para. 6. SWSP, Vol. XII, Annex LA-180 (citing Russia's Plea Concerning Jurisdiction).

and they pose no questions regarding entitlements to maritime areas, let alone delimitation of those entitlements. These submissions cannot plausibly be regarded as objects of China's contentions regarding delimitation. This would be the case, for example, with respect to submissions 10, 11, 12(b), 13 and 14.

The remaining submissions, in whole or in part, either explicitly or implicitly, pose questions regarding entitlements to maritime areas. With respect to these submissions, China's contention conflates two different things: (1) entitlement to maritime zones, and (2) delimitation of areas where those zones overlap. There is a cardinal distinction between these two legal matters.

One of the Convention's greatest achievements -- an achievement that long eluded the international community -- is the near universal adherence to a detailed elaboration of what are, and are not, the entitlements of coastal states. This is accompanied by access for any state party to courts and tribunals for the purpose of resolving disputes regarding the interpretation and application of the provisions that determine the nature and extent of those coastal state entitlements.

The rights and freedoms of every state -- every state -- are potentially affected by claims of

exclusive rights or regulatory powers over parts of the sea. The detailed provisions regarding baselines and low-tide elevations, for example, determine the area where all states do, and do not, enjoy the freedoms of the sea. The provisions limiting the entitlements of small insular features similarly protect the interests of all states. The detailed provisions regarding the nature and limits of the territorial sea, the exclusive economic zone and the continental shelf are designed to carefully balance the interests of the coastal state with those of all other states.

China itself affords us a textbook example of interests that are independent of overlapping entitlements that may be affected by an assertion of entitlement to maritime jurisdiction. In 2009, and again in 2011, China vigorously objected to Japan's submission to the Commission on the Limits of the Continental Shelf in respect of Oki-No-Tori-Shima.[49] China maintained that Japan is not entitled to a continental shelf in respect of Oki-No-Tori-Shima because that feature, China asserted, is "in its

[49] *See Note Verbale* from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/2/2009 (6 Feb. 2009). MP, Vol. VI, Annex 189; *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/59/2011 (3 Aug. 2011). MP, Vol. VI, Annex 203.

natural conditions"[50] a rock within the meaning of Article 121(3) of the Convention. Both of China's *notes verbales* to the UN Secretary-General on the matter are included in your folder at tab 1.18.

As you can see on the map, China's coast is very far from Oki-No-Tori-Shima. No question of delimitation with China was implicated. Rather, as China expressly observed, application of Article 121(3) of the Convention -- and here I read from their notes -- "relates to the overall interests of the international community, and is an important legal issue of general nature" that impacts "the maintenance of an equal and reasonable order for the oceans".[51] In this way, Mr President, China recognises the fundamental distinction between an entitlement on the one hand, and delimitation on the other.

Unlike such questions of entitlement, delimitation engages only the legal interests of states whose zones overlap, and only the areas where zones overlap. That is why the primary means for delimitation is agreement between those states; that is why very few provisions

[50] *Note Verbale* from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/2/2009 (6 Feb. 2009), p. 2. MP, Vol. VI, Annex 189.

[51] *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/59/2011 (3 Aug. 2011), p. 2. MP, Vol. VI, Annex 203.

of the Convention address delimitation; and that is why those provisions are flexible. It is also why an optional exception to compulsory jurisdiction with respect to the few provisions on delimitation was not regarded as seriously impairing the coherence of the law of the sea as a whole. The drafters of the Convention did not insert any exception, optional or otherwise, excluding questions of entitlement of the kind with which we are concerned in this case.

Now, it is of course to be expected that issues of entitlement and issues of delimitation both may arise between coastal states that border the same gulf or sea. It is therefore of particular importance to distinguish between the two types of rules in that context. Both protect coastal states, but in different ways.

The rules of entitlement set forth in the Convention secure the exclusive sovereign rights of each coastal state from intrusion by others. These rules of entitlement determine what part of a coastal state's zones are, and are not, overlapped by the zones of another coastal state. That determination is critical to the interests of the coastal state. This is especially true in the absence of delimitation. The ability to enjoy the benefits of the exclusive sovereign rights conferred by the Convention is

necessarily more limited in areas where zones overlap. The third paragraphs of Articles 74 and 83 themselves make that clear. These practical and legal constraint may last a very long time, especially where one of the states concerned has made a declaration under Article 298(1)(a).

It was considerations such as these that prompted the Philippines to submit to this Tribunal a dispute about the nature and extent of the parties' entitlement to maritime zones, and in particular the extent of China's actual or potential maritime entitlements. No question is raised in these proceedings regarding delimitation of maritime zones that overlap.

The question of maritime delimitation does not arise unless and until it is determined that there are overlapping maritime entitlements. To put it differently, "Delimitation presupposes an area of overlapping entitlements". That is how the International Tribunal for the Law of the Sea put it in paragraph 377 of its judgment in the *Bay of Bengal* case.[52] In that case, the parties challenged each other's entitlement to a continental shelf beyond 200 miles. Only after those contentions were

[52] *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012*, ITLOS Reports 2012, para. 377. MP, Vol. XI, Annex LA-43.

considered and rejected in the judgment did that judgment proceed to delimitation of the overlapping entitlements.

The International Court of Justice applied the same approach in its 2012 judgment in the *Nicaragua v Colombia* case. In the course of its analysis of entitlements generated by maritime features under the rules of international law articulated by the Convention, the court expressly declined (in paragraph 169 of its judgment) to consider whether an equitable delimitation would limit the islands' maritime zones to 12 miles.[53] The court first determined the entitlements of the features in question, and only then did it turn to delimitation of the areas in which those features are found. That is the logical and, we believe, correct approach.

Paragraph 67 of China's Position Paper attempts to turn this on its head.[54] It argues that questions of entitlement are relevant factors in applying the law of maritime delimitation under Articles 74 and 83 of the Convention. Even if this were so, it would not mean that entitlement disputes are, in and of themselves, integral parts of delimitation disputes. But, more to the point, it is not so.

[53] *Territorial and Maritime Dispute (Nicaragua v Colombia)*, Merits, Judgment, ICJ Reports 2012, paras. 169. MP, Vol. XI, Annex LA-35.

[54] China’s Position Paper, para. 69. SWSP, Vol. VIII, Annex 467.

Paragraph 59 of China's Position Paper acknowledges this. It states that the persistence of the dispute regarding territorial sovereignty has precluded negotiation on maritime delimitation.[55] In practice as in principle, entitlement is separate from and antecedent to delimitation.

The fact that resolution of delimitation issues may require the prior resolution of entitlement issues does not mean that entitlement issues are an integral part of the delimitation process itself. Having decided the question of entitlements with respect to the continental shelf, the judgment of the Law of the Sea Tribunal in the *Bay of Bengal* case expressly rejected the suggestion that it revert to the basis for those entitlements as a relevant circumstance in maritime delimitation.[56] That's in paragraph 460 of the judgment.

It is particularly difficult to understand how China could conclude that entitlements and entitlement disputes submitted to this Tribunal are an integral part of a delimitation dispute.

In the *North Sea Continental Shelf* cases, the International Court of Justice indicated that

[55] *Id.*, para. 59.

[56] *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012*, ITLOS Reports 2012, para. 460. MP, Vol. XI, Annex LA-43.

a delimitation dispute arises when:

"... the methods chosen by them ..."

That is the methods chosen by the parties:

"... for the purpose of fixing the delimitation of their respective areas may happen in certain localities to lead to an overlapping of the areas appertaining to them."[57]

The map on this screen depicts China's nine-dash line. Is any delimitation method apparent here? Can one plausibly characterise this line as defining only "certain localities"?

In this case, the Philippines seeks a determination that China is entitled to claim only those maritime zones and rights that are set forth in the Convention, and that the claim of "historic rights" has no bearing on the nature or extent of China's maritime entitlements. As Mr Reichler demonstrated, without its "historic rights" claim, there are large areas of the South China Sea where the entitlements of the parties under the Convention do not overlap, and where the Philippines alone has entitlements.

In this connection, the Philippines also seeks a determination:

[57] *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, Judgment, ICJ Reports 1969, para. 99. MP, Vol. XI, Annex LA-4.

(1) of the areas of the South China Sea where the Philippines has entitlements that are not overlapped by any entitlements of China;

(2) that certain features within the limits of the Philippine EEZ and continental shelf are part of the seabed and subsoil, and accordingly are conduct to the sovereign rights and jurisdiction conferred by those regimes;

(3) that Scarborough Shoal, as well as the high tide features in the southern sector, do not generate entitlements to an EEZ and continental shelf; and

(4) that China must comply with its obligations under the Convention: to respect and refrain from interfering with the rights and freedoms of the Philippines and its nationals; to refrain from constructing artificial islands, installations and structures in contravention of the rights of the Philippines under Articles 60 and 80; to protect and preserve the marine environment; and to ensure that China's nationals and vessels do the same.

All of this -- all of this -- is without prejudice to delimitation of any areas where entitlements overlap.

An award on the entitlement issues posed by the Philippines would resolve only those issues. Other matters would remain to be addressed by the parties.

But the award would perform one of the most important functions of law and legal process in facilitating cooperation: narrowing the issues.

Mr President, let me now turn to the second point. China's jurisdictional objection must also fail because it is based on a misinterpretation of Article 298(1)(a).

Paragraph 72 of the award on jurisdiction in the *Arctic Sunrise* case concluded that:

"Russia's Declaration cannot create an exclusion that is wider in scope than what is permitted by Article 298(1)(b)."[58]

The same holds true of China's assertions regarding Article 298(1)(a).

As we all know, Article 31 of the Vienna Convention on the Law of Treaties -- to which China and the Philippines are party -- provides that a treaty shall be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty, in their context, and in the light of its object and purpose.

The pertinent text of Article 298(1)(a), which is at tab 1.19 of your folder, excludes "disputes concerning the interpretation or application of

[58] *Arctic Sunrise Arbitration (Kingdom of the Netherlands v Russian Federation)*, Award on Jurisdiction, UNCLOS Annex VII Tribunal (26 Nov. 2014), para. 72. SWSP, Vol. XII, Annex LA-180.

Articles 15, 74 and 83 relating to sea boundary delimitations". That is what it excludes that is relevant for purposes of China's argument.

The text sets forth two requirements for exclusion. The first is that the dispute concern the interpretation and application of Articles 15, 74 and 83. The second is that the dispute relate to sea boundary delimitation. The specific reference to the three articles was deliberately added to a prior text of this article that contained only the second requirement.

These two requirements are cumulative. They are not alternatives. There is no word "or" between them. Unless both requirements are satisfied, jurisdiction is not excluded.

The dispute submitted by the Philippines satisfies neither requirement for exclusion in Article 298(1)(a). Nothing in the dispute before this Tribunal requires it to interpret or apply Article 15, 74 or 83. And, as previously demonstrated, the dispute regarding entitlement submitted to this Tribunal is not a dispute relating to sea boundary delimitation.

China asserts that Article 298(1)(a) excludes disputes on other issues if they constitute an integral part of a delimitation dispute. That is

not consistent with the text. That is not what the words say. Acceptance of China's assertion would, to put it charitably, require interpreting Article 298 very expansively indeed. The textual context of this provision indicates that such an expansive reading of the exception in Article 298(1)(a) is not justified.

The basic principle regarding compulsory jurisdiction is set forth in the opening article of Section 2 of Part XV. I think it is worth reading it:

"... any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section."

That principle is expressly stated to be subject to Section 3 of Part XV. The title of Section 3 is "Limitations and Exceptions to Applicability of Section 2". Article 298 is part of Section 3. Its title is "Optional exceptions to applicability of section 2". Paragraph 72 of the *Arctic Sunrise* award on jurisdiction specifically refers to "an exception that is permitted under article 298".

The permissible exceptions derogate from the principle that "any dispute" concerning the interpretation or application of the Convention may be

submitted to the appropriate court or tribunal by a party to the dispute.

This textual context suggests a strict construction, not a liberal one. It presents a classic case for applying the maxim that exceptions are to be narrowly construed, where a tightly framed exception derogates from a basic principle that is integral to the object and purpose of the instrument as a whole.

In this regard, it is important to bear in mind that the textual context is not limited to Part XV. Article 309, which is also at tab 1.[19] of your folder, is one of the most important structural provisions of the Convention. It is designed to ensure the coherence and universality of the treaty regime. It is no accident that the rule set forth in Article 309 is explicitly preserved in the Law of the Sea Convention's two implementing agreements.

Article **309 states:**

"No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention."

Article 309 specifically requires that an exception be express. Implications and inferences do not suffice. Article 309 would therefore require a strict reading of Article 298 even if that

conclusion did not emerge from the structure of Part XV itself.

Article 31 of the Vienna Convention also specifies that the terms of a treaty are to be interpreted in light of its object and purpose.[59] This brings me to the third point, namely that acceptance of China's argument would impair the effectiveness of the Law of the Sea Convention.

At its heart, the question posed here is whether compulsory jurisdiction is integral to the effective functioning of the Convention or, on the other hand, is exceptional. The point of view that informs China's Position Paper is that compulsory jurisdiction is exceptional, and that the relevant norm remains the right of states to refuse to accept it. Even if that point of view were an accurate appraisal outside the context of a comprehensive treaty regime that includes compulsory jurisdiction within its structure, the question here is whether that view should inform the interpretation and application of the Law of the Sea Convention.

The question all but answers itself. Unlike its predecessors and many other treaties, the Law of the Sea Convention provides for consent to arbitration or

[59] Vienna Convention on the Law of Treaties (23 May 1969), 1155 UNTS 332, entered into force 27 Jan. 1980, Art. 31. MP, Vol. XI, Annex LA-77.

adjudication as an integral part of the treaty. Unlike many other treaties, that consent is not subject to reservation. Unlike many other treaties that enumerate particular issues that are subject to compulsory jurisdiction, the Law of the Sea Convention establishes jurisdiction over any dispute concerning its interpretation or application, subject only to enumerated limitations and exceptions.

One of the most important reasons for inclusion of compulsory jurisdiction in the Law of the Sea Convention was to provide a means for challenging the lawfulness of entitlement claims such as those that are being challenged in this case. In the most basic sense, exaggerated unilateral claims of maritime entitlement were -- and here I borrow the colourful language used by common law courts of yore -- the "evil sought to be remedied" both by the substantive provisions of the Convention and by the inclusion of compulsory jurisdiction.

China's expansive reading of the scope of the exception to compulsory jurisdiction would undermine the effectiveness of compulsory jurisdiction precisely in that context. There are many places in the world with actual or potential delimitation disputes. On China's reading, Article 298 would preclude challenges to unlawful assertions of maritime jurisdiction on the

grounds that such challenges come within the orbit of the exception for delimitation disputes. All a state need do to insulate its maritime claims from arbitration or adjudication initiated by a neighbouring coastal state would be to assert claims that overlap the entitlements of its neighbour, to file a declaration under Article 298, and to then argue that the dispute is one "relating to sea boundary delimitations", even if Articles 15, 74 and 83 do not have to be interpreted and applied. As is evident in this very case, that might be done at any time. But the premise is plainly wrong.

To sum up then, China's assertion that Article 298(1)(a) precludes jurisdiction in this case misses the mark: on the facts, on the text, and on the object and purpose of the Convention. This is also true of the Chinese Government's rejection, in paragraph 1 of the Chinese Ambassador's letter of 1st July, of the submission to arbitration of issues of "maritime rights and interests" without qualification. Such a statement is, on its face, incompatible with both the text and the object and purpose of the Convention. Professor Sands will have more to say on this in the afternoon.

Before concluding, Mr President, I would like to add a brief word on one of the questions that was

posed by the Tribunal in December 2014, namely Question 8 regarding "the implications, if any, of any possible continental shelf claim by China for the Tribunal's jurisdiction in light of Article 298(1)(a)".

We believe there are no such implications under Article 298(1)(a). Continental shelf claims pose questions of entitlement under Articles 76 and 121, a matter distinct from delimitation of overlapping continental shelf entitlements under Article 83. The issues raised by the Philippines regarding China's potential maritime entitlements relate equally to the exclusive economic zone and the continental shelf. Those issues do not come within the ambit of Article 298(1)(a), for the reasons indicated in our remarks today and in our Supplemental Written Submission.

China has not made a submission to the Commission on the Limits of the Continental Shelf in respect of the South China Sea. In order to assist us in responding to the Tribunal's question, we asked a widely recognised expert, Dr Lindsay Parson, to examine the potential extent of a Chinese continental shelf submission beyond 200 miles. Dr Parson's report is attached to our Supplemental Written Submission as

Annex 514.[60]

Mr President, the subject of the continental shelf entitlement recalls the extensive analysis of the Law of the Sea tribunal's jurisdiction on the matter in the *Bay of Bengal* judgment. In the course of its analysis, the tribunal stated -- and here I quote only relevant excerpts:

"A decision ... not to exercise ... jurisdiction over the dispute ... would not be conducive to the efficient operation of the Convention ... Inaction in the present case ... would leave the Parties in a position where they may be unable to benefit fully from their rights over the continental shelf."[61]

Mr President, that would be the consequence of inaction in this case as well, especially for the Philippines.

I thank you, Mr President and members of the Tribunal, for your very kind attention. Mr President, would this be an opportune time for a break, after which Mr Reichler might be invited to speak?

THE PRESIDENT: I think you are absolutely right, it is an opportune time for us to have a break. Thank you.

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[60] Dr. Lindsay Parson, *The potential for China to develop a viable submission for continental shelf area beyond 200 nautical miles in the South China Sea* (Mar. 2015), para 4.1. SWSP, Vol. IX, Annex 514.

[61] *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), Judgment of 14 March 2012*, ITLOS Reports 2012, paras. 391-392. MP, Vol. XI, Annex LA-43.

(11.31 am)

(A short break)

(11.54 am)

THE PRESIDENT: Mr Reichler, please go ahead.

First-round submissions by MR REICHLER

MR REICHLER: Thank you, Mr President.

Mr President, members of the Tribunal, good afternoon. Before the break, Professor Oxman showed you that the Philippines' submissions do not fall under Article 298(1)(a) because they do not concern the interpretation of Articles 15, 74 or 83 relating to sea boundary delimitations. I will complete our showing that the Philippines' submissions avoid application of Article 298(1)(a) by showing you that they also do not involve historic bays or titles.

There are two reasons why the jurisdictional exclusion of claims involving historic bays or historic titles does not deprive the Tribunal of jurisdiction over the Philippines' submissions. First, China does not claim that it has historic bays or historic titles in the South China Sea. And second, China could not make such a claim in regard to waters or seabed that extend hundreds of miles beyond the limits of its territorial sea. I will address each of these points in turn.

In regard to the first point, what China claims in the South China Sea, beyond the limits of its entitlements under UNCLOS, are "historic rights". It does not claim historic bays or historic titles. Mr President, you and your colleagues are well aware that China's Position Paper of 7th December 2014 invoked Article 298(1)(a) as a jurisdictional defence against the Philippines' claims. But it did so only on the ground that, according to China, the Philippines' submissions concern sea boundary delimitations under Articles 15, 74 and 83.[62] Notably, China did not argue that the Philippines' submissions involve historic bays or historic titles. We say that is effectively an admission that they do not.

Nor is there any evidence that China claims -- or has ever claimed -- that the South China Sea is a historic bay. China could not plausibly do so. The geographical characteristics simply cannot be assimilated to those of a bay. The South China Sea is not an indentation of any shoreline, let alone the shoreline of China. And the nine-dash line bears no resemblance to a bay closing line or any other form of

[62] 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"), paras. 68-75. SWSP, Vol. VIII, Annex 467.

baseline. It is no surprise then that the South China Sea was not mentioned on the memorandum on historic bays prepared by the Secretariat of the United Nations in 1958, and that this omission has never been objected to by China.[63]

Nor has China claimed historic titles in the South China Sea. Historic title is, of course, equivalent to sovereignty. But what China claims beyond the limits of its UNCLOS entitlements are not historic titles, but "historic rights"; that is, a set of rights that, although robust in China's view, fall short of actual sovereignty. Even in its Position Paper, China makes clear that it does not claim sovereignty in these areas:

"It should be particularly emphasized that China always respected the freedom of navigation and overflight enjoyed by all States in the South China Sea in accordance with international law."[64]

This statement is inconsistent with a claim of title or full sovereignty.

That China's claim is for "historic rights", and not historic titles, is also clear from China's own laws and official statements, some of which I cited

[63] *See generally* United Nations, Secretary General, *Historic Bays: Memorandum by the Secretariat of the United Nations*, UN Doc. A/CONF.13/1 (30 Sept. 1957). SWSP, Vol. XII, Annex LA-183.

[64] China’s Position Paper, para. 28. SWSP, Vol. VIII, Annex 467.

yesterday. In the Chinese text of Article 298(1)(a), the words for "historic titles" are *li shi xing suo you quan*; literally translated, "power of possession or ownership". In contrast, what China has repeatedly claimed beyond its entitlements under 1982 Convention, are *li shi xing quan li*, which are rights that do not amount to title or ownership.

China's first formal assertion of maritime rights beyond its UNCLOS entitlements was in Article 14 of its 1998 EEZ law.[65] You will recall that Judge Gao wrote, in the AJIL article I cited yesterday, that the 1998 law is the source of China's "historic rights" claim and the justification for the nine-dash line, which he says "preserves Chinese historic rights in fishing, navigation and such other marine activities as oil and gas development in the waters and on the continental shelf surrounded by the line".[66] Judge Gao thus equated China's "historic rights" claim to a claim of sovereign rights, not sovereignty.

China's 1998 EEZ law makes this clear. In that law, the rights claimed are expressed as *li shi xing quan li* (rights), not *li shi xing suo you quan* (title); and China itself translates this text into

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

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

English as "historic rights", not title or sovereignty. You can see the difference for yourselves at tab 2.14 of your folders. We have provided the Chinese text of the relevant portion of Article 14 of the 1998 law with the words for "historic rights", in Chinese characters, underscored. Alongside it, there is a transliteration of those words: *li shi xing quan li*, "historic rights". On the following page, we have provided the Chinese text and transliteration of the relevant portions of UNCLOS Articles 15 and 298(1)(a), where the words are, in contrast, *li shi xing suo you quan*, "title".

In this case, it is China's claim of "historic rights" that is challenged by the Philippines. In contrast, since there is no Chinese claim of historic bays or historic titles, there is no dispute about them, and they are not addressed in the Philippines' submissions. On this basis alone, Article 298(1)(a) can have no application to this case, and your jurisdiction is unaffected by it.

I turn now to the second reason why Article 298(1)(a) does not preclude jurisdiction over the Philippines' claims: "historic title" can only exist in relation to waters closely appurtenant to a state's coast; there can be no historic title beyond the limits of a state's territorial sea, let alone

hundreds of miles beyond it. In the Memorial, the Philippines cited the UN Secretariat's 1962 study on *Juridical Regime of Historic Waters, Including Historic Bays*, as well as the preparatory works of the 1982 Convention.[67]

In its 1962 study, the Secretariat observed that historic title involves a claim by a state over "waters adjacent to its coasts",[68] based on the continuous exercise of sovereignty over the area for a considerable time, with the acquiescence of other states.[69] The UN study also concluded that "[a] claim to 'historic waters' is a claim by a State, based on an historic title, to a maritime area as part of its national domain; it is a claim to sovereignty over the area", and "the authority continuously exercised by the State in the area must be sovereignty".[70]

As noted in the study, when the regime of historic waters evolved, there were no maritime zones recognised beyond the territorial sea. Accordingly, only two types of maritime space were amenable to a claim of "historic title" or sovereignty: waters

[67] *See* Memorial, paras. 446-4.52.

[68] 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.

[69] *Id.*, paras. 80, 85.

[70] *Id.*, para. 87.

that could be assimilated to internal waters, like historic bays, and the territorial sea.[71]

The drafting history of the 1982 Convention also confirms that, consistent with the 1962 UN study, the drafters understood "historic title" to be a narrow concept applicable only to near-shore waters; that is, to internal waters or to territorial sea over which the coastal state exercised sovereignty.

From the outset of, and throughout, the Third UN Conference on the Law of the Sea, the term "historic waters" was included as a sub-item of the topic "Territorial Sea".[72] The negotiations reflected that historic waters, including historic titles were to be part of the legal regime of the territorial sea. Thus, when the Main Trends Working Paper was adopted in 1974, historic waters and historic titles were included in Part I, entitled "Territorial Sea".[73] Two sections of Part I are relevant: they are in your folders at tab 2.15.

Section 2 of Part I, captioned "historic waters", contained two provisions. Provision 2 stated:

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[71] *Id.*, paras. 160-167.

[72] *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.

[73] UN Conference on the Law of the Sea III, "Working Paper of the Second Committee: Main Trends", UN Doc. A/CONF.62/L.8/Rev. 1, Annex II, Appendix I (1974), p. 109. MP, Vol. XI, Annex LA-98.

"The territorial sea may include waters pertaining to a State by reason of an historic right or title and actually held by it as its territorial sea."

Provision 3 provided:

"No claim to historic waters shall include land territory or waters under the established sovereignty, sovereign rights or jurisdiction of another State."

These two proposals are significant because they reflect an understanding that (1) historic titles could only exist in maritime areas close to the coast and subject to the exercise of sovereignty by the coastal state, and (2) historic titles cannot exist in maritime areas subject to the sovereign rights or jurisdiction of another state.

Section 3 of Part I of the 1974 Working Paper, also at tab 2.15, addressed the limits and delimitation of the territorial sea. It included three relevant provisions. Provision 17, entitled "Historic bays or other historic waters", contained what was labelled "Formula B", which provided:

"In the absence of other applicable rules the baselines of the territorial sea are measured from the outer limits of historic bays or other historic waters."[74]

[74] UN Conference on the Law of the Sea III, "Working Paper of the Second Committee: Main Trends", UN Doc. A/CONF.62/L.8/Rev. 1, Annex II, Appendix I (1974), p. 110. MP, Vol. XI, Annex LA-98.

Which necessarily were part of the territorial sea.

Provision 21 related to the delimitation of the territorial sea, and followed Article 12(1) of the 1958 Convention by stating that "historic title" may constitute a special circumstance justifying the departure from the median line in delimiting the territorial sea.[75]

Finally, Provision 22 of the 1974 Working Paper related to the breadth of the territorial sea, and set out three alternative proposals or formulae.

Formula A:

"Each State shall have the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines drawn in accordance with articles ... of this Convention."

Formula B, a second alternative:

"Each State has the right to establish the breadth of its territorial sea up to a distance not exceeding 200 nautical miles, measured from the applicable baselines."

And most interesting, formula C:

"The maximum limit provided in this article shall

[75] UN Conference on the Law of the Sea III, "Working Paper of the Second Committee: Main Trends", UN Doc. A/CONF.62/L.8/Rev. 1, Annex II, Appendix I (1974), p. 111. MP, Vol. XI, Annex LA-98.

not apply to historic waters held by any State as its territorial sea.

"Any State which, prior to the approval of this Convention, shall have already established a territorial sea with a breadth more than the maximum provided in this article shall not be subject to the limit provided herein."[76]

Formula C actually reflected the proposal of the Philippines, which sought to establish a special rule exempting it from the emerging consensus in favour of limiting the breadth of the territorial sea to 12 miles, based on what the Philippines called its "unique nature and configuration". Other states rejected this proposal, and formula C was abandoned.

At the concluding sessions of the Third UNCLOS Conference, the Philippines itself recognised that the Convention prohibited -- prohibited -- it from claiming historic or legal title over waters beyond its territorial sea, and that under UNCLOS it would be entitled only to sovereign rights in its 200-mile exclusive economic zone.[77] And of course, as you have heard from Professor Sands this morning, the Philippines' implementing legislation for UNCLOS

[76] UN Conference on the Law of the Sea III, "Working Paper of the Second Committee: Main Trends", UN Doc. A/CONF.62/L.8/Rev. 1, Annex II, Appendix I (1974), p. 111. MP, Vol. XI, Annex LA-98.

[77] UN Conference on the Law of the Sea III, Plenary, *189th Meeting*, UN Doc. A/CONF.62/SR.189 (8 Dec. 1982), para. 58. SWSP, Vol. XII, Annex LA-192.

conforms its national law in consonance with the Convention.

In light of this negotiating history, it is evident that the drafters of the Convention and the states parties understood "historic title" to be a narrow concept, applicable only to near-shore waters over which the coastal state exercised sovereignty. It did not extend past the limits of the territorial sea, and it did not include the exercise of rights or jurisdiction, however fulsome, short of sovereignty.

This is further confirmed by the efforts during the Third UNCLOS Conference to define the concept of "historic waters". Although no agreement was reached, and the effort was ultimately terminated,[78] the main elements of the various proposed definitions deserve some attention. As in the case of the 1974 Main Trends Working Paper, the differing proposals reflected in so-called "Blue Papers" converged to the extent they underscored the limited scope of "historic waters". In particular: historic waters were understood as "an area of the sea adjacent to a coastal state";[79] and historic waters could be claimed as either internal waters or as territorial

[78] *See* UN Conference on the Law of the Sea III, *Revised Single Negotiating Text*, UN Doc. A/CONF.62/WP.8/Rev.1 (6 May 1976). MP, Vol. XI, Annex LA-107.

[79] UN Conference on the Law of the Sea III, Second Committee, Blue Papers, *Bays and Other Historic Waters*, UN Doc. C.2/Blue Paper No. 3 (3 Apr. 1975), Art. 1. SWSP, Vol. XII, Annex LA-190.

sea, depending on the scope of authority the coastal state had historically exercised.[80]

The Convention's negotiating history thus makes clear that the concept of "historic waters" or "historic title" applies only to near-shore areas that may be assimilated to internal waters or to territorial sea which had been subject to a coastal state's exercise of sovereignty. Of all the proposals on historic waters, including historic title, summarised and reflected in the 1974 Main Trends Working Paper and other negotiating documents, the only ones that were ultimately incorporated into the final text of the Convention are in Article 10(6), which refers to "historic bays", and Article 15, which refers to "historic title", notably in the context of "Delimitation of the Territorial Sea between States with Opposite or Adjacent Coasts". This is the only reference to "historic title" in the entire Convention, outside Article 298(1)(a). And significantly, it is in Part II, Section 2, "Limits of the Territorial Sea". This confirms that "historic titles" are not understood to exist beyond those limits.

"Historic titles" thus cannot be conflated with

[80] UN Conference on the Law of the Sea III, Second Committee, Blue Papers, *Historic Waters*, UN Doc. C.2/Blue Paper No. 3/Rev.1 (9 Apr. 1975), Art. 2. SWSP, Vol. XII, Annex LA-191.

"historic rights". These are two very different concepts. While the Convention refers to "historic titles" in two places, Articles 15 and 298(1)(a), it nowhere mentions "historic rights". These two words never appear together anywhere in the entire text.

Moreover, in all of its official languages, the Convention distinguishes between "titles" on the one hand, and "rights" on the other. I have already alluded to the Chinese text, and I will spare you further attempts by me to pronounce the Chinese. But in that text, as I have shown, the same words for "historic titles" are used in Article 298(1)(a) as in Article 15. In contrast, when the word "rights" appears in other articles of the Convention, as in China's 1998 EEZ law, different words are used.

In fact, the same distinction is reflected in the other official texts. At tab 2.16 of your folders, you will find a chart that we prepared showing how the English words "titles" and "rights" are rendered in the French, Spanish, Arabic, and Russian texts, in addition to the Chinese. In all these languages, different words are used to differentiate these two very different concepts.

For example, the French version of Articles 15 and 298(1)(a) uses the phrase "*titres historiques*". In other articles, that refer to "rights" as opposed to

"titles", the French text uses the word "*droits*".

In Arabic, "historic titles" in Article 15 and 298 are "*sanadat tarikhiyya*", as distinguished from the provisions that speak of "rights", and use the word "*huqooq*".

In the Russian version, Articles 15 and 298 refer to "*istoricheskie pravoosnovania*" for "historic titles" -- this may be one of the most challenging speeches I have ever given in a court or arbitral tribunal; I hope you'll grant some leeway here, Mr President! -- while the articles of the Convention in Russian that speak of "rights" use the word "*pravo*".

The Tribunal will be aware that the Philippines has presented an expert opinion on the Russian text as part of its Supplemental Written Submission of 16th March 2015. In that opinion, Professor Zadorozhny confirms that the term "*istoricheskie pravoosnovania*", as used in the Russian text of the Convention, means "historic titles", in the sense of full sovereignty, not "historic rights" short of sovereignty.[81]

There is an anomaly in the Spanish text, I am sad

[81] Dr Alexander Zadorozhny, *Expert Opinion on the Russian term "историческиеправооснования" in Article 298(1)(a)(i) of the 1982 United Nations Convention on the Law of the Sea* (8 Mar. 2015), para. 5. SWSP, Vol. IX, Annex 512.

to say, because Spanish is my second language; I speak it almost as inartfully as I speak English. But in Spanish, as in French, there is a clear distinction between title, or *título*, which means ownership -- that is, sovereignty -- and rights, or *derechos*, which do not equate to, and fall short of, title.

Article 298(1)(a) predictably uses the words "*títulos historicos*" for historic titles. Curiously, however, Article 15 in the Spanish version uses "*derechos historicos*". This is not explicable except as an error in translation. As you will see in tab 2.16, in every article of the Convention in which "rights", as distinguished from "title", are conferred, the Spanish text properly uses the word "*derechos*", rights, not "*títulos*", titles.

Thus, we say, the Convention clearly distinguishes between "historic titles", which may be excluded from jurisdiction under Article 298(1)(a), and "historic rights", which are what China has claimed in the South China Sea, and which are not excluded from your competence.

This leaves no doubt, Mr President, that Article 298(1)(a) does not preclude the exercise of jurisdiction by the Tribunal over any of the disputes the Philippines has brought before you in any of its 14 submissions.

Mr President, members of the Tribunal, this concludes my presentation. I thank you for your specially courteous attention. And I ask that you call Professor Oxman back to the podium to address the non-applicability of Article 298(1)(b) to the submissions of the Philippines.

THE PRESIDENT: Thank you very much. I now have the pleasure of calling Professor Oxman back to the podium. Thank you.

(12.23 pm)

First-round submissions by PROFESSOR OXMAN

PROFESSOR OXMAN: Mr President, members of the Tribunal, before the break I addressed China's invocation of the exception to jurisdiction in paragraph (1)(a) of Article 298 with respect to "disputes concerning the interpretation or application of articles 15, 74 and 83 relating to maritime delimitation".

Notwithstanding the fact that China's declaration under Article 298 covers all of the exceptions in Article 298, the exception I addressed earlier is the only Article 298 exception that is invoked in China's Position Paper. And I might note that the text of Article 298 is at tab 1.19 in your folders.

As you noted yesterday, Mr President, Procedural Order No. 4 states that:

"... the Hearing on Jurisdiction will not be limited to questions raised in China's Position Paper."[82]

The letter to the parties of 23rd June adds that:

"... the Arbitral Tribunal does not accept that any issue of jurisdiction or admissibility is waived by virtue of its non-inclusion in China's communications to date."[83]

Of course, the fact that something is not dispositive doesn't mean it's irrelevant.

Article 298 contains a limited list of purely optional exceptions to jurisdiction. The decision to rely on those options is a matter of choice, both at the declaration stage and thereafter. A respondent is not required to insist on a jurisdiction exception covered by a declaration; paragraphs 2 and 3 of Article 298 make that clear.

In this regard, there are particular reasons for taking into account a decision to omit the exceptions in paragraph (1)(b) from a plea that affirmatively invokes a declaration under Article 298.

The decision by a state to characterise its own actions as military activities is not one that is

[82] Procedural Order No. 4, § 1.4 (21 Apr. 2015).

[83] *Letter* from Judith Levine, Registrar, Permanent Court of Arbitration, to the Parties (23 June 2015).

taken lightly. The political, legal and other consequences may extend well beyond Article 298, or indeed the Law of the Sea Convention as a whole.

The record in this case confirms China's reluctance to characterise its activities as military. For example, China repeatedly told the Philippines that the facilities at Mischief Reef were being built for civilian use.[84] The relevant documents are collected at tab 2.17 of your folders.

As recently as 16th June of this year, China's Ministry of Foreign Affairs stated, with respect to the Nansha (or Spratly) Islands, that:

"Apart from satisfying the need of necessary military defense, the main purpose of China's construction activities is to meet various civilian

[84] *Memorandum* from the Ambassador of the Republic of the Philippines in Beijing to the Undersecretary of Foreign Affairs of the Republic of the Philippines (10 Mar. 1995). MP, Vol. III, Annex 18; *Memorandum* from the Ambassador of the Republic of the Philippines in Beijing to the Undersecretary of Foreign Affairs of the Republic of the Philippines (10 Apr. 1995), p. 2. MP, Vol. III, Annex 21; *Memorandum* from the Ambassador of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-231-95 (20 Apr. 1995). MP, Vol. III, Annex 22; *Memorandum* from Ambassador of the Republic of Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-76-98-S (6 Nov. 1998). MP, Vol. III, Annex 33; *Memorandum* from Ambassador of the Republic of Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-18-99-S (15 Mar. 1999), p. 1. MP, Vol. III, Annex 38; Government of the Republic of the Philippines and Government of the People's Republic of China, *Philippine-China Bilateral Consultations: Summary of Proceedings* (20-21 Mar. 1995), p. 7. MP, Vol. VI, Annex 175; Government of the Republic of the Philippines and Government of the People's Republic of China, *Agreed Minutes on the First Philippines-China Bilateral Consultations on the South China Sea Issue* (10 Aug. 1995), p. 1. MP, Vol. VI, Annex 180; Government of the Republic of the Philippines, *Transcript of Proceedings Republic of the Philippines-People's Republic of China Bilateral Talks* (10 Aug. 1995), p. 1. MP, Vol. VI, Annex 181.

demands and better perform China's international obligations and responsibilities in the areas such as maritime search and rescue, disaster prevention and mitigation, marine scientific research, meteorological observation, ecological environment conservation, navigation safety as well as fishery production service."[85]

The full statement is in your folders at tab 2.18.

Reticence is again evident. A fleeting intimation of a concurrent defence purpose falls far short of a characterisation of the activities as military. China's statement concentrates on the civilian objectives that it describes as "the main purpose".[86]

Moreover, the application of Article 298(1)(b) is dependent on facts regarding the precise nature and purpose of each of the activities in question at each location. The state that conducts the activities has access to information that can facilitate that task. China has chosen not to supply that information. In such circumstances, it would be unfair for the Philippines to bear the burden of proving the negative.

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[85] Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Lu Kang's Remarks on Issues Relating to China's Construction Activities on the Nansha Islands and Reefs* (16 June 2015), *available at* http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1273370.shtml.

[86] *Id*.

For these reasons, it would be appropriate for the Tribunal to take into account the fact that China's plea on jurisdiction does not invoke the exceptions to jurisdiction permitted by Article 298(1)(b), and that China has supplied no evidence in support of their application.

In any event, the end result is the same, in light of the text of the Convention and the information that is available: the exceptions permitted by Article 298(1)(b) do not preclude the exercise of jurisdiction in this case.

To begin with, both exceptions in paragraph (1)(b) relate only to activities. Many of the submissions in this case concern entitlements, not activities. Those submissions are outside the ambit of paragraph (1)(b) of Article 298. Some of our submissions do concern activities. The question then is whether Article 298(1)(b) applies to those activities.

While the Convention does not define the terms "military activities" or "law enforcement activities", Article 298 does distinguish between the two. The distinction is important. The exception from compulsory jurisdiction for law enforcement activities is limited: it is limited by the text to law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded by

paragraph (2) or (3) of Article 297 from the jurisdiction of a court or tribunal. This was confirmed by both tribunals that addressed the issue in the *Arctic Sunrise* case.[87]

The result is that the law enforcement activities involved in this case do not come within the scope of the exception in Article 298(1)(b) because they fall outside the scope of the referenced exclusions in Article 297.

Professor Boyle will address the interpretation and application of Article 297 later today. For present purposes, we might bear in mind just a few points.

The exclusion from jurisdiction in paragraph (2) of Article 297 relates only to certain questions regarding marine scientific research. No such questions are posed by this case.

Paragraph (3) of Article 297, which is in your folder at tab 1.19, makes clear that compulsory jurisdiction applies with respect to fisheries, subject to a narrowly drawn exception. That exception relates only to the sovereign rights of the coastal

[87] *See Arctic Sunrise Case (Kingdom of the Netherlands v Russian Federation), Provisional Measures, Order of 22 November 2013*, ITLOS Reports 2013, para. 45. MP, Vol. XI, Annex LA-45; *Arctic Sunrise Arbitration (Kingdom of the Netherlands v Russian Federation)*, Award on Jurisdiction, UNCLOS Annex VII Tribunal (26 Nov. 2014), para. 72. SWSP, Vol. XII, Annex LA-180.

state, with respect to the living resources, in its own exclusive economic zone. This presupposes that the state objecting to jurisdiction is entitled to an exclusive economic zone in the area in question. Absent entitlement to an EEZ, the exception in paragraph (3) does not apply.

It would appear, Mr President, that the jurisdictional determination in this particular respect would not possess an exclusively preliminary character. It depends on whether there is a feature claimed by China that is within 200 miles of the area in question, that is above water at high tide, and that generates an EEZ under Article 121 of the Convention. If so, the issue of which state has sovereignty over the island is not before the Tribunal; for purposes of these proceedings it is assumed, *quod non*, that China is that state.

That said, it is unnecessary to decide whether there is an island claimed by China that generates an EEZ in the area in question in order to decide whether Article 297(3) excludes jurisdiction. There are other reasons for deciding that jurisdiction is not excluded: the exclusion from jurisdiction in Article 297(3) does not apply to the territorial sea because the exception refers only to the EEZ; the exclusion does not apply to sedentary species of

a continental shelf because the regime of the EEZ does not apply to such species under Article 68; the exclusion does not apply to non-living resources because the exception refers only to living resources; the exclusion does not apply to flag state duties because the exception refers only to coastal state sovereign rights; and the exclusion does not apply to the sovereign rights of the state that submits the dispute to settlement under Section 2 of Part XV, because the exception refers only to the sovereign rights of the state that is not obliged to accept that submission. This is evident from the use of the term "its sovereign rights" in the text of the provision.

In that light, I will turn now to the question of the applicability of Article 298(1)(b). The characterisation of activities referred to in this provision, including the distinction it draws between military and law enforcement activities, depends on the nature and purpose of the activity.

The functions that are typically assigned to the type of government ship involved, or to the government agency responsible for the activity, are not dispositive. But they can provide helpful indicia from which the nature of the activity might reasonably be inferred.

Military activities are ordinarily conducted at

sea only by vessels and aircraft operated by the armed forces of a state. Absent evidence to the contrary -- which is possible -- but absent evidence to the contrary, it can ordinarily be assumed that other vessels and aircraft are not engaged in military activities.

The reverse, however, is not true. Many states use their naval vessels for law enforcement purposes at least some of the time. Depending on the laws and practices of the flag state, naval vessels may be engaged in either military activities or law enforcement activities. A White Paper issued in 2013 by China's Defence Ministry, which is at tab 2.20 in your folders, states with respect to the Chinese Navy:

"In combination with its routine combat readiness activities, the PLAN provides security support for China's maritime law enforcement, fisheries, and oil and gas exploitation. It has established mechanisms to coordinate and cooperate with law-enforcement organs of marine surveillance and fishery administration ..."[88]

Similarly, the involvement of military personnel in construction or land reclamation activities does not necessarily mean that the purpose of the

[88] Ministry of Defence of the People's Republic of China, *The Diversified Employment of China's Armed Forces* (Apr. 2013), *available at* http://eng.mod.gov.cn/Database/WhitePapers/2012.htm.

activities is military. The logistical capabilities of the armed forces are at times engaged for civilian purposes in different parts of the world. Units with particular expertise in civil engineering may be part of the military structure, but devote their primary attention to infrastructure projects whose primary object is civilian. The US Army Corps of Engineers is, of course, one well-known example.

The Chinese People's Liberation Army is expressly tasked by the constitution to "participate in national reconstruction", and has an extensive record of civil projects. Tab 2.21 contains relevant excerpts from White Papers produced by China's Defence Ministry.

While the Convention does not elaborate on what constitutes a military activity, the provisions of other multilateral treaties may be instructive, bearing in mind, of course, that the context is different. Those provisions confirm the importance of determining the nature and purpose of the activity.

For example Article 1 of the 1959 Antarctic Treaty, which is at tab 2.22 of your folders, prohibits:

"... any measures of a military nature, such as the establishment of military bases and fortifications, the carrying-out of military maneuvres, as well as the testing of any type of

weapons."

At the same time, Article 1 makes clear that:

"... [this does] not prevent the use of military personnel or equipment for scientific research or for any other peaceful purpose."

Article 4 of the 1967 Outer Space Treaty, at tab 2.23, takes a similar approach.

Article 3 of the 1921 Convention on the Non-Fortification and Neutralisation of the Aaland Islands, which is at tab 2.24 of your folder in the authentic French text and English translation, prohibits "Aucun établissement ou base d'opérations militaires ou navales, aucun établissement ou base d'opérations d'aéronautique militaire", or "aucune autre installation utilisée à des fins de guerre".

While the Law of the Sea Convention also does not define what constitutes a law enforcement activity, the text and related cases do provide useful guidance.

In its judgment in the *Virginia G* case, the Law of the Sea Tribunal noted that the term "sovereign rights" includes "the right to take the necessary enforcement measures".[89]

Article 73 of the Convention treaties activities with respect to unauthorised fishing as law

[89] *The M/V "Virginia G" Case (Panama/Guinea-Bissau), Judgment of 14 April 2014*, ITLOS Reports 2014, para. 211.

enforcement activities. Similarly, the International Court of Justice has observed that boarding, inspection, arrest and minimum use of force to secure compliance with fisheries laws and regulations "are all contained with within the concept of enforcement of conservation and management measures".[90]

Articles 21(1)(h) and 33 of the Law of the Sea Convention treat the prevention of unlawful entry into the territory or territorial sea of a state as a law enforcement matter. The same is true of paragraph (3) of Article 211 regarding conditions for entry to ports or internal waters.

The foregoing analysis informs our conclusions that Article 298(1)(b) does not apply to the relevant submissions. I will take them in order.

In submission 8, the Philippines asks the Tribunal to determine that:

"China has unlawfully interfered with the enjoyment and exercise of the sovereign rights of the Philippines with respect to the living and non-living resources of its exclusive economic zone and continental shelf ..."

The activities relevant to this submission are properly considered law enforcement activities, not

[90] *Fisheries Jurisdiction (Spain v Canada)*, Jurisdiction, Judgment, ICJ Reports 1998, p. 432, para. 83. MP, Vol. XI, Annex LA-23.

military activities. Virtually all of the disputed conduct was undertaken by law enforcement vessels from the China Coastguard, China Marine Surveillance, or China's Fisheries and Law Enforcement Command. On the few occasions when naval vessels were present, they were there to support the other agencies in their law enforcement role.

The exception for law enforcement activities is also not applicable to this submission, submission 8, for several reasons: the exception does not apply to the applicant's sovereign rights; the exception does not apply to non-living resources or sedentary species; none of the relevant high-tide features claimed by China generate entitlement to an EEZ in the areas in which the interference occurred.

In submission 9, the Philippines asks the Tribunal to determine that:

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

Monitoring one's own fishing vessels is a law enforcement activity, not a military activity. The Law of the Sea Tribunal's recent analysis of flag state duties with respect to fishing vessels expressly

refers to enforcement measures in this context.[91]

The exception for law enforcement activities also to not apply to this submission for several reasons: the submission is not directed to law enforcement activities, but rather to their absence; the exception does not apply to the applicant's sovereign rights; the exception does not apply to flag state duties; none of the relevant high-tide features claimed by China generate entitlement to an EEZ in the relevant areas.

In submission 10, the Philippines asks the Tribunal to determine that:

"China has unlawfully prevented Philippine fishermen from pursuing their livelihoods by interfering with traditional fishing activities at Scarborough Shoal ..."

Preventing the nationals of other states from fishing is a law enforcement activity, not a military activity. The exception for law enforcement activities also does not apply to this submission because Scarborough Shoal is a high-tide feature and the activities took place in its territorial sea.

In submission 11, the Philippines asks the Tribunal to determine that:

[91] *See Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC), ITLOS, Advisory Opinion of 2 April 2015*, paras. 134, 138, 219(3).

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

The relevant activities are not military in nature. The environmentally destructive conduct at both locations was carried out by non-governmental Chinese-flagged ships, operating under the watchful eye of Chinese enforcement vessels.

The exception for law enforcement activities also does not apply to this submission for several reasons: at Scarborough Shoal, the activities took place in the territorial sea; the submission is not directed to law enforcement activities, but rather to their absence; the exception does not apply to flag state duties; and none of the high-tide features that are within 200 miles of Second Thomas Shoal, and over which China claims sovereignty, generates entitlement to an exclusive economic zone under Article 121.

I might add that, at what I trust is minimal risk of mistaken inference, standing by while fishing boats engage in environmentally destructive practice is not what was contemplated by the reference to the enforcement duties of the flag state in the Law of the Sea Tribunal's recent advisory opinion.

In submission 12, the Philippines asks the

Tribunal to determine that:

"China's occupation and construction activities on Mischief Reef

"(a) violate the provisions of the Convention concerning artificial islands, installations and structures;

"(b) violate China's duties to protect and preserve the marine environment under the Convention; and

"(c) constitute unlawful acts of appropriation ..."

Evidence that Mischief Reef is now occupied by personnel associated with the Chinese military is not relevant to the question of jurisdiction over China's conduct at the time of its initial occupation and construction activities. At that time, China itself repeatedly asserted that these activities were for civilian purposes. These representations are included in tab 2.17, to which I referred earlier. Accordingly, the exception for military activities does not apply. Nor does any question of law enforcement activities arise with respect to this submission.

The Philippines has not made similar claims concerning China's construction activities at the other features that were named in Question 10 posed by

the Tribunal in December 2014. Those others are Cuarteron Reef, Fiery Cross Reef, Johnson Reef, McKennan Reef -- including Hughes Reef -- and Subi Reef. The submissions in regard to these features deal only with the question of status and entitlement under the Convention, namely whether they are low-tide elevations under Article 13 or islands under Article 121; and, if the latter, whether they are rocks within the meaning of paragraph (3) of Article 121. These submissions contain no claims regarding Chinese activities at these features, military or otherwise. Accordingly, the involvement of Chinese military personnel at facilities on these features is irrelevant, as is Article 298(1)(b).

In submission 13, the Philippines asks the Tribunal to determine that:

"China has breached its obligations under the Convention by operating its law enforcement vessels in a dangerous manner causing serious risk of collision to Philippine vessels navigating in the vicinity of Scarborough Shoal ..."

The activity in which the vessels were engaged, attempting to drive Philippine vessels away from Scarborough Shoal by exposing them to danger of collision, that is a law enforcement activity, not a military activity. The conduct at issue was carried

out in the territorial sea by law enforcement vessels, namely those of China Marine Surveillance and Fisheries Law Enforcement Command. No naval vessels were involved. And the submission itself is limited to law enforcement vessels.

The exception for law enforcement activities also does not apply to this submission because it does not entail enforcement of the rights referred to in Article 297, paragraph (2) or paragraph (3).

In submission 14, the Philippines asks the Tribunal to determine that:

"Since the commencement of this arbitration in January 2013, China has unlawfully aggravated and extended the dispute by, among other things:

"(a) interfering with the Philippines' rights of navigation in the waters at, and adjacent to, Second Thomas Shoal;

"(b) preventing the rotation and resupply of Philippine personnel stationed at Second Thomas Shoal; and

"(c) endangering the health and well-being of Philippine personnel stationed at Second Thomas Shoal..."

The obligation to refrain from aggravating or extending a dispute that is *sub judice*, that is before a tribunal, protects the integrity of the judicial and

arbitral process. Submission 14 entails a separate and independent violation of what the Permanent Court of International Justice called:

"... the principle universally accepted by international tribunals ... to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute."[92]

Submission 14 addresses only breaches of that obligation that occurred after the dispute was submitted to this Tribunal. Jurisdiction over the dispute originally submitted to the Tribunal is the only requirement for jurisdiction over this submission. Articles 297 and 298 are inapplicable.

Even in the context of a decision that there was no jurisdiction by virtue of Article 281, the award in the *Southern Bluefin Tuna* arbitration expressly acknowledged that there would be jurisdiction over a claim that the respondent violated the obligations regarding good faith and abuse of right contained in Article 300 of the Convention. That statement is made

[92] *Electricity Company of Sofia and Bulgaria (Belgium v Bulgaria)*, Provisional Measures, Order, *1939, PCIJ* Series A/B, No. 79 (5 Dec. 1939), p. 199. MP, Vol. XI, Annex LA-61.

in paragraph 64 of the award.[93] The same holds true of a breach of duty not to aggravate or extend a dispute *sub judice*; that is, already before a tribunal. Moreover, even if Article 298(1)(b) were regarded as relevant to this submission, it would not exclude jurisdiction.

The activities are properly regarded as law enforcement activities, not military activities. They were largely carried out by law enforcement vessels seeking to enforce restrictions on entry into areas claimed by China. In one instance, a naval missile frigate was present, but it was there to provide support to the law enforcement vessels.

The exception for law enforcement activities also would not apply to this submission for two reasons: the activities in question do not entail the exercise of sovereign rights or jurisdiction with respect to marine scientific research or living resources, thus they are not within the exclusions set forth in paragraphs (2) or (3) of Article 297; also, none of the high-tide features that are within 200 miles of Second Thomas Shoal, and over which China claims sovereignty, generates entitlement to an EEZ or continental shelf under Article 121.

[93] *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan)*, Award on Jurisdiction and Admissibility, UNCLOS Annex VII Tribunal (4 Aug. 2000), para. 64. MP, Vol. XI, Annex LA-50.

Mr President, we therefore conclude that it is very clear that the exceptions to jurisdiction permitted by Article 298(1)(b), which China has chosen not to invoke, do not, in any event, preclude the exercise of jurisdiction in respect of any of the submissions to the Tribunal in this case.

This concludes my presentation on Article 298(1)(b). I thank you, Mr President and members of the Tribunal, for your kind attention.

Mr President, would this be an opportune time to break for lunch?

THE PRESIDENT: Yes, it is, and I think that everybody would welcome it. Thank you very much for your presentation. We will meet again at 2.30.

(12.59 pm)

(Adjourned until 2.30 pm)

(2.31 pm)

THE PRESIDENT: Professor Boyle, you have the floor.

First-round submissions by PROFESSOR BOYLE

PROFESSOR BOYLE: Thank you, Mr President.

Mr President, members of the Tribunal, it is a great honour to appear before you today on behalf of the Republic of the Philippines. My task this afternoon is to explain why you have jurisdiction to decide that China has violated its obligation under

Part XII of the Convention to protect and preserve the marine environment of one of the largest and most productive coral reef systems in the world.[94]

Part XV of UNCLOS gives you jurisdiction to decide that claim for two reasons. First, this part of the case requires you to interpret and apply Articles 192 and 194 of the Convention, among others, and it therefore falls squarely within compulsory jurisdiction as established by Articles 286 and 288.

Secondly, no other article of the Convention deprives you of jurisdiction. For reasons already elaborated by my colleagues, Articles 281, 282 and 283 either do not apply or have been satisfied. But in response to the Tribunal's questions of 23rd June, I will explain later on this afternoon why the Convention on Biological Diversity also has no effect on your jurisdiction.

Finally, Articles 297(2) and 297(3) do not exclude jurisdiction. This is neither a dispute about marine scientific research nor about coastal state management of EEZ living resources. So, in short, what I will be saying this afternoon is that you do have jurisdiction to consider the merits of submissions 11 and 12(b).

Submission 11 reads as follows:

[94] *See* Kent E. Carpenter, Ph.D., *Eastern South China Sea Environmental Disturbances and Irresponsible Fishing Practices and their Effects on Coral Reefs and Fisheries* (22 Mar. 2014), pp. 4-9. MP, Vol. VII, Annex 240.

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

Our claim is that:

"China's toleration, encouragement of and failure to prevent environmentally destructive fishing practices at Scarborough Shoal and Second Thomas Shoal violate its duty to protect and preserve the marine environment ..."[95]

We say that China has flagrantly violated Articles 192 and 194 by using dynamite to destroy coral reefs, cyanide to kill the fish, and by harvesting giant clams, which are an endangered species that live on the reefs.

Submission 12(b) makes a similar claim with respect to the harmful environmental effect of construction activities at Mischief Reef.[96] So the marine environment that we are concerned with in these proceedings is thus a particular one: it is the ecosystem of coral reefs and the biodiversity and living resource sustained by that environment.

Article 192 of the Convention provides that:

"States have the obligation to protect and

[95] Memorial of the Philippines (hereinafter “MP”), para. 7.35.

[96] MP, paras. 6.108-6.113.

preserve the marine environment."

It covers areas within national jurisdiction and areas beyond national jurisdiction. In short, it is about the obligation of states to take measures to preserve the ecological balance of the oceans.[97]

The broad and comprehensive character of Part XII is evidenced by Article 194(5), which provides that:

"The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life."

The recent award in the *Chagos* arbitration confirms that Article 194 covers the conservation and preservation of marine ecosystems, including coral reefs.[98]

With regard to Scarborough Shoal, Second Thomas Shoal and Mischief Reef, we will therefore argue at the merits stage -- assuming that you conclude that you have jurisdiction -- that Articles 192 and 194

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[97] *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 4 (M. Nordquist, et. al., eds., 2002), pp. 3-12, especially para XII.13.

[98] *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*, UNCLOS Annex VII Tribunal, Award (18 Mar. 2015) (hereinafter "*Chagos Arbitration*"), para. 538 ("... the Parties' disagreement regarding the scope of Article 194 is answered by the fifth provision of that Article, ... Article 194 is accordingly not limited to measures aimed strictly at controlling pollution and extends to measures focussed primarily on conservation and the preservation of ecosystems."). Hearing on Jurisdiction, Annex LA-225. *See also id.*, para 320.

establish the following obligations: (a) to take measures to protect and preserve marine ecosystems, including coral reefs; (b) to ensure sustainable use of the biological resources which those coral reefs represent; (c) to protect and preserve endangered species found in the reefs; (d) to apply a precautionary approach in all these respects; and finally (e) to consult and cooperate with the Philippines and other relevant states in the management of the biological resources, ecosystems and marine environment of all of the reef systems in the South China Sea.

In doing so, we will not be alleging any separate breach of the Convention on Biological Diversity or of the UN Agreement on Straddling and Highly Migratory Fish Stocks, although it is true that both parties to this arbitration are also parties to those treaties. Our argument with respect to these agreements is simply that the Biological Diversity Convention and the Fish Stocks Agreement are "relevant rules of international law" for the purposes of Article 31(3)(c) of the Vienna Convention on the Law of Treaties.[99] In our view, the normative content of Articles 192 and 194 should be informed by reference

[99] *Id.*, paras. 11.3-11.4.

to those treaties and other relevant instruments.[100]

Previous UNCLOS tribunals have taken that approach. In the *Saiga (No. 2)* case, for example, the ITLOS took into account the Convention on the Conditions of Registration of Ships, the FAO Compliance Agreement and the UN Fish Stocks Agreement when interpreting Article 94 of the Convention.[101]

Coming now to jurisdiction over the Philippines' environmental claims, jurisdiction over those claims is quite straightforward. Articles 286 and 288(1) establish the principle of compulsory jurisdiction over "any dispute concerning the interpretation or application" of the Convention.[102]

Is there a dispute concerning the meaning or application of Articles 192 and 194? Yes, there is. In the absence of any Chinese response on the merits, it is, of course, impossible to say how China would interpret and apply these articles. But its inaction speaks volumes. If it agreed with the Philippines, it would have stopped the destructive practices currently engaged in at Scarborough Shoal, Second Thomas Shoal

[100] Supplemental Written Statement of the Philippines (hereinafter "SWSP"), para 11.3.

[101] *The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v Guinea), Judgment of 1 July 1999*, ITLOS Reports 1999, paras. 84-85. MP, Vol. XI, Annex LA-36. *See also M/V "Virginia G" Case (Panama/Guinea-Bissau), Judgment of 14 April 2014*, ITLOS Reports 2014, para 216.

[102] *Chagos MPA Arbitration*, para. 318. Hearing on Jurisdiction, Annex LA-225.

and Mischief Reef. So there is plainly a dispute whose existence can be inferred from the behaviour of the parties.[103]

China has ignored the repeated protests made by the Philippines at the damage it has caused or permitted.[104] The issue was again ignored in the December 2014 Position Paper,[105] and its fishermen have continued their harmful activities at Scarborough Shoal and at Second Thomas Shoal under the protection of Chinese Coastguard vessels. And construction activities have proceeded unabated at Mischief Reef, as you can see from the photographs you saw this morning.

On this evidence, China either believes its fishermen are acting lawfully, or it does not care that they are acting unlawfully. The same can be said about activities at Mischief Reef. Either way, its failure to protect the ecosystems, the biodiversity and the endangered species of the reefs is, in our view, a straightforward violation of the 1982

[103] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)*, Preliminary Objections, Judgment, ICJ Reports 1998, p. 315, para. 89. MP, Vol. XI, Annex LA-25. *See also United States Diplomatic and Consular Staff in Tehran (United States v Iran)*, Merits, Judgment, ICJ Reports 1980, paras. 46, 47, 49, 51. SWSP, Vol. XII, Annex LA-175.

[104] MP, para. 6.55.

[105] See 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"). SWSP, Vol. VIII, Annex 467.

Convention.

The ICJ case law shows that China could not plausibly argue that there is no dispute, no "conflict of legal views"[106] on the legality of its actions -- or inactions -- at any of these locations. The facts speak for themselves, and they clearly show that "the claim of one party is positively opposed by the other".[107]

Could China then argue that the dispute is not about the marine environmental provisions of UNCLOS? This would not be a realistic objection to jurisdiction in respect of submissions 11 and 12(b). In the *Ambatielos* case,[108] the International Court held that jurisdiction is "based on" a treaty if:

"... the arguments advanced by the [claimant] Government ... are of a sufficiently plausible character to warrant a conclusion that the claim is based on the Treaty."

The Philippines' environmental claim meets the variety of formulations used by the ICJ in *Ambatielos*:

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[106] *Mavrommatis Palestine Concessions*, Judgments, *1924, PCIJ* Series A, No. 2, p. 11. MP, Vol. XI, Annex LA-57.

[107] *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)*, Preliminary Objections, Judgment, ICJ Reports 1962, p. 319, at p. 328. *See also Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, ICJ Reports 1988, p. 12, para. 35; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, ICJ Reports 1950, p. 74. MP, Vol. XI, Annex LA-1.

[108] *Ambatielos (Greece v United Kingdom)*, Judgment, ICJ Reports 1953, p. 10, at p. 18. Hearing on Jurisdiction, Annex LA-220.

it is more than sufficiently plausible, it is eminently arguable, it is most certainly possible.

This commonsense approach has been followed in subsequent cases. In the *Nicaragua* case, the ICJ reaffirmed that there must be a "reasonable connection between the Treaty and the claims submitted to the Court".[109] Again, that test is plainly met in this case. There is an obvious connection between UNCLOS Part XII and the environmental claims made in submissions 11 and 12.

Could China plausibly argue that this part of the case is, in reality, a territorial sovereignty dispute, not an environmental one? Again, the answer is clearly no. If that were a good argument in this case, it would have been a good argument in the *Chagos* arbitration. But, as Professor Sands pointed out yesterday, the arbitrators in *Chagos* held that they did have jurisdiction over a dispute about protection of the marine environment,[110] even though the remainder of Mauritius's case was characterised as a dispute about competing claims to sovereignty over land territory outside UNCLOS compulsory jurisdiction.[111]

[109] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, p. 431, para. 81. MP, Vol. XI, Annex LA-13.

[110] *Chagos MPA Arbitration*, para. 323. Hearing on Jurisdiction, Annex LA-225.

[111] *Id.*, paras. 213-221, 228-230.

So before coming to the next part of my argument, let me simply summarise the three points I have made so far. First, there is a dispute concerning protection and preservation of the marine environment, and that is a reasonable characterisation of submissions 11 and 12. Secondly, the dispute centres on the alleged violation of Articles 192 and 194 of the Convention, and the parties do appear to have opposing views on the legality of Chinese conduct. That's the environmental dispute we are inviting you to decide on the merits. And thirdly, it is thus a dispute about interpretation or application of the Convention, and you have jurisdiction to decide that dispute under Article 288(1).

Now let me turn to the question whether the environmental dispute outlined in submissions 11 and 12 is excluded from compulsory jurisdiction by Article 297 or by any other provision of UNCLOS. With respect to Article 297, there are two possible ways of answering the question. The simplest is to say that exclusions from Article 297(3) are inapplicable.

At Scarborough Shoal there are six pinnacles of rock above water at high tide, so in our view it does have a territorial sea, but no entitlement to an EEZ or a continental shelf.[112] The activities that we are

[112] MP, paras. 5.5-5.12; SWSP, Vol. II, pp. 158-160.

questioning at Scarborough Shoal, the fishing activities, occur within the territorial sea, as Professor Oxman pointed out this morning. The language of the exclusions from jurisdiction in 297(3) does not apply to the territorial sea.

Article 297(3) is also irrelevant to Second Thomas Shoal and Mischief Reef because they are, at most, low-tide elevations, and as such they form part of the seabed and subsoil, and we would say they form part of the seabed and subsoil of the Philippines' continental shelf and exclusive economic zone.[113] Article 297(3) could be relevant only if the claimant state -- that's the Philippines -- were challenging the respondent state's sovereign rights in the EEZ. But of course that's not the case here. In respect of Second Thomas Shoal and Mischief Reef, China is not the relevant coastal state. China is not bringing the case. It's the Philippines, less than 200 miles away, that is the relevant coastal state. As Professor Oxman cogently explained this morning, Article 297(3) cannot prevent the Philippines from resorting to UNCLOS proceedings in order to protect its own marine environment.

The second response, however, is to say that Article 297(1) is an affirmation of compulsory jurisdiction with respect to the whole of the marine

[113] MP, paras. 5.60, 5.63 & SWSP, Vol. II, pp. 126-128, 162-164.

environment. Article 297(1) thus supports our case on jurisdiction over environmental disputes within the territorial sea and on the continental shelf, even if China were the relevant coastal state, which of course it is not.

Now, these points all follow from the *Chagos* case. That award provides no support for any contrary argument by China. I propose briefly to take the Tribunal to the relevant passages of *Chagos* in a moment or two. But in summary, that arbitral award makes two relevant findings with respect to Article 297. First, it holds that Article 297(1) confirms and expands jurisdiction over environmental disputes, but does not limit it. Second, although Article 297(3) excludes disputes concerning EEZ living resources from compulsory jurisdiction, it does not apply to disputes concerning protection of coral reefs and giant clams, because these are sedentary species subject to the continental shelf regime.[114]

So the *Chagos* tribunal thus gives a broad reading to the category of environmental disputes within compulsory jurisdiction under Article 297(1), and a narrow reading to the category of living resources disputes excluded from compulsory jurisdiction by

[114] *Chagos MPA Arbitration*, para. 304. Hearing on Jurisdiction, Annex LA-225.

Article 297(3). That is precisely the position which the Philippines invites the Tribunal to affirm in this case.

Now, if you would like to turn to the excerpts from the *Chagos* award at tab 3.1 in your folder, I can briefly draw your attention to the most relevant passages in what is a long and quite complex decision. The relevant paragraphs are 307 to 321, and happily they are not all relevant.

At paragraph 307, the tribunal first observes that:

"... Article 297(1) ... is phrased entirely in affirmative terms and includes no exceptions to the jurisdiction the Tribunal may exercise."

And in paragraph 308, it goes on:

"Article 297(1) [they say] does not state that disputes concerning the exercise of sovereign rights and jurisdiction are only subject to compulsory settlement in the enumerated cases ... as a matter of textual construction, the Tribunal does not consider that such a limitation can be implied."

And after some further elaboration in the same paragraph, the tribunal concludes:

"Textually, therefore, Article 297(1) reaffirms, but does not limit [they say], the Tribunal's jurisdiction pursuant to Article 288(1)."

And that's probably the key finding with regard to the environment.

There then follows a long discussion of the drafting history of Article 297 -- which is worth reading, but I will not take you through that -- before the tribunal makes another important point at paragraph 316. Now, there it notes:

"... in certain respects Article 297(1) expands the jurisdiction of a Tribunal over the enumerated cases beyond that which would follow from the application of Article 288(1) alone. In addition ..."

And this is the key point:

"In addition to describing disputes relating to the interpretation and application of the Convention itself, each of the three specified cases in Article 297(1) includes a *renvoi* to sources of law beyond the Convention itself."

And then further down paragraph 316, the tribunal refers specifically to Article 297(1)(c) as one of the provisions which makes a *renvoi* to other environmental rules. And at paragraph 320, the tribunal expressly rejects "the suggestion that Article 297(1)(c) or Part XII of the Convention ... are limited to measures aimed at controlling marine pollution", and it then cites, rather obviously, Article 194(5). It seems to me, drawing an obvious conclusion from that, that on

this reading, Article 297(1)(c) could be construed to include a *renvoi* to the Convention on Biological Diversity, the Convention on International Trade in Endangered Species and the UN Fish Stocks Agreement.

This is the last quotation from the award. Finally, at paragraph 321, the tribunal also rejects:

"... the proposition that Article 297(1)(c) was intended to refer only to external conventions such as MARPOL, SOLAS, or the London Convention."

And because it's relevant to this case, I might note here that the tribunal could have added the COLREGS Convention to this list.[115]

As I said earlier, the Philippines has not sought to allege that China is in breach of the Biological Diversity Convention or the Fish Stocks Agreement or the Endangered Species Convention. But the *Chagos* tribunal's interpretation of 297(1)(c) does imply that you would have jurisdiction over a violation of these agreements, each of which is aimed in part at protection and preservation of the marine environment. In our view, it is unnecessary to go this far. As I explained earlier, the environmental destruction at Scarborough Shoal, Second Thomas Shoal and Mischief Reef is amply covered by Articles 192 and 194. But if

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

you were disinclined to rely exclusively on the Philippines' broad reading of those articles, I would merely observe that Article 297(1)(c) provides another way to reach the same conclusion.

That brings me to 297(3). Article 297(3)(a) does two things. First, it affirms compulsory jurisdiction over "Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries". This is a comprehensive and unqualified affirmation of jurisdiction over UNCLOS fisheries disputes, wherever they arise. Secondly, it then exempts a coastal state from any obligation to accept compulsory jurisdiction over "any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise". Professor Oxman I think explained the implications of that formulation this morning.

The fisheries jurisdiction affirmed in the first limb of Article 297(3)(a) is very broad. It would extend to the dispute over Philippine fishing in the territorial sea of Scarborough Shoal referred to in submission 10. It would extend to the indiscriminate impact of Chinese fishing practices at Scarborough and Second Thomas Shoals referred to in submission 11. And to answer the questions put by the Tribunal in paragraph F of its letter of 23rd June, Article 297(3)

would also give you jurisdiction over submissions 8 and 9, where they relate to Chinese fishing or interference with fishing in the Philippines' EEZ.

By way of contrast, the exclusion from jurisdiction in Article 297(3) is very narrow. It relates only to the EEZ, and applies only in respect of the coastal state's sovereign rights over living resources. It does not apply to the territorial sea or to the continental shelf, or to cases brought by the coastal state against other states for their violations of the Convention within the claimant state's exclusive economic zone. On its own terms, the exclusion of Article 297(3) can have no relevance for disputes about fishing and management of living resources in the territorial sea or the continental shelf, or for disputes about Chinese fishing practices in the Philippines' EEZ.

Mr President, that's all I have to say on Article 297. I can now proceed to the final section of what I have to say this afternoon, which is to deal with the Convention on Biological Diversity and to argue that it does not affect your jurisdiction.

If it had appeared in these proceedings, China might have said that, in substance, the environmental dispute is about protection of biodiversity, and that it should be settled in accordance with the dispute

settlement procedures of the Convention on Biological Diversity. Let me explain why this would be a bad argument.

There are two reasons. First, this is not a dispute about the interpretation and application of the Convention on Biological Diversity, and references to biological diversity and marine ecosystems do not make it one. It is a dispute about interpretation and application of Part XII of UNCLOS in general, and of UNCLOS Article 194(5) in particular.

In our view, as I explained at the beginning of this speech, Article 194(5) includes the protection and preservation of the biological diversity represented by coral reefs, but it doesn't thereby incorporate the Convention on Biological Diversity, nor does it convert an UNCLOS dispute into a dispute under the CBD.

Secondly, neither Article 281 nor 282 of UNCLOS applies to this part of the dispute or precludes this Tribunal from deciding it. To explain that point, I need to draw your attention to the dispute settlement provisions on the Convention on Biological Diversity, and you will find the text of Article 27 in your judges' folder at tab 3.2.[116]

[116] Article 27(1) provides:

Now, in summary, Article 27(1) of the Biological Diversity Convention requires the parties to seek a solution to disputes by negotiation. Article 27(3) then affords them the option of accepting arbitration or the ICJ as a compulsory means for the settlement of disputes under the Convention. And in default of any such choice, Article 27(4) provides for compulsory conciliation in accordance with Annex II of the Biological Diversity Convention, and you will find the text of Annex II at tab 3.3 in your folder.

The Tribunal is familiar with the terms of Articles 281 and 282 of UNCLOS, so I certainly don't need to read those out. But the essential point of Articles 281 and 282 is that where the parties have agreed on some other dispute settlement process, that

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In the event of a dispute between Contracting Parties concerning the interpretation or application of this Convention, the parties concerned shall seek solution by negotiation.

(2) [Omitted].

(3) When ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, a State or regional economic integration organization may declare in writing to the Depositary that for a dispute not resolved in accordance with paragraph 1 or paragraph 2 above, it accepts one or both of the following means of dispute settlement as compulsory: (a) Arbitration in accordance with the procedure laid down in Part 1 of Annex II; (b) Submission of the dispute to the International Court of Justice.

(4) If the parties to the dispute have not, in accordance with paragraph 3 above, accepted the same or any procedure, the dispute shall be submitted to conciliation in accordance with Part 2 of Annex II unless the parties otherwise agree.

(5) [Omitted].

Convention on Biological Diversity, 1760 UNTS 79 (5 June 1992), entered into force 29 Dec. 1993, Art. 27. MP, Vol. XI, Annex LA-82.

process will prevail over Part XV if the terms of those articles are met.

It is convenient, perhaps, to look first at Article 282, which applies where the parties have submitted to an alternative process that entails a binding decision. No such process has been agreed under the Convention on Biological Diversity as between the Philippines and China: neither party has accepted compulsory jurisdiction pursuant to Article 27(3) of the Biodiversity Convention. So the only compulsory procedure applicable under that Convention to both parties is conciliation as provided for in Article 27(4) and Annex II. And conciliation, of course, is not binding on the parties to the dispute. So it seems very clear that Article 282 cannot possibly deprive this Tribunal of jurisdiction, even if you were to take the view that this is a dispute about biological diversity.

That leaves Article 281. Article 281 does not require the alternative process to entail a binding decision, but it limits your jurisdiction to cases where no settlement has been reached and "the agreement between the parties does not exclude any further procedure". For Article 281 to work in China's favour, it would have to be established that Article 27(4) of the Convention on Biological

Diversity excludes further UNCLOS proceedings.

Nothing in the wording of Article 27 or in Annex II of that Convention specifically excludes proceedings under Part XV of UNCLOS or anywhere else. Mr Martin has already indicated that the intent to exclude further procedures must be evident from the terms of the agreement. So does the existence of a mandatory conciliation procedure in the Biological Diversity Convention constitute an agreement excluding any further procedure under Part XV of UNCLOS? That's the only way one can pose the question under the Biological Diversity Convention.

As Mr Martin noted this morning, the arbitral award in the *Bluefin Tuna* case held that:

"... the absence of an express exclusion of any procedure ... is not decisive ..."

And the arbitrators went on to say that the inclusion of an express obligation to keep the dispute under review:

"... equally imports ... that the intent of Article 16 [of the *Bluefin Tuna* Convention] is to remove proceedings under that Article from the reach of the compulsory procedures of section 2 of Part XV of UNCLOS..."[117]

[117] *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan)*, Award on Jurisdiction and Admissibility, UNCLOS Annex VII Tribunal (4 Aug. 2000), para. 57. MP, Vol. XI, Annex LA-50.

Now, the similarity between the *Bluefin Tuna* Convention, Article 16, and the Biological Diversity [Convention], Article 27, is that it can be said that neither provision expressly [ex]cludes further procedures under UNCLOS. There is a difference, however. The Biological Diversity Convention does provide for compulsory conciliation if other procedures are not agreed on, while obviously the *Bluefin Tuna* Convention does not.

But the question is the same in either case: is resort to UNCLOS Part XV procedures excluded even though the other agreement does not expressly say so? So we come back to the affirmative decision on this point in the *Bluefin Tuna* arbitral award, and that decision, or the decision on that point, is almost universally disputed in the literature,[118] and by other judicial decisions.[119]

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[118] *See* Bernard H. Oxman, "Complementary Agreements and Compulsory Jurisdiction", *American Journal of International Law*, Vol. 95, No. 2 (2001), p. 277; "Southern Bluefin Tuna Cases", *Max Planck Encyclopaedia of International Law* (R. Wolfrum, ed., 2008); David A. Colson and Peggy Hoyle, "Satisfying the Procedural Prerequisites to the Compulsory Dispute Settlement Mechanisms of the 1982 LOSC", *Ocean Development & International Law*, Vol. 34, No. 1 (2003), p. 59; Cesare Romano, "The Southern Bluefin Tuna Dispute", *Ocean Development & International Law*, Vol. 32, No. 4 (2001), p. 313.

[119] *Compare Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan), Provisional Measures, Order of 27 August 1999*, ITLOS Reports 1999, para. 55. MP, Vol. XI, Annex LA-37 ("*Considering* that, in the view of the Tribunal, the fact that the Convention of 1993 applies between the parties does not preclude recourse to the procedures in Part XV, section 2, of the Convention on the Law of the Sea") with *The MOX Plant Case (Ireland v United Kingdom), Provisional Measures, Order of 3 December 2001*, ITLOS Reports 2001, para. 49. MP, Vol. XI, Annex LA-39 ("*Considering* that the dispute settlement procedures under the OSPAR Convention, the EC Treaty and the Euratom Treaty deal with disputes concerning the interpretation or

It is true to say that the arbitral award on this point has very few supporters, if any; and indeed this may be the moment for you to be merciful and kill it off, finally. I would merely say that there is simply no basis in treaty interpretation for the conclusion that Article 281 comes into play when another treaty dealing with a related issue fails to make provision for a compulsory binding dispute settlement.

The fact that other agreements, even post-UNCLOS ones, make no provision for compulsory jurisdiction tells us absolutely nothing about the parties' intention with regard to the settlement of UNCLOS disputes. There is nothing in the text or the context of the *Bluefin Tuna* Convention to justify the conclusion that it was meant to exclude compulsory jurisdiction over disputes under UNCLOS, and that surely is the key point in dealing with the Biological Diversity Convention.

Now, the arbitrators in the *Bluefin Tuna* award characterised that dispute as one "primarily centred" on the *Bluefin Tuna* Convention, rather than UNCLOS. But that doesn't mean there was no UNCLOS dispute, nor does it explain why the UNCLOS dispute couldn't be settled under Part XV. It doesn't require the

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application of those agreements, and not with disputes arising under the Convention…").

resources of Foley Hoag to invent an UNCLOS dispute in the *Bluefin Tuna* case, though it would probably help. But, at most, that point merely tells us that a dispute under the *Bluefin Tuna* Convention cannot be decided in Part XV proceedings or elsewhere unless the parties agree. But that is what Article 288(2) provides. That is what 288(2) is for. Article 281 has no role in this context.

So, first and foremost, we say that *Bluefin Tuna*, on this point, was wrongly decided, and that Part XV procedures are not trumped by the existence of some other treaty which says nothing on the subject of UNCLOS disputes. The Convention on Biological Diversity falls fairly into that category. But even if you don't accept that argument, we would also point out that our case under submissions 11 and 12(b) is entirely centred on protection and preservation of the marine environment under UNCLOS; it's not centred at all on conservation and sustainable use of biological diversity under the Convention on Biological Diversity.

It would therefore be extraordinary if you were now to decide that Article 27 of the Convention on Biological Diversity, by implication, precludes resort to Part XV procedures in a case which alleges violation of Articles 192 and 194 of UNCLOS. That

cannot have been the intention of the drafters of the Convention on Biological Diversity, nor does it follow from the ordinary meaning of Article 27, nor from its silence on the question of UNCLOS disputes.

Mr President, members of the Tribunal, in your letter of 23rd June, you asked at paragraph G:

"Whether the Tribunal's consideration of its jurisdiction over the ... dispute is dependent upon a prior determination of (i) sovereignty over disputed feature with a possible environment to an [EEZ] overlapping [with] the Philippines; or (ii) the status (as an island, rock, [LTE], or submerged feature) of any disputed feature with a possible entitlement to an [EEZ] overlapping [with] the Philippines."

I can answer that question in respect of submission 10, 11 and 12, and the answer is no. Submissions 10 and 11 assume that Scarborough Shoal is -- *quod non*, and only for the purpose of these proceedings -- under Chinese sovereignty, and that it is entitled to a territorial sea. If, contrary to the Philippines' argument, it also has a continental shelf and exclusive economic zone, the answer is still no. Submission 11 is about Chinese activities which are harmful to the marine environment, regardless of where they take place or in whose maritime zones.

That answer also covers Second Thomas Shoal and

Mischief Reef, and therefore submission 12. Of course, we do maintain that Second Thomas Shoal and Mischief Reef are LTEs that are part of the Philippines' continental shelf. But even if they were, for whatever reason, Chinese, or even if they did, for whatever reason, have some entitlement in their own right to maritime zones, the answer is still the same: it makes no difference for the purposes of submissions 11 or 12 whether the marine environment in question is the territorial sea, the continental shelf, the exclusive economic zone or the high seas, nor does it make any difference whether it is Chinese or Philippine. China is still violating its obligations under Articles 192 and 194.

And I have one last point, for the sake of completeness. It's not an environmental claim, but it is related to one.

Submission 12(a) relates to the construction activities at Mischief Reef which are the source of the environmental problems referred to in submission 12(b). In respect of 12(a), the Philippines alleges a violation of Articles 60 and 80 of UNCLOS. But here, too, your jurisdiction is very clearly established by Articles 286 and 288(1), and Article 297 is irrelevant to these provisions. And I believe Professor Sands has already covered

submission 12(c), so I don't need to say anything about that one.

So, Mr President, members of the Tribunal, to conclude, the essential points are these: you have jurisdiction under Articles 288(1) and 297(1)(c) to hear argument on the merits of submissions 11, 12(a) and 12(b); neither Article 297(3) nor any other provision of the Convention or any other treaty precludes you from doing so; and Article 297(3) also gives you jurisdiction over submissions 8, 9 and 10 insofar as they relate to fishing in the territorial sea of either state or in the Philippines' EEZ.

Does China in any way contradict any of the arguments I have made today? No. The Position Paper it submitted in December talks at length about territorial sovereignty, maritime boundaries, other agreements, but it nowhere mentions the issues I have addressed this afternoon.[120] There is no discussion of the environmental dispute, whether on the merits or in jurisdictional terms. There is no reference to Articles 192 and 194. There is no elaboration of China's position on Article 297(3). The Position Paper does not contest your jurisdiction to decide submissions 10, 11 and 12 on their merits; and that, I would submit, reinforces the conclusion that there

[120] China's Position Paper. SWSP, Vol. VIII, Annex 467.

is no such objection.

Mr President, that concludes what I have to say. I thank you and all members of the Tribunal for giving me an attentive and patient hearing this afternoon. Unless there are any questions, I would ask you to call Professor Sands to the podium. Thank you.

THE PRESIDENT: Thank you very much, Professor Boyle. We don't have any questions for you at the moment, so we will ask Professor Sands to come to the podium.

(3.09 pm)

First-round submissions by PROFESSOR SANDS

PROFESSOR SANDS: Mr President, members of the Tribunal, it falls to me to conclude the first round of these oral arguments on behalf of the Republic of the Philippines.

I am first going to address a final point in relation to the Tribunal's jurisdiction and the admissibility of these proceedings, namely that of the indispensable third party. I will then say something about the submissions of the Philippines generally, and the issues raised by the Tribunal in your letter of 23rd June last.

Let me begin with third parties. In our Memorial we set out the basis for our submission that there is no bar to the exercise by this Tribunal of its

jurisdiction by reason of the absence of any indispensable third state.[121] We noted -- as the Tribunal must surely also have done -- that China has not addressed this point in its Position Paper,[122] and it has not raised this as an objection to jurisdiction or admissibility.

In this regard, the Philippines has requested the Tribunal to make a determination on the nature of and the entitlements that flow from Scarborough Shoal and eight of the insular Spratly features that are occupied or controlled by China. The Spratly features are also claimed by Vietnam, which is not a party to these proceedings and which has not sought to intervene, but is represented as an observer in this room today with other states.

Vietnam has, however, communicated its view to the Tribunal, and it has not raised an indispensable third-party objection to the exercise of jurisdiction. To the contrary, as Mr Reichler noted yesterday, Vietnam's statement to the Tribunal of December 5th 2014 says unequivocally that Vietnam "has no doubt that the Tribunal has jurisdiction in these

[121] Memorial of the Philippines (hereinafter "MP"), Vol. I, paras. 5.115-5.137.

[122] 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). Supplemental Written Submissions of the Philippines (hereinafter "SWSP"), Vol. VIII, Annex 467 (hereinafter "China's Position Paper").

proceedings".[123] Nor do we, on the Philippines' side, have any doubts that the Tribunal has jurisdiction. And Vietnam's absence as a party to these proceedings does not deprive the Tribunal of the right to exercise the jurisdiction that it has, as Vietnam's statement made very clear.

The position of the Philippines on this issue more broadly has been spelled out in our Memorial at paragraphs 5.115 to 5.137, and I won't spend a lot of time going back over it. Simply put, we analysed all the relevant case law, starting with the International Court's decision of 1954 in the *Monetary Gold* case, and demonstrated that Vietnam is not an indispensable party to these proceedings.

As we explained in our Memorial, it is of cardinal importance to recognise the distinction between a situation in which legal interests may be affected, on the one hand -- in respect of which there is no indispensable third-party issue -- and the situation, on the other hand, in which the legal interests of a third party, to take the words of the International Court, "form the very subject matter of the

[123] 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* (5 Dec. 2014), para. 1. SWSP, Vol. VIII, Annex 468.

decision",[124] in which case there may be an indispensable third-party issue. In the present case, no legal interest of a third state can be said to form the very subject matter of the decision.

We know too that the principle has been successfully invoked "only in exceptional circumstances".[125] It has happened, in fact, only once before the International Court of Justice in the 51 years since the *Monetary Gold* case, in *Portugal v Australia*,[126] and on one other occasion in arbitral proceedings under the auspices of the Permanent Court of Arbitration, in what might be called the curious case of *Larsen v the Hawaiian Kingdom*.[127]

These cases share two common features. First, the legal rights and obligations of the third state had to be determined as a prerequisite to the determination of the merits of the case. And second, the legal determination in question related to the lawfulness of the conduct by the third state. It is evident that neither of these features is present in this case.

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[124] *Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom of Great Britain and Northern Ireland, and United States of America)*, Preliminary Question, Judgment, ICJ Reports 1954, p. 32. MP, Vol. XI, Annex LA-3.

[125] Christine Chinkin, *Third Parties in International Law* (1993), p. 198. MP, Vol. XI, Annex LA-133.

[126] *Portugal v Australia*. MP, Vol. XI, Annex LA-22.

[127] Larsen *v Hawaiian Kingdom,* Arbitral Award, Permanent Court of Arbitration (5 Feb. 2001), MP, Vol. XI, Annex LA-52.

A determination of the status of the maritime features in the South China Sea -- and the legal entitlements such features are entitled to generate as a matter of international law in accordance with the 1982 Convention -- does not require the Tribunal to consider, as a prerequisite, any claim by any state that is not party to this arbitration. Nor is the Tribunal called upon to make an assessment of the legality or illegality of any claims or conduct by Vietnam, or by any other state that is not party to these proceedings.[128]

We note, finally, that Vietnam's legal position on the status and entitlement of the eight Spratly features that are the subject of the Philippines' submissions is not inconsistent with the position of the Philippines. As Vietnam wrote to the Tribunal last December:

"... none of the features mentioned by the Philippines in these proceedings can enjoy their own exclusive economic zone or continental shelf or generate maritime entitlements in excess of 12 nautical miles since they are low-tide elevations or 'rocks ...' under Article 121(3) of the Convention."[129]

[128] S. Rosenne and Y. Ronen, *The Law and Practice of the International Court, 1920–2005*, Vol. II (4th ed. 2006), p. 539. MP, Vol. XI, Annex LA-155.

[129] Socialist Republic of Viet Nam, *Statement of the Ministry of Foreign Affairs of the Socialist Republic of Viet Nam Transmitted to the Arbitral*

We assume that these are the reasons why Vietnam has encouraged this Tribunal to take and then exercise jurisdiction over the claims presented by the Philippines.

Mr President, I think at this stage of the proceedings there is no need for me to elaborate further on this issue. We noted that the Tribunal did not seek further comment or argument from the Philippines in its written questions of 16th December 2014, and it did not identify this issue in its 23rd June 2015 list of issues that might be addressed at these oral hearings. In the circumstances, we consider it to be a non-issue. But of course, if the Tribunal does have any questions that it wishes to pose at the end of this round, we will be very pleased to respond to them on Monday, in accordance with the timetable.

Mr President, members of the Tribunal, I turn to a summation of the totality of what you have heard. I am going to bring together the general strands of the Philippines' case as they are at this stage.

China has made arguments that are, it might be said, very far-reaching in terms of their potential implications for the future life and wellbeing of the

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Tribunal in the Proceedings Between the Republic of the Philippines and the People's Republic of China (5 Dec. 2014) (hereinafter "Viet Nam's Statement"), p. 5. SWSP, Vol. VIII, Annex 468.

1982 Convention, and for the dispute settlement provisions that are set out in Part XV. China's most recent word is set out in its letter of 1st July 2015, just a few days ago -- and you can see that at tab 3.4 -- when it wrote to the Tribunal and made the following statement:

"On issues of territorial sovereignty and maritime rights and interests, China will not accept any imposed solution or any unilateral reporting to a third party settlement."[130]

We have taken very careful note of this formulation, which goes beyond what they have said before, and in particular to the claim that Part XV cannot be applied to any situation, it would seem, where a state asserts "maritime rights and interests".[131] On what basis does China justify this? It says:

"... this is the legitimate right bestowed upon China by international law, including the United Nations Convention on the Law of the Sea ..."[132]

What China effectively seeks to do here is to exclude virtually the entirety of dispute settlement

[130] Letter from H.E, Ambassador Chen Xu of the People's Republic of China, addressed individually to each member of the Arbitral Tribunal (1 July 2015), para. 1. Hearing on Jurisdiction, Annex 574.

[131] *Ibid.*, para. 1.

[132] *Ibid.*, para. 1.

from Part XV. And that is, we say, a very significant challenge to the Convention, to Part XV, and to this Tribunal.

When we first saw this recent contribution on the part of China, there came to our mind the words of the Annex VII tribunal in another case, in its recent award on jurisdiction in the *Arctic Sunrise* case. In that case, the tribunal held unanimously that a unilateral declaration by a party to UNCLOS:

"... cannot exclude from the jurisdiction of the procedures in Section 2 of Part XV of the Convention 'every dispute' that concerns [certain matters]."[133]

As the tribunal put it, a party can only exclude disputes which are also excluded from the jurisdiction of a court or tribunal under certain provisions of UNCLOS. As the tribunal put it in that case, a party's declaration -- and I am going to quote this at length:

"... must be interpreted with due regard to the relevant provisions of the Convention. Article 309 of the Convention provides that no reservation or exception may be made to the Convention unless expressly permitted by its other provisions. Although Article 310 states that article 309 does not preclude

[133] *Arctic Sunrise Arbitration (Kingdom of the Netherlands v Russian Federation)*, Award on Jurisdiction, UNCLOS Annex VII Tribunal (26 Nov. 2014), para. 69. SWSP, Vol. XII, Annex LA-180.

a State ... from making declarations or statements, it adds the proviso that 'such declarations or statements [should] not purport to exclude or to modify the legal effect of the provisions of this Convention'. It follows that a State party may only exclude the legal effect of a provision of the Convention when such exclusion is expressly permitted by a provision of the Convention."[134]

That is the tribunal in *Arctic Sunrise*.

We commend this formulation to this Tribunal. In our submission, it is correct as a general proposition, and it is directly applicable to the present case. The limits of jurisdiction under Part XV are constrained only by the provisions set forth in that part of the Convention. And the latest communication by China -- if it is to be treated as a statement -- cannot operate to exclude the jurisdiction of the court or the exercise of jurisdiction. These are matters for the Tribunal to decide. As Judges Wolfrum and Kelly put it in the *Arctic Sunrise* case at the ITLOS phase:

"Even if the declaration would exclude the jurisdiction of the Annex VII arbitral tribunal, the decision on its jurisdiction rests with that tribunal and not with the Russian Federation. International

[134] *Ibid.*, para. 70.

courts and tribunals have a sole right to decide on their jurisdiction (Kompetenz-Kompetenz/la compétence de la compétence)."[135]

In that case, as in this one, the respondent state has chosen not to appear at all, and that has given rise to application of Article 9 of Annex VII of the Convention, which you, sir, mentioned, I think, in the introduction to the hearings yesterday.

This provision, Article 9, allows the Philippines to "request the tribunal to continue the proceedings and to make its award", as we have done. It makes clear, that provision, that the absence of China "shall not constitute a bar to the proceedings". And it imposes upon the Tribunal the obligation -- sometimes a burdensome obligation -- at this stage of the proceedings, "to satisfy itself that it has jurisdiction over the dispute". Indeed, Article 9 follows the same approach as Article 28 of the ITLOS Statute, which itself was influenced by, and closely follows, the default provision of the ICJ Statute, its Article 53.[136]

Judge Paik at ITLOS has summarised rather neatly the twofold purpose of these default provisions: they

[135] *Arctic Sunrise Case (Kingdom of the Netherlands v Russian Federation), Provisional Measures, Order of 22 November 2013, Separate Opinion of Judges Wolfrum and Kelly*, ITLOS Reports 2013, para. 8. MP, Vol. XI, Annex LA-47.

[136] See *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 5 (M. Nordquist, et al., eds., 2002), pp. 389-90.

are aimed at enabling a court or tribunal to continue its proceedings in the case of default by one of the parties, and then as he puts it:

"... thus safeguarding the right of the appearing State to the judicial settlement of the dispute, and at the same time protecting the rights of the defaulting state in such proceedings."[137]

That is a balance, and it is surely the right and understandable balance. And the Philippines and its counsel recognise that the price it pays for being able to continue with these proceedings is for the Tribunal to go the added mile to assure itself that it has jurisdiction. And we recognise that the Tribunal has gone that added mile, no doubt ably assisted by the Secretariat at the Permanent Court of Arbitration.

On December 16th last year, you submitted a Request for Further Written Argument, communicated to us pursuant to Article 25(2) of the Rules of Procedure. On 16th March 2015, the Philippines submitted its response to that request: a not insubstantial Supplemental Written Response which ran to 201 pages, and no less than eleven annexes and additional volumes of materials. You then offered China an opportunity to provide comments on our

[137] *Arctic Sunrise Case (Kingdom of the Netherlands v Russian Federation), Provisional Measures, Order of 22 November 2013, Separate Opinion of Judge Paik*, ITLOS Reports 2013, para. 4. Hearing on Jurisdiction, Annex LA-222.

Supplemental Written Response by 16th June 2015, and China declined to accede to that offer.

Then a week later, on 23rd June 2015, the Tribunal wrote to us to request that we "address any objection that [the Philippines] considers could reasonably be advanced to the jurisdiction of the Arbitral Tribunal or to the admissibility of the Philippines' claims", irrespective of whether such objection had at any point been raised by China. And the Tribunal provided us with an Annex of Issues the Philippines May Wish to Address at the July Hearing.

Let me be clear: we have found all of this extremely helpful, and we found the list of issues to be extremely helpful in concentrating our minds. We understand absolutely why, on so important a case, the Tribunal would feel it necessary to take all appropriate steps to "satisfy itself that it has jurisdiction over the dispute".

Now, your June annex identified a total of 38 "Issues" that might be addressed, set out in eight different categories, listed A to H. The annex that you sent us is to the tab 3.5 of your folders, by way of reminder. In preparing for this hearing, we have -- I think it should now be clear -- very carefully considered each and every one of the issues raised by the Tribunal, as well as any others we

considered relevant. We have done all we can to be responsive to your request.

As you will have heard in the course of the last two days, that list of issues has served as a rather useful checklist, not only for us in these proceedings or for the Tribunal, but, one might suggest, for any state that finds itself involved in proceedings under Part XV, and also for any future tribunals that might find themselves called upon to address issues of jurisdiction. It is a very helpful list of issues.

At tab 3.6 of your folder -- and I would invite you to have a look at it -- you will find a document that we have prepared that is intended to assist the Tribunal in locating our responses to all of the issues that you have identified. I could have stood before you for three or four hours and taken you through all of this material; we thought that that would not be useful.

What you will see in that document is that it comprises just a few pages. At the top of page 1, you will see headings for a number of columns: from left to right, the issue you identified, and then the speech in the course of the oral hearings that has addressed it, and then the paragraph or paragraphs of the relevant speeches, and then a reference, where appropriate, to the relevant Philippines submission.

You will no doubt be relieved that I do not intend to address all 38 issues for the rest of this afternoon or the rest of this week. But I do want to touch on one, by way of illustration and as a sort of wrap-up to bring everything together.

The first set of issues which you raised, which is referred to as "A" in your list, arises in relation to Articles 286 and 288 of the Convention. Issue A1 invites us to address whether there "exists a legal dispute between the Philippines and China" with respect to each of the Philippines' submissions as set out on page 271 and 272 of the Memorial. And it is useful to go through this by way of conclusion to bring us back to the submissions where we started yesterday afternoon.

Mr President, members of the Tribunal, we are very clear that each and every one of the submissions is indeed the subject of a legal dispute, in the sense of your question, and that it arises under and calls for the interpretation or application of specific identified provisions of the Convention. This is not a case like the *Nuclear Tests* cases in 1973 and 1974, where the International Court of Justice felt it necessary to identify what it called the "essentially preliminary" question of "the existence of a dispute"

over which it could exercise jurisdiction.[138] If you compare that case with this, you will see that here there are very clearly a number of persisting legal disputes between the Philippines and China in relation to China's claims and activities in the South China Sea.

Now, we note, of course, that the Convention does not refer to the concept of a "legal dispute": it refers to a "dispute concerning the interpretation or application of the Convention".[139] And Mr Reichler explained what we understand by the concept of a "legal dispute" in the annex that you prepared: namely that China has adopted a position that is positively opposed by the Philippines, and that the difference can be resolved by the interpretation and then the application of the Convention. He addressed this issue in relation to the Philippines' first nine submissions;[140] I dealt with a few others; and Professors Oxman and Boyle have then covered submissions 10 through 14.

It may be helpful if I now address the submissions

[138] *Nuclear Tests (Australia v France)*, Judgment, ICJ Reports 1974, para. 24. MP, Vol. XI, Annex LA-7.

[139] UNCLOS, Article 288(1) provides: “A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part”.

[140] *See* Tr., 7 July 2015, pp. 30:5-54:9. (Presentation of Mr. Paul S. Reichler)(reference is to uncorrected version).

seriatim. For convenience, you will find them set out at tab 1.1 of your folder.

The Philippines' first submission invites the Tribunal to declare that:

"China's maritime entitlement in the South China Sea, like those of the Philippines, may not extend beyond those permitted by [UNCLOS] ..."

There is self-evidently a legal dispute between the parties. China asserts that it is entitled to exercise sovereign rights in areas that do go beyond those areas permitted by UNCLOS, and in particular the rights and their limits imposed by Articles 55, 56, 57, 62, 76, 77 and 121 of the Convention, which comprehensively set out the parties' maritime entitlements beyond the territorial sea. China claims maritime entitlements -- and has adopted measures to give effect to those supposed claims -- that are disputed by the Philippines as being inconsistent with the Convention and the legal obligations it imposes. The purpose of this submission is to make clear that China's rights are determined by the Convention, and they cannot extend beyond the rights the Convention sets out.

The Philippines' second submission invites the Tribunal to declare that:

"China's claims to sovereign rights and

jurisdiction, and to 'historic rights', with respect to the maritime areas of the South China Sea encompassed by the so-called 'nine-dash line' are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under UNCLOS."

Now, this, of course, is closely related to the first submission, but focuses more specifically on China's claims to maritime entitlements beyond those authorised by UNCLOS on the basis of so-called "historic rights". China says that the Convention respects "historic rights". The Philippines says that the concept finds no expression or support anywhere in the Convention. The parties are plainly opposed on this issue, and there is rather obviously a legal dispute between them as to what the Convention does and does not allow. And this relates also to the question put yesterday by Judge Wolfrum.

The Philippines' third submission is for a declaration that:

"Scarborough Shoal generates no entitlement to an exclusive economic zone or continental shelf ..."

China says that Scarborough Shoal "is not a sand

bank but rather an island",[141] one that is entitled to a 200-mile exclusive economic zone and a continental shelf. No, says the Philippines, it is no more than a gathering of "rocks"[142] that is entitled to nothing more than a territorial sea. So, once again, there is rather obviously a dispute on the matter, and that dispute will be resolved by the interpretation and application of Article 121.

The Philippines' fourth submission is for a declaration that:

"Mischief Reef, Second Thomas Shoal and Subi Reef are low-tide elevations that do not generate entitlement to a territorial sea, [EEZ] or continental shelf, and are not features ... capable of appropriation by occupation or otherwise ..."

China has asserted that these reefs are part of "China's Nansha Islands", the Spratlys, and that they "are fully entitled to Territorial Sea, Exclusive Economic Zone ... and Continental Shelf".[143] No, says

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[141] Department of Foreign Affairs of the Republic of the Philippines, *Record of Proceedings: 10th Philippines-China Foreign Ministry Consultations* (30 July 1998), p. 23. MP, Vol. VI, Annex 184.

[142] Department of Foreign Affairs of the Republic of the Philippines, *Notes on the 18th Philippines-China Foreign Ministry Consultations* (19 Oct. 2012), para. 52. MP, Vol. IV, Annex 85.

[143] *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). MP, Vol. VI, Annex 201; *Memorandum* from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-070-2014-S (7 Mar. 2014), p. 2. MP, Vol. IV, Annex 98.

the Philippines, Mischief Reef is "permanently submerged under water",[144] it generates no maritime entitlements; Second Thomas Shoal is a low-tide elevation that is "part of the seabed"; and Subi Reef is not entitled to anything more than a "12[-mile] territorial sea",[145] if that. This legal dispute arises and calls for resolution under Article 13(2) of the Convention.

The Philippines' fifth submission is for a declaration that:

"Mischief Reef and Second Thomas Shoal are part of the exclusive economic zone and continental shelf of the Philippines ..."

Mischief Reef is located 126 nautical miles from the nearest point on Palawan in the Philippines, and 596 miles from the nearest point on Hainan Island in China, and over 50 miles from Nanshan, the nearest high-tide feature in the Spratlys that is claimed by China.[146] Second Thomas Shoal is 104 miles from the nearest point on Palawan in the Philippines, and 614 miles from the nearest point on Hainan Island in

[144] *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 983577 (5 Nov. 1998), p. 2. MP, Vol. VI, Annex 185.

[145] *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 110885 (4 Apr. 2011), p. 1. MP, Vol. VI, Annex 199.

[146] MP, para. 5.63.

China, and 55 miles from Nanshan.[147]

The legal dispute here -- again, self-evidently -- is whether Mischief Reef and Second Thomas Shoal are part of the exclusive economic zone and continental shelf of the Philippines or, as China puts it, of "China's Nansha Islands", and the dispute turns on whether the Spratly Islands can generate an EEZ and continental shelf. This dispute will be resolved definitively by the application of Articles 13(2), 57, 76 and 121 of the Convention.

The Philippines' sixth submission is for a declaration that:

"Gaven Reef and McKennan Reef (including Hughes Reef) are low-tide elevations that do not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, but their low-water line may be used to determine the baseline from which the breadth of the territorial sea of Namyit and Sin Cowe, respectively, is measured ..."

What is the dispute here? The dispute between the Philippines and China is whether these two reefs are low-tide elevations that do not generate any maritime entitlements of their own. Once again, this legal dispute arises under, and can be fully resolved by, Article 13(2) of the Convention.

[147] *Ibid.*, para 5.60.

The Philippines' seventh submission is for a declaration that:

"Johnson Reef, Cuarteron Reef and Fiery Cross Reef generate no entitlement to an [EEZ] or continental shelf..."

Again, the legal dispute between the Philippines and China turns on whether these three reefs do or do not generate an entitlement to an exclusive economic zone or continental shelf. Again, this dispute arises under, and can be fully resolved by, Article 121(3) of the Convention.

The Philippines' eighth submission is for a declaration that:

"China has unlawfully interfered with the enjoyment and exercise of the sovereign rights of the Philippines with respect to the living and non-living resources of its [EEZ] and continental shelf ..."

This legal dispute arises precisely because China has interfered with lawful activity of the Philippines -- petroleum exploration, seismic surveys and fishing -- within 200 miles of the Philippines' mainland coast, as a consequence of China's erroneous belief that it is entitled to claim sovereign rights beyond its entitlements under UNCLOS. This, too, is obviously a legal dispute, and one that will be resolved by application of Articles 56, 76, 77 and 121

of the Convention.

The Philippines' ninth submission is for a declaration that:

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

In a sense, this is the flipside of the eighth submission, challenging the legality under UNCLOS of China's purported grant of rights to nationals and vessels[148] in areas over which the Philippines exercises sovereign rights. This legal dispute arises under Article 56 of the Convention.

The Philippines' tenth submission is that:

"China has unlawfully prevented Philippine fishermen from pursuing their livelihoods by interfering with traditional fishing activities at or near Scarborough Shoal ..."

This legal dispute is premised on fact that China has unlawfully prevented Philippine fishermen from carrying out traditional fishing activities within the territorial sea of Scarborough Shoal. The dispute arises out of Article 2(3) of the Convention, which "contains an obligation on States to exercise their sovereignty subject to 'other rules of international

[148] MP, paras. 6.36, 6.63.

law'",[149] which, we say, in turn require China to act in good faith in its relations with the Philippines,[150] and to respect traditional fishing rights of Filipino fishermen at Scarborough Shoal.

We come to the Philippines' eleventh submission; just a few more to go. And it is for a declaration that:

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

You have seen the materials and you have heard Professor Boyle. This is a legal dispute that relates to China's failure to protect and preserve the marine environment at these two shoals. It is not a situation in which China is establishing a small hotel, in which the Philippines is objecting to individuals sitting around drinking beers and lemon Proseccos. It is not. It is about massive environmental harm. It arises under, and will be resolved by, Articles 192 and 194 of the Convention.

The Philippines' twelfth submission seeks a declaration that:

"China's occupation of and construction activities

[149] *Mauritius v UK*, ¶ 514. Hearing on Jurisdiction, Annex LA-225.

[150] *Id.*, ¶ 517.

on Mischief Reef

"(a) violate the provisions of the Convention concerning artificial islands, installations and structures;

"(b) violate China's disputes to protect and preserve the marine environment under the Convention, and

"(c) constitute unlawful acts of attempted appropriation in violation of the Convention ..."

This, too, is a legal dispute, and one that is premised on the characterisation of Mischief Reef as a low-tide elevation that is part of the seabed and subsoil and located in the Philippines' EEZ and continental shelf. China's construction and other activities,[151] constantly opposed by the Philippines, give rise to disputes under Articles 13, 60, 76, 77, 80, 192, 194, and 206 of the Convention.

The Philippines' thirteenth submission is that:

"China has breached its obligations under the Convention by operating its law enforcement vessels in a dangerous manner causing serious risk of collision to Philippine vessels navigating in the vicinity of Scarborough Shoal ..."

The Philippines has constantly protested these

[151] *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 983577 (5 Nov. 1998), p. 2. MP, Vol. VI, Annex 185.

purported law enforcement activities as violating the Convention on the International Regulations for the Prevention of Collisions at Sea, and also violating UNCLOS,[152] and China has rejected these protests.[153] This legal dispute will be resolved by application of Articles 21, 24 and 94 of the Convention.[154]

Finally, the Philippines' fourteenth submission seeks a declaration that "China has unlawfully aggravated and extended the dispute" by its activities at Second Thomas Shoal even after these proceedings were commenced. Amongst other matters, China has prevented the rotation and resupply of Philippine personnel at Second Thomas Shoal[155] and it has interfered with navigation around there.[156] And this gives rise to a distinct legal dispute under, *inter alia*, Article 300 of the Convention, which establishes obligations regarding good faith and abuse of rights, and out of the inherent obligation of a party to a dispute to refrain from aggravating or

[152] *Note Verbale* from the Department of Foreign Affairs of the Philippines to the Embassy of the People's Republic of China in Manila, No. 12-1222 (30 Apr. 2012), p. 1. MP, Vol. VI, Annex 209.

[153] *Note Verbale* from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (12) PG-239 (25 May 2012). p. 1. MP, Vol. VI, Annex 211.

[154] *See* MP, paras. 6.128-6.133.

[155] *Ibid.*, 3.62, 6.152.

[156] *Ibid.*, 3.62. *See also* 3.59-3.67.

extending a dispute that is *sub judice*.[157]

Mr President, those are the submissions. We have prepared another document which is intended to be of assistance, which you can see at tab 3.7. It may be worth just having a momentary look at it. Tab 3.7 comprises a document which identifies each of the 15 submissions and directs you to each place in the oral arguments where they have been addressed. You will find there the name of the speaker, with a reference to the paragraph or paragraphs in which the submission has been addressed. We have prepared these two documents -- and I, I think on behalf of the whole team, want to thank our more junior colleagues who have been tasked with this very extensive and time-consuming exercise -- with the intention of assisting the Tribunal and making its task, and that of the Secretariat, easier in the days and weeks ahead.

We have here also addressed all of the issues you have raised in your various communications in relation to sovereignty and admissibility. This tab 3.7 deals with Section B of your annex. As I explained yesterday, you are not called upon to express any view on any issue of sovereignty, and there are no matters that could make any aspect of the claims of the

[157] *Ibid.*, para. 6.151.

Philippines inadmissible.[158]

As regards the requirements of Article 281 (Section C of your annex), these have been fully addressed by Mr Martin[159] and, in relation to the Convention on Biological Diversity and related matters, by Professor Boyle.[160] The parties have not "agreed to seek settlement of the dispute by a peaceful means of their own choice".

As regards Article 282 (Section D of your annex) these have been fully addressed by Mr Martin,[161] and again by Professor Boyle.[162] The parties have not "agreed, through a general, regional or bilateral arrangement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision".

As regards Article 283 (Section E of your annex), the points you raise have been fully addressed by Mr Martin.[163] The parties to the dispute have

[158] *See* Tr., 7 July 2015, pp. 60:6-65:16, 67:2-83:18, 84:8-99:8 (Presentation of Prof. Philippe Sands QC) (reference is to uncorrected version).

[159] *See* Tr., 8 July 2015, pp. 9:16-17:3, 20:9-22:10 (Presentation of Mr. Lawrence H. Martin) (reference is to uncorrected version).

[160] *See* Tr., 8 July 2015, pp. 107:10-114:13 (Presentation of Prof. Alan Boyle) (reference is to uncorrected version).

[161] *See* Tr., 8 July 2015, pp. 23:1-24:9 (Presentation of Mr. Lawrence H. Martin) (reference is to uncorrected version).

[162] *See* Tr., 8 July 2015, pp. 107:10-114:13 (Presentation of Prof. Alan Boyle) (reference is to uncorrected version).

[163] Tr., 8 July 2015, pp. 24:19-35:22 (Presentation of Mr. Lawrence H. Martin) (reference is to uncorrected version).

proceeded "to an exchange of views regarding its settlement by negotiation or other peaceful means", and have done so over an extended period of time. The exchanges between them have been as numerous as they have been fruitless. And you have been able to read for yourselves the latest statement by China in its letter of 1st July 2015. You can form your own view as to the tenor of what has passed so far.

As regards Article 297 (Section F of your annex), the four points you raise have been fully addressed by Professor Boyle.[164] None of the limitations there set out operate to exclude the jurisdiction of this Tribunal, or its exercise, in relation to any part of the dispute.

As regards Article 298 (Section G of your annex), the numerous points you have raised have been fully addressed by Mr Reichler,[165] Professor Oxman[166] and Professor Boyle.[167] None of the limitations there set out operate to exclude the jurisdiction of this Tribunal, or its exercise, again in relation to any

[164] *See* Tr., 8 July 2015, pp. 102:1-107:9, 115:6-15 (Presentation of Prof. Alan Boyle) (reference is to uncorrected version).

[165] *See* Tr., 8 July 2015, pp. 59:1-72:26 (Presentation of Mr. Paul S. Reichler) (reference is to uncorrected version).

[166] *See* Tr., 8 July 2015, pp. 39:23-49:3, 49:22-55:12, 72:22-76:22, 79:7-17, 80:26-90:9 (Presentations of Prof. Bernard H. Oxman) (reference is to uncorrected version).

[167] *See* Tr., 8 July 2015, pp. 115:6-116:16 (Presentation of Prof. Alan Boyle) (reference is to uncorrected version).

part of the dispute.

Finally, you have inquired, in section H of your annex, whether there are any potential issues of jurisdiction or admissibility which should be deferred in consideration with the merits. Mr President, we say there are none. In this regard, we have taken note of the clear, robust and unanimous approach adopted by the tribunal over which you preside in the *Arctic Sunrise* arbitration,[168] and we consider and submit to you that this case requires no different treatment.

Mr President, members of the Tribunal, this concludes the first oral round by the Republic of the Philippines and its presentation today. I hope you will see that we have done all we can to be responsive to your very helpful requests and communications. We are, of course, in your hands going forward in this oral procedure and in these hearings, and of course we are available on Monday to address any questions you may put to us, I think it's by 10.00 am on Friday morning.

We have, of course, also taken note of one outstanding question from Judge Rüdiger Wolfrum, which, as you will have heard from Mr Martin, we would

[168] *Arctic Sunrise Arbitration (Kingdom of the Netherlands v Russian Federation)*, Award on Jurisdiction, UNCLOS Annex VII Tribunal (26 Nov. 2014), para. 79. SWSP, Vol. XII, Annex LA-180.

propose to address on Monday. We will, of course, all be reading ourselves into the subject of estoppel and recent utterances on the subject in other cases by various members of the Tribunal.

Mr President, unless there is any further assistance I can give to the Tribunal, that concludes the first-round presentation by the Republic of the Philippines. We once again thank you for your extremely kind attention, and for the assistance of the Secretariat and the transcribers.

THE PRESIDENT: Thank you very much indeed, Professor Sands.

As you were informed, the Tribunal will meet tomorrow, and we will indicate to you by 10 o'clock on Friday if there are any questions that we want to pose to you. But as you say, we will in any case meet on Monday, because Mr Martin will be given time to answer the question that was posed to him.

So I think we will meet on Monday. But whether we will have any further questions to ask you will be made clear to you by Friday at 10 o'clock.

PROFESSOR SANDS: Mr President, if it is of any assistance -- and I speak under the control of my agents -- to the extent that there might perhaps not be any other questions, if it would be of assistance to the Tribunal, we could of course respond to that

question in written form in the next days, if that would be preferable. But we leave that to you to decide in due course.

THE PRESIDENT: We will decide. It depends entirely on whether we have any other questions for you. So if we don't have any other questions for you, we will then decide as to how you can answer the question put to Mr Martin.

Thank you. So we will either meet, or if we don't meet, then it will be because we don't have any other questions for you. Then if we decide that we want you to respond to the question put to Mr Martin in writing, that would then mean that we would not have another meeting.

Thank you very much.

(3.53 pm)

(The hearing adjourned until 10.00 am on Monday, 13th July 2015)