

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

PCA Case No. 2013-19

Permanent Court of Arbitration
Peace Palace
The Hague
The Netherlands

Day 4

Monday, 30th November 2015

Hearing on the Merits and Remaining Issues
of Jurisdiction and Admissibility

Before:

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

BETWEEN:

THE REPUBLIC OF THE PHILIPPINES

-and-

THE PEOPLE'S REPUBLIC OF CHINA

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

The People's Republic of China was not represented.

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(Participants may not have been present for the entire hearing.)

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Monday, 30th November 2015

(10.01 am)

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

Please go ahead.

(10.01 am)

Second-round submissions by MR REICHLER

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

The order of presentation will be as follows.

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

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

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

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

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

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

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

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

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

24 "China always maintains that countries enjoy

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

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

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

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

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

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

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

² *Id.*

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

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

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

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

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

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

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

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

⁶ Ministry of Foreign Affairs of the People's Republic of China, *Statement of the Ministry of Foreign Affairs of the People's Republic of China on the Award on Jurisdiction and Admissibility of the South China Sea Arbitration by the Arbitral Tribunal Established at the Request of the Republic of the Philippines* (30 Oct. 2015), para. I. Supplemental Documents, Vol. I, Annex 649 (emphasis added).

1 our written pleadings.

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

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

10 The Tribunal then goes on to observe:

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

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

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

⁷ Questions for the Philippines to Address in the Second Round, Question 13.

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

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

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

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

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

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

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

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

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

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

10 This is true not only for features with the same
11 size and conditions as Itu Aba, as in the *Nicaragua*
12 *v Colombia* case,¹⁰ but also for considerably larger
13 features that unquestionably do sustain human
14 habitation and economic life, like St Martin's
15 Island¹¹ and Abu Musa.¹² We made the point, which we
16 consider beyond any serious argument, that in any
17 future delimitation that might be performed by a duly
18 constituted tribunal, applying the Convention,
19 features like Itu Aba and Thitu, as well as the other

⁹ See UNCLOS, Arts. 74(1), 83(1).

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

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

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

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

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

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

¹³ Hearing on Merits, Tr. (Day 2), p. 127.

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

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

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

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

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

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

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

7 My precise words last week were:

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

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

¹⁶ Hearing on Merits, Tr. (Day 2), pp. 109-10.

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

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

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

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

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

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

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

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

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

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

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

23 "The field collections were made by Tseng-Chieng

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

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

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

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

9 This preceding sentence is also important:

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

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

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

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

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

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

25 "The underground water is salty and unusable for

¹⁹ *Id.*, p. 2.

1 drinking."

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

8 Also significant is this sentence:

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

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

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

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

²⁰ *Id.*, p. 1.

²¹ *Id.*

1 of stabilized dune or inland vegetation."²²

2 Strand plants are reported to grown in:

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

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

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

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

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

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

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

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

²⁴ A. Waiter & C. Sam, *Fruits of Oceania* (2002), available at http://aci-ar.gov.au/files/node/578/mn85_pdf_45615.pdf, pp. 222-223. Hearing on Merits, Annex 843; "Cayratia trifolia", in *Weeds of Upland Crops in Cambodia* (2009), available at http://aci-ar.gov.au/files/node/11477/mn141_weeds_of_upland_crops_in_cambodia_khmer_tr_19691.pdf, pp. 216-218. Hearing on Merits, Annex 846; A. Waiter & C. Sam, *Fruits of Oceania* (2002), available at http://aci-ar.gov.au/files/node/578/mn85_pdf_45615.pdf. Hearing on Merits, Annex 843.

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

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

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

²⁵ See SWSP, Vol. II, p. 200.

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

²⁷ *Id.*

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

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

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

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

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

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

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

²⁸ See SWSP, Vol. II, pp. 74-75.

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

1 Philippines does not disagree. The statement
2 continues:

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

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

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

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

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

³⁰ *Id.*

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

5 "The underground water is salty and unusable for
6 drinking."³¹

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

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

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

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

1 "Itu Aba has groundwater wells ..."³³

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

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

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

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

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

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

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

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

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

5 "The underground water is salty and unusable for
6 drinking."³⁷

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

22 On account of what you see here, Taiwan claims

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁴³ *Id.*

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

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

1 The report also states:

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

4 Again, there is no soil.

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

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

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

19 "The underground water is salty and unusable for
20 drinking."⁴⁸

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

⁴⁶ *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁵⁸ *Id.*, pp. 10-15.

⁵⁹ *See id.*, Annex I, Article 5.

⁶⁰ *See id.*, p. 10, fn. 23.

1 There is no record that this has ever been done.

2 Accordingly, the evidence indicates that Taiwan
3 first claimed a 200-mile entitlement for Itu Aba in
4 response to this arbitration, almost two and a half
5 years after it commenced, in July 2015, in
6 contradiction of its own law, which claims an EEZ and
7 continental shelf only from coasts for which baselines
8 have been decided by the Executive Yuan. The Tribunal
9 can draw its own conclusions about the authenticity of
10 Taiwan's newly minted claim.

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

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

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

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

1 or is performed on Itu Aba.

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

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

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

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

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

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

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

7 (11.13 am)

8 **PROFESSOR CLIVE SCHOFIELD (called)**

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

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

17 **PROFESSOR SCHOFIELD:** Very good.

18 (11.14 am)

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

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

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

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

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

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

1 concern a number of my past academic publications.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 regardless of being called "islands".

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

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

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

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

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

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

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

13 **THE PRESIDENT:** Thank you.

14 **(11.29 am)**

15 **(A short break)**

16 **(11.48 am)**

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

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

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

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

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

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

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

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

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

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

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

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

6 First, the Tribunal asks:

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

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

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

23 The second element to your question 6 is:

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

26 For Landsat TM7 imagery, the answer is that the

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

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

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

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

4 Thirdly, I am asked:

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

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

15 Fourthly, the Tribunal asks:

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

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

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

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

13 In question 7, the Tribunal asks:

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

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

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

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

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

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

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

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

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

26 The issue is whether Subi Reef falls wholly or

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

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

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

1 on this point was, however, mixed.

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

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

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

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

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

1 earlier this year in the writing of my own report.⁶²

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

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

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

⁶² See SWSP, Vol. II.

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

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

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

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

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

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

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

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

25 The conclusion in our report was that on the

⁶³ See SWSP, Vol. II, p. 57.

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

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

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

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

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

24 I will now call on Professor Sands.

25 **(12.12 pm)**

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

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

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

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

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

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

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

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

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

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

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

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

⁶⁷ *Ibid.*, p. 44, line 14 to p. 55, line 4.

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

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

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

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

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

22 We spent some time over this fine weekend looking
23 into the question of reclamation in the Netherlands.
24 And here I use the word "reclamation" because it does

⁶⁸ UNCLOS, Article 13.

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

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

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

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

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

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

⁷⁰ UNCLOS, Article 11.

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

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

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

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

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

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

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

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

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

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

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

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

⁷⁴ *Ibid.*, p. 34, lines 1-19.

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

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

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

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

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

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

⁷⁶ *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁸² MP, paras. 4.28-4.80.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁸⁴ UNCLOS, Article 55.

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

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

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

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

⁸⁶ *Ibid.*, para. 94.

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

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

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

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

⁸⁷ *Ibid.*, para. 235.

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

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

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

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

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

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

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

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

⁹¹ *Ibid.*, p. 161, lines 11-13.

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

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

10 ITLOS determined that the coastal state has:

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

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

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

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

⁹³ *Ibid.*, para. 104.

⁹⁴ *Ibid.*, para. 106.

⁹⁵ *Ibid.*, para. 108.

⁹⁶ *Ibid.*, para. 123.

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

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

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

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

17 And these are the crucial words:

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

⁹⁷ *Ibid.*, para. 124.

⁹⁸ *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), Advisory Opinion of 1 February 2011*, ITLOS Reports 2011. Annex LA-243.

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

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

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

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

22 Instead of adopting measures to prevent fishing,

⁹⁹ *Ibid.*, paras 110-111.

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

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

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

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

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

¹⁰³ Hearing on the Merits, Edited Transcript, Day 3, p. 33, lines 13-15. See also *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), Advisory Opinion of 1 February 2011*, ITLOS Reports 2011, para. 146. Annex LA-243.

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

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

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

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

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

1 stand ready to provide further assistance.

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

4 **(12.44 pm)**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁰⁹ *Id.*, para. 2.

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

6 China continued:

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

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

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

¹¹⁰ *Id.*

¹¹¹ *Id.*, para. 6.

¹¹² *Id.*

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

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

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

24 These final clauses, Mr President, would be devoid

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

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

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

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

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

23 First, for much of that period, China

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

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

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

¹¹⁵ See SWSP, Vol. 1, para. A13.7.

¹¹⁶ See *id.*, para. A13.9.

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

¹¹⁸ See SWSP, Vol. 1, para. A13.37.

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

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

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

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

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

¹²⁰ See SWSP, Vol. 1, para. A13.32.

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

6 We also know that by the end of the 19th and the
7 beginning of the 20th century, China was influenced by
8 the prevailing understanding of the international law
9 of the sea. The Chinese representatives supported the
10 3-mile limit at the Hague Codification Conference in
11 1930.¹²¹ At a meeting of the International
12 Law Commission in 1952, Mr Shushi Hsu of China
13 indicated that his early training had been based on
14 the principle of the three-mile limit, although he no
15 longer believed that that limit was required by
16 international law.¹²² It is interesting that Mr Hsu
17 even voted against the articles on the continental
18 shelf in 1953 because, in his view:

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

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

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

1 States."¹²³

2 In a broader sense, the question posed by the Tribunal
3 goes to the heart of the reasons why the overwhelming
4 majority of developing countries and newly independent
5 countries favoured the negotiation of a new
6 comprehensive Convention on the Law of the Sea that
7 would prevail over everything that had gone before
8 that was incompatible with the new legal order.

9 Consistently with its position throughout the
10 negotiation of the Convention, this point was
11 underscored by the representative of the People's
12 Republic of China in his statement at the signing
13 session in Montego Bay in December 1982. He stated
14 that the new Convention has:

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

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

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

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

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

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

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

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

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

6 **(1.01 pm)**

7 **(Adjourned until 2.30 pm)**

8 **(2.30 pm)**

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

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

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

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

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

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

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

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

¹²⁵ Jurisdictional Hearing Tr. (Day 2), pp.82-83.

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

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

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

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

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

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

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

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

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

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

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

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

¹²⁷ United States, The White House, Office of the Press Secretary, *Press Release: Remarks by President Obama and President Xi of the People's Republic of China in Joint Press Conference* (25 Sept. 2015), p. 18. Supplemental Documents, Vol. I, Annex 664.

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

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

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

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

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

21 **(2.39 pm)**

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

¹²⁸ See, e.g., Memorial, para. 7.151; SWSP, Vol. 1, paras. 10.2-10.3; Jurisdictional Hearing Tr. (Day 3), p. 48-51; 53; 55-57.

¹²⁹ See generally China's Position Paper. SWSP, Vol. VIII, Annex 467. See also Letter from H.E. Ambassador Chen Xu, Embassy of the People's Republic of China in The Hague, to H.E. Judge Thomas A. Mensah (6 Feb. 2015), para. 1. SWSP, Vol. VIII, Annex 470 ("This Paper *comprehensively* explains why the Arbitral Tribunal established at the request of the Philippines ... manifestly has no jurisdiction over the case.") (emphasis added).

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

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

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

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

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

¹³⁰ Hearing on Merits, Tr. (Day 2), p. 188.

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

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

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

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

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

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

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

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

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

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

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

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

1 the immediately adjacent coastal states.

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

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

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

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

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

¹³³ See Hearing on Merits, Tr. (Day 2), p. 174.

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

3 The answer here is: yes.

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

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

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

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

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

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

¹³⁵ Hearing on Merits, Tr. (Day 2), p. 186.

1 endangered."¹³⁶

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

6 China first declared a territorial sea of 12 miles
7 around the Zhongsha Islands, of which it nominally
8 considered Scarborough Shoal a part, in 1958.¹³⁷ I say
9 "nominally" because it is not entirely clear when
10 China first adopted that position. Scarborough is
11 fully 168 miles from Macclesfield Bank and is not
12 labelled in the 1947 depiction of the nine-dash line.

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

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

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

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

1 to 1971.¹³⁹

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

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

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

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

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

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

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

1 fished there for as long as anyone can remember.¹⁴¹

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

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

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

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

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

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

4 The Philippines' 26th April 2012 note proposing to
5 bring the matter to ITLOS can be found at Annex 207.¹⁴³
6 China's 29th April 2012 note rejecting that proposal
7 just three days later can be found at Annex 208.¹⁴⁴

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

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

18

¹⁴³ *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.

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

1 (2.54 pm)

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

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

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

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

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

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

5 Mr President, I turn now to question 2.

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

12 On that occasion, Mr Wang stated as follows:

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

16 That is, the Paracels:

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

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

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

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

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

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

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

18 It then continues:

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

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

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

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

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

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

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

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

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

¹⁴⁷ *Id.*

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

1 the Declarations did not legally bind the States of
2 the declaring governments."¹⁴⁹

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

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

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

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

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

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

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

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

11 These declarations, as well as others claiming
12 additional South China Sea islands in the name of
13 France, may be found at tab 6.2.¹⁵³

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

20 "[These] islands and islets henceforth come under

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

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

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

1 French sovereignty."¹⁵⁴

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

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

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

14 "... form the southernmost part of Chinese
15 territory."¹⁵⁶

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

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

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

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

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

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

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

¹⁵⁷ SWSP, Vol. II, pp. 14, 176.

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

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

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

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

4 A memorandum from Britain's Undersecretary of
5 State for Foreign Affairs to the Committee of Imperial
6 Defence concerning "Islands in the South China Seas"
7 dated 27th April 1938 -- that is, shortly before the
8 outbreak of hostilities that led to the Cairo
9 Declaration -- makes Britain's commitment to
10 protecting the French sovereignty claim particularly
11 clear.¹⁶² The memorandum addresses what "armed
12 support" it might "afford to the French Government in
13 the event of the Japanese Government taking forcible
14 measures to deny French sovereignty" over the South
15 China Sea islands that France had claimed in its
16 public notice.¹⁶³ In that regard, the Undersecretary
17 observed that "French sovereignty over these islands"
18 had been asserted since 1933.¹⁶⁴

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

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

¹⁶² *Id.*

¹⁶³ *Id.*, p. 1.

¹⁶⁴ *Id.*

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

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

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

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

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

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

¹⁶⁷ *Id.*

1 The United States endorsed that bilateral
2 solution.

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

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

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

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

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

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

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

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

5 The Tribunal then held that the:

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

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

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

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

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

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

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

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

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

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

1 People's Government of China."¹⁶⁹

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

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

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

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

¹⁷⁰ *Id.*, para. 5.

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

1 sovereignty over those features.¹⁷²

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

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

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

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

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

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

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

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

9 Regardless, Foreign Minister Wang did not provide
10 any evidence to show that China had ceased by the end
11 of June; nor, as far as the Philippines is aware, have
12 any other Chinese officials. The evidence indicates
13 otherwise. This includes satellite imagery which
14 establishes that China's activities continued after
15 the end of June 2015.¹⁷³

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

24 Now consider recent developments at Mischief Reef.
25 The left-hand satellite image was taken on

¹⁷³ All images in response to Question 10 are collected at Tab 6.6.

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

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

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

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

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

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

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

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

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

1 set out in its Submission 12.

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

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

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

15 There is a question from Judge Wolfrum.

16 **(3.24 pm)**

17 **Tribunal questions**

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

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

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

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

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

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

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

13 There is another question.

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

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

1 response on a subsequent occasion.

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

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

6 **MR LOEWENSTEIN:** Yes.

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

9 **(3.28 pm)**

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

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

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

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

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

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

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

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

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

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

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

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

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

1 from outside the region.

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

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

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

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

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

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

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

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

26 This is a satellite image of Mischief Reef on

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁷⁴ See Annex 240.

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

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

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

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

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

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

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

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

¹⁷⁶ John McManus, "Presentation at Panel on Security and Development in the South China Sea, Promoting Sustainable Usage of Oceans", YouTube Video (19 Oct. 2015), available at <https://www.youtube.com/watch?v=tNbkrnvPY1Q> (2:45). Hearing on Merits, Annex 836; John McManus, "Offshore coral reef damage, overfishing and paths to peace in the South China Sea", *The South China Sea: An International Law Perspective*, Conference Papers (6 Mar. 2015). Hearing on Merits, Annex 850.

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

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

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

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

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

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

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

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

8 With all due respect, China's assertions about the
9 environmental impact of island-building activities and
10 the conclusion of this report are contrary to
11 everything that we know about coral reef ecology and
12 conservation.

13 If in fact the Chinese Government did undertake
14 a scientific evaluation of the ecological effects of
15 their proposed island-building activities, they must
16 have proceeded with the full knowledge that this
17 activity would have had catastrophic effects on the
18 reefs. I cannot imagine a coral reef biologist would
19 conclude otherwise.

20 The effects of dredging on coral reefs is very
21 well understood. I see absolutely no evidence from
22 the satellite imagery that any effective measures were
23 taken to preserve the ecological environment.

24 Instead, full-scale dredging went ahead, with the
25 obvious catastrophic effect on the coral reef.

¹⁷⁸ *Id.*

1 I agree within the conclusions of Dr McManus, who
2 concludes that this type of direct manmade activity:

3 "... constitutes the most rapid nearly permanent
4 loss of coral reef area in human activity."¹⁷⁹

5 Question 10 asks to what extent extraction of
6 corals would be required before it would start having
7 detrimental environmental effects.

8 Corals grow slowly, and a recent review indicated
9 that plate-like corals grow as slow as 1.1 millimetre
10 per year, while the very fastest-growing branching
11 corals only grow up to 93 millimetres per year.

12 Corals provide topography that allows fishes and other
13 invertebrates to survive. These refuges attract
14 fishes and invertebrates because they help avoid
15 predators.

16 Any removal of a coral head large enough to house
17 a fish or any invertebrate, many of which are less
18 than a centimetre or less in size, would have
19 an adverse effect on the carrying capacity of the reef
20 and would take a substantial amount of time to regrow.
21 Corals are also a source of food for some reef
22 inhabitants. Almost any extraction of corals will
23 have a negative environmental impact, and this ranges
24 from small to very large, depending upon the amount of

¹⁷⁹ John McManus, "Offshore coral reef damage, overfishing and paths to peace in the South China Sea", *The South China Sea: An International Law Perspective*, Conference Papers (6 Mar. 2015). Hearing on Merits, Annex 850.

1 coral extracted.

2 The Philippines' Memorial details many occasions
3 when Chinese nationals were caught with extracted
4 corals, and on one occasion 15 tonnes of endangered
5 coral were confiscated. Over an extended period, this
6 will cause a significant environmental impact.

7 Question 11 asks to what extent extraction of
8 giant clams would be required before it would start
9 having a detrimental effect.

10 Extraction of a single giant clam will reduce the
11 carrying capacity of the reef for fishes and
12 invertebrates. These structures attract other
13 organisms as a potential refuge from predation. The
14 more you extract, the greater the reduction in the
15 carrying capacity, and the greater the environmental
16 effect.

17 The Philippine Memorial details many occasions
18 when Chinese fishermen were apprehended with recently
19 extracted giant clams at Scarborough Shoal, and on one
20 occasion confiscated 16 tons of giant clams. Over
21 an extended period, this level of extraction will
22 cause a large environmental effect.

23 Questions 12 and 13 are interrelated, and I will
24 answer these questions together. Question 12 asks
25 about the sediment-rejection capabilities of corals
26 and the extent of dredging activity that is required

1 before it would generate enough sediment to smother
2 corals. Question 13 asks at what point turbidity
3 starts having a negative impact on corals.

4 Fortunately, there is a very rich scientific
5 literature, dating back several decades, that examines
6 dredging effects on corals. Even more fortunate is
7 that there is a recent review of this literature by
8 a very prominent group of mostly Dutch coral
9 biologists.¹⁸⁰

10 Dredging damages and destroys coral, to the extent
11 they are found on the sections of the ocean floor in
12 the path of the dredgers. Dredging activities are
13 detrimental to coral in that it destroys coral through
14 the dredging process, primarily from covering and
15 smothering corals, and from light reduction from
16 turbidity in the water.

17 As you will imagine, the response of corals is
18 highly varied depending on the species. Since there
19 are over 500 species of coral in the South China
20 Sea,¹⁸¹ it is difficult to generalise. However,
21 Erftemeijer *et al* (2013) conceptualise the effect of
22 dredging in this image now displayed across a wide

¹⁸⁰ P.L.A. Erftemeijer, et al., "Environmental Impacts of Dredging and Other Sediment Disturbances on Corals: A Review", *Marine Pollution Bulletin*, Vol. 64, No. 9 (2012). Hearing on Merits, Annex 847.

¹⁸¹ D. Huang, et al., "Extraordinary Diversity of Reef Corals in the South China Sea", *Marine Biodiversity*, Vol. 45, No. 2 (2015). Hearing on Merits, Annex 848.

1 range of coral species.

2 This diagram shows that generally, as the
3 intensity of the two main stressors -- sedimentation
4 and turbidity -- increases and the duration of these
5 stressors increases, the response of corals ranges
6 from no effect to mortality. Of course, any coral
7 directly impacted by a dredger head would die.

8 In my review of the satellite images, I would
9 judge that, in areas that China has dredged, most of
10 the immediate reef area experienced a high intensity
11 of sedimentation and turbidity stressors for at least
12 several weeks, if not months. Consequently, with very
13 high intensity and extended duration, coral mortality
14 was most likely. For the immediate reef area,
15 I predict that mortality of corals was nearly
16 complete.

17 In addition to the immediate reef area,
18 sedimentation that was suspended from dredging would
19 settle on corals downstream from the dredging. If
20 this sedimentation stays in place on the coral for
21 an extended period of time, as the diagram shows, even
22 a moderate to high level of intensity of stressor, it
23 results in mortality of the coral. Extended
24 sedimentation exposure can lead to mortality to
25 portions of coral tissue, even if the entire coral is
26 not killed. Many corals with immediate sub-lethal

1 effects die in the long term.

2 Questions 14 and 15 relate to whether the
3 ecosystem around Scarborough Shoal and Second Thomas
4 Shoal constitute rare and fragile ecosystems.

5 Question 14 asks if I am aware of ecosystems in
6 the ocean similar to that around Scarborough Shoal and
7 Second Thomas Shoal. These two shoals are similar to
8 the other reefs and shoals of the Spratlys and
9 dissimilar to other reefs around the world in many
10 respects.

11 Scarborough Shoal and Second Thomas Shoal are
12 considered oceanic reefs. There are many oceanic
13 reefs around the world, but the biological make-up of
14 the reefs in the Spratlys and the eastern South China
15 Sea are unique in that they represent an assemblage of
16 species found nowhere else in the world. The
17 uniqueness of this region is embodied in its
18 recognition as a separate large marine ecosystem.¹⁸²

19 The only reef system I know of that closely
20 resembles the oceanic reefs of the Spratlys and
21 Scarborough Shoal is Tubbataha Reef in the Sulu Sea,
22 east of Palawan. Tubbataha Reef was declared a World
23 Heritage Site because of its spectacular assemblage of

¹⁸² D. Pauly & V. Christensen, "Stratified Models of Large Marine Ecosystems: A General Approach and an Application to the South China Sea", in *Large Marine Ecosystems: Stress, Mitigation, and Sustainability* (K. Sherman, et al., eds., 1993). Hearing on Merits, Annex 840.

1 biodiversity. The scientists who have visited both
2 Tubbataha Reef and the Spratlys report that each of
3 the reef features in the Spratlys is roughly
4 equivalent in terms of the spectacular biodiversity of
5 Tubbataha.

6 Question 15 asks how I would describe the
7 endurance of the reef and species around Scarborough
8 Shoal and Second Thomas Shoal compared to other
9 ecosystems in the ocean. In general, coral reefs are
10 considered fragile ecosystems because of the
11 dependence of the ecosystem on the complex symbiotic
12 relationship of corals and algae. If this symbiosis
13 is disturbed, the corals may die. This leads to
14 a disruption of the coral reef ecosystem.

15 Many of the species of corals of the South China
16 Sea are threatened with extinction, and corals
17 themselves are at a heightened risk of extinction
18 because of climate change and ocean acidification.
19 I consider Scarborough Shoal and Second Thomas Shoal
20 to belong to one of the most fragile marine ecosystems
21 globally.

22 Question 16 relates to whether China has taken all
23 necessary measures to prevent harm in areas where it
24 exercises sovereign rights (assuming that China has
25 such rights in the relevant areas). It asks, given
26 the nature and characteristics of the ecosystem in the

1 relevant areas, whether there are less detrimental
2 measures available to exploit the resources of the
3 marine environment.

4 There are many less detrimental measures that
5 could be practised to avoid harm. These include:
6 a management plan that determines safe levels of
7 exploitation; and guidelines for use of minimally
8 destructive reef fishing methods, such as
9 hook-and-line, biodegradable fish traps, and
10 spearfishing without the use of SCUBA or hookah.

11 Fishermen should be informed of the types of
12 threatened species in the area and given protocols to
13 return threatened species to the wild in the case of
14 accidental capture. Use of dynamite and cyanide
15 should be prohibited and enforced, as should
16 extraction of coral and giant clams. Adherence to the
17 FAO Fishing Code of Conduct should be monitored and
18 enforced.

19 Questions 17 and 18 relate to whether China has
20 taken all necessary measures to prevent or mitigate
21 harm. Question 17 asks what measures can be taken to
22 encourage recovery of the reefs, given that the
23 prospect of recovery for coral reefs, once destroyed,
24 is uncertain and unlikely. Question 18 refers to our
25 report, which indicates that a number of the reefs in
26 the Spratlys have been permanently destroyed, and asks

1 if there are any measures which can be adopted to
2 mitigate the damage and harm caused to the
3 environment. The concepts of recovery and mitigation
4 are very closely related in conservation biology.
5 I will therefore answer these questions together.

6 The McManus report indicates that these reefs may
7 not recover for decades. I concur with this
8 assessment. The reefs with extensive island-building
9 activity will never be the same. As mentioned
10 previously, the continuing sedimentation plumes from
11 these artificial reefs indicate instability that could
12 continue to harm surrounding reefs for a very long
13 time.

14 Mitigating this harm may involve somehow
15 dismantling the artificial islands in a way that the
16 sediments are discharged into deep water, where they
17 would do less environmental harm than on the reefs
18 themselves. Another possibility would be to somehow
19 reinforce the islands so that sedimentation plumes
20 would cease to leak from the islands. This action may
21 help reefs recover more quickly, but it may also pose
22 other problems because hardened shoreline structures
23 can encourage shoreline erosion, which would defeat
24 the purpose. These issues of recovery and mitigation
25 involve complex engineering that I am not qualified to
26 express a view on.

1 Mr President, I have about six or seven more
2 minutes of answering questions. I believe this is the
3 time when a coffee break is typically taken. At your
4 discretion, I could either stop at this point and
5 continue on with another six or seven minutes when we
6 return, or I could continue.

7 **THE PRESIDENT:** Please continue.

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

9 Okay. Then I will finish by answering
10 questions 19 to 22.

11 Question 19 asks me to elaborate on the effects of
12 cyanide on the marine environment, including the scope
13 of such effects. Cyanide is a very strong poison that
14 prevents cells from using oxygen for respiration and
15 also inhibits photosynthetic activity.¹⁸³ When marine
16 animals come into contact with cyanide in solution,
17 they undergo respiratory distress and can quickly die.
18 Corals expel their symbiotic algae and may eventually
19 die.

20 Cyanide fishing occurs generally at two scales:
21 one is for capturing ornamental fish for the aquarium
22 fish industry; and the other is for capturing large
23 reef fish, such as groupers, for the live reef fish

¹⁸³ R.J. Jones & O. Hoegh-Guldberg, "Effects of Cyanide on Coral Photosynthesis: Implications for Identifying the Cause of Coral Bleaching and for Assessing the Environmental Effects of Cyanide Fishing", *Marine Ecology Progress Series*, Vol. 177 (1999). Hearing on Merits, Annex 842.

1 food trade.¹⁸⁴

2 In the ornamental trade, cyanide is sprayed into
3 the water, partially incapacitating a target fish.
4 The effects are localised, but repeated applications
5 have cumulative effects, and fishing often involves
6 breaking corals to extract hiding fish.

7 The use of cyanide to capture large reef fish
8 generally involves dumping large quantities (a drum or
9 more) on to the reef and waiting for large fishes to
10 swim to the surface in distress, where they are
11 scooped up with nets and taken to clean water to
12 recuperate, so they remain live and enter the live
13 reef fish food trade. The large release of cyanide
14 causes large swathes of destruction on the reef, with
15 many non-target fishes, invertebrates and corals being
16 killed in the process.

17 The extent of this destruction is on the order of
18 tens of square metres of reefs.¹⁸⁵ The Philippine
19 Memorial indicates that Chinese fishermen were
20 apprehended with both stocks of cyanide and large live
21 groupers and other reef fishes.

¹⁸⁴ R.J. Jones & A.L. Steven, "Effects of cyanide on corals in relation to cyanide fishing on reefs", *Marine Freshwater Research*, Vol. 48 (1997). Hearing on Merits, Annex 841; K. Warren-Rhodes, et al., "Marine Ecosystem Appropriation in the Indo-Pacific: A Case Study of the Live Reef Fish Food Trade", *Ambio: A Journal of the Human Environment*, Vol. 32, No. 7 (Nov. 2003). Hearing on Merits, Annex 845.

¹⁸⁵ R.J. Jones & A.L. Steven, "Effects of cyanide on corals in relation to cyanide fishing on reefs", *Marine Freshwater Research*, Vol. 48 (1997). Hearing on Merits, Annex 841.

1 Question 20 asks me to elaborate on the effects of
2 the use of explosives for fishing and blasting for
3 construction on the marine environment. Localised
4 effects of blast-fishing include killing a large
5 number of fishes and a coral destruction blast zone of
6 from 0.5 to 1.5 metres from the blast epicentre. This
7 pulverises coral into rubble.

8 The cumulative effect of blast-fishing in some
9 areas is documented to be up to 300-square-metre
10 rubble zones where active coral growth often does not
11 return for many years because of the unstable rubble
12 substrate covering the reef. Blast-fishing reduces
13 the topography of the reef, which in turn reduces the
14 carrying capacity of the reef for fishes and
15 invertebrates that are attracted to vertical relief as
16 a refuge from predators.

17 Question 21 asks for an elaboration of the process
18 of construction activities on a reef causing a shift
19 from coral-based to algal-based community.

20 The shift from a coral-based to an algal-based
21 community typically involves some form of coral
22 destruction and reduction in herbivorous fishes.¹⁸⁶
23 These two elements lead to the proliferation of fleshy
24 algae or seaweed on the reef because herbivorous

¹⁸⁶ C.H. Ainsworth & P.J. Mumby, "Coral-algal phase shifts alter fish communities and reduce fisheries production", *Global Change Biology* (9 July 2014). Hearing on Merits, Annex 851.

1 fishes are not abundant enough to reduce algal cover
2 by grazing. Because algae grow faster than corals,
3 they out-compete for the hard substrate that is
4 required for both coral and seaweed attachment on the
5 reef.

6 In construction areas, coral is often reduced on
7 the hard substrate from blasting or clearing
8 activities, and this is often accompanied by
9 a reduction in fishes, either as a byproduct of
10 construction or from an increase in fishing from
11 construction workers or new inhabitants of the
12 construction. Phase shifts favouring algae can be
13 further promoted if new inhabitants in the
14 construction area contribute to nutrient enrichment
15 that fertilises algal growth from pollution or
16 run-off.

17 Finally, question 22 asks for an elaboration on
18 the effects that a shift from a coral-based to
19 an algal-based community would have.

20 A phase shift from a coral-based to algal-based
21 community will change the accompanying fish
22 community.¹⁸⁷ The reduction in hard topography from
23 loss of corals leads to a reduced biodiversity of fish
24 communities that typically have smaller body sizes

¹⁸⁷ C.H. Ainsworth & P.J. Mumby, "Coral-algal phase shifts alter fish communities and reduce fisheries production", *Global Change Biology* (9 July 2014). Hearing on Merits, Annex 851.

1 than fishes in mature coral reef communities. This
2 typically reduces dramatically the number of resident
3 fishes that are targeted and favoured in fisheries.

4 Mr President and distinguished members of the
5 Tribunal, thank you for your kind attention. This
6 concludes my presentation.

7 **THE PRESIDENT:** Thank you very much, Professor Carpenter,
8 that will be all. So I will now give the floor to
9 Mr Reichler.

10 **MR REICHLER:** Thank you very much, Mr President.

11 I apologise for delaying the coffee break; it will not
12 be long. I simply want to thank you and the members
13 of the Tribunal for your indulgence in allowing us
14 a few moments to give some thought and consultation in
15 respect of the two very pertinent questions that were
16 asked at the conclusion of Mr Loewenstein's
17 presentation, and I would just like to assure the
18 Tribunal that we will be prepared to provide answers
19 to both questions immediately upon our return from the
20 break, if that is your pleasure.

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

22 So we will now have a short break for coffee. We
23 will come back at about 4.20.

24 **(4.09 pm)**

25 **(A short break)**

26 **(4.29 pm)**

1 **THE PRESIDENT:** Yes, Mr Reichler, please go ahead.

2 (4.29 pm)

3 **Answers to Tribunal questions by MR REICHLER**

4 **MR REICHLER:** Yes, good afternoon again, Mr President,
5 members of the Tribunal.

6 Judge Wolfrum asked: can the People's Republic of
7 China issue acts which are of legal relevance in
8 international law for Taiwan, the Republic of China?
9 The answer: the Philippines recognises the People's
10 Republic of China as the *de jure* government of China,
11 including all of its territorial components. It is
12 for the People's Republic of China to determine
13 whether its own laws and regulations apply to its
14 entire territory or to specific regions of the
15 country. The People's Republic of China is the only
16 government of China recognised diplomatically by the
17 Republic of the Philippines.

18 In response to the question of Judge Pawlak, we
19 wish to emphasise at the outset of our answer that
20 regardless of which state, if any, received
21 sovereignty over any of the Spratly Islands upon
22 Japan's renunciation of its claims, that would only --
23 it could only -- shed light on who might have
24 sovereignty over the high-tide features themselves,
25 and by extension their territorial seas. It would
26 have no relevance to any claim in respect of maritime

1 areas, whether based on the Convention or even general
2 international law beyond those territorial seas.

3 As we have repeatedly said, especially in our
4 written pleadings and during the July hearings, this
5 case is not about which state has sovereignty over
6 land features. The claims that are before you in the
7 form of the Philippines' submissions concern only
8 entitlements to maritime areas beyond the territorial
9 seas of these features, and to the sovereign rights
10 and jurisdiction in those maritime areas. As we have
11 said -- and the Tribunal has agreed in its award of
12 29th October -- these entitlement claims can be
13 decided irrespective of which state has sovereignty
14 over the disputed insular features.

15 Accordingly, it is the Philippines' position that
16 the question of which state has sovereignty over the
17 features since World War II is beyond the scope of the
18 Philippines' claims and -- as the Tribunal itself
19 appears to have said in its award of 29th October --
20 beyond the Tribunal's jurisdiction.

21 That said, it is the Philippines' submission that
22 the historical record shows that there is no factual
23 or legal basis to conclude that Japan's renunciation
24 of its claims to the Spratly features conveyed title
25 in any form to China. Indeed, the record shows that
26 the Allied powers took great care to make sure that

1 Japan's renunciation did not convey title to China,
2 and in fact it did not.

3 This statement of the Philippines' position is
4 without prejudice to our longstanding position that
5 the question of sovereignty over insular features that
6 constitute islands because they are above water at
7 high tide is not part of the Philippines' claims, is
8 not part of this case, and may be beyond the
9 Tribunal's jurisdiction.

10 Mr President, members of the Tribunal, thank you
11 very much for allowing us this opportunity to answer
12 these two most interesting questions. I would be
13 grateful if the Tribunal would now invite
14 Professor Boyle to address you.

15 **THE PRESIDENT:** Thank you very much indeed for the
16 further clarification that you have given. We will
17 take that into account.

18 I now call on Professor Boyle.

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

20 **(4.35 pm)**

21 **Second-round submissions by PROFESSOR BOYLE**

22 **PROFESSOR BOYLE:** Mr President, in this final submission
23 by our legal team, I have been asked to answer
24 questions 9, 20 to 23, and 25, and I will do so in
25 that order.

26 Judge Wolfrum asked in question 9 for:

1 "... a review of the factual evidence in the
2 record underpinning Professor Carpenter's report and
3 the Philippines' environmental claims."

4 We understood this to refer to the evidence
5 regarding destructive fishing practices, given
6 Judge Wolfrum's reference to "illegal fishing,
7 illegally taking parts of the sea, marine biomass, and
8 destroying the coral", but if the question was
9 intended to refer more broadly to the environmental
10 impact of dredging and construction works, then
11 I would respectfully refer you to
12 Professor Carpenter's testimony and to his reports.

13 The evidence for destructive fishing practices is
14 laid out in paragraphs 6.50 to 6.65 of the Memorial.
15 It consists in information gathered from reports
16 produced by Philippine fisheries enforcement vessels,
17 by the armed forces and in court cases, as well as
18 diplomatic correspondence between the Parties. These
19 various reports detail incidents occurring between
20 1998 and 2012 at Scarborough Shoal, and also in 2013
21 at Second Thomas Shoal.

22 In particular, the evidence describes an incident
23 at Scarborough Shoal in April 2012 involving the
24 large-scale collection of corals, giant clams and

1 "assorted endangered species".¹⁸⁸ According to
2 a Chinese Ministry of Foreign Affairs spokesman,
3 Chinese vessels from FLEC and CMS were present to:

4 "... protect the safety and legitimate fishing
5 activities of Chinese fishermen and Chinese
6 vessels."¹⁸⁹

7 Further reports from April 2012 also describe more
8 incidents involving the taking of coral and removal of
9 giant clams at Scarborough Shoal. And in addition the
10 reports discuss various instances between 1998 and
11 2006 in which Chinese vessels were discovered in the
12 vicinity of Scarborough Shoal in possession of
13 corals,¹⁹⁰ sea turtles,¹⁹¹ sharks¹⁹² and giant clams.¹⁹³

¹⁸⁸ *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.

¹⁸⁹ Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Liu Weimin's Regular Press Conference on April 12, 2012* (12 Apr. 2012). MP, Vol. V, Annex 117.

¹⁹⁰ *Memorandum* from Assistant Secretary of the Department of Foreign Affairs, Republic of the Philippines, to the Secretary of Foreign Affairs of the Republic of the Philippines (23 Mar. 1998), p. 1. MP, Vol. III, Annex 29; *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People's Republic of China in Manila, No. 2000100 (14 Jan. 2000), p. 2. MP, Vol. VI, Annex 186; *Situation Report* from Col. Rodrigo C. Maclang, Philippine Navy, to Chief of Staff, Armed Forces of the Philippines, No. 004-18074 (18 Apr. 2000), p. 1. MP, Vol. III, Annex 41; *Memorandum* from Willy C. Gaa, Assistant Secretary of Foreign Affairs, Republic of the Philippines to Secretary of Foreign Affairs, Republic of the Philippines (14 Feb. 2001), p. 1. MP, Vol. III, Annex 45; Office of Asian and Pacific Affairs, Department of Foreign Affairs, Republic of the Philippines, *Apprehension of Four Chinese Fishing Vessels in the Scarborough Shoal* (23 Feb. 2001), pp. 2-3. MP, Vol. III, Annex 46; *Memorandum* from Perfecto C. Pascual, Director, Naval Operation Center, Philippine Navy, to The Flag Officer in Command, Philippine Navy (11 Feb. 2002). MP, Vol. III, Annex 49; *Letter* from Victorino S. Hingco, Vice Admiral, Philippine Navy, to Antonio V. Rodriguez, Assistant Secretary, Office of Asia and Pacific Affairs, Department of Foreign Affairs, Republic of the Philippines (26 Mar. 2002), p. 1. MP, Vol. III, Annex 50; *Report* from Lt. Commander Angeles, Philippine Navy, to Flag Officer in Command, Philippine Navy, No. N2E-F-1104-012 (18 Nov. 2004),

1 Again, there were reports between 1998 and 2002 in
2 which Chinese fishing vessels were inspected or
3 apprehended in possession of explosives and cyanide to
4 be used for fishing.¹⁹⁴

pp. 1, 10-15. MP, Vol. III, Annex 55; *Report from Commanding Officer, NAVSOU-2, Philippine Navy, to Acting Commander, Naval Task Force 21, Philippine Navy, No. NTF21-0406-011/NTF21 OPLAN (BANTAY AMIANAN) 01-05 (9 Apr. 2006), pp. 5-6. MP, Vol. III, Annex 59.*

¹⁹¹ *Memorandum from Assistant Secretary of the Department of Foreign Affairs, Republic of the Philippines, to the Secretary of Foreign Affairs of the Republic of the Philippines (23 Mar. 1998), p. 1. MP, Vol. III, Annex 29; Office of Asian and Pacific Affairs, Department of Foreign Affairs, Republic of the Philippines, *Apprehension of Four Chinese Fishing Vessels in the Scarborough Shoal* (23 Feb. 2001), pp. 2-3. MP, Vol. III, Annex 46; *Memorandum from Perfecto C. Pascual, Director, Naval Operation Center, Philippine Navy, to The Flag Officer in Command, Philippine Navy (11 Feb. 2002). MP, Vol. III, Annex 49.**

¹⁹² *Office of Asian and Pacific Affairs, Department of Foreign Affairs, Republic of the Philippines, *Apprehension of Four Chinese Fishing Vessels in the Scarborough Shoal* (23 Feb. 2001), pp. 2-3. MP, Vol. III, Annex 46.*

¹⁹³ *Memorandum from Josue L. Villa, Embassy of the Republic of the Philippines in Beijing, to the Secretary of Foreign Affairs of the Republic of the Philippines (21 May 2001), p. 10. MP, Vol. III, Annex 48; *Memorandum from Perfecto C. Pascual, Director, Naval Operation Center, Philippine Navy, to The Flag Officer in Command, Philippine Navy (11 Feb. 2002). MP, Vol. III, Annex 49; Letter from Victorino S. Hingco, Vice Admiral, Philippine Navy, to Antonio V. Rodriguez, Assistant Secretary, Office of Asia and Pacific Affairs, Department of Foreign Affairs, Republic of the Philippines (26 Mar. 2002), p. 1. MP, Vol. III, Annex 50; *Report from CNS to Flag Officer in Command, Philippine Navy, File No. N2D-0802-401 (1 Sept. 2002), p. 1. MP, Vol. III, Annex 52; *Report from Lt. Commander Angeles, Philippine Navy, to Flag Officer in Command, Philippine Navy, No. N2E-F-1104-012 (18 Nov. 2004), pp. 1, 10-15. MP, Vol. III, Annex 55; *Report from Commanding Officer, NAVSOU-2, Philippine Navy, to Acting Commander, Naval Task Force 21, Philippine Navy, No. NTF21-0406-011/NTF21 OPLAN (BANTAY AMIANAN) 01-05 (9 Apr. 2006), p. 2. MP, Vol. III, Annex 59.*****

¹⁹⁴ *People of the Philippines v Wuh Tsu Kai, et al*, Criminal Case No. RTC 2362-I, Decision, Regional Trial Court, Third Judicial Region, Branch 69, Iba, Zambales, Philippines (29 Apr. 1998), p. 1. MP, Vol. III, Annex 31; *People of the Philippines v Zin Dao Guo, et al*, Criminal Case No. RTC 2363-I, Decision, Regional Trial Court, Third Judicial Region, Branch 69, Iba, Zambales, Philippines (29 Apr. 1998), p. 1. MP, Vol. III, Annex 32; *Memorandum from Josue L. Villa, Embassy of the Republic of the Philippines in Beijing, to the Secretary of Foreign Affairs of the Republic of the Philippines (21 May 2001), p. 10. MP, Vol. III, Annex 48; *Memorandum from Perfecto C. Pascual, Director, Naval Operation Center, Philippine Navy, to The Flag Officer in Command, Philippine Navy (11 Feb. 2002). MP, Vol. III, Annex 49; *Report from CNS to Flag Officer in Command, Philippine Navy, File No. N2D-0802-401 (1 Sept. 2002), p. 1. MP, Vol. III, Annex 52.***

1 Then finally, at Second Thomas Shoal the evidence
2 of harmful fishing practices dates from May 2013, and
3 it is found in a report from Philippine personnel
4 stationed on a ship at that feature. They observed
5 the gathering of coral and giant clams,¹⁹⁵ and
6 a Philippine air patrol photographed one of the
7 vessels, which hopefully you can see on your screen
8 now; it is also at tab 6.10. You can see there a ship
9 loaded with what are identifiably giant clams and
10 coral.

11 Question 20 asks whether the Philippines wishes to
12 amend Submissions 11 and 12(b) to include
13 environmental damage at locations other than
14 Scarborough Shoal, Second Thomas Shoal and Mischief
15 Reef, and the answer is: yes, we do.

16 The Philippines requests the Tribunal's permission
17 to amend Submission 11 so that it would now cover
18 violation of China's obligations to protect and
19 preserve the marine environment at Cuarteron Reef,
20 Fiery Cross Reef, Johnson Reef, McKennan (Hughes)
21 Reef, Gaven Reef and Subi Reef, in addition to the
22 existing claims with respect to Scarborough Shoal and
23 Second Thomas Shoal. The Agent will indicate the
24 precise wording of the revised Submission 11 in his

¹⁹⁵ Armed Forces of the Philippines, Near-occupation of Chinese vessels of Second Thomas (Ayungin) Shoal in the early weeks of May 2013 (May 2013), p. 3. MP, Vol. IV, Annex 94.

1 speech following me. No amendment of Submission 12(b)
2 with respect to Mischief Reef is necessary.

3 Question 21 invites the Philippines to elaborate
4 on the interpretation of Article 192 of the Convention
5 and it asks whether the article is simply declaratory
6 of customary international law or whether it
7 establishes an independent obligation that goes beyond
8 custom.

9 Mr President, I might perhaps say that it is now
10 30 years since I first published my first-ever article
11 on the Law of the Sea Convention, Article 192, so it
12 is a pleasure to return to these questions.

13 Article 192 is the first articulation of a general
14 obligation to protect and preserve the marine
15 environment.¹⁹⁶ In the words of the UNCLOS commentary:

16 "... article 192 is the culmination of a process
17 of adopting increasingly broad measures in different
18 types of international instruments relating to marine
19 environmental issues ..."¹⁹⁷

20 And I would submit that it is today to be treated
21 as declaratory of customary international law for the
22 following reasons.

23 Most importantly, the two formative declarations

¹⁹⁶ *United Nations Convention on the Law of the Sea 1982: A Commentary*,
Vol. 4 (M. Nordquist, et. al., eds., 2002), p. 36. MP, Vol. XI, Annex
LA-147(bis).

¹⁹⁷ *Id.*

1 on international environmental law both recognise that
2 states have an obligation not to cause damage to the
3 environment of other states or of areas beyond
4 national jurisdiction. Principle 21 of the 1972
5 Stockholm Declaration on the Human Environment¹⁹⁸ was
6 reiterated with minor amendments by Principle 2 of the
7 1992 Rio Declaration on Environment and Development,¹⁹⁹
8 and it has also been reiterated by other Rio and
9 post-Rio instruments.²⁰⁰

10 To remind you, Rio Principle 2 provides,
11 *inter alia*, that:

12 "States have ... the responsibility to ensure that
13 activities within their jurisdiction or control do not
14 cause damage to the environment of other states or of

¹⁹⁸ UN Conference on the Human Environment, *Declaration of the United Nations Conference on the Human Environment*, UN Doc. A/CONF.48/14/Rev.1 (16 June 1972), Principle 21. MP, Vol. XI, Annex LA-63.

¹⁹⁹ UN Conference on Environment and Development, *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26/Rev 1 (Vol. I) (1993), principle 2. Supplemental Documents, Vol. VI, Annex LA-251.

²⁰⁰ See Convention on Biological Diversity, 1760 UNTS 79 (5 June 1992), entered into force 29 Dec. 1993, Art. 3. MP, Vol. XI, Annex LA-82; United Nations Framework Convention on Climate Change, 1771 UNTS 107 (9 May 1992), entered into force 21 Mar. 1994, preamble. Supplemental Documents, Vol. VI, Annex LA-261; Convention to combat desertification in those countries experiencing serious drought and/or desertification, particularly in Africa, 1954 UNTS 3 (14 Oct. 1994), entered into force 26 Dec. 1996, preamble. Supplemental Documents, Vol. VI, Annex LA-266; Stockholm Convention on Persistent Organic Pollutants, 2256 UNTS 119 (22 May 2001), entered into force 17 May 2004, preamble. Supplemental Documents, Vol. VI, Annex LA-273; International Tropical Timber Agreement (2006), 2797 UNTS 006 (27 Jan. 2006), entered into force 7 Dec. 2011, preamble. Supplemental Documents, Vol. VI, Annex LA-275; U.N. General Assembly, *Non-Legally Binding Instrument on all Types of Forests*, U.N. Doc. A/RES/62/98 (31 Jan. 2008), preamble. Hearing on Merits, Annex LA-309.

1 *areas beyond the limits of national jurisdiction.*"²⁰¹

2 You will, I'm sure, recall that in its *Advisory*
3 *Opinion on the Legality of the Threat or Use of*
4 *Nuclear Weapons*, and in later cases, the International
5 Court has held that:

6 "The existence of the general obligation of states
7 to ensure that activities within their jurisdiction
8 and control respect *the environment of other states or*
9 *of areas beyond national control* is now part of the
10 corpus of international law relating to the
11 environment."²⁰²

12 Articles 192 and 194 of the 1982 UN Convention
13 apply this general obligation more specifically to the
14 protection and preservation of the marine environment,
15 but they also go further. Articles 192 and 194(1) are
16 applicable to the marine environment as an integrated
17 whole.²⁰³ Properly understood, they impose

²⁰¹ UN Conference on Environment and Development, *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26/Rev 1 (Vol. I) (1993), principle 2. Supplemental Documents, Vol. VI, Annex LA-251 (emphasis added).

²⁰² *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, para. 29. Hearing on Merits, Annex LA-298 (emphasis added). See also *Case Concerning The Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, para 53. Hearing on Merits, Annex LA-299; and with respect to transboundary harm, *Arbitration Regarding the Iron Rhine ("IJzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, Award (24 May 2005), reprinted in XXVII U.N.R.I.A.A. 35, paras. 222-223. Hearing on Merits, Annex LA-303; *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, ICJ Reports 2010, para. 101. Supplemental Documents, Vol. VI, Annex LA-240; *The Indus Waters Kishenganga Arbitration (Pakistan v. India)*, Partial Award (18 Feb. 2013), para. 448. Hearing on Merits, Annex LA-305.

²⁰³ UN Conference on Environment and Development, *Agenda 21* (3-14 June 1992), para. 17.1. MP, Vol. XI, Annex LA-65.

1 an obligation on all states -- including China -- to
2 take appropriate measures to protect not only the
3 marine environment of other states and the marine
4 environment of areas beyond national jurisdiction, but
5 also -- and this is the important point -- to protect
6 *their own marine environment*, including their own
7 territorial sea, their own exclusive economic zone and
8 their own continental shelf.

9 Now, the reason for this different approach in the
10 Convention is obvious. If states do not first protect
11 their own waters, they will not be able to control
12 pollution or other forms of environmental damage
13 spreading to other areas of the marine environment
14 beyond their own jurisdiction.²⁰⁴

15 The view that the normative provisions of UNCLOS
16 as a whole are today to be treated as customary
17 international law is too widely held by states parties
18 and non-parties alike to require further iteration.
19 Regional seas agreements reflect this view and they
20 have been a significant means of implementing
21 Article 192 and other provisions of Part XII, even
22 before the entry into force of the Convention itself.
23 The state practice that is evident in these agreements
24 is thus another reason why Article 192, and Part XII
25 as a whole, can reasonably be regarded today as

²⁰⁴ See in particular UNCLOS, Arts. 207 and 208.

1 declaratory of customary international law on the
2 marine environment.²⁰⁵

3 You have asked about the interpretation and scope
4 of Article 192. Article 192 serves as an overarching
5 chapeau to the whole of Part XII of UNCLOS, the part
6 concerned with "Protection and Preservation of the
7 Marine Environment". You may not necessarily think
8 that from reading Part XII because most of its
9 provisions are, undoubtedly, largely concerned with
10 controlling pollution of the sea from various sources.
11 But that said, Articles 194(5), 196 and 237 in
12 particular take a broader environmental perspective.
13 The very general wording of Article 192 thus

²⁰⁵ Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution (24 Apr. 1978). Hearing on Merits, Annex LA-311; Convention for the Protection of the Marine Environment and Coastal Area of the South-East Pacific (12 Nov. 1981), entered into force 1986. Hearing on Merits, Annex LA-313; Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of West and Central African Region (23 Mar. 1981), entered into force 5 Aug. 1984. Hearing on Merits, Annex LA-312; Regional Convention for the Conservation of the Red Sea and the Gulf of Aden (14 Feb. 1982), entered into force 20 Aug. 1985. Hearing on Merits, Annex LA-314; Convention for the Protection and Development of the Marine Environment of the Wider Caribbean, 1506 U.N.T.S. 157 (24 Mar. 1983), entered into force 11 Oct. 1986. Hearing on Merits, Annex LA-315; Convention for the Protection, Management, and Development of the Marine and Coastal Environment of East Africa (21 June 1985), entered into force 30 May 1996. Hearing on Merits, Annex LA-316; Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (25 Nov. 1986), entered into force 22 Aug. 1990. Hearing on Merits, Annex LA-317; Convention for the Protection of the Marine Environment and Coastal Region of the Mediterranean (10 June 1995), entered into force 9 July 2004. Hearing on Merits, Annex LA-319; Convention for the Protection of the Marine Environment of the North-East Atlantic, 2354 U.N.T.S. 67, (22 Sept. 1992), entered into force 25 Mar. 1998. Hearing on Merits, Annex LA-318; Convention on the Protection of the Marine Environment of the Baltic Sea Area (9 Apr. 1992), entered into force 17 Jan. 2000. Supplemental Documents, Vol. VI, Annex LA-260; Convention for Cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific (18 Feb. 2002). Hearing on Merits, Annex LA-323.

1 emphasises that Part XII applies to the marine
2 environment as a whole, in all of its ecological
3 dimensions, and not simply to pollution of the sea.

4 It is that broader environmental perspective which
5 was emphasised during the Rio Conference, in
6 particular in Agenda 21 of that conference report.

7 Agenda 21, Chapter 17 refers to "International law, as
8 *reflected in the provisions of the ... Convention on*
9 *the Law of the Sea*",²⁰⁶ and Chapter 17 starts from the
10 premise that UNCLOS provides:

11 "... the international basis upon which to pursue
12 the protection and sustainable development of the
13 marine and coastal environment and its resources
14 ..."²⁰⁷

15 Unlike Part XII of UNCLOS, however, the focus of
16 Chapter 17 of Agenda 21 is more broadly on the
17 prevention of environmental degradation and the
18 protection of ecosystems.²⁰⁸

19 Agenda 21 can legitimately be taken into account

²⁰⁶ UN Conference on Environment and Development, *Agenda 21* (3-14 June 1992), para. 17.1. MP, Vol. XI, Annex LA-65 (emphasis added).

²⁰⁷ *Id.*

²⁰⁸ *Id.* See also R. Falk & H. Elver, "Comparing Global Perspectives: The 1982 UNCLOS and the 1992 UNCED", in *Order for the Oceans at the Turn of the Century* (D. Vidas & W. Østfeng, eds., 1999), p. 145. Hearing on Merits, Annex LA-325; Alexander Yankov, "The Law of the Sea Convention and Agenda 21: Marine Environment Implications", in *International Law and Sustainable Development* (A. Boyle & D. Freestone, eds., 1999), p. 271. Hearing on Merits, Annex LA-326; Yoshifumi Tanaka, "Zonal and Integrated Management Approaches to Ocean Governance: Reflections on a Dual Approach in International Law of the Sea", *International Journal of Marine and Coastal Law*, Vol. 19, No. 4 (2004), p. 483. Hearing on Merits, Annex LA-328.

1 when interpreting or implementing the Convention.²⁰⁹

2 It has had the effect of legitimising and encouraging
3 legal developments based on the new perspective set
4 out there.²¹⁰ In the words of one former FAO official,
5 it illustrates how "a more conceptually sophisticated"
6 focus on protection of the marine environment has
7 evolved out of Part XII.²¹¹ And as one former judge of
8 the Hamburg tribunal has observed:

9 "It is hard to conceive of the development of the
10 modern law of the sea and the emerging international
11 law of the environment in ocean-related matters
12 outside the close association and interplay between
13 UNCLOS and Agenda 21."²¹²

14 Question 21 also asks for an elaboration of the

²⁰⁹ Vienna Convention on the Law of Treaties (23 May 1969), 1155 UNTS 332, entered into force 27 Jan. 1980, Art. 31(3)(c). MP, Vol. XI, Annex LA-77. See International Law Commission, Draft Articles on the Law of Treaties with Commentaries, in *Report of the International Law Commission on the work of its eighteenth session (4 May-19 July 1966)*, in *Yearbook of the International Law Commission*, Vol. II (1966), commentary to draft Article 27, at para. (16). SWSP, Vol. XII, Annex LA-184.

²¹⁰ See, e.g., OSPAR Convention; Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 1936 UNTS 269 (17 Mar. 1992), entered into force 6 Oct. 1996. Supplemental Documents, Vol. VI, Annex LA-262; Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean (10 June 1995), entered into force, 12 Dec. 1999. Hearing on Merits, Annex LA-320; Protocol Concerning Pollution from Land-based Sources and Activities to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (6 Oct. 1999), entered into force 13 Aug. 2010. Hearing on Merits, Annex LA-322.

²¹¹ R. Falk & H. Elver, "Comparing Global Perspectives: The 1982 UNCLOS and the 1992 UNCED", in *Order for the Oceans at the Turn of the Century* (D. Vidas & W. Østreng, eds., 1999), p. 153. Hearing on Merits, Annex LA-325.

²¹² Alexander Yankov, "The Law of the Sea Convention and Agenda 21: Marine Environment Implications", in *International Law and Sustainable Development* (A. Boyle & D. Freestone, eds., 1999), p. 272. Hearing on Merits, Annex LA-326.

1 significance of the Convention on Biological Diversity
2 in informing the content of Article 192 and how this
3 compares to Article 194(5).

4 The Law of the Sea Convention of course makes no
5 reference to biological diversity; the words are not
6 there. A decade later, the Rio Conference adopted the
7 Convention on Biological Diversity, whose provisions
8 are intended to promote conservation and sustainable
9 use of terrestrial and marine biodiversity.

10 So international law on conservation of marine
11 living resources and protection and preservation of
12 the marine environment today is not the exclusive
13 preserve of either treaty. Each agreement is plainly
14 relevant for the purpose of interpreting and
15 implementing the other. Principles of international
16 environmental law, including those concerned with
17 conservation and sustainable use of natural resources,
18 must also be taken into account when interpreting
19 UNCLOS in the same way that they have been when
20 interpreting other treaties.²¹³

21 Now, the Philippines does not suggest that the
22 Convention on Biological Diversity has been wholly

²¹³ *The Indus Waters Kishenganga Arbitration (Pakistan v. India)*, Partial Award (18 Feb. 2013), para. 452. Hearing on Merits, Annex LA-305; Case Concerning The Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, paras. 112 & 140. Hearing on Merits, Annex LA-299; *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, ICJ Reports 2010, paras. 64-65, 204-05. Supplemental Documents, Vol. VI, Annex LA-240.

1 incorporated into UNCLOS, still less that there is
2 a dispute about compliance with the Convention on
3 Biological Diversity by China. Its point is a simple
4 one: that protection and preservation of the marine
5 environment should be interpreted to include
6 protection and preservation of biological diversity.²¹⁴

7 Article 2 of the Convention on Biological
8 Diversity defines that concept in these terms. It
9 says:

10 "'Biological diversity' means the variability
11 among living organisms from all sources, including,
12 *inter alia*, terrestrial, marine and other aquatic
13 ecosystems and the ecological complexes of which they
14 are part ..."

15 And it goes on to say:

16 "... *this includes diversity within species,*
17 *between species and of ecosystems.*"²¹⁵

18 I think that's probably the key point in that
19 definition: "diversity within species, between species
20 and of ecosystems".

²¹⁴ In its *Shrimp-Turtle* decision, for example, the WTO Appellate Body referred *inter alia* to the 1992 Rio Declaration on Environment and Development, the 1982 UNCLOS, the 1973 CITES Convention, the 1979 Convention on Conservation of Migratory Species and the 1992 Convention on Biological Diversity in order to determine the present meaning of "exhaustible natural resources" in the GATT. *Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the WTO Appellate Body, Doc. No. WT/DS58/AB/R (12 Oct. 1998), paras. 130-131. SWSP, Vol. XII, Annex LA-178.

²¹⁵ Convention on Biological Diversity, 1760 UNTS 79 (5 June 1992), entered into force 29 Dec. 1993, Art. 2. MP, Vol. XI, Annex LA-82 (emphasis added).

1 The UN Agreement on Straddling and Highly
2 Migratory Fish Stocks proceeds from the assumption
3 that the Law of the Sea Convention already imposes on
4 coastal states and states fishing on the high seas
5 an obligation to protect "biodiversity in the marine
6 environment".²¹⁶ So does Agenda 21.²¹⁷ Put simply,
7 that is the nub of the Philippines' argument with
8 respect to biodiversity in this case.

9 We argue that Article 192 and other pertinent
10 articles of Part XII are engaged whenever activities
11 are undertaken or permitted which may adversely affect
12 the diversity of ecosystems or diversity within or
13 between species. And given the fundamental importance
14 of coral reefs to the ecology of the South China Sea,
15 any large-scale destruction of those reefs will
16 necessarily damage biodiversity throughout the South
17 China Sea, as Professor Carpenter's evidence shows.²¹⁸
18 We submit that UNCLOS Part XII provides an appropriate

²¹⁶ Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 2167 UNTS 3 (4 Aug. 1995), entered into force 11 Dec. 2001, Art. 5. Supplemental Documents, Vol. VI, Annex LA-267 ("In order to conserve and manage straddling fish stocks and highly migratory fish stocks, coastal States and States fishing on the high seas shall, *in giving effect to their duty to cooperate in accordance with the Convention*: ... (g) protect 'biodiversity in the marine environment.'").

²¹⁷ UN Conference on Environment and Development, *Agenda 21* (3-14 June 1992), paras. 17.7, 17.85. MP, Vol. XI, Annex LA-65.

²¹⁸ K.E. Carpenter & L.M. Chou, *Environmental Consequences of Land Reclamation Activities on Various Reefs in the South China Sea* (14 Nov. 2015), pp. 26-27. Supplemental Documents, Vol. II, Annex 699.

1 legal order with which to address the damage or the
2 risk of future damage.

3 This view of Article 192 differs from
4 Article 194(5) only insofar as the latter is narrower.
5 Article 194(5) refers to "rare or fragile" ecosystems,
6 and the habitat of "depleted, threatened or endangered
7 species". The coral reefs in this case are indeed
8 "rare or fragile", as I argued on Thursday,²¹⁹ and the
9 species at risk are in some cases "depleted,
10 threatened or endangered"; most notably the giant
11 clams, turtles and other species identified by
12 Professor Carpenter in his testimony a few minutes
13 ago. So Submissions 11 and 12(b) could be decided on
14 that basis alone: that there is a violation of
15 Article 194(5).

16 But to focus only on rare or fragile ecosystems or
17 threatened, depleted or endangered species would be to
18 miss the point of the Convention on Biological
19 Diversity, namely that diversity itself is a key value
20 to be protected, including diversity within the
21 relevant ecosystem. In that connection, I would
22 simply draw your attention to the preamble to the
23 Convention on Biological Diversity, and specifically
24 the first ten recitals. You will find a copy at
25 tab 6.8 in your bundle.

²¹⁹ Hearing on Merits, Tr. (Day 3), p. 26.

1 Ecosystems or species can easily be wiped out by
2 development, even if they are not rare or fragile or
3 endangered. The objective of the Convention on
4 Biological Diversity, as its preamble makes clear, is
5 to protect and preserve them before they reach that
6 state. Thus the fundamental point of the Convention
7 is not adequately captured by a narrow reading of the
8 specific wording of Article 194(5).

9 In our view, a coherent and comprehensive
10 understanding of the present law on protection and
11 preservation of the marine environment requires you to
12 give a broader reading to Article 192, the one that we
13 advocate here; in other words, that it includes
14 protection and preservation of biodiversity. That, in
15 our view, is a point which is relevant to Part XII as
16 a whole, not simply to Article 192, and it underpins
17 our Submissions 11 and 12(b).

18 Question 22 asks whether the Philippines is aware
19 of any experts from China or elsewhere publishing
20 views about the environmental impact of China's
21 activities or its toleration of activities which are
22 contrary to or differ from those of the Philippines.

23 Well, Mr President, I can assure you that the
24 sleepy eyes you see in the second row of our legal
25 team are partly as a result of their diligence in
26 searching the internet for English and

1 Chinese-language publications that address the
2 environmental impact of China's activities. It has
3 unfortunately been one of those pieces of research
4 that all PhD students are familiar with at some point:
5 they spend weeks researching something, and they find
6 nothing. Apart from a brief statement from the State
7 Oceanic Administration, to which I will refer in
8 a moment, there is nothing. Given the problems of
9 access to the features occupied by China, and its
10 approach to the activities it is undertaking,
11 including a rather expedited timeframe, this should
12 not be surprising.

13 Question 23 invites the Philippines to comment on
14 a statement given by Mr Ouyang Yujing,
15 director-general of the Department of Boundary and
16 Ocean Affairs of the Ministry of Foreign Affairs of
17 the People's Republic of China. The statement makes,
18 I think, six assertions.

19 First, he says the construction projects
20 undertaken in the South China Sea have "gone through
21 a science-based evaluation and assessment, with equal
22 importance given to construction and protection".²²⁰
23 Second, he says full account was taken of ecological
24 preservation and fishery protection. Third, he claims

²²⁰ Embassy of the People's Republic of China in Canada, *An Interview on China's Construction Activities on the Nansha Islands and Reefs* (27 May 2015). Hearing on Merits, Annex 820.

1 that strict environmental standards and requirements
2 were followed in the construction process. Fourth, he
3 says that "effective measures" were taken to preserve
4 the ecological environment. Fifth, there is a promise
5 to step up ecological monitoring of the reefs, islands
6 and waters. And finally, he claims that the
7 Convention on Biological Diversity and the CITES
8 Convention will be strictly observed.

9 This is a statement that is unaccompanied by any
10 supportive evidence. If there has been
11 a science-based evaluation, it has not been made
12 public; it has not been communicated to the
13 Philippines or to "the competent international
14 organizations", as required by Articles 205 and 206 of
15 the Convention. We say that that failure is itself
16 conclusive evidence of a violation of these articles.
17 Even without appearing in these proceedings, China
18 could easily have made its evaluation available to the
19 Tribunal directly or in some other way. It has not
20 been slow to publicise its views on other matters, so
21 why has it not produced the evaluation?

22 The only reasonable inference to be drawn from
23 what is missing is that it does not exist. Had China
24 appeared in these proceedings, it could not possibly
25 or plausibly have asserted the evidence of an EIA
26 without producing the relevant document. The Tribunal

1 cannot allow its non-appearance to exempt China from
2 the normal burden of proof that attaches to any
3 assertion of fact in inter-state proceedings.

4 But, Mr President, after some very dedicated
5 research by our legal team over the weekend, we have
6 now located a short article from the State Oceanic
7 Administration briefly describing the techniques
8 allegedly employed to mitigate the environmental
9 effects of the Chinese construction works.²²¹ You will
10 find a copy of that short article at tab 6.9 in your
11 folder. You could miss it quite easily because it is
12 only a page long. It does not claim to be a summary
13 of anything bigger.

14 It is certainly nothing like the multi-volume EIA
15 which Uruguay deposited in the *Pulp Mills* case,²²²
16 which is currently still weighing down an entire
17 bookshelf in my library. China's dredging and
18 construction in the South China Sea is a much bigger
19 project than the Uruguayan pulp mill and the
20 environmental risks are comparably greater, and
21 a comparably more extensive EIA would be warranted.

22 More importantly, this document describes the

²²¹ See China State Oceanic Administration, "Construction Work at Nansha Reefs Will Not Harm Oceanic Ecosystems" (18 June 2015), available at http://www.soa.gov.cn/xw/hyyw_90/201506/t20150618_38598.html. Hearing on Merits, Annex 821.

²²² See *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Merits, Counter-Memorial of Uruguay (20 July 2007), Vols. VI & VII. Hearing on Merits, Annex LA-301.

1 construction project in some detail, but you will see
2 that it makes no attempt to assess the impact on the
3 marine environment in general, or on the ecosystem and
4 biological diversity of the reefs in particular. It
5 simply asserts in its conclusions that:

6 "The construction work on the Nansha reefs
7 stresses ecological protection. Many protection
8 measures were adopted in the stages of planning,
9 design and construction ... [T]he ecological impact on
10 the coral reefs is partial, temporary, controllable
11 and recoverable."²²³

12 Well, you've just heard Professor Carpenter's
13 evidence and you have, I think, seen the photographs
14 for yourselves. You can draw your own conclusions.

15 This pseudo-evaluation meets none of the
16 requirements for an EIA set out by the International
17 Court in the *Pulp Mills* case.²²⁴ It is plainly not
18 an EIA. In these circumstances, the Philippines
19 maintains its position that China has not conducted
20 an environmental impact assessment as required by
21 Article 206 in respect of its land creation and
22 construction activities at Mischief Reef, or anywhere

²²³ China State Oceanic Administration, "Construction Work at Nansha Reefs Will Not Harm Oceanic Ecosystems" (18 June 2015), available at http://www.soa.gov.cn/xw/hyyw_90/201506/t20150618_38598.html. Hearing on Merits, Annex 821.

²²⁴ *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, ICJ Reports 2010, para. 205. Supplemental Documents, Vol. VI, Annex LA-240.

1 else in the South China Sea.

2 For the third and fourth statements by Mr Yujing
3 to be given any credence would, I think, again require
4 some effort by China to identify the relevant
5 environmental standards and protective measures they
6 claim have been taken. It is not obvious, looking at
7 the photos, what they would be. It has not made any
8 attempt to identify those measures. All we have here
9 are assertions, unsupported by any evidence.

10 Finally, the last item in his statement.
11 Compliance with the Biological Diversity Convention
12 and the CITES Convention simply is not in issue in
13 these proceedings. What matters is whether the
14 requirements of Part XII of UNCLOS have been met.

15 That brings me to question 25, which asks whether
16 the Philippines alleges that Chinese land reclamation
17 at Subi Reef, Fiery Cross Reef, Gaven Reef, Johnson
18 Reef, Cuarteron Reef and McKennan (Hughes) Reef
19 constitutes a violation of the Convention, other than
20 a duty not to aggravate the dispute pending
21 litigation; and, if so, which provisions of the
22 Convention.

23 The answer to this question is: yes, we do so
24 allege. The relevant provisions of the Convention are
25 those identified on Thursday afternoon in my
26 environmental speech; that is, Articles 123, 192, 194,

1 197 and 206. In addition, it is now clear -- as
2 explained a few moments ago -- that there is also
3 a violation of Article 205.

4 Everything alleged in respect of dredging and
5 construction activities at Mischief Reef in
6 Submission 12(b), in our Memorial and in our oral
7 presentations applies equally to Subi Reef, Fiery
8 Cross Reef, Gaven Reef and Johnson Reef and Cuarteron
9 Reef and Hughes Reef. It's exactly the same case with
10 exactly the same evidence. We did not have that
11 evidence when we drafted the Memorial; we do have it
12 now.

13 Mr President, members of the Tribunal, that
14 concludes my answers to your questions. This has
15 been, I think I might say, a most remarkable case,
16 probably one of the most remarkable there has ever
17 been on the law of the sea. For my part, it has been
18 a real privilege to represent the Philippines and to
19 appear before you all. As they say on the BBC, thank
20 you for listening.

21 Unless you have any questions, I would ask you to
22 call Secretary del Rosario to the podium.

23 **THE PRESIDENT:** Well, Professor Boyle it looks like there
24 is no question for you. So we will invite the
25 Minister for Foreign Affairs to the podium.

26 **(5.03 pm)**

1 **Concluding remarks by MINISTER DEL ROSARIO**

2 **MINISTER DEL ROSARIO:** Mr President, distinguished
3 members of the Tribunal, good afternoon. Before our
4 Agent, the Honourable Solicitor General, presents our
5 final submissions, it is my honour to respectfully
6 address you one last time in this Great Hall of
7 Justice.

8 When I first had the privilege of appearing before
9 you in July, it was at the beginning of the hearings
10 on jurisdiction. We did not know then whether or not
11 we would ever reach this point. The Philippines,
12 however, never doubted this Tribunal's jurisdiction.
13 But there are some who could not believe that the
14 Arbitral Tribunal would have the courage to apply the
15 law to a country like China.

16 There are those who think the rule of law in
17 international relations does not apply to great
18 powers. We reject that view. International law is
19 the great equaliser among states. It allows small
20 countries to stand on an equal footing with more
21 powerful states. Those who think "might makes right"
22 have it backwards. It is exactly the opposite, in
23 that right makes might.

24 That is why, in January 2013, we confidently put
25 our fate in the hands of this Tribunal and the
26 compulsory dispute resolution mechanisms of UNCLOS.

1 With your wise guidance, we have come a long way.

2 Mr President, distinguished members of the
3 Tribunal, the 29th October Award on Jurisdiction is
4 a remarkable document. It will not only stand the
5 test of time, it will be a model for ages. It is
6 remarkable in many ways, most especially for its moral
7 strength. It is a compelling rebuke to those who
8 doubt that international justice does exist and will
9 prevail.

10 I say this not just as the Secretary of Foreign
11 Affairs of the Philippines, but also as a global
12 citizen. It is not just the fate of the Philippines
13 that rests in your hands. I note the presence of the
14 distinguished observers from Australia, Indonesia,
15 Japan, Malaysia, Singapore, Thailand and Vietnam, and
16 I thank them for their presence. Other countries too
17 are watching to see what this Tribunal will do.

18 It is fitting that these hearings are ending as
19 2015 itself draws to a close. This year marks the
20 70th anniversary of the United Nations. That great
21 institution is an expression of the best in us. It is
22 unfortunate that it took one of the saddest episodes
23 in human history to create it. Yet those of us who
24 lived through that episode also remember the hopes for
25 a new chapter in our common history. We dared to
26 envision a future of enduring peace, shared prosperity

1 and a new era of collaboration.

2 Two centrepieces of that new order were: the
3 sovereign equality of all states; and the commitment
4 to settle disputes peacefully. The sovereign equality
5 of states is enshrined in the first substantive
6 provision of the UN Charter, Article 2(1). The
7 obligation to settle disputes by peaceful means
8 appears subsequently in Article 2(3).

9 Mechanisms for the compulsory settlement of
10 disputes were also a critical part of this new order.
11 Article 33(1) specifically mentions arbitration and
12 judicial settlement. And of course the Charter also
13 gave birth to the International Court of Justice.

14 I am proud to say that the Philippines was among
15 the original 51 signatories of the UN Charter. That
16 was true for China as well.

17 When we started this arbitration, the Philippines
18 was fulfilling one of its most solemn duties, which is
19 to settle international disputes peacefully. The
20 Tribunal knows that our disputes with China in the
21 South China Sea have, for a very long time,
22 complicated our relationship. Most recently, tensions
23 have risen dramatically. Unable to resolve these
24 disputes ourselves, we thus turned to this arbitration
25 to provide all parties a durable, rules-based
26 solution.

1 China has said it considers the initiation of this
2 arbitration to be "an unfriendly act". We disagree.
3 In 1982, the US General Assembly adopted the Manila
4 Declaration on the Peaceful Settlement of
5 International Disputes between States, which declared
6 that recourse to the judicial settlement of disputes:

7 "... should not be considered an unfriendly act
8 between States."

9 This year is also the 40th anniversary of the
10 establishment of diplomatic relations between the
11 Philippines and the People's Republic of China. Since
12 1975, economic and political ties between our two
13 countries have grown. We view China as a valued
14 friend, and it is precisely to preserve that
15 friendship that we initiated this arbitration.

16 We believe this arbitration benefits everyone.
17 For China, it will define and clarify its maritime
18 entitlements. For the Philippines, it will clarify
19 what is ours, specifically our fishing rights, rights
20 to resources, and rights to enforce our laws within
21 our EEZ. And for the rest of the international
22 community, it will help ensure peace, security,
23 stability and freedom of navigation and overflight in
24 the South China Sea.

25 We also believe that this arbitration will be
26 instructive for other states to consider the dispute

1 settlement mechanism under UNCLOS as an option for
2 resolving disputes in a peaceful manner.

3 Mr President, distinguished members of the
4 Tribunal, the Philippines more than anyone is mindful
5 of the fact that your October Award on Jurisdiction
6 was not the end of the story. Several jurisdictional
7 questions were joined to these hearings on the merits.
8 We trust that last week, and again today, our counsel
9 have resolved any lingering jurisdictional concerns
10 you may have.

11 In our view, the Tribunal's jurisdiction could not
12 be clearer with respect to declaring that China's
13 claim to "historic rights" in the areas encompassed by
14 the nine-dash line is inconsistent with UNCLOS.
15 Mr Reichler showed last Tuesday that the historic
16 rights that China claims are very different from
17 a claim to historic title that might be precluded from
18 jurisdiction under Article 298.

19 On the substance of the matter, Professor Oxman
20 and Mr Loewenstein showed that the regimes of the
21 continental shelf and exclusive economic zone under
22 UNCLOS, and even general international law, plainly
23 exclude China's claim of "historic rights" within the
24 nine-dash line.

25 Mr President, I am not a lawyer. But in my mind,
26 when the Convention says that the Philippines' rights

1 in its continental shelf exist *ipso facto* and
2 *ab initio*, and do not depend on occupation, that means
3 that there is no room for China's claim. And when the
4 Convention speaks of an "exclusive" economic zone,
5 I take "exclusive" to mean exclusive. That means it
6 is ours. And what is ours is ours, not China's.

7 On Wednesday morning, Professor Sands showed why
8 we so desperately need your guidance. With
9 an assertiveness that is growing with every passing
10 day, China is preventing us from carrying out even the
11 most basic exploration and exploitation activities in
12 areas where only the Philippines can possibly have
13 rights.

14 The preamble to the UN Charter states:

15 "WE THE PEOPLES OF THE UNITED NATIONS DETERMINED
16 ...

17 "to establish conditions under which justice and
18 respect for the obligations arising from treaties and
19 other sources of international law can be maintained,
20 and

21 "to promote social progress and better standards
22 of life in larger freedom ..."

23 China is failing on both counts, Mr President. It
24 is failing to respect the obligations arising from
25 treaties, specifically UNCLOS. It is also interfering
26 with the Philippines' sovereign duty to promote the

1 social progress of our people and our efforts to
2 achieve a better standard of life for all Filipinos.

3 China is not just interfering with the progress of
4 the Filipino people; China's unilateral actions and
5 the atmosphere of intimidation they have created are
6 also trampling upon the rights and interests of the
7 peoples of Southeast Asia and beyond.

8 China's massive island-building campaign shows its
9 utter disregard for the rights of other states and for
10 international law. China started this a year after
11 the Philippines initiated the arbitration. It is
12 intent on changing unilaterally the status quo in the
13 region, imposing China's illegal nine-dash line claim
14 by fiat and presenting this Tribunal with
15 a *fait accompli*.

16 China's island-building not only undermines
17 regional stability, but also the rule of law. It is,
18 moreover, inflicting massive environmental damage on
19 the most diverse marine environment in the world.
20 China has intentionally created one of the biggest
21 emerging environmental disasters in the world,
22 Mr President.

23 Yet the stakes are still greater. The
24 Convention's "Constitution for the Oceans" is itself
25 at risk. No state, no matter how powerful, should be
26 allowed to claim an entire sea as its own and to use

1 force or the threat of force in asserting that claim.
2 No state should be permitted to write and rewrite the
3 rules in order to justify its expansionist agenda. If
4 that is allowed, the Convention itself will be deemed
5 useless. Power, Mr President, will have prevailed
6 over reason and the rule of law will have been
7 rendered meaningless.

8 We trust that our counsel have made it equally
9 clear that there is no issue of overlapping
10 entitlements beyond 12 miles in the South China Sea.
11 Mr Reichler and Professor Schofield showed that there
12 is no feature in the Spratly Islands that can sustain
13 human habitation or an economic life of its own.
14 There is, therefore, no feature that can generate
15 an EEZ or continental shelf. Mr Reichler called
16 Itu Aba a "'Potemkin' island".

17 Since there are no overlapping entitlements beyond
18 12 miles, the Tribunal is free to rule that China's
19 actions at Mischief Reef, at Second Thomas Shoal and
20 elsewhere violate the Philippines' sovereign rights
21 and jurisdiction.

22 Last Thursday, Professor Oxman made clear what the
23 practical consequences of deciding that even a single
24 feature in the Spratly Islands generates entitlement
25 beyond 12 miles would be. China regards its
26 entitlements in the South China Sea as excluding those

1 of the Philippines and of Vietnam, Malaysia, Indonesia
2 and Brunei as well. It has absolutely no regard for
3 the entitlements of other states. China is also more
4 than willing to use force and the threat of force to
5 enforce its perceived entitlements, even where it has
6 none.

7 If the Tribunal found that China has a potential
8 entitlement to 200 miles on the basis of a speck of
9 broken coral and sand in the middle of the South China
10 Sea, it would effectively hand China the "golden key"
11 that Mr Martin referred to last Wednesday. The
12 Filipino people would only be able to benefit from the
13 natural resources of our EEZ and continental shelf on
14 China's terms, if at all. In the real world, that
15 would mean not at all.

16 It would also perpetuate in another form the same
17 disputes, the same danger and the same instability
18 that China currently exploits without restraint. And
19 this time it would be much worse: the possibility of
20 a just solution obtained through arbitration will have
21 been exhausted. We will have no other legal avenue of
22 confronting China's unlawful conduct.

23 Mr Martin and Professor Oxman showed that the very
24 purpose of Article 121(3) is to prevent such perverse
25 results by denying tiny islands expanded maritime
26 zones. The need for clear and definitive legal

1 constraint is obvious. And it is to you,
2 Mr President, members of the Tribunal, to whom we
3 confidently entrust the task of providing the
4 necessary constraint.

5 Mr President, distinguished members of the
6 Tribunal, if I may say so, there is no greater
7 contribution to international peace and security the
8 Tribunal could make than to decide that none of the
9 features in the Spratly Islands is capable of
10 generating any entitlement beyond 12 miles. The
11 unjustifiable encroachment on the sovereign rights of
12 other states, as well as the global commons, would be
13 avoided. The importance of the sovereignty disputes
14 over these tiny bits of land would be reduced in
15 importance. They would cease to be a *casus belli*.
16 And the inexcusable harm to the environment resulting
17 from efforts to solidify expansionist maritime claims
18 would be diminished.

19 Mr President, distinguished members of the
20 Tribunal, we recognise that the Tribunal's mission is
21 in fact judicial. The Tribunal must decide the claims
22 on the basis of the facts and the law, in this case
23 UNCLOS. We submit that on that basis alone, the
24 Tribunal must sustain all of the Philippines' claims,
25 especially in regard to the maritime entitlements of
26 the Parties and the exclusive sovereign rights and

1 jurisdiction of the Philippines within 200 miles of
2 its coasts, except for the 12-mile territorial seas
3 around the disputed insular features.

4 That said, the Tribunal's mandate to achieve
5 justice is not carried out in a vacuum. Judges and
6 arbitrators are not expected to be oblivious to the
7 realities on the ground. UNCLOS is the United Nations
8 Convention on the Law of the Sea. The object and
9 purpose of the Charter, as well as those of the
10 Convention, are far from irrelevant. These purposes
11 include the maintenance and strengthening of
12 international peace and security. Nothing would
13 contribute more to these objectives than the
14 Tribunal's finding that China's rights and obligations
15 are neither more nor less than those established by
16 UNCLOS, and that the entitlements of the tiny insular
17 features it claims are limited to 12 miles.

18 Finding otherwise would gravely undermine these
19 same objectives. It would leave the Philippines and
20 its ASEAN neighbours in worse straits than when we
21 embarked on this arbitral voyage. It would convert
22 the nine-dash line, or its equivalent in the form of
23 exaggerated maritime zones for tiny, uninhabitable
24 features, into a Berlin Wall of the sea: a giant fence
25 owned by and excluding everyone but China itself.

26 We are confident that you will interpret and apply

1 the law in a way that produces a truly just solution.
2 That is the best way -- indeed, the only way -- to
3 craft a legal solution that truly promotes peace,
4 security and good neighbourliness in the South China
5 Sea.

6 Mr President, distinguished members of the
7 Tribunal, all that remains for me to do is to say
8 thank you.

9 First, I wish to thank our counsel. The
10 Philippines could not have entrusted this case, our
11 fate, to more skilled, principled and determined
12 professionals. I know they share the Philippines'
13 firm conviction about the need to uphold the
14 international rule of law as the bedrock of peace,
15 order and stability in our world.

16 Second, I wish to thank the most able personnel of
17 the Permanent Court of Arbitration, who have provided
18 all of us with diligent assistance that has made these
19 proceedings run so smoothly. We know none of this
20 would have been possible without them.

21 Finally, Mr President, distinguished members of
22 the Tribunal, on behalf of our President, Benigno S
23 Aquino III, on behalf of myself, and on behalf of all
24 the Filipino people, I wish to humbly thank you for
25 the care, dedication, wisdom and courage with which
26 you have conducted these proceedings. We confidently

1 entrust our fate, the fate of the region and indeed
2 the fate of the Convention to you. We know that in
3 your capable hands, the rule of law will not be
4 reduced to the quaint aspiration of a time now past,
5 but rather will be accorded the primacy that the
6 founders of the United Nations and the drafters of
7 UNCLOS envisioned.

8 Mr President, distinguished members of the
9 Tribunal, we proffer to you once again our deepest
10 gratitude. May I now ask that you kindly invite the
11 Honourable Solicitor General to the lectern to present
12 the final submissions of the Philippines.

13 **THE PRESIDENT:** Thank you very, very much, Mr Secretary,
14 and thank you for those kind words from you. I now
15 invite the Agent and Solicitor General of the
16 Philippines to the podium.

17

1

2 (5.25 pm)

3 **Final submissions by SOLICITOR GENERAL HILBAY**

4 **SOLICITOR GENERAL HILBAY:** Mr President, esteemed members
5 of the Tribunal, it is an honour for me to appear
6 before you once more to read the Philippines' final
7 submissions into the record. Before I do, let me just
8 echo the deep appreciation expressed by the Honourable
9 Secretary of Foreign Affairs a few moments ago.

10 Mr President, members of the Tribunal, the
11 Philippines' final submissions. On the basis of the
12 facts and law set forth in the written and oral
13 pleadings, the Philippines respectfully asks the
14 Tribunal to adjudge and declare that:

15 A. The Tribunal has jurisdiction over the claims
16 set out in Section B of these submissions, which are
17 fully admissible, to the extent not already determined
18 to be within the Tribunal's jurisdiction and
19 admissible in the Award on Jurisdiction and
20 Admissibility of 29th October 2015.

21 B. (1) China's maritime entitlements in the South
22 China Sea, like those of the Philippines, may not
23 extend beyond those expressly permitted by the United
24 Nations Convention on the Law of the Sea;

25 (2) China's claims to sovereign rights
26 jurisdiction, and to "historic rights" with respect to

1 the maritime areas of the South China Sea encompassed
2 by the so-called "nine-dash line" are contrary to the
3 Convention and without lawful effect to the extent
4 that they exceed the geographic and substantive limits
5 of China's maritime entitlements expressly permitted
6 by UNCLOS;

7 (3) Scarborough Shoal generates no entitlement to
8 an exclusive economic zone or continental shelf;

9 (4) Mischief Reef, Second Thomas Shoal, and
10 Subi Reef are low-tide elevations that do not generate
11 entitlement to a territorial sea, exclusive economic
12 zone or continental shelf, and are not features that
13 are capable of appropriation by occupation or
14 otherwise;

15 (5) Mischief Reef and Second Thomas Shoal are part
16 of the exclusive economic zone and continental shelf
17 of the Philippines;

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

25 (7) Johnson Reef, Cuarteron Reef and Fiery Cross
26 Reef generate no entitlement to an exclusive economic

1 zone or continental shelf;

2 (8) China has unlawfully interfered with the
3 enjoyment and exercise of the sovereign rights of the
4 Philippines with respect to the living and non-living
5 resources of its exclusive economic zone and
6 continental shelf;

7 (9) China has unlawfully failed to prevent its
8 nationals and vessels from exploiting the living
9 resources in the exclusive economic zone of the
10 Philippines;

11 (10) China has unlawfully prevented Philippine
12 fishermen from pursuing their livelihoods by
13 interfering with traditional fishing activities at
14 Scarborough Shoal;

15 (11) China has violated its obligations under the
16 Convention to protect and preserve the marine
17 environment at Scarborough Shoal, Second Thomas Shoal,
18 Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson
19 Reef, Hughes Reef and Subi Reef;

20 (12) China's occupation of and construction
21 activities on Mischief Reef

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

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

1 (c) constitute unlawful acts of attempted
2 appropriation in violation of the Convention;

3 (13) China has breached its obligations under the
4 Convention by operating its law enforcement vessels in
5 a dangerous manner, causing serious risk of collision
6 to Philippine vessels navigating in the vicinity of
7 Scarborough Shoal;

8 (14) Since the commencement of this arbitration in
9 January 2013, China has unlawfully aggravated and
10 extended the dispute by, among other things:

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

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

16 (c) endangering the health and wellbeing of
17 Philippine personnel stationed at Second Thomas Shoal;
18 and

19 (d) conducting dredging, artificial
20 island-building and construction activities at
21 Mischief Reef, Cuarteron Reef, Fiery Cross Reef,
22 Gaven Reef, Johnson Reef, Hughes Reef and Subi Reef;
23 and

24 (15) China shall respect the rights and freedoms
25 of the Philippines under the Convention, shall comply
26 with its duties under the Convention, including those

1 relevant to the protection and preservation of the
2 marine environment in the South China Sea, and shall
3 exercise its rights and freedoms in the South China
4 Sea with due regard to those of the Philippines under
5 the Convention.

6 Mr President, esteemed members of the Tribunal,
7 thank you and good evening.

8 **(5.32 pm)**

9 **Closing remarks by THE PRESIDENT**

10 **THE PRESIDENT:** I thank the Solicitor General and Agent
11 of the Philippines. I shall shortly declare this
12 hearing closed, but before I do so, allow me to make
13 a few remarks about the next steps in the proceedings.

14 As I mentioned in my opening remarks, the Tribunal
15 is conscious of its duty under Article 5 of Annex VII
16 to the Convention to "assure each party a full
17 opportunity to be heard and to present its case". The
18 Tribunal has kept China updated on all developments in
19 the arbitration. The Registry of the Tribunal, the
20 PCA, has been delivering to the Chinese Embassy copies
21 of the transcripts of this hearing, a copy of the
22 judges' folder handed to us by the Philippines, as
23 well as materials received from the Philippines.

24 The Parties have until 9th December 2015 to review
25 and submit corrections to the transcript. In due
26 course, the reviewed and corrected transcripts will be

1 made available to the observers and to the public via
2 the PCA's website.

3 The Philippines will have until 18th December 2015
4 to submit any written answers to any of the
5 arbitrators' questions or to amplify any oral answers
6 that they have given in writing.

7 Article 25(2) of the Rules of Procedure, which
8 deals with a party's failure to appear or to make
9 submissions, provides that the Tribunal may take:

10 "... [whatever steps] it may consider necessary,
11 within the scope of its powers under the Convention,
12 its Annex VII, and these Rules, to afford to each of
13 the Parties a full opportunity to present its case."

14 In line with this provision, the Arbitral Tribunal
15 has decided to provide China with the opportunity to
16 comment in writing by 1st January 2016 on anything
17 said during the hearing and any subsequent written
18 answers which may be filed by the Philippines by
19 18th December 2015, as I have already said.

20 As the Tribunal now enters its deliberations, the
21 Tribunal is conscious of its duty to conduct the
22 proceedings "to avoid unnecessary delay and expense
23 and to provide a fair and efficient process".

24 The Tribunal will issue its final award on the
25 merits and any remaining issues of jurisdiction and
26 admissibility after a review of the material which has

1 been put before us. If at any point during this work
2 the Tribunal comes to the conclusion that it would
3 benefit from further information or clarification from
4 the Parties, it will be in contact with them.

5 Finally, I would like to say some words of thanks
6 on behalf of the Tribunal.

7 First, we are very grateful to the court reporter,
8 Mr Trevor McGowan, and the technical support provided
9 by the IFS team.

10 Second, I would like to convey the Tribunal's
11 gratitude to the Registrar, Judith Levine, her
12 colleague Garth Schofield and their team from the
13 Permanent Court of Arbitration: Nicola Peart, Philipp
14 Kotlaba, Julia Solana, Iuliia Samsonova and Gaelle
15 Chevalier.

16 Thirdly, I would like to thank Grant Boyes, the
17 expert appointed by the Tribunal to assist us
18 throughout this phase of the proceedings.

19 Fourthly, I wish to express the Tribunal's
20 appreciation to Professors Schofield and Carpenter for
21 their presentations and for their willingness to
22 answer our questions today.

23 Fifthly, I wish to express our thanks to the
24 observer delegations for their presence and for the
25 interest that they have shown in the proceedings.

26 Finally, I wish to thank the distinguished

1 representatives of the Philippines for their oral and
2 written submissions, which we have found most helpful.

3 I now have the great pleasure to declare this
4 hearing closed, and I wish everyone a safe return
5 journey home, wherever they are going. Thank you very
6 much indeed. That brings us to the end of the
7 hearing.

8 **(5.39 pm)**

9 **(The hearing concluded)**