

ARBITRATION UNDER ANNEX VII OF THE UNITED NATIONS
CONVENTION ON THE LAW OF THE SEA



REPUBLIC OF THE PHILIPPINES

v.

PEOPLE'S REPUBLIC OF CHINA

WRITTEN RESPONSES OF THE PHILIPPINES TO
THE TRIBUNAL'S 13 JULY 2015 QUESTIONS

23 JULY 2015

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I. JUDGE WOLFRUM'S QUESTIONS

You have referred to, Mr Reichler, this note verbale of 6th July which just has been added to the folder. In this note verbale there is a reference to the Philippines' note verbale 15-2341 of 16th June. I don't recall to have seen it; maybe my mistake. Could you perhaps provide us with a copy of that note verbale? This is the first part of my only question.... In this note verbale of China, there is, as you said, reference to "indisputable sovereignty over the South China Sea Islands and their adjacent waters". There is a certain -- yes, how should I put it? -- there is room for interpreting the word "Islands" in this respect. It is not for you to interpret this note verbale, but do we have to take it as referring to reefs, low-tide elevations and islands, or only islands, technically speaking? That is the first part of the question.

Second, there is a reference to the Treaty of Paris of 1898, the Treaty of Washington of 1900, and another treaty of 1930. I don't recall that these treaties have been referred to much in substance. This is certainly an issue which you would like to look into, and perhaps it is better you provide the answer thereto in writing. I would like to hear about the relevance of these treaties in the context of this dispute, if any.¹

Response to Judge Wolfrum's Question Regarding "Islands"

I.1 The Philippines fully endorses Mr Reichler's oral response of 13 July.² By way of amplification, it calls the Tribunal's attention to China's explicit statement that "the Nansha Islands is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf."³ China has claimed these entitlements for the Nansha Islands as a "comprehensive whole."⁴ This claim applies not only to features that are defined as islands in Article 121(1), namely those that are above water at high tide, but also to those that form part of the seabed and subsoil, including low-tide elevations and fully submerged banks that China considers integral parts of the Nansha Islands and therefore subject to appropriation and capable of generating maritime entitlements.

¹ Tr., 13 July 2015, pp. 22:13-23:22 (Question by Judge Wolfrum) (uncorrected transcript).

² Tr., 13 July 2015, pp. 68:11-70:12 (Response by Mr Reichler) (uncorrected transcript).

³ *Note Verbale* from the Permanent Mission of the People's Republic of China to the Secretary-General of the United Nations, No. CML/8/2011 (14 Apr. 2011), p. 2. MP, Vol. VI, Annex 201.

⁴ *Memorandum* from Secretary General, Commission on Maritime and Ocean Affairs Secretariat, Department of Foreign Affairs of the Republic of the Philippines to the Secretary of Foreign Affairs of the Republic of the Philippines (28 Mar. 2011), p. 2. MP, Vol. IV, Annex 71. *See also Note Verbale* from the Permanent Mission of the People's Republic of China to the Secretary-General of the United Nations, No. CML/8/2011 (14 Apr. 2011), p. 2. MP, Vol. VI, Annex 201.

I.2 In particular, China considers that Second Thomas Shoal, which is depicted as a low-tide elevation on both Philippine and Chinese nautical charts,⁵ is “part of the Nansha islands [over which] China has indisputable sovereignty.”⁶ Similarly, Mischief Reef, which is also uniformly charted as a low-tide elevation,⁷ is, according to China, “part of the Nansha islands.”⁸ China also considers that Reed Bank, a wholly underwater feature,⁹ is “not just an adjacent water of the ‘Nansha’, but rather an integral part of the collective whole of ‘Nansha.’”¹⁰

I.3 Publicly available documents provide further confirmation that China considers low-tide elevations to form part of the “comprehensive whole” of the “Nansha Islands.”¹¹ On 2 July 2013, for example, the Foreign Minister of China stated that China has “indisputable sovereignty over ... Second Thomas Shoal,”¹² indicating that it is an integral part of the Nansha Islands, despite the fact that it is located more than 27 M from any feature that is

⁵ SWSP, Vol. II, p. 163.

⁶ *Memorandum* from Assistant Secretary, Asian and Pacific Affairs, Department of Foreign Affairs of the Republic of the Philippines, to Secretary of Foreign Affairs of the Republic of the Philippines (11 Mar. 2014). MP, Vol. IV, Annex 101.

⁷ SWSP, Vol. II, pp. 127-28.

⁸ Government of the Republic of the Philippines and Government of the People’s Republic of China, *Philippine-China Bilateral Consultations: Summary of Proceedings* (20-21 Mar. 1995), p. 7. MP, Vol. VI, Annex 175.

⁹ SWSP, Vol. II, pp. 150-52.

¹⁰ *Memorandum* from Gilberto G.B. Asuque & Henry B. Bensurto, Jr., Department of Foreign Affairs of the Republic of the Philippines, to the Secretary of Foreign Affairs of the Republic of the Philippines (23 Mar. 2012). MP, Vol. III, Annex 76.

¹¹ China has recently and occasionally referred to the “Nansha islands and reefs”. *See, e.g.*, Ministry of Foreign Affairs of the People’s Republic of China, *Foreign Ministry Spokesperson Lu Kang’s Remarks on Issues Relating to China’s Construction Activities on the Nansha Islands and Reefs* (16 June 2015). Hearing on Jurisdiction, Annex 579. *See also* Ministry of Foreign Affairs of the People’s Republic of China, *Foreign Ministry Spokesperson Hua Chunying’s Regular Press Conference on May 27, 2015* (27 May 2015). Written Responses of the Philippines to the Tribunal’s 13 July 2015 Questions (hereinafter “PWRTQ”), Vol. II, Annex 590; Ministry of Foreign Affairs of the People’s Republic of China, *Foreign Ministry Spokesperson Hong Lei’s Regular Press Conference on April 27, 2015* (27 Apr. 2015). PWRTQ, Vol. II, Annex 589; Ministry of Foreign Affairs of the People’s Republic of China, *Foreign Ministry Spokesperson Hong Lei’s Regular Press Conference on April 17, 2015* (17 Apr. 2015). PWRTQ, Vol. II, Annex 588; Ministry of Foreign Affairs of the People’s Republic of China, *Foreign Ministry Spokesperson Hong Lei’s Regular Press Conference on April 15, 2015* (15 Apr. 2015). PWRTQ, Vol. II, Annex 587; Ministry of Foreign Affairs of the People’s Republic of China, *Foreign Ministry Spokesperson Hong Lei’s Regular Press Conference on February 27, 2015* (27 Feb. 2015). PWRTQ, Vol. II, Annex 586; Ministry of Foreign Affairs of the People’s Republic of China, *Foreign Ministry Spokesperson Hua Chunying’s Regular Press Conference on June 16, 2014* (16 June 2014). PWRTQ, Vol. II, Annex 585. China’s usage of “Nansha islands” far predates the new formulation of “Nansha islands and reefs.” This confirms that China’s references over the past 25 years to the “Nansha islands” includes reefs.

¹² “Philippines Claim that Huangyan Dao and Second Thomas Shoal Have Been ‘Occupied’: Wang Yi Espouses a Firm Position”, *China.com* (2 July 2013). PWRTQ, Vol. II, Annex 599.

governed by Article 121 and, as a low tide elevation according to the Chinese charts,¹³ is part of the seabed and not a feature over which any State might be able to claim sovereignty. Further, on 22 May 2013, the official spokesperson of the Chinese Foreign Ministry, Mr. Hong Lei, stated that “Second Thomas Shoal is part of the Nansha Islands.”¹⁴

**Response to Judge Wolfrum’s Question Regarding the Treaties Mentioned
in China’s Note Verbale**

I.4 In its note of 6 July 2015, China wrote that “according to” three treaties dating from 1898 to 1930, as well as “a series of international treaties which determine the territorial area of the Republic of the Philippines, the South China Sea Islands have never been included in the Philippine territory.”¹⁵ The three treaties cited are the 1898 Treaty of Paris,¹⁶ the 1900 Treaty of Washington,¹⁷ and a further 1930 Convention between the United States and Great Britain Delimiting the Boundary between the Philippines Archipelago and the State of North Borneo.¹⁸ These three colonial-era treaties defining the territory of the Philippines were addressed in the Memorial, by way of historical background.¹⁹

I.5 The Philippines considers that all three treaties are wholly irrelevant to the disputes that the Philippines has brought before this Tribunal. They indicate, as of their respective dates, the territory over which the Philippines was said to be sovereign. None of the three instruments addresses territorial sovereignty Philippine territorial sovereignty over the Spratly Islands. China presumably invokes in support of its claim that it alone is sovereign over those islands. But that is irrelevant to the matters presently before the Tribunal. As the

¹³ See SWSP, Vol. II, p. 163.

¹⁴ Ministry of Foreign Affairs of the People’s Republic of China, *Foreign Ministry Spokesperson Hong Lei’s Regular Press Conference on May 22, 2013* (22 May 2013). PWRTQ, Vol. II, Annex 584.

¹⁵ *Note Verbale* from the Embassy of the People’s Republic of China to the Department of Foreign Affairs of the Philippines, No. (15)PG-229 (6 July 2015), p. 1. Hearing on Jurisdiction, Annex 580.

¹⁶ Treaty of Peace Between the United States and the Kingdom of Spain (“Treaty of Paris”) (10 Dec. 1898), entered into force 11 Apr. 1899. MP, Vol. XI, Annex LA-69.

¹⁷ Treaty Between the United States of America and the Kingdom of Spain for the Cession to the United States of Any and All Islands of the Philippine Archipelago Lying Outside of the Lines Described in Article III of the Treaty of Peace of December 10, 1898 (“Treaty of Washington”) (7 Nov. 1900). MP, Vol. XI, Annex LA-70.

¹⁸ Convention Between the United States and Great Britain, *Boundaries: Philippines and North Borneo* (2 Jan. 1930), entered into force 13 December 1932. MP, Vol. XI, Annex LA-71.

¹⁹ Memorial, paras. 2.33 n. 116, 3.3, 4.77.

Philippines has repeatedly stated in its written pleadings,²⁰ and as Professor Sands explained on 7 July, the Philippines' claims in this case do not call upon the Tribunal to determine which State is sovereign over any land territory in the South China Sea; nor would resolution of those claims carry any implications in regard to which State is sovereign over any land territory, insular or otherwise.²¹ To the contrary, the Philippines' claims scrupulously avoid any such question.

I.6 Finally, insofar as the China might invoke the three treaties in support of its claim of "historic rights" in the South China Sea, as distinguished from its claim of sovereignty over the insular features, it should be recalled that, as elaborated in the Memorial, China claimed no sovereignty, or historic rights, south of the Paracel Islands as of the date of the latest of these treaties.²² Moreover, since becoming party to the Law of the Sea Convention, the Philippines has brought all of its maritime claims into strict conformity with the Convention, which it considers to be the exclusive basis for its maritime entitlements without regard to the three treaties. This is made clear in the written pleadings.²³

²⁰ Memorial, paras. 1.16, 1.26, 2.13, 4.19-4.20, 5.116, 7.12-7.14, 7.123; SWSP, Response to Question 6.

²¹ Tr., 7 July 2015, pp. 60:10-65:16, 67:2-83:18, 88:19-99:8 (Presentation by Prof. Philippe Sands QC) (uncorrected transcript).

²² See Republic of China, National Defense Committee Secretariat, *Statement of Opinions Based on Research of Military Relevance and Methods Regarding the Nine French-Occupied Islands* (1 Sept. 1933), reprinted in *Archival Compilation on South China Sea Islands by Ministry of Foreign Affairs*, Vol. 1, Doc. No. II(1):072 (Republic of China Ministry of Foreign Affairs Research & Planning Committee ed.) (1995). SWSP, Vol. VIII, Annex 475. See also SWSP, paras. 13.12-13.13, A13.44-A13.45.

²³ Memorial, paras. 3.8-3.12.

II. PROFESSOR SOONS' QUESTION

On Wednesday, Mr Martin stated:

“In its Memorial, the Philippines argued that even if the [Declaration of Conduct] were a binding agreement within the meaning of Article 281 (quod non), and even if it purported to exclude further procedures (also quod non), China could still not rely on it to avoid jurisdiction due to its own conduct in flagrant disregard of the undertakings it made in the DOC.”

Mr Martin then mentioned:

“... a general principle of law that ‘a party which ... does not fulfil its own obligations cannot be recognized as retaining the rights which it claims to derive from the relationship’.”

The clean hands doctrine.

As the Philippines is aware, the Chinese Government has repeatedly referred to alleged Philippine activities on some of the islands occupied by it: construction activities, reclamation, et cetera. This morning we saw an example during your speech, Mr Reichler, when you referred to the document that is in Annex 63 of the Memorial, I think, on page 2, “Second Thomas Shoal”:

“China reiterates its concern over the Philippines’ alleged building of new structures in the Second Thomas Shoal. This, for them, is a violation of the DOC”

Could the Philippines elaborate on any implications of such observations made by China with respect to the Philippines’ compliance with its obligations in the South China Sea? Thank you.²⁴

Response to Professor Soons’ Question

II.1 In the Philippines’ view, China’s observations with respect to the Philippines’ compliance with the DOC have no implications for the Tribunal’s jurisdiction in respect of the Philippines’ claims in this case.

II.2 On the facts, China is incorrect when it asserts that the Philippines is building new structures on Second Thomas Shoal or, indeed, on any other feature in the South China Sea on which it currently maintains a presence. Unlike some other States, Philippines is *not* building any such new structures.

²⁴ Tr., 13 July 2015, pp. 59:11-60:17 (Question by Professor Soons) (uncorrected transcript).

II.3 As Mr. Reichler stated in his preliminary oral response to this question,²⁵ the Philippines has refrained from undertaking necessary repairs of existing infrastructure during the pendency of these proceedings. In particular, the airstrip on Thitu Island (known in the Philippines as “Pagasa”) requires significant repairs. Funds for the repairs were allocated in 2013.²⁶ Nevertheless, the Government of the Philippines decided to refrain from moving forward with the repair work.²⁷

II.4 As the Tribunal is aware, the Philippines has maintained a presence at Second Thomas Shoal in the form of a grounded, World War II-era landing ship, the BRP *Sierra Madre*, since approximately 1999 (before the signing of the 2002 Declaration of Conduct). Due to its age, as well as its exposure to the elements, the ship is in a state of substantial disrepair, posing a serious risk to the health and well-being the small contingent of Philippine personnel continuously stationed there.²⁸

II.5 In these circumstances, the Philippines decided to perform repair work on the ship to ensure the safety and comfort of its personnel. It is, in particular, reinforcing the rusting deck and hull, and installing air conditioning units.²⁹ It is not building new, or expanding existing, structures. The Philippines considers these measures, particularly insofar as they are designed only to ensure the wellbeing of its personnel and entail no change to the status quo on the feature, entirely consistent with its political commitments under the 2002 DOC (which is not legally binding in any event).

II.6 In addition to being factually incorrect, China’s allegations about the conduct of the Philippines are also legally irrelevant. It is China that is affirmatively seeking to invoke the 2002 DOC as a shield for purposes of avoiding the Tribunal’s jurisdiction in these proceedings. The Philippines, for its part, does not rely on the DOC for any purpose. It is

²⁵ Tr., 13 July 2015, pp. 70:2-72:19 (Response by Mr Reichler) (uncorrected transcript).

²⁶ Alexis Romero, “Gov’t to spend P480M to upgrade Navy, Air Force facilities in Spratlys “, *The Philippine Star* (4 Dec. 2013). PWRTQ, Vol. II, Annex 600.

²⁷ Carmela Fonbuena, “PH puts on hold repair of airstrip in West PH Sea”, *Rappler* (4 Oct. 2014). PWRTQ, Vol. II, Annex 602.

²⁸ Jim Gomez, “Old US ship home to Filipinos in China standoff “, *Associated Press* (31 Mar. 2014). PWRTQ, Vol. II, Annex 601; Jeff Himmelman, “A Game of Shark And Minnow”, *New York Times* (17 Oct. 2013). SWSP, Vol. IV, Annex 430.

²⁹ Manuel Mogato, “Exclusive: Philippines reinforcing rusting ship on Spratly reef outpost - sources”, *Reuters* (13 July 2015). PWRTQ, Vol. II, Annex 603.

China that is impermissibly seeking to invoke “the rights which it claims to derive from the relationship” even as it is failing to “fulfil its own obligations” (by virtue of its conduct at Scarborough and Second Thomas Shoals,³⁰ and its massive land reclamation campaign on *all* of the features it occupies in the Spratly Islands³¹).

II.7 Indeed, if China is to be judged by its own standard—that new construction activities on any of the South China Sea insular features are breaches of the DOC—then the evidence establishes that China itself, and not the Philippines, has committed such breaches. This reinforces the Philippines’ contention that China is barred from invoking the DOC by its unclean hands.

II.8 China’s reliance on the DOC is entirely misplaced for the other dispositive reasons previously articulated by the Philippines: (1) it is not a legally binding agreement designed to settle particular disputes; and (2) it does not preclude recourse to compulsory proceedings under Part XV of the Convention, but rather specifically contemplates them.³²

³⁰ See Memorial, paras. 3.45, 3.51-3.54, 4.88, 6.39-6.47, 6.114-6.127, 6.148-6.152.

³¹ Center for Strategic & International Studies, Asia Maritime Transparency Initiative, “Island Tracker”, available at <http://amti.csis.org/island-tracker/> (last accessed 21 July 2015). PWRTQ, Vol. II, Annex 597.

³² See Memorial, paras. 7.50-7.58, 7.64-6.73; SWSP, paras. 26.27-26.45; Tr., 8 July 2015, pp. 7:22-17:3 (Presentation by Mr Martin) (uncorrected transcript).

III. JUDGE PAWLAK'S QUESTIONS

Judge Pawlak's Questions to Professor Sands

I have some questions to Professor Sands[.] Professor, you argued in your interesting statements last week that the question of which state has sovereignty over the insular feature is “entirely irrelevant” to the characterisation of an insular feature or the entitlements it may have, and that: “... such matters... fall to be determined by this Tribunal exclusively by interpretation and application of Articles 13 and 121, and other relevant provisions of the Convention.” Could you agree, sir, that among those “other relevant provisions” that should be taken into consideration is the preamble of the Convention, including the paragraph in which the states parties to the Convention “recogniz[e] the desirability of establishing through this Convention, with due regard for the sovereignty of all States” -- I repeat: “with due regard for the sovereignty of all States” -- a legal order for the seas and oceans”?

*And the second question: could you also indicate any relevant jurisprudence or practice of states when entitlements to maritime features were decided separately from sovereignty over them?*³³

Response to Judge Pawlak's Question Concerning the Preamble

III.1 In the Philippines' view, Paragraph 4 of the preamble of the 1982 UNCLOS, in which the States Parties to the Convention *inter alia* “recogniz[e] the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans”, is not a “relevant provision” for purposes of determining whether a maritime feature is a low-tide elevation under Article 13 or an island under 121 of the Convention.

III.2 Under well-established rules of treaty interpretation, the preamble of a treaty is not considered to be part of the legally binding or “operative” text of the treaty.³⁴ As the tribunal in *Beagle Channel Arbitration* held: “[p]reambles to treaties do not usually—nor are they

³³ Tr. 8 July 2015, p. 3:14-62 (Questions by Judge Pawlak) (uncorrected transcript).

³⁴ A. von Bogdandy & R. Wolfrum eds., *Max Planck Yearbook of International Law*, Vol. 8 (2004), p. 146. PWRTQ, Vol. II, Annex LA-239. (“Preambles of international agreements set forth the motives of the parties as well as the object and purpose of the treaty. They serve as ‘context’ for the purposes of treaty interpretation and do not create any legal commitment beyond the treaty’s operative part.”) (Emphasis added); Hans-Dietrich Treviranus, “Preamble,” *Encyclopedia of Public International Law*, Vol. 7 (R. Bernhardt ed., 1984), p. 394. PWRTQ, Vol. II, Annex LA-237. (“Preambular provisions ... are generally not intended to constitute substantive stipulations. Since they are mere statements, *preambles do not create any legal commitment above and beyond the actual text of the treaty.*”) (Emphasis added).

intended to—contain provisions or dispositions of substance—(in short they are not operative clauses)[.]”³⁵

III.3 This principle of treaty interpretation is applicable to UNCLOS, as confirmed by its negotiating history. In that regard, the *Virginia Commentary* observes:

In the course of ... negotiations, questions were asked concerning the status of the preamble of this Convention. *Subject to its terms, the preamble of an international treaty rarely in itself imposes direct obligations on the States concerned. Its importance lies in its “siting” the instrument in its political, historical, and, if necessary, ideological context.* Furthermore, article 31 of the Vienna Convention on the Law of Treaties may take the legal implications of the preamble of an international convention somewhat further. That article provides as a general rule in interpretation of treaties that a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the treaty’s object and purpose”; and it goes on to explain that for the purpose of the interpretation of a treaty, “the context shall comprise, in addition to the text, *including its preamble and annexes*” [emphasis added].³⁶

III.4 The *Virginia Commentary* also observes that during negotiations “[t]here was general agreement that the preamble ... would have to refer to the genesis of the Conference and its principal objectives, *without dealing with the operative part of the Convention.*”³⁷

III.5 The Philippines accepts that the preamble of a treaty may shed light on its “object” and “purpose”,³⁸ and in that way, it may be helpful to the “interpretation of the treaty”.³⁹ The Philippines itself has invoked the Preamble of the 1982 Convention as evidence of its comprehensive nature, and the intent of the framers to establish a constitution for the oceans that was supreme in all matters regulated by it, leaving the rules of general international law

³⁵ *Dispute between Argentina and Chile concerning the Beagle Channel*, Award (18 Feb. 1977), XXI R.I.A.A. 53, p. 89. PWRTQ, Vol. II, Annex LA-230.

³⁶ *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. I (M. Nordquist, ed., 1985), pp. 466-467 (emphasis added). PWRTQ, Vol. II, Annex LA-238.

³⁷ *Id.*, p. 459 (emphasis added).

³⁸ *Asylum (Colombia/Peru)*, Judgment, I.C.J. Reports 1950, p. 282. PWRTQ, Vol. II, Annex LA-229; *Dispute between Argentina and Chile concerning the Beagle Channel*, Award (18 Feb. 1977), XXI R.I.A.A. 53, p. 89. PWRTQ, Vol. II, Annex LA-230 (holding that it is “generally accepted that [preambles] may be relevant and important as guides to the manner in which the Treaty should be interpreted, and in order, as it were, to ‘situate’ it in respect of its object and purpose”).

³⁹ Article 31(2) of the Vienna Convention on the Law of Treaties (“The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes ...”). Vienna Convention on the Law of Treaties (23 May 1969), 1155 U.N.T.S. 332, entered into force 27 Jan. 1980, Art. 31(2). MP, Vol. XI, Annex LA-77.

applicable only in respect of matters not regulated by UNCLOS.⁴⁰ This understanding of the Preamble is confirmed by the negotiating history.⁴¹

III.6 However, there is nothing in the Preamble—either directly or indirectly—that can be said to limit or inform the competence of a Part XV Tribunal to interpret or apply Articles 13 or 121. Even if the words “due regard for the sovereignty of all States” are interpreted to confirm the object and purpose of the Convention to have no application to disputes as to which competing claim of territorial sovereignty over land territory is to prevail, there is nothing in this case that requires the Tribunal to make such a determination. Moreover, to suggest that the Convention does not address the very amenability of features at sea to claims of sovereignty by any State runs counter to its express text. This includes, but is by no means limited to, Articles 13 and 121. The prohibition on claims of sovereignty in Article 89 applies, by virtue of Articles 58(2) and 86, to all parts of the sea beyond the territorial sea, and any such claims of sovereignty over any feature that forms part of the seabed and subsoil beyond the territorial sea would also violate the exclusive sovereign rights of the coastal State under Article 77 and the rights of mankind as a whole under Article 137.

Response to Judge Pawlak’s Question Concerning International Jurisprudence and State Practice

III.7 International jurisprudence and state practice also demonstrate that the determination of whether a particular feature is an island, or a rock, or a low-tide elevation, does not require a determination of which state has sovereignty over the feature. It is a question that is distinct from, and is decided separately from sovereignty. For example, in *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, the ICJ expressly held that “taking into account the principle that the ‘land dominates the sea’ ... , *the legal nature of the land features in the disputed area must be assessed at the outset*” before addressing questions

⁴⁰ Tr. 7 July 2015, p. 52:18-53:4 (Presentation by Mr Reichler).

⁴¹ Tr. 7 July 2015, p. 52:14-17 (Presentation by Mr Reichler), referring to UN Conference on the Law of the Sea, *185th Meeting*, UN Doc. A/CONF.62/PV.185 (26 Jan. 1983), para. 47. MP, Vol. XI, Annex LA-116. See also *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. I (M. Nordquist, ed., 1985), pp. 466-467. PWRTQ, Vol. II, Annex LA-238.

of sovereignty or delimitation.⁴² Following that principle, the Court determined the legal status of disputed maritime features⁴³ separately from the question of sovereignty.⁴⁴

III.8 That approach was consistent with the decision the Court adopted earlier in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*. In that case, the parties disagreed whether Qit'at Jaradah is an island or a low-tide elevation and also claimed sovereignty over that feature.⁴⁵ The Court first determined that Qit'at Jaradah was an island:

The Court recalls that the legal definition of an island is “a naturally formed area of land, surrounded by water, which is above water at high tide.” The Court has carefully analysed the evidence submitted by the Parties and weighed the conclusions of the experts referred to above, in particular the fact that the experts appointed by Qatar did not themselves maintain that it was scientifically proven that Qit'at Jaradah is a low-tide elevation. On these bases, the Court concludes that the maritime feature of Qit'at Jaradah satisfies the above-mentioned criteria and that it is an island.⁴⁶

Only after it had so determined did the Court then separately address the question of which State had sovereignty over the island (deciding that Bahrain had a better sovereignty claim over the island than Qatar).⁴⁷

III.9 The same steps in the same sequence, and independently of each other, were taken most recently by the ICJ in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*. There the Court decided at the outset whether disputed maritime features at Quitasueño were low

⁴² *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Merits, Judgment, I.C.J. Reports 2007, para.135 (emphasis added). SWSP, Vol. XII, Annex LA-177.

⁴³ *Id.*, para. 137. (“The Court notes that the Parties do not dispute the fact that Bobel Cay, Savanna Cay, Port Royal Cay and South Cay remain above water at high tide. *They thus fall within the definition and régime of islands under Article 121 of UNCLOS* (to which Nicaragua and Honduras are both parties). *Therefore these four features will hereinafter be referred to as islands*”). (emphasis added).

⁴⁴ See paras. 146-227 of the Court’s decision where it separately decided claims to sovereignty over the maritime features. *Id.*, paras. 146-227.

⁴⁵ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, I.C.J. Reports 2001, paras. 191, 196. MP, Vol. XI, Annex LA-26.

⁴⁶ *Id.*, para. 195.

⁴⁷ *Id.*, para. 197.

tide elevations falling within Article 13, or islands under Article 121(1).⁴⁸ Having made those decisions, it then separately determined which State had sovereignty over Quitasueño.⁴⁹

III.10 Arbitral awards also support the conclusion that outstanding sovereignty claims over maritime features raise no impediment to the determination of their maritime entitlements. For example, in the *Dubai-Sharjah Border* arbitration, the tribunal had to establish the maritime entitlements of Abu Musa, an island whose sovereignty was disputed by Sharjah and Iran. Dubai contended that the tribunal could not give Abu Musa the full breadth of its maritime entitlements because of the sovereignty dispute.⁵⁰ The tribunal disagreed. It “examin[ed] firstly, the extent of the territorial sea to which the island of Abu Musa [was] entitled, and, secondly, the extent, if any, of that island’s entitlement to a share of the continental shelf of the Gulf beyond its territorial sea and adjacent to its coastline,”⁵¹ notwithstanding the competing sovereignty claims. The tribunal then proceeded to effect the delimitation between Dubai and Sharjah, giving Abu Musa a full 12 M territorial sea.⁵²

III.11 State practice is to the same effect. For example, in 1971 Iran and Sharjah concluded a Memorandum of Understanding establishing a *modus vivendi* pending the resolution of their sovereignty dispute over the Abu Musa island, in which Iran recognized Sharjah’s proclamation of a 12 M territorial sea for the island.⁵³ Another example comes from the practice of Argentina and the United Kingdom. Even though they are in dispute concerning

⁴⁸ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Merits, Judgment, I.C.J. Reports 2012, paras. 28-38. MP, Vol. XI, Annex LA-35.

⁴⁹ *Id.*, paras. 39-103.

⁵⁰ *Dubai/Sharjah Border Arbitration*, Award (19 Oct. 1981), 91 I.L.R. 543 (1981), p. 664. PWRTQ, Vol. II, Annex LA-231.

⁵¹ *Id.*, p. 673.

⁵² *Id.*, p. 674 (holding that “[f]ull effect must be given to the territorial sea generated by the island and thus the notional continuation of the lateral equidistance boundary between the continental shelves of Dubai and of Sharjah is displaced, between points E and H on the Chart, by the outer limit of the extent of the territorial sea (of 12 nautical miles in breadth) claimed by Sharjah.”). The tribunal also ruled on the legal entitlement of Abu Musa to a continental shelf. While the tribunal recognized that Abu Musa generated continental shelf entitlements beyond the breadth of the territorial sea, it nonetheless gave no effect to the island in the delimitation of the continental shelf to avoid an inequitable cut-off effect on Dubai’s maritime projections into the delimitation area. *Id.*, pp. 674-677.

⁵³ See reference to the Memorandum of Understanding. *Id.*, p. 664.

sovereignty over the Falkland Islands, both are in agreement that these islands are entitled to an EEZ and continental shelf.⁵⁴

III.12 China's practice is no exception. For example, in 2009, and again in 2011, China objected to Japan's submission to the Commission on the Limits of the Continental Shelf in respect of Oki-No-Tori-Shima.⁵⁵ China maintained that Japan is not entitled to a continental shelf in respect of Oki-No-Tori-Shima because that feature, China asserted, is an Article 121(3) rock, which "on its natural condition, obviously cannot sustain human habitation or economic life of its own."⁵⁶ China expressly observed that application of Article 121(3) "relates to the overall interests of the international community, and is an important legal issue of general nature" that impacts "the maintenance of an equal and reasonable order for the oceans."⁵⁷ In this way, China recognizes that the question of the status of a maritime feature, and its corresponding maritime entitlement, is capable of being determined independently of matters of sovereignty or delimitation.⁵⁸

⁵⁴ See P. Armstrong & V. Forbes, "The Falkland Islands and Their Adjacent Maritime Area", *IBRU Maritime Briefing* Vol. 2, No. 3 (1997). PWRTQ, Vol. II, Annex 605.

⁵⁵ See *Note Verbale* from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/2/2009 (6 Feb. 2009). MP, Vol. VI, Annex 189; *Note Verbale* from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/59/2011 (3 Aug. 2011). MP, Vol. VI, Annex 203.

⁵⁶ *Note Verbale* from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/2/2009 (6 Feb. 2009), p. 2. MP, Vol. VI, Annex 189.

⁵⁷ *Note Verbale* from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/59/2011 (3 Aug. 2011), p. 2. MP, Vol. VI, Annex 203.

⁵⁸ The Republic of Korea made similar objections to Japan's claim to the continental shelf beyond 200 M measured from the baselines of Oki-no-Tori Shima. *Note Verbale* from the Permanent Mission of the Republic of Korea to the United Nations to the Secretary-General of the United Nations, No. MUN/046/09 (27 Feb. 2009). PWRTQ, Vol. II, Annex 591; *Note Verbale* from the Permanent Mission of the Republic of Korea to the United Nations to the Secretary-General of the United Nations, No. MUN/230/11 (11 Aug. 2011). PWRTQ, Vol. II, Annex 591.

Judge Pawlak’s Questions to Mr Martin

I have questions to Mr Martin.

Mr Martin, would you agree that Article 283 requires the parties to a dispute not only to exchange views on some aspects of their dispute, but also imposes on the parties the duty to exchange views expressly—I underline “expressly”—for the purpose of settling the dispute “by negotiation or other peaceful means”?

In light of this understanding, could you comment on some discrepancies between your statement made last week that “the Philippines has more than met its obligation to exchange of views with China under Article 283”, with the following information that is set out in the Chinese Position Paper of 7th December 2014:

“... the exchanges of views between China and the Philippines in relation to their disputes have so far...”

I underline “so far”:

“... pertained to responding to incidents at sea in the disputed areas and promoting measures to prevent conflicts, reduce frictions, maintain stability in the region, and promote measures of cooperation.”

As you see, there is nothing in this quotation on entitlements for maritime features. China asserts also that:

“... the two countries have never engaged in negotiations with regard to subject matter of the arbitration.”

*Thank you, Mr President.*⁵⁹

Response to Judge Pawlak’s Question Concerning the Existence of a Duty To Exchange Views Expressly for the Purpose of Settling the Dispute “By Negotiation or Other Peaceful Means”

III.13 As the Tribunal suggested at item (E) of its 23 June 2015 “Annex of Issues the Philippines May Wish to Address at July Hearing”, Article 283 is susceptible to two possible interpretations: it can be read either to require the parties to a dispute to exchange views on the *means* by which the dispute will be settled, or to require them to exchange views on the *substance* of the dispute. The jurisprudence on this issue is not entirely free from ambiguity.⁶⁰

⁵⁹ Tr., 13 July 2015, pp. 62:1-63:7 (Question by Judge Pawlak) (uncorrected transcript).

⁶⁰ See *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, Award, UNCLOS Annex VII Tribunal (18 Mar. 2015) (hereinafter “*Chagos MPA Arbitration*”), para. 381. Hearing on Jurisdiction, Annex

There are cases in which Article 283 appears to have been deemed satisfied by virtue of an exchange of views on the substance of the dispute.⁶¹ There are also cases in which the Article was deemed satisfied by virtue of an exchange of views on the means by which the dispute might be settled. The unifying element in *all* these cases, however, is that no international court or tribunal has ever ruled that Article 283 requires the parties to have exchanged views “expressly for the purpose of settling the dispute”. To the contrary, Article 283 has routinely been deemed satisfied where no such exchanges have taken place. Moreover, in all prior cases the Article 283 requirement was understood to impose only a modest burden on the disputing States.

III.14 The *MOX Plant* case is an example. There was no showing in that case that the relevant exchanges took place for the express purpose of settling the dispute by “negotiations or other peaceful means”. Nevertheless, Article 283 was deemed satisfied. Ireland, in requesting provisional measures, argued that there has been a full “exchange of views such as is required by Article 283. ... Ireland ... has written to the United Kingdom on numerous occasions, and has received either inadequate or no responses.”⁶² The United Kingdom disagreed, arguing that the requirement to exchange views had not been satisfied because:

The letters to which Ireland appears to be referring are requests for the public disclosure of certain information withheld from the public versions of the reports following public consultations on the economic case for the MOX plant. *They did not invite the United Kingdom to engage in any exchange views with the aim of settling by negotiation or other peaceful means what Ireland now characterises as the dispute arising under UNCLOS ...*⁶³

LA-225 (observing that “in the jurisprudence on Article 283 it is frequently not clear as to whether the communications that were considered sufficient for the purposes of Article 283 were substantive or procedural in nature.”).

⁶¹ See, e.g., *The MOX Plant Case (Ireland v. United Kingdom), Provisional Measures, Order of 3 December 2001*, ITLOS Reports 2001 (hereinafter “*MOX Plant Case ITLOS Order*”), paras. 58-61. MP, Vol. XI, Annex LA-39; *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003*, ITLOS Reports 2003 (hereinafter “*Land Reclamation by Singapore in and around the Straits of Johor*”), paras. 33-51. MP, Vol. XI, Annex LA-41; *The “ARA Libertad” Case (Republic of Argentina v. Ghana), Provisional Measures, Order of 15 December 2012*, ITLOS Reports 2012, p. 16, paras. 68-72. MP, Vol. XI, Annex LA-44.

⁶² *The MOX Plant Case (Ireland v. United Kingdom), Request for Provisional Measures*, Verbatim Record, ITLOS/PV/01/08 (20 Nov. 2001), p. 26 (Mr Plender), p. 26:7-10. PWRTQ, Vol. II, Annex LA-233.

⁶³ *The MOX Plant Case (Ireland v. United Kingdom), Request for Provisional Measures, ITLOS*, Written Response of the United Kingdom (15 Nov. 2001), para. 188 (emphasis added). PWRTQ, Vol. II, Annex LA-232.

III.15 At the provisional measures stage, ITLOS rejected the United Kingdom's interpretation of Article 283. It held that Article 283 was satisfied, notwithstanding the absence of an exchange of views "with the aim of settling [the dispute] by negotiation or other peaceful means," because:

Considering that Ireland contends that, in its letter written as early as 30 July 1999, it had drawn the attention of the United Kingdom to the dispute under the Convention and that further exchange of correspondence on the matter took place up to the submission of the dispute to the Annex VII arbitral tribunal;

Considering that Ireland contends further that it has submitted the dispute to the Annex VII arbitral tribunal only after the United Kingdom failed to indicate its willingness to consider the immediate suspension of the authorization of the MOX plant and a halt to related international transports;

Considering that, in the view of the Tribunal, a State Party is not obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted;

Considering that, in the view of the Tribunal, the provisions of the Convention invoked by Ireland appear to afford a basis on which the jurisdiction of the Annex VII arbitral tribunal might be founded[.]⁶⁴

III.16 Having lost the argument before ITLOS, the United Kingdom chose not even to press its interpretation of Article 283 before the Annex VII tribunal. In its Order No. 3, that tribunal observed: "With regard to the international law issues raised by the United Kingdom, there has clearly been an exchange of views between the Parties, as required under article 283 of the Convention, and the United Kingdom does not now contest this."⁶⁵

III.17 As the above excerpts make clear, even though there had been no exchange of views for the express purpose of settling the parties' dispute by negotiation or other peaceful means, there had "clearly been an exchange of views between the Parties, as required under article 283 of the Convention".⁶⁶

III.18 Similarly, in the *Land Reclamation* case, the duty to exchange views was deemed satisfied by Malaysia's mere transmission of three diplomatic notes in which it raised

⁶⁴ *MOX Plant Case ITLOS Order*, paras. 58-61. MP, Vol. XI, Annex LA-39.

⁶⁵ *The MOX Plant Case (Ireland v. UK)*, UNCLOS Annex VII Tribunal, Order No. 3 (24 June 2003), para. 18. MP, Vol. XI, Annex LA-53.

⁶⁶ *Id.*

concerns over Singapore's land reclamation activities.⁶⁷ There was is nothing that case, too, to suggest that any of the relevant exchanges were made for the express purpose of settling the dispute by negotiations or other peaceful means.

III.19 The same is true in cases in which Article 283 was understood to require the disputing States to exchange views on the *means* to settle the dispute. In the *Chagos Islands* case, for example, the Annex VII tribunal found Article 283 satisfied by virtue of an exchange in which the United Kingdom stated simply: "Our ongoing bilateral talks are an excellent forum for your Government to express its views on the [Marine Protected Area]." ⁶⁸ Mauritius, for its part, responded that it was "not in a position to hold separate consultations with the team of experts of the UK on the proposal to establish a Marine Protected Area". ⁶⁹

III.20 On the basis of these exchanges, the Tribunal concluded that

the Parties' views on the settlement of the dispute by negotiation were clearly exchanged in December 2009. This is all that Article 283 requires. It is not necessary for the Parties to comprehensively canvas the means for the peaceful settlement of disputes set out in either the UN Charter or the Convention, nor was Mauritius "obliged to continue with an exchange of views when it concludes that the possibilities of reaching agreement have been exhausted". ⁷⁰

III.21 However Article 283 is interpreted, the central point is that it is to be applied pragmatically, "without an undue formalism". ⁷¹ The *Chagos* tribunal put the point neatly:

Article 283 forms part of the Convention and was intended to ensure that a State would not be taken entirely by surprise by the initiation of compulsory proceedings. It should be applied as such, but without an undue formalism as to the manner and precision with which views were exchanged and understood. In the Tribunal's view, Article 283 requires that a dispute have

⁶⁷ *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Request for Provisional Measures*, Verbatim Record, ITLOS/PV.03/01 (25 Sept. 2003), p. 13 (Mr Patail), p. 13:41-14:18. PWRTQ, Vol. II, Annex LA-234. See also *Land Reclamation by Singapore in and around the Straits of Johor*, paras. 33-51. MP, Vol. XI, Annex LA-41.

⁶⁸ *Chagos MPA Arbitration*, para. 383. Hearing on Jurisdiction, Annex LA-225.

⁶⁹ *Id.*, para. 384.

⁷⁰ *Id.*, para. 385 (quoting *Land Reclamation by Singapore in and around the Straits of Johor*, para. 47. MP, Vol. XI, Annex LA-41).

⁷¹ *Id.*, para. 382.

arisen with sufficient clarity that the Parties were aware of the issues in respect of which they disagreed.⁷²

III.22 For the reasons the Philippines explained in its Memorial and reiterated during the oral hearings, the purposes of Article 283 have plainly been satisfied in this case. Under no view of the facts, could China have been taken by surprise by the initiation of compulsory proceedings. Indeed, the record shows that the Philippines specifically raised the possibility of arbitration following the Parties' confrontation at Scarborough Shoal in 2012.⁷³ Nor is there any doubt that China was aware of the issues in respect of which it and the Philippines disagreed. The letter and spirit of Article 283 were therefore satisfied.

Response to Judge Pawlak's Question Concerning the Discrepancies between the Parties' Positions on the Contents of Their Exchanges of Views

III.23 With respect to the substantive content of the Parties' exchanges of views, the Philippines reiterates the preliminary answer Mr Reichler presented orally on 13 July.⁷⁴ As he stated, China's two assertions are demonstrably false.⁷⁵

III.24 In its Memorial, the Philippines presented a detailed account of the diplomatic history of the its disputes with China.⁷⁶ As recounted there, the exchanges between the Philippines and China addressed far more than the topics China identifies in its Position Paper, and included the subject matter of the disputes presently before the Tribunal.⁷⁷ Mr. Martin described this evidence during the Philippines' presentations on 8 July. Detailed footnote references were provided to each of the statements made in the course of his presentation.⁷⁸

III.25 The written and oral pleadings, and the many sources cited therein, point clearly to the conclusion that China's assertion is baseless. The record reflects numerous diplomatic

⁷² *Id.*

⁷³ *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.

⁷⁴ Tr., 13 July 2015, pp. 74:5-75:9 (Response by Mr Reichler) (uncorrected transcript).

⁷⁵ *Id.*, p. 74:13-14.

⁷⁶ Memorial, paras. 3.22-3.72.

⁷⁷ See Memorial, paras. 3.27-3.31, 3.33-3.37 (regarding maritime entitlements in the Southern Sector); 3.32, 3.51-3.54 (regarding the status of and disputes surrounding Scarborough Shoal); 3.38-3.40, 3.51-3.54 (regarding fishing rights); 3.41-3.44, 3.55-3.58 (regarding the nine-dash line); 3.46-3.50 (regarding exploitation of non-living resources); 3.59-3.67 (regarding aggravation of the dispute).

⁷⁸ See Tr., 8 July 2015, pp. 28:19-32:1 (Presentation by Mr Martin) (uncorrected transcript).

exchanges and face-to-face meetings between the Parties at which their maritime disputes, including the issue of their respective maritime entitlements, were discussed.⁷⁹ For example,

⁷⁹ See, e.g., *Memorandum* for the Assistant Secretary, Office of Asian and Pacific Affairs, Department of Foreign Affairs, Republic of the Philippines (23 Mar. 1992). MP, Vol. III, Annex 16 (noting that Mr. Lin Guozhang, First Secretary and Consul-General of the Chinese Embassy in Manila “reiterated the position of the People’s Republic of China that it has undisputed sovereignty over the Nansha Islands (Spratly Islands) and its nearby waters”.); *Memorandum* from Undersecretary of Foreign Affairs of the Republic of the Philippines to the Ambassador of the People’s Republic of China in Manila (6 Feb. 1995), p. 2. MP, Vol. III, Annex 17 (same); *Memorandum* from Erlinda F. Basilio, Acting Assistant Secretary, Office of Asian and Pacific Affairs, Department of Foreign Affairs, Republic of the Philippines, to the Secretary of Foreign Affairs of the Republic of the Philippines (29 Mar. 1995), paras. 1.2, 2.2. MP, Vol. III, Annex 19 (reporting on discussions regarding maritime jurisdiction); *Memorandum* from Lauro L. Baja, Jr., Assistant Secretary, Office of Asian and Pacific Affairs, Department of Foreign Affairs, Republic of the Philippines, to the Secretary of Foreign Affairs of the Republic of the Philippines (7 Apr. 1995). MP, Vol. III, Annex 20 (reporting on discussions regarding maritime jurisdiction); *Memorandum* from the Ambassador of the Republic of the Philippines in Beijing to the Undersecretary of Foreign Affairs of the Republic of the Philippines (10 Apr. 1995). MP, Vol. III, Annex 21; *Memorandum* from the Secretary of Foreign Affairs of the Republic of the Philippines to the President of the Republic of the Philippines (31 July 1995), pp. 2, 3. MP, Vol. III, Annex 23 (reporting on the meeting between Chinese Vice-Premier and Foreign Minister and Philippines Secretary of Foreign Affairs); Department of Foreign Affairs of the Republic of the Philippines, *Transcript of Proceedings: RP-PRC Bilateral Talks* (9 Aug. 1995), pp. 2, 5, 6. MP, Vol. VI, Annex 179 (transcript recording discussions regarding maritime jurisdiction); Government of the Republic of the Philippines and Government of the People’s Republic of China, *Agreed Minutes on the First Philippines-China Bilateral Consultations on the South China Sea Issue* (10 Aug. 1995), p. 1. MP, Vol. VI, Annex 180 (claiming sovereign rights in “the Nansha (Spratlys) and their adjacent waters”); Government of the Republic of the Philippines, *Transcript of Proceedings Republic of the Philippines-People’s Republic of China Bilateral Talks* (10 Aug. 1995), p. 3. MP, Vol. VI, Annex 181 (acknowledging that “dispute between China and the Philippines in the Nansha [Spratlys] ... includes to some extent the maritime jurisdiction issue”); Government of the Republic of the Philippines and Government of the People’s Republic of China, *Joint Press Communiqué: Philippines-China Foreign Ministry Consultations* (29-31 July 1998), para. 4. MP, Vol. VI, Annex 183; Department of Foreign Affairs of the Republic of the Philippines, *Record of Proceedings: 10th Philippines-China Foreign Ministry Consultations* (30 July 1998). MP, Vol. VI, Annex 184 (stating Chinese view that Scarborough Shoal “is not a sand bank but rather an island,” indicating an entitlement to an EEZ); *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People’s Republic of China in Manila, No. 983577 (5 Nov. 1998), p. 2. MP, Vol. VI, Annex 185 (asserting that Mischief Reef is “a geographic feature that is permanently submerged under water” and protest the construction of “illegal structures” there); *Memorandum* from Ambassador of the Republic of Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-76-98-S (6 Nov. 1998). p.1. MP, Vol. III, Annex 33 (describing exchange of views regarding construction at Mischief Reef); *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People’s Republic of China in Manila, No. 2000100 (14 Jan. 2000), p. 2. MP, Vol. VI, Annex 186 (same); Government of the Republic of the Philippines and Government of the People’s Republic of China, *Joint Press Statement on the State Visit of H.E. President Gloria Macapagal-Arroyo to the People’s Republic of China, 1-3 Sept. 2004* (3 Sept. 2004), p. 4. MP, Vol. VI, Annex 188; *Note Verbale* from the Embassy of the People’s Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (10)PG-047 (22 Feb. 2010). MP, Vol. VI, Annex 195 (protesting issuance of petroleum service contract); *Memorandum* from Secretary General, Commission on Maritime and Ocean Affairs Secretariat, Department of Foreign Affairs of the Republic of the Philippines to the Secretary of Foreign Affairs of the Republic of the Philippines (7 Dec. 2010), p. 1. MP, Vol. IV, Annex 66 (reporting on a meeting in which China’s claim to historic rights was discussed); *Memorandum* from Secretary General, Commission on Maritime and Ocean Affairs Secretariat, Department of Foreign Affairs of the Republic of the Philippines to the Secretary of Foreign Affairs of the Republic of the Philippines (28 Mar. 2011), p. 3. MP, Vol. IV, Annex 71 (noting that Mr. Bensurto informed Ambassador Ning Fukui, Director General of the Ocean and Boundary Affairs Department of the Chinese Ministry of Foreign Affairs that the nine-dash line conflicted with the Philippines’ maritime jurisdiction in the South China Sea); *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People’s Republic of China in Manila, No. 110885 (4 Apr. 2011), p. 2.

MP, Vol. VI, Annex 199 (stating that at most, “any relevant geological feature” in the Spratlys is entitled to “12 M territorial waters.”); *Note Verbale* from the Permanent Mission of the Republic of the Philippines to the United Nations to the Secretary-General of the United Nations, No. 000228 (5 Apr. 2011), pp. 2-4. MP, Vol. VI, Annex 200 (protesting China’s claim made in its 7 May 2009 *notes verbales* that “sovereignty and jurisdiction over the waters around or adjacent to each” feature in the South China Sea must be “as provided for under the” Convention and that waters to which China could make a claim would be “determinable under UNCLOS, specifically under Article 121”); *Note Verbale* from the Permanent Mission of the People’s Republic of China to the Secretary-General of the United Nations, No. CML/8/2011 (14 Apr. 2011). MP, Vol. VI, Annex 201 (rejecting the contents of Annex 200 as “totally unacceptable” and asserting “indisputable sovereignty over the islands of the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof” and that “China’s Nansha [Spratly] Islands are fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf”); *Memorandum* from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-064-2011-S (21 June 2011), para. 8, p. 6. MP, Vol. IV, Annex 72 (regarding discussions over the source of China’s historic rights claim); *Note Verbale* from the Embassy of the People’s Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (11)PG-202 (7 July 2011). MP, Vol. VI, Annex 202 (responding to the Philippines’ offering of petroleum blocks stating that China “has indisputable sovereignty, sovereign rights and jurisdiction over the islands in South China Sea including Nansha [Spratly] Islands and its adjacent waters. The action of the Philippine Government has seriously infringed on China’s sovereignty and sovereign rights”); *Record of Discussion: 17th Philippines-China Foreign Ministry Consultations* (14 Jan. 2012), paras. 131-158. MP, Vol. VI, Annex 204 (exchanging wide range of views regarding maritime disputes); “Philippines Must Learn Self-Restraint in South China Sea Disputes,” *People’s Daily* (1 Mar. 2012), p. 2. MP, Vol. V, Annex 115 (warning against Philippine oil exploration activity at Reed Bank); *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People’s Republic of China in Manila, No. 12-0894 (11 Apr. 2012), p. 2. MP, Vol. VI, Annex 205 (protesting extraction of endangered species from Scarborough Shoal); *Note Verbale* from the Department of Foreign Affairs of the Philippines to the Embassy of the People’s Republic of China in Manila, No. 12-1030 (15 Apr. 2012). MP, Vol. VI, Annex 206 (indicating that Scarborough Shoal does not generate an EEZ); *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People’s Republic of China in Manila, No. 12-1137 (26 Apr. 2012). MP, Vol. VI, Annex 207 (indicating that Scarborough Shoal does not generate an EEZ); *Note Verbale* from the Department of Foreign Affairs of the Philippines to the Embassy of the People’s Republic of China in Manila, No. 12-1222 (30 Apr. 2012). MP, Vol. VI, Annex 209 (protesting “provocative and extremely dangerous maneuvers”); *Memorandum* from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-080-2012-S (24 May 2012). MP, Vol. IV, Annex 81 (reporting on discussions relating to fishing at Scarborough Shoal); *Note Verbale* from the Embassy of the People’s Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (12) PG-239 (25 May 2012). MP, Vol. VI, Annex 211 (rejecting the Philippines’ protest); *Note Verbale* from the Department of Foreign Affairs of the Republic of Philippines to the Embassy of People’s Republic of China in Manila, No. 12-1453 (31 May 2012). MP, Vol. VI, Annex 212 (protesting China’s Regulations on Marine Observation and Forecast); *Memorandum* from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-110-2012-S (26 July 2012). MP, Vol. IV, Annex 84 (same); Department of Foreign Affairs of the Republic of the Philippines, *Notes on the 18th Philippines-China Foreign Ministry Consultations* (19 Oct. 2012). MP, Vol. IV, Annex 85 (same); *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. 12-3331 (21 Nov. 2012). MP, Vol. VI, Annex 214 (regarding Philippines’ protest to the nine-dash line); *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People’s Republic of China in Manila, No. 13-1585 (9 May 2013). MP, Vol. VI, Annex 217 (Second Thomas Shoal is “part of the seabed,” *i.e.*, a low-tide elevation); *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People’s Republic of China in Manila, No. 13-1878 (7 June 2013). MP, Vol. VI, Annex 218 (regarding Philippines’ protest to a ten-dash line); *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People’s Republic of China in Manila, No. 13-1882 (10 June 2013). MP, Vol. VI, Annex 219; *Memorandum* from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-070-2014-S (7 Mar. 2014), p. 2 MP, Vol. IV, Annex 98 (same); *Note Verbale* from the Department of Foreign Affairs of the Philippines to the Embassy of the People’s Republic of China in Manila, No. 14-0711 (11 Mar. 2014). MP, Vol. VI, Annex 221 (asserting “there are no insular features

in 2011 the Philippines wrote to the U.N. Secretary-General, stating that China's claim to jurisdiction over

“the ‘relevant waters as well as the seabed and subsoil thereof’ (as reflected in the so-called 9-dash line map ...) ... would have no basis under international law, specifically UNLCOS. With respect to these areas [within 200 M of the Philippines], sovereignty and jurisdiction or sovereign rights, as the case may be, necessarily appertain or belong to the appropriate coastal or archipelagic state – the Philippines – to which these bodies of waters as well as seabed and subsoil are appurtenant, either in the nature of Territorial Sea, or 200 m Exclusive Economic Zone (EEZ), or Continental Shelf (CS) in accordance with Articles 3, 4, 55, 56, and 76 of UNCLOS.”⁸⁰

China responded by rejecting the “contents of the Note Verbale ... of the Republic of the Philippines [as] totally unacceptable” and arguing that “China’s Nansha Islands is fully entitled to Territorial Sea, Exclusive Economic Zone (EEZ) and Continental Shelf.”⁸¹ In yet another diplomatic missive, China protested the decision of the Philippines’ Department of Energy to offer 15 petroleum blocks to local and international companies for exploration and development. Two of these, AREA 3 and AREA 4, are near Reed Bank. China claimed that it “has indisputable sovereignty, sovereign rights and jurisdiction over the islands in South China Sea including Nansha [Spratly] Islands and its adjacent waters. The action of the Philippine Government has seriously infringed on China’s sovereignty and sovereign rights ...”⁸²

III.26 For further evidence of the Parties’ exchanges of views on these matters, and on the substance of the other matters raised by the Philippines’ Submissions, the Tribunal is respectfully referred to the Memorial, at paragraphs 3.27 to 3.67.

III.27 For all these reasons, the Philippines considers that the requirements of Article 283 are entirely satisfied. China’s arguments to the contrary are meritless.

claimed by China in the South China Sea capable of generating any potential entitlement in the area where [Second Thomas Shoal] is located”).

⁸⁰ *Note Verbale* from the Permanent Mission of the Republic of the Philippines to the United Nations to the Secretary-General of the United Nations, No. 000228 (5 Apr. 2011), pp. 3-4. MP, Vol. VI, Annex 200 (emphasis omitted from original).

⁸¹ *Note Verbale* from the Permanent Mission of the People’s Republic of China to the Secretary-General of the United Nations, No. CML/8/2011 (14 Apr. 2011). MP, Vol. VI, Annex 201.

⁸² *Note Verbale* from the Embassy of the People’s Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (11)PG-202 (7 July 2011). MP, Vol. VI, Annex 202.

IV. JUDGE COT'S QUESTIONS

*I would like to have some answer to the question of the vertical datum here, and more specifically: what is the Philippines' position on vertical datum in the South China Sea? What is the definition the Philippines eventually gives of this vertical datum? Is it the same as that of other states; of China, naturally, but also of third-party states who have their own definitions of vertical datum, if I have read correctly the pleadings?*⁸³

Response to Judge Cot's Questions Regarding the Philippines' Position on the Vertical Datum in the South China Sea and the Definition it Gives

IV.1 The Philippines understands the term "vertical datum" to refer to the level of reference for vertical measurements such as depths and heights of tide. The choice of vertical datum is linked to determining normal baselines consistent with the "low water line as marked on large-scale charts officially recognized by the coastal State."⁸⁴ In regard to the classification of a feature as a low-tide elevation under Article 13 of the Convention, the identification of the chart datum may have relevance to the determination of whether a particular feature is to be considered a low-tide elevation under Article 13, or a rock under Article 121(3). A feature may be recognized as a low-tide elevation using one chart datum, e.g., Mean Low Water Springs, but not using another, e.g., Lower Low Water Large Tides.⁸⁵

IV.2 The Philippines' National Mapping and Resource Information Authority (NAMRIA) uses "the datum of soundings on charts of the locality which is mean lower low water (MLLW)."⁸⁶ Large-scale charts produced by NAMRIA apply this as the chart datum. The MLLW datum for the Southern Sector of the South China Sea is related to the tidal station at Puerto Princesa on the island of Palawan.⁸⁷ It is computed as the average of all lower low waters observed and/or recorded from the start of the operation of the tide station. The current MLLW at Puerto Princesa is 1.161 meters and is based on data collected from 1 July 1990 to

⁸³ Tr., 13 July 2015, pp. 63:25-64:8 (Question by Judge Cot) (uncorrected transcript).

⁸⁴ UNCLOS, Art. 5.

⁸⁵ International Hydrographic Organization, *A Manual on Technical Aspects of the United Nations Convention on the Law of the Sea – 1982*, Special Publication No. 51 (4th ed., Mar. 2006), pp. 2-18-2-19. PWRTQ, Vol. II, Annex 594.

⁸⁶ Republic of the Philippines, National Mapping and Resource Information Authority, *Tide & Current Tables: Philippines 2014* (2013), p. 3. PWRTQ, Vol. II, Annex 595.

⁸⁷ There is also a secondary tidal station on Thitu, but this station lacks a tide gauge that permits long-term measurement of the sea level in that area.

31 December 2008. The MLLW datum for the Northern Sector of the South China Sea is tied to the tidal station at Manila. It is computed as the average of all lower low waters observed and/or recorded from the start of the operation of the tide station. The current MLLW at Manila is 2.303 meters and is based on data collected from 1989 to 2008.

Response to Judge Cot’s Questions Regarding Other States’ Definitions of the Vertical Datum in the South China Sea

IV.3 To provide the most complete response possible, the Philippines reviewed each of the 66 nautical charts it submitted to the Tribunal in response to its Question 17 of the Tribunal’s 16 December 2014 Request for Further Written Argument, in order to determine the vertical chart datum applied by the relevant national charting authority. The table below indicates the vertical chart datum for the charts concerning which the Philippines has been able to obtain such information.

Producing Agency	Title of Chart	Year of Production	Annex Number	Vertical Chart Datum
CHINA				
Navigation Guarantee Department of the Chinese Navy Headquarters	Chart No. 18400 (Zhenghe Qunjiao to Yongshu Jiao)	2005	NC17	Lowest Astronomical Tide
Navigation Guarantee Department of the Chinese Navy Headquarters	Chart No. 18500 (Nanfang Qiantan to Haikou Jiao)	2005	NC18	Lowest Astronomical Tide
Navigation Guarantee Department of the Chinese Navy Headquarters	Chart No. 17310 (Huangyan Dao)	2012	NC23	Lowest Astronomical Tide
Navigation Guarantee Department of the Chinese Navy Headquarters	Chart No. 18600 (Yinqing Qunjiao to Nanwei Tan)	2012	NC24	Lowest Astronomical Tide
Navigation Guarantee Department of the Chinese Navy Headquarters	Chart No. 18100 (Shuangzi Qunjiao to Zhenghe Quojiao)	2013	NC25	Lowest Astronomical Tide

Producing Agency	Title of Chart	Year of Production	Annex Number	Vertical Chart Datum
Navigation Guarantee Department of the Chinese Navy Headquarters	Chart No. 18200 (Liyue Tan)	2013	NC26	Lowest Astronomical Tide
Navigation Guarantee Department of the Chinese Navy Headquarters	Chart No. 18300 (Yongshu Jiao to Yinqing Qunjiao)	2013	NC27	Lowest Astronomical Tide
Navigation Guarantee Department of the Chinese Navy Headquarters	Chart No. 18700 (Wumie Jieo to Huanglu Jiao)	2013	NC28	Lowest Astronomical Tide
MALAYSIA				
Malaysia National Hydrographic Centre	Chart No. MAL 6 (Sabah - Sarawak)	1996	NC13	Lowest Astronomical Tide
Malaysia National Hydrographic Centre	Chart No. MAL 781 (Peninjau) (2013)	2013	NC14	Lowest Astronomical Tide
Malaysia National Hydrographic Centre	Chart No. MAL 885 (Beting Mantanani - Selat Balabac)	2013	NC15	Lowest Astronomical Tide
Malaysia National Hydrographic Centre	Chart No. MAL 884 (Terumbu UBI - Terumbu Laksamana)	2014	NC16	Lowest Astronomical Tide
PHILIPPINES				
Philippine National Mapping and Resource Information Authority	Chart No. 4200 (Philippines)	2004	NC31	Mean Lower Low Water
Philippine National Mapping and Resource Information Authority	Chart No. 4803 (Scarborough Shoal)	2006	NC32	Mean Lower Low Water (based on 1970-1988, measuring 2.066 meters)
Philippine National Mapping and Resource Information Authority	Chart No. 4723 (Kalayaan Island Group)	2008	NC33	Mean Lower Low Water
Philippine National Mapping and Resource Information Authority	Chart No. 4723(A) (Kalayaan Island Group and Recto Bank including Bajo De Masinloc)	2011	NC5	Mean Lower Low Water
UNITED KINGDOM				
United Kingdom Hydrographic Office	Chart No. 967 (South China Sea; Palawan)	1985	NC44	Mean Low Water Springs

Producing Agency	Title of Chart	Year of Production	Annex Number	Vertical Chart Datum
United Kingdom Hydrographic Office	Chart No. 3488 (Song Sai Gon to Hong Kong)	1997	NC45	Lowest Astronomical Tide
United Kingdom Hydrographic Office	Chart No. 3489 (Manila to Hong Kong)	1998	NC46	Lowest Astronomical Tide
United Kingdom Hydrographic Office	Chart No. 3483 (South China, Sulu and Celebes Seas; Mindoro Strait to Luconia Shoals and Selat Makasar)	2002	NC1	Lowest Astronomical Tide
United Kingdom Hydrographic Office	Chart No. 3482 (Singapore Strait to Song Sai Gon)	2012	NC48	Lowest Astronomical Tide
United Kingdom Hydrographic Office	Chart No. 4411 (Cabra Island to Cape Bojeador)	2012	NC49	Mean Lower Low Water
UNITED STATES				
United States Defense Mapping Agency	Chart No. 93043 (Tizard Bank South China Sea)	1950	NC51	Lowest low water
United States Defense Mapping Agency	Chart No. 93046 (Indonesia; South China Sea; Palawan Passage; Mantangule Island to Eran Bay)	1982	NC52	Lower low water
United States Defense Mapping Agency	Chart No. 93048 (Duhu Ansha to Kimanis Bay)	1982	NC53	Lowest low water
United States Defense Mapping Agency	Chart No. 93044 (Indonesia South China Sea: Yongshu Jiao to Yongdeng Ansha)	1983	NC6	Lowest low water
United States Defense Mapping Agency	Chart No. 93045 (Heng Jiao (Livock Reef) to Haima Tan (Routh Shoal/Seahorse Shoal))	1984	NC54	Mean low water
United States Defense Mapping Agency	Chart No. 93047 (South China Sea: Yongshu Jiao to P'o-Lang Chiao)	1984	NC55	Lowest low water
United States Defense Mapping Agency	Chart No. 93042 (Plans In the South China Sea)	1985	NC56	Lowest low water
United States Defense Mapping Agency	Chart No. 92033 (Palawan, Philippines)	1986	NC57	Mean lower low water
United States Defense Mapping Agency	Chart No. 93049 (Vanguard Bank to Spratly Island)	1997	NC61	Mean lower low water

Producing Agency	Title of Chart	Year of Production	Annex Number	Vertical Chart Datum
United States Defense Mapping Agency	Chart No. 71027 (Pulau Bintan to Mui Ca Mau Including North Coast of Borneo and Adjacent Islands)	1998	NC62	Lowest low water
United States Defense Mapping Agency	Chart No. 91004 (South China Sea: Scarborough Shoal)	2012	NC63	Mean sea level
VIETNAM				
Vietnamese People's Navy	Chart No. I-1000-04 (Cam Ranh - Quần - đảo Tr'ông Sa)	2008	NC64	Lowest Astronomical Tide
Vietnamese People's Navy	Chart No. I-2500-01 (Việt Nam)	2010	NC65	Lowest Astronomical Tide
Vietnamese People's Navy	Chart No. I-2500-04 (Phi-Líp-Pin Và Dao Dài Loan)	2010	NC66	Lowest Astronomical Tide

IV.4 For some of the 66 charts reviewed, the applicable chart datum was not readily available. For the Philippines' charts not listed above, this is due to the fact that small-scale charts often do not specify a chart datum because there is no single chart datum that can be applied across the entire small-scale chart.⁸⁸ For charts of other States, the charting agency may not have been able to adequately identify the chart datum. As the Schofield and Prescott Report notes, "defining tidal levels is likely to be technically challenging in the context of the complex tidal regime of the South China Sea which is variable spatially and temporally and which has not been subject to detailed hydrographic surveys in recent times."⁸⁹ Further, "[i]n some cases where the chart is based upon old surveys, particularly in areas where the range of tide is not great, the sounding datum may not be known"⁹⁰ and therefore not specified. Finally, the Philippines has been unable to determine the chart datum of any of the charts produced by Russia and Japan, as the information is not referenced on the charts. The

⁸⁸ U.S. National Imagery and Mapping Agency, *Pub No. 9: The American Practical Navigator: An Epitome of Navigation* (2002 ed.) (hereinafter "*American Practical Navigator*"), p. 37. PWRTQ, Vol. II, Annex 594. ("detailed information [on small-scale charts] is ... 'generalized' in the areas covered by larger scale charts.")

⁸⁹ C. Schofield, et al., *An Appraisal of the Geographical Characteristics and Status of Certain Insular Features in the South China Sea* (Mar. 2015), p. 7. SWSP, Vol. IX, Annex 513.

⁹⁰ *American Practical Navigator*, p. 41. PWRTQ, Vol. II, Annex 593.

Philippines has, however, been able to identify information indicating that Japanese charts generally apply “nearly lowest low water.”⁹¹

IV.5 The issue of vertical datum arose before the International Court of Justice in *Nicaragua v. Colombia*, where the parties disputed the evidence regarding the classification of a number of alleged high-tide features at Quitasueño. Nicaragua claimed they were all low-tide elevations, at best, and therefore to be treated as part of the seabed. Colombia argued that there were several high-tide features at Quitasueño, such that it should be treated as falling under Article 121.⁹² The question appeared to turn on the appropriate tidal reference level.⁹³ In its Judgment the Court ruled that a single feature—QS 32—was above water at high tide, but made no reference to the chart datum.⁹⁴

IV.6 In the present case, there is no such dispute among charting agencies. The charts produced by *all* of the different charting agencies agree that the low-tide elevations that are the subject of the Philippines’ Submissions, *i.e.*, Gaven Reef, McKennan (Hughes) Reef, Mischief Reef, Second Thomas Shoal and Subi Reef, are, in fact, low-tide elevations. This is true regardless of the chart datum used. As indicated above, even though the Philippines uses MLLW and China uses LAT, all Philippine and Chinese charts are in concordance on the nature (*i.e.*, low-tide elevation or rock) of that each and every one of the eight Spratly features that are the subject of the Philippines’ Submissions.⁹⁵

IV.7 It has been suggested that modern charts “frequently take the Lowest Astronomical Tide (LAT) as the low-water datum and this has been accepted as the preferred datum for

⁹¹ Japan Coast Guard, *Document No. 6011: Chart Symbols and Abbreviations* (Feb. 2013), p. 3. PWRTQ, Vol. II, Annex 596.

⁹² See *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2012, p. 624, paras. 27-29. MP, Vol. XI, Annex LA-35.

⁹³ See *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, CR 2012/9 (24 Apr. 2012), p. 37 (Prof. Oude Elferink), paras. 32-38. PWRTQ, Vol. II, Annex LA-235. PWRTQ, Vol. II, Annex LA-23; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, CR 2012/12 (27 Apr. 2012), p. 35 (Prof. Crawford), paras. 45-51. PWRTQ, Vol. II, Annex LA-236.

⁹⁴ *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2012, p. 624, paras. 27-38. MP, Vol. XI, Annex LA-35.

⁹⁵ See SWSP, Vol. II, pp. 49 (Fiery Cross Reef), 79 (Johnson South Reef), 57 (Gaven Reef), 103 (Cuarteron Reef), 123 (McKennan (Hughes) Reef), 127 (Mischief Reef), 163 (Second Thomas Shoal), 181 (Subi Reef).

navigational charts by the International Hydrographic Office (IHO).”⁹⁶ Indeed, the use of lowest astronomical tide is recommended by Commander Peter Beazley, the technical expert in the *Gulf of Maine* case, who has observed that while there is “no agreed tidal level to which all chart datums conform,” there is international agreement that the vertical datum used for charting purposes should be “at a plane so low that the tide will not frequently fall below it”.⁹⁷ As applied to the present case, this would suggest that the Tribunal might wish to place greater reliance on the charts of China, Viet Nam and Malaysia, all of which use LAT. The Philippines would have no objection to such reliance, for purposes of these proceedings. In all cases, the charts of these States agree with those of the Philippines that all eight Spratly features are low-tide elevations.

IV.8 In fact, the charts of the Philippines and China agree not only on the nature of the eight Spratly features that are the subject of the Philippines’ Submissions, but on the nature of the 41 other maritime features about which the Tribunal inquired in its Written Questions to the Philippines of 16 December 2014, with just two exceptions. This is reflected in the *Atlas* that the Philippines submitted on 16 March 2015, as Volume II of its Supplemental Written Pleading. As shown therein, there was only one feature—Central Reef—that the Philippine charts showed as a low-tide elevation but was depicted on the Chinese charts as a high-tide feature.⁹⁸ And there was only one feature—Namyit—that the Philippine charts showed as a rock but the Chinese charts depicted as a low-tide elevation.⁹⁹ For purposes of this case, the Philippines is prepared to accept the characterizations of these two features as they appear on China’s charts. In the case of every other feature, the Philippine and Chinese charts are in agreement.

⁹⁶ C. Schofield & C. Carleton, “Developments in the Technical Determination of Maritime Space: Charts, Datums, Baselines, Maritime Zones and Limits”, *IBRU Maritime Briefing*, Vol. 3, No. 3 (2001), p. 22. PWRTQ, Vol. II, Annex 606.

⁹⁷ Peter B. Beazley, “Technical Aspects of Maritime Boundary Delimitation”, *IBRU Maritime Briefing*, Vol.1, No. 2 (1994), p. 6 (citing IHO Technical Resolution A2.5). PWRTQ, Vol. II, Annex 604. *See also* International Hydrographic Organization, *A Manual on Technical Aspects of the United Nations Convention on the Law of the Sea – 1982*, Special Publication No. 51 (4th ed., Mar. 2006), p. 2-18. PWRTQ, Vol. II, Annex 594.

⁹⁸ *See* SWSP, Vol. II, p. 99. The charts of all other States showed it to be a low-tide elevation. *See id.*, pp. 99-100.

⁹⁹ *See id.*, p. 131. All but the United States and Vietnamese charts show Namyit as a low-tide elevation. *See id.*, pp. 131-32.

IV.9 The jurisdiction of the Tribunal includes the authority to make such factual determinations, on the basis of the available evidence, as are necessary for resolution of the issues before it. In this case, where there is no significant difference of view in the published charts regarding the question of which features are above water at high tide and which are above water only at low tide or not at all, and where the Philippines has no objection to relying on charts published by China in this regard, there would appear to be little need for further precision regarding the exact location of the low-water line. While the Philippines has requested a determination of whether a feature does or does not generate entitlement to a territorial sea, EEZ, or continental shelf, it has not requested that the Tribunal determine the precise location of limits measured from the low-water line, be it the 12 M territorial sea limit or the 200 M EEZ limit. Moreover, since no delimitation issue is posed, there is no need to make precise determinations of the location of base points on the low-water line for purposes of drawing an equidistance line.

IV.10 The Philippines therefore does not consider that, under the circumstances, the vertical datum or other charting information could pose a bar to the Tribunal's jurisdiction over, or render inadmissible, any of its Submissions. At the merits stage, should the Tribunal agree that it has jurisdiction, the Philippines plans to present an analysis of the status of Gaven Reef, McKennan (Hughes) Reef, Mischief Reef, Second Thomas Shoal and Subi Reef, and any other feature about which the Tribunal may inquire, prepared by EOMap on the basis of satellite-derived bathymetry. EOMap is "the largest commercial producer of satellite derived shallow water depth data globally"¹⁰⁰ and, using the latest technology, is capable of identifying the status of each of these features using any chart datum, including lowest astronomical tide.

¹⁰⁰ EOMap, "Satellite Derived Bathymetry", *available at* <http://www.eomap.com/services/bathymetry/> (accessed 21 July 2015). PWRTQ, Vol. II, Annex 598.

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