

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

**RESPONSES OF THE PHILIPPINES TO THE TRIBUNAL'S
26 MAY 2016 REQUEST FOR COMMENTS ON
MATERIALS FROM THE FRENCH ARCHIVES**

3 JUNE 2016

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1. In its letter no. PH-CH 170048 dated 26 May 2016, the Tribunal invited the Parties to comment on documents the Tribunal obtained from the *Bibliothèque Nationale de France* and from the *Archives Nationales d’Outre-Mer* in Aix-en-Provence, France. These documents consist of 26 scientific reports, diplomatic records, and newspaper articles. Since they date from between 1928 and 1949, that is, before Itu Aba and other insular features in the South China Sea were enhanced by military forces stationed there to reinforce sovereignty claims, these documents are particularly probative of the natural state of those features. The Philippines is grateful for the opportunity to comment on these materials, and presents its observations in three sections below.

2. In **Section I**, the Philippines describes how the documents confirm that Itu Aba and the other insular features discussed in the French documents were never inhabited on a permanent or anything resembling a long-term basis, and that they lack the natural resources, including fertile soil and freshwater, necessary to sustain human habitation or economic life. In **Section II**, we address the documents that corroborate the Philippines’ submission that Itu Aba, Thitu, Spratly Island, Amboyna Cay, Loaita Island, Northeast Cay, Southwest Cay, Namyt, and Sand Cay are above water at high tide. Lastly, in **Section III** we explain how the documents confirm that even assuming, *quod non*, that historic rights beyond near-shore areas could exist after the conclusion of UNCLOS, China has not fulfilled the requirements under general international law for establishing such rights.

I. Habitability

3. The documents obtained from the French archives confirm that Itu Aba, like the other features in the Spratlys, cannot sustain human habitation or economic life of its own.

A. Itu Aba

4. In regard to Itu Aba, the Philippines makes the following observations.

5. *First*, the documents show that the Spratlys, including their largest feature, Itu Aba, were recognized as not having any economic value. A newspaper article dated 23 December 1939 reported that the Spratly “archipelago has no economic importance and, from the perspective of colonization, its interest is zero”.¹ Another article, dated 1 April 1939, observed that the Spratlys were understood to have only strategic value: “Although no economic value, [the Spratlys] constitute an important strategic position, since they are at the center of the China Sea, equidistant from Indochina, the Philippines and Borneo”.²

6. The same point was made in an article dated 18 April 1939; it observed that even though the Spratlys “have no economic value”, they “have an undeniable strategic value, especially between the coastline and the coral belt, as they include sufficiently extensive water bodies to be used by seaplanes”.³ Accordingly, when Japan annexed the Spratlys in

¹ Annex II – News Items Extracts: 1939, 11. *Les Poslednia Novosti* 23 décembre 1939 – L’archipel des Spratly – No. 208, p. 1 (“Cet archipel n’a pas d’importance économique et, du point de vue de la colonisation, son intérêt est nul”).

² Annex II – News Items Extracts: 1939, 02. *L’Ouest-Éclair* 1 avril 1939 – Le Japon a décidé d’occuper les îles Spratly dans la Mer de Chine, p. 3 (“Quoique sans valeur économique, elles constituent une position stratégique importante, car elles sont au centre de la mer de Chine, à distance égale de l’Indochine, des Philippines et de Bornéo”).

³ Annex II – News Items Extracts: 1939, 08. *Les Annales coloniales* 18 avril 1939 – Menaces sur l’Empire. Le Japon plante ses jalons, p. 4 (“si elles n’ont aucune valeur économique, ont une incontestable valeur stratégique, d’autant qu’entre le littoral et la ceinture de corail, elles comprennent des plans d’eau assez étendus pour être utilisés par les hydravions”). *See also* Annex I – News Items Extracts: 1933, 03. *Le Journal* 29 juillet 1933 – Une histoire d’annexion qui n’a rien d’impérialiste, p. 3 (“It is only for the interest of navigation that France has

1939, it was reported that until that time they had been considered “worthless”.⁴ The Government of France expressed this view internally. A government report, dated 5 April 1939, concluded that the Spratlys were “[t]erritorially... insignificant”. The islands’ only “importance” was their “strategic location”.⁵

7. *Second*, the French documents corroborate that the only attempt to use Itu Aba for economic purposes—the brief Japanese effort to exploit guano—quickly ended in failure. A report from 1934 observed that “the Japanese had tried with all its might, but without success, to exploit a shallow layer of phosphates”.⁶ Similarly, the 1939 French governmental report referred to the fact that the Japanese had attempted “phosphate mining” in 1917 but noted that the venture had “ceased in 1925”.⁷ As the Philippines has previously shown, the fact that the guano extraction effort quickly failed is confirmed by the Japanese documents included as exhibits to the *Amicus Curiae* Submission by the Chinese (Taiwan) Society of International Law.⁸

held islands in the China Sea”) (“C’est uniquement pour l’intérêt de la navigation que la France a occupé des îles dans la mer de Chine”).

⁴ Annex II – News Items Extracts: 1939, 03. *Bulletin périodique de la presse américaine* 1 avril 1939, p. 31 (“sans valeur”).

⁵ Annex VIII – Report – “Les Iles Spratly”, Document No. 210, 5 avril 1939, p. 7 (“cet archipel tire toute son importance de sa situation stratégique... Territorialement, il est insignifiant”).

⁶ Annex V – Extract from the *Bulletin de la Société d’enseignement mutuel du Tonkin*, Tome XIV, No. 1 janvier-mars, 1934, p. 72 (“des Japonais avaient tenté, avec des moyens puissants, mais sans succès, l’exploitation d’une couche superficielle de phosphates”).

⁷ Annex VIII – Report – “Les Iles Spratly”, Document No. 210, 5 avril 1939, p. 8 (“d’une exploitation des phosphates tentée par les Japonais, en 1917, et qui aurait cessé en 1925”).

⁸ Responses of the Philippines to the Tribunal’s 1 April 2016 Request for Comments on Additional Materials Concerning the Status of Itu Aba (25 Apr. 2016), paras. 19-20.

8. *Third*, the documents confirm that Itu Aba, like the other features in the Spratlys, had no permanent human population. An article dated 8 April 1939 reported that “[n]obody lived in the largest of them”, *i.e.*, Itu Aba, when the Japanese arrived to try to extract guano.⁹

9. An official French expedition to Itu Aba after Japan’s short-lived effort had been abandoned observed that Itu Aba continued to be unpopulated. The *Institut océanographique* of the Government of French Indochina visited Itu Aba in 1933; the feature was uninhabited and found to be dominated by scorpions.¹⁰ Even seabirds were reported to have “almost deserted” the feature.¹¹

10. Itu Aba’s complete lack of inhabitants was observed the following year, 1934, in the *Bulletin de la Société d’enseignement mutuel du Tonkin*. It described Itu Aba as “deserted”.¹² The only traces of human activities were remnants of the failed Japanese guano extraction venture and signs that sojourning fishermen had previously been present.¹³

11. Likewise, a 1936 scientific study reporting on the French expedition to Itu Aba concluded that the feature was “completely deserted”.¹⁴ It observed that the “only visitors to the island currently seem to be Chinese and Japanese fishermen that sea junks drop off and

⁹ Annex II – News Items Extracts: 1939, 07. *L’Echo d’Alger* 8 avril 1939 – Le Japon rejette la protestation française contre l’annexion des îles Spratly, p. 3 (“Personne n’habitait dans le plus important d’entre eux”).

¹⁰ See Annex III – “Institut océanographique”, *Rapports au Grand Conseil des Intérêts Économiques et Financiers et au Conseil de Gouvernement de l’Indochine*, Gouvernement Général de l’Indochine, Session ordinaire, 1933, pp. 159-168; Annex V – Extract from the *Bulletin de la Société d’enseignement mutuel du Tonkin*, Tome XIV, No. 1 janvier-mars, 1934, pp. 72-75.

¹¹ Annex III – “Institut océanographique”, *Rapports au Grand Conseil des Intérêts Économiques et Financiers et au Conseil de Gouvernement de l’Indochine*, Gouvernement Général de l’Indochine, Session ordinaire, 1933, p. 162 (“près désertes”).

¹² Annex V – Extract from the *Bulletin de la Société d’enseignement mutuel du Tonkin*, Tome XIV, No. 1 janvier-mars, 1934, p. 72 (“déserte”).

¹³ *Id.* These sojourning fishermen are mentioned as well in Annex I(2). See Annex I(2) – News Items Extracts: 1933, 02. *La Croix* 28 juillet 1933 – À propos de la prise de possession par la France d’un groupe d’îles dans le Pacifique, p. 1.

¹⁴ Annex IV – “Visite Botanique au Récif Tizard”, *Bulletin économique de l’Indo-Chine*, septembre-octobre 1936 – Report elaborated by the *Division Botanique à l’Institut des Recherches Agronomiques de L’Indochine*, p. 771 (“L’île est maintenant complètement abandonnée”).

pick up during their seasonal voyages from China to Singapore or Japan to Singapore and back”.¹⁵

12. As the Philippines has previously explained, Itu Aba had traditionally been used temporarily by fisherman in this manner, but there was never any settlement intended to be permanent.¹⁶ This is further corroborated by the 1939 French governmental report, which observed: “There is no doubt that, from time immemorial, these islands were frequented and even temporarily inhabited by Chinese, Malaysian and Annamite fishermen, that haunt this area”.¹⁷

13. *Fourth*, the documents confirm that Itu Aba’s soil is incapable of sustaining agricultural production. The 1936 scientific study determined that the feature consisted “entirely of exposed coral reefs”.¹⁸ This is consistent with a report by the British Navy that visited Itu Aba two years later, in 1938, which found the feature to consist of “[s]urface loose fine sand[,] broken Coral and [a] thin crust of conglomerate coral sand”.¹⁹

¹⁵ *Id.*, p. 771 (“Les seuls hôtes de l’île semblent être, maintenant, des pêcheurs chinois et japonais que des jonques de mer déposent et reprennent lors de leurs voyages saisonniers Chine-Singapour ou Japon-Singapour et retour”).

¹⁶ See Tr. (25 Nov. 2016), pp. 97:8-100:8 (Presentation by Mr. Reichler); Tr. (30 Nov. 2015), p. 25:7-19 (Presentation by Mr. Reichler).

¹⁷ Annex VIII – Report – “Les Iles Spratly”, Document No. 210, 5 avril 1939, p. 7 (“Il est hors de doute que, depuis un temps immémorial, ces îles furent fréquentées et même temporairement habitées par les pêcheurs chinois, malais et annamites qui hantent ces parages”).

¹⁸ Annex IV – “Visite Botanique au Récif Tizard”, *Bulletin économique de l’Indo-Chine*, septembre-octobre 1936 – Report elaborated by the *Division Botanique à l’Institut des Recherches Agronomiques de L’Indochine*, p. 769 (“entièrement constituée par des récifs coralliens émergés”).

¹⁹ *Message* from H.M.S. “Herald”, United Kingdom, to British Admiralty (27 Apr. 1938). SWSP, Vol. III, Annex 377.

14. Botanists who participated in the French expedition to Itu Aba determined that only part of it had what could be described as “soil”. The rest was covered with coral sand, guano, and natural phosphate.²⁰

15. These scientists sampled and analyzed the material that their report described as “soil”.²¹ Its content was determined to be dominated by sand; no less than 87% of the soil was comprised of this infertile material.²² That makes agriculture unsustainable. As Professor Motavalli explains in a supplemental expert report submitted herewith:

This mineral fraction of an uncultivated soil generally contains low plant levels of nutrients such as nitrogen and provides little nutrient retention and water-holding capacity to support crop growth. Soils dominated by sand-sized particles generally have low cation exchange capacity, which is important for nutrient retention. They also generally have low water-holding capacity because both nutrients and soil water are largely retained by the clay and soil organic matter fractions in soils, which in sand-dominated soils are deficient.²³

16. Other results reported in the soil analysis confirm that whatever soil might have existed on Itu Aba was poorly suited to agriculture. This included the fact that the soil had a low level of potassium.²⁴ Moreover, the pH was very high: 8.07.²⁵ Professor Motavalli explains:

²⁰ Annex IV – “Visite Botanique au Récif Tizard”, *Bulletin économique de l’Indo-Chine*, septembre-octobre 1936 – Report elaborated by the *Division Botanique à l’Institut des Recherches Agronomiques de L’Indochine*, pp. 773-75.

²¹ *Id.*, p. 774 (“echantillon moyen de sol”).

²² *Id.*, p. 775. See also Dr. Peter P. Motavalli, Ph.D., *Second Supplemental Expert Report on Soil Resources and Potential Self-Sustaining Agricultural Production on Itu Aba* (2 June 2016), p. 2. RPRC (3 June 2016), Annex 934.

²³ Dr. Peter P. Motavalli, Ph.D., *Second Supplemental Expert Report on Soil Resources and Potential Self-Sustaining Agricultural Production on Itu Aba* (2 June 2016), pp. 2-3. RPRC (3 June 2016), Annex 934.

²⁴ *Id.*, p. 3. See also Annex IV – “Visite Botanique au Récif Tizard”, *Bulletin économique de l’Indo-Chine*, septembre-octobre 1936 – Report elaborated by the *Division Botanique à l’Institut des Recherches Agronomiques de L’Indochine*, p. 775 (measuring potassium at 0.03% of the sample).

Plants growing in this soil are likely to suffer from deficiencies in several important nutrients, including potassium because this nutrient is in relatively low supply in this soil. In addition, micronutrients such as iron would be unavailable for plant uptake because the high soil pH transforms these nutrients into unavailable chemical forms (Stone et al., 2000).²⁶

17. The impact of Itu Aba's infertile soil is evident in the paucity of plants that the botanists observed during their visit to the feature. In regard to its native species, they reported the "vegetation is very poor".²⁷ The plants on Itu Aba's north and west coasts were especially sparse. Those areas were "covered with scrubber vegetation that is bare of foliage ... [and had] many dead plants".²⁸

18. None of the native species cataloged by the visiting botanists are agricultural crops capable of supporting human habitation. They are either inedible or have only limited nutritional value,²⁹ or are used only as medicinal remedies.³⁰

²⁵ Annex IV – "Visite Botanique au Récif Tizard", *Bulletin économique de l'Indo-Chine*, septembre-octobre 1936 – Report elaborated by the *Division Botanique à l'Institut des Recherches Agronomiques de L'Indochine*, p. 775 (measuring pH of 8.075).

²⁶ Dr. Peter P. Motavalli, Ph.D., *Second Supplemental Expert Report on Soil Resources and Potential Self-Sustaining Agricultural Production on Itu Aba* (2 June 2016), p. 3. RPRC (3 June 2016).

²⁷ Annex IV – "Visite Botanique au Récif Tizard", *Bulletin économique de l'Indo-Chine*, septembre-octobre 1936 – Report elaborated by the *Division Botanique à l'Institut des Recherches Agronomiques de L'Indochine*, p. 771 ("la végétation est très pauvre") (emphasis added).

²⁸ *Id.*, p. 770 ("sont couverts d'une végétation torturée, dégarnie de feuilles et présentant beaucoup de végétaux morts").

²⁹ See L.S. Nelson, et al., "*Calophyllum inophyllum* L.", in *Handbook of Poisonous and Injurious Plants* (2d ed., 2007), p. 101. RPRC (3 June 2016), Annex 920 (reporting that *Calophyllum inophyllum* "can cause nausea, vomiting, abdominal cramping, diarrhea, and dehydration"); Edward Balfour, *Cyclopædia of India and of Eastern and Southern Asia* (2d Supp.) (1862), p. 115. Annex 914 (identifying *Capsicum fruticosum* as a type of chili pepper); "Trema species", *Firewood Crops: Shrub and Tree Species for Energy Production* (1980), pp. 68-69. RPRC (3 June 2016), Annex 915 (discussing *Trema*); Jim Croft, "An Introduction to the Structure of Ferns and their Allies", Australian National Botanic Gardens (1999), available at <https://www.anbg.gov.au/fern/structure.html> (accessed 31 May 2016). RPRC (3 June 2016), Annex 916. (discussing *Belchnum*); Burdekin Dry Tropics NRM, *Coastal Plants of the Burdekin Dry Tropics* (2008), available at http://wiki.bdnrm.org.au/index.php?title=Coastal_Plants_of_the_Burdekin_Dry_Tropics. RPRC (3 June 2016), Annex 922 (discussing *Thuaria involuta*, an alternate name for the grass listed Annex IV as *Thuaria sarmentosus*, and *Pandanus*); L. Watson & M.J. Dallwitz, "The grass genera of the world" (7 Dec. 2015), available at <http://delta-intkey.com/grass/www/ischaemu.htm>. RPRC (3 June 2016), Annex 931 (discussing *Ischaemum*, an alternate spelling of the genus of grass referred to in Annex IV as *Ischoemum*); Betsy R. Jackes, *Plants of Magnetic Island* (3d ed., 2010), available at <https://issuu.com/jamescookuniversity/docs/maggie-complete>, p. 4. RPRC (3 June 2016), Annex 927 (discussing *Triumfetta repens*, another name for the species

19. The botanists observed a small number of imported plants. However, these were limited to “one hundred coconut palms” and a smattering of castor oil plants and papaya trees.³¹ An earlier report, from 1934, also referred to a “small field planted with coconut, banana and potatoes”.³² As the Philippines has explained previously, the presence of such plants in small quantities comes nowhere close to making Itu Aba capable of sustaining human habitation.³³

20. Finally, the Philippines observes that nothing in the French documents supports Taiwan’s recent effort to claim that Itu Aba possesses abundant fresh water. To the contrary, the lack of any discussion of freshwater in any of the documents (other than a reference to a “well” on the map included with the 1936 scientific report) is conspicuous. Tellingly, several

listed in Annex IV as *Triumfetta radicans*); Xavier Romero-Frias, “Eating on the Islands: As times have changed, so has the Maldives’ unique cuisine and culture”, *Himal Southasian*, Vol. 29, No. 1 (5 Apr. 2013), pp. 78-79. RPRC (3 June 2016), Annex 930 (noting that *Scoevola koenigii*, also known as beach cabbage, was eaten “[i]n times of scarcity”).

³⁰ See H. Suryawanshi & M. Patel, “Traditional Uses, Medicinal and Phytopharmacological Properties of *Erythrina Indica* Lam: An Overview”, *International Journal of Research in Ayurveda & Pharmacy*, Vol. 2, No. 5 (10 Feb. 2011), available at http://www.ijrap.net/admin/php/uploads/649_pdf.pdf, p. 1531. RPRC (3 June 2016), Annex 928 (discussing *Erythrina indica*); “*Ochrosia borbonica*”, in *Plant Resources of Tropical Africa*, Vol. 11, No. 1 (2008), p. 389. RPRC (3 June 2016), Annex 924 (discussing *Ochrosia borbonica*); V. Selvam, *Trees and shrubs of the Maldives*, FAO Regional Office for Asia and the Pacific Publication No. 2007/12 (2007), p. 117. RPRC (3 June 2016), Annex 921 (discussing *Morinda citrifolia*); Forest Biodiversity Division, Royal Forest Department, Government of Thailand, *Sufficient convention of Tahsida people in Phukambok forest* (Sept. 2008), available at <http://fbd.forest.go.th/en/wp-content/uploads/2010/07/roiet.pdf>, p. 14. RPRC (3 June 2016), Annex 923 (discussing *Clitoria macrophylla*); S.T. Gopukumar, et al., “Biochemical Profile and Potential Medicinal Use of *Ipomea Biloba* Present in the Western Coastal Line of Arabian Sea at South India”, in *Drug Discovery, Threatened Medicinal Plants and Strategies for Sustainable Use* (S. Dominicraj Kumar & J.K. Lal, eds., 2013), p. 136. RPRC (3 June 2016), Annex 929 (discussing *Ipomea biloba*). Annex IV reports the presence of *Macaranga* but observes that “the exact species... could not be determined because they were bare of flowers and fruit”. Annex IV – “Visite Botanique au Récif Tizard”, *Bulletin économique de l’Indo-Chine*, septembre-octobre 1936 – Report elaborated by the *Division Botanique à l’Institut des Recherches Agronomiques de L’Indochine*, p. 770 (“dont l’espèce n’a pu être déterminée faute de fleurs et de fruits”). At least one species of *Macaranga* genus only appears to be used medicinally. See “*Macaranga grandifolia*”, *Tropical Plant Catalog*, available at http://toptropicals.com/catalog/uid/macaranga_grandifolia.htm (accessed 31 May 2016). RPRC (3 June 2016), Annex 933 (“The leaf ash was eaten as a cure for enlarged bellies”).

³¹ Annex IV – “Visite Botanique au Récif Tizard”, *Bulletin économique de l’Indo-Chine*, septembre-octobre 1936 – Report elaborated by the *Division Botanique à l’Institut des Recherches Agronomiques de L’Indochine*, p. 769 (“une centaine de cocotiers”).

³² Annex V – Extract from the *Bulletin de la Société d’enseignement mutuel du Tonkin*, Tome XIV, No. 1 janvier-mars, 1934, p. 72 (“un petit domaine planté de cocotiers, de bananiers et de patates”).

³³ See Responses of the Philippines to the Tribunal’s 1 April 2016 Request for Comments on Additional Materials Regarding the Status of Itu Aba (25 Apr. 2016), paras. 77-92.

of the plants observed by the botanists who catalogued Itu Aba's flora are known to tolerate saline water.³⁴

B. Other Spratly Features

21. The French documents also confirm that other features in the South China Sea are incapable of sustaining human habitation or economic life of their own. As an internal French government report from September 1949 concluded: "These islands have no fixed population and carry only stunted vegetation".³⁵

22. In regard to *Namyit*, the 1936 scientific study reported that it has "[c]oral sand only" and "no guano and consequently no phosphate".³⁶ The feature's vegetation was described as being "[e]ven less than on Itu-Aba" and the "only trees on the island (about

³⁴ See "*Cordia subcordata*", *Native Plants Hawai'i*, University of Hawaii, available at http://nativeplants.hawaii.edu/plant/view/Cordia_subcordata (accessed 31 May 2016), pp. 4-5. RPRC (3 June 2016), Annex 926; W.A. Whistler & C. Elevitch, "*Erythrina variegata* (coral tree)", *Species Profiles for Pacific Island Agroforestry* (Apr. 2006), available at http://priede.bf.lu.lv/ftp/vg_Daba/201101/Erythrinacoraltree.pdf, pp. 2, 5, 6. RPRC (3 June 2016), Annex 919 (*Erythrina indica*); J. C. Dagar, et al., "Agroforestry rejuvenates saline soils using saline irrigation", *Asia-Pacific Agroforestry Newsletter*, No. 26 (July 2005), available at <http://www.fao.org/docrep/008/af338e/af338e04.htm#bm04>. RPRC (3 June 2016), Annex 917 (*Calophyllum inophyllum*); V. Selvam, "*Guettarda speciosa* L.", in *Trees and shrubs of the Maldives*, FAO Regional Office for Asia and the Pacific Publication No. 2007/12 (2007), pp. 101, 117. RPRC (3 June 2016), Annex 921 (*Guettarda speciosa*, and *Morinda citrifolia*); "*Capsicum annum* var. *glabriusculum*", *Natives For Your Neighborhood*, available at <http://regionalconservation.org/beta/nfyn/plantdetail.asp?tx=Capsannuglab> (accessed 31 May 2016). RPRC (3 June 2016), Annex 932 (discussing *Capsicum* in general); "*Cyperus javanicus*", *Native Plants Hawai'i*, University of Hawaii, available at http://nativeplants.hawaii.edu/plant/view/Cyperus_javanicus (accessed 31 May 2016). RPRC (3 June 2016), Annex 925 (*Cyperus javanicus*, also known as *Mariscus alescens*); Burdekin Dry Tropics NRM, *Coastal Plants of the Burdekin Dry Tropics* (2008), available at http://wiki.bdtmrm.org.au/index.php?title=Coastal_Plants_of_the_Burdekin_Dry_Tropics, p. 26. RPRC (3 June 2016), Annex 922 (*Thuaria sarmentos* and *Pandanus*); S.T. Gopukumar, et al., "Biochemical Profile and Potential Medicinal Use of *Ipomea Biloba* Present in the Western Coastal Line of Arabian Sea at South India", in *Drug Discovery, Threatened Medicinal Plants and Strategies for Sustainable Use* (S. Dominicraj Kumar & J.K. Lal, eds., 2013), pp. 136-37. RPRC (3 June 2016), Annex 929 (*Ipomea biloba*); F. Göldenboth, et al., eds., *Ecology of Insular Southeast Asia: The Indonesian Archipelago* (2006), p. 179. RPRC (3 June 2016), Annex 918 (*Triumfetta repens*, also known as *Triumfetta radicans*).

³⁵ Annex XIII – Report – Iles Spratly – septembre 1949 – Haut-Commissariat, p. 1 ("ces îles n'ont pas de population fixe et ne portent qu'une végétation rabougrie").

³⁶ Annex IV – "Visite Botanique au Récif Tizard", *Bulletin économique de l'Indo-Chine*, septembre-octobre 1936 – Report elaborated by the *Division Botanique à l'Institut des Recherches Agronomiques de L'Indochine*, p. 772 ("uniquement du sable corallien. Il n'y a pas de guano, par suite pas de phosphate").

fifteen) are a few coconut palms”.³⁷ The report further observed that Namyit was “deserted” and only “visited by Japanese fishermen who don goggles and dive to collect” nacreous shells.³⁸

23. The same 1936 report concluded that *Sand Cay* was a “desert island of no interest”.³⁹ It had “[n]o trees, only a few *Scoevola* [a genus of flowering plant]” and its “herbaceous vegetation” was “sickly and stunted”.⁴⁰ It further reported: “This island is little visited by fishermen. There are no interesting shells”.⁴¹

24. *Amboyna Cay* was characterized in the 1939 French government report as a “sandy coral island populated only by seabirds”.⁴² The same report described *Loaita* as “uninhabited” and *Thitu* and “Deux-Iles”, *i.e.*, *Northeast Cay* and *Southwest Cay*, as only hosting “Chinese fishermen” who had come “from Hainan” and who were dependent upon supplies delivered to them from Hainan.⁴³

25. Finally, internal French government documents mention a proposal by the Phosphate Company of Tonkin to assess whether *Spratly Island* might support guano extraction.⁴⁴ However, as the Philippines previously explained, there is no evidence that the

³⁷ *Id.* (“Plus pauvre encore que celle d’Itu-Alba... Quelques cocotiers (une quinzaine) sont les seuls arbres de l’île”).

³⁸ *Id.* (“elle est fréquentée par des pêcheurs japonais qui, munis de lunettes imperméables, plongent pour les ramener”).

³⁹ *Id.* (“une île déserte sans intérêt”).

⁴⁰ *Id.* (“La végétation herbacée, sans nouvelles espèces, est chétive et très mal venante”).

⁴¹ *Id.* (“Cette île est peu fréquentée par les pêcheurs. On n’y trouve pas de coquillages intéressants”).

⁴² Annex VIII – Report – “Les îles Spratly”, Document No. 210, 5 avril 1939, p. 8 (“îlot de sable corallien peuplé seulement d’oiseaux de mer.”).

⁴³ *Id.*, p. 7 (“des pêcheurs chinois originaires de Haïnan qui étaient ravitaillés tous les ans par des Jonques ramenant dans cette île la chair de tortue et les holoturies séchées”). *See also* Annex V – Extract from the *Bulletin de la Société d’enseignement mutuel du Tonkin*, Tome XIV, No. 1 janvier-mars, 1934, p. 72.

⁴⁴ Annex VII – Exchange of Official Telegrams, 1928-1929 re: mining permit for Spratly Island, p. 8.

company's proposed assessment was ever implemented, much less that it successfully extracted guano from the feature.⁴⁵

II. Status at High Tide

26. In this Section, the Philippines comments on the French documents insofar as they may assist the Tribunal in determining whether the South China Sea's various insular features are above or below water at high tide.

27. The Philippines observes that, unlike the materials which the Tribunal obtained from the United Kingdom Hydrographic Office, the French documents do not contain hydrographic data. Nonetheless, their descriptions of several of the South China Sea's insular features confirm that the Philippines has correctly characterized them as "naturally formed area[s] of land, surrounded by water, which [are] above water at high tide".⁴⁶ Those features are:

- Itu Aba;⁴⁷
- Thitu;⁴⁸
- Spratly Island;⁴⁹
- Amboyna Cay;⁵⁰
- Loaita Island;⁵¹
- Northeast Cay;⁵²
- Southwest Cay;⁵³

⁴⁵ See Supplemental Written Submission of the Philippines (16 Mar. 2015), Vol. II, p. 176.

⁴⁶ See UNCLOS, Article 121(1).

⁴⁷ See Annex IV – "Visite Botanique au Récif Tizard", *Bulletin économique de l'Indo-Chine*, septembre-octobre 1936 – Report elaborated by the *Division Botanique à l'Institut des Recherches Agronomiques de L'Indochine*.

⁴⁸ See Annex IX – Publication – "Les Îles de la Tempête ou Îles Spratly", *Le Monde Colonial Illustré*, mai 1939, p. 118 (describing Thitu as 400 by 300 meters in size).

⁴⁹ See *id.* (describing Spratly Island as 300 by 200 meters in size).

⁵⁰ See *id.* (describing Amboyna Cay as 200 by 200 meters in size).

⁵¹ See *id.* (describing Loaita as 450 by 250 meters in size).

⁵² See Annex V – Extract from the *Bulletin de la Société d'enseignement mutuel du Tonkin*, Tome XIV, No. 1 janvier-mars, 1934.

⁵³ See *id.*

- Namyit;⁵⁴ and
- Sand Cay.⁵⁵

28. The only other features mentioned in the French archival materials are Subi Reef,⁵⁶ Fiery Cross Reef,⁵⁷ West London Reef,⁵⁸ and what is described generally as London Reef,⁵⁹ which may be a collective reference to Cuarteron and East, West and Central London Reefs. However, these features are not described in a manner that could assist the Tribunal in determining whether they are above or below water at high tide.

III. Absence of Historic Rights

29. The Philippines observes that the French documents confirm that China has not acquired historic rights to the waters enclosed by the nine-dash line, assuming *quod non* that such historic rights survive the conclusion of UNCLOS (which, as the Philippines has repeatedly demonstrated, they do not).⁶⁰

30. *First*, the documents corroborate the fact that prior to the Second World War France did not consider China to have made a claim in regard to any of the Spratlys, or to the waters of the South China Sea far removed from China’s mainland coast. In that regard, the documents dating from 1933 to 1939 describe France’s annexation of various features in the

⁵⁴ See Annex IV – “Visite Botanique au Récif Tizard”, *Bulletin économique de l’Indo-Chine*, septembre-octobre 1936 – Report elaborated by the *Division Botanique à l’Institut des Recherches Agronomiques de L’Indochine*, p. 771-72 (describing Namyit in terms that make clear that it is above water at high tide).

⁵⁵ See *id.*, p. 772 (describing Sand Cay in terms that make clear that it is above water at high tide).

⁵⁶ See Annex III – “Institut océanographique”, *Rapports au Grand Conseil des Intérêts Économiques et Financiers et au Conseil de Gouvernement de l’Indochine*, Gouvernement Général de l’Indochine, Session ordinaire, 1933, p. 161.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See Annex IX – Publication – “Les Îles de la Tempête ou Îles Spratly”, *Le Monde Colonial Illustré*, mai 1939.

⁶⁰ See Memorial of the Philippines (30 Mar. 2014), paras. 4.38-4.80; Supplemental Written Submission of the Philippines (16 Mar. 2015), Response to Question 3; Tr. (7 July 2015), pp. 29:18-51:14, 52:8-58:2 (Presentation by Mr. Reichler); Tr. (24 Nov. 2015), pp. 12:3-52:20 (Presentation by Mr. Reichler); Tr. (30 Nov. 2015), pp. 2:17-7:1 (Presentation by Mr. Reichler).

Spratlys (including Itu Aba), as well as Japan's objection to those claims, and Japan's own annexation of them in 1939.⁶¹ Tellingly, this was viewed as a bilateral dispute between France and Japan; no putative rights of China were considered to be implicated.⁶² For that reason, France proposed to Japan that their dispute be resolved through judicial means,⁶³ a proposal that the United States endorsed.⁶⁴ China was not considered an interested party. This is not surprising. As the Philippines has previously shown, China informed France by diplomatic note dated 29 September 1932 that the Paracels, which lie far to the north of the Spratlys, "form the southernmost part of Chinese territory".⁶⁵

31. *Second*, there is nothing in the French documents that supports China's contention that it somehow "recovered" the Spratlys by operation of the Cairo Declaration and Potsdam Proclamation or by the post-war peace treaties. To the contrary, the post-war documents—including France's internal records—make clear that France retained its claim to those features.⁶⁶ This is consistent with the fact that, as the Philippines has previously shown, the

⁶¹ See Annex I(04) – *L'Homme Libre* 4 août 1933 – L'occupation des îles au large de l'Indochine, 05. *La Croix* 30 Juillet 1933 – Des îles qui créent des incidents internationaux; Annex II – News Item Extracts: 1939, *passim*; Annex V – Extract from the *Bulletin de la Société d'enseignement mutuel du Tonkin*, Tome XIV, No. 1 janvier-mars, 1934, p. 72; Annex VIII – Report – "Les Îles Spratly", Document No. 210, 5 avril 1939, p. 8; Annex IX – Publication – "Les Îles de la Tempête ou Îles Spratly", *Le Monde Colonial Illustré*, mai 1939; Annex X – Publication – "La Poussée Nippone vers l'Ouest: Occupation des Spratly", *Revue des Troupes Coloniales*, mai 1939.

⁶² See, e.g., Annex I(04) – *L'Homme Libre* 4 août 1933 – L'occupation des îles au large de l'Indochine; Annex I(05) – *La Croix* 30 Juillet 1933 – Des îles qui créent des incidents internationaux; Annex II(09) – *L'Ordre* 6 avril – A Tokio – La France proteste contre l'occupation des îles Spratly – La France proteste contre l'occupation des îles Spratly; Annex II(11) – *Les Poslednia Novosti* 23 décembre 1939 – L'archipel des Spratly – No. 208.

⁶³ Annex IX – Publication – "Les Îles de la Tempête ou Îles Spratly", *Le Monde Colonial Illustré*, mai 1939, p. 4.

⁶⁴ Telegram from Embassy of the United States in Paris to the Department of State of the United States (5 Apr. 1939), p. 13. SWSP, Vol. III, Annex 382.

⁶⁵ *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), p. 184. MP, Vol. VI, Annex 171.

⁶⁶ See, e.g., Annex XII – Note from the Ministry of Defense to the Secretary of State in charge of the Navy – "Situation dans les archipels des Paracels et des Spratly", 2 septembre 1949. See also, e.g., Government of France, Ministry of Foreign Affairs, Asia/Oceania Section, *Memorandum* (8 Sept. 1953), p. 112. RPRC (29 Apr. 2016), Vol. II, Annex 897.

United Kingdom and the United States (the two other signatories to the Cairo Declaration and Potsdam Proclamation) both wished to protect France's sovereignty claim.⁶⁷

32. Indeed, as the Philippines has demonstrated, upon the conclusion of the 28 April 1952 Peace Treaty between Japan and the Republic of China, which recognized that, by Article 2 of the San Francisco Treaty, Japan had renounced all claims to the Spratlys, Japan entered into an exchange of notes with France clarifying that this was not intended to recognize Chinese sovereignty over those features.⁶⁸

33. *Third*, nothing in the French documents contradicts the fact that, for decades following the conclusion of the Second World War, China made no claim to possess historic rights in the South China Sea. When the People's Republic of China proclaimed a 12-mile territorial sea on 4 September 1958 in regard to various features, including the Spratlys, it made no mention of putative rights beyond the territorial sea.⁶⁹ Three more decades would pass before the People's Republic of China occupied any of the Spratlys, which it ultimately did when it occupied five low-tide elevations and small rocky protrusions in 1988.⁷⁰ Even then, no claim of historic rights was made. That assertion would wait another twenty years,

⁶⁷ See *Telegram* from Embassy of the United States in Paris to the Department of State of the United States (5 Apr. 1939). SWSP, Vol. II, Annex 382; United Kingdom, Foreign Office, "Islands in the South China Sea" (27 Apr. 1938). SWSP, Vol. II, Annex 378. See also Tr. (30 Nov. 2015), pp. 118:18-121:5 (Presentation by Mr. Loewenstein).

⁶⁸ *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. See also Tr. (30 Nov. 2015), pp. 128:1-132:1 (Presentation by Mr. Loewenstein).

⁶⁹ People's Republic of China, *Declaration of the Government of the People's Republic of China on China's Territorial Sea* (4 Sept. 1958), in *Collection of the Sea Laws and Regulations of the People's Republic of China* (3rd ed. 2001), Arts. 1, 2. MP, Vol. V, Annex 103.

⁷⁰ See Supplemental Written Submission of the Philippines (16 Mar. 2015), para. A13.50.

until May 2009, when China, for the first time, claimed such rights within the nine-dash line.⁷¹

34. The French documents are thus consistent with the evidence that was placed before the Tribunal prior to the close of the oral hearings: there was no continuous or longstanding Chinese exercise of authority in the waters of the South China Sea beyond the territorial sea that extends from the Chinese mainland; there was not even a Chinese *claim* of right to those waters (before 2009); and there was no acquiescence by any State, at any time, to China's alleged historic rights in the waters. Thus, the French documents confirm that China has no legitimate claim of historic rights under general international law.

⁷¹ 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/17/2009 (7 May 2009). MP, Vol. VI, Annex 191; *Note Verbale* from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations, No. CML/18/2009 (7 May 2009). MP, Vol. VI, Annex 192.

LIST OF EXHIBITS

- Annex 914 Edward Balfour, *Cyclopædia of India and of Eastern and Southern Asia* (2d Supp.) (1862)
- Annex 915 “*Trema* species”, *Firewood Crops: Shrub and Tree Species for Energy Production* (1980)
- Annex 916 Jim Croft, “An Introduction to the Structure of Ferns and their Allies”, Australian National Botanic Gardens (1999), available at <https://www.anbg.gov.au/fern/structure.html> (accessed 31 May 2016)
- Annex 917 J. C. Dagar, et al., “Agroforestry rejuvenates saline soils using saline irrigation”, *Asia-Pacific Agroforestry Newsletter*, No. 26 (July 2005), available at <http://www.fao.org/docrep/008/af338e/af338e04.htm#bm04>
- Annex 918 F. Göldenboth, et al., eds., *Ecology of Insular Southeast Asia: The Indonesian Archipelago* (2006)
- Annex 919 W.A. Whistler & C. Elevitch, “*Erythrina variegata* (coral tree)”, *Species Profiles for Pacific Island Agroforestry* (Apr. 2006), available at http://priede.bf.lu.lv/ftp/.vg_Daba/201101/Erythrinacoraltree.pdf
- Annex 920 L.S. Nelson, et al., “*Calophyllum inophyllum* L.”, in *Handbook of Poisonous and Injurious Plants* (2d ed., 2007)
- Annex 921 V. Selvam, *Trees and shrubs of the Maldives*, FAO Regional Office for Asia and the Pacific Publication No. 2007/12 (2007)
- Annex 922 Burdekin Dry Tropics NRM, *Coastal Plants of the Burdekin Dry Tropics* (2008), available at http://wiki.bdtprm.org.au/index.php?title=Coastal_Plants_of_the_Burdekin_Dry_Tropics
- Annex 923 Forest Biodiversity Division, Royal Forest Department, Government of Thailand, *Sufficient convention of Tahsida people in Phukambok forest* (Sept. 2008), available at <http://fbd.forest.go.th/en/wp-content/uploads/2010/07/roiet.pdf>
- Annex 924 “*Ochrosia borbonica*”, in *Plant Resources of Tropical Africa*, Vol. 11, No. 1 (2008)
- Annex 925 “*Cyperus javanicus*”, *Native Plants Hawai’i*, University of Hawaii, available at http://nativeplants.hawaii.edu/plant/view/Cyperus_javanicus (accessed 31 May 2016)

- Annex 926 “*Cordia subcordata*”, *Native Plants Hawai’i*, University of Hawaii, available at http://nativeplants.hawaii.edu/plant/view/Cordia_subcordata (accessed 31 May 2016)
- Annex 927 Betsy R. Jackes, *Plants of Magnetic Island* (3d ed., 2010), available at <https://issuu.com/jamescookuniversity/docs/maggie-complete>
- Annex 928 H. Suryawanshi & M. Patel, “Traditional Uses, Medicinal and Phytopharmacological Properties of *Erythrina Indica* Lam: An Overview”, *International Journal of Research in Ayurveda & Pharmacy*, Vol. 2, No. 5 (10 Feb. 2011), available at http://www.ijrap.net/admin/php/uploads/649_pdf.pdf
- Annex 929 S.T. Gopukumar, et al., “Biochemical Profile and Potential Medicinal Use of *Ipomea Biloba* Present in the Western Coastal Line of Arabian Sea at South India”, in *Drug Discovery, Threatened Medicinal Plants and Strategies for Sustainable Use* (S. Dominicraj Kumar & J.K. Lal, eds., 2013)
- Annex 930 Xavier Romero-Frias, “Eating on the Islands: As times have changed, so has the Maldives’ unique cuisine and culture”, *Himal Southasian*, Vol. 29, No. 1 (5 Apr. 2013)
- Annex 931 L. Watson & M.J. Dallwitz, “The grass genera of the world” (7 Dec. 2015), available at <http://delta-intkey.com/grass/www/ischaemu.htm>
- Annex 932 “*Capsicum annum* var. *glabriusculum*”, *Natives For Your Neighborhood*, available at <http://regionalconservation.org/beta/nfyn/plantdetail.asp?tx=Capsannuglab> (accessed 31 May 2016)
- Annex 933 “*Macaranga grandifolia*”, *Tropical Plant Catalog*, available at http://toptropicals.com/catalog/uid/macaranga_grandifolia.htm (accessed 31 May 2016)
- Annex 934 Dr. Peter P. Motavalli, Ph.D., *Second Supplemental Expert Report on Soil Resources and Potential Self-Sustaining Agricultural Production on Itu Aba* (2 June 2016)