

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

PCA Case No. 2013-19

Permanent Court of Arbitration  
Peace Palace  
The Hague  
The Netherlands

Day 3

Monday, 13th July 2015

Hearing on Jurisdiction and Admissibility

**Before:**

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

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BETWEEN:

**THE REPUBLIC OF THE PHILIPPINES**

-and-

**THE PEOPLE'S REPUBLIC OF CHINA**

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

The People's Republic of China was not represented.

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**Participants may not have been present for the entire hearing.**

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Monday, 13th July 2015

(10.05 am)

**THE PRESIDENT:** Good morning. May I welcome you all back. The hearing on jurisdiction and admissibility in the arbitration between the Philippines and China is resumed.

On Friday morning, the Arbitral Tribunal circulated to the parties some questions for the Philippines to address at this second round of arguments. I understand that copies of these questions have now been made available to the observer delegations so they can follow the discussions. Additionally, some of my colleagues will also pose individual questions this morning, which the Philippines can address after the break. It is of course open to the Philippines to answer in writing after the hearing if it is not able to provide a full answer to any question today, and we will give you until 23rd July to do so.

Before I invite the distinguished representatives of the Philippines to address the Arbitral Tribunal on those questions, I wish to extend a welcome to the new members of the Philippines' delegation who are attending for the first time today.

I also wish to welcome His Excellency Mr Hugo Hans

1 Siblesz, the Secretary-General of the Permanent Court  
2 of Arbitration. We are very grateful for your  
3 presence and, if I may say so, for the excellent  
4 assistance that your staff have given us in these  
5 proceedings.

6 Finally, I wish to note that the Arbitral Tribunal  
7 has received over the weekend several letters from the  
8 Agent of the Philippines. These include:

9 - The Philippines' comments on various requests  
10 from the observer delegations.

11 - A copy of the *note verbale* from the Embassy of  
12 the People's Republic of China in Manila dated  
13 6th July 2015;

14 - A new Annex 583 comprising a list of (i) dates  
15 that satellite photos were taken, and (ii) dates of  
16 surveys on which navigational charts are based. This  
17 information was filed in response to questions raised  
18 in the Arbitral Tribunal's letter of 23rd June 2015.

19 - And finally, we have received a list of new  
20 documents referred to in the course of the  
21 Philippines' oral pleadings, with annex numbers, for  
22 which the Registry is grateful.

23 Mr Reichler, you have the floor now. Thank you.

24



1 (10.08 am)

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

3 **MR REICHLER:** Mr President, members of the Tribunal, good  
4 morning. I hope you had an enjoyable weekend. Our  
5 team, as you might imagine, was quite busy, but we are  
6 by no means complaining. For us, our work on behalf  
7 of the Philippines, even on weekends, is a great  
8 privilege.

9 This morning we will respond to the six questions  
10 that you put to us in writing last Friday.  
11 Afterwards, the honourable Solicitor General and Agent  
12 of the Philippines will provide closing remarks. We  
13 have found your questions to be most helpful, and we  
14 have striven to provide complete and accurate answers  
15 to all of them. We have also aimed to be as direct  
16 and efficient as possible. We expect to conclude our  
17 answers to your questions before noon.

18 The order of presentation of answers to your  
19 questions will be this: I will respond to Question 1;  
20 Professor Sands will then respond to Questions 2 and  
21 6; Mr Martin will respond to Question 3 and the first  
22 part of Question 4, pertaining to the Treaty of Amity  
23 and Cooperation; Professor Boyle will then respond to  
24 the remainder of Question 4, pertaining to the  
25 question on biological diversity; then Professor Oxman

1 will respond to Question 5, concerning the exception  
2 for military activities.

3 Question 1 invites the Philippines to direct the  
4 Arbitral Tribunal to the sources relied upon for  
5 ascertaining China's position with respect to each of  
6 the Philippines' specific submissions in the context  
7 of establishing the existence of a legal dispute. We  
8 are very pleased to accept the Tribunal's invitation.

9 At tab 4.1 of your folders today, you will find  
10 a document that we have created in response to this  
11 question. It may be helpful to you if you allow me to  
12 take you to it now.

13 You will see on page 1 a heading that reads  
14 "Submissions 1 and 2". This is followed by the texts  
15 of these submissions, which comprise the Philippines'  
16 claims in regard to these matters, and then you will  
17 see statements of China's position in opposition to  
18 our claims.

19 If you turn the page, you will see a "List of  
20 Sources". This is a list of the documentary and other  
21 sources in the written pleadings, and in the public  
22 record, upon which the Philippines has relied for  
23 ascertaining China's positions opposing those of the  
24 Philippines, and establishing the existence of legal  
25 disputes.

26 We have taken this approach in respect of each of

1 the Philippines' 14 submissions. For example, at  
2 page 11, you will see the heading "Submission 3", and  
3 following that page, you will find the list of sources  
4 where China's position opposing that of the  
5 Philippines in regard to submission 3 can be found.  
6 The pattern is repeated for each of the subsequent  
7 submissions.

8 We trust that you will find this approach helpful.  
9 We thought it would be more convenient for the  
10 Tribunal than standing here for hours reading out the  
11 list of sources in respect of all 14 submissions; or  
12 worse, reading all of the source material itself aloud  
13 to you.

14 That said, I think it would be helpful if  
15 I briefly reviewed with you some of the highlights.  
16 If this were television, and you were watching  
17 Eurosport or ESPN, this would be equivalent not to  
18 showing all of the goals that were scored in all of  
19 the most recent English Premier League matches, but  
20 only the most notable and memorable ones. You have  
21 a collection of all the goals at tab 4.1.

22 So I will begin with the most important sources  
23 relating to submissions 1 and 2, and in particular to  
24 China's claim that its maritime entitlements in the  
25 South China Sea extend beyond those permitted by  
26 UNCLOS (in opposition to our submission 1), and its

1 claim to "historic rights", including sovereign rights  
2 and jurisdiction, within the maritime area encompassed  
3 by the nine-dash line beyond the limits of its UNCLOS  
4 entitlements (in opposition to our submission 2).

5 On July 7th, I cited, quoted from, and showed you  
6 some of these sources during my presentation. It may  
7 be worth recalling China's 2009 *notes verbales*  
8 asserting China's claim to "sovereign rights and  
9 jurisdiction over the relevant waters as well as the  
10 seabed and subsoil thereof (see attached map)",<sup>1</sup>  
11 depicting the nine-dash line; and the statements by  
12 senior Chinese officials that, "While [the  
13 Philippines] has legal rights under UNCLOS, China has  
14 historical rights which are acknowledged under  
15 UNCLOS";<sup>2</sup> and that China has "rights and relevant  
16 claims over the South China Sea [that] have been  
17 formed in history and upheld by the Chinese  
18 government";<sup>3</sup> and that UNCLOS "does not entitle any  
19 country to extend its EEZ or continental shelf" to any

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<sup>1</sup> *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.

<sup>2</sup> *Memorandum* from the Embassy of the Republic of the Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-064-2011-S (21 June 2011), para. 8. MP, Vol. IV, Annex 72.

<sup>3</sup> Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Jiang Yu's Regular Press Conference on September 15, 2011* (16 Sept. 2011), p. 2. MP, Vol. V, Annex 113.

1 areas where they might "restrain or deny a country's  
2 right which is formed in history and abidingly  
3 upheld";<sup>4</sup> and that China claims sovereign rights,  
4 including rights to oil and gas extraction, and to  
5 fishing, in "all the waters within the nine-dash  
6 line";<sup>5</sup> and that, in explicit regard to the alleged  
7 lawfulness of China's assertion of maritime rights  
8 within the nine-dash line, "China's rights and  
9 interests in the South China Sea are formed in history  
10 and protected by international law".<sup>6</sup>

11 The direct sources of all of these Chinese  
12 statements were cited in footnotes to my speech, and  
13 they appear again today at tab 4.1 in the list of all  
14 sources.

15 Last week, I also showed you a map depicting  
16 China's assertion that it is entitled -- I should say  
17 exclusively entitled -- to the non-living resources up  
18 to the limit of the nine-dash line, even in areas that  
19 are within Vietnam's continental shelf, and more than  
20 200 miles from any land feature over which China

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<sup>4</sup> *Id.*

<sup>5</sup> Jane Perlez, "China Asserts Sea Claim with Politics and Ships", *New York Times* (11 Aug. 2012), p. 3. MP, Vol. X, Annex 320.

<sup>6</sup> Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Hong Lei's Statement Regarding Comments by an Official of the United States Department of State on the South China Sea* (8 Feb. 2014). MP, Vol. V, Annex 131 (official translation quoted available at [http://www.fmprc.gov.cn/mfa\\_eng/xwfw\\_665399/s2510\\_665401/2535\\_665405/t1127014.shtml](http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1127014.shtml)).

1 claims sovereignty. This map, which is from our  
2 Memorial and is at tab 2 of your folders today,  
3 tab 4.2, shows the geographic area covered by  
4 Philippines oil block SC-58, in relation to the  
5 nine-dash line, and the Philippines' 200-mile  
6 continental shelf.

7 On 30th July 2010, China protested Philippine  
8 activity in this area on the ground that SC-58:

9 "... and other nearby service contracts are  
10 located 'deep within China's 9-dash line'. China  
11 considers the Philippines as violating and encroaching  
12 on China's sovereignty and sovereign rights in these  
13 areas [deep within the nine-dash line]."<sup>7</sup>

14 This Chinese protest is also documented at  
15 tab 4.2.

16 China has repeatedly protested the Philippines'  
17 oil-related activities at or near Reed Bank, which is  
18 now highlighted on the screen, and, since the public  
19 unveiling of the nine-dash line claim in 2009, has  
20 sent its law enforcement vessels to interfere with and  
21 prevent any such Philippine activities in this area.

22 This map, showing oil block GSEC-101, is at  
23 tab 4.3. Also at that tab is the record of China's

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<sup>7</sup> Memorandum from Rafael E. Seguis, Undersecretary for Special and Ocean Concerns, Department of Foreign Affairs, Republic of the Philippines, to the Secretary of Foreign Affairs of the Republic of the Philippines (30 July 2010), p. 1. MP, Vol. IV, Annex 63.

1 protest of 9th March 2011, which states:

2 "Since ancient times, China has indisputable  
3 sovereignty over the waters of Nansha Islands and its  
4 adjacent waters. The GSEC-101 ... area is situated in  
5 the adjacent waters of the Nansha Islands."<sup>8</sup>

6 This map is at tab 4.4.

7 On 6th July 2011, China sent a *note verbale* to the  
8 Philippines in respect of these Philippine oil blocks:

9 "The Chinese side urges the Philippines side to  
10 immediately withdraw the bidding offer for AREA 3 and  
11 AREA 4, [and] refrain from any action that infringes  
12 on China's sovereignty and sovereign rights ..."<sup>9</sup>

13 China's note to that effect is also at tab 4.4.

14 China has also claimed exclusive fishing rights  
15 in, and denied Philippine fishermen from entering,  
16 waters encompassed by its "historic rights" claim,  
17 beyond its UNCLOS entitlements. In May 2012, China  
18 adopted regulations imposing a fishing moratorium  
19 throughout the northern sector of the South China Sea,  
20 within the limits of the nine-dash line.<sup>10</sup> China has

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<sup>8</sup> *Memorandum* from Acting Assistant Secretary of the Department of Foreign Affairs of the Republic of the Philippines to the Secretary of Foreign Affairs (10 Mar. 2011), p. 1. MP, Vol. IV, Annex 70.

<sup>9</sup> *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 (6 July 2011), p.1. MP, Vol. VI, Annex 202.

<sup>10</sup> People's Republic of China, Ministry of Agriculture, South China Sea Fishery Bureau, *Announcement on the 2012 Summer Ban on Marine Fishing in the South China Sea Maritime Space* (10 May 2012), Art. 1, nn.1-2. MP, Vol. V, Annex 118. See also "Fishing ban starts in South China Sea", *Xinhua* (17 May 2012). MP, Vol. X, Annex 318.

1 imposed a similar ban in the southern sector. It has  
2 allowed only Chinese vessels to fish in the waters in  
3 this sector, and has banned Philippine vessels.

4 The moratorium in this area is still in effect.  
5 As recently as last Monday, 6th July, on the eve of  
6 these hearings, the Chinese Embassy in Manila sent  
7 a communication to the Philippines' Department of  
8 Foreign Affairs, as follows:

9 "The Chinese side issues 'Nansha Certification of  
10 Fishing Permit' to the Chinese vessels, allowing them  
11 to conduct fishery production activities outside the  
12 areas under fishing moratorium. This is in conformity  
13 with the Chinese laws and relevant regulations. The  
14 Chinese side does not accept and firmly opposes the  
15 groundless protests and accusation of the Philippine  
16 side, and hereby requests the Philippine side to  
17 earnestly respect China's sovereignty, sovereign  
18 rights and jurisdiction, and to educate its own  
19 fishermen, so that they can strictly abide by the  
20 fishing moratorium of South China Sea issued by the  
21 Chinese government and the administrative managements  
22 and law-enforcing authorities. The Chinese  
23 law-enforcing authorities will strengthen their  
24 maritime patrols and other law-enforcing actions,  
25 investigate and punish the relevant fishing vessels  
26 and fishermen who violate the fishing moratorium in



1 accordance with the law."<sup>11</sup>

2 China's note is at tab 4.5.

3 In this sector of the South China Sea, China  
4 claims both historic rights within the nine-dash line  
5 and 200-mile entitlements, purportedly under UNCLOS,  
6 for all of the Spratly features. It has said  
7 repeatedly that:

8 "China's Nansha Islands are fully entitled to  
9 Territorial Sea, Exclusive Economic Zone and  
10 Continental Shelf."<sup>12</sup>

11 The sources of these statements too are included  
12 in the list at tab 4.1.

13 As I explained last week, both of China's claims  
14 give rise to legal disputes with the Philippines,  
15 because both exceed the limits on entitlements under  
16 UNCLOS, which the Philippines claims, in its  
17 submissions 1 and 2, to be the exclusive source of  
18 such entitlements.<sup>13</sup>

19 This is the position of the Philippines with  
20 respect to its maritime entitlements and those of the  
21 so-called Nansha Islands under UNCLOS. China's

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<sup>11</sup> *Note Verbale* from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (15) PG-299 (6 July 2015). Hearing on Jurisdiction, Annex 580.

<sup>12</sup> *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.

<sup>13</sup> Mr. Reichler, 7 July 2015 Transcript, pp. 59:1-72:26.

1 entitlements do not extend to Mischief Reef or  
2 Reed Bank, because the former is a low-tide elevation  
3 and the latter is entirely submerged under the water  
4 at all times. China has got it entirely wrong when it  
5 says this is a case primarily about territorial  
6 sovereignty, and only peripherally about maritime  
7 rights and jurisdiction.

8 The Philippines considers that none of the  
9 high-tide features in the Spratlys is entitled to more  
10 than a 12-mile territorial sea, because none is  
11 capable of supporting human habitation or economic  
12 life. The total areas of those features, including  
13 their 12-mile entitlements, within 200 miles of the  
14 Philippines -- now shaded in blue -- is 28,690 square  
15 kilometres. The total area of the remainder of the  
16 waters within 200 miles of the Philippines -- that is,  
17 within its entitlements under UNCLOS in this sector --  
18 is 188,535 square kilometres. These measurements  
19 speak for themselves. Only a mere 13.2% of this area  
20 is land or territorial sea. The remaining 86.8%  
21 consists of sea and seabed beyond 12 miles from any  
22 insular feature.

23 This shows clearly that the dispute between the  
24 parties is primarily about maritime rights and  
25 jurisdiction, and access to resources. The dispute  
26 over the land features themselves -- which is not part

1 of this case -- is of far, far lesser significance  
2 than the UNCLOS disputes that are before you. This  
3 map is at tab 4.6.

4 Mr President, as you and your colleagues on the  
5 Tribunal examine these and the other sources on the  
6 list at tab 4.1, it is absolutely clear that China has  
7 opposed, and continues to oppose, the claims made by  
8 the Philippines in submissions 1 and 2, and that legal  
9 disputes between the parties plainly exist. Judge Gao  
10 understood that China's claim within the nine-dash  
11 line is one of historic rights, which include  
12 sovereign rights and jurisdiction beyond China's  
13 entitlements under UNCLOS.<sup>14</sup> We see no basis on which  
14 this Tribunal could reach any other understanding, or  
15 harbour any doubt about the nature of China's claims  
16 or the fact that they are disputed by the Philippines.

17 The legal disputes in regard to each of the other  
18 submissions are just as clear. I will very briefly  
19 review some of those highlights too.

20 In opposition to submission 3, in which the  
21 Philippines claims that Scarborough Shoal is a rock  
22 under Article 121(3) of the Convention, and is  
23 entitled only to a 12-mile territorial sea, China has  
24 asserted that the feature "is not a sand bank but

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<sup>14</sup> Z. Gao and B.B. Jia, "The Nine-Dash Line in the South China Sea: History, Status, and Implications", *American Journal of International Law*, Vol. 107, No. 1 (2013), pp. 109-110. MP, Vol. X, Annex 307.

1       rather an island",<sup>15</sup> and China has claimed that  
2       Scarborough Shoal generates an exclusive economic  
3       zone.<sup>16</sup> The sources of these statements are in the  
4       list at tab 4.1, pages 12 and 13.

5             The source list also shows that China has likewise  
6       opposed the claims made by the Philippines in  
7       submissions 4 through 7 in regard to the character and  
8       entitlements of eight other specific features, all of  
9       which are in the Spratlys, and which the Philippines  
10      regards as low-tide elevations with no maritime  
11      entitlements, or rocks with only a 12-mile  
12      entitlement. In contrast, China claims a 200-mile EEZ  
13      and continental shelf for all of these Spratly  
14      features.<sup>17</sup>

15            Mr President, there are many sources for our  
16      statements that China opposes the claims set forth in  
17      submissions 8 and 9, and these are also listed at  
18      tab 4.1, pages 31 to 45. But I must again call your  
19      attention to China's *note verbale* of 6th July 2015,  
20      which, of course, could not have been included in our

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<sup>15</sup> Department of Foreign Affairs of the Republic of the Philippines, *Record of Proceedings: 10th Philippines-China Foreign Ministry Consultations* (30 July 1998), p. 23. MP, Vol. VI, Annex 184.

<sup>16</sup> See Foreign Ministry of the People's Republic of China, *Chinese Foreign Ministry Statement Regarding Huangyandao* (22 May 1997), p. 2. MP, Vol. V, Annex 106.

<sup>17</sup> *Note Verbale* from the Permanent Mission of the People's Republic of China to the Secretary-General of the United Nations, No. CML/8/2011 (14 Apr. 2011), p. 2. MP, Vol. VI, Annex 201.

1 written pleadings, and so we submitted it yesterday.

2 In that note, as you will recall, China states, in  
3 regard to maritime areas indisputably within 200 miles  
4 of the Philippines and more than 12 miles from any  
5 insular feature claimed by China, that only China may  
6 determine where it is permissible to fish, that only  
7 Chinese fishermen may fish in the allowable areas, and  
8 that Philippine fishermen may not.<sup>18</sup> As I have also  
9 shown you, China also claims for itself the exclusive  
10 right to explore for oil in the same area, and has  
11 prevented the Philippines from doing so.

12 There can be no doubt, therefore, that China's  
13 position is directly opposed to that of the  
14 Philippines with respect to submissions 8 and 9, and  
15 that this is demonstrated both by China's statements  
16 and its enforcement actions against the Philippines.

17 Submission 10 concerns China's denial of  
18 traditional fishing rights at and within 12 miles of  
19 Scarborough Shoal in and after 2012. The main sources  
20 are two Chinese statements. One, 24th May 2012:

21 "Philippines should withdraw its vessels from  
22 Huangyan Island waters."<sup>19</sup>

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<sup>18</sup> *Note Verbale* from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs of the Republic of the Philippines, No. (15) PG-299 (6 July 2015). Hearing on Jurisdiction, Annex 580.

<sup>19</sup> *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), p. 2. MP, Vol. IV, Annex 81.

1 Huangyan Island is China's name for Scarborough  
2 Shoal.

3 And two, 26th July 2012:

4 "Philippine vessels, including fishing vessels,  
5 should not return to the area ... The two sides can  
6 talk about the possibility of Philippine fishing  
7 vessels in the area, under the condition that Chinese  
8 sovereignty is guaranteed."<sup>20</sup>

9 That has remained China's position.

10 The parties' legal dispute in regard to  
11 submission 11, concerning China's failure to protect  
12 and preserve the marine environment at Scarborough  
13 Shoal and Second Thomas Shoal, is evidenced by the  
14 Philippines' repeated protest notes over construction  
15 activities and the destruction of coral reefs, the  
16 dynamiting of fish populations, and the harvesting of  
17 endangered species. The relevant notes are included  
18 in the list at tab 4.1, pages 52 to 54. China's  
19 opposition is reflected in its actions, its refusal to  
20 act, and its Foreign Ministry's statements.

21 First, China has repeatedly ignored the  
22 Philippines' protests. Second, Chinese law  
23 enforcement vessels have protected the Chinese fishing

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<sup>20</sup> 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), p. 5. MP, Vol. IV, Annex 84.

1 vessels engaged in these environmentally destructive  
2 practices. The Memorial includes indisputable  
3 photographic evidence of this;<sup>21</sup> the cites are in the  
4 list at tab 4.1. And third, Chinese law enforcement  
5 vessels have physically prevented Philippine law  
6 enforcement vessels from intervening to stop the  
7 harmful practices of the Chinese fishermen.

8 As the Tribunal is well aware, words of  
9 disagreement may not be necessary to demonstrate the  
10 existence of a legal dispute; it can be deduced or  
11 inferred from a party's actions. The case law for  
12 this well-established proposition is cited in  
13 footnote.<sup>22</sup>

14 But further, the Chinese Foreign Ministry has  
15 stated that:

16 "[China's activities on the] Nansha islands and  
17 reefs fall within the scope of China's sovereignty,  
18 and are lawful, reasonable, and justified ... nor have  
19 they caused or will they cause damage to the marine  
20 ecological system and environment in the South China

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<sup>21</sup> MP, Figure 6.5, at p. 177, and 6.7, at p. 185.

<sup>22</sup> See *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, Judgment, ICJ Reports 1998, para. 89. MP, Vol. XI, Annex LA-25; *United States Diplomatic and Consular Staff in Tehran*, Judgment, I. C. J. Reports 1980, paras. 46, 47, 49, 51. SWSP, Vol. XII, Annex LA-175.

1 Sea, and thus are beyond reproach."<sup>23</sup>

2 Needless to say, that assertion is very much  
3 disputed by the Philippines.

4 In respect of submissions 12(a), (b) and (c) --  
5 pertaining to Chinese construction of installations,  
6 environmental destruction and purported appropriation  
7 of Mischief Reef, a low-tide elevation only 126 miles  
8 from the Philippine coast, and more than 12 miles from  
9 any insular feature over which China claims  
10 sovereignty -- China has responded to the Philippines'  
11 protests with numerous statements like the following:

12 "Chinese Government exercises sovereignty over the  
13 Nansha Islands and it is the sovereign prerogative of  
14 the Chinese government to undertake repair and  
15 renovation works on the structures erected in 1995 [at  
16 Mischief Reef]."<sup>24</sup>

17 And the following:

18 "Mischief Shoal has always been part of China, as  
19 part of the Nansha islands ..."<sup>25</sup>

20 And this:

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<sup>23</sup> 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.

<sup>24</sup> 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.

<sup>25</sup> 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.



1 "Chinese local fishing authorities will undertake  
2 'soon' the renovation and reinforcement works which  
3 have become necessary ..."<sup>26</sup>

4 China's opposition to the claim set forth in  
5 Submission 13 is well established, *inter alia*, by  
6 an exchange of notes in April and May 2012. The  
7 Philippines' note of 30th April 2012 asserted that  
8 Chinese law enforcement vessels were threatening  
9 Philippine search and rescue vessels at Scarborough  
10 Shoal by making "provocative and extremely dangerous  
11 manoeuvres" against them.<sup>27</sup> China rejected the  
12 Philippines' claim on 25th May 2012:

13 "The various jurisdiction measures adopted by the  
14 Chinese government over Huangyan Island and its  
15 waters..."

16 That's China's name for Scarborough Shoal:

17 "... and activities by Chinese ships, including  
18 government public service ships and fishing boats, in  
19 Huangyan Island and its waters are completely within  
20 China's sovereignty."<sup>28</sup>

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<sup>26</sup> Memorandum from Lauro L. Baja, Jr., Undersecretary for Policy, Department of Foreign Affairs, Republic of the Philippines to all Philippine Embassies (11 Nov. 1998), p. 1. MP, Vol. III, Annex 35.

<sup>27</sup> 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.

<sup>28</sup> 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.

1           This brings me to the final submission,  
2           Submission 14. The Philippines has protested all of  
3           the specified Chinese behaviours at Second Thomas  
4           Shoal: interfering with navigation rights, preventing  
5           the rotation and resupply of personnel, and  
6           endangering their health and wellbeing. China has  
7           been perfectly clear in rejecting these protests, both  
8           in word and action. China's statements include: the  
9           "Chinese side w[ill] not allow the continuous  
10          stranding of the vessel" at Second Thomas Shoal.<sup>29</sup>  
11          China also demanded that Philippine "ships have to  
12          leave the area and should bear full responsibility of  
13          the consequences resulting there from".<sup>30</sup> China's  
14          actions at Second Thomas Shoal demonstrating its  
15          opposition to the Philippines' claims are also  
16          described in tab 4.1, pages 64 and 65.

17           Mr President, as I said earlier, this is just  
18           a sampling of the source material we have provided  
19           documenting China's explicit opposition to each and  
20           every one of the claims raised by the Philippines in  
21           its 14 Submissions. There can be no question that  
22           each of these claims is opposed by China, and that

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<sup>29</sup> *Memorandum from the Secretary of Foreign Affairs of the Republic of the Philippines to the President of the Republic of the Philippines (23 Apr. 2013), p. 1. MP, Vol. IV, Annex 93.*

<sup>30</sup> *Letter from the Virgilio A. Hernandez, Major General, Armed Forces of the Philippines, to the Secretary of Foreign Affairs, Department of Foreign Affairs of Republic of the Philippines (10 Mar. 2014), p. 1. MP, Vol. IV, Annex 99.*

1 a legal dispute exists in regard to every one of them.  
2 Moreover, as I explained last week in regard to  
3 Submissions 1 through 9,<sup>31</sup> and as my colleagues  
4 explained in regard to Submissions 10 through 14,<sup>32</sup> in  
5 all of these Submissions the legal dispute arises  
6 under UNCLOS and calls for the Convention's  
7 interpretation or application.

8 In sum, Mr President, your jurisdiction to address  
9 all 14 of the Philippines' Submissions is fully and  
10 firmly established, and this is so even if the  
11 standard is that a legal dispute must be shown to  
12 exist separately for each and every Submission. We  
13 note in this regard, however, that UNCLOS itself does  
14 not appear to set such a high bar: it does not use the  
15 words "legal disputes". And other Annex VII tribunals  
16 appear not to have imposed the standard separately for  
17 each of the applicant state's submissions.  
18 Nevertheless, even if this Tribunal were to establish  
19 such a standard and require a showing of a legal  
20 dispute separately for each submission, we have

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<sup>31</sup> Tr., 7 July 2015, pp. 27:5-25, 29:16-50:26, 55:9-57:7, 58:10-58:24 (Presentation of Mr. Paul S. Reichler) (reference is to uncorrected version).

<sup>32</sup> Tr., 8 July 2015, pp. 94:10- 100:6, 101:21-103:17, 108:16-109:14, 107:3-114:5, 116:17-25 (Presentation of Prof. Alan Boyle) (reference is to uncorrected version). See also Tr., 8 July 2015, pp. 93:21-120:1 (Presentation of Prof. Alan Boyle) (reference is to uncorrected version); Tr., 8 July 2015, pp. 39:23-40:6, 47:23-48:20, 84:16- 92:13 (Presentation of Prof. Bernard H. Oxman) (reference is to uncorrected version).

1 plainly met it.

2 Mr President, members of the Tribunal, I thank you  
3 again for your kind courtesy and patient attention  
4 this morning, and throughout these proceedings. I ask  
5 that you give the floor to Professor Sands, who will  
6 be much briefer than I have been.

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

8 I will, without ado, ask Professor Sands, please.

9 **Tribunal questions**

10 **JUDGE WOLFRUM:** Mr Reichler, sorry, I have a question,  
11 which has been announced by the President.

12 You have referred to, Mr Reichler, this *note*  
13 *verbale* of 6th July which just has been added to the  
14 folder. In this *note verbale* there is a reference to  
15 the Philippines' *note verbale* 15-2341 of 16th June.  
16 I don't recall to have seen it; maybe my mistake.  
17 Could you perhaps provide us with a copy of that  
18 *note verbale*? This is the first part of my only  
19 question.

20 **MR REICHLER:** May I answer that? I will be the first of  
21 my colleagues to venture to answer a question from the  
22 podium. The question to your question is: yes, we  
23 will very gladly provide you with a copy of that note.

24 **JUDGE WOLFRUM:** May I continue my question? In this  
25 *note verbale* of China, there is, as you said,

1 reference to "indisputable sovereignty over the South  
2 China Sea Islands and their adjacent waters". There  
3 is a certain -- yes, how should I put it? -- there is  
4 room for interpreting the word "Islands" in this  
5 respect. It is not for you to interpret this *note*  
6 *verbale*, but do we have to take it as referring to  
7 reefs, low-tide elevations and islands, or only  
8 islands, technically speaking? That is the first part  
9 of the question.

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

19 Thank you, Mr Reichler.

20 **MR REICHLER:** Thank you very much, Judge Wolfrum.

21 If there are no further questions at this time,  
22 Mr President, I would ask that you kindly call  
23 Professor Sands to the podium.

24 **THE PRESIDENT:** Yes, except that we would like to know at  
25 some point, not necessarily this morning, at some  
26 point we would like to know whether you intend to

1       respond to this question -- the question from  
2       Judge Wolfrum -- now, or you need some time to address  
3       that question.

4       **MR REICHLER:** Yes, Mr President, I will consult with our  
5       Agent and with colleagues, and we will advise you in  
6       the course of this morning at what time we will  
7       respond to those pending questions. We will let you  
8       know the answer to that in the course of this morning.

9       **THE PRESIDENT:** Thank you very much. Thank you. That is  
10      enough, yes. Professor Sands, then.

11      **(10.43 am)**

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

13      **PROFESSOR SANDS:** Mr President, members of the Tribunal,  
14      I will answer Questions 2 and 6.

15                   With respect to Question 2, the Tribunal has  
16      invited us to elaborate on the relevance of the  
17      reference to the *Mauritius v. United Kingdom* decision  
18      to the present case, and I can be brief.

19                   The recent decision might be said to have  
20      relevance for two reasons: first, it confirms that  
21      an Annex VII tribunal established under Part XV of the  
22      Convention can and will distinguish between that part  
23      of a dispute which raises matters of territorial  
24      sovereignty and those parts of the dispute which do  
25      not, and that it has and will exercise jurisdiction

1 over those latter parts; and second, the *Mauritius v.*  
2 *United Kingdom* case did raise a question about which  
3 state had sovereignty over land territory, while the  
4 present case very obviously does not raise such  
5 a question.

6 In such circumstances, the *Chagos* award offers  
7 clearly authority for this Tribunal to rule that it  
8 has jurisdiction over the claims of the Philippines,  
9 and it should exercise that jurisdiction.

10 The Tribunal has also asked in that question  
11 whether any issues of sovereignty that may be  
12 implicated in this case can be considered "minor  
13 issue[s] of territorial sovereignty" that fall within  
14 the Arbitral Tribunal's "ancillary" jurisdiction. The  
15 answer to that question is no, because this Tribunal  
16 is not called upon to determine which of two or more  
17 competing claims to sovereignty over land territory is  
18 to prevail. The issue of ancillary jurisdiction over  
19 "territorial sovereignty" simply does not arise at all  
20 in this case, and so this Tribunal is not called upon  
21 to express any view as to that matter.

22 In this regard, it is important to emphasise the  
23 point that, under the Convention, a low-tide elevation  
24 is not to be treated as land territory, and the  
25 determination of its status is a matter that plainly  
26 falls within the jurisdiction of an Annex VII tribunal

1 under Article 13 of the 1982 Convention.

2 With respect to Question 6, my statement last week  
3 that we believe there are no issues of jurisdiction or  
4 admissibility which should be deferred was intended to  
5 reflect our view that all such issues can be addressed  
6 and resolved at this stage of the proceedings. By its  
7 nature, it was a summary remark that did not repeat my  
8 colleagues' more detailed reasoning.

9 The portion of Professor Oxman's statement with  
10 respect to the issue of the law enforcement activities  
11 exception in Article 298(1)(b) that is quoted in  
12 Question 6 relates only to a decision as to whether  
13 there is an island claimed by China that generates  
14 an EEZ in the area in question. Immediately following  
15 this remark, Professor Oxman continued:

16 "That said, it is unnecessary to decide whether  
17 there is an island claimed by China that generates  
18 an EEZ in the area in question in order to decide  
19 whether Article 297(3) excludes jurisdiction. There  
20 are other reasons for deciding that jurisdiction is  
21 not excluded ..."<sup>33</sup>

22 None of the alternative reasons identified by  
23 Professor Oxman requires deferral for consideration  
24 with the merits. And similarly, his comments on each

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<sup>33</sup> Tr., 8 July 2015, pp. 79:18 to 79:23 (Presentation of Prof. Bernard H. Oxman) (reference is to uncorrected version).



1 of the specific submissions identified in the question  
2 include reasons for concluding that the law  
3 enforcement exception does not apply to that  
4 submission, and so do not require deferral for  
5 consideration with the merits.<sup>34</sup>

6 Mr Reichler stated that the question of whether  
7 China's alleged "historic rights" are in conflict with  
8 the Convention, or are preserved by them, necessarily  
9 falls within the Tribunal's jurisdiction, and we say  
10 that this could not be any clearer. His reference to  
11 the possibility -- the possibility -- of joining the  
12 issue to the merits related only to the possibility  
13 that the Tribunal might harbour doubts regarding the  
14 nature and extent of China's "historic rights" claims,  
15 and in that context he stated the view of the  
16 Philippines that there is cause for none. If,  
17 however, the Tribunal considers otherwise on any  
18 particular issue, then of course the approach taken by  
19 the *Arctic Sunrise* tribunal commends itself as  
20 an obvious approach.

21 Thus, while neither Professor Oxman nor  
22 Mr Reichler excluded the possibility that the Tribunal  
23 would decide that resolution of an issue of  
24 jurisdiction or admissibility did not possess

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<sup>34</sup> Tr., 8 July 2015, pp. 85:8 to 85:13; 86:2 to 86:7; 87:10 to 87:15; 90:24 to 92:4 and 92:14-20 (Presentation of Prof. Bernard H. Oxman) (reference is to uncorrected version).

1 an exclusively preliminary character, both indicated  
2 the view of the Philippines that the issues they  
3 addressed could and should be resolved at this stage  
4 of the proceedings. And we are grateful to the  
5 Tribunal and welcome the opportunity to clarify. We  
6 do see -- as I have made clear, I hope -- no  
7 inconsistency amongst the various views expressed.

8 Mr President, members of the Tribunal, that  
9 concludes my responses to Questions 2 and 6. Unless  
10 there are any other questions from the Tribunal,  
11 I would invite you to invite Mr Martin to the bar.  
12 I thank you for your very kind attention.

13 **THE PRESIDENT:** Thank you very much, Professor Sands.

14 I think we have questions, but they are not related to  
15 this, and therefore I will ask Mr Martin to come on.

16 Thank you.

17 **(10.50 am)**

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

19 **MR MARTIN:** Mr President, members of the Tribunal, good  
20 morning. I will address two of the Tribunal's  
21 questions: first, the question Judge Wolfrum asked me  
22 last Wednesday concerning estoppel; second, Question 4  
23 relating to the Treaty of Amity and Cooperation.  
24 Professor Boyle will deal with that question insofar  
25 as it relates to the Convention on Biological

1 Diversity.

2 Last week Judge Wolfrum asked about estoppel, and  
3 whether or not the DOC and later references to it  
4 might estop the Philippines from bringing a case  
5 before an arbitral tribunal. The answer is no. There  
6 is nothing in the DOC, taken alone or together with  
7 later references to it, that gives rise to any  
8 estoppel.

9 The requirements for estoppel in international law  
10 were recently summarised in the *Chagos Islands Award*.  
11 They are: (1) a state has made clear and consistent  
12 representations; (2) such representations were made  
13 through an authorised agent; (3) the state invoking  
14 estoppel relied on such representations to act to its  
15 detriment; and (4) such reliance was legitimate.<sup>35</sup>  
16 These requirements are not met here.

17 Estoppel is a doctrine that is frequently invoked  
18 in international proceedings, but rarely succeeds.  
19 There are very few cases in the modern age where  
20 estoppel has been found by the majority. These

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<sup>35</sup> *Mauritius v UK*, ¶ 435. Hearing on Jurisdiction, Annex LA-225. The principle as it exists in international law was well summarized by Judge Spender in *Temple of Preah Vihear*: "the principle [of estoppel] operates to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State, either expressly or impliedly, on which representation the other State was, in the circumstances, entitled to rely and in fact did rely, and as a result the other State has been prejudiced or the State making it has secured some benefit or advantage for itself. (*Cambodia v Thailand*, Judgment of 15 June 1962, Dissenting Opinion of Judge Spender, ICJ Reports 1962, p. 101 at pp. 143-44)".

1 include the *Temple* case and the *Chagos* case. Many  
2 other cases rejecting estoppel are cited in  
3 footnote.<sup>36</sup> The reasons pleas of estoppel so rarely  
4 succeed is because the requirements are strict. This  
5 is especially true in the case of procedural estoppel,  
6 as would be the case here, since the issue relates to  
7 the Tribunal's jurisdiction.<sup>37</sup>

8 The first requirement for estoppel is, as I said,  
9 that a state has made clear and unequivocal  
10 representations. In his question, Judge Wolfrum noted  
11 that:

12 "... there are many principles referred to in the  
13 dock which are matters of at least customary  
14 international law, such as the obligation to settle  
15 disputes by peaceful means ..."

16 It is true that in paragraph 1 of the DOC, the  
17 signatory states reaffirm their commitment to

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<sup>36</sup> Cases where pleas for estoppel was refused include *e.g.*: *Aerial Incident of 10 August 1999 (Pakistan v India)*, Jurisdiction of the Court, Judgment, ICJ Reports 2000, p. 12, ¶45; *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, Judgment, ICJ Reports 1998, p. 275, ¶57. MP, Vol. XI, Annex LA-25; *Serbian Loans*, Judgment No. 14, 1929, PCIJ, Series A, No. 20, p. 39; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, ICJ Reports 2008, p. 12 at p. 81. MP, Vol. XI, Annex LA-31; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)*, Judgment of 12 October 1984, ICJ Reports 1984, p. 246, ¶145. MP, Vol. XI, Annex LA-12; *Barcelona Traction ((Belgium v Spain) Preliminary Objections*, Judgment, ICJ Reports 1964, p. 3 at p. 25; *Legality of Use of Force (Serbia and Montenegro v Canada) (Preliminary Objections)*, ¶42; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene*, Judgment, ICJ Reports 1990, p. 92, ¶63; *Bangladesh/Myanmar*, ¶125. MP, Vol. XI, Annex LA-43.

<sup>37</sup> *ARA Libertad (ITLOS Case No. 20)*, Joint Separate Opinion of Judge Wolfrum and Judge Cot, ¶ 67.

1 "universally recognized principles of international  
2 law which shall serve as the basic norms governing  
3 state-to-state relations". In paragraph 4, they also  
4 undertake "to resolve their territorial and  
5 jurisdictional disputes by peaceful means".

6 But none of these statements constitutes  
7 a representation by the Philippines that it would not  
8 bring a case before a court or tribunal under Part XV  
9 of UNCLOS. There is nothing in "universally  
10 recognized principles of international law" that  
11 prevents a state from having recourse to compulsory  
12 dispute settlement. To the contrary, Article 33(1) of  
13 the UN Charter makes clear that judicial settlement  
14 and arbitration form part of the very fabric of  
15 international law on the acceptable means of dispute  
16 settlement. And, there is no requirement to negotiate  
17 in advance. As Gautier has written:

18 "In general international law, there is no rule  
19 prescribing parties to negotiate before submitting  
20 a dispute to an international court."<sup>38</sup>

21 Other authorities to the same effect are cited in  
22 footnote.<sup>39</sup>

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<sup>38</sup> Ph. Gautier, *Settlement of Disputes*, in *The IMLI Manual on International Maritime Law: Volume I: The Law of the Sea* edited by D. Attard, M. Fitzmaurice, N. Gutierrez (2014), p. 541.

<sup>39</sup> See *Cameroon v Nigeria* (Preliminary Objections), ¶56. MP, Vol. XI, Annex LA-25; *Georgia v Russia* (joint dissent) (stating that "the Court has never conditioned its jurisdiction on the existence of prior negotiations between the parties, except on the basis of an express provision to that effect.").

1           The DOC's mere invocation of universally  
2 recognised principles of international law therefore  
3 cannot be construed as a representation that the  
4 Philippines would not bring compulsory proceedings  
5 against China.

6           Nor can the reference to negotiations and  
7 consultations in paragraph 4 of the DOC operate to  
8 create an estoppel. There is absolutely no  
9 contradiction between an undertaking to negotiate, on  
10 the one hand, and bringing compulsory proceedings, on  
11 the other. The ICJ made this perfectly clear in its  
12 decision in the *Aegean Sea* case, in which it stated:

13           "Negotiation and judicial settlement are  
14 enumerated together in Article 33 of the Charter of  
15 the United Nations as means for the peaceful  
16 settlement of disputes. The jurisprudence of the  
17 Court provides various examples of cases in which  
18 negotiations and recourse to judicial settlement have  
19 been pursued *pari passu* ... [T]he fact that  
20 negotiations are being actively pursued during  
21 [ongoing] proceedings is not, legally, any obstacle to  
22 the exercise by the Court of its judicial function."<sup>40</sup>

23           The *Cameroon v Nigeria* case is particularly  
24 instructive, and particularly on point. In that case,  
25 Nigeria raised a jurisdictional objection, arguing

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<sup>40</sup> *Aegean Sea Continental Shelf*, ¶ 29. MP, Vol. XI, Annex LA-9.

1       that:

2           "... for a period of at least 24 years prior to  
3       the filing of the Application the Parties have in  
4       their regular dealings accepted a duty to settle all  
5       boundary questions through the existing bilateral  
6       machinery."<sup>41</sup>

7           According to Nigeria, an agreement was thus  
8       reached to resort exclusively to such machinery, and  
9       Cameroon was estopped from having recourse to the  
10      court.<sup>42</sup> The court rejected Nigeria's pleas without  
11      difficulty, finding that:

12           "... an estoppel would only arise if by its acts  
13      or declarations Cameroon had consistently made it  
14      fully clear that it had agreed to settle the boundary  
15      dispute submitted to the Court by bilateral avenues  
16      alone."<sup>43</sup>

17           That condition was not met because:

18           "Cameroon did not attribute an exclusive character  
19      to the negotiations conducted with Nigeria ..."<sup>44</sup>

20           It is exactly the same here, Mr President. Last  
21      Wednesday, I showed that the 2002 DOC did not purport

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<sup>41</sup> *Cameroon v Nigeria* (Preliminary Objections), ¶ 48. MP, Vol. XI, Annex LA-25

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*, ¶ 57.

<sup>44</sup> *Ibid.* See also *Aerial Incident of 10 August 1999 (Pakistan v India)*, Jurisdiction of the Court, Judgment, ICJ Reports 2000, p. 12, ¶45.

1 to exclude further procedures within the meaning of  
2 Article 281. Paragraph 4 of the DOC does not  
3 "attribute an exclusive character to" the  
4 negotiations. Indeed, it does quite the opposite,  
5 since it specifically contemplates recourse to  
6 compulsory proceedings. It expressly states:

7 "The Parties concerned undertake to resolve their  
8 territorial and jurisdictional disputes by peaceful  
9 means ... through friendly consultations and  
10 negotiations ... in accordance with ... recognized  
11 principles of international law, including the 1982  
12 UN Convention on the Law of the Sea."

13 The reference to the 1982 Convention includes all  
14 aspects of the Convention, including Part XV.

15 Exactly the same point comes through in  
16 paragraph 1 of the DOC, in which:

17 "The parties reaffirm their commitment to the  
18 purposes and principles of the Charter of the  
19 United Nations [and] the 1982 UN Convention on the Law  
20 of the Sea ..."

21 Both the UN Charter and the 1982 Convention  
22 explicitly recognise arbitration as an appropriate  
23 means of peaceful dispute settlement.

24 The DOC therefore does not constitute  
25 a representation that the Philippines would never have  
26 recourse to third-party dispute settlement, much less



1 a clear and unequivocal one.<sup>45</sup>

2 Nor can the two statements by the Philippines that  
3 China cites in its 2014 Position Paper that postdate  
4 the DOC somehow convert it into the clear and  
5 unequivocal representation that estoppel requires.

6 China refers to two statements, one in 2004 and  
7 one in 2011. In 2004, China and the Philippines  
8 issued a joint press statement in which:

9 "They agreed that the early and vigorous  
10 implementation of the 2002 ASEAN-China Declaration on  
11 the Conduct of the Parties in the South China Sea will  
12 pave the way for the transformation of the South China  
13 Sea into an area of cooperation."

14 And in 2011, the two sides issued a joint  
15 statement in which they "reaffirmed their commitment  
16 to respect and abide by" the DOC.

17 Insofar as both statements merely reaffirm the  
18 DOC, they cannot give that instrument more weight than  
19 the drafters intended. Neither statement can  
20 plausibly be read as a commitment, much less a clear  
21 and unequivocal one, not to have recourse to  
22 third-party settlement.

23 The circumstances here contrast sharply with those  
24 present in the recent *Libertad* case before ITLOS on

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<sup>45</sup> See *Payment of Various Serbian Loans Issued in France*, Judgment of 12 July 1929, PCIJ Series A, Nos. 20/21, p. 5 at p. 39 (declining to find an estoppel in the absence of a "clear and unequivocal representation").

1 provisional measures. There, two judges of the  
2 tribunal -- who shall remain nameless -- found, on the  
3 particular facts of that case, that Ghana was estopped  
4 from contesting the Tribunal's jurisdiction in light  
5 of its unequivocal assurances to Argentina that the  
6 *Libertad*, a military vessel, could dock at Tema  
7 Harbour in Ghana.<sup>46</sup> They identified what they  
8 considered to be a clear, unequivocal, unqualified  
9 official representation. By contrast, there is  
10 nothing remotely equivalent present in this case.

11 Also plainly not satisfied is the requirement that  
12 the state in whose favour estoppel is invoked was  
13 induced by the other state's representations to act to  
14 its detriment. There is no indication in China's  
15 Position Paper, in the record before the Tribunal or  
16 anywhere else, that China changed its behaviour based  
17 on the Philippines' (non-existent) representations.

18 *Cameroon v Nigeria* is again instructive. In  
19 denying Nigeria's estoppel argument, the court  
20 determined that Nigeria did not show that it had  
21 changed its position to its detriment, or that it had  
22 suffered any prejudice in the sense that it was  
23 precluded from taking some action it might have done

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<sup>46</sup> *ARA Libertad* (ITLOS Case No. 20), Joint Separate Opinion of Judge Wolfrum and Judge Cot, para. 67.

1 in reliance on Cameroon's representations.<sup>47</sup> It is  
2 just the same here. There can be no estoppel.

3 Likewise, the requirement that any reliance on the  
4 part of the state claiming estoppel was legitimate is  
5 also not met. Also I explained a few moments ago,  
6 China could not legitimately have relied on the DOC as  
7 a basis on which to conclude that the Philippines  
8 would not institute compulsory proceedings. There is  
9 nothing in the text that attributes an exclusive  
10 character to negotiations. To the contrary, the  
11 references to general international law, to the UN  
12 Charter and to the 1982 Convention all make clear that  
13 the negotiations referred to were to be conducted  
14 against the backdrop of the possibility of compulsory  
15 proceedings. Thus, even if China had relied on the  
16 DOC -- and there is absolutely no indication that it  
17 did -- that reliance would not have been reasonable.

18 If estoppel has any application in this case,  
19 Mr President, it is against China, not the  
20 Philippines. As I noted last Wednesday, China itself  
21 has repeatedly admitted that the DOC is "a political  
22 document ... instead of a legal document to solve  
23 specific disputes".<sup>48</sup> China cannot be allowed to blow

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<sup>47</sup> *Cameroon v Nigeria* (Preliminary Objections), ¶ 57. MP, Vol. XI, Annex LA-25

<sup>48</sup> Ministry of Foreign Affairs of the People's Republic of China, "Spokesperson's Comment on China-Asean Consultation" (30 Aug. 2000), p.1. SWSP, Vol. VIII, Annex 491.

1 hot and cold, and now take exactly the opposite  
2 view.<sup>49</sup> To allow it to do so would constitute  
3 manifest inequity. *Allegans contraria non audiendus*  
4 *est.*

5 With that, Mr President, I come to the first part  
6 of Question 4, concerning the High Council provisions  
7 of the Treaty of Amity and Cooperation. In its  
8 question, the Tribunal asked:

9 "... whether, in light of the compulsory nature of  
10 the High Council Provisions of the Treaty of Amity and  
11 Cooperation ... it was necessary for the Philippines  
12 to attempt the resolution of the Parties' dispute  
13 through [those mechanisms] before having recourse to  
14 the dispute resolution provisions of the Convention."

15 With great respect, Mr President, the Philippines  
16 does not agree with the premise that appears to  
17 underlie the question. We do not consider the High  
18 Council provisions of the Treaty of Amity and  
19 Cooperation to be compulsory. We say this on the  
20 basis of the plain text.

21 In its question, the Tribunal highlighted the  
22 portion of Article 15 that provides:

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<sup>49</sup> See also Memo of China's Position Regarding the Latest Draft Code of Conduct by the ASEAN (December 18, 1999), SWSP, Vol. VIII, Annex 471 (stating: "The draft of the Chinese side (early last October 1999) is positive and constructive. It covers comparatively an extensive sphere and general content, providing a guideline for developing relations and cooperation among countries in the region of South China Sea in the new century. *This is in accordance with the consensus that the Code should be a political document of principle.*").

1            "... the High Council shall take cognizance of the  
2            dispute ... and shall recommend to the parties in  
3            dispute appropriate means of settlement ..."

4            Whether or not this creates a binding obligation  
5            to refer matters to the High Council cannot, however,  
6            be determined by reference to Article 15 alone. The  
7            provision must be read in the context of the treaty as  
8            a whole, and in particular the two paragraphs that  
9            come immediately after it.

10           The first is Article 16. And here, Mr President,  
11           I must apologise. The copy of the treaty we submitted  
12           as an annex, and included in your folders last week,  
13           contained a typographical error in Article 16. In the  
14           copy we previously gave you, the first six words of  
15           Article 16 read:

16           "The foregoing provision [singular] of this  
17           Chapter..."

18           In fact, the actual text, which we have taken off  
19           the UN website and included in your folders today at  
20           tab 4.7, reads:

21           "The foregoing provisions ..."

22           The word is in the plural, not singular:

23           "The foregoing provisions of this Chapter shall  
24           not apply to a dispute unless all the parties to the  
25           dispute agree to their application to that dispute."

26           Article 16's reference to "this Chapter" is to

1 Chapter IV of the treaty, which is entitled "Pacific  
2 Settlement of Disputes", and includes Articles 13  
3 through 17. When Article 16 says that the foregoing  
4 provisions of Chapter IV do not apply "unless all the  
5 parties to the dispute agree", it expressly includes  
6 the High Council provisions of Article 15.

7 To put it simply, Article 16 makes it clear that  
8 Article 15 is not compulsory. More than this,  
9 Article 16 makes clear that Article 15 cannot apply to  
10 this case, because the parties to the dispute, the  
11 Philippines and China, have never agreed to submit the  
12 dispute, or any part of it, to the High Council.

13 Article 17 further confirms the point. It  
14 provides:

15 "Nothing in this Treaty shall preclude recourse to  
16 the modes of peaceful settlement contained in  
17 Article 33(1) of the Charter of the United Nations."

18 As I have already said -- and the Tribunal needs  
19 no reminding in any event -- arbitration is among the  
20 means of peaceful settlement Article 33(1) specifies.  
21 No priority is given to any particular means. This  
22 can only mean that nothing in the Treaty of Amity  
23 prevents recourse to arbitration at any time, without  
24 precondition.

25 State practice further confirms the point. At  
26 least two compulsory proceedings have been brought

1 under UNCLOS by states parties to the Treaty of Amity:  
2 the *Land Reclamation* case and *Bangladesh v India*. In  
3 neither case did the respondent state raise any  
4 objection based on the treaty, nor was there any prior  
5 resort to the High Council, which has never even been  
6 constituted in any event. This reflects the shared  
7 understanding that the High Council provisions are not  
8 compulsory.

9 Because the High Council provisions of the Treaty  
10 of Amity are not compulsory, and because Article 16  
11 makes them inapplicable to these proceedings in any  
12 event, it cannot have been necessary for the  
13 Philippines to attempt the resolution of these  
14 disputes through the High Council before having  
15 recourse to the dispute settlement provisions of  
16 UNCLOS. There was no need for it to do so, and it did  
17 not do so.

18 Mr President, distinguished members of the  
19 Tribunal, thank you very much for your kind attention  
20 both today and last week. It has been a great  
21 pleasure to be part of these proceedings with you and  
22 your extraordinarily able colleagues from the  
23 Registry. May I ask that you call Professor Boyle to  
24 the podium?

25 **THE PRESIDENT:** Thank you very much, Mr Martin. As you  
26 suggested, we will call Professor Boyle.

1 (11.09 am)

2 **Second-round submissions by PROFESSOR BOYLE**

3 **PROFESSOR BOYLE:** Mr President, members of the Tribunal,  
4 good morning. I have been asked to respond to  
5 Question 4 insofar as it refers to the Convention on  
6 Biological Diversity and to the requirement to  
7 conciliate under Article 27(4) of that Convention.

8 The Philippines has made no attempt to invoke  
9 Article 27(4) because it has no dispute with China  
10 concerning compliance with the Convention on  
11 Biological Diversity, and no part of its case in the  
12 present proceedings will involve any question of  
13 compliance with the Convention on Biological  
14 Diversity.

15 Given its clear and unambiguous wording,  
16 Article 27(4) can only be relevant to a dispute  
17 concerning interpretation and application of the  
18 Convention on Biological Diversity. For simplicity  
19 I will refer to that as the "CBD". It is clearly not  
20 relevant to a dispute that exclusively concerns  
21 interpretation and application of UNCLOS. And the  
22 only dispute which the Philippines' submissions 11 and  
23 12 require the Tribunal to decide is a dispute  
24 concerning UNCLOS Part XII and related provisions.  
25 That alone eliminates Article 27(4) of the CBD as



1 a potential obstacle to jurisdiction under Article 281  
2 of UNCLOS.

3 So whether Article 281 requires prior resort to  
4 conciliation under the CBD before invoking Part XV of  
5 UNCLOS is, for that reason, strictly academic in these  
6 proceedings. For it to have that effect, it would  
7 have to be shown that Article 27(4) constitutes  
8 an agreement by the parties "to seek settlement of the  
9 dispute by a peaceful means of their own choice."

10 As Judge Wolfrum observed in the *Mox Plant*  
11 (*Provisional Measures*) case:

12 "... such agreement among the parties to  
13 a conflict cannot be presumed. An intention to  
14 entrust the settlement of disputes concerning the  
15 interpretation and application of the Convention to  
16 other institutions must be expressed explicitly in  
17 respective agreements."<sup>50</sup>

18 The "dispute" to which Article 281 makes reference  
19 can only be a dispute concerning interpretation and  
20 application of UNCLOS; it cannot be a dispute  
21 concerning some other treaty. That is the ordinary  
22 and unambiguous meaning of the words used, and neither  
23 the context of Article 281 nor the object and purpose  
24 of Part XV would suggest otherwise. The purpose of

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<sup>50</sup> *Separate Opinion, Mox Plant Case (Ireland v United Kingdom), Provisional Measures, ITLOS No 10, Order of 3 December 2001.*

1 Part XV is, of course, to ensure that UNCLOS disputes  
2 can be settled by some agreed procedure, and the  
3 purpose of Articles 281 and 282 within that broader  
4 framework is to ensure that, where the parties have  
5 agreed on another form or another procedure, that  
6 agreement prevails.<sup>51</sup>

7 That purpose is not served by treating an UNCLOS  
8 dispute as if it were a dispute under some other  
9 treaty. As I said last Wednesday, the fact that a few  
10 substantive provisions of the CBD may be relevant to  
11 the interpretation of Articles 192 and 194 does not  
12 convert this case into a dispute about interpretation  
13 and application of the CBD. If you were to hold  
14 otherwise, that would deter parties to an UNCLOS  
15 dispute from referring to any other treaty, or from  
16 invoking Article 31(3)(c) of the Vienna Convention on  
17 Treaties, or indeed Article 293 of UNCLOS.

18 So our conclusion, therefore, is that  
19 Article 27(4) of the CBD does not bar UNCLOS Part XV  
20 proceedings for an alleged violation of Articles 192  
21 and 194, even if the Convention on Biological  
22 Diversity is relevant to the interpretation of those  
23 articles.

24 Moreover, biodiversity is only one small part of

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<sup>51</sup> Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge, 2005), p.2, references cited at nn. 5 and 6, and p.34ff.

1 our case under submissions 11 and 12. So even if  
2 there were some overlap between our UNCLOS case and  
3 a hypothetical CBD dispute, that should not bring  
4 Article 281 into play. Treaty obligations and treaty  
5 dispute settlement options may overlap, but that does  
6 not mean that they merge or lose their separate  
7 identity.

8 A comparable question arose, as you will be well  
9 aware, in the *Mox Plant* case at the provisional  
10 measures stage,<sup>52</sup> albeit that it was concerned with  
11 Article 282 rather than Article 281. You will find  
12 the text of paragraphs 48 to 52 from the ITLOS order  
13 of 3rd December 2001 at tab 4.8 in your folder. But  
14 if I may summarise what the ITLOS held, they concluded  
15 that:

16 "... the dispute settlement procedures under the  
17 OSPAR Convention, the EC Treaty and the Euratom Treaty  
18 deal with disputes concerning the interpretation and  
19 application of those agreements, and not with disputes  
20 arising under the Convention."

21 They went on to say that although those three  
22 treaties "contain rights or obligations similar to or  
23 identical with the rights and obligations set out in  
24 the Convention, the rights and obligations under those

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<sup>52</sup> *Mox Plant Case (Ireland v United Kingdom) (Provisional Measures)* ITLOS No 10, Order of 3 December 2001, paras. 48-52. MP, Vol. XI, Annex LA-39.

1 agreements have a separate existence from those under  
2 the Convention". The ITLOS then concluded:

3 "... since the dispute before the Annex VII  
4 arbitral tribunal concerns the interpretation or  
5 application of the Convention and no other agreement,  
6 only the dispute settlement procedures under the  
7 Convention are relevant to that dispute."

8 On the same point, I would also draw your  
9 attention to the separate opinion in that case of  
10 Judge Wolfrum, the relevant excerpts of which are at  
11 tab 4.9 in your folder.<sup>53</sup>

12 Mr President, members of the Tribunal, these  
13 passages from the ITLOS decision in *Mox Plant* are  
14 equally applicable to the present dispute. In our  
15 view, you should apply the same reasoning to the  
16 Convention on Biological Diversity and its  
17 relationship to Article 281 of the Convention. There  
18 is no reason to differentiate Article 281 from  
19 Article 282 in this respect. The dispute settlement  
20 procedures of the CBD deal with disputes concerning  
21 interpretation and application of that treaty.  
22 A dispute under UNCLOS does not become a dispute under  
23 the CBD merely because there is some overlap between  
24 the two. Parallel regimes remain parallel regimes.  
25 You have a case to decide under UNCLOS. You do not

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<sup>53</sup> Judge Wolfrum, pp. 1-2.

1 have a case to decide under the CBD.

2 We acknowledge that the reasoning of the ITLOS in  
3 *Mox Plant* is not consistent with the reasoning of the  
4 Annex VII Tribunal in the *Southern Bluefin Tuna* case,  
5 but, as you will recall, the Philippines regards the  
6 latter case as wrongly decided on this issue, and it  
7 has invited you not to follow the reasoning of the  
8 arbitral tribunal. It is not possible for both of  
9 these cases to be correct. We believe you should  
10 prefer the reasoning adopted by the ITLOS, because it  
11 respects the characterisation of the dispute adopted  
12 by the party bringing the case, and because it better  
13 reflects the need for a coherent integration of  
14 different treaty regimes with each other.

15 Mr President, unless I can be of any further  
16 assistance to the Tribunal, that concludes the  
17 Philippines' answer to Question 4. It has been  
18 a great pleasure to appear before you, and I would now  
19 ask you to invite Professor Oxman to the podium.

20 **THE PRESIDENT:** Thank you very much indeed,  
21 Professor Boyle. I will call now Professor Oxman,  
22 please.

23 **(11.19 am)**

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

25 **PROFESSOR OXMAN:** Good morning, Mr President, members of

1 the Tribunal. Mr President, Mr Reichler indicated  
2 this morning that we expect to complete our remarks by  
3 noon. With your permission, sir, I will now continue.  
4 Thank you very much, sir.

5 Mr President, members of the Tribunal, Question 5  
6 requests the Philippines to elaborate on a number of  
7 points regarding the military activities exception set  
8 forth in Article 298(1)(b). The question is posed in  
9 the context of the activities at Mischief Reef that  
10 are the object of submission 12. In this regard  
11 I note that the points raised are not relevant to the  
12 references to Mischief Reef in submissions 4 and 5,  
13 because those submissions do not in any way address  
14 activities; they are concerned with the status of  
15 features and their entitlements, if any.

16 In its Supplemental Written Submission in response  
17 to the questions posed by the Tribunal on  
18 16th December 2014, the Philippines indicated that it  
19 had presented in its Memorial all the information  
20 available to it concerning the construction and  
21 operation of the Chinese facilities at Mischief Reef.

22 As described in the Memorial, the Philippines  
23 first confronted China over reports of Chinese  
24 construction activities at the feature in 1995.

25 China responded by asserting that the structures  
26 were not military in nature, but rather intended as

1 a shelter for its fishermen. Three years later, when  
2 China substantially expanded its initial structures,  
3 it again underscored "the civilian nature of the  
4 facilities". In 1999, China added a helipad, wharves  
5 and additional communications equipment. It  
6 maintained the previous position it had taken, stating  
7 that, "The new facilities are meant for civilian use  
8 and not for military purposes". Documents regarding  
9 the foregoing communications can be found at tab 2.17  
10 of your folders.

11 China's approach is confirmed by the Sailing  
12 Directions for Meiji Reef (the Chinese name for  
13 Mischief Reef) that were published in 2011 by the  
14 Navigation Guarantee Department of the Chinese Navy  
15 Headquarters,<sup>54</sup> and that were submitted as part of the  
16 Philippines' Supplemental Written Submission in  
17 March 2014. They state:

18 "To develop the distant-sea fishing industry, in  
19 1994, China fishing authorities constructed stilt  
20 houses and navigational aid facilities on this reef,  
21 set up administrative offices, and created the  
22 conditions for distant-sea operations, fishing vessel  
23 safety and production, supply, wind protection, and  
24 mooring."

25 This can be found at tab 4.10 of your folders.

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<sup>54</sup> SWSP, Vol. II, p. 127.

1           We have inserted pictures of Mischief Reef taken  
2           in 2003, 2012 and 2013 at tab 4.11 of your folders.  
3           These pictures appeared in the Memorial. They show  
4           Mischief Reef and the structures that were constructed  
5           there prior to the time of the Notification and  
6           Statement of Claim and the filing of the Memorial.

7           The first slide<sup>55</sup> is from a satellite image taken  
8           in 2012. It shows two small structures, one that is  
9           labelled "Site #1" and the other that is labelled  
10          "Site #2".

11          The second slide<sup>56</sup> is an aerial photograph of those  
12          two structures that was taken in 2003. The small  
13          octagonal structures at the bottom right appear to be  
14          the "stilt houses" referred to in the Chinese Sailing  
15          Directions that I read.

16          The third slide<sup>57</sup> contains a 2013 picture of one of  
17          the larger structures.

18          The fourth slide<sup>58</sup> contains a 2013 picture of the  
19          other structure, as well as the small octagonal  
20          structures.

21          The facilities shown on the photographs could have  
22          been used for a variety of non-military purposes,

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<sup>55</sup> MP Figure 5.9.

<sup>56</sup> MP Figure 6.8.

<sup>57</sup> MP Figure 6.9.

<sup>58</sup> MP Figure 6.10.



1 including law enforcement. The Philippines had no  
2 basis at the time it commenced these arbitration  
3 proceedings in January 2013, or at the time it filed  
4 its Memorial in March 2014, for contradicting China's  
5 assurances that the purposes of the facilities were  
6 non-military.

7 Accordingly, the evidence in the record of this  
8 case indicates that at the time that the dispute was  
9 submitted to this Tribunal, China steadfastly and  
10 consistently maintained the position that its  
11 facilities at Mischief Reef were civilian, not  
12 military. The record also indicates that in its  
13 official communications with China on the matter, the  
14 Philippine Government repeatedly requested  
15 explanations and contested the lawfulness of the  
16 appropriation and construction activities, but it did  
17 not contest China's assurances regarding their  
18 purpose. Nor has it done so in its pleadings in this  
19 case. Submission 12 questions only the consistency of  
20 China's appropriation and construction activities with  
21 its obligations under the Law of the Sea Convention.

22 China's statement of 16th June 2015, to which the  
23 Tribunal's question adverts, does not refer  
24 specifically to Mischief Reef. We have, however,  
25 placed photographs of China's dredging activities at  
26 Mischief Reef -- photographs that were retrieved from

1 publicly available websites -- in your folders at  
2 tab 4.12. They trace efforts to create an artificial  
3 island at Mischief Reef this year.

4 The first photograph was taken in February of this  
5 year. It shows the dredging of sand from the seabed  
6 for use as landfill to create an artificial island not  
7 far from Site #2. A dredger is located at the lower  
8 right of the picture, and the landfill is just above  
9 the centre.

10 The second photograph shows the progress that was  
11 made by mid-March of this year, and you can see the  
12 area in Site #2 at the bottom and the other areas now  
13 at the upper left.

14 The third photograph shows further progress in  
15 mid-April of this year.

16 The last photograph was taken from the  
17 International Space Station on 9th June of this year.  
18 It shows an artificial island created by landfill  
19 covering the entire northern half of the reef. The  
20 large number of dredgers and other vessels used to  
21 achieve this can be seen in the picture -- in my case  
22 at least if it's enlarged.

23 These photographs suggest a substantial expansion  
24 of activity. Its nature and purpose, however, is  
25 unknown. But dredging and landfill are not inherently  
26 military in nature, and China does not suggest

1 otherwise.

2 Question 5 asks us to consider whether an activity  
3 that is military in nature can be deprived of that  
4 characterisation for purposes of Article 298(1)(b) by  
5 virtue of the activity concurrently serving other  
6 purposes. The answer is yes. The express exception  
7 in the article is for military activities, not  
8 mixed-use activities. For example, substantial mixed  
9 use of a dock by both naval and other vessels might  
10 well mean that operation of the dock would not come  
11 within the exception for military activities. Only  
12 military activities of the naval vessels would remain  
13 within the exception.

14 Even if China's references to reefs are regarded  
15 as including Mischief Reef, its statement of  
16 16th June 2015 accordingly confirms that the nature  
17 and purpose of China's activities at Mischief Reef are  
18 not military for purposes of Article 298(1)(b). Even  
19 if the newly constructed facilities (that is,  
20 facilities that were constructed after the filing of  
21 the Memorial) are said to be "satisfying the need of  
22 necessary military defense", China itself declares  
23 that the "main purpose of [its construction]  
24 activities is to meet various civilian demands", which  
25 it then proceeds to identify. Those construction  
26 activities are plainly non-military; they do not fall

1 within the exception of Article 298(1) (b).

2 The Philippines informed the Tribunal of the  
3 appearance of Chinese military personnel at Mischief  
4 Reef. That fact does not, as such, change the  
5 characterisation of the facilities' nature or purpose.  
6 The mere presence of military personnel does not  
7 determine the nature and purpose of the underlying  
8 activity. For example, the presence of a military  
9 garrison and weapons guarding the entrance to  
10 a harbour does not render the operation of the harbour  
11 a military activity, or turn the harbour into  
12 a military facility. Neither does the harbour's  
13 strategic location or importance.

14 Moreover, any change in the nature or purpose of  
15 the facility would not be relevant to the Philippines'  
16 claims regarding China's acts of appropriation and  
17 construction at the time that they occurred,  
18 commencing in the mid-1990s and continuing through the  
19 filing of the Statement of Claim in this case. Those  
20 acts are, in our view, unlawful because they were  
21 carried out without the requisite consent, located as  
22 they are within the limits of the Philippine exclusive  
23 economic zone and continental shelf. The question of  
24 whether their purpose might be military is pertinent  
25 only to an objection to the jurisdiction of this  
26 Tribunal on grounds that the nature and purpose of

1 China's activities at Mischief Reef is military --  
2 an assertion that China has not made either in regard  
3 to these proceedings or in its other statements  
4 regarding its activities at the Mischief Reef.

5 Once the applicant has established that there is  
6 a dispute concerning the interpretation or application  
7 of the Convention that has been submitted to the  
8 appropriate tribunal under Section 2 of Part XV, the  
9 respondent bears the burden of asserting an optional  
10 objection to jurisdiction under Article 298 and  
11 proving the facts necessary to sustain that objection.  
12 This is especially true where the issue concerns the  
13 nature and purpose of the respondent's own activities,  
14 a matter with respect to which the respondent is in  
15 the best position to garner the evidence.

16 In the *Arctic Sunrise* case, the Law of the Sea  
17 Tribunal stated that:

18 "... the Netherlands should not be put at  
19 a disadvantage because of the non-appearance of the  
20 Russian Federation in the proceedings."<sup>59</sup>

21 The same principle clearly applies in this case as  
22 well. China has not appeared. It has submitted  
23 a Position Paper that does not raise the exception for  
24 military activities. Quite to the contrary, it has  
25 consistently claimed at all relevant times that its

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<sup>59</sup> *Arctic Sunrise*, ITLOS, Order, 2013, para. 56. MP, Vol. XI, Annex LA-45.

1 activities at Mischief Reef are not military in  
2 character. In these circumstances, Mr President, we  
3 see no basis for declining jurisdiction on the grounds  
4 that those activities are military.

5 The decision by a state to refrain from  
6 characterising its activities as military should be  
7 accorded significant weight. As I observed last week,  
8 the decision whether to characterise activities as  
9 military is not made lightly, and the implications of  
10 characterising activities as military can transcend  
11 the Law of the Sea Convention. It is difficult for  
12 others to determine what those implications, and their  
13 potential effects, might be.

14 There would appear to be little, if any, risk that  
15 a state would characterise its activities as civilian  
16 rather than military for self-serving purposes under  
17 Article 298. For example, even if China had asserted  
18 a jurisdictional objection to submission 12 based on  
19 the military activities exception, it would have  
20 encountered difficulty proving it in light of its own  
21 statements to the contrary. Indeed, China's repeated  
22 assurances to the Philippines regarding the civilian  
23 nature of its activities at Mischief Reef are so clear  
24 and specific that the Tribunal would be justified in  
25 concluding that China is procedurally estopped from  
26 now asserting that those activities are military;

1 an assertion which, of course, China has not made.

2 Even if China, in its statement of 16th June 2015,  
3 had made a specific assertion indicating that the  
4 purpose of its facilities at Mischief Reef is now  
5 military -- which it has not done -- such an assertion  
6 would have no effect on the jurisdiction of this  
7 Tribunal. The nature of the activity complained of is  
8 determined as of the time that activity occurred. The  
9 respondent cannot thereafter unilaterally change the  
10 jurisdictional facts regarding its past conduct,  
11 especially two and a half years after the proceedings  
12 were commenced.

13 In sum, Mr President, the facts are that China's  
14 acts of appropriation and construction began in 1995,  
15 were expanded in 1999, and continued between then and  
16 2012, and that China repeatedly assured the  
17 Philippines at the time that their purpose was  
18 civilian, not military. There is accordingly no  
19 basis, in our view, for concluding that the activities  
20 of which the Philippines complains in submission 12  
21 are military activities.

22 Mr President, that concludes my remarks on  
23 Question 5. I thank you and the other members of the  
24 Tribunal for your kind attention. Mr President, I ask  
25 that you invite Mr Reichler to the podium to respond  
26 to your question this morning regarding the timing of

1       our responses to the two questions posed by  
2       Judge Wolfrum following Mr Reichler's presentation.

3             Thank you, sir.

4       **THE PRESIDENT:** Thank you very much, Professor Oxman.

5       I will now ask Mr Reichler, please, to come forward.

6       **MR REICHLER:** Mr President, as promised, I address you  
7       now in response to your question about the timing of  
8       our answers to the questions put by Judge Wolfrum at  
9       the end of my presentation this morning.

10            We would propose to answer the question about  
11       China's characterisation of the Spratly features as  
12       "islands", in its note of 6th July 2015 and elsewhere,  
13       orally, immediately after the break. However, we  
14       would respectfully reserve the right, if we may, to  
15       amplify our answers after we have had a chance to more  
16       thoroughly review the written pleadings and annexes.  
17       We would supply any such amplification of our answer  
18       to that question on or before 23rd July, as you have  
19       instructed.

20            In regard to Judge Wolfrum's question pertaining  
21       to the treaties invoked by China in its note of  
22       6th July 2015, and their relevance, if any, to the  
23       legal disputes in this case, we would propose to  
24       provide our answer to that question in writing on or  
25       before 23rd July.

26            Mr President, unless I can be of further



1 assistance to you or your colleagues on the Tribunal,  
2 I would propose that this might be an excellent time  
3 for the break. And perhaps, Mr President, in order to  
4 allow a sufficient time to prepare and review the  
5 answer we will give you orally after the break, you  
6 might kindly consider instructing us to return at  
7 12.15.

8 Thank you, Mr President.

9 **THE PRESIDENT:** Thank you very much. I think other  
10 members of the Tribunal have questions, which I think  
11 it would be useful to put them now, before we break.  
12 So I will ask Professor Soons to ask his question  
13 first.

14 **Tribunal questions**

15 **PROFESSOR SOONS:** My question relates to the potential  
16 effects of the Declaration of Conduct on the issues of  
17 jurisdiction and admissibility. This issue was  
18 addressed by Mr Martin on Wednesday, and again this  
19 morning when he dealt with particularly the estoppel  
20 issue, but I am not asking for further clarification  
21 on estoppel now.

22 On Wednesday, Mr Martin stated:

23 "In its Memorial, the Philippines argued that even  
24 if the [Declaration of Conduct] were a binding  
25 agreement within the meaning of Article 281

1       (*quod non*), and even if it purported to exclude  
2       further procedures (also *quod non*), China could still  
3       not rely on it to avoid jurisdiction due to its own  
4       conduct in flagrant disregard of the undertakings it  
5       made in the DOC."<sup>60</sup>

6           Mr Martin then mentioned:

7           "... a general principle of law that 'a party  
8       which ... does not fulfil its own obligations cannot  
9       be recognized as retaining the rights which it claims  
10      to derive from the relationship'."<sup>61</sup>

11          The clean hands doctrine.

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

20          "China reiterates its concern over the  
21      Philippines' alleged building of new structures in the  
22      Second Thomas Shoal. This, for them, is a violation  
23      of the DOC ..."

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<sup>60</sup> Tr., 8 July 2015, p. 17:4-10 (Presentation of Mr. Larry Martin)  
(reference is to uncorrected version).

<sup>61</sup> Tr., 8 July 2015, p. 20:2-6 (Presentation of Mr. Larry Martin)  
(reference is to uncorrected version).

1           Could the Philippines elaborate on any  
2           implications of such observations made by China with  
3           respect to the Philippines' compliance with its  
4           obligations in the South China Sea? Thank you.

5 **MR REICHLER:** Thank you very much, Professor Soons.

6           I will, of course, consult with our Agent and  
7           colleagues in regard to the timing of our answer to  
8           that question.

9 **THE PRESIDENT:** Thank you very much. Judge Pawlak also  
10          has some questions.

11 **JUDGE PAWLAK:** Thank you, Mr President. Mr President,  
12          I have some questions to Professor Sands and to  
13          Mr Martin for clarification and a further  
14          understanding of their views as presented last week.

15                 To Professor Sands: Professor, you argued in your  
16          interesting statements last week that the question of  
17          which state has sovereignty over the insular feature  
18          is "entirely irrelevant" to the characterisation of  
19          an insular feature or the entitlements it may have,  
20          and that:

21                 "... such matters ... fall to be determined by  
22          this Tribunal exclusively by interpretation and  
23          application of Articles 13 and 121, and other relevant  
24          provisions of the Convention."<sup>62</sup>

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<sup>62</sup> Tr., 8 July 2015, p. 3:14-62 (Presentation by Mr. Philippe Sands QC)  
(reference is to uncorrected version).

1           Could you agree, sir, that among those "other  
2 relevant provisions" that should be taken into  
3 consideration is the preamble of the Convention,  
4 including the paragraph in which the states parties to  
5 the Convention "recogniz[e] the desirability of  
6 establishing through this Convention, with due regard  
7 for the sovereignty of all States" -- I repeat: "with  
8 due regard for the sovereignty of all States" --  
9 a legal order for the seas and oceans"?

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

14           They are the questions to Professor Sands, and  
15 I have questions to Mr Martin.

16           Mr Martin, would you agree that Article 283  
17 requires the parties to a dispute not only to exchange  
18 views on some aspects of their dispute, but also  
19 imposes on the parties the duty to exchange views  
20 expressly -- I underline "expressly" -- for the  
21 purpose of settling the dispute "by negotiation or  
22 other peaceful means"?

23           In light of this understanding, could you comment  
24 on some discrepancies between your statement made last  
25 week that "the Philippines has more than met its  
26 obligation to exchange of views with China under

1 Article 283",<sup>63</sup> with the following information that is  
2 set out in the Chinese Position Paper of  
3 7th December 2014:

4 "... the exchanges of views between China and the  
5 Philippines in relation to their disputes have so  
6 far..."

7 I underline "so far":

8 "... pertained to responding to incidents at sea  
9 in the disputed areas and promoting measures to  
10 prevent conflicts, reduce frictions, maintain  
11 stability in the region, and promote measures of  
12 cooperation."<sup>64</sup>

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

16 "... the two countries have never engaged in  
17 negotiations with regard to subject-matter of the  
18 arbitration."<sup>65</sup>

19 Thank you, Mr President.

20 **MR REICHLER:** Thank you, Judge Pawlak. Thank you very  
21 much.

22 **THE PRESIDENT:** Finally, I think we have a question from  
23 Judge Cot.

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<sup>63</sup> Tr., 8 July 2015, p. 7:19-21 (Presentation by Mr. Larry Martin)  
(reference is to uncorrected version)..

<sup>64</sup> Chinese Position Paper, para. 47.

<sup>65</sup> Chinese Position Paper, para. 45.

1   **JUDGE COT:**       Thank you, Mr President.

2           Mr President, my question is for Professor Sands.  
3       Professor Sands answered the Tribunal's question on  
4       vertical datum. In my opinion, he didn't really  
5       answer it. He answered by examining the question of  
6       the Chinese charts, but not vertical datum as such.

7           We all know that vertical datum is an essential  
8       element in qualification of low-tide elevations. At  
9       least the International Court of Justice did so in the  
10      *Nicaragua v Colombia* case, and the parties actually  
11      spent quite some time on identifying the relevant  
12      vertical datum, and they were opposed to the methods  
13      of identifying these vertical datum.

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

23          So I would like to have some elements on this, to  
24      answer fully the question put forward to you by the  
25      Tribunal. Thank you.

26   **MR REICHLER:** Thank you, Judge Cot. Mr President, does

1           that comprise the entirety of the questions?

2   **THE PRESIDENT:** Yes. For the moment, yes.

3   **MR REICHLER:** Thank you.

4           As I indicated, we certainly would be prepared to  
5           give an oral answer to one of Judge Wolfrum's  
6           questions put earlier this morning after the break,  
7           again subject to our right to amplify in writing after  
8           we have had a chance to thoroughly review the record  
9           by the deadline that you have given us of 23rd July.

10          I doubt we are going to have a three- or four-hour  
11          break this morning. Given what I would assume to be  
12          the very reasonable amount of time for the break that  
13          you are undoubtedly likely to order, I think it is  
14          most likely that we would want to answer all of the  
15          very serious and excellent questions that we have  
16          received at this time in writing on or before  
17          23rd July. However, we will take a look at the  
18          provisional transcript during the break and see if it  
19          is possible for us to provide any further answers, or  
20          partial answers, at the end of the break.

21          I don't mean to appear to be flattering anybody,  
22          but I think it is quite obvious these are all very  
23          serious and well-thought-out and important questions,  
24          and they merit a serious and well-thought-out response  
25          by the Philippines. Therefore, I think it is unlikely  
26          that we would want -- or that I think the Tribunal

1 would want us -- to provide answers after 15 or  
2 20 minutes, but rather that we take the time that  
3 serious questions like this merit.

4 By characterising these questions as serious and  
5 excellent and well-thought-out, I do not mean to  
6 suggest that I think we have any difficulty providing  
7 persuasive answers to all of them. In fact, I am  
8 quite sure we can, and that we will be able to  
9 persuade you in our answers to these questions -- as  
10 we have said throughout these hearings -- that there  
11 is not a shred of doubt that this Tribunal has  
12 jurisdiction over each and every one of our  
13 submissions, that legal disputes exist in respect of  
14 each and every one of our submissions, and that these  
15 legal disputes arise under and call for interpretation  
16 and application of the 1982 Convention, therefore  
17 leaving no doubt that all of our submissions are  
18 within your jurisdiction and entirely admissible.

19 But we will return after the break and at least  
20 provide you with an oral response to one of  
21 Judge Wolfrum's questions.

22 Thank you, Mr President.

23 **THE PRESIDENT:** Thank you very much. I think we will  
24 certainly want to hear whatever you are able to give  
25 at this time. If not, naturally we will expect that  
26 you will provide the amplification that you mentioned,



1 not only to Judge Wolfrum's question but to the other  
2 questions, if necessary, at the time that we have set.

3 **MR REICHLER:** Yes. We will do our best, sir.

4 **THE PRESIDENT:** Yes. Thank you very much indeed. So we  
5 will close now, and come back at 12.30.

6 **MR REICHLER:** Thank you, Mr President.

7 **(11.57 am)**

8 **(A short break)**

9 **(12.37 pm)**

10 **THE PRESIDENT:** So, Mr Reichler, I notice that you have  
11 been chosen as the spokesperson.

12 **MR REICHLER:** Yes. They actually asked me to do it in  
13 Chinese, but I had to decline that mission! So I will  
14 use my inartful English, and do the best I can.

15 **(12.38 pm)**

16 **Response to Tribunal questions by MR REICHLER**

17 **MR REICHLER:** Mr President, we are very grateful to the  
18 Tribunal for its questions, and even more for what  
19 they demonstrate about this Tribunal's dedication,  
20 hard work and mastery of the rather extensive record  
21 in this case. It is gratifying to the Philippines to  
22 know that all of you have spent so much time on the  
23 pleadings that have been filed.

24 The questions, as I indicated before the break,  
25 are very serious ones, they are certainly relevant,

1 important ones; and as such, they merit our deepest  
2 thought and analysis prior to giving you our  
3 definitive responses. And so I say, before I venture  
4 into giving you the answers that we are able to  
5 provide today in a half-hour, that we would  
6 respectfully provide written amplifications to all of  
7 these questions, as you have indicated, on or before  
8 23rd July.

9 With that said, I will provide our answers,  
10 insofar as we have been able to develop them in the  
11 time allotted, to the questions that have been posed  
12 this morning. I will take them in the order in which  
13 they were given, if that is acceptable.

14 Judge Wolfrum referred to China's diplomatic note  
15 of 6th July 2015 and particularly to the words "South  
16 China Sea Islands". I think this brings up a very  
17 critical point. China repeatedly refers to the South  
18 China Sea features, particularly Scarborough Shoal and  
19 all of the Spratly features, as "islands". It refers  
20 to all of the Spratly features in particular as the  
21 "Nansha Islands".

22 Now, in its diplomatic exchanges, both *notes*  
23 *verbales* and its oral *démarches*, and its official  
24 statements, it has claimed that every feature in the  
25 Nansha Islands is an island, and that the Nansha  
26 Islands are a unified whole. China even refers to

1 submerged features like Reed Bank as an island, as  
2 part of the Nansha Islands; and it refers to low-tide  
3 elevations, including Mischief Reef, as islands. And  
4 it claims a 200-mile entitlement for the Nansha  
5 Islands as a whole, including all of its features;  
6 and, as we showed this morning, it claims a 200-mile  
7 EEZ for Scarborough Shoal. All of these statements of  
8 China's position are included at tab 4.1 today, as  
9 part of the sources of China's positions that  
10 demonstrate legal disputes in regard to these matters.

11 So there can be no question that there are legal  
12 disputes about all of the features that the  
13 Philippines has included in its submissions:  
14 Scarborough Shoal and all eight Spratly features.  
15 China regards them as islands; the Philippines regards  
16 all of these features, as I have said, either as  
17 low-tide elevations, entitled to no maritime zone, or  
18 at least not even to a 12-mile territorial sea, and/or  
19 rocks, which are entitled to no more than a 12-mile  
20 territorial sea.

21 But there is another dispute here that recalls  
22 Judge Cot's question, to which I will come in the  
23 course of the answers I am presenting at this time.  
24 There is a dispute between China's characterisation of  
25 all of these features in its diplomatic notes and  
26 *démarches* and its official statements, and China's own

1 charts. China's own charts are in agreement with the  
2 Philippines, or *vice versa*. China's own nautical  
3 charts call a low-tide elevation every feature that  
4 the Philippines calls a low-tide elevation, and they  
5 call a submerged feature those areas that the  
6 Philippines regards as submerged.

7 This does not negate the existence of a legal  
8 dispute between the Philippines and China because, of  
9 course, China has adopted policy positions which are  
10 in direct contradiction with its own charts, and it  
11 has sought to enforce those positions, as I have  
12 pointed out repeatedly and as is demonstrated  
13 throughout the record. You will, of course, find all  
14 of the sources in our list of sources. We will  
15 amplify on this response prior to 23rd July.

16 Professor Soons brought up the DOC and  
17 specifically asked if the Philippines has, in some  
18 way, been in violation of it. I hope you will bear  
19 with me as I insist that the DOC, in the first place,  
20 is not a legally binding instrument. I need not  
21 elaborate; you are very well aware of our position and  
22 the justification for it. And in any event, it  
23 envisions -- rather than precludes -- recourse to  
24 arbitration per Article 33 of the UN Charter or per  
25 Part XV of UNCLOS, and in fact it specifically refers  
26 to the dispute resolution mechanisms of these

1 instruments.

2 Now, in regard to the issue of unclean hands, as  
3 Professor Soons pointed out, it is the Philippines  
4 that has invoked the doctrine of unclean hands as  
5 a form of estoppel against China asserting the DOC.  
6 Again, we don't believe the Tribunal needs to reach  
7 that issue because the issue is ended with your  
8 finding -- if you agree with us -- that the DOC is not  
9 a legally binding agreement in the first place, or it  
10 is not preclusive of recourse to the dispute  
11 resolution mechanisms of UNCLOS.

12 But on the subject of unclean hands, well, you,  
13 Mr President, members of the Tribunal, can determine  
14 whether their hands are unclean; but as  
15 Professor Oxman showed you, they are covered with sand  
16 and other dredged materials. In regard to the  
17 Philippines, the bald and unsupported statements by  
18 China to the effect that the Philippines is somehow in  
19 violation of the political commitments it made under  
20 the DOC are exactly that: bald, unsupported and,  
21 I might say, completely false.

22 The Philippine vessel BRP Sierra Madre became  
23 stuck on Second Thomas Shoal in the late 1990s, and  
24 its rusted hulk, manned by a handful of Philippine  
25 personnel, has been there ever since. In other words,  
26 its presence at Second Thomas Shoal predates by

1 several years the DOC. The DOC, as you will recall,  
2 calls for maintaining the status quo; it doesn't call  
3 for any state to withdraw its personnel or equipment  
4 from any feature at which they were present prior to  
5 its signature.

6 In regard to the other features in the Spratlys  
7 that are occupied by Philippine personnel, again,  
8 China has presented nothing, either publicly or in  
9 diplomatic exchanges or in its Position Paper, to  
10 support the idea that the Philippines has engaged in  
11 any enhancement of its presence or facilities  
12 whatsoever. In fact, the contrary is true: the  
13 Philippines has not enhanced its presence, its  
14 facilities, its personnel, at any feature in the  
15 Spratlys under Philippine occupation at any time since  
16 prior to the DOC.

17 In fact, as you will recall from our Memorial, the  
18 largest feature in the Spratlys occupied by the  
19 Philippines -- which is known as Thitu or Pagasa --  
20 has a runway. That runway is full of potholes. The  
21 Philippines has even refrained from filling in the  
22 potholes in the runway in order to avoid any  
23 suggestion that it is enhancing its presence at any of  
24 these features. I might say that I think that is  
25 a bit extreme: I think filling in potholes in a runway  
26 for the purposes of safety would not violate any

1 political commitments the Philippines has made. But  
2 this gives you a good idea of how rigorous the  
3 Philippines has been in avoiding violation of any of  
4 the political commitments it undertook in the DOC.

5 Again, our response to Professor Soons' question  
6 will be amplified within the deadline established by  
7 the Tribunal.

8 Judge Pawlak asked two questions of  
9 Professor Sands and one of Mr Martin. Again, we will  
10 answer briefly today, in part because you have asked  
11 for jurisprudence, and we want to take care to be  
12 thorough and accurate in citing the relevant  
13 jurisprudence.

14 But we will answer briefly today simply by stating  
15 that in relation to the question of whether the  
16 preamble of the 1982 Convention is to be treated as  
17 one of the other relevant provisions to which  
18 Professor Sands referred alongside Articles 13 and  
19 121, the Tribunal will have noted what he said last  
20 week: that the preambular language of a treaty is  
21 generally not treated as having the same status as the  
22 operative parts of a Convention. The preamble thus is  
23 not to be treated as one of the "other relevant  
24 provisions" that Professor Sands had in mind.

25 But in any event -- as you will see elaborated in  
26 the response we will provide in writing -- the

1 position of the Philippines in this case is entirely  
2 consistent with the preambular language in regard to  
3 respect for the sovereignty of the states parties.  
4 There is absolutely no contradiction between the  
5 Philippines' position in this case in regard to your  
6 jurisdiction, and that particular preambular language.

7 As regards Judge Pawlak's second question, as you  
8 know, the Philippines' position is that the character  
9 of a maritime feature -- whether it is a low-tide  
10 elevation, a rock or a full island -- is distinct  
11 from, and can be decided separately from, the question  
12 of which state may be sovereign over it. That is  
13 decided separately. Professor Sands did cite some of  
14 the relevant jurisprudence, particularly in his  
15 presentation last week. A fuller and more detailed  
16 response on the applicable jurisprudence and practice  
17 under it will be provided within the time limits  
18 established by the Tribunal.

19 Judge Pawlak directed a question in regard to  
20 Mr Martin's presentation concerning the obligation to  
21 exchange views. Once again, we will answer fully in  
22 writing as of 23rd July. But for present purposes, we  
23 would note that China's assertion in its Position  
24 Paper of December 2014 that the parties' exchanges of  
25 views to date have been limited to "preventing  
26 incidents at sea, promoting measures to reduce



1 conflicts" is not correct. In fact, it is shamefully  
2 false. Shamefully false.

3 As we showed in our Memorial, and as Mr Martin  
4 demonstrated last week -- and this is fully supported  
5 in all the footnote references in his speech -- the  
6 parties have exchanged views repeatedly over many  
7 years on the substance of their disputes, as we have  
8 presented them in this case. In fact, the Honourable  
9 Secretary of Foreign Affairs gave you a recitation of  
10 a good many -- but certainly not all -- of these  
11 exchanges of views between the Philippines and China  
12 regarding the maritime disputes that are at the centre  
13 of this case; indeed, all of them.

14 It is our position -- again, as we will further  
15 elaborate, but to be perfectly clear -- that, contrary  
16 to China's assertion in its Position Paper, the  
17 parties have exchanged views repeatedly, and over many  
18 years, on all aspects of the maritime disputes that  
19 have been placed before you in these proceedings.  
20 Unlike China, we will not support this statement with  
21 empty words. We have supported it amply in the  
22 record, and we will call your attention to all of that  
23 evidence in our written response.

24 Finally, I come to the question posed by  
25 Judge Cot. We acknowledge or understand that  
26 Judge Cot does not consider the response that we have

1 provided to the Tribunal's question on vertical datum  
2 to be fully adequate, and we do apologise for that.  
3 This is, of course, a technical question, and one that  
4 we will devote considerable attention to in the coming  
5 week, in consultation with the technical experts who  
6 have been retained by the Philippines.

7 Judge Cot -- who was then ad hoc Judge Cot -- will  
8 remember very well Dr Robert Smith, who was the  
9 technical advisor to Colombia. He is one of the  
10 technical advisors to the Philippines, and we are  
11 quite confident that he will be able to assist us in  
12 getting it right the second time round; that we will  
13 be able to answer this question to your and the  
14 Tribunal's satisfaction before 23rd July. I will say  
15 this, if I may, as a placeholder, because we are  
16 attempting to answer all of the questions, at least in  
17 part, in advance of our written responses.

18 As I indicated previously in response to  
19 Judge Wolfrum's question on islands, the Chinese  
20 charts that you have been given -- these are all  
21 official Chinese charts -- indicate the status, the  
22 character, the nature of these various features --  
23 that is, whether they are below water, whether they  
24 are low-tide elevations or whether they are above  
25 water at high tide -- and the Philippines considers  
26 that all of the characterisations of these features in

1 the Chinese charts -- whether as submerged low-tide  
2 elevations or above water at high tide -- are  
3 accurate. The Philippines accepts them, and indeed  
4 has incorporated them into its own presentations in  
5 this case. There are no discrepancies there.

6 There is no factual dispute between the  
7 Philippines and China, at least in regard to China's  
8 charts, regarding the nature/status/character of these  
9 features under Article 13 or under Article 121(3).  
10 The dispute exists because China, in its diplomatic  
11 statements, *démarches*, notes, official statements, and  
12 in its enforcement actions in the South China Sea, in  
13 fact has adopted positions that are diametrically  
14 opposed to those reflected in its own charts.

15 Mr President, I trust that you will regard this as  
16 a good faith effort on the part of the Philippines, in  
17 the short time allotted, to give the most direct  
18 and -- hopefully -- helpful answers to the Tribunal to  
19 the various questions that have been posed this  
20 morning. We will, of course, revert to you within ten  
21 days with our fuller written responses.

22 Unless I can be of any further assistance to the  
23 Tribunal in regard to these matters, I would  
24 respectfully request that you call the Honourable  
25 Solicitor General and Agent of the Philippines to the  
26 podium for closing remarks.

1 **THE PRESIDENT:** Thank you very much indeed, Mr Reichler.  
2 I think that what you have said is in line with what  
3 the Tribunal expected. So we will expect to receive  
4 the amplifications that you have promised, and I do  
5 not think that we need any further explanation from  
6 you.

7 So I will now ask the Agent to come to the podium  
8 and give the submissions. Thank you.

9 **(1.01 pm)**

10 **Closing remarks by SOLICITOR GENERAL HILBAY**

11 **SOLICITOR GENERAL HILBAY:** Mr President, distinguished  
12 members of the Tribunal, I am honoured to conclude the  
13 oral presentation submitted by the Philippines on  
14 jurisdiction, which, if I may add, have been so  
15 diligently prepared and presented by our exceptional  
16 legal team. I know I speak for all of us, including  
17 the Honourable Secretary of Foreign Affairs, when  
18 I say that it has been such a remarkable privilege to  
19 prepare the Philippines before you in these  
20 proceedings.

21 On behalf of the Filipino people and our  
22 government, I convey to you, Mr President, and to each  
23 esteemed member of this eminent Tribunal, our deep  
24 gratitude. We also thank the excellent staff of the  
25 Permanent Court of Arbitration, the stenographers, and

1 the entire team that has made these hearings run so  
2 smoothly.

3 Despite the challenges that China's non-appearance  
4 has posed, you have demonstrated your evident  
5 determination to "satisfy [yourselves] ... that [you]  
6 ha[ve] jurisdiction over the dispute" we have brought  
7 before you. Your astute questions, raised both before  
8 and during these hearings, have made quite clear that  
9 the Tribunal has left no stone unturned. We hope that  
10 we have properly and sufficiently addressed all the  
11 points that you have raised, and demonstrated why  
12 there is manifestly no bar to the Tribunal exercising  
13 jurisdiction in this case.

14 Before concluding, I do wish to acknowledge and  
15 extend our appreciation to the observers from  
16 Indonesia, Japan, Malaysia, Thailand and Vietnam. By  
17 their presence in this Great Hall of Justice, they  
18 have demonstrated the vital importance of these issues  
19 to the region, and indeed to the 1982 Convention and  
20 to the international rule of law. This case is not  
21 just between the Philippines and China; it is about  
22 everyone who has coasts facing on to the South China  
23 Sea. It is about respect for the integrity of the  
24 Convention itself. I thank you, distinguished ladies  
25 and gentlemen.

26 Mr President, members of the Tribunal, I thank you

1 once again for your kind attention, which we know was  
2 made more difficult by what Professor Philippe Sands  
3 described as the "tropical heat" we all experienced in  
4 this Great Hall, especially on the first day! We are  
5 certain that you will deliberate carefully, taking  
6 account of all our arguments, and that your expertise  
7 and wisdom will bring us to the correct and just  
8 result in accordance with international law.

9 Mr President, members of the Tribunal, I will now  
10 present the Philippines' final submissions. The  
11 Philippines respectfully asks the Tribunal to adjudge  
12 and declare that the claims brought by the  
13 Philippines, as reflected in its submissions recorded  
14 at pages 271 and 272 of our Memorial, are entirely  
15 within its jurisdiction and are fully admissible.

16 Mr President, I thank you and the members of the  
17 Tribunal for your courtesy and attention, today and  
18 throughout these hearings. Have a pleasant afternoon.

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

20 Mr Solicitor General.

21 **(1.05 pm)**

22 **Closing remarks by THE PRESIDENT**

23 **THE PRESIDENT:** I shall shortly be declaring this hearing  
24 closed, but before I do so, allow me to make a few  
25 remarks about the next steps in the proceedings.

1           As I mentioned in my opening remarks on Tuesday,  
2           the Arbitral Tribunal has been conscious of its duty  
3           under Article 5 of Annex VII of the Convention to  
4           "assure each party a full opportunity to be heard and  
5           to present its case". I noted that the Arbitral  
6           Tribunal has kept China updated on all developments in  
7           the arbitration. The Registry has been delivering to  
8           the Chinese Embassy copies of the daily transcripts of  
9           this hearing, a copy of the judge's folder handed up  
10          by the Philippines, and the new materials received  
11          from the Philippines over the weekend.

12          The parties will have until next Monday -- that is  
13          20th July 2015 -- to review and submit corrections to  
14          the transcripts. The Registry will be in contact with  
15          the parties regarding the format and method of  
16          submitting such corrections. With respect to requests  
17          by the observers for copies of the reviewed and  
18          corrected transcripts, as well as other documents in  
19          connection with the case, the Registry will be in  
20          contact with the observers in due course. The  
21          Philippines will have until next Thursday -- that is  
22          23rd July 2015 -- to submit written answers to any of  
23          the arbitrators' questions, or to amplify their oral  
24          answers in writing.

25          Article 25(2) of the Rules of Procedure deals with  
26          a party's failure to appear or to make submissions.

1 It sets forth a procedure, already implemented, for  
2 the Arbitral Tribunal to invite written arguments from  
3 the appearing party, and for the non-appearing party  
4 to comment on those further written arguments.

5 Article 25(2) additionally provides that:

6 "The Arbitral Tribunal may take whatever other  
7 steps it may consider necessary, within the scope of  
8 its powers under the Convention, its Annex VII, and  
9 these Rules, to afford to each of the Parties a full  
10 opportunity to present its case."

11 In line with this, the Arbitral Tribunal has  
12 decided to provide China with the opportunity to  
13 comment in writing by Monday, 17th August 2015 on  
14 anything that was said during this hearing on  
15 jurisdiction and admissibility, and the subsequent  
16 written answers from the Philippines which are to be  
17 filed on 23rd July 2015.

18 As the Arbitral Tribunal now enters its  
19 deliberations, and as noted in Procedural Order No. 4,  
20 the Arbitral Tribunal is conscious of its duty to  
21 conduct proceedings in order "to avoid unnecessary  
22 delay and expense and to provide a fair and efficient  
23 process". The Arbitral Tribunal will endeavour to  
24 issue its decision on issues of jurisdiction and  
25 admissibility that it determines to be appropriate as  
26 soon as possible.



1           As further noted in Procedural Order No. 4, if the  
2           Arbitral Tribunal determines that there are  
3           jurisdictional objections or issues of admissibility  
4           that do not possess an exclusively preliminary  
5           character, then, in accordance with Article 20(3) of  
6           the Rules of Procedure, such matters will be reserved  
7           for consideration and decision at a later stage of the  
8           proceedings.

9           Finally, on behalf of the Arbitral Tribunal,  
10          I wish to thank Mr Trevor McGowan, the court reporter,  
11          for his excellent services. I also express our thanks  
12          to the Registrar, Ms Judith Levine, her colleague  
13          Mr Garth Schofield, and their team from the Permanent  
14          Court of Arbitration, for their services to the  
15          Tribunal in all matters. I also wish to thank the  
16          observer delegations for their presence. Finally,  
17          I wish to thank -- and heartily to thank -- the  
18          distinguished representatives of the Philippines for  
19          their helpful oral submissions, and for their written  
20          submissions that they have promised us today.

21          I thank you very much, and I now declare this  
22          hearing closed and wish everyone a safe return journey  
23          home. Thank you very much indeed.

24       **(1.11 pm)**

25                               **(The hearing concluded)**