

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

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**REPUBLIC OF THE PHILIPPINES**

**v.**

**PEOPLE'S REPUBLIC OF CHINA**

SUPPLEMENTAL WRITTEN SUBMISSION OF THE PHILIPPINES

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16 MARCH 2015



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## INTRODUCTION

1. The Republic of the Philippines respectfully presents this Supplemental Written Submission in response to the Tribunal's 16 December 2014 "Request for Further Written Argument by the Philippines Pursuant to Article 25(2) of the Rules of Procedure."

2. The Philippines is grateful for the opportunity to provide its views on the matters addressed in the Tribunal's questions. It is mindful of the evident care and effort that went into the preparation of the questions. It has therefore made every effort to respond to each as clearly and as directly as possible. The Philippines is confident that when the Tribunal has completed its review of the additional observations and information presented herein, it will conclude that it has jurisdiction over the dispute the Philippines has submitted to it, and that the claims of the Philippines are well founded in fact and law.

3. This Supplemental Written Submission is presented in twelve volumes. Volume I contains the main text of the Philippines' responses to the 26 Questions posed by the Tribunal, together with relevant figures. For the Tribunal's convenience, each of its questions is restated and followed immediately by the response of the Philippines.

4. Volume II consists of an *Atlas of Relevant Features* in which the Philippines has compiled the information concerning all of the features identified in the Tribunal's Questions 19 through 24. The Philippines has chosen to proceed in this fashion because it considers that the *Atlas* presents the information requested by the Tribunal in the most readily-accessible and user-friendly format. The *Atlas* presents the relevant features in alphabetical order and, for each, provides: a geographic and hydrographic description; its position on a locator map; a satellite image; photographs; excerpts from sailing directions and nautical charts; and a summation of the pertinent geographic and hydrographic information. Also included is historical and anthropological information on the feature (if requested by the Tribunal), and the views of the Philippines on its legal status under UNCLOS.

5. Volumes III, IV, and V consist of supporting materials cited in the *Atlas of Relevant Features*.

6. Volume VI consists of copies in A3 format of the historical maps requested by the Tribunal in Question 14. In addition to the copies reproduced in Volume VI, the Philippines is also simultaneously depositing two sets of large-format paper versions of the historical

maps with the Registry. High-resolution digital copies of each map are also being provided to the members of the Tribunal and to the Registry. Volume VII consists of copies in A3 format of oil and gas maps. High-resolution digital copies of each map are also being provided to the members of the Tribunal and to the Registry

7. Volumes VII - XI contain additional documentary exhibits, expert reports and other supporting materials, and Volume XII (in electronic format only) contains additional legal authorities.

8. In addition to these twelve volumes, the Philippines is also depositing with the Registry two copies of a portfolio containing the large-scale nautical charts requested by the Tribunal in Question 17. All other copies of the nautical charts are produced electronically preserving their original resolution. In addition, the Philippines is submitting electronically in their original file format the South China Sea Electronic Navigational Charts prepared by the East Asia Hydrographic Commission as requested by the Tribunal in Question 17.

## QUESTION 1

*The Tribunal notes the Philippines' argument that "[t]he 2002 DOC [ASEAN Declaration on the Conduct of the Parties in the South China Sea] poses no obstacle to the Tribunal's jurisdiction". The Philippines is invited to elaborate on this issue, in particular with respect to whether the Declaration on Conduct constitutes an agreement within the meaning of Article 282 of the Convention.*

### **Response:**

1.1. The Philippines does not consider the 2002 DOC to be an agreement within the meaning of Article 282 of the Convention. Before explaining why, the Philippines notes that in its 7 December 2014 Position Paper, China presented, among other things, detailed arguments concerning the 2002 DOC and why, in its view, it constitutes an agreement within the meaning of Article 281. (In contrast, it did not make any argument concerning Article 282.) The Philippines responds to China's arguments in regard to Article 281 in connection with its response to Question 26 (at pp. 123-150) soliciting the Philippines' views on China's Position Paper. In responding to the current question, the Philippines will focus exclusively on Article 282 as the Tribunal has requested.

1.2. Article 282 of the Convention provides:

If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to *a procedure that entails a binding decision*, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.<sup>1</sup>

1.3. There are two requirements for Article 282 to apply: (1) that there be an agreement; and (2) that the agreement provide for "a procedure that entails a binding decision". The 2002 DOC does not satisfy either condition.

1.4. With respect to the requirement that there be an agreement, the Philippines showed in its Memorial that the DOC is a political undertaking only. It does not purport to create legally

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<sup>1</sup> (Emphasis added.)

binding obligations and is therefore not an agreement under international law.<sup>2</sup> The Philippines elaborates on these arguments more fully in response to Question 26.

1.5. With respect to the requirement that the agreement in question provide for “a procedure that entails a binding decision”, the plain terms of the 2002 DOC make clear that it does not do so. The two relevant paragraphs of the DOC are paragraphs 4 and 7. They provide:

4. The Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea;

...

7. The Parties concerned stand ready to continue their consultations and dialogues concerning relevant issues, through modalities to be agreed by them, including regular consultations on the observance of this Declaration, for the purpose of promoting good neighbourliness and transparency, establishing harmony, mutual understanding and cooperation, and facilitating peaceful resolution of disputes among them[.]

1.6. The only “procedures” contemplated (assuming they can be characterized as such) are consultations, negotiations and dialogue. None of these entails a binding decision. Article 282 is therefore of no relevance and, as stated, China’s Position Paper makes no argument to the contrary.

1.7. Indeed, the only phrase in the 2002 DOC that even hints at a procedure that entails a binding decision is the statement in paragraph 4 that the governments concerned undertake to resolve their “jurisdictional disputes” through consultations and negotiations “in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea”. Paragraph 4 thus specifically contemplates that the envisaged consultations and negotiations will be conducted in accordance with the Convention, of which Section 2 of Part XV forms an integral part. Thus, far from requiring that the Parties’ jurisdictional disputes should be settled by recourse to procedures *other* than those provided for in Part XV, the 2002 DOC indicates that when negotiations fail — as in

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<sup>2</sup> Memorial, paras. 7.51-7.58.

the present case — the disputes should be settled in accordance with the binding procedures specified in that Part.

1.8. Accordingly, the 2002 DOC provides no basis for an objection to the Tribunal's jurisdiction based on Article 282 of UNCLOS.





## QUESTION 2

*The Philippines is invited to address the effect, if any, of the Treaty of Amity and Cooperation in Southeast Asia on the Tribunal's jurisdiction and the admissibility of the Philippines' claims, in particular with reference to Articles 281 and 282 of the Convention. The Philippines is also invited to elaborate on whether any other regional or bilateral agreement or forum, or any public representation made by the Philippines regarding the resolution of the Parties' dispute, gives rise to any issue with respect to the admissibility of the Philippines' claims.*

### **Response:**

2.1. Neither the 1976 Treaty of Amity and Cooperation in Southeast Asia ("Treaty of Amity and Cooperation")<sup>3</sup> nor any other agreement or public representation by the Philippines precludes the Tribunal's jurisdiction or affects the admissibility of the Philippines' claims.

### **I. The Treaty of Amity and Cooperation**

2.2. Article 13 of the Treaty of Amity and Cooperation provides that the Contracting States "shall at all times settle such disputes among themselves through friendly negotiations". Article 14 further establishes a High Council comprising ministerial representatives of all Contracting States<sup>4</sup> "to take cognizance of the existence of disputes or situations likely to disturb regional peace and harmony". In the event that no solution is reached through direct negotiations, and provided that all parties to the dispute so agree, the High Council is empowered pursuant to Articles 15 and 16 to "take cognizance of the existence of the disputes" and "recommend to the parties in dispute appropriate means of settlement such as good offices, mediation, inquiry or conciliation". In addition, the High Council can, if the parties agree, also constitute itself as a committee of mediation, inquiry or conciliation.<sup>5</sup> Finally, Article 17 states:

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<sup>3</sup> Treaty of Amity and Cooperation in Southeast Asia, 1025 U.N.T.S. 319 (24 Feb. 1976), entered into force 15 July 1976. SWSP, Vol. XII, Annex LA-185.

<sup>4</sup> The parties to the Treaty of Amity and Cooperation are: Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, Viet Nam, Australia, Bangladesh, Brazil, Canada, Democratic People's Republic of Korea, the European Union, France, India, Japan, Mongolia, New Zealand, Norway, People's Republic of China, Pakistan, Republic of Korea, Russia, Sri Lanka, Timor-Leste, Turkey, the United Kingdom and the United States.

<sup>5</sup> Treaty of Amity and Cooperation in Southeast Asia, 1025 U.N.T.S. 319 (24 Feb. 1976), entered into force 15 July 1976, Art. 15. SWSP, Vol. XII, Annex LA-185.

*Nothing in this Treaty shall preclude recourse to the modes of peaceful settlement contained in Article 33(1) of the Charter of the United Nations. The High Contracting Parties which are parties to a dispute should be encouraged to take initiatives to solve it by friendly negotiations before resorting to the other procedures provided for in the Charter of the United Nations.*<sup>6</sup>

2.3. Thus, the Treaty merely encourages the parties to a dispute to attempt to settle it by negotiation. It provides for referral to the High Council only if the disputing parties agree to do so, which the Philippines and China have not done in relation to the disputes the Philippines has raised in these proceedings. Moreover, the Treaty expressly endorses recourse to the modes of settlement contained in Article 33 of the Charter, which include binding arbitration. Accordingly, whether analysed under Article 281 or Article 282 of the Convention, the Treaty has no impact on the Tribunal's jurisdiction in this case.

2.4. Article 281 provides:

If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.

This provision operates to preclude the jurisdiction of a tribunal convened under Section 2 of Part XV *only* when: (1) there is an agreement to seek settlement of a dispute by means other than those provided for in Part XV, and (2)(a) either a settlement has been reached by recourse to such means, or (b) the agreement precludes further procedures.

2.5. The Treaty of Amity and Cooperation does not bar jurisdiction or undermine the admissibility of the Philippines' claims in the first instance because it does not constitute a legally binding agreement to negotiate before having recourse to arbitration. Article 17 makes clear that pre-arbitration negotiation is not mandatory when it provides that States "which are parties to a dispute *should be encouraged* to take initiatives to solve it by friendly negotiations"<sup>7</sup> before having resort to the procedures listed in Article 33(1) of the U.N. Charter. The use of the hortatory phrase "should be encouraged" is inconsistent with the

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<sup>6</sup> *Id.* The modes of peaceful settlement specifically listed in Article 33(1) of the U.N. Charter are negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, and resort to regional agencies or arrangements.

<sup>7</sup> Treaty of Amity and Cooperation in Southeast Asia, 1025 U.N.T.S. 319 (24 Feb. 1976), entered into force 15 July 1976, Art. 17 SWSP, Vol. XII, Annex LA-185 (emphasis added).

existence of a legal obligation. Indeed, the plain implication of Article 17 is that the States Parties would be within their rights to resort to the procedures identified in Article 33(1) of the U.N. Charter even before attempting negotiations.

2.6. Moreover, even if the Treaty of Amity and Cooperation could be construed as an “agreement” of the sort envisioned in Article 281 — which it cannot — that Article does not impair the Tribunal’s jurisdiction or affect the admissibility of the Philippines’ claims because no settlement has been reached through the means contemplated in the Treaty (*i.e.*, negotiation), and it does not exclude recourse to the procedures specified in Section 2 of Part XV. Indeed, it expressly authorizes the procedures set forth in Article 33 of the Charter.

2.7. Chapter 3 of the Philippines’ Memorial described the extensive efforts the Parties have made to settle their dispute through negotiations conducted over many years.<sup>8</sup> Notwithstanding those efforts, no settlement has been possible. The Philippines has therefore complied with any obligation it may have under the Treaty of Amity and Cooperation to attempt to settle its disputes with China “through friendly negotiations”.

2.8. Negotiations having failed, nothing in the Treaty of Amity and Cooperation precludes recourse to the procedures in Part XV of the Convention. Quite the contrary. Article 17 of the Treaty expressly contemplates that the Contracting States may have “recourse to the modes of peaceful settlement contained in Article 33(1) of the Charter of the United Nations”. These, of course, include both “arbitration” and “judicial settlement”.<sup>9</sup> Rather than excluding further procedures, the Treaty of Amity and Cooperation specifically contemplates them. Article 281 therefore does not bar the Tribunal’s jurisdiction or undermine the admissibility of the Philippines’ claims.

2.9. The Treaty of Amity and Cooperation also does not implicate Article 282 of the Convention. None of the Treaty’s dispute settlement provisions establishes “a procedure that entails a binding decision”. Failing negotiation, the High Commission is, at most, empowered to “recommend to the parties in dispute appropriate means of settlement such as good offices, mediation, inquiry or conciliation” and/or constitute itself as a committee of mediation,

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<sup>8</sup> Memorial, paras. 3.22-3.72.

<sup>9</sup> Charter of the United Nations (26 June 1945), Art. 33(1). SWSP, Vol. XII, Annex LA-181.

inquiry or conciliation.<sup>10</sup> Even then, these procedures cannot be initiated “at the request of any party to the dispute”, as Article 282 requires. Rather, they must be specifically agreed upon by all parties in dispute — which has not happened here.

2.10. For all of these reasons, whether under Article 281 or Article 282, the 1976 Treaty of Amity and Cooperation in Southeast Asia neither impairs the Tribunal’s jurisdiction nor affects the admissibility of the Philippines’ claims. Indeed, China appears to agree. It makes no argument concerning the Treaty of Amity and Cooperation in its 7 December 2014 Position Paper.

## **II. Other Bilateral Arrangements and Public Representations by the Philippines**

2.11. In contrast to its silence on the Treaty of Amity and Cooperation, China’s Position Paper does point to several joint statements that, taken together with the 2002 DOC, it says constitute an “agreement” by the Parties under Article 281 to settle their dispute through negotiations to the exclusion of the compulsory procedures provided in Section 2 of Part XV.<sup>11</sup> Because these are arguments that China has specifically raised in its Position Paper, the Philippines responds to them in its answer to the Tribunal’s Question 26.

2.12. As the Tribunal will read, the statements China invokes are political and aspirational in nature; they are not legally binding. Moreover, even if they were binding (*quod non*), they neither preclude recourse to further procedures nor provide for procedures entailing a binding decision. As a result, neither Article 281 nor Article 282 is implicated.

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<sup>10</sup> Treaty of Amity and Cooperation in Southeast Asia, 1025 U.N.T.S. 319 (24 Feb. 1976), entered into force 15 July 1976, Art. 15. SWSP, Vol. XII, Annex LA-185.

<sup>11</sup> People’s Republic of China, *Position Paper of the Government of the People’s Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines* (7 Dec. 2014) (hereinafter “China’s Position Paper”), paras. 31-38, 40. SWSP, Vol. VIII, Annex 467. In particular, China seeks to rely on Government of the Republic of the Philippines and Government of the People’s Republic of China, *Agreed Minutes on the First Philippines-China Bilateral Consultations on the South China Sea Issue* (10 Aug. 1995). MP, Vol. VI, Annex 180; Government of the Republic of the Philippines and Government of the People’s Republic of China, *Joint Statement: Philippine-China Experts Group Meeting on Confidence Building Measures* (23 Mar. 1999), p. 2. MP, Vol. VI, Annex 178; Government of the Republic of the Philippines and Government of the People’s Republic of China, *Joint Statement: Framework of Bilateral Cooperation in the Twenty-First Century* (16 May 2000). SWSP, Vol. IX, Annex 505.; Government of the Republic of the Philippines and Government of the People’s Republic of China, *Joint Statement: 3rd Philippines-China Experts’ Group Meeting on Confidence-Building Measures, Manila, 3-4 April 2001* (4 Apr. 2001). SWSP, Vol. IX, Annex 506.; Government of the Republic of the Philippines and Government of the People’s Republic of China, *Joint Press Statement on the State Visit of H.E. President Gloria Macapagal-Arroyo to the People’s Republic of China, 1-3 Sept. 2004* (3 Sept. 2004). MP, Vol. VI, Annex 188; Government of the Republic of the Philippines and Government of the People’s Republic of China, *Joint Statement* (1 Sept. 2011). SWSP, Vol. IX, Annex 507.

### QUESTION 3

*The Tribunal notes paragraph 7.23 of the Memorial, which provides as follows:*

*The fact that the Convention makes no specific reference to “historic rights” of the kind China asserts does not mean that its claim does not concern the interpretation or application of the Convention. To the contrary, as detailed in Chapter 4, claims to “historic rights” like those China asserts – that is, in maritime areas that formerly were considered “high seas” but were subsumed within the EEZ or continental shelf of a coastal State – were specifically rejected by the drafters of UNCLOS and superseded by it. The question of whether or not China’s claim is consistent with UNCLOS, therefore, requires the interpretation and application of the Convention, including but not limited to the specific articles mentioned above.*

*The Philippines is invited to elaborate on these arguments.*

#### **Response:**

3.1. The Philippines considers China’s assertion of “historic rights” within the maritime areas encompassed by its nine-dash line to be manifestly inconsistent with UNCLOS. Submissions 1 and 2 of the Philippines’ Memorial request the Tribunal to adjudge and declare that:

1. China’s maritime entitlements in the South China Sea, like those of the Philippines, may not extend beyond those permitted by the United Nations Convention on the Law of the Sea (“UNCLOS” or the “Convention); [and]
2. China’s claim to sovereign rights and jurisdiction, and to “historic rights”, with respect to maritime areas of the South China Sea encompassed by the so-called “nine-dash line” are contrary to the Convention and without lawful effect to the extent they exceed the geographic and substantive limits of China’s maritime entitlements under UNCLOS[.]<sup>12</sup>

3.2. China disagrees. It takes the view that the Convention “does not restrain or deny a country’s right which is formed in history and abidingly upheld”,<sup>13</sup> and that “China’s

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<sup>12</sup> Memorial, p. 271.

<sup>13</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). MP, Vol. V, Annex 113.

maritime rights in the South China Sea were formed historically and are protected by international law”.<sup>14</sup>

3.3. Determining which of the Parties is correct and deciding whether UNCLOS does or does not “restrain or deny a country’s right which is formed in history and abidingly upheld” is unmistakably a question concerning the interpretation or application of the Convention over which the Tribunal has jurisdiction under Article 288(1).<sup>15</sup> Indeed, the Philippines does not understand China to contend otherwise. In its 7 December 2014 Position Paper, China does *not* argue that the compatibility of its assertion of “historic rights” in maritime areas beyond the limits of its entitlement under the Convention is a matter in respect of which the Tribunal lacks jurisdiction.

3.4. Any such argument would be unsustainable. The Philippines showed in its Memorial that UNCLOS was intended to, and does, constitute a “comprehensive constitution for the oceans which will stand the test of time”.<sup>16</sup> The very first paragraph of the Preamble states that the Convention seeks “to settle ... *all issues* relating to the law of the sea”.<sup>17</sup> The Philippines also demonstrated that “under the Convention, coastal States have the exclusive rights to the living and non-living resources in their EEZs and continental shelves, such that no other State may enjoy ‘historic rights’ under the rules of general international law or otherwise to the resources in those maritime areas”.<sup>18</sup>

3.5. Assessing these arguments, and adjudicating their merits, requires an analysis of text and drafting history of Parts V and VI of the Convention, including, *inter alia*, Articles 55, 56, 57, 58 and 62, and Articles 76, 77 and 78. It necessarily requires the interpretation or application of those provisions. The Philippines does not consider there to be any serious argument that the Tribunal lacks the power to undertake that task (and, as stated, China itself makes none).

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<sup>14</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), p. 1. MP, Vol. V, Annex 131.

<sup>15</sup> Article 288(1) provides: “A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part.”

<sup>16</sup> Memorial, para. 4.46 (quoting Ambassador Tommy Koh, U.N. Conference on the Law of the Sea, *185th Meeting*, U.N. Doc. A/CONF.62/PV.185 (26 Jan. 1983), para. 47. MP, Vol. XI, Annex LA-116.).

<sup>17</sup> (Emphasis added.)

<sup>18</sup> *Id.*, para. 4.54.

3.6. The fact that China claims that its “historic rights” predate and exist independently of the Convention does not alter this analysis. The Philippines’ claim is that UNCLOS is the exclusive source of entitlement to maritime areas; that it does not permit claims to maritime areas in derogation of the rights and freedoms of other States except as specifically provided in the Convention (notably Articles 10 and 15); and that any such claims that predated the Convention were extinguished by it. The Philippines calls upon the Tribunal to interpret and apply the Convention, and specifically to determine whether it supersedes claims based on alleged “historic rights” that are inconsistent with its terms. It is difficult to see how the Philippines’ claim would *not* fall under Article 288(1).





## QUESTION 4

*The Tribunal notes the Philippines' argument that "nothing in paragraph 1 of Article 297 impairs the Tribunal's jurisdiction over this case" (Memorial, para. 7.105). The Philippines is invited to elaborate further on this issue, in particular in light of its Submission 11.*

*[Submission 11: China has violated its obligations under the Convention to protect and preserve the marine environment at Scarborough Shoal and Second Thomas Shoal.]*

### **Response:**

4.1. Article 297(1) does not impair the Tribunal's jurisdiction to address Submission 11 with respect to Scarborough Shoal because the relevant waters constitute territorial sea, to which Article 297 does not apply. It does not impair the portion of Submission 11 relating to Second Thomas Shoal because China is not the "coastal State" in the area.

4.2. Article 297 is captioned "Limitations on the applicability of Section 2 [of Part XV]". Paragraph 1 provides that "[d]isputes concerning the interpretation or application of this Convention with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in this Convention shall be subject to the procedures provided for in section 2" in the categories of cases enumerated in the three subparagraphs thereof.<sup>19</sup>

4.3. The use of the phrase "sovereign rights and jurisdiction" is notable. It is generally associated with the powers granted coastal States with respect to their EEZs and continental shelves, *not* their territorial seas. The doctrine supports the view that Article 297 as a whole applies the EEZ.<sup>20</sup> Sohn, for example, has written: "Article 297 governs disputes relating to the exercise by a coastal State of its sovereign rights and jurisdiction in the Exclusive

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<sup>19</sup> The three categories of cases are disputes in which it is alleged that (a) a coastal State has contravened the Convention's provisions regarding "the freedoms and rights of navigation, overflight, or the laying of submarine cables and pipelines", or regarding "other internationally lawful uses of the sea specified in article 58"; (b) in exercising the aforementioned freedoms, rights or uses, a State has contravened the Convention or the coastal State's laws or regulations in conformity with the Convention and "other rules of international law not incompatible with" the Convention; and (c) a coastal State has contravened "specified international rules and standards for the protection and preservation of the marine environment" applicable to the coastal State and established by the Convention "or through a competent international organization or diplomatic conference in accordance with" the Convention.

<sup>20</sup> The Philippines recognizes that other readings are possible. Even if Article 297(1) were deemed applicable to the territorial sea, the Philippines considers that the Tribunal would still have jurisdiction to adjudicate its environmental claims relating to Scarborough Shoal. Article 297(1)(c) provides for jurisdiction in cases "when it is alleged that a coastal State has acted in contravention of specified rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State and which have been established by this Convention...". In the view of the Philippines, Articles 192 and 194 can be deemed to constitute "such specified rules and standards".

Economic Zone”.<sup>21</sup> Whatever their scope, the limitations provided for in Article 297(1) are therefore of no consequence to disputes relating to matters arising in the territorial sea.

4.4. In such cases, courts and tribunals must be guided by the general rules relating to their jurisdiction. In particular, Article 288(1) provides: “A court or tribunal referred to in article 287 shall have jurisdiction over *any dispute* concerning the interpretation or application of this Convention ...”.<sup>22</sup> The dispute the Philippines has presented to the Tribunal concerns, in part, China’s violations of its obligations under Article 192 and 194 to protect and preserve the marine environment in the territorial sea around Scarborough Shoal. It therefore falls squarely within the jurisdiction Article 288 specifically confers on the Tribunal.

4.5. In this respect, the Philippines observes further that nothing in the language of either Article 192 or 194 suggests that the obligations stated do not apply in the territorial sea. To the contrary, the plain text of both provisions makes clear that they apply equally in all maritime zones, whether it is the territorial sea, the EEZ, the continental shelf or the Area. Article 192, for example, states: “State have the obligation to protect and preserve the marine environment”. Article 194(1) similarly provides: “States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment ...”. Neither article excludes or draws any distinction among maritime zones.

4.6. Article 297(1) also has no application to China’s violations of its obligation to protect and preserve the marine environment in and around Second Thomas Shoal, albeit for a different reason. Article 297(1) applies, if at all, only to disputes concerning “the exercise by a *coastal State* of its sovereign rights or jurisdiction provided for in this Convention”.<sup>23</sup>

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<sup>21</sup> Louis B. Sohn, “Peaceful Settlement of Disputes in Ocean Conflicts: Does UNCLOS III Point the Way?”, *Law and Contemporary Problems*, Vol. 46, No. 2 (1983), p. 197. SWSP, Vol. XII, Annex LA-200. *See also* Robin Churchill, “Some Reflections on the Operation of the Dispute Settlement System of the UN Convention on the Law of the Sea During its First Decade”, in *The Law of the Sea* (D. Freestone, et al., eds. 2006), p. 407. SWSP, Vol. XII, Annex LA-210 (“Article 297 ... provides ... that disputes concerning the exercise by a coastal State of its rights within its EEZ are exempt from compulsory dispute settlement under Section 2 unless the dispute concerns the exercise of other States’ rights under the LOSC of navigation, overflight and the laying of cables and pipelines, or the dispute concerns allegations that a coastal State has acted in contravention of specified international rules for the protection of the marine environment”).; Hugo Caminos, “The International Tribunal for the Law of the Sea: An Overview of its Jurisdictional Procedure”, *The Law and Practice of International Courts and Tribunals*, Vol. 5 (2006), p. 18. SWSP, Vol. XII, Annex LA-211 (“The language used in [Article 297](1) is the same used in the Convention to describe the rights of the coastal State in the Exclusive Economic Zone and over the continental shelf”).

<sup>22</sup> (Emphasis added.)

<sup>23</sup> (Emphasis added.)

China, however, does not have sovereign rights and jurisdiction over Second Thomas Shoal and the surrounding areas, which constitute EEZ and continental shelf.

4.7. In its Memorial, the Philippines demonstrated that Second Thomas Shoal is a low-tide elevation located 104 M from the Philippine coast on Palawan.<sup>24</sup> The physical characteristics of Second Thomas Shoal are further highlighted at pages 162-164 of the *Atlas* the Philippines has presented with this Submission. Both the *Atlas* and Memorial demonstrate that Second Thomas Shoal is not located within 12 M of any feature that is above water at high tide and that none of the high-tide features within 200 M of Second Thomas Shoal over which China claims sovereignty is capable of generating entitlement to an EEZ or continental shelf.<sup>25</sup> As a result, the Philippines, not China, is the coastal State entitled to exercise sovereign rights and jurisdiction in the area.

4.8. Because Article 297(1) does not apply to the Philippines' environmental claims relating to Second Thomas Shoal, the Tribunal again is to be guided by general principles: the dispute presented by the Philippines concerns the interpretation and application of Article 192 and 194; the Tribunal therefore has jurisdiction by virtue of Article 288(1).

4.9. Accordingly, as the Philippines first stated in its Memorial, nothing in Article 297(1) impairs the Tribunal's jurisdiction to address Submission 11.

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<sup>24</sup> Memorial, paras. 5.60-5.114.

<sup>25</sup> *Id.*, paras. 5.60-5.61.



## QUESTION 5

*The Tribunal notes the Philippines' argument that "Paragraph[.]...3 of Article 297...[does] not apply to any of the claims of the Philippines in this case" (Memorial, para. 7.108). The Philippines is invited to elaborate further on this issue, in particular in light of its Submissions 8, 9, and 10.*

*[Submission 8: China has unlawfully interfered with the enjoyment and exercise of the sovereign rights of the Philippines with respect to the living and non-living resources of its exclusive economic zone and continental shelf.*

*Submission 9: China has unlawfully failed to prevent its nationals and vessels from exploiting the living resources in the exclusive economic zone of the Philippines.*

*Submission 10: China has unlawfully prevented Philippine fishermen from pursuing their livelihoods by interfering with traditional fishing activities at Scarborough Shoal.]*

### **Response:**

5.1. Nothing in paragraph 3 of Article 297 impairs the Tribunal's jurisdiction to address Submissions 8, 9 and 10. Only subparagraph (a) of paragraph 3 is relevant for present purposes. It provides:

Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.

5.2. Article 297(3)(a) has two parts. The first provides that disputes concerning the interpretation or application of the provisions of this Convention "with regard to fisheries" shall be settled in accordance with section 2 of Part XV. It thus states the general rule that fisheries disputes are subject to compulsory jurisdiction. As Judge Keith observed in his Separate Opinion in *Southern Bluefin Tuna*, "the general run of fisheries disputes...is not

subject to the limitations in Section 3 [of Part XV]. Section 2 [of Part XV] ...continues to apply to them in full (article 297(3))”.<sup>26</sup>

5.3. The second part of Article 297(3)(a) carves out a limitation that applies in the case of disputes relating to (1) the sovereign rights of “the coastal State” with respect to (2) “the living resources in the exclusive economic zone”. This limited exception does not apply to Submissions 8, 9 or 10 for the reasons explained below.

5.4. **Submission 8** concerns China’s unlawful interference with the Philippines’ enjoyment and exercise of its sovereign rights with respect to the living and non-living resources of its EEZ and continental shelf — *i.e.*, the EEZ and continental shelf of *the Philippines*. Article 297(3)(a) does not impair the Tribunal’s jurisdiction over this Submission in the first instance because China is not “the coastal State” in those areas.

5.5. The Philippines demonstrated in its Memorial that it is entitled to a 200 M EEZ measured from its archipelagic baselines and to a continental shelf extending to at least that distance, except only to the extent that nearby features generate overlapping potential entitlements.<sup>27</sup> The Philippines also demonstrated that none of the insular features claimed by China in the Southern Sector of the South China Sea generates entitlement to an EEZ or continental shelf.<sup>28</sup> As a result, the waters, seabed and subsoil within 200 M of the Philippines, but beyond 12 M from any high-tide feature, constitute the EEZ and continental shelf of the Philippines, not China. Article 297(3)(a) therefore does not preclude the Tribunal’s jurisdiction to address Submission 8.

5.6. The jurisdictional exception stated in the second part of Article 297(3)(a) does not apply to the portion of Submission 8 relating to China’s interference with the Philippines’ sovereign rights with respect to *non-living resources* for another reason. By its terms, the exception applies only to disputes relating to a coastal State’s sovereign rights with respect to “the living resources” in the EEZ. Non-living resources are not covered.

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<sup>26</sup> *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, Award on Jurisdiction and Admissibility, Separate Opinion of Justice Sir Kenneth Keith, UNCLOS Annex VII Tribunal (4 Aug. 2000), para. 22. MP, Vol. XI, Annex LA-51.

<sup>27</sup> Memorial, Ch. 5, Sections 1 & 2.

<sup>28</sup> *Ibid.*, Ch. 5, Section 2.

5.7. **Submission 9** is directed at China’s failure “to prevent its nationals and vessels from exploiting the living resources in the exclusive economic zone *of the Philippines*”.<sup>29</sup> The relevant EEZ is that of the Philippines, not China. As in the case of Submission 8, the second part of Article 297(3)(a) does not exclude jurisdiction because China is not the relevant “coastal State”.

5.8. Finally, **Submission 10** relates to China’s actions in preventing Philippine nationals from pursuing their traditional fishing activities in the territorial sea around Scarborough Shoal. Article 297(3)(a) does not impair the Tribunal’s jurisdiction to address this submission because the relevant limitations apply only “in the exclusive economic zone”, not the territorial sea. Fisheries disputes concerning activities within the territorial sea remain subject to the general grant of jurisdiction in Section 2 of Part XV and the first part of Article 297(3)(a).

5.9. Accordingly, nothing in Article 297(3)(a) operates to bar the Tribunal’s jurisdiction over any aspect of Submissions 8, 9 and 10.

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<sup>29</sup> (Emphasis added.)





## QUESTION 6

*The Tribunal notes the Philippines' statement that "[f]or the avoidance of all doubt, the Philippines does not seek any determination by the Tribunal as to any question of sovereignty over islands, rocks or any other maritime features" (Memorial, para. 1.16). The Philippines is invited to address (i) whether a determination that a feature constitutes a low-tide elevation may implicitly involve a determination as to whether that feature may be subject to a claim of territorial sovereignty or appropriation/acquisition, and (ii) the relevance, if any, to the exceptions to jurisdiction under Article 298(1)(a) of the Convention.*

### **Response:**

6.1. The determination of whether a maritime feature is, or is not, an LTE is an issue that plainly arises under the Convention. Article 13(1) provides: "A low-tide elevation is a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide". The Philippines' claims regarding the status of Mischief Reef, Second Thomas Shoal, Subi Reef, Gaven Reef and McKennan Reef (including Hughest Reef) call upon the Tribunal to interpret and apply Article 13(1). Deciding whether a given feature is an LTE therefore squarely presents a question concerning the interpretation or application of UNCLOS over which the Tribunal has jurisdiction by virtue of Article 288(1). There is nothing in Article 298(1) that would exclude the issue from the Tribunal's jurisdiction.

6.2. The language from the Memorial quoted in the Tribunal's question was intended to make clear that none of the issues the Philippines has presented to the Tribunal require it to decide between competing claims to sovereignty over features amenable to such claims. The sentence in paragraph 1.16 immediately following the quoted language makes this clear. It states: "The Tribunal is not invited, directly or indirectly, to adjudicate on the competing sovereignty claims to any of the features at issue (or any others)".<sup>30</sup> The Philippines understands that sovereignty questions of this kind are beyond the jurisdiction of a court or tribunal convened under Part XV.

6.3. This does not mean that the Tribunal must abstain from deciding questions concerning the interpretation or application of Article 13(1), which it plainly has jurisdiction to do, merely because its determination may incidentally affect the separate question of whether a feature is susceptible of acquisition or appropriation under international law. Simply put, LTE's are not land territory under international law; they are part of the seabed, whose status

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<sup>30</sup> Memorial, para. 1.16.

is determined and regulated by the Convention. As such, as more fully elaborated in the Philippines' response to Question 18, sovereignty over them cannot be acquired by occupation or appropriation. Rather, sovereignty over an LTE located in the territorial sea belongs to the State in whose territorial sea it lies. An LTE lying beyond the territorial sea is not subject to a claim of sovereignty by any State (although, if it lies within a coastal State's EEZ or continental shelf, that State enjoys the exclusive sovereign rights and jurisdiction with respect to the LTE as provided for in Parts V, VI, and other relevant provisions of the Convention).

6.4. Moreover, Part XV tribunals routinely make determinations in regard to LTEs, the incidental result of which is that sovereignty over the feature vests in one of the parties. In *Bangladesh v. India*, for example, the arbitral tribunal exercised its jurisdiction to determine the maritime boundary in the territorial sea pursuant to Article 15 of UNCLOS. In so doing, it incidentally attributed a disputed LTE to India by drawing the boundary in such manner as to leave the feature on India's side of the line.<sup>31</sup> The tribunal's award thus not only "implicitly involve[d] a determination as to whether that feature may be subject to a claim of territorial sovereignty or appropriation/acquisition",<sup>32</sup> it actually determined which State was sovereign over the LTE. There could be no doubt of the tribunal's jurisdiction to do so in respect of the seabed of the territorial sea.

6.5. The same tribunal was also called upon to, and did, determine the precise location of the land boundary terminus ("LBT"), which the parties had disputed. The determination was necessary to fix the starting point of the maritime boundary. In fixing the LBT, the tribunal necessarily determined where the two States' territorial sovereignty ended and their territorial seas began. This implicitly, but unavoidably, impacted the territorial sovereignty of both States. Again, this did not compromise the tribunal's jurisdiction.

6.6. One can also imagine, for example, a case in which one coastal State challenges the straight baselines of another as incompatible with Article 7. If Part XV tribunals were barred

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<sup>31</sup> *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, UNCLOS Annex VII Tribunal (7 July 2014), paras. 271-276. SWSP, Vol. XII, Annex LA-179. See also *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, I.C.J. Reports 2001, p. 109, para. 22. MP, Vol. XI, Annex LA-26 (allocating sovereignty over various LTE's based on the location of the territorial sea boundary); *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Merits, Judgment, I.C.J. Reports 2008, para. 299. MP, Vol. XI, Annex LA-31 (stating "sovereignty over South Ledge, as a low-tide elevation, belongs to the State in the territorial waters of which it is located"). See also *id.*, paras. 297-298.

<sup>32</sup> Tribunal's Question 6.

from exercising their power to interpret and apply the Convention whenever their decisions might have repercussions for questions of territorial sovereignty, no court or tribunal would be able to hear the case. This is because, under Article 8, the landward side of a State's baselines constitute internal waters, which are assimilated to land territory.<sup>33</sup> A decision on the compatibility of a State's baselines with the Convention would therefore constitute a determination about whether certain areas are amenable to a claim of territorial sovereignty. To suggest that a Part XV tribunal might be barred from exercising its jurisdiction to interpret and apply the Convention merely because its conclusions may have incidental consequences for matters of territorial sovereignty would be to impose a broad and unjustified constraint on the power of UNCLOS courts and tribunals.

6.7. For these reasons, the Philippines considers that even if a finding that a feature is an LTE implies that it may not be subject to a claim of territorial sovereignty, that would be without consequence to the Tribunal's jurisdiction, especially since the Tribunal is not called upon to determine which State, if any, is sovereign over the feature.

6.8. With respect to the second part of the Tribunal's question concerning the relevance, if any, of Article 298(1)(a), the Philippines considers that Article 298(1)(a) does not preclude the Tribunal from determining whether a feature is an LTE. This is true whether or not that determination implies that the feature in question may be subject to a claim of territorial sovereignty.

6.9. The Article 298(1)(a) exception applies to "disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles ...". Since the determination of whether or not a feature constitutes an LTE involves only the interpretation and application of Article 13 (and potentially Article 121), Article 298(1)(a) is not relevant. Articles 15, 74 and 83 are not before the Tribunal; nor does the matter involve historic bays or titles.

6.10. For the reasons presented above, determining whether a feature is an LTE does not fall outside the Tribunal's jurisdiction.

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<sup>33</sup> R. R. Churchill and A. V. Lowe, *The Law of the Sea* (3rd ed. 1988), pp. 60-61. SWSP, Vol. XII, Annex LA-130(bis) (observing: "As a matter of international law the baseline divides a State's land territory and the internal waters which are assimilated to it from its territorial sea"); cf. Article 7(3) (providing that the areas lying within straight baselines "must be sufficiently closely linked to the land domain to be subject to the regime of internal waters").



## QUESTION 7

*The Tribunal notes the Philippines' argument that –*

*Article 298's reference to "historic titles" does not apply in the first instance because China is not claiming such title in the South China Sea. To the contrary, as discussed in Chapter 4, what China asserts is a more limited bundle of "historic rights", short of sovereignty. On the face of China's claim, Article 298(1)(a)(i) is therefore inapplicable.*

*(Memorial, para. 7.129)*

*The Philippines is invited to elaborate on these arguments. In particular, the Philippines is invited to provide further argument on the scope and content of the phrase "historic bays or titles" in Article 298(1)(a) of the Convention. The Philippines is also invited to provide further argument on the effect, if any, of Article 298(1)(a) of the Convention on any claim relating to China's possible historic rights or titles, bearing in mind the drafting history and non-English versions of that Article.*

### **Response:**

7.1. The Philippines does not consider there to be any argument that the South China Sea forms an "historic bay". The geographic characteristics of the area cannot be assimilated to those of a bay. For purposes of responding to the Tribunal's question, the Philippines will therefore focus exclusively on the scope and content of the phrase "historic titles" as used Article 298(1)(a).

7.2. The Philippines demonstrated in its Memorial that the words "historic title" have a limited and specific meaning. They relate only to near-shore areas that are amenable to a claim of sovereignty that arises by reference to activity and title in relation to land.<sup>34</sup> The concept does not cover assertions of rights short of sovereignty in distant maritime zones. The Philippines supported this view by reference to the U.N. Secretariat's 1962 study *Juridical Regime of Historic Waters, Including Historic Bays* and other authoritative sources.<sup>35</sup>

7.3. The Philippines has undertaken an exhaustive examination of the Convention's drafting history in preparing its response to the Tribunal's question. Such discussion as there

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<sup>34</sup> See Memorial, para. 7.130.

<sup>35</sup> *Id.*, paras. 7.131-7.134.

was had a limited focus. The Philippines sets forth what it was able to find in the paragraphs that follow.

7.4. As the Tribunal will note, the comparative dearth of discussion is explained by the fact that the negotiating States' understanding of the scope and content of the phrase "historic titles" was informed by, and consistent with, the 1962 U.N. study. There was therefore no need for extensive debate. The phrase "historic title" was understood, as it always had been, to relate only to areas close to shore over which the coastal State exercised long, peaceful and unchallenged sovereignty.

7.5. Early during the Third U.N. Conference on the Law of the Sea in 1972, the Sea-Bed Committee approved a list of subjects for negotiation. The item "[h]istoric waters" was included as a sub-item for discussion under the rubric of negotiations concerning the "Territorial Sea".<sup>36</sup> These issues were subsequently assigned to the Second Committee.

7.6. Two years later, in 1974, the Second Committee adopted a "Main Trends Working Paper" that was intended, as its name suggests, to reflect the main trends that had emerged during the negotiations to date.<sup>37</sup> Part I of the Main Trends Working Paper was entitled "Territorial Sea".<sup>38</sup> Issues relating to historic waters, including historic titles, were summarized in two sections thereunder (Sections 2 and 3), and nowhere else. Each of these sections merits attention and is addressed in turn.

7.7. Section 2 of Part I was entitled "[h]istoric waters" and contained two provisions. Provision 2 stated:

The territorial sea may include waters pertaining to a State by reason of an historic right or title and actually held by it as its territorial sea.<sup>39</sup>

Provision 3 provided:

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<sup>36</sup> See U.N. Conference on the Law of the Sea III, *Statement of activities of the Conference during its first and second sessions*, U.N. Doc. A/CONF.62/L.8/REV.1 (17 Oct. 1974), p. 97. SWSP, Vol. XII, Annex LA-196.

<sup>37</sup> U.N. Conference on the Law of the Sea III, "Working Paper of the Second Committee: Main Trends", U.N. Doc. A/CONF.62/L.8/Rev. 1, Annex II, Appendix I (1974), p. 109. MP, Vol. XI, Annex LA-98.

<sup>38</sup> *Id.*

<sup>39</sup> Provision 1 is contained in Section 1 and is not relevant to the issues at hand.

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

7.8. These two proposals are significant because, consistent with the 1962 UN Study, they reflect an understanding that (1) historic titles could relate only to maritime areas close to the coast subject to a claim of sovereignty, and (2) the exercise of rights or jurisdiction by other States in the area is incompatible with a claim to historic title.

7.9. Section 3 of Part I of the 1974 Working Paper addressed the limits and delimitation of the territorial sea. It included three provisions relevant to the question now under consideration. Provision 17 was captioned “Historic bays or other historic waters” and contained what was labelled “Formula B”,<sup>40</sup> which provided: “In the absence of other applicable rules the baselines of the territorial sea are measured from the *outer limits of historic bays or other historic waters*”.<sup>41</sup>

7.10. Provision 21 related to the delimitation of the territorial sea and paralleled Article 12(1) of the 1958 Convention by stating that “historic title” may constitute a special circumstance justifying the departure from the median line in delimiting the territorial sea.

7.11. Finally, Provision 22 related to the breadth of the territorial sea and distilled three formulae from the main trends that are relevant here:

#### Formula A

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

#### Formula B

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

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<sup>40</sup> Formula A of Provision 17 followed Article 8(6) of the 1958 Convention on the Territorial Sea and excluded “so-called ‘historic bays’” from the application of provisions governing juridical bays. It is therefore irrelevant for the issue before the Tribunal. U.N. Conference on the Law of the Sea III, “Working Paper of the Second Committee: Main Trends”, U.N. Doc. A/CONF.62/L.8/Rev. 1, Annex II, Appendix I (1974), p. 110. MP, Vol. XI, Annex LA-98.

<sup>41</sup> *Id.*

## Formula C

The maximum limit provided in this article shall not apply to historic waters held by any State as its territorial sea.

Any State which, prior to the approval of this Convention, shall have already established a territorial sea with a breadth more than the maximum provided in this article shall not be subject to the limit provided herein.<sup>42</sup>

Formula C reflected the proposal of the Philippines,<sup>43</sup> which sought to establish a special rule exempting it from the emerging consensus in favour of limiting the breadth of the territorial sea to 12 M based on the “unique nature and configuration” of the Philippines.<sup>44</sup> The Philippines explained the reasons underlying its proposal as follows:

We claim these waters [of the territorial sea] under historic and legal title. Their outer limits were set forth in the Treaty of Paris between Spain and the United States of 10 December 1898 and the Treaty of Washington between the United States and Great Britain of 2 January 1930. These limits were expressly acknowledged by the United States in our Mutual Defence Treaty...of 20 August 1951 and its related interpretative documents. We have existing legislation, both of a constitutional and a statutory character, confirming those limits. At one point—to show the peculiar character and configuration of our territorial sea—the outer limit of these historic waters is over 200 miles from the shore, but at several other points it is less than three miles.<sup>45</sup>

7.12. Other States did not accept this proposal, and Formula C was abandoned. At the concluding sessions of the Third UNCLOS Conference, the Philippines itself recognized that the Convention prohibited it from claiming historic or legal title over waters beyond its territorial sea, and that under UNCLOS it would be entitled only to sovereign rights in its 200 M exclusive economic zone:

Our problem on the matter of our territorial sea is a difficult one indeed, but, in the opinion of our delegation and our

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<sup>42</sup> *Id.*, p. 111.

<sup>43</sup> See Republic of the Philippines, *Revised draft article on historic waters and delimitation of the territorial sea*, U.N. Doc A/Conf. 62/C.2/L.24/Rev.1 (19 Aug. 1974). SWSP, Vol. XII, Annex LA-188.

<sup>44</sup> U.N. Conference on the Law of the Sea III, Plenary, *189th Meeting*, U.N. Doc. A/CONF.62/SR.189 (8 Dec. 1982), para. 55. SWSP, Vol. XII, Annex LA-192.

<sup>45</sup> *Id.*



Government, it is not insurmountable. ... In the 200-mile belt of water around our archipelago the Philippines will have sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the sea-bed, the sub-soil and the superjacent waters. In addition, the Philippines would have sovereign rights in the exclusive economic zone in regard to other activities of economic exploitation and exploration—such as the production of energy from waters, current and winds—as well as sovereign jurisdiction over such matters as scientific research and the protection of the marine environment.<sup>46</sup>

7.13. In light of the above, it is evident that the drafters of the Convention always understood “historic title” to be a narrow concept applicable only to near-shore waters over which the coastal State exercised sovereignty, whether they be internal waters or territorial sea. It did not include the exercise of rights or jurisdiction short of outright sovereignty.

7.14. In the negotiations that followed, few of the provisions on historic waters, including historic title, summarized in the Main Trends Working Paper were retained. The only ones that survived and were ultimately incorporated into the final text of the Convention are those relating to historic bays (Article 10(6)) and the delimitation of the territorial sea (Article 15).

7.15. Some effort to more clearly define the concept of historic waters was made during the negotiation process. Although complete agreement was never reached and the effort was ultimately abandoned,<sup>47</sup> the main elements of the various proposed definitions deserve attention. As in the case of the 1974 Main Trends Working Paper, the differing proposals converge to the extent they underscore the limited scope of the concepts “historic waters” and “historic title”.

7.16. An examination of the various “Blue Papers” on the subject reflects the following consensus elements of any definition of historic waters and historic title. *First*, historic waters were understood as “an area of the sea adjacent to a coastal State”.<sup>48</sup> *Second*, the following requirements must be met for such an area to constitute historic waters: (1) the maritime area must have been subject to the effective exercise of sovereignty; (2) sovereignty must have been exercised continuously, peacefully and for a long period of time; (3) the exercise of

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<sup>46</sup> *Id.*, para. 58.

<sup>47</sup> See U.N. Conference on the Law of the Sea III, *Revised Single Negotiating Text*, U.N. Doc. A/CONF.62/WP.8/Rev.1 (6 May 1976). MP, Vol. XI, Annex LA-107.

<sup>48</sup> U.N. Conference on the Law of the Sea III, Second Committee, Blue Papers, *Bays and Other Historic Waters*, U.N. Doc. C.2/Blue Paper No. 3 (3 Apr. 1975), Art. 1. SWSP, Vol. XII, Annex LA-190.

sovereignty must have been expressly or tacitly accepted by third States, and in particular by neighbouring States; (4) a State claiming historic waters must have vital interests, in particular defence or economic interests peculiar to the area.<sup>49</sup> And *third*, historic waters could be claimed as either internal waters or as territorial sea, depending on the scope of authority the coastal State had historically exercised.<sup>50</sup>

7.17. Viewed as a whole, the Convention's negotiating history thus reflects an understanding as to the scope and content of the words "historic title" articulated in the 1962 U.N. Study. In particular, it is clear that the concept applies only to near-shore areas that may be (1) assimilated to internal waters (*e.g.*, historic bays, straits or estuaries) or territorial sea and (2) subject to a claim of sovereignty.

7.18. The fact that claims of "historic rights" short of sovereignty are different from "historic title" is further confirmed by reference to the various authentic texts of the Convention. The Philippines showed in its Memorial that the term for "historic title" used in both Articles 15 and 298(1)(a) in the Chinese text is 历史性所有权 (*li shi xing suo you quan*), which translates literally as the power of possession or ownership — in a word, sovereignty.<sup>51</sup> By contrast, what China has asserted since 1998 are 历史性权利 (*li shi xing quan li*); that is "historical rights" short of sovereignty.<sup>52</sup>

7.19. This same distinction is reflected in the other official texts of the Article 298(1)(a), all of which employ terms for "historic titles" that are different from "historic rights". The French version uses the phrase "titres historiques"; the Spanish uses "títulos históricos". The terms "titres" and "títulos" are to be distinguished from those used for the word "rights" throughout the Convention: "droits" and "derechos" in French and Spanish, respectively.<sup>53</sup>

7.20. The Arabic text is to the same effect. In Article 298(1)(a), the Arabic phrase corresponding to "historic titles" is "تاريخيات تادس" (*sanadat tarikhiyya*), *sanadat* meaning

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<sup>49</sup> See U.N. Conference on the Law of the Sea III, Second Committee, Blue Papers, *Bays and Other Historic Waters*, U.N. Doc. C.2/Blue Paper No. 1/Rev.1 (25 Mar. 1975), § 1. SWSP, Vol. XII, Annex LA-189; U.N. Conference on the Law of the Sea III, Second Committee, Blue Papers, *Historic Waters*, U.N. Doc. C.2/Blue Paper No. 3/Rev.1 (9 Apr. 1975), Art. 1. SWSP, Vol. XII, Annex LA-191.

<sup>50</sup> U.N. Conference on the Law of the Sea III, Second Committee, Blue Papers, *Historic Waters*, U.N. Doc. C.2/Blue Paper No. 3/Rev.1 (9 Apr. 1975), Art. 2. SWSP, Vol. XII, Annex LA-191.

<sup>51</sup> Memorial, para. 7.133

<sup>52</sup> *Id.*

<sup>53</sup> See, *e.g.*, UNCLOS, Arts. 3, 17, 38, 52, 53, 56, 58, 59, 60, 69, 70, 72, 77, 79, 85, 90, 297.

“titles” in the sense of a legal instrument or deed signifying ownership, and *tarikhiyya* meaning historic. The Arabic term for “rights” as used elsewhere in the Convention, for instance, in Article 56 — “قوقح” (*huqooq*) — is different.

7.21. The only one of the authentic texts of the Convention in which the distinction between “historic title” and “historic rights” may not appear evident at first glance is the Russian. The Russian version of Article 298(1)(a) employs the phrase “исторические правооснования” where the English uses “historic titles”. The word “исторические” means “historic”. The term “правооснования”, however, is a compound noun formed by two nouns: “право”, which means “right”, and “основания”, which means “bases”.<sup>54</sup> Nevertheless, it is clear that the words mean “historic titles” in the sense of full sovereignty, not “historic rights” short of sovereignty.

7.22. This conclusion is supported by the expert opinion of Dr. A. Zadorozhny, the head of the International Law Department at Taras Shevchenko National University in Kyiv (Ukraine), included as Annex 512 hereto. Dr. Zadorozhny did his international law training during the Soviet era, and is fluent in both Russian and English. His expert opinion is based on Russian-English dictionaries and relevant scholarly works.<sup>55</sup>

7.23. Among the reference works to which Dr. Zadorozhny refers is the *Russian-English Dictionary of Diplomacy*, which covers international law terms, including those relating to the Law of the Sea. This dictionary translates “правооснование” as “title”.<sup>56</sup> Notably, it also distinguishes “правооснование” (“title”) from the term “право”, meaning “right”, which has a different normative content.<sup>57</sup> The *Russian-English Law Dictionary* also translates the term “правооснование” as “title (in the sense of ownership)”.<sup>58</sup> The equivalency between “title” and “правооснование” is further confirmed by the *English-Russian Law Dictionary*, in

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<sup>54</sup> The word “основания” is a plural form of “основание”, which means “basis”.

<sup>55</sup> Dr. Alexander Zadorozhny, *Expert Opinion on the Russian term “исторические правооснования” in Article 298(1)(a)(i) of the 1982 United Nations Convention on the Law of the Sea* (8 Mar. 2015) (hereinafter “Zadorozhny Report”), para. 5. SWSP, Vol. IX, Annex 512.

<sup>56</sup> *Russian-English Dictionary of Diplomacy* (K.V. Zhuravchenko, ed., 2006), p. 464. SWSP, Vol. XII, Annex LA-217. See also Zadorozhny Report, para. 7. SWSP, Vol. IX, Annex 512.

<sup>57</sup> See, e.g., “право навигации” = “navigation right”, *id.*, p. 460; “право плавания под морским флагом” = “right to fly a maritime flag”, *id.*; “право прохода” = right of passage”, *id.*; “право свободного доступа к морю” = “right of free access to the sea”, *id.*, p. 461. See also Zadorozhny Report, para. 7. SWSP, Vol. IX, Annex 512.

<sup>58</sup> Leonid L. Gousev, *Russian-English Law Dictionary* (2003), p. 308. SWSP, Vol. XII, Annex LA-215. See also Zadorozhny Report, para. 8. SWSP, Vol. IX, Annex 512.

which “title” is translated as “правооснование”.<sup>59</sup> “Right”, in contrast, is translated as “право”.<sup>60</sup>

7.24. The same views are reflected in Russian legal doctrine. In his opinion, Professor Zadorozhny cites the authoritative work *Qualification of Maritime Areas as Historic Waters in Public International Law: Theory and State Practice*, published in Russian and edited by Professor A. Vylegzhanin, a leading Russian scholar on the law of the sea.<sup>61</sup> In this study, the terms “историческое правооснование” and “исторический титул” are used interchangeably to mean “historical title”.<sup>62</sup> A clear distinction is also drawn between these two terms and that used for “historic rights” (“исторические права”). Professor Vylegzhanin observes, for example, that unlike historic title (“историческое правооснование”/“исторический титул”), historic rights (“исторические права”) are non-exclusive and have nothing to do with claims of sovereignty over maritime zones.<sup>63</sup> Professor Vylegzhanin also notes that, unlike historic rights, which may exist farther ashore based on fishing practice, historic waters claimed on the basis of a historic title must be adjacent to the coastline of a State, and “a State may not have a historic title to a maritime area located near the coast of other States”.<sup>64</sup>

7.25. The plain text of the Convention confirms the distinction between titles, on the one hand, and rights, on the other. Where UNCLOS refers to “rights”, as distinguished from “title”, the Russian word used is “право”. Examples include: Article 17 (“Право мирного прохода” = “Right of innocent passage”); Article 53 (“Право архипелажного прохода по морским коридорам” = “Right of archipelagic sea lanes passage”); Article 56 (“Права,

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<sup>59</sup> A.G. Pivovarov & V.I. Osipov, *English-Russian Legal Dictionary* (2003), p. 799. SWSP, Vol. XII, Annex LA-216. See also Zadorozhny Report, para. 9. SWSP, Vol. IX, Annex 512.

<sup>60</sup> A.G. Pivovarov & V.I. Osipov, *English-Russian Legal Dictionary* (2003), p. 799. SWSP, Vol. XII, Annex LA-216.

<sup>61</sup> A.N. Vylegzhanin, et al., *Qualification of Maritime Area as Historic Waters in Public International Law: Theory and State Practice* (2012). SWSP, Vol. XII, Annex LA-218. See also Zadorozhny Report, para. 12. SWSP, Vol. IX, Annex 512.

<sup>62</sup> A.N. Vylegzhanin, et al., *Qualification of Maritime Area as Historic Waters in Public International Law: Theory and State Practice* (2012), p. 20. SWSP, Vol. XII, Annex LA-218. See also Zadorozhny Report, paras. 14-16. SWSP, Vol. IX, Annex 512.

<sup>63</sup> A.N. Vylegzhanin, et al., *Qualification of Maritime Area as Historic Waters in Public International Law: Theory and State Practice* (2012), p. 29. SWSP, Vol. XII, Annex LA-218 (“Historical rights are also different from ‘historic waters’ in that the latter do not constitute claims to jurisdiction or sovereignty in maritime areas”). See also Zadorozhny Report, para. 17. SWSP, Vol. IX, Annex 512.

<sup>64</sup> A.N. Vylegzhanin, et al., *Qualification of Maritime Area as Historic Waters in Public International Law: Theory and State Practice* (2012), p. 30. SWSP, Vol. XII, Annex LA-218. See also Zadorozhny Report, paras. 14-16. SWSP, Vol. IX, Annex 512.

юрисдикция и обязанности прибрежного государства в исключительной экономической зоне” = “*Rights, jurisdiction and duties of the coastal State in the exclusive economic zone*”); and Article 58 (“*Права и обязанности государств в исключительной экономической зоне*” = “*Rights and duties of other States in the exclusive economic zone*”).<sup>65</sup>

7.26. Thus, in every authentic text of the Convention, there is a clear differentiation between what China is claiming in the South China Sea — “historic rights” — and those issues that may be excluded from jurisdiction under Article 298(1)(a) — “historic titles”. Article 298(1)(a) therefore does not impair the Tribunal’s jurisdiction to adjudicate the claims of the Philippines in this case.

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<sup>65</sup> See also, e.g., Article 70 (“*Право государств, находящихся в географически неблагоприятном положении*” = “*Right of geographically disadvantaged States*”); Article 72 (“*Ограничение на передачу прав*” = “*Restrictions on transfer of rights*”); Article 77 (“*Права прибрежного государства на континентальный шельф*” = “*Rights of the coastal State over the continental shelf*”); Article 90 (“*Право судоходства*” = “*Right of navigation*”); Article 297(1) (“*К спорам, касающимся толкования или применения настоящей Конвенции в отношении осуществления прибрежным государством своих суверенных прав или юрисдикции*” = “*Disputes concerning the interpretation or application of this Convention with regard to the exercise by a coastal State of its sovereign rights or jurisdiction ...* “). See also Zadorozhny Report, para. 11. SWSP, Vol. IX, Annex 512.



## QUESTION 8

*The Tribunal notes the Philippines' argument that –*

*The Philippines's Amended Statement of Claim does not present a dispute concerning the interpretation or application of Article 15, 74 or 83, let alone a dispute relating to sea boundary delimitation. The Tribunal is not called upon to express any view on those articles. The dispute the Philippines has submitted raises questions of entitlement, not the delimitation of those entitlements.*

*(Memorial, para. 7.120).*

*The Philippines is invited to provide additional written argument on the extent of the continental shelf beyond 200 NM in the South China Sea/West Philippine Sea and the implications, if any, of any possible continental shelf claim by China for the Tribunal's jurisdiction in light of Article 298(1)(a).*

### **Response:**

8.1. None of the existing or potential claims to a continental shelf beyond 200 M in the South China Sea has any implications for the Tribunal's jurisdiction over the Philippines' claims. Nor does any existing or potential claim to an outer continental shelf raise issues implicating Article 298(1)(a).

8.2. Two littoral States have already made Submissions to the Commission on the Limits of the Continental Shelf ("CLCS") in respect of areas of the South China Sea. On 6 May 2009, Viet Nam and Malaysia made a Joint Submission covering areas of the South China Sea lying between the mainland coasts of the two States.<sup>66</sup> The next day, Viet Nam also made a separate Partial Submission in respect of areas of the South China Sea further north.<sup>67</sup> The area covered by these two submissions are shown in **Figure S8.1** (appearing following page 38).

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<sup>66</sup> Malaysia and the Socialist Republic of Vietnam, *Joint Submission to the Commission on the Limits of the Continental Shelf, in Respect of the Southern Part of the South China Sea* (6 May 2009). MP, Vol. VII, Annex 223.

<sup>67</sup> United Nations Commission on the Limits of the Continental Shelf, *Receipt of the Joint Submission made by Malaysia and the Socialist Republic of Viet Nam to the Commission on the Limits of the Continental Shelf*, U.N. Doc. CLCS.33.2009.LOS (7 May 2009). MP, Vol. VII, Annex 224.

8.3. On 12 May 2009, Brunei also submitted preliminary information indicative of the outer limits of the continental shelf to the CLCS.<sup>68</sup> Brunei's preliminary information indicated that it intended to make a full submission "within 12 months".<sup>69</sup> To date, however, it has not yet done so. Although Brunei's preliminary information does not contain a map depicting the approximate location of the outer limit of the continental margin it intends to claim, the text, read in conjunction with other materials, makes clear that it will be limited to areas that overlap with the previously submitted Joint Submission by Viet Nam and Malaysia.<sup>70</sup>

8.4. The Philippines made a Partial Submission in respect of certain areas east of the island of Luzon in April 2009.<sup>71</sup> It is currently in the process of preparing an additional submission covering areas of the South China Sea/West Philippine Sea. The approximate location of the outer edge of the continental margin that the Philippines intends to submit is provisionally indicated on in **Figure S8.2** (appearing following Figure S8.1).<sup>72</sup>

8.5. China made a Partial Submission relating to certain areas of the East China Sea in December 2012.<sup>73</sup> The Philippines has no information on whether or not China intends to make any further submission (or submissions) in respect of areas of the South China Sea. However, in order to be as fully responsive to the Tribunal's question as possible, the Philippines engaged the services of Dr Lindsay Parson, one of the world's foremost experts on matters relating to the continental shelf beyond 200 M who has, among other things, advised over 30 States in the preparation of submissions to the CLCS. The Philippines asked Dr Parson to examine the extent of the outer continental shelf, if any, that China might be

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<sup>68</sup> Brunei Darussalam, *Preliminary Submission concerning the Outer Limits of its Continental Shelf* (12 May 2009), SWSP, Vol. IX, Annex 509.

<sup>69</sup> *Id.*, p. 5.

<sup>70</sup> As reflected in the 2003 map depicting Brunei's maritime claims, see Brunei Darussalam, Surveyor General, *Map showing the limits of the territorial sea, continental shelf and exclusive economic zone of Brunei Darussalam* (Brunei, 2003). SWSP, Vol. VI, Annex M22, Brunei's claims are confined to a parallel corridor located in front of its coast.

<sup>71</sup> Republic of the Philippines, *A Partial Submission of Data and Information on the Outer Limits of the Continental Shelf of the Republic of the Philippines Pursuant to Article 76(8) of the United Nations Convention on the Law of the Sea: Executive Summary* (8 Apr. 2009). SWSP, Vol. IX, Annex 508.

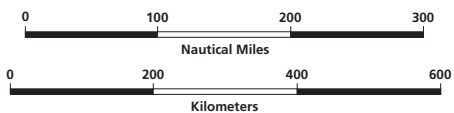
<sup>72</sup> The southern limit of the area covered by the forthcoming submission has yet to be fixed.

<sup>73</sup> People's Republic of China, *Submission by the People's Republic of China Concerning the Outer Limits of the Continental Shelf beyond 200 Nautical Miles in Part of the East China Sea: Executive Summary* (14 Dec. 2012). SWSP, Vol. IX, Annex 510.



# SUBMISSIONS WITH RESPECT TO A CONTINENTAL SHELF BEYOND 200 M BY VIETNAM AND MALAYSIA

Mercator Projection  
Datum: WGS-84  
(Scale accurate at 15°N)



Coastline sources: NGA charts 71027, 91004, 91005, 91010, 92033, 93030, 93036, 93044, 93045, 93046, 93047, 93049, 93520 and BA charts 94, 3482, 3483, 3488 and 3489.

Prepared by: International Mapping

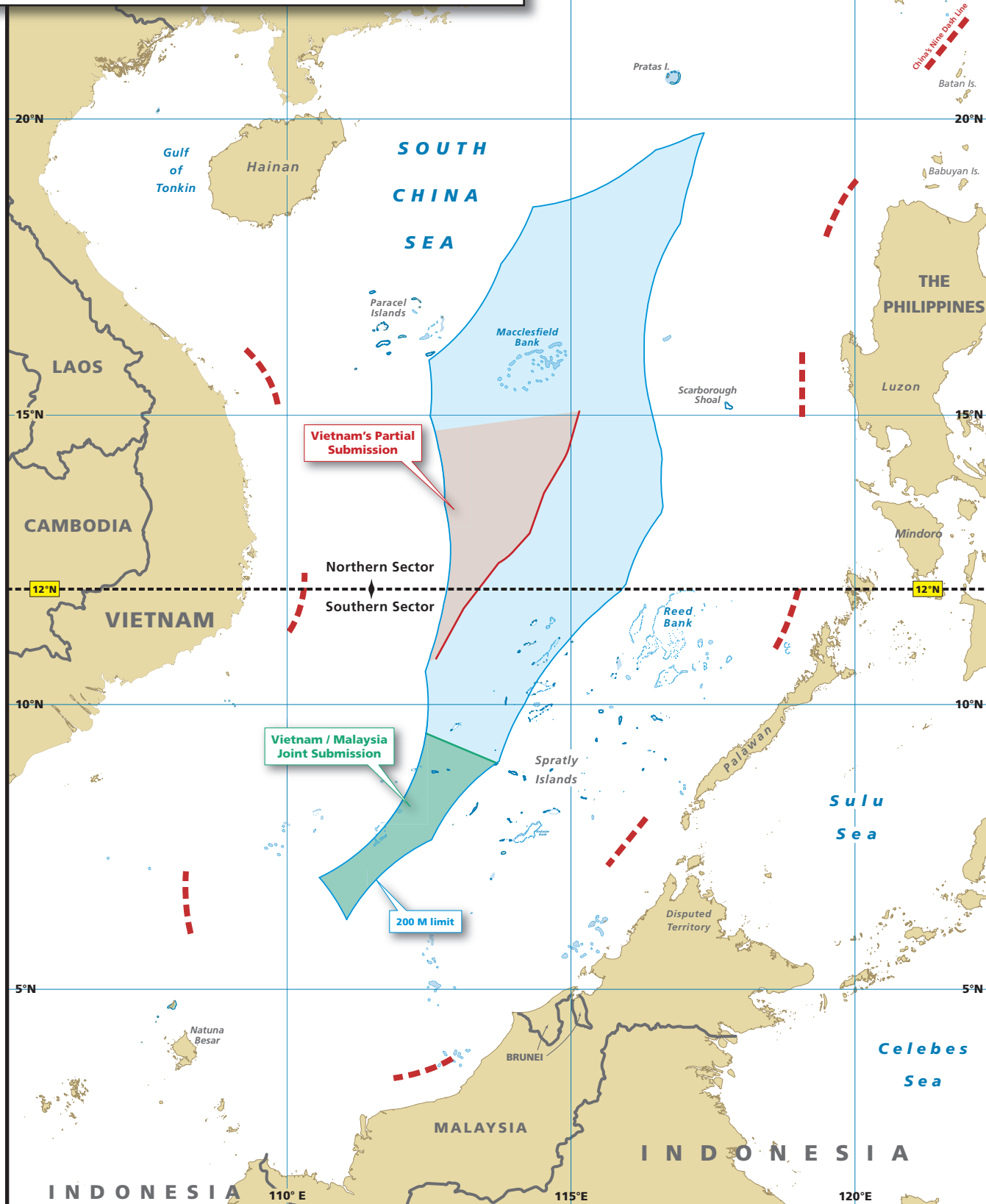
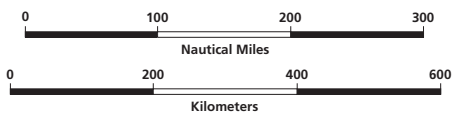


Figure S8.1



# THE PHILIPPINES' FORTHCOMING SUBMISSION WITH RESPECT TO A CONTINENTAL SHELF BEYOND 200 M

Mercator Projection  
Datum: WGS-84  
(Scale accurate at 15°N)



Coastline sources: NGA charts 71027, 91004, 91005, 91010, 92033, 93030, 93036, 93044, 93045, 93046, 93047, 93049, 93520 and BA charts 94, 3482, 3483, 3488 and 3489.

Prepared by: International Mapping

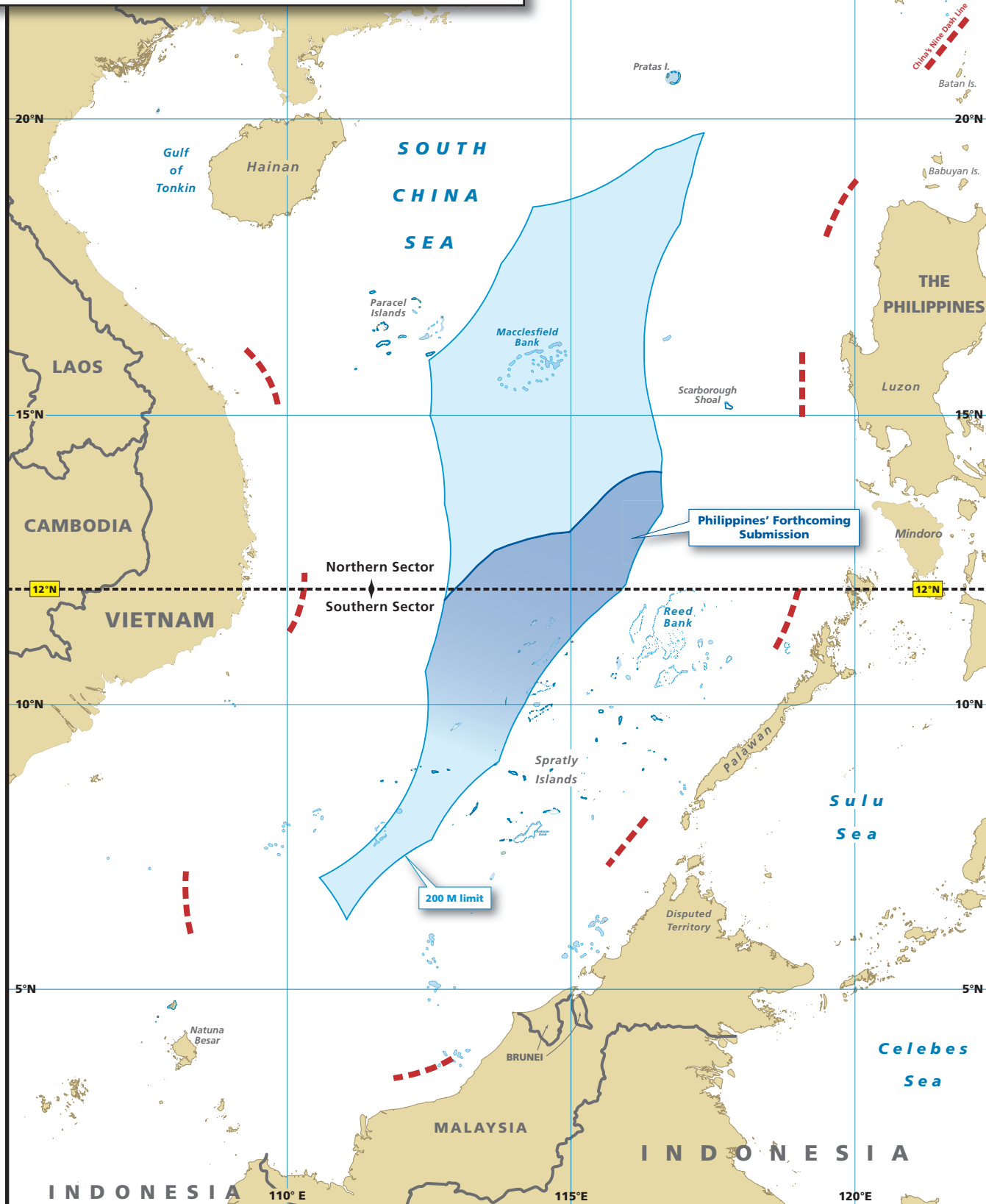


Figure S8.2



able to claim from the features over which it claims sovereignty in both the Northern and Southern Sectors of the South China Sea.<sup>74</sup>

8.6. Dr Parson's expert report is attached hereto as Annex 514. Its contents are easily summarized. In the Southern Sector (*i.e.*, the areas below 12° N covering the Spratly Islands), no issues arise. The outer edge of the continental margin determined in accordance with Article 76(4) of the Convention lies considerably *within* 200 M.<sup>75</sup> Thus, even if any of the insular features in the Spratly Islands were capable of generating entitlement to maritime zones beyond 12 M, which the Philippines denies (as does Viet Nam: *see* response to Question 12), no additional considerations involving a continental shelf beyond 200 M would be implicated.

8.7. Neither do any significant additional issues arise in the Northern Sector. For purposes of analysing this aspect of the issue, the Philippines asked Dr Parson to consider the potential continental shelf claims beyond 200 M China might make from (1) the coasts of the Chinese mainland, Hainan Island and the Paracel Islands in the northeast; and (2) the coast the Pratas Islands in the north.

8.8. The Philippines does not consider either the Paracel or the Pratas Islands to be capable of generating entitlements beyond 12 M. Nevertheless, it recognizes that the status and potential entitlements of the two island groups are not at issue in this arbitration. For purposes of this exercise therefore, and in order to adopt a maximally conservative approach, it asked Dr Parson to assume that the Paracel and Pratas Islands were capable of generating entitlement to a continental shelf.

8.9. Proceeding on that basis, Dr Parson concludes that both from the mainland, Hainan Island and the Paracel Islands, and from the Pratas Islands, China may have potential claims to a continental shelf beyond 200 M.<sup>76</sup> In both instances, however, the approximate limits of those claims only somewhat exceed 200 M. In the case of the mainland, Hainan and the Paracel Islands, for example, the limit of the continental margin extends to 237 M from the

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<sup>74</sup> The Philippines would have no objection if the Tribunal were to determine that it wishes to engage its own expert to confirm the contents of Dr. Parson's report.

<sup>75</sup> Dr. Lindsay Parson, *The potential for China to develop a viable submission for continental shelf area beyond 200 nautical miles in the South China Sea* (Mar. 2015), para 4.1. SWSP, Vol. IX, Annex 514.

<sup>76</sup> *See id.*, paras. 2.1, 3.1.

Paracels. In the case of the Pratas Islands, the limit of the continental shelf extends to 230 M (and most of this lies within 200 M of Taiwan).

8.10. Both potential claim areas are depicted in **Figure S8.3** (following page 40). As the Tribunal can see, substantial area of indisputable Philippine continental shelf (and EEZ) remains. The limits of China's potential submission remain fully 94 M (in the case of the mainland, Hainan and Paracels) and 178 M (in the case of the Pratas) from Scarborough Shoal.

8.11. **Figure S8.4** (following Figure S8.3) reflects all the existing and potential submissions with respect to a continental shelf beyond 200 M from any of the littoral States on the South China Sea.

8.12. With respect to the portion of the Tribunal's question concerning the implications of China's possible continental shelf submission(s) in light of Article 298(1)(a), the Philippines considers that there are no such implications.

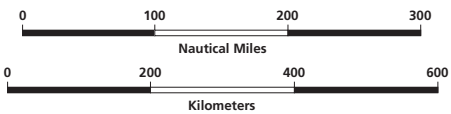
8.13. Article 298(1)(a) provides in relevant part that the Tribunal does not have jurisdiction over "disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations". As the Philippines made clear in its Memorial, no questions concerning any aspect of these three articles, including those portions relating to sea boundary delimitations, are before the Tribunal. Nothing about China's possible submission(s) with respect to a continental shelf beyond 200 M alters the analysis.

8.14. *First*, as described above, China has no possible claim from the Spratly Islands in the Southern Sector. And even in the Northern Sector where hypothetical claims may exist, those claims do not materially enlarge upon China's putative 200 M entitlements and do not impinge significantly on the maritime areas claimed by the Philippines, including especially on the area around Scarborough Shoal.

8.15. *Second*, submissions concerning the location of the outer edge of the continental margin determined in accordance with Article 76(4) and (5) raise only issues of potential *entitlement*. They do not raise issues of *delimitation*. The outer edge of the continental margin represents the maximum seaward limit of the area a coastal State may be entitled to claim under UNCLOS. It does not, however, resolve the issue of overlapping continental shelf entitlements of two or more coastal States. That wholly separate determination is a function

# CHINA'S POTENTIAL SUBMISSIONS WITH RESPECT TO A CONTINENTAL SHELF BEYOND 200 M IN THE NORTHERN SECTOR

Mercator Projection  
Datum: WGS-84  
(Scale accurate at 15°N)



Coastline sources: NGA charts 71027, 91004, 91005, 91010, 92033, 93030, 93036, 93044, 93045, 93046, 93047, 93049, 93520 and BA charts 94, 3482, 3483, 3488 and 3489.

Prepared by: International Mapping

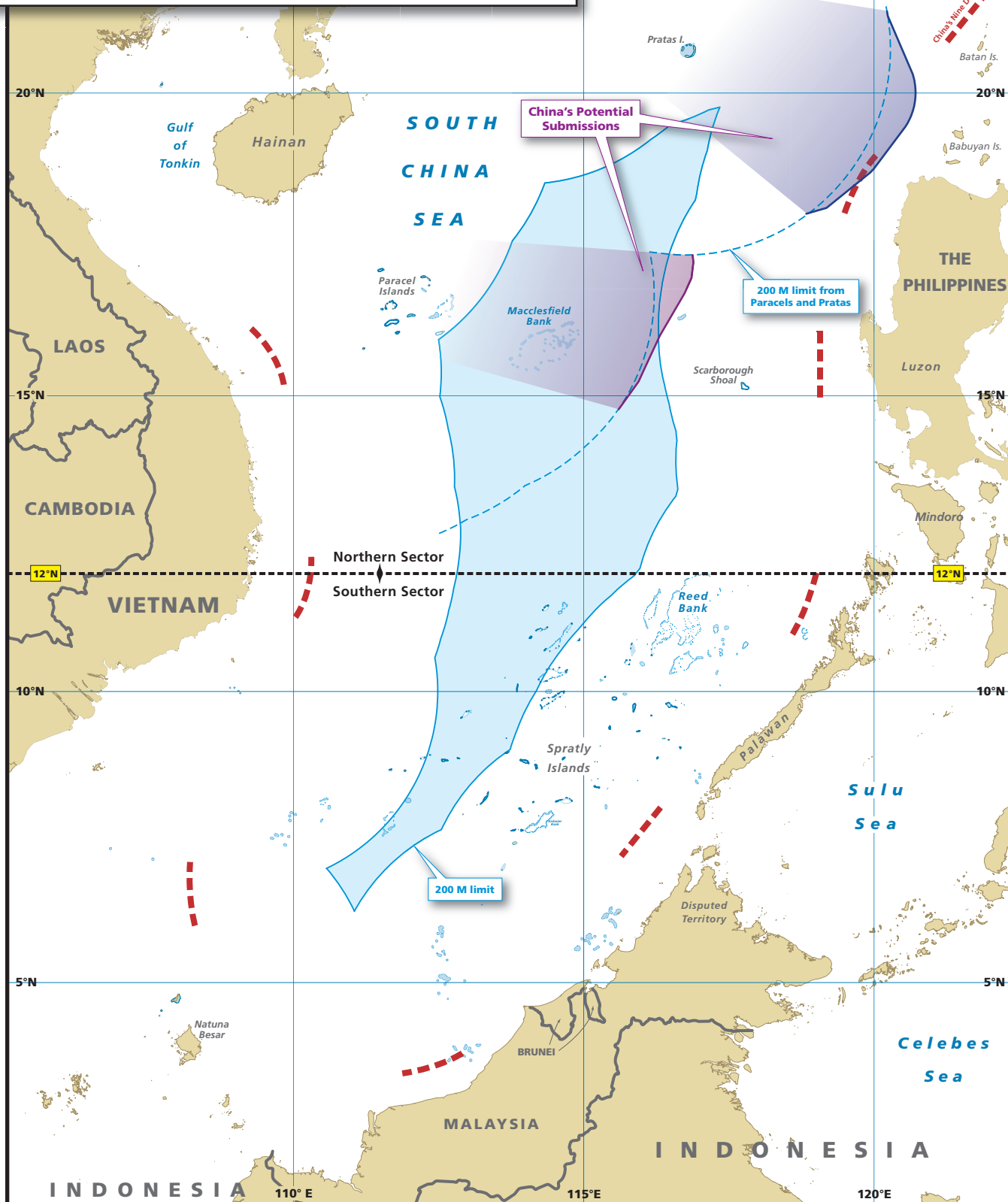


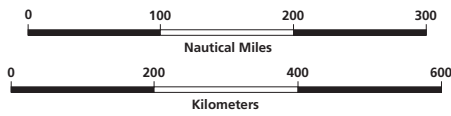
Figure S8.3





# SUBMISSIONS AND POTENTIAL SUBMISSIONS WITH RESPECT TO A CONTINENTAL SHELF BEYOND 200 M IN THE SOUTH CHINA SEA

Mercator Projection  
Datum: WGS-84  
(Scale accurate at 15°N)



Coastline sources: NGA charts 71027, 91004, 91005, 91010, 92033, 93030, 93036, 93044, 93045, 93046, 93047, 93049, 93520 and BA charts 94, 3482, 3483, 3488 and 3489.

Prepared by: International Mapping

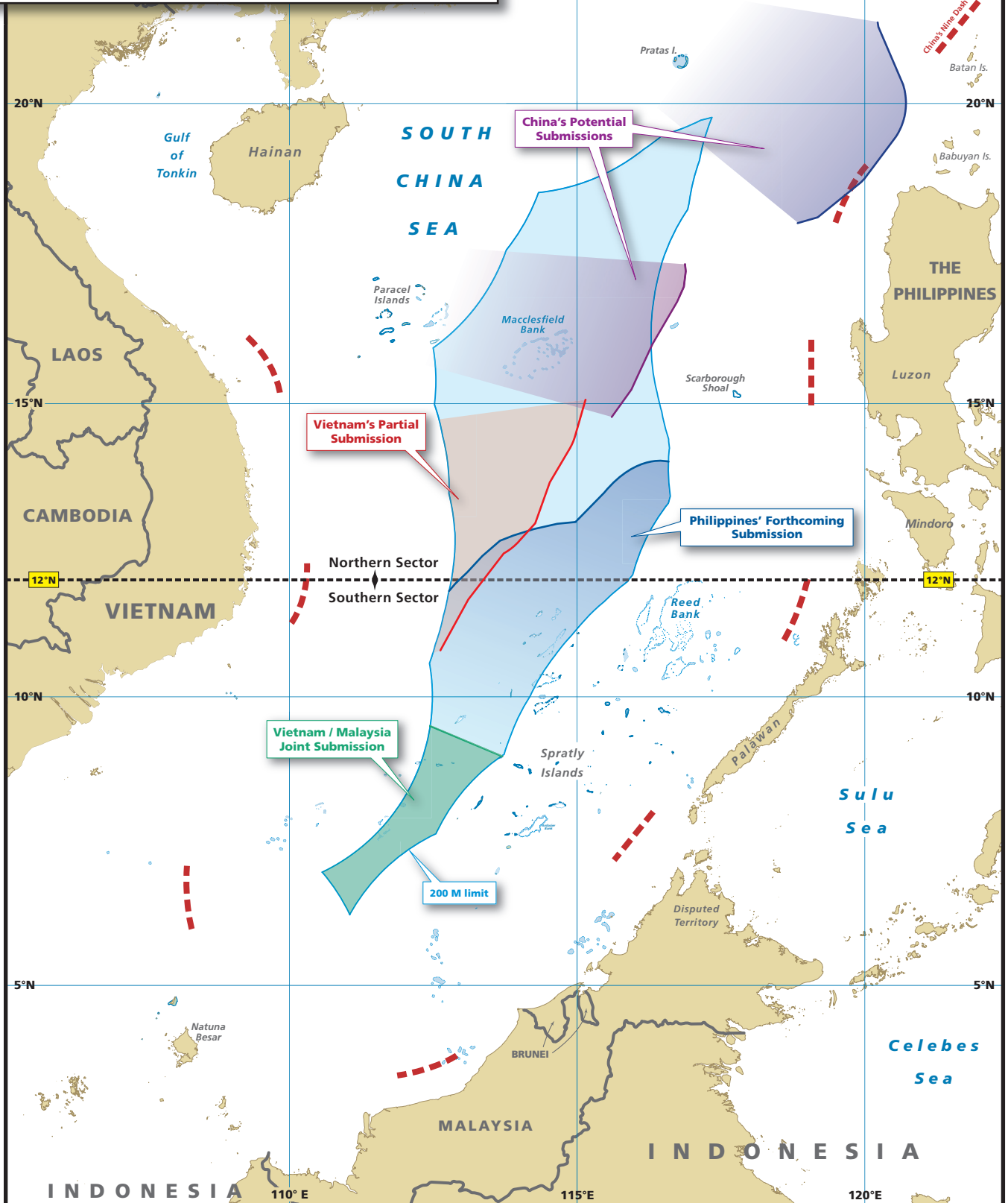


Figure S8.4



of the delimitation process, no aspect of which is before the Tribunal. Although this observation is true generally, it applies with particular force in the context of the South China Sea, a semi-enclosed sea strewn with insular features and surrounded on by many coastal States.

8.16. Accordingly, no questions concerning the interpretation or application of Article 15, 74 or 83 are implicated.



## QUESTION 9

*The Tribunal notes the Philippines' argument that none of its claims "raise issues involving military or law enforcement activities in any way. The Tribunal's jurisdiction over them is therefore unaffected by Article 298(1)(b)" (Memorial, para. 7.145), and further that –*

*The claims of the Philippines relate only to the existence of these rights, not their exercise. Moreover, the Philippines' claims only concern areas where China has no entitlement to an EEZ or continental shelf. The law enforcement activities exception is therefore inapplicable to these proceedings.*

*(Memorial, para. 7.154)*

*The Philippines is invited to elaborate further on these issues, in particular with respect to the Philippines' Submissions 8-11 and 13-14. In the course of such elaboration, the Philippines is invited specifically to address the applicability, if any, of Article 298(1)(b) within the potential maritime zones of a feature whose status as a submerged feature, low-tide elevation, rock, or island is disputed or within the potential maritime zones of a feature whose sovereignty is disputed.*

*[Submission 8: China has unlawfully interfered with the enjoyment and exercise of the sovereign rights of the Philippines with respect to the living and non-living resources of its exclusive economic zone and continental shelf;*

*Submission 9: China has unlawfully failed to prevent its nationals and vessels from exploiting the living resources in the exclusive economic zone of the Philippines;*

*Submission 10: China has unlawfully prevented Philippine fishermen from pursuing their livelihoods by interfering with traditional fishing activities at Scarborough Shoal;*

*Submission 11: China has violated its obligations under the Convention to protect and preserve the marine environment at Scarborough Shoal and Second Thomas Shoal;*

...

*Submission 13: China has breached its obligations under the Convention by operating its law enforcement vessels in a dangerous manner causing serious risk of collision to Philippine vessels navigating in the vicinity of Scarborough Shoal;*

*Submission 14: Since the commencement of this arbitration in January 2013, China has unlawfully aggravated and extended the dispute by, among other things:*

- (a) interfering with the Philippines' rights of navigation in the waters at, and adjacent to, Second Thomas Shoal;*
- (b) preventing the rotation and resupply of Philippine personnel stationed at Second Thomas Shoal; and*

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

**Response:**

9.1. The Tribunal’s jurisdiction over Submissions 8-11 and 13-14 is unimpaired by the exception set forth in Article 298(1)(b). The Philippines does not understand China to disagree. In its 7 December 2014 Position Paper, China makes no mention of Article 298(1)(b); still less does it invoke it to argue that the Tribunal does not have jurisdiction over any aspect of the Philippines’ claims.

9.2. China’s silence is significant. By its terms, the Position Paper “is intended to demonstrate that the arbitral tribunal ... does not have jurisdiction over this case”.<sup>77</sup> China also subsequently characterized its Position Paper as “comprehensively explain[ing] why the Arbitral Tribunal ... manifestly has no jurisdiction over the case”.<sup>78</sup> Its failure to invoke Article 298(1)(b) would therefore appear to be both considered and intentional. For the reasons discussed below, it was also appropriate.

9.3. Article 298(1) permits a State Party to the Convention to “declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to” the categories of disputes listed in subparagraphs (a) through (c). Subparagraph (b) covers

disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under article 297, paragraph 2 or 3[.]

9.4. Article 298(1)(b) thus excludes from jurisdiction two different types of disputes: (1) disputes concerning military activities; and (2) disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from jurisdiction by Article 297(2) or (3).

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<sup>77</sup> China’s Position Paper, para. 2. SWSP, Vol. VIII, Annex 467.

<sup>78</sup> Letter from H.E. Ambassador Chen Xu, Embassy of the People’s Republic of China in The Hague, to H.E. Judge Thomas A. Mensah (6 Feb. 2015), para. 1. SWSP, Vol. VIII, Annex 470.

9.5. As regards the so-called “military activities exception”, the Philippines demonstrated in its Memorial that the Convention distinguishes between military and law enforcement activities.<sup>79</sup> Whether a given activity is properly categorized as “military” or “law enforcement” depends on the nature and purpose of the activity itself, not on the identity of the actor.<sup>80</sup>

9.6. As regards the “law enforcement activities exception”, it bears note that not all law enforcement activities are excepted. Rather, the excluded activities are only those “in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under Article 297, paragraph 2 or 3”. The *Virginia Commentary* explains:

Only disputes concerning the enforcement of provisions relating to marine scientific research or fisheries, which are not subject to the jurisdiction of a court or tribunal because of the express exceptions in article 297, paragraphs 2 and 3, can be excepted by a declaration under article 298.<sup>81</sup>

Accordingly, the scope of the law enforcement activities exception is anchored to Article 297(2) and (3). When the latter exceptions do not apply, neither does the former.<sup>82</sup>

9.7. As discussed above in the Philippines’ response to Question 5, Article 297(3) excepts from jurisdiction disputes relating to a coastal State’s exercise of its sovereign rights with respect to the living resources in its own EEZ. The article therefore does not preclude jurisdiction over disputes concerning (1) the purported exercise of sovereign rights by one State *in the EEZ of another*; (2) the exercise of sovereign rights relating to *non-living resources*; or (3) the exercise of sovereign rights relating to living resources in the *territorial sea*.<sup>83</sup> Consequently, disputes concerning law enforcement activities relating to any of the above three categories are not excluded from jurisdiction.

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<sup>79</sup> Memorial, paras. 7.146-7.150.

<sup>80</sup> *Id.*, para. 7.148.

<sup>81</sup> *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 5 (M. Nordquist, et al., eds., 2002), p. 137. SWSP, Vol. XII, Annex LA-148(bis). See also *Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation)*, *Provisional Measures, Order of 22 November 2013*, ITLOS Reports 2013, para. 45. MP, Vol. XI, Annex LA-45; *Arctic Sunrise Arbitration (Kingdom of the Netherlands v. Russian Federation)*, Award on Jurisdiction, UNCLOS Annex VII Tribunal (26 Nov. 2014), paras. 73-77. SWSP, Vol. XII, Annex LA-180.

<sup>82</sup> The Article 297(2) exception concerns marine scientific research and is therefore not relevant to the submissions identified in the question.

<sup>83</sup> See *supra* Response to Question 5.

9.8. In the paragraphs that follow, the Philippines will address each of Submissions 8-11 and 13-14, and show that neither the military activities exception nor the law enforcement activities exception impairs the Tribunal's jurisdiction to address any of them.

9.9. **Submission 8** concerns China's unlawful interference with the Philippines' enjoyment and exercise of its sovereign rights with respect to the living and non-living resources of its EEZ and continental shelf.

9.10. The military activities exception does not limit the Tribunal's jurisdiction to address this submission because none of the activities about which the Philippines complains can properly be considered "military" in nature. Virtually all the disputed conduct was undertaken by law enforcement vessels from the China Coast Guard ("CCG"), China Marine Surveillance ("CMS") or China's Fisheries and Law Enforcement Command ("FLEC") carrying out prototypical law enforcement activities.<sup>84</sup> On those very few occasions when vessels of the People's Liberation Army Navy ("PLAN") were present, they were there to support the CCG, CMS and FLEC in their law enforcement role.<sup>85</sup> The activities relevant to Submission 8 are therefore properly considered law enforcement activities.

9.11. The law enforcement activities implicated by Submission 8 are non-excluded activities for two reasons. *First*, with respect to China's interference with the Philippines' exercise of sovereign rights over both living and non-living resources<sup>86</sup>, the Philippines has shown that China is not the relevant "coastal State". As discussed, none of the relevant maritime features, wherever located, generates entitlement to an EEZ or continental shelf.<sup>87</sup> The waters, seabed and subsoil within 200 M of the Philippine coast but beyond 12 M from any high-tide feature therefore constitute the EEZ and continental shelf of the Philippines. In those areas, the Philippines — not China — enjoys the sovereign rights that UNCLOS accords. Submission 8 therefore does not implicate China's exercise of its sovereign rights as "the coastal State", as Articles 297(3)(a) and 298(1)(b) would require.

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<sup>84</sup> See Memorial, paras. 6.16-6.26, 6.50-6.65.

<sup>85</sup> See *id.*, para. 6.63.

<sup>86</sup> See *id.*, paras. 6.15-6.38.

<sup>87</sup> See *supra* para. 5.5.



9.12. *Second*, with respect to Chinese law enforcement vessels' interference with the Philippines' exercise of its sovereign rights over *non-living* resources<sup>88</sup>, these too are not excluded from jurisdiction. By its plain terms, Article 297(3)(a) — and thus also the law enforcement component of Article 298(1)(b) — applies only to “living resources”. There is therefore no bar to jurisdiction.

9.13. **Submission 9** concerns China's failure to prevent its nationals and vessels from exploiting the living resources of the Philippines' EEZ. This submission also does not run afoul of either the military activities or the law enforcement activities exceptions.

9.14. The former exception is not implicated both as a matter of principle and as a matter of fact. *First*, as a matter of principle, preventing one's own nationals from conducting illegal fishing activities in the maritime zones of another State is intrinsically a law enforcement, not a military, activity. *Second*, as a matter of fact, China has deployed its law enforcement vessels to monitor Chinese fishermen exploiting living resources in the relevant areas of the South China Sea.<sup>89</sup>

9.15. The law enforcement activities exception also does not apply because, for the reasons previously stated, China is not the relevant “coastal State” whose exercise of fisheries law enforcement authority is shielded from jurisdiction by Articles 297(3)(a) and 298(1)(b).

9.16. Submission 10 concerns China's actions to prevent Philippine nationals from pursuing their traditional fishing activities at Scarborough Shoal. This submission is not covered by the military activities exception for the same reasons as Submission 9. That is, as a matter of principle, preventing the nationals of other States from fishing in a given area is intrinsically a law enforcement, not military, activity. Moreover, as a matter of fact, China's actions at Scarborough Shoal were carried out by CMS and FLEC vessels.<sup>90</sup>

9.17. Submission 10 is also not covered by the law enforcement activities exception because China's conduct occurred in the territorial sea around Scarborough Shoal. By virtue of Article 297(3), the law enforcement component of Article 298(1)(b) applies only in the

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<sup>88</sup> See Memorial, paras. 6.15-6.28.

<sup>89</sup> *Id.*, para. 6.29-6.38.

<sup>90</sup> *Id.*, paras. 3.53-3.54.

EEZ. It therefore does not impair the Tribunal's jurisdiction over law enforcement activities relating to the living resources within 12 M of a high-tide feature.

9.18. **Submission 11** concerns China's violations of its obligations to protect and preserve the marine environment at Scarborough and Second Thomas Shoals. Article 298(1)(b) does not bar the Tribunal's jurisdiction over this submission any more than it does the others discussed above. The environmentally destructive conduct at both Scarborough and Second Thomas Shoals were carried out by non-governmental Chinese-flagged ships<sup>91</sup> operating under the watchful eye of CMS and FLEC vessels.<sup>92</sup> The relevant activities were not military in nature, rendering that prong of Article 298(1)(b) irrelevant.

9.19. The law enforcement activities exception is equally inapplicable. Providing cover to fishing boats engaged in environmentally destructive practices is plainly not a law "enforcement" activity. Moreover, even if it were, the exception would still not apply. In the case of Scarborough Shoal, the relevant activities occurred in the territorial sea, to which the limitation in Article 297(3)(a) — and with it the law enforcement exception in Article 298(1)(b) — does not apply.

9.20. In the case of Second Thomas Shoal, the law enforcement activities exception does not apply because that feature is located some 104 M from the nearest point on the Philippine island of Palawan, and substantially more than 200 M from any feature claimed by China that is capable of generating entitlement to an EEZ. China's activities were therefore not conducted within its own EEZ, as Articles 297(3)(a) and 298(1)(b) require, but rather that of the Philippines.

9.21. **Submission 13** concerns China's breach of its obligations under the Convention by operating its law enforcement vessels in a dangerous manner causing serious risk of collision to Philippine vessels navigating in the vicinity of Scarborough Shoal.

9.22. The military activities exception does not impair the Tribunals' jurisdiction to address this submission because the underlying mission in which the Chinese vessels were engaged — attempting to drive away the fishing boats of other States — is intrinsically law

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<sup>91</sup> *Id.*, paras. 6.50-6.61.

<sup>92</sup> *Id.*, paras. 6.52-6.54, 6.62. In one instance at Second Thomas Shoal, the CMS and FLEC vessels were accompanied by a PLAN ship. *Id.*, para. 6.63. Even so, the military activities exception does not apply because the PLAN vessel was assisting the Chinese CMS vessels in their purported law enforcement activity.

enforcement in nature, as evidenced by the fact that the conduct at issue was carried out by CMS and FLEC vessels.<sup>93</sup>

9.23. The law enforcement activities exception also does not deprive the Tribunal of jurisdiction because China's unlawful actions all took place in the territorial sea around Scarborough Shoal, in which zone the exception does not apply.

9.24. **Submission 14** concerns China's unlawful aggravation and extension of the dispute after the commencement of this arbitration by, among other things: (1) interfering with the Philippines' rights of navigation in the waters at, and adjacent to, Second Thomas Shoal; (2) preventing the rotation and resupply of Philippine personnel stationed at Second Thomas Shoal; and (3) endangering the health and well-being of Philippine personnel stationed at Second Thomas Shoal.

9.25. This submission does not implicate the military activities exception because the conduct at issue is more appropriately considered in the nature of law enforcement activities, as evidenced by the fact that it was largely carried out by CCG and CMS vessels seeking to enforce China's purported "jurisdiction". To be sure, in one instance, a PLAN missile frigate was also present.<sup>94</sup> That bare fact is insufficient to transform a purely law enforcement activity into an excluded military activity, especially since the PLAN frigate was there merely to provide support to the law enforcement vessels.

9.26. Moreover, even if the conduct to which Submission 14 is addressed could be characterized as military in nature (*quod non*), the Tribunal's jurisdiction would remain unaffected. Submission 14 relates to conduct post-dating the Philippines' Statement of Claim that has had the effect of aggravating and extending the dispute previously brought before the Tribunal. It therefore does not, technically speaking, present a distinct dispute over which the Tribunal must separately determine that it has jurisdiction. Rather, it raises issues consequent to the original dispute. Provided only that the Tribunal has jurisdiction over that original dispute, it also has jurisdiction to address Submission 14. Put another way, Submission 14 does not itself present a "dispute concerning military activities" within the meaning of Article 298(1)(b).

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<sup>93</sup> *Id.*, paras. 6.114-6.127, 6.140-6.146.

<sup>94</sup> *Id.*, para. 3.60, 6.63.

9.27. Adopting any other view would open a dangerous loophole in the international adjudicatory regime. The obligation not to aggravate or extend a dispute is of singular importance. It ensures the integrity of the judicial and arbitral process.

9.28. The law enforcement exception is equally without consequence to the Tribunal's jurisdiction in respect of Submission 14. Second Thomas Shoal is a low-tide elevation substantially more than 12 M from any high-tide feature. It is subject to the sovereign rights of the Philippines in respect of the EEZ and the continental shelf. As a result, China is not "the coastal State" entitled to invoke the law enforcement activities exception in the area of Second Thomas Shoal.

9.29. The law enforcement activities exception does not apply for another reason as well. In particular, the exception applies only to claims involving marine scientific research or fishing in the EEZ. Submission 14 addresses neither subject.

9.30. Article 298(1)(b) therefore does not impair the Tribunal's jurisdiction to address any of Submissions 8-11 or 13-14.

## QUESTION 10

*The Tribunal notes the Philippines' provision of satellite images installations on six maritime features in the South China/West Philippine Sea and its submission 12 in relation to Chinese activities on Mischief Reef. The Philippines is invited to elaborate on the nature of the installations located on Cuarteron Reef, Fiery Cross Reef, Johnson Reef, McKennan Reef (including Hughes Reef), Mischief Reef, and Subi Reef, and on whether military personnel are known to have been currently or previously involved in the construction or operation of such installations. The Philippines is further invited to elaborate on the implications of any involvement of military personnel with these facilities for the Tribunal's jurisdiction in particular by reference to Article 298(1)(b).*

[Submission 12: China's occupation and construction activities on Mischief Reef

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

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

*(c) constitute unlawful acts of appropriation]*

### **Response:**

10.1. The Philippines presented all the information available to it concerning the construction and operation of the Chinese facilities at Mischief Reef in its Memorial. As described there, the Philippines first confronted China over reports of Chinese construction activities at the feature in 1995. China responded by asserting that the structures were not military in nature, but rather intended as a shelter for its fishermen.<sup>95</sup> Three years later, when China substantially expanded its initial structures, it again underscored "the civilian nature of the facilities".<sup>96</sup> In 1999, China added a helipad, wharves and additional communication equipment. Still, it maintained its stance, stating: "The new facilities are meant for civilian use and not for military purposes".<sup>97</sup>

10.2. Consistent with its officially stated position that the facilities at Mischief Reef were constructed for civilian purposes, China's 7 December 2014 Position Paper does not invoke

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<sup>95</sup> Memorial, paras. 6.93-6.94.

<sup>96</sup> *Id.*, paras. 6.95-6.96.

<sup>97</sup> *Id.*, para. 6.97 (citing *Memorandum* from Ambassador of the Republic of Philippines in Beijing to the Secretary of Foreign Affairs of the Republic of the Philippines, No. ZPE-18-99-S (15 Mar. 1999), p. 1. MP, Vol. III, Annex 38.).

the military activities exception to challenge the Tribunal's jurisdiction to address Submission 12 or, indeed, any other aspect of the Philippines' claims.

10.3. Intelligence available to the Philippines, which was cited in the Memorial, suggests that Mischief Reef is now occupied by personnel associated with the Chinese military. That fact is, however, insufficient to render China's initial occupation of and construction activities at the feature beyond the Tribunal's jurisdiction. By China's own cognizance, those acts were undertaken for civilian purposes. It is by reference to that time that the applicability of Article 298(1)(a) must be judged. And since they were not then military activities, Article 298(1)(a) does not operate to preclude the Tribunal's jurisdiction. There is therefore no bar to the Tribunal's competence to determine whether China's construction activities at Mischief Reef violated the provisions of the Convention concerning: (1) the construction of artificial islands, installations and structures; (2) the duty to preserve and protect the marine environment; (3) and the violation of the Philippines' sovereign rights within its EEZ and continental shelf.

10.4. The Philippines has not made similar Submissions about the other features identified in the Tribunal's question (Cuarteron Reef, Fiery Cross Reef, Johnson Reef, McKennan Reef (including Hughes Reef) and Subi Reef). Its specific Submissions in regard to those features concern their status under the Convention; that is, whether they are low-tide elevations under Article 13 or islands under Article 121; and, if the latter, whether they are "rocks" under Article 121(3).<sup>98</sup>

10.5. In regard to those features, and in response to the Tribunal's Question 10, the following additional facts can be added to what the Philippines previously stated in its Memorial.

10.6. At Cuarteron Reef, China has completed construction of a reef fortress and supply platform, which has anti-aircraft guns, naval guns, search radars and radio communications equipment. PLA personnel are stationed there but the number is not publicly available.<sup>99</sup>

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<sup>98</sup> Memorial, p. 271 (Submissions 4, 6 & 7). The Philippines reserves its right to amend its Submissions at a later date as appropriate.

<sup>99</sup> David Jude Sta Ana, "China builds more Spratly outposts", *The Philippine Star* (24 May 2011). SWSP, Vol. XI, Annex 562.

10.7. At Fiery Cross Reef, there are reported to be approximately 200 Chinese PLA troops.<sup>100</sup> Beginning in 2014, China has undertaken significant land reclamation activities to expand its existing installation. It appears to be preparing to construct an airstrip and port.<sup>101</sup>

10.8. At Johnson Reef, the Chinese facilities prior to 2014 included a small concrete platform housing a communications facility, a garrison building and a pier. Beginning in 2014, China has undertaken land reclamation activities to create an artificial island that currently measures approximately 400 m across and covers some 0.1 km<sup>2</sup>.<sup>102</sup>

10.9. At McKennan Reef (including Hughes Reef), China's installation is garrisoned by PLA personnel and equipped with anti-aircraft guns. As it has at a number of other features — indeed, at *all* the other features listed in the Tribunal's question — China is in the process of substantial land reclamation activities at McKennan Reef (which began in 2013). The Philippines has no official information about whether military personnel are involved in these works.

10.10. Finally, the information concerning China's presence at Subi Reef is especially limited. To the information stated at paragraphs 5.73-5.75 of the Memorial, the Philippines can add only that 200 PLA troops are reported to be stationed at the feature.<sup>103</sup>

10.11. The apparent involvement of Chinese military personnel at these facilities is of no consequence to the Tribunal's jurisdiction under the military activities prong of Article 298(1)(b). Other than Submission 12 concerning Mischief Reef and addressed above, the Philippines has to date made no claims concerning China's construction activities at any of Cuarteron, Fiery Cross, Johnson, McKennan or Subi Reefs.<sup>104</sup> The military activities exception is therefore of no consequence to any of the Philippines' claims. The absence of any reference to that exception in China's 7 December 2014 Position Paper suggests that China agrees.

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<sup>100</sup> David Jude Sta Ana, "China reclaiming land in 5 reefs?", *The Philippine Star* (13 June 2014). SWSP, Vol. XI, Annex 564.

<sup>101</sup> See Memorial, p. 271 (Submissions 4, 6 & 7). See also Letter from Francis H. Jardeleza, Solicitor General of the Republic of the Philippines, to Judith Levine, Registrar, Permanent Court of Arbitration (30 July 2014). SWSP, Vol. VIII, Annex 466.

<sup>102</sup> J. Hardy & S. O'Connor, "China advances with Johnson South Reef construction," *IHS Jane's Defence Weekly* (19 Sept. 2014). SWSP, Vol. XI, Annex 549.

<sup>103</sup> David Jude Sta Ana, "China reclaiming land in 5 reefs?", *The Philippine Star* (13 June 2014). SWSP, Vol. XI, Annex 564.

<sup>104</sup> See Memorial, p. 271 (setting for the Submissions of the Philippines).





## QUESTION 11

*The Tribunal notes the Philippines' argument that –*

*China's toleration of its fishermen's environmentally harmful activities at Scarborough Shoal and Second Thomas Shoal, including its failure to prevent them from harvesting endangered species, or from using dynamite or cyanide to extract fish, clams or corals at these features, constitute violations of its obligations under the [Convention on Biological Diversity].*

*(Memorial, para. 6.89)*

*The Philippines is invited to elaborate on the relationship between alleged violations of the Convention on Biological Diversity and the Convention. In particular, the Philippines is invited to elaborate, by reference to Articles 281, 282, 288(1), 288(2), and 297(1) of the Convention, on the Tribunal's jurisdiction to address alleged violations of the Convention on Biological Diversity.*

### **Response:**

11.1. The Philippines demonstrated in response to Question 4 that the Tribunal has jurisdiction to adjudicate its claims concerning China's violations of its obligations under Articles 192 and 194 of the Convention to protect and preserve the marine environment at Scarborough and Second Thomas Shoals.

11.2. The evidence proving China's breaches of its obligations under Articles 192 and 194 is set out in the Memorial.<sup>105</sup> In summary, the evidence shows:

- Chinese government vessels tolerated and actively supported the environmentally harmful fishing practices by Chinese nationals in the waters around Scarborough Shoal and Second Thomas Shoal.
- Chinese government vessels failed to prevent Chinese nationals from releasing cyanide into the waters around Scarborough Shoal and Second Thomas Shoal, which constitute rare, fragile ecosystems.
- These actions led to the destruction of the fragile coral reef at Scarborough Shoal and to the depletion of endangered species, such as giant clams and corals.

11.3. The Philippines considers China's actions (and failures to act) to be inconsistent with the provisions of the Convention on Biological Diversity ("CBD"), for the reasons stated in

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<sup>105</sup> *Id.*, paras. 6.73-6.74; 6.80-6.81.

its Memorial.<sup>106</sup> That is not to say, however, that the Philippines has presented a claim arising under the CBD as such. It has not. The Philippines considers instead that the normative content of Articles 192 and 194 of the Convention should be informed by reference to the provisions of the CBD relating to the protection of endangered species.<sup>107</sup>

11.4. Article 31(3)(c) of the Vienna Convention on the Law of Treaties specifically contemplates such an approach to the interpretation of treaties. It provides that, in interpreting a treaty, account shall be taken of “[a]ny relevant rules of international law applicable in the relations between the parties”. Both the Philippines and China are States Parties to the CBD. The provisions thereof therefore constitute “relevant rules of international law” applicable in relations between them.

11.5. Moreover, looking to the provisions of the CBD to inform the interpretation and application of Articles 192 and 194 is consistent with the language and structure of the Convention as a whole. The *Virginia Commentary* observes that Article 192 “explicitly proclaim[s] in positive terms, as a general principle of law, that all States have the obligation to protect and preserve the marine environment, and implicitly (in negative terms) the obligation not to degrade it deliberately (or perhaps even carelessly)”.<sup>108</sup> It represents “the first occasion on which a disposition of this character has been included in a general international treaty of a comprehensive and universal scope”.<sup>109</sup> Similar observations apply equally to Article 194’s obligation to prevent the pollution of the marine environment.

11.6. Both Articles are, however, worded in a general fashion. When the Convention was adopted, it was anticipated that their normative content would be developed further in other international instruments. Article 197 of the Convention, for example, provides:

States shall cooperate on a global basis ... in formulating rules,  
standards and recommended practices and procedures

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<sup>106</sup> See *id.*, paras. 6.82-6.89.

<sup>107</sup> See *Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the WTO Appellate Body, Doc. No. WT/DS58/AB/R (12 Oct. 1998), paras. 130-131. SWSP, Vol. XII, Annex LA-178. (referring to, *inter alia*, the 1992 Convention on Biological Diversity in order to interpret the 1947 GATT Agreement).

<sup>108</sup> *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 4 (M. Nordquist, et. al., eds., 2002), pp. 39-40. MP, Vol. XI, Annex LA-147.

<sup>109</sup> *Id.*, p. 40.

consistent with this Convention, for the protection of the marine environment ....<sup>110</sup>

11.7. It is significant that the CBD itself takes note of the Convention's provisions relating to the protection of the marine environment. In particular, Article 22(2) of the CBD provides that it must be implemented "with respect to the marine environment consistently with the rights and obligations of States under the law of the sea". The CBD's norms are therefore specifically intended to be "consistent with this Convention". In this respect, the Philippines notes that UNCLOS Article 293(1) expressly provides: "A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention".

11.8. Using the CBD to inform the scope and content of China's obligations under Articles 192 and 194 in the manner suggested by the Philippines would therefore be entirely consistent with the scheme of UNCLOS.

11.9. Inasmuch as the Philippines invokes the provisions of the CBD to inform the Parties' dispute concerning interpretation and application of Article 192 and 194, the issue is one over which Article 288(1) expressly gives the Tribunal jurisdiction.<sup>111</sup> Because no dispute concerning the interpretation or application of the CBD *per se* is presented, Article 288(2) is irrelevant.<sup>112</sup>

11.10. Irrelevant too are Articles 281 and 282. These two provisions could only apply if the dispute settlement mechanisms of the CBD were deemed to constitute an agreement to settle disputes "concerning the interpretation or application of *this Convention*" — *i.e.*, UNCLOS — by recourse to means other than those provided for in Section 2 of Part XV. They are not. By their terms, the CBD's dispute settlement procedures apply only to disputes concerning the interpretation or application of that different Convention.<sup>113</sup> Yet, as discussed above, the

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<sup>110</sup> See also, *e.g.*, Articles 207, 208 & 210.

<sup>111</sup> Article 288(1) provides: "A court or tribunal referred to in article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part".

<sup>112</sup> Article 288(2) provides: "A court or tribunal referred to in article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement".

<sup>113</sup> See Convention on Biological Diversity (hereinafter "CBD"), 1760 U.N.T.S. 19 (5 June 1992), entered into force 29 Dec. 1993, Art. 27. MP, Vol. XI, Annex LA-82.

issue now before the Tribunal concerns only the interpretation or application of *UNCLOS*, not the CBD.

11.11. An analogous issue arose in the *MOX Plant* case. On the request for provisional measures Ireland submitted to ITLOS pending constitution of the Annex VII tribunal, the United Kingdom challenged the tribunal's *prima facie* jurisdiction on the grounds that the same matter was pending before an OSPAR arbitral tribunal as well as the European Court of Justice. ITLOS unanimously rejected the U.K.'s challenge, stating:

[T]he dispute settlement procedures under the OSPAR Convention, the EC Treaty and the Euratom Treaty deal with disputes concerning the interpretation or application of those agreements, and not with disputes arising under the Convention;

... [E]ven if the OSPAR Convention, the EC Treaty and the Euratom treaty contain rights or obligations similar to or identical with the rights set out in the Convention, the rights and obligations under these agreements have a separate existence from those under the Convention;

...

[T]he Tribunal is of the opinion that, since the dispute before the Annex VII arbitral tribunal concerns the interpretation or application of the Convention and no other agreement, only the dispute settlement procedures under the Convention are relevant to that dispute[.]<sup>114</sup>

Articles 281 and 282 are therefore without consequence to the Tribunal's jurisdiction

11.12. Finally, Article 297(1) does not operate to impair the Tribunal's jurisdiction for the reasons previously stated in response to Question 4.

11.13. The Tribunal therefore has the jurisdiction to look to the CBD to inform its interpretation and application of Articles 192 and 194 of the Convention.

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<sup>114</sup> *The MOX Plant Case (Ireland v. United Kingdom)*, *Provisional Measures, Order of 3 December 2001*, ITLOS Reports 2001, paras. 49-50, 52. MP, Vol. XI, Annex LA-39.

## QUESTION 12

*The Tribunal notes the Philippines' Submission 5, requesting a declaration that "Mischief Reef and Second Thomas Shoal are part of the exclusive economic zone and continental shelf of the Philippines". The Philippines is invited to address the implications, if any, on the Tribunal's jurisdiction in respect of this submission of any overlapping claims or undelimited entitlements to an exclusive economic zone or continental shelf on the part of governments that are not parties to this arbitration.*

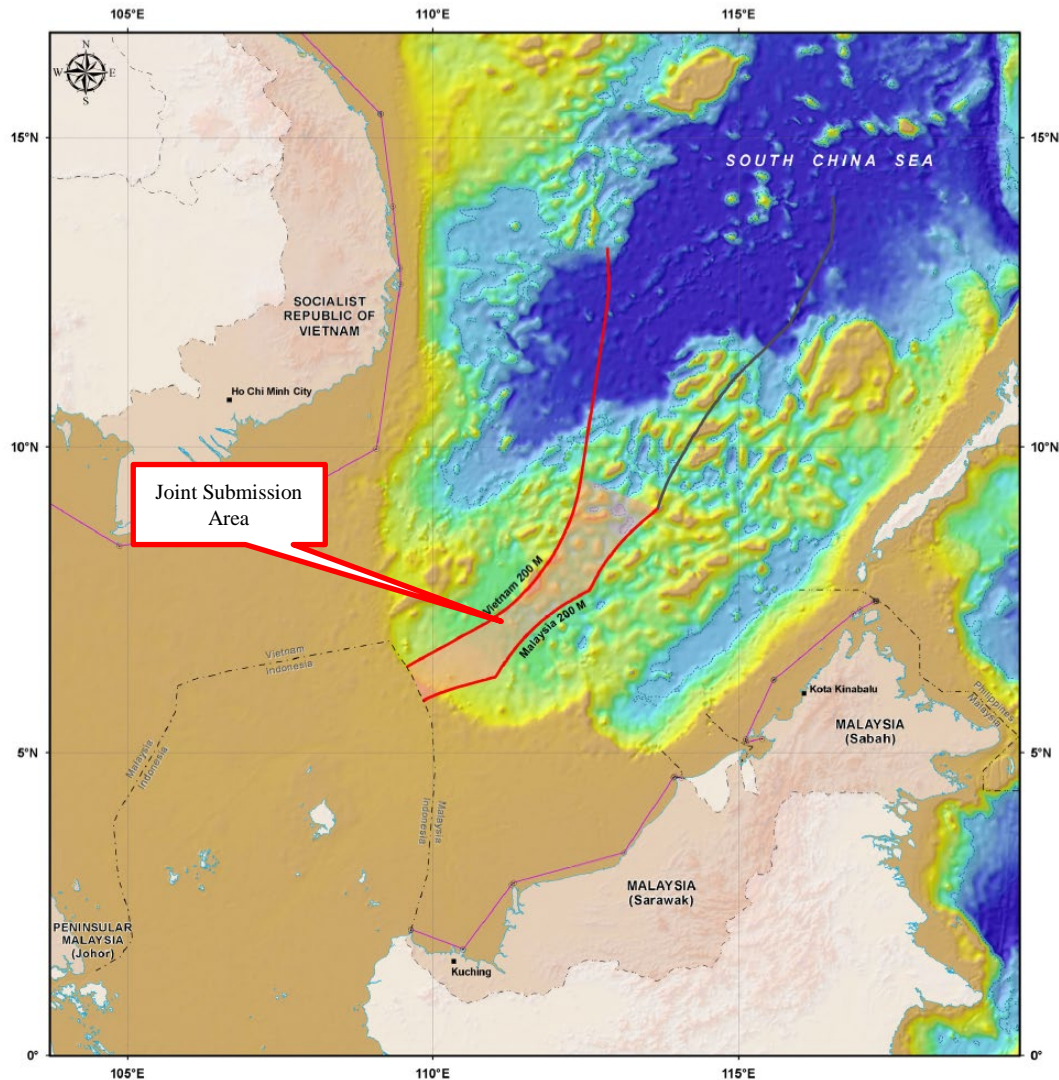
### **Response:**

12.1. There are no overlapping claims or undelimited entitlements of any States that are not parties to this arbitration that are relevant to the issues raised in Submission 5. There are therefore no implications for the Tribunal's jurisdiction or its exercise.

12.2. Neither Viet Nam nor Malaysia, which claim sovereignty over insular features in the Spratly Islands, has claimed an EEZ with respect to any such feature.

12.3. Further, by their conduct both Viet Nam and Malaysia have demonstrated that they do not claim a continental shelf in regard to any of the Spratly features over which they claim sovereignty. This is evidenced by their 6 May 2009 Joint Submission to the CLCS in respect of the continental shelf beyond 200 M in the southern part of the South China Sea. The Joint Submission covers the area reflected in Figure S12.1 (on page 60), an annotated reproduction of a sketch-map that appears in the Executive Summary to the Joint Submission.

12.4. The area covered by the Joint Submission is well within 200 M of several of the features addressed by the Tribunal in its Questions, which are claimed and/or occupied by Viet Nam and Malaysia. These include, *inter alia*, Itu Aba and Namyt (claimed by Viet Nam), and Amboyna Cay and Investigator Shoal (claimed by Malaysia). If either State considered that these features, or any others over which they assert sovereignty claims, generated entitlement to a continental shelf, the Joint Submission would have been redundant; the area covered is already encompassed within the notional 200 M entitlements generated by those features. Thus, there is no EEZ or continental shelf entitlement claimed by either State that overlaps Mischief Reef or Second Thomas Shoal.



**Figure S12.1: Viet Nam-Malaysia Joint Submission Area**  
(annotated)

12.5. In its December 2014 Statement submitted the Tribunal, in which it set forth its positions on various matters in dispute in this arbitration, Viet Nam stated expressly that it does not claim entitlement to an EEZ or continental shelf from any of the features identified in the Philippines’ Statement of Claim:

Viet Nam is of the view that none of the features mentioned by the Philippines in these proceedings can enjoy their own exclusive economic zone or continental shelf or generate maritime entitlements in excess of 12 nautical miles since they are low-tide elevations or “rocks which cannot sustain human

habitation or an economic life of their own” under Article 121(3) of the Convention.<sup>115</sup>

12.6. By the same logic, none of the other features in the Spratlys “can enjoy their own exclusive economic zone or continental shelf or generate maritime entitlements in excess of 12 nautical miles since they are low-tide elevations or ‘rocks which cannot sustain human habitation or an economic life of their own’ under Article 121(3) of the Convention” — as demonstrated in the *Atlas* and the Report of Professors Prescott and Schofield, attached to the Submission as Volume II and Annex 513, respectively.

12.7. Malaysia has likewise made clear that it does not claim entitlement over areas that overlap with either Mischief Reef or Second Thomas Shoal. In 1979, it published the *Peta Menunjukkan Sempadan Perairan dan Pelantar Benua Malaysia* (the “Map Showing the Territorial Waters and Continental Shelf Boundaries of Malaysia”), a copy of which is reproduced in full as Annexes M82 and M83 hereto. The map indicates the limits of Malaysia’s maritime claim in the vicinity of Mischief Reef and Second Thomas Shoal. As the annotated excerpt included as **Figure S12.2** (on the following page) demonstrates, Malaysia makes no claim in the area of the two features.

12.8. Accordingly, there are no overlapping claims or undelimited entitlements to an EEZ or continental shelf on the part of governments that are not parties to this arbitration in the area of Mischief Reef and Second Thomas Shoal. There are therefore no implications for the Tribunal’s jurisdiction arising from such claims or entitlements.

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<sup>115</sup> Socialist Republic of Viet Nam, *Statement of the Ministry of Foreign Affairs of the Socialist Republic of Viet Nam Transmitted to the Arbitral Tribunal in the Proceedings Between the Republic of the Philippines and the People’s Republic of China* (14 Dec. 2014), para. 4(ii). SWSP, Vol. VIII, Annex 468.



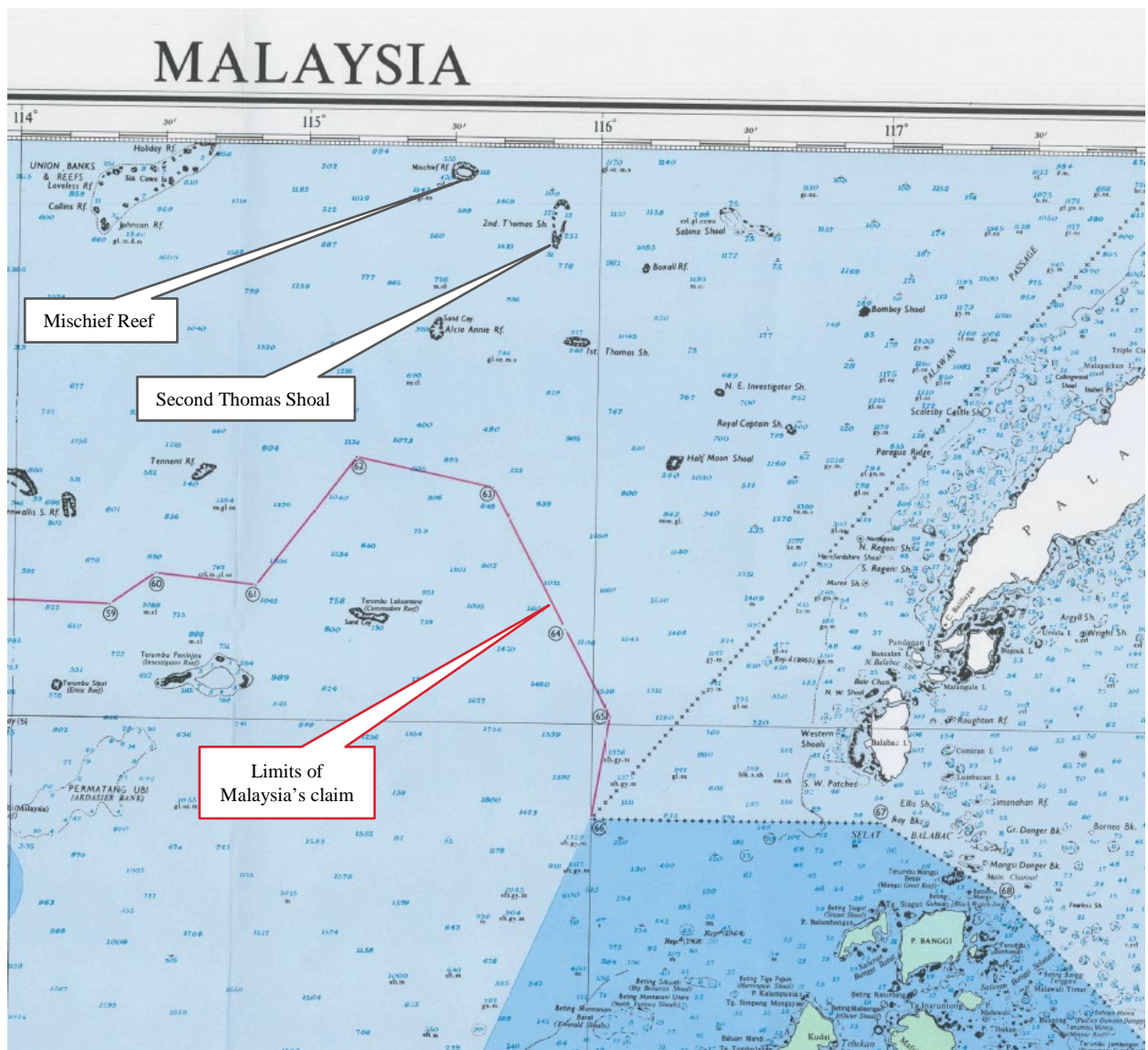


Figure S12.2: Annotated Excerpt of Malaysia's Map (1979)



### QUESTION 13

*The Tribunal notes the Philippines' argument that 'even under pre-Convention legal standards, China would have no valid claim of 'historic rights' anywhere beyond its UNCLOS entitlements, let alone within the Philippines EEZ' (Memorial, para. 4.84). The Philippines is invited to provide further written argument on this issue, in particular with respect to whether China has exercised continuous sovereignty, sovereign rights, historic title, or historic rights over the maritime areas within the nine-dash line. The Philippines is also invited to address, as a point of comparison, any Chinese claims to historic rights or historic title in maritime areas other than the South China Sea/West Philippine Sea, as well as any Chinese reaction to claims of historic rights or historic title advanced by other States.*

#### **Response:**

13.1. Section I responds to the Tribunal's invitation to the Philippines to provide further written argument on China's claim of "historic rights" beyond its UNCLOS entitlements. It is supplemented by an Appendix in which the Philippines presents additional, more detailed historical evidence showing that China has not exercised continuous sovereignty, sovereign rights, historic title, or historic rights over the maritime areas within the nine-dash line; and that China did not even claim such rights or title before 2009, at which time its claim was opposed by the Philippines, Viet Nam, Malaysia and Indonesia. Section II addresses China's historic claims in other maritime areas; namely, the Bohai Sea and the Qiongzhou Strait. Section III describes China's rejection of Viet Nam's historic claims in the Gulf of Tonkin, and shows that the reasons presented by China for that rejection apply with even greater force to its own claims in the South China Sea.

#### **I. China's Claim to Historic Rights in the South China Sea**

13.2. China has not exercised continuous sovereignty, sovereign rights, historic title, or historic rights over the maritime areas within the nine-dash line.

13.3. To begin with, China's claim to possess historic rights in the South China Sea is of recent vintage.<sup>116</sup> Although China first published a map with a dashed line encompassing much of the South China Sea in 1948 (based on a map circulated internally within the government in 1947),<sup>117</sup> it was intended only to demarcate the islands over which China

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<sup>116</sup> See Memorial, paras. 3.13-3.20.

<sup>117</sup> See Z. Gao and B.B. Jia, "The Nine-Dash Line in the South China Sea: History, Status, and Implications", *American Journal of International Law*, Vol. 107, No. 1 (2013), p. 102. MP, Vol. X, Annex 307. The 1947 map on which that 1948 map is based is produced in the Memorial as Figure 4.5 and in Volume VI as Annex M20.

claimed sovereignty. It did not claim historic rights over the maritime space enclosed by the dashed line.<sup>118</sup>

13.4. Nor did China assert such rights in its 1958 Declaration on the Territorial Sea, which recognized that the islands south of Hainan that it then claimed, including the Spratly Islands, were “separated from the mainland ... by the high seas”.<sup>119</sup> This was reaffirmed in its 1992 law on the Territorial Sea and Contiguous Zone, which defined China’s “territorial land” as “the mainland and its offshore islands, Taiwan and the various affiliated islands including Diaoyu Island, Penghu Islands, Dongsha Islands, Xisha Islands, Nansha (Spratly) Islands and other islands that belong to the People’s Republic of China”.<sup>120</sup> The 1992 law proclaimed a 12 M territorial sea and a 12 M contiguous zone, but did not claim a more extensive maritime entitlement, let alone sovereign rights over all the waters within the nine-dash line.

13.5. It was not until 1998 that China first enacted legislation (the Law on the Exclusive Economic Zone and Continental Shelf) that claimed *any* historic rights, and even then China did not purport to claim any such rights in the South China Sea.<sup>121</sup> The Law simply stated in general terms: “The provisions of this Act shall not affect the historical rights of the People’s Republic of China”.<sup>122</sup> There was no explanation of what those rights were, or where they were located.

13.6. It was not until 7 May 2009, when China submitted to the U.N. Secretary-General maps depicting its nine-dash line, that it first claimed historic rights in the South China Sea.<sup>123</sup> In contrast with its conspicuous silence on the matter prior to 2009, it has done so with increasing assertiveness ever since.

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<sup>118</sup> See *id.*, pp. 102-105.

<sup>119</sup> People’s Republic of China, *Declaration of the Government of the People’s Republic of China on China’s Territorial Sea* (4 Sept. 1958), in *Collection of the Sea Laws and Regulations of the People’s Republic of China* (3rd ed. 2001), para 1 MP, Vol. V, Annex 103.

<sup>120</sup> Memorial, para. 3.15. See also People’s Republic of China, *Law on the Territorial Sea and the Contiguous Zone* (25 Feb. 1992), Art. 2. MP, Vol. V, Annex 105.

<sup>121</sup> People’s Republic of China, *Exclusive Economic Zone and Continental Shelf Act* (26 June 1998). MP, Vol. V, Annex 107.

<sup>122</sup> People’s Republic of China, *Exclusive Economic Zone and Continental Shelf Act* (26 June 1998), Art. 14. MP, Vol. V, Annex 107.

<sup>123</sup> Boundary Department of the Ministry of Interior, *Nanhai shu dao wei shi tu [Map Showing The Location of The Various Islands in The South Sea]* (China, 1947). SWSP, Vol. VI, Annex M20. See also Memorial, Figure 1.1.

13.7. The fact that China did not, until very recently, claim any historic rights in the South China Sea reflects its lack of any such rights. In order for a claim to historic rights to a maritime area to prevail, even under pre-Convention standards, there must be (1) “exercise of authority over the area by the State claiming the historic right”, (2) “continuity of this exercise of authority ... for a considerable time”, and (3) either “acquiescence of other States” or “absence of opposition by th[o]se States”.<sup>124</sup> China, however, never exercised authority over the area within the nine-dash line, much less continuously.<sup>125</sup> Nor did other States acquiesce to any such claim by China, and when the claim was first made on 7 May 2009, it was swiftly opposed by other littoral States: the Philippines, Viet Nam, Indonesia and Malaysia.<sup>126</sup>

13.8. China’s claim to historic rights in the waters of the South China Sea is thoroughly disproven by the historical record. Put simply, China did not at any time, let alone continuously, exercise sovereignty, sovereign rights, historic title, or historic rights over the South China Sea or its maritime features, south of Hainan Island. As detailed in the Appendix submitted with this Response, the historical evidence establishes the following:

13.9. *First*, during the period preceding the entry of Europeans to the South China Sea region, China was only one of many littoral polities that made use of the area for shipping, trade and fishing purposes.<sup>127</sup> Unlike the other polities, which dominated trade and controlled various sections of the Sea,<sup>128</sup> China periodically banned its subjects from navigating these waters,<sup>129</sup> believing the maritime realm to be the province of barbarians. The edicts of its various Emperors, some of which were in force for many decades, to refrain from navigating

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<sup>124</sup> United Nations, Secretary General, *Juridical Regime of Historic Waters, Including Historic Bays*, U.N. Doc No. A/CN.4/143 (9 Mar. 1962), para. 80. MP, Vol. XI, Annex LA-89.

<sup>125</sup> See generally *infra* Appendix to Response to Question 13.

<sup>126</sup> Memorial, para. 4.9. See also *Note Verbale* from the Permanent Mission of the Socialist Republic of Vietnam to the United Nations to the Secretary-General of the United Nations, No. 86/HC-2009 (8 May 2009). MP, Vol. VI, Annex 193; *Note Verbale* from the Permanent Mission of Malaysia to the United Nations to the Secretary-General of the United Nations, No. HA 24/09 (20 May 2009), p. 1. MP, Vol. VI, Annex 194; *Note Verbale* from the Permanent Mission of the Republic of Indonesia to the United Nations to the Secretary-General of the United Nations, No. 480/POL-703/VII/10 (8 July 2010), pp. 1-2. MP, Vol. VI, Annex 197; *Note Verbale* from the Permanent Mission of the Republic of the Philippines to the United Nations to the Secretary-General of the United Nations, No. 000228 (5 Apr. 2011), p. 1. MP, Vol. VI, Annex 200. It has also been specifically opposed by the United States. See United States, House Committee on Foreign Affairs, Subcommittee on Asia and the Pacific, “Testimony of Daniel Russel, Assistant Secretary of State Bureau of East Asian and Pacific Affairs at the U.S. Department of State” (5 Feb. 2014). MP, Vol. VI, Annex 170.

<sup>127</sup> See generally *infra* Appendix to Response to Question 13.

<sup>128</sup> See generally *infra* Appendix to Response to Question 13.

<sup>129</sup> See, e.g., *infra* Appendix to Response to Question 13, paras. A13.6; A13.9-10; and A13.37.

in the South China Sea completely negate the hypothesis of “continuous” exercise of sovereign or historic rights or title.

13.10. *Second*, when Europeans arrived in the South China Sea, they operated without interference by or protest from China. They shipped goods across the Sea and patrolled its navigational routes to safeguard those shipments.<sup>130</sup> Their naval forces surveyed the Sea in detail to mitigate the dangers of traversing the Sea,<sup>131</sup> and they cooperated to combat the threat of piracy,<sup>132</sup> which was a pervasive and long-standing problem that China did not effectively address.<sup>133</sup> Moreover, during this time, the independent Vietnamese polity exercised a degree of authority in part of the South China Sea.<sup>134</sup> The historical record evidences no Chinese objections to any of these activities. To the contrary, China’s involvement in the South China Sea was sporadic and minimal for centuries. Even during periods when Chinese vessels from the coastal Fujian region were permitted to carry out trade with the littoral States and polities of the South China Sea, they did so without claim of right or title to the waters or insular features south of Hainan.<sup>135</sup>

13.11. *Third*, in the nineteenth century, European States, such as Britain and France, began to claim sovereignty over the Paracel Islands and certain individual features in the Spratlys,<sup>136</sup> while Spain claimed sovereignty over Scarborough Shoal.<sup>137</sup> There is no record of China, then under the Qing Dynasty, having protested any of these claims, or of claiming any insular features south of Hainan Island, except for the Paracels.<sup>138</sup> Likewise, there is no record of China protesting the activities of the European colonial powers in these waters, or of claiming, let alone exercising, any sovereign or historic rights in those maritime areas.

13.12. *Fourth*, in the twentieth century, prior to World War II, as the European colonial powers and Japan intensified their interest in the South China Sea, including patrolling it with

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<sup>130</sup> See generally *infra* Appendix to Response to Question 13.

<sup>131</sup> See, e.g., *infra* paras. A13.20-23; A13.39-41; and A13.43.

<sup>132</sup> See, e.g., *infra* paras. A13.29-A13.31.

<sup>133</sup> See *infra* paras. A13.27-A13.32.

<sup>134</sup> See, e.g., *infra* paras. A13.33-13.35.

<sup>135</sup> See generally *infra* Appendix to Response to Question 13.

<sup>136</sup> See, e.g., *infra* paras. A13.40-A13.41.

<sup>137</sup> Antonio Remiro Brotóns, *Spain in the Philippines (16th - 19th Centuries)* (19 Mar. 2014), p. 24. MP, Vol. VII, Annex 238.

<sup>138</sup> See, e.g., *infra* para. A13.45.

warships.<sup>139</sup> China continued to acquiesce to these activities. When, under its Republican government, China finally showed an interest in the South China Sea, it surveyed the historical evidence and concluded that “the southernmost territory of China is Triton Island of Xisha [Paracel] Islands”.<sup>140</sup> It made no attempt to claim sovereignty over, or rights in, any features south of the Paracels or the maritime space within the nine-dash line. It was not until 1947 that China, for the first time, publicly asserted a claim to the islands within the dashed line.<sup>141</sup> But even then, as President Ma of the Taiwan Authority has recently confirmed, China’s claim was only to the islands themselves, not to all the waters encompassed by the line.<sup>142</sup>

13.13. *Fifth*, between 1946 and 2009, China made no attempt to exercise sovereignty, sovereign rights or historic rights in the waters of the South China Sea south of Hainan Island, except for those immediately appurtenant to the Paracels. Its actions during that period were consistent with a claim of sovereignty only over particular insular features. The Republic of China seized uninhabited Itu Aba in the Spratlys in 1946 and subsequently abandoned it. The Taiwan Authorities returned to occupy it militarily in 1956.<sup>143</sup> The People’s Republic of China did not occupy any of the features in the Spratlys until 1988, when it seized Fiery Cross Reef. Between then and 1995, it occupied six other tiny features: Johnson Reef, Cuarteron Reef, Gaven Reef, McKennan Reef (including Hughes Reef), Subi Reef and Mischief Reef, the latter four of which are under water at high tide.<sup>144</sup> Meanwhile, 35 other features in the Spratlys were occupied by Viet Nam (20), Malaysia (6) and the Philippines (9), whose access to them was unimpeded.<sup>145</sup> These facts belie a claim that China

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<sup>139</sup> See Memorial, para. 2.35.

<sup>140</sup> Republic of China, National Defense Committee Secretariat, *Statement of Opinions Based on Research of Military Relevance and Methods Regarding the Nine French-Occupied Islands* (1 Sept. 1933), reprinted in *Archival Compilation on South China Sea Islands by Ministry of Foreign Affairs*, Vol. 1, Doc. No. II(1):072 (Republic of China Ministry of Foreign Affairs Research & Planning Committee ed.) (1995). SWSP, Vol. VIII, Annex 475.

<sup>141</sup> See Zou Keyuan, “The Chinese Traditional Maritime Boundary Line in the South China Sea and Its Legal Consequences for the Resolution of the Dispute over the Spratly Islands”, *International Journal of Marine and Coastal Law*, Vol. 14, No. 27 (1999), p. 33. MP, Vol. VIII, Annex 264; L. Jinming and L. Dexia, “The Dotted Line on the Chinese Map of the South China Sea: A Note”, *Ocean Development & International Law*, Vol. 34, No. 3-4 (2003), p. 290. MP, Vol. VIII, Annex 275.

<sup>142</sup> See *infra* Response to Question 15.

<sup>143</sup> Bill Hayton, *The South China Sea: The Struggle for Power in Asia* (2014), p. 70. SWSP, Vol. V, Annex 459; Marwyn S. Samuels, *Contest for the South China Sea* (1982), pp. 76-77. SWSP, Vol. V, Annex 246(bis).

<sup>144</sup> See Memorial, paras. 5.63-5.76, 5.89-5.94.

<sup>145</sup> See *infra* paras. A13.4-A13.9.

exercised sovereignty, sovereign rights, or historic rights or title over the maritime areas between or surrounding the Spratlys, all of which lie within the nine-dash line.

13.14. In short, there is no support for China's claim to have historic rights in the South China Sea, even under pre-UNCLOS legal standards. It has not continuously exercised sovereignty, sovereign rights, historic title or historic rights within the nine-dash line. Even if China had attempted to do so, *quod non*, the activities of other States demonstrate that China's "claim" was not accepted or acquiesced to.

## **II. China's Claims to Historic Rights or Historic Title in Maritime Areas Other than the South China Sea/West Philippine Sea**

13.15. This section responds to the part of Question 13 that invites the Philippines to address "any Chinese claims to historic rights or historic title in maritime areas other than the South China Sea/West Philippine Sea" by describing China's claims in the Bohai Sea and the Qiongzhou Strait.

### **A. Bohai Sea**

13.16. As shown in **Figure S13.1** (following page 68), the Bohai Sea (渤海) is a large gulf of the Yellow Sea located off the northeastern coast of China near Beijing. It is bounded by the Liaodong Peninsula in the north and the Shandong Peninsula in the south. It covers approximately 100,412 km<sup>2</sup> and is one of the busiest seaways in the world.

The Bohai Sea is defined by the International Hydrographic Organization as follows:

The Bo Hai is situated in the northwest part of the Yellow Sea and bounded by the coast of China. Its limits are the following:

*On the East:*

A line joining the mouth of Liugu He [River] (40°16'N - 120°30'E), in Liaoning Province, southeastward to the western extremity of Changxing Dao [Island] (39°33'N - 121°14'E), on the western coast of Liaodong Bandao [Peninsula] (*the common limit with the Liaodong Wan [Gulf], see 7.4.2*);

thence following the western coast of the Liandong Bandao, in China, to Laotieshen Xijiǎo (38°44'N - 121°08'E), the southwestern extremity of Liandong Bandao;

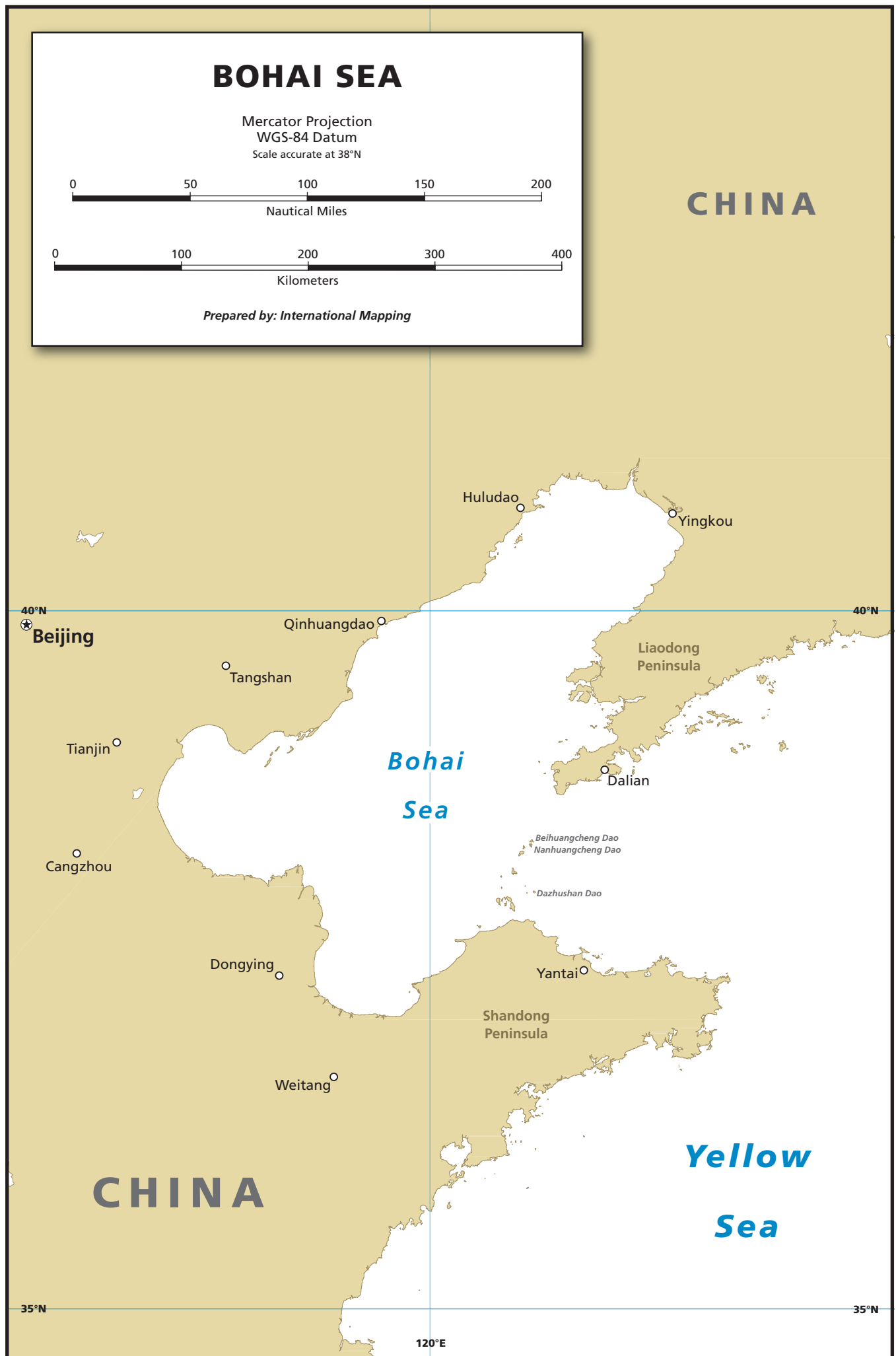


Figure S13.1





thence southward to Penglai Xijiao (37°50'N – 120°45'E), the northern extremity of Shandong Bandao (*the common limit with the Yellow Sea, see 7.4*).

On the West:

From Penglai Xijiao, westward, northward and northeastwards, along the coast of China to Linghe.<sup>146</sup>

13.17. In its 1958 Declaration on the Territorial Sea, China claimed the Bohai Sea as “inland waters”.<sup>147</sup> Specifically, China asserted that the Bohai Sea was “inside the baseline” “composed of the straight lines connecting base-points on the mainland coast and on the outermost of the coastal islands”.<sup>148</sup>

13.18. In 1959, China published “an official explanatory pamphlet ... to justify” the 1958 declaration,<sup>149</sup> entitled *Regarding the Issue of Territorial Waters of China*. It claimed that the Bohai Sea “should absolutely be considered an internal bay of China” on the basis of three arguments.<sup>150</sup> First, when a State adopts straight baselines, as China did in its 1958 declaration,<sup>151</sup> and a bay is within those baselines, “then the bay should be an internal bay of

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<sup>146</sup> International Hydrographic Organization, *Limits of Oceans and Seas: North Pacific*, Special Publication No. 23 (Draft 4th ed. 2002), § 7.4.1. SWSP, Vol. IX, Annex 511.

<sup>147</sup> People's Republic of China, *Declaration of the Government of the People's Republic of China on China's Territorial Sea* (4 Sept. 1958), in *Collection of the Sea Laws and Regulations of the People's Republic of China* (3rd ed. 2001), p. 197, para. 2. MP, Vol. V, Annex 103. The observant reader will note that the term used to refer to the Bohai Sea in the Declaration is 渤海湾 (*bo hai wan*), *see id.*, which is the term used in contemporaneous Chinese maps for a smaller inlet of Bohai Sea known in English as Bohai Bay, *see* China Cartographic Publishing House, *Hanging Map of the People's Republic of China* (1956). SWSP, Vol. VI, Annex M4. It is also the term used in the official explanatory pamphlet, *see* Fu Zhu, *Regarding the Issue of Territorial Waters of China* (1959), p. 17. SWSP, Vol. VIII, Annex 485. The Bohai Sea, on the other hand, was (and still is) referred to as 渤海 (*bo hai*), *see* China Cartographic Publishing House, *Hanging Map of the People's Republic of China* (1956). SWSP, Vol. VI, Annex M4; China Cartographic Publishing House, “Map of the People's Republic of China” (Jan. 2013). SWSP, Vol. VI, Annex M19. Notwithstanding this naming issue, China almost certainly intended to refer to the Bohai Sea (渤海) in its declaration; the explanatory pamphlet, for example, describes the entrance of the body of water being discussed as “connects Liaodong Peninsula and Shandong Peninsula” with an “entrance [of] 45 nautical miles”, with a series of “islands at the entrance of the bay, forming entrances”, including Beihuangcheng Island. Fu Zhu, *Regarding the Issue of Territorial Waters of China* (1959), p. 18. SWSP, Vol. VIII, Annex 485. These all refer to the Bohai Sea (渤海), not the Bohai Bay (渤海湾).

<sup>148</sup> People's Republic of China, *Declaration of the Government of the People's Republic of China on China's Territorial Sea* (4 Sept. 1958), in *Collection of the Sea Laws and Regulations of the People's Republic of China* (3rd ed. 2001), p. 197, para. 2. MP, Vol. V, Annex 103.

<sup>149</sup> Zou Keyuan, “Historic Rights in International Law and in China's Practice”, *Ocean Development & International Law*, Vol. 32, No. 2 (2001), p. 156. MP, Vol. XI, Annex LA-144.

<sup>150</sup> Fu Zhu, *Regarding the Issue of Territorial Waters of China* (1959), p. 17-18. SWSP, Vol. VIII, Annex 485.

<sup>151</sup> People's Republic of China, *Declaration of the Government of the People's Republic of China on China's Territorial Sea* (4 Sept. 1958), in *Collection of the Sea Laws and Regulations of the People's Republic of China* (3rd ed. 2001), p. 197, para. 2. MP, Vol. V, Annex 103.

the country”.<sup>152</sup> The Bohai Sea, according to China, “is completely within the baseline of [China’s] territorial waters”,<sup>153</sup> although China has apparently never officially announced its baselines.<sup>154</sup>

13.19. *Second*, China claimed that even though the mouth of the Bohai Sea is “45 nautical miles, there are a series of islands at the entrance of the bay, forming eight entrances”.<sup>155</sup> The publication suggested that Article 7(4) the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone<sup>156</sup> permits the drawing of a

straight line ... between the low-water marks, to be referred to as the closing line; the waters within the closing line are internal waters, and the bay becomes an internal bay of the coastal country. If there are many islands in the mouth of the bay, in turn forming several entries, each entrance shall be computed based on the above method.<sup>157</sup>

On the basis of this method, China contended that because there was a “series of islands at the entrance of the bay, forming eight entrances”, and each of those entrances measured less than 24 M, “Bohai Bay should be recognized as Chinese internal waters based on this calculation method as well”.<sup>158</sup>

13.20. *Third*, China claimed that the Bohai Sea is “a historic bay of China”. In support, China stated as follows:

For several thousand years, it has continuously and historically been under the actual jurisdiction of China. China has always treated it as internal waters, which has been publicly recognized in international society. For instance, during a war between

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<sup>152</sup> Fu Zhu, *Regarding the Issue of Territorial Waters of China* (1959), p. 17. SWSP, Vol. VIII, Annex 485.

<sup>153</sup> *Id.*, p. 18.

<sup>154</sup> China declared some straight baselines in 1996, see People’s Republic of China, *Declaration of the Government of the People’s Republic of China on the baselines of the territorial sea* (15 May 1996). SWSP, Vol. VIII, Annex 490, but those did not extend to include the Bohai Sea, U.S. Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, “Straight Baseline Claim: China”, *Limits in the Seas*, No. 117 (9 July 1996), p. 2. SWSP, Vol. IX, Annex 501.

<sup>155</sup> Fu Zhu, *Regarding the Issue of Territorial Waters of China* (1959), p. 18. SWSP, Vol. VIII, Annex 485.

<sup>156</sup> Convention on the Territorial Sea and Contiguous Zone, 516 U.N.T.S. 205 (29 Apr. 1958), entered into force 10 Sept. 1964, Art. 4(4). MP, Vol. XI, Annex LA-76 (“Where the method of straight baselines is applicable under the provisions of paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by a long usage”).

<sup>157</sup> Fu Zhu, *Regarding the Issue of Territorial Waters of China* (1959), p. 17. SWSP, Vol. VIII, Annex 485.

<sup>158</sup> *Id.*, p. 18.

Prussia and Denmark, the SMS Gazelle captured a Danish vessel in Bohai Bay. At the time, the Chinese government issued a protest to the Prussian government based on the rationale that Bohai Bay was the internal waters of China, forcing the Prussian government to release the Danish vessel. This was the most significant example of international public recognition that Bohai Bay was Chinese internal waters over a hundred years ago.

It is even more evident that Bohai Bay has extremely important economic and national defensive roles for China. For example, in terms of national defense, Bohai Bay is the Chinese gate to the north, and is highly important for the defensive security of Beijing, the capital. Historically, imperialists have initiated several invasions and wars against China, such as the 1857 invasion of China by the Anglo-French Alliance, and the 1900 invasion of China by the Eight-Nation Alliance. In both instances, the invading forces landed at Dagukou in Bohai Bay, in order to directly threaten Beijing and Tianjin, in turn forcing the Qing Dynasty to sign the unequal treaties, Treaty of Tientsin [Tianjin] and the Boxer Protocol. According to historical records, among the six invasions initiated by imperialists against the Qing government (Opium War of 1842, the two Anglo-French Alliance wars of 1857 and 1860, the Sino-French War of 1884, the First Sino-Japanese War, and the Eight-Nation Alliance War), imperialist forces landed at Dagukou in Bohai Bay three times (other than the two times mentioned above, there was also the second Anglo-French invasion of China in 1860). During invasions by Japanese imperialists, Bohai Bay was also used as an important channel for supplying materials. Furthermore, during the second Chinese Civil War, the United States helped Chiang Kai-shek's "suppression of the rebellion" by using landing vessels with Kuomintang forces in northern and northeastern China, for which Bohai Bay was used as a docking location. Today, even though these historical facts have forever become the past, the one important lesson is that Bohai Bay must be fully controlled by the Chinese people to enable true guarantees for the national defense security of China.<sup>159</sup>

The term used for historic bay, *li shi xing hai wan* (历史性海湾), is the same term used in Article 298(1)(a)(i).

13.21. Without commenting on the validity of China's claim in regard to the Bohai Sea, the Philippines points out that the claim of historic right or title pertains to a maritime area appurtenant to the mainland coast that China regards as internal waters.

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<sup>159</sup> *Id.*, p. 18-19.

## **B. Qiongzhou Strait**

13.22. China's 1958 declaration claimed "the Chiungchow Straits" as "Chinese inland waters".<sup>160</sup> As shown in **Figure S13.2** (following page 72) the Qiongzhou Strait (琼州海峡), also known as the Hainan Strait, separates Hainan Island from the Leizhou Peninsula on the Chinese mainland. It is, on average 15.5 M wide, and 20 M at its widest. It runs east-west for 44 M.

13.23. China's 1958 declaration explained that the Qiongzhou Strait was "inside the baseline" "composed of the straight lines connecting base-points on the mainland coast and on the outermost of the coastal islands".<sup>161</sup>

13.24. The 1959 explanatory pamphlet justified claiming the Qiongzhou Strait as "inland waters" in the following terms:

When a coastal country uses the straight baseline method to delimit the width of territorial seas, if the strait is within the baseline for territorial sea, then the strait should be strait within the internal waters of the coastal country. Qiongzhou Strait is this type of strait, because it is within the territorial sea baseline of our country, our declaration on territorial sea proclaimed that it is part of the internal water of China.

China has many internal straits, the largest of which is Qiongzhou Strait. Since it is located between Mainland China and Hainan Island, it is an important maritime passage connecting Mainland China and Hainan Island, as well a maritime shortcut to Southeast Asian countries. It is extremely significant to Chinese in economic and national defense terms. *Historically, it has always been under Chinese sovereign jurisdiction and an inseparable component of Chinese territory. Since liberation, China has long managed it as an internal strait. The declaration on territorial sea by our government is merely a reiteration of historical fact.*<sup>162</sup>

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<sup>160</sup> People's Republic of China, *Declaration of the Government of the People's Republic of China on China's Territorial Sea* (4 Sept. 1958), in *Collection of the Sea Laws and Regulations of the People's Republic of China* (3rd ed. 2001), p. 197, para. 2. MP, Vol. V, Annex 103.

<sup>161</sup> *Id.* As with its claim to the Bohai Sea, China's 1996 straight baselines claim does not completely include the Qiongzhou Strait, although it "cuts off the eastern approaches to" the Strait. See U.S. Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, "Straight Baseline Claim: China", *Limits in the Seas*, No. 117 (9 July 1996), p. 8. SWSP, Vol. IX, Annex 501.

<sup>162</sup> Fu Zhu, *Regarding the Issue of Territorial Waters of China* (1959), pp. 20-21 (emphasis added). SWSP, Vol. VIII, Annex 485.

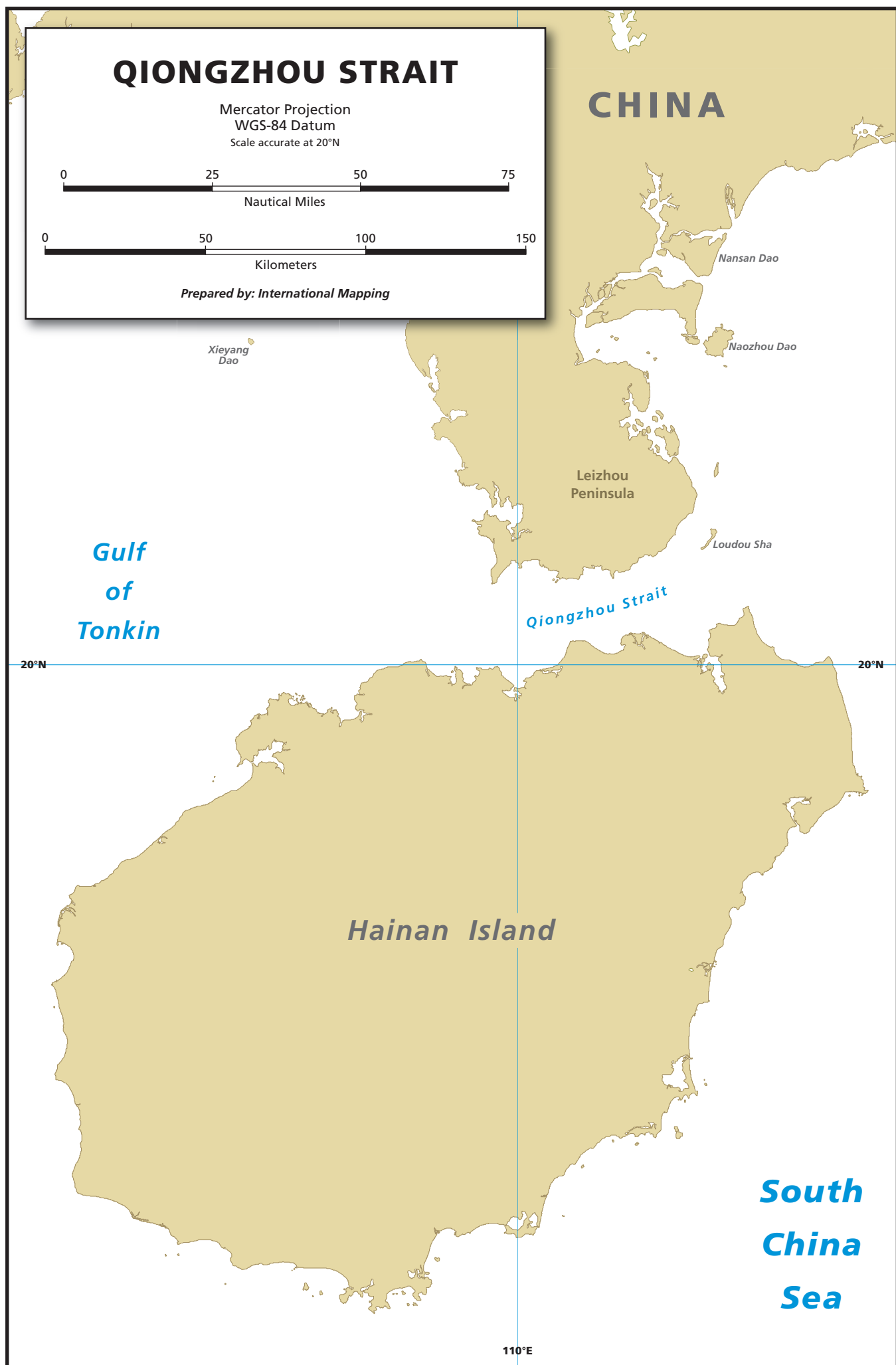


Figure S13.2



13.25. Here again, it is worth noting that China's claim of historic right pertains to a maritime area appurtenant to its coast that it claims to have treated historically as inland waters. Except for its recent claim in regard to the waters encompassed by the nine-dash line, China has never claimed historic rights or title in any maritime area far removed from its coast and beyond any possibility of characterizing as inland waters.

### **III. China's Reactions to Claims of Historic Rights or Historic Title Advanced by Other States**

13.26. In this section, the Philippines addresses the Tribunal's invitation to describe "any Chinese reaction to claims of historic rights or historic title advanced by other States".

#### ***A. China's Endorsement of Claims to Historic Bays***

13.27. In support of its claim that the Bohai Sea and the Qiongzhou Strait are Chinese internal waters, China's 1959 explanatory publication stated that "there are many ... examples [of historic bays] in international practice".<sup>163</sup> It cited three: Norway's Varanger Fjord; Canada's Hudson Bay; and France's Bay of Cancale.<sup>164</sup> China also referred to Russia's Peter the Great Bay, although it is unclear whether China agreed that it qualifies as an historic bay.<sup>165</sup>

13.28. China did not explain why it considered Varanger Fjord, Hudson Bay and the Bay of Cancale to be historic bays, although it expressed the view that historic bays must have "important national defense and economic value for a coastal country", and that a State must have "continuously exercised jurisdiction over the bay".<sup>166</sup>

#### ***B. China's Rejection of Viet Nam's Claim to Historic Waters in the Gulf of Tonkin***

13.29. As far as the Philippines is aware, the only other case in which China has reacted to a claim of historic rights or title is in regard to Viet Nam's claim that the Gulf of Tonkin is

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<sup>163</sup> *Id.*, p. 17

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

an historic bay. As detailed below, China rejected this claim for reasons that apply equally to its own claim in the South China Sea.

13.30. In 1974, during bilateral negotiations with China over their land and maritime boundaries, Viet Nam asserted that the Gulf of Tonkin constituted an historic bay, a claim that China rejected.<sup>167</sup>

13.31. The basis for China's objection was articulated in a speech delivered in 1979 by Han Nianlong, the Head of the Government Delegation of China at the fourth plenary meeting of the Sino-Vietnamese negotiations at the vice-foreign minister level, where he addressed what he referred to as Viet Nam's "unreasonable proposition" that the Gulf of Tonkin is an historic bay.<sup>168</sup>

13.32. Mr. Han observed that Viet Nam's claim was of recent vintage, stating that it was "news to [China]", which had "no knowledge at all about such a declaration by previous Governments of the two countries at any time".<sup>169</sup> As Mr. Han explained:

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<sup>167</sup> Epsey Cooke Farrell, *The Socialist Republic of Vietnam and the Law of the Sea: An Analysis of Vietnamese Behavior within the Emerging International Oceans Regime* (1998), p. 70. SWSP, Vol. X, Annex 527. In 1982, Vietnam nonetheless declared that "the maritime frontier in the gulf [of Tonkin] between Viet Nam and China is delineated according to the June 26, 1887 convention ... signed between France and the Qing Dynasty of China", and that "[t]he part of the gulf appertaining to Viet Nam constitutes the historic waters and is subjected to the juridical regime of internal waters of ... Vietnam". Socialist Republic of Viet Nam, *Statement by the Government of the Socialist Republic of Viet Nam on the Territorial Sea Baseline of Viet Nam* (12 Nov. 1982), reprinted in *Law of the Sea Bulletin*, No. 1 (1983), p. 74 (emphasis omitted). SWSP, Vol. IX, Annex 500. China responded by stating that "the Sino-Vietnamese boundary Delimitation Convention signed between China and France in 1887 did not in any way delimit the maritime area in the [Gulf of Tonkin]", and that "the so-called boundary line ... as asserted by the Vietnamese Government is illegal and null and void". Ministry of Foreign Affairs of the People's Republic of China, *Spokesman's Statement of 28 November 1982* (28 Nov. 1982), reprinted in *Law of the Sea Bulletin*, No. 1 (1983), p. 76. SWSP, Vol. VIII, Annex 489. Although China's formal objection "left aside the legal status of the gulf", Epsey Cooke Farrell, *The Socialist Republic of Vietnam and the Law of the Sea: An Analysis of Vietnamese Behavior within the Emerging International Oceans Regime* (1998), p. 71. SWSP, Vol. X, Annex 527, it is clear that China continued to object to both "[t]he Vietnamese historic waters claim and the delimitation line in the 1887 Border Treaty". Zou Keyuan, "The Sino-Vietnamese Fishery Agreement on Maritime Delimitation in the Gulf of Tonkin", *Ocean Development and International Law*, Vol. 36 (2005), p. 15. SWSP, Vol. X, Annex 536.

<sup>168</sup> Letter from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations (14 May 1979), reprinted in U.N. General Assembly, Thirty-fourth Session, *Report of the Security Council*, U.N. Doc. A/34/235 (14 May 1979) (with attachment), p. 7. SWSP, Vol. VIII, Annex 486. See also "May 12, 1979 Speech by Han Nianlong, Head of the Government Delegation of China, at the Fourth Plenary Meeting of the Sino-Vietnamese Negotiations at the Vice-Foreign Minister Level", reprinted in *Beijing Review*, Vol. 22, No. 21 (25 May 1979), p. 17. SWSP, Vol. VIII, Annex 487.

<sup>169</sup> Letter from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations (14 May 1979), reprinted in U.N. General Assembly, Thirty-fourth Session, *Report of the Security Council*, U.N. Doc. A/34/235 (14 May 1979) (with attachment), p. 7. SWSP, Vol. VIII, Annex 486. See also "May 12, 1979 Speech by Han Nianlong, Head of the Government Delegation of China, at



As for the Vietnamese side's assertion that for nearly a hundred years the Governments of the two countries have always exercised their sovereignty and jurisdiction in accordance with the above-mentioned longitude, it is not at all based on facts. Everyone knows that the previous governments in China and the French colonial authorities observed the three-nautical-mile principle in regard to the territorial sea. The government of the People's Republic of China declared a 12-nautical-mile territorial sea in September 1958. China has never exercised sovereignty over or jurisdiction in the Beibu Gulf sea area beyond its territorial sea. In September 1964, the Vietnamese Government also declared its territorial sea to be 12 nautical miles wide and published a map showing its territorial sea boundary in the Beibu Gulf. If, as the Vietnamese side claims, the vast sea area in the Beibu Gulf west of 108°3'13"E was its inland sea long ago, why did it draw another territorial sea boundary within its own inland sea? The Vietnamese assertion is absurd from the viewpoint of international law and is illogical and self-contradictory. Has any ship had to ask for permission from the Vietnamese authorities for entry into the sea west of 108°3'13"E? The "sea boundary line", a brain-child of the Vietnamese authorities, has never existed either in historical agreements or in reality. As for the assertion that the Beibu Gulf is "a historical gulf" belonging to China and Viet Nam, it is really news to us. We have no knowledge at all about such a declaration by previous Governments of the two countries at any time. Vietnamese insistence on this unreasonable proposition prevented any results in the negotiations, which went on for three months in vain. The division of the Beibu Gulf sea area between the two countries is still an unresolved issue.<sup>170</sup>

13.33. China reiterated its rejection of Viet Nam's claim in an article published in the *Guangming Daily* in November of 1980. It stated that "[f]or China as one of the coastal nations", Viet Nam's claim that the Gulf of Tonkin had been a historic gulf "[f]or several centuries" was "news previously unknown", and "completely without historical or legal basis".<sup>171</sup>

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the Fourth Plenary Meeting of the Sino-Vietnamese Negotiations at the Vice-Foreign Minister Level", *reprinted in Beijing Review*, Vol. 22, No. 21 (25 May 1979), p. 17. SWSP, Vol. VIII, Annex 487.

<sup>170</sup> Letter from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations (14 May 1979), *reprinted in* U.N. General Assembly, Thirty-fourth Session, *Report of the Security Council*, U.N. Doc. A/34/235 (14 May 1979) (with attachment), pp. 6-7.

<sup>171</sup> Chen Tiqiang and Zhang Hongzeng, "The Issue of Delimiting the Beibu Gulf Sea -- Rebuttal of Vietnamese Errors from the Perspective of International Law", *Guangming Daily* (2 Dec. 1980), p. 1 of translation. SWSP, Vol. VIII, Annex 488.

13.34. China further stated:

In 1958, during the Convention on the High Seas, the United Nations Secretariat prepared the ‘Historic Bays: Memorandum by the Secretariat of the United Nations,’ listing the key historic bays in the world. As a significant bay, [The Gulf of Tonkin] was not included, yet no one raised any objection to this.<sup>172</sup>

China also observed that Viet Nam’s *Declaration on Vietnamese Territorial Waters, Contiguous Zones, Exclusive Economic Zones, and Continental Shelf* “did not mention that [the Gulf of Tonkin] was a Vietnamese ‘territorial gulf’”.<sup>173</sup>

13.35. With respect to the fact that Viet Nam had not exercised sovereignty over the Gulf of Tonkin, China stated that “[i]n internal waters, foreign merchant ships must first obtain special permits before sailing through”, and that “tens of thousands of foreign vessels [in the Gulf of Tonkin had] always enjoyed all freedoms of international waters”.<sup>174</sup>

13.36. If Viet Nam’s claim to historic waters in the Gulf of Tonkin is, as the head of the Chinese delegation put it, “self-contradictory”,<sup>175</sup> then China’s claim to historic waters in the

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<sup>172</sup> Chen Tiqiang and Zhang Hongzeng, “The Issue of Delimiting the Beibu Gulf Sea -- Rebuttal of Vietnamese Errors from the Perspective of International Law”, *Guangming Daily* (2 Dec. 1980), p. 6 of translation. SWSP, Vol. VIII, Annex 488. See also Zou Keyuan, “Historic Rights in International Law and in China’s Practice”, *Ocean Development & International Law*, Vol. 32, No. 2 (2001), p. 157. MP, Vol. XI, Annex LA-144. (“In China’s view, Vietnam’s claim is untenable in international law for a number of reasons”, including the fact that “in French practice, the Gulf of Tonkin was never mentioned in the context of historic waters at a time when France regarded other bays as historic waters such as the Bay of Cancale with a breadth of 17 nautical miles at the entrance”).

<sup>173</sup> Chen Tiqiang and Zhang Hongzeng, “The Issue of Delimiting the Beibu Gulf Sea -- Rebuttal of Vietnamese Errors from the Perspective of International Law”, *Guangming Daily* (2 Dec. 1980), pp. 7-8 of translation. SWSP, Vol. VIII, Annex 488.

<sup>174</sup> *Id.*, pp. 5-6 of translation. See also *id.*, p. 7 (“Since 1957, the governments of China and Vietnam established three fishery agreements. The most recent agreement line was twelve nautical miles from the baseline between the parties. Vessels of one side crossing over the other’s agreement line required permission, while the Beibu Gulf region outside of the agreement line had long been common fishing grounds for both sides”); and Zou Keyuan, “Historic Rights in International Law and in China’s Practice”, *Ocean Development & International Law*, Vol. 32, No. 2 (2001), p. 158. MP, Vol. XI, Annex LA-144. (noting China’s claim that “in Vietnamese practice, the fishery agreements signed with China created 12 nautical mile zones within which foreign fishing required special permission, and beyond that the waters in the Gulf of Tonkin were a common fishing zone for both sides”).

<sup>175</sup> Letter from the Permanent Mission of the People’s Republic of China to the United Nations to the Secretary-General of the United Nations (14 May 1979), reprinted in U.N. General Assembly, Thirty-fourth Session, *Report of the Security Council*, U.N. Doc. A/34/235 (14 May 1979) (with attachment), p. 6. SWSP, Vol. VIII, Annex 486. See also “May 12, 1979 Speech by Han Nianlong, Head of the Government Delegation of China, at the Fourth Plenary Meeting of the Sino-Vietnamese Negotiations at the Vice-Foreign Minister Level”, reprinted in *Beijing Review*, Vol. 22, No. 21 (25 May 1979), p. 17. SWSP, Vol. VIII, Annex 487.

South China Sea is as well. All of China's reasons for objecting to the Gulf of Tonkin as an historic bay apply to the South China Sea.

13.37. *First*, China's complaint that it had "no knowledge at all about such a declaration by previous governments of the two countries at any time"<sup>176</sup> applies to the South China Sea, where, until China submitted the nine-dash line map to the United Nations in 2009, it had never asserted historic rights or title.

13.38. *Second*, like the Gulf of Tonkin, the South China Sea was not mentioned in the 1958 memorandum on historic bays prepared by the Secretariat of the United Nations, and its omission was not objected to by China.<sup>177</sup>

13.39. *Third*, just as China observed that the French colonial authorities had claimed only a three mile territorial sea in the Gulf of Tonkin and that Viet Nam had claimed only a 12 M territorial sea, without claiming historic title or rights in either declaration, China's 1958 *Declaration of the Government of the People's Republic of China on China's Territorial Sea* claimed only a 12 M territorial sea and recognized waters between the Chinese mainland and its South China Sea islands as "high seas".<sup>178</sup>

13.40. *Fourth*, China has not "continuously exercised jurisdiction over"<sup>179</sup> the area encompassed by the nine-dash line. China's observation that "tens of thousands of foreign vessels [in the Gulf of Tonkin had] always enjoyed all freedoms of international waters"<sup>180</sup>

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<sup>176</sup> Letter from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations (14 May 1979), reprinted in U.N. General Assembly, Thirty-fourth Session, Report of the Security Council, U.N. Doc. A/34/235 (14 May 1979) (with attachment), p. 7. SWSP, Vol. VIII, Annex 486. See also "May 12, 1979 Speech by Han Nianlong, Head of the Government Delegation of China, at the Fourth Plenary Meeting of the Sino-Vietnamese Negotiations at the Vice-Foreign Minister Level", reprinted in *Beijing Review*, Vol. 22, No. 21 (25 May 1979), p. 17. SWSP, Vol. VIII, Annex 487; Zou Keyuan, "Historic Rights in International Law and in China's Practice", *Ocean Development & International Law*, Vol. 32, No. 2 (2001), p. 157 ("In China's view, Vietnam's claim is untenable in international law for a number of reasons", including the fact that "in French practice, the Gulf of Tonkin was never mentioned in the context of historic waters at a time when France regarded other bays as historic waters such as the Bay of Cancale with a breadth of 17 nautical miles at the entrance"). MP, Vol. XI, Annex LA-144.

<sup>177</sup> See generally United Nations, Secretary General, *Historic Bays: Memorandum by the Secretariat of the United Nations*, U.N. Doc. A/CONF.13/1 (30 Sept. 1957). SWSP, Vol. XII, Annex LA-183.

<sup>178</sup> See generally People's Republic of China, *Declaration of the Government of the People's Republic of China on China's Territorial Sea* (4 Sept. 1958), in *Collection of the Sea Laws and Regulations of the People's Republic of China* (3rd ed. 2001). MP, Vol. V, Annex 103.

<sup>179</sup> Fu Zhu, *Regarding the Issue of Territorial Waters of China* (1959), p. 17. SWSP, Vol. VIII, Annex 485.

<sup>180</sup> Chen Tiqiang and Zhang Hongzeng, "The Issue of Delimiting the Beibu Gulf Sea -- Rebuttal of Vietnamese Errors from the Perspective of International Law", *Guangming Daily* (2 Dec. 1980), pp. 6-7 of translation. SWSP, Vol. VIII, Annex 488. ("Since 1957, the governments of China and Vietnam established three fishery

applies to the South China Sea, which for centuries has served as a vital conduit for maritime traffic. China's observation that it would have been "inconceivable" for China and France to have regarded "such an expanse of the high seas as the Gulf of Tonkin as an inland sea", can equally be said about the much larger South China Sea.<sup>181</sup>

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agreements. The most recent agreement line was twelve nautical miles from the baseline between the parties. Vessels of one side crossing over the other's agreement line required permission, while the Beibu Gulf region outside of the agreement line had long been common fishing grounds for both sides"). *See also* Zou Keyuan, "Historic Rights in International Law and in China's Practice", *Ocean Development & International Law*, Vol. 32, No. 2 (2001), p. 158. MP, Vol. XI, Annex LA-144 (noting China's claim that "in Vietnamese practice, the fishery agreements signed with China created 12 nautical mile zones within which foreign fishing required special permission, and beyond that the waters in the Gulf of Tonkin were a common fishing zone for both sides").

<sup>181</sup> *Letter from the Permanent Mission of the People's Republic of China to the United Nations to the Secretary-General of the United Nations* (14 May 1979), *reprinted in* U.N. General Assembly, Thirty-fourth Session, *Report of the Security Council*, U.N. Doc. A/34/235 (14 May 1979) (with attachment), p. 6. SWSP, Vol. VIII, Annex 486. *See also* "May 12, 1979 Speech by Han Nianlong, Head of the Government Delegation of China, at the Fourth Plenary Meeting of the Sino-Vietnamese Negotiations at the Vice-Foreign Minister Level", *reprinted in Beijing Review*, Vol. 22, No. 21 (25 May 1979), pp. 16-17. SWSP, Vol. VIII, Annex 487.

## QUESTION 14

*The Tribunal notes that the Philippines' Submission 9 relates to "China's claims to sovereign rights and jurisdiction, and to 'historic rights', with respect to the maritime areas of the South China Sea encompassed by the so-called 'nine-dash line.'" The Philippines is invited to provide copies of historic maps of the South China Sea/West Philippine Sea prepared by any of the littoral States, covering to the greatest extent possible the areas and periods of time that are potentially relevant to the question of Chinese historic rights or titles. The Philippines is also invited to provide any further reference material or sources that would assist the Tribunal in interpreting historic maps of the area.*

### **Response:**

14.1. In response to Question 14, the Philippines has endeavoured to obtain historic maps of the South China Sea prepared by the littoral States and their colonial predecessors that cover as wide a time frame as possible. For the Tribunal's convenience, these 218 maps are reproduced as the historic atlas found at Volume VI, and in the atlas of oil and gas maps found at Volume VII. In accordance with the 5 March 2015 letter from the Registry, the historic maps appearing in Volume VI are also reproduced in large format, two copies of which have been deposited with the Permanent Court of Arbitration.

14.2. Within the historic atlas, the maps are organized by littoral State and presented chronologically. They include maps prepared by:

- China;
- The Philippines;
- Spain (the colonial predecessor of the Philippines);
- The United States of America (the colonial predecessor of the Philippines);
- Malaysia;
- Brunei;
- The United Kingdom (the colonial predecessor of Malaysia and Brunei);
- Viet Nam;
- France (the colonial predecessor of Viet Nam);
- Indonesia;
- The Netherlands (the colonial predecessor of Indonesia);

- Portugal (the colonial predecessor in Malacca and Macao); and
- Japan (which had colonial pretensions in the South China Sea).<sup>182</sup>

14.3. Each entry in the historic atlas contains a copy of the entire map, an enlargement of the relevant area, and pertinent information, including the source and date of publication.

14.4. Question 14 also requests that the Philippines provide “further reference material or sources that would assist the Tribunal in interpreting historic maps of the area”. In addition to the scholarly works cited in the response to Question 13, the Philippines has identified and annexed the following academic publications that address historic cartography in the South China Sea and which may assist the Tribunal in interpreting the maps presented in the historic atlas. They are, in chronological order:

- Annex 517: J.F. Baddeley, “Matteo Ricci’s Chinese World-Maps, 1584-1608”, *The Geographical Journal*, Vol. 50, No. 4 (Oct. 1917) (produced in Volume IX of the Philippines’ Supplemental Written Submission);
- Annex 518: Nobuo Muroga, “The Philippines in Old Chinese Maps”, *Philippine Historical Review*, Vol. 2 (1969) (produced in Volume IX of the Philippines’ Supplemental Written Submission);
- Annex 253: Cordell D.K. Yell, “Traditional Chinese Cartography and the Myth of Westernization” in *The History of Cartography*, Vol. 2, Book 2 (J.B. Harley and D. Woodward, eds. 1994) (produced in Volume VII of the Philippines’ Memorial);
- Annex 261: D. Hancox and V. Prescott, *Secret Hydrographic Surveys in the Spratly Islands* (1999) (produced in Volume VIII of the Philippines’ Memorial);
- Annex 528: excerpts from Thomas Suárez, *Early Mapping of Southeast Asia: The Epic Story of Seafarers, Adventurers, and Cartographers Who First Mapped the Regions Between China and India* (1999) (produced in Volume X of the Philippines’ Supplemental Written Submission);
- Annex 265: Anthony Reid, *Charting the Shape of Early Modern Southeast Asia* (2000) (produced in Volume VIII of the Philippines’ Memorial);
- Annex 539: Hyunhee Park, “A Buddhist Woodblock-printed Map in 13th Century China”, *Crossroads: Studies on the History of Exchange Relations in the East Asian World*, Vol. 1/2 (2010) (produced in Volume X of the Philippines’ Supplemental Written Submission);

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<sup>182</sup> The Philippines has also presented pre-1800 maps published in Italy, which during that period was significant centre for cartography. See Thomas Suárez, *Early Mapping of Southeast Asia: The Epic Story of Seafarers, Adventurers, and Cartographers Who First Mapped the Regions Between China and India* (1999), p. 130. SWSP, Vol. X, Annex 528.

- Annex 540: excerpts from Carlos Quirino, *Philippine Cartography: 1320-1899* (3d ed., 2010) (produced in Volume X of the Philippines' Supplemental Written Submission);
- Annex 544: Greg Wood, "Successive States: Aaron Arrowsmith's *Chart of the Pacific Ocean, 1798-1832*", *The Globe: Journal of The Australian and New Zealand Map Society Inc.*, No. 70 (2012) (produced in Volume XI of the Philippines' Supplemental Written Submission);
- Annex 308: Laura Hostetler, "Early Modern Mapping at the Qing Court: Survey Maps from the Kangxi, Yongzheng, and Qianlong Reign Periods" in *Chinese History in Geographical Perspective* (Y. Du & J. Kyong-McClain, eds., 2013) (produced in Volume X of the Philippines' Memorial);
- Annex 547: Robert Batchelor, "The Selden Map Rediscovered: A Chinese Map of East Asia Shipping Routes, c. 1619", *Imago Mundi: The International Journal for the History of Cartography*, Vol. 65, No. 1 (24 Jan. 2013) (produced in Volume XI of the Philippines' Supplemental Written Submission); and
- The following bibliographic records of the U.S. Library of Congress for certain maps produced in Volume VI:
  - Annex 567: U.S. Library of Congress, *Bibliographic Record: Junheng Zuo, Map of Tian di tu (1601)*, available at <http://www.loc.gov/item/2002626725/> (accessed 4 Feb. 2015) (produced in Volume XI of the Philippines' Supplemental Written Submission);
  - Annex 568: U.S. Library of Congress, *Bibliographic Record: Map of Hua yi tu Map (Stone) (circa 1933)*, available at <http://www.loc.gov/item/gm71005081/> (accessed 4 Feb. 2015) (produced in Volume XI of the Philippines' Supplemental Written Submission);
  - Annex 569: U.S. Library of Congress, *Bibliographic Record: Map of Da Ming yu di tu (Plate) (circa 1547)*, available at <http://www.loc.gov/item/2002626776> (accessed 4 Feb. 2015) (produced in Volume XI of the Philippines' Supplemental Written Submission);
  - Annex 570: U.S. Library of Congress, *Bibliographic Record: Map of Xia lan zhi zhang (Plate) (circa 1647)*, available at <http://www.loc.gov/item/2002626721/> (accessed 5 Feb. 2015) (produced in Volume XI of the Philippines' Supplemental Written Submission);
  - Annex 571: U.S. Library of Congress, *Bibliographic Record: Map of Huang yu quan lan fen sheng tu (Plate) (1721)*, available at <http://www.loc.gov/item/2002626779/> (accessed 6 Feb. 2015) (produced in Volume XI of the Philippines' Supplemental Written Submission);

14.5. To further assist the Tribunal, the Philippines includes as an appendix to its response to Question 14 the Philippines' interpretation of the maps presented in the historic atlas.<sup>183</sup>

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<sup>183</sup> See *infra* Appendix to Response to Question 14.



## QUESTION 15

*The Tribunal notes the Philippines' Submission 2, requesting a declaration that –*

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

*The Philippines is invited to comment on the relevance, if any, to the interpretation of the "nine dash line" of the remarks of the President of the Taiwan Authority of China, Mr. Ma Ying-jeou, on 1 September 2014 on the occasion of the opening ceremony of an exhibition of historical archives (available at <http://www.president.gov.tw/Default.aspx?tabid=131&itemid=33125&rmid=514>).*

### **Response:**

15.1. As indicated in the Tribunal's question, on 1 September 2014 the President of the Taiwan Authority of China, Mr. Ma Ying-jeou, addressed the opening ceremony of the "Exhibition of Historical Archives on the Southern Territories of the Republic of China".

15.2. President Ma's speech clarifies Taiwan's interpretation of the nine-dash line, which is of considerable importance given that the dashed line first appeared on a map internally distributed by the Republic of China in 1947.<sup>184</sup> As detailed below, President Ma makes three points that are relevant to matters at issue in this arbitration. First, he explains that the 1947 map depicting the line was a claim to the *islands* encompassed by it, not to all of the enclosed waters.<sup>185</sup> Second, in connection to maritime claims in the South China Sea, President Ma refers to the principle that the land dominates the sea, making clear Taiwan's position that maritime claims must be based on entitlements generated by land, rather than on free-standing rights to waters.<sup>186</sup> Finally, President Ma accepts that the spatial extent of maritime claims is determined by international law, and that at the time the dashed line was first published, this restricted China's claim to between 3 and 12 M of its claimed insular features.<sup>187</sup>

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<sup>184</sup> See *infra* para. A14.22.

<sup>185</sup> See generally *infra* Section 15.I.

<sup>186</sup> See generally *infra* Section 15.II.

<sup>187</sup> See generally *infra* Section III.

15.3. President Ma is a distinguished public international law scholar and expert on the law of the sea. He received his S.J.D. from Harvard Law School in 1980, where he wrote his dissertation on law of the sea issues in the East China Sea. He subsequently published at least two monographs on the law of the sea: *Legal Problems of Seabed Boundary Delimitation in the East China Sea*, and *The Tiao-Yu-T'ai (Senkaku) Islets and the East China Sea Delimitation: A Review Under the New Law of the Sea*.

15.4. President Ma's speech was described by Taiwan on its official government website in both English<sup>188</sup> and Chinese<sup>189</sup>, and was the subject of a press release issued by the Taiwanese Ministry of Foreign Affairs.<sup>190</sup> He later addressed the dashed line in an interview with *The New York Times*.<sup>191</sup>

15.5. Counsel for the Philippines accessed the website referenced in the Tribunal's question on 29 December 2014. Sometime thereafter, between 29 December 2014 and 15 January 2015, the video at the link referred to by the Tribunal<sup>192</sup> was edited to remove certain statements. However, the Philippines has located elsewhere on the Internet what appears to be an unabridged recording of President Ma's speech. It is to this video, attached to this submission as Annex 493 on the USB containing the annexes to the Philippines' Supplemental Written Submission, that the Philippines will therefore refer in Response to the Tribunal's question.<sup>193</sup> For the Tribunal's convenience, the Philippines also provides at

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<sup>188</sup> See Office of the President of the Taiwan Authority of China, "President Ma attends opening ceremonies of Exhibition of Historical Archives on the Southern Territories of the Republic of China" (1 Sept. 2014), available at <http://english.president.gov.tw/Default.aspx?tabid=491&itemid=33215&rmid=2355> (accessed 25 Feb. 2015). SWSP, Vol. VIII, Annex 496.

<sup>189</sup> See Transcript of Office of the President of the Taiwan Authority of China, President Ma Ying-jeou, "Excerpts from Remarks at Opening Ceremony for the Exhibition of Historical Archives on the Southern Territories of the Republic of China" (1 Sept. 2014), available at <http://www.president.gov.tw/Default.aspx?tabid=131&itemid=33125&rmid=514> (accessed 27 Jan. 2015). SWSP, Vol. VIII, Annex 495.

<sup>190</sup> See Taipei Economic and Cultural Office in Malaysia, "President Ma vows Taiwan will play important role in South China Sea talks" (2 Sept. 2014). SWSP, Vol. VIII, Annex 497.

<sup>191</sup> "Transcript of New York Times Interview With President Ma Ying-jeou of Taiwan", *New York Times* (31 Oct. 2014). SWSP, Vol. XI, Annex 566.

<sup>192</sup> Office of the President of the Taiwan Authority of China, "Excerpts from Remarks at Opening Ceremony for the Exhibition of Historical Archives on the Southern Territories of the Republic of China" (1 Sept. 2014), available at <http://www.president.gov.tw/Default.aspx?tabid=131&itemid=33125&rmid=514> (accessed 27 Jan. 2015). SWSP, Vol. VIII, Annex 494.

<sup>193</sup> Office of the President of the Taiwan Authority of China, "Opening Ceremony for the Exhibition of Historical Archives on the Southern Territories of the Republic of China", YouTube Video (remarks of President Ma Wing-jeou begin at 47:10) (1 Sept. 2014), available at <https://www.youtube.com/watch?v=h89dhJWqViw> (accessed 27 Jan. 2015). SWSP, Vol. VIII, Annex 493. A transcript and translation of this video may be found at Transcript of Office of the President of the Taiwan

Annex 495 a transcript of both videos, with the parts of President Ma's remarks that were removed indicated by highlighting in the unabridged version.<sup>194</sup>

15.6. President Ma's remarks clarify the interpretation of the nine-dash line in three ways.

15.7. *First*, in regard to the original intent of the line, President Ma states:

... the point we want to stress in this exhibition is that we had published a map of the islands of South China Sea as early as 1935, and that in 1947, after our victory against Japan, we recovered many islands from Japan and published the map of the islands of South China Sea and their locations. We can therefore say that our claim over the South China Sea islands began a long time ago. Furthermore, no country protested or expressed a different opinion when we made the claim. This is because there is in fact copious historical evidence that these islands were used by the people of our country in ancient times. I think that this is the most salient point that these historical archives of our southern territory show, and we must strengthen this point further.<sup>195</sup>

15.8. President Ma herein refers to the 1947 map as being a "map of the *islands* of [the] South China Sea and their locations",<sup>196</sup> which in his view, supports Taiwan's position that its "claim over the South China Sea *islands* began a long time ago".<sup>197</sup> President Ma does *not* suggest that the dashed-line was intended to claim any rights to the maritime space encompassed by it.

15.9. Other statements by the Taiwanese authorities confirm the position articulated by President Ma that the line was originally intended to claim islands, not maritime spaces. An

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Authority of China, President Ma Ying-jeou, "Excerpts from Remarks at Opening Ceremony for the Exhibition of Historical Archives on the Southern Territories of the Republic of China" (1 Sept. 2014), *available at* <http://www.president.gov.tw/Default.aspx?tabid=131&itemid=33125&rmid=514> (accessed 27 Jan. 2015). SWSP, Vol. VIII, Annex 495.

<sup>194</sup> Transcript of Office of the President of the Taiwan Authority of China, President Ma Ying-jeou, "Excerpts from Remarks at Opening Ceremony for the Exhibition of Historical Archives on the Southern Territories of the Republic of China" (1 Sept. 2014), *available at* <http://www.president.gov.tw/Default.aspx?tabid=131&itemid=33125&rmid=514> (accessed 27 Jan. 2015) (hereinafter "Transcript of President Ma's Speech"). SWSP, Vol. VIII, Annex 495.

<sup>195</sup> Transcript of President Ma's Speech, pp. 4-5. SWSP, Vol. VIII, Annex 495.

<sup>196</sup> Transcript of President Ma's Speech, p. 4. SWSP, Vol. VIII, Annex 495. (emphasis added). *See also* Rodolfo C. Severino, *Where in the World is the Philippines? Debating Its National Territory* (2011), p. 76 ("In 1947, the Nationalist government of China published a map, the Location Map of the South China Sea Islands, in which nine bars or an 'interrupted line' enclosed the South China Sea"). MP, Vol. IX, Annex 298.

<sup>197</sup> Transcript of President Ma's Speech, p. 4. SWSP, Vol. VIII, Annex 495. (emphasis added).

official Taiwanese press release on President Ma's remarks states that the 1947 map referenced by President Ma "includes a U-shape line to demarcate the islands as [Taiwanese] territory".<sup>198</sup> The official Taiwanese governmental webpage similarly states that "the [Republic of China] back in 1935 issued [the] *Map of Chinese Islands in the South China Sea* to advocate [the Republic of China's] sovereignty over the islands in the area".<sup>199</sup>

15.10. *Second*, President Ma confirms that maritime claims in the South China Sea are governed by what he refers to as the "basic principle" that "land determines the sea".<sup>200</sup> In a subsequent interview with *The New York Times*, President Ma repeated that "[t]here is a basic principle in the Law of the Sea, that land dominates the sea", and went on to observe: "Thus marine claims begin with land..."<sup>201</sup> Taiwan's acceptance of this foundational principle of the law of the sea is reiterated by the official Taiwanese government webpage describing President Ma's remarks in English,<sup>202</sup> as well as by the official Chinese text found beneath the video referred to by the Tribunal.<sup>203</sup>

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<sup>198</sup> Taipei Economic and Cultural Office in Malaysia, "President Ma vows Taiwan will play important role in South China Sea talks" (2 Sept. 2014), p. 1. SWSP, Vol. VIII, Annex 497. (emphasis added).

<sup>199</sup> See Office of the President of the Taiwan Authority of China, "President Ma attends opening ceremonies of Exhibition of Historical Archives on the Southern Territories of the Republic of China" (1 Sept. 2014), available at <http://english.president.gov.tw/Default.aspx?tabid=491&itemid=33215&rmid=2355> (accessed 25 Feb. 2015). SWSP, Vol. VIII, Annex 496. (emphasis added). In fact, China has interpreted a similar line as denoting the allocation of islands, rather than as a delimitation of maritime space. This is what China suggested when disputing Vietnam's assertion, discussed in question 13, that the so-called "red line" in the map attached to the 1897 Sino-French Border Convention was a maritime delimitation of the Gulf of Tonkin rather than a line allocating islands. See, e.g., Chen Tiqiang & Zhang Hongzeng, "The Issue of Delimiting the Beibu Gulf Sea -- Rebuttal of Vietnamese Errors from the Perspective of International Law", *Guangming Daily* (2 Dec. 1980), p. 193. SWSP, Vol. VIII, Annex 488. ("Regardless of the treaty text, the names on the map, or the islands shown on the map all clearly showed that the red line only involved land and coastal islands on the two sides of the line.... Thus, we know that the 1887 *Convention Concerning the Delimitation of the Border between China and Tonkin* had absolutely no intention of delineating the entire Beibu Gulf".)

<sup>200</sup> Transcript of President Ma's Speech, p. 8. SWSP, Vol. VIII, Annex 495.

<sup>201</sup> "Transcript of New York Times Interview With President Ma Ying-jeou of Taiwan", *New York Times* (31 Oct. 2014), p. 7. SWSP, Vol. XI, Annex 566.

<sup>202</sup> See Office of the President of the Taiwan Authority of China, "President Ma attends opening ceremonies of Exhibition of Historical Archives on the Southern Territories of the Republic of China" (1 Sept. 2014), available at <http://english.president.gov.tw/Default.aspx?tabid=491&itemid=33215&rmid=2355> (accessed 25 Feb. 2015), p. 4. SWSP, Vol. VIII, Annex 496. ("The principle that 'sovereignty over land determines ownership of the surrounding waters,' which is set out in the United Nations Convention on the Law of the Sea, applies to disputes concerning sovereignty over both land and sea, [President Ma] stated, explaining that this is why nations are seeking to occupy islands and reefs in the South China Sea".).

<sup>203</sup> See Office of the President of the Taiwan Authority of China, "The President Attended the Opening Ceremony for 'Republic of China Southern Historical Exhibition'" (1 Sept. 2014), p. 4. SWSP, Vol. VIII, Annex 492. (Summarizing President Ma as stating that "the principle of 'the land dominates the sea' in *United Nations Convention on the Law of the Sea* still applies to the disputes over territorial sovereignty or over territorial waters, thereby resulting in various countries fighting over the islands and reefs in the South China Sea".).

15.11. The necessary consequence of President Ma's acceptance that the "land dominates the sea" and that "maritime claims begin with land" is that President Ma—speaking on behalf of Taiwan—accepts that international law recognizes maritime claims only insofar as a State has title to land that generates maritime entitlements. Claims to maritime space that are unconnected to claims to land may not be made.

15.12. *Finally*, and consistent with his observations concerning the relationship between land and maritime claims, President Ma clarifies that the spatial extent of a maritime entitlement is governed by general international law. In that connection, President Ma correctly observes that, at the time the 1947 map was published, the "concept of territorial sea was 3 nautical miles". He goes on to say that, "[i]f there was smuggling, [Taiwan] would try to capture the smugglers at twice the distance or at most 12 nautical miles".<sup>204</sup> According to President Ma, there "*was no claim at all on other so-called sea regions*".<sup>205</sup> President Ma's position on this point is affirmed by the official summary of his remarks, which states that "when the [Republic of China] issued the *Location Map of the South China Sea Islands* in 1947, aside from the concept of territorial waters, *no other concepts regarding maritime zones existed, nor had any claims been made*".<sup>206</sup>

15.13. Taken together, President Ma's remarks accept that the original dashed line was intended to be a claim to the insular features enclosed by it. Since maritime claims are governed by the principle that the land dominates the sea, China's maritime claims at the time the line was first published were limited to between 3 and 12 M of the surrounding maritime space, which was the outer limit of a maritime entitlement then recognized by international law. Since the maximum extent of maritime claims under modern international law is determined by UNCLOS, no State can claim maritime rights beyond those permitted by its provisions. President Ma's statement therefore constitutes a rejection of the claim first

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<sup>204</sup> Transcript of President Ma's Speech, p.7. SWSP, Vol. VIII, Annex 495.

<sup>205</sup> *Id.* (emphasis added).

<sup>206</sup> See Office of the President of the Taiwan Authority of China, "President Ma attends opening ceremonies of Exhibition of Historical Archives on the Southern Territories of the Republic of China" (1 Sept. 2014), available at <http://english.president.gov.tw/Default.aspx?tabid=491&itemid=33215&rmid=2355> (accessed 25 Feb. 2015), p. 3. SWSP, Vol. VIII, Annex 496. (emphasis added.) See also Office of the President of the Taiwan Authority of China, "The President Attended the Opening Ceremony for 'Republic of China Southern Historical Exhibition'" (1 Sept. 2014), p. 4. SWSP, Vol. VIII, Annex 492. (Stating that, when Taiwan published its "Map of South China Sea Islands and Their Locations" in 1947, "other than the territorial waters, *there were no other claims and concepts of maritime space*".) (emphasis added).

asserted by the authorities in Beijing in 2009 that China is sovereign, or enjoys sovereign rights over, all of the waters within the nine-dashed line.

## QUESTION 16

*The Philippines is invited to address whether, as a matter of international law, an archipelago not pertaining to an Archipelagic State (as defined by Article 46 of the Convention) may be subject to a system of straight baselines surrounding the archipelago as a whole. The Philippines is likewise invited to address whether the Spratly Islands may be such an archipelago pursuant to the application of the Convention, of historic rights or titles, or of general international law.*

### **Response:**

16.1. The short answer to the first question is yes: an archipelago not pertaining to an Archipelagic State (as defined by Article 46 of the Convention) may be subject to a system of straight baselines surrounding the archipelago as a whole, but only if it conforms to the criteria for employing straight baselines set out in Article 7 of the 1982 Convention.

16.2. The short answer to the second question is no: the Spratly Islands are not such an archipelago pursuant to the application of the Convention, of historic rights or titles, or of general international law. There is no basis for drawing straight baselines around the Spratlys as a whole, nor have China or the Philippines applied their respective systems of straight baselines and archipelagic baselines to the Spratly Islands. Nor has Viet Nam, which claims sovereignty over all of the Spratly features, endeavoured to apply a system of straight baselines to them.

### **I. The Application of Article 7 to Dependent Archipelagos**

16.3. Article 7 of UNCLOS allows for the drawing of straight baselines around coastal archipelagos in the following terms:

1. In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity....

...

3. The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.

...

16.4. The case law on Article 7 takes a restrictive approach.<sup>207</sup> In the *Qatar/Bahrain* case the International Court of Justice concluded that Bahrain was not entitled to draw straight baselines connecting its outermost islands and low-tide elevations. It had neither declared itself to be an archipelagic state, nor could Article 7 be applied to the geographical configuration of Bahrain.<sup>208</sup>

16.5. Article 7 might be relied upon to justify drawing a system of straight baselines around an oceanic archipelago which consists of a few larger islands fringed by other smaller islands in their immediate vicinity, or which has a deeply indented coastline. The first of those conditions was satisfied in the *Eritrea/Yemen Maritime Delimitation*.<sup>209</sup> The arbitrators described the Dahlak Islands as a “tightly knit group” or “‘carpet’ of islands and islets” that formed “an integral part of the general coastal configuration”.<sup>210</sup> They also found that “[t]he relatively large islet of Tiqfash, and the smaller islands of Kutama and Uqban further west, all appear to be part of an intricate system of islands, islets and reefs which guard this part of the coast. This is indeed, in the view of the Tribunal, a ‘fringe system’ of the kind contemplated by Article 7 of the Convention, even though Yemen does not appear to have claimed it as such”.<sup>211</sup>

16.6. A “fringe” implies more than one island; the Special Rapporteur of the International Law Commission sessions that prepared what became Article 4 of the Geneva Convention on the Territorial Sea says simply: “the Commission interpreted the International Court of Justice’s decision [in the *Fisheries Case*] as meaning that a single island would not

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<sup>207</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, I.C.J. Reports 2001, para. 212. MP, Vol. XI, Annex LA-26 (“The Court observes that the method of straight baselines, which is an exception to the normal rules for the determination of baselines, may only be applied if a number of conditions are met. This method must be applied restrictively. Such conditions are primarily that either the coastline is deeply indented and cut into, or that there is a fringe of islands along the coast in its immediate vicinity”). See also *Anglo-Norwegian Fisheries (United Kingdom v. Norway)*, Judgment, I.C.J. Reports 1951, pp. 133-139. MP, Vol. XI, Annex LA-2 (requiring evidence of consistent and uninterrupted usage).

<sup>208</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, I.C.J. Reports 2001, paras. 213-215. MP, Vol. XI, Annex LA-26.

<sup>209</sup> *Eritrea v. Yemen*, Second Stage of the Proceedings (Maritime Delimitation), Award (17 Dec. 1999), para. 140. MP, Vol. XI, Annex LA-49 (“[T]he Dahlak fringe of coastal islands is also suitable for the application not of the ‘normal baseline’ of the territorial sea, but of the ‘straight baselines’ described in Article 7 of the Convention (as there distinguished from the ‘normal’ baseline described in Article 5). The straight baseline system is there described as ‘the method of straight baselines joining appropriate points’. Yemen appears to have little difficulty in agreeing that the Dahlaks form an appropriate situation for the establishment of a straight baseline system”).

<sup>210</sup> *Id.*, para. 139.

<sup>211</sup> *Id.*, para. 151.



be enough to justify the application of the straight baseline rule, but that a certain number of islands were necessary”.<sup>212</sup> Once again a few very small rocks or islets may not constitute a fringe: “the exact number of islands will depend partially on size; three large islands might constitute a fringe where three islets over the same [sea] area would not”.<sup>213</sup>

16.7. Article 7 has to be applied to the facts of each island group, however, and may not always justify straight baselines enclosing the whole archipelago. It will most likely be inapplicable to archipelagos consisting of a few similarly sized islands or small islands that are widely spaced.<sup>214</sup> As Kopela observes: “The applicability of Article 7 for dependent outlying archipelagos is rather limited”.<sup>215</sup>

16.8. The State practice must be viewed cautiously, therefore.<sup>216</sup> Examples of State practice which relies, at least in part, on Article 7 include the Falkland Islands, Spitsbergen, and the Faroes.<sup>217</sup> These island groups each comprise closely-spaced clusters of islands that appear to meet the requirements of Article 7, including the close land/water linkage of Article 7(3). They are to some degree both deeply indented and fringed by smaller islands.

16.9. The Spratly Islands, however, are neither “deeply indented and cut into”, nor can it be said that they constitute a fringe of islands grouped around or in the immediate vicinity of one or more larger islands. The extensive sea areas surrounding these very tiny features do not meet the requirement of being “sufficiently closely linked to the land domain to be the subject to a regime of internal waters”. The ICJ’s reasoning in paragraph 214 of the

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<sup>212</sup> International Law Commission, “317th Meeting”, in *Report of the International Law Commission Covering the Work of its Seventh Session*, U.N. Doc. A/CN.4/SER.A/1955 (22 June 1955), p. 205, para. 40. SWSP, Vol. XII, Annex LA-182.

<sup>213</sup> Peter Beazley, *Maritime Limits and Baselines: A Guide to their Delineation* (1987), p. 13. SWSP, Vol. XII, Annex LA-201.

<sup>214</sup> Peter Beazley, *Maritime Limits and Baselines: A Guide to their Delineation* (1987), p. 14 argues that “[w]here the territorial waters measured from the low-water line around individual islands spaced along the coast do not overlap, those islands are unlikely to constitute a fringe”. SWSP, Vol. XII, Annex LA-201. *See also* W.M. Reisman & G. Westerman, *Straight Baselines in International Maritime Boundary Delimitation* (1992), pp. 88-89. SWSP, Vol. XII, Annex LA-204.

<sup>215</sup> Sophia Kopela, *Dependent Archipelagos in the Law of the Sea* (2013), p. 259. SWSP, Vol. XII, Annex LA-213.

<sup>216</sup> *See Id.*, chs. 2, 3; W.M. Reisman & G. Westerman, *Straight Baselines in International Maritime Boundary Delimitation* (1992), ch. 5. SWSP, Vol. XII, Annex LA-204; J. Roach & R. Smith, *Excessive Maritime Claims* (2012). SWSP, Vol. XII, Annex LA-212.

<sup>217</sup> *See* Sophia Kopela, *Dependent Archipelagos in the Law of the Sea* (2013) pp. 122-124, 195-200. SWSP, Vol. XII, Annex LA-213.

*Qatar/Bahrain* case appears equally applicable here: the features are tiny and widely scattered and there is no cluster or system around a main island.<sup>218</sup>

16.10. Article 7 cannot justify the drawing of straight baselines around this archipelago, and neither China nor the Philippines (nor Viet Nam) has suggested that it could. It follows that a system of straight baselines could be applied only if the Spratlys form part of an archipelagic State, and only insofar as the conditions specified in articles 46 and 47 are met.

## **II. Whether the Spratly Islands Are Entitled to Archipelagic Status**

### ***A. Pursuant to Other Articles of the Convention***

16.11. For the purposes of the Convention Article 46 defines an archipelagic State to mean “a State constituted wholly by one or more archipelagos and may include other islands”. It also defines an “archipelago” to mean “a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such”. The Spratly Islands meet neither part of this definition.

16.12. The first part of this definition excludes — and was intended to exclude — dependent archipelagos not pertaining to an archipelagic State,<sup>219</sup> *i.e.* those archipelagos that are not themselves States but are simply part of a continental or mainland State. A distinction between an archipelagic State and a State with archipelagos is thus fundamental to Part IV of UNCLOS.<sup>220</sup> The former is entitled to draw archipelagic straight baselines in accordance with the special rules set out in Article 47 of the Convention. The latter is entitled to employ straight baselines only within the narrower terms of Article 7 of the Convention. Neither

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<sup>218</sup> Itu Aba would be the principal island.

<sup>219</sup> Prompted in part by the Bahamas which in 1975 introduced a key document entitled “18 Principles for Inclusion in Archipelagic Articles”. See *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 5 (M. Nordquist, et al., eds., 2002), pp. 402, 405, where the document is reproduced. SWSP, Vol. XII, Annex LA-148(bis).

<sup>220</sup> See especially, D.P. O’Connell, *The International Law of the Sea* Vol. 1 (1982), pp. 237, 256-258. SWSP, Vol. XII, Annex LA-199; *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 5 (M. Nordquist, et al., eds., 2002), pp. 401-404. SWSP, Vol. XII, Annex LA-148(bis); Clive R. Symmons, *The Maritime Zones of Islands in International Law* (1979), p. 6. SWSP, Vol. XII, Annex LA-198; Sophia Kopela, *Dependent Archipelagos in the Law of the Sea* (2013), pp. 25-37. SWSP, Vol. XII, Annex LA-213.

China nor Viet Nam, the only two States that claim sovereignty over all of the Spratly features, is an archipelagic State.

16.13. The second point which follows from the definition of an archipelago in Article 46 is the need for the interconnecting waters, islands and other features to be “so closely interrelated” as to constitute “an intrinsic geographical, economic and political entity”. The closeness of the geographical connection was emphasized at UNCLOS III.<sup>221</sup> Amerasinghe set out the prevalent view of advocates of archipelagic status “...The mere existence of several islands in the ocean would not make them an archipelago”.<sup>222</sup>

16.14. For archipelagic States Article 47 establishes the maximum ratio of water to land at 9:1; a 100 NM limit on the length of baselines, or exceptionally 125 NM; and a requirement that “the drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago”.<sup>223</sup> The maximum ratio of water to land was intended to exclude widely-spaced archipelagos such as Tuvalu and Kiribati because of the very large sea areas that would be enclosed.<sup>224</sup>

16.15. The Spratlys as a whole comprise no more than 5 km<sup>2</sup> of land territory.<sup>225</sup> They encompass more than 410,000 km<sup>2</sup> of maritime space,<sup>226</sup> a water/land ratio of approximately 82,000:1. They would fail the test of Article 47 even if, *quod non*, dependent archipelagos could constitute archipelagic States. Part IV does not apply to such a collection of features so small and widely scattered that they lack a close relationship with each other and with interconnecting sea areas. That, too, would exclude the Spratlys from having any form of archipelagic status even if Part IV did apply to archipelagos that do not pertain to archipelagic States.

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<sup>221</sup> The Mauritian delegate explained that an archipelagic State must “[constructively] form a single physical and economic entity”. U.N. Conference on the Law of the Sea III, Second Committee, *Summary Records of the 37th Meeting*, U.N. Doc. A/CONF.62/C.2/SR.37 (12 Aug. 1974), p. 269. SWSP, Vol. XII, Annex LA-187. The Cuban delegate said that “remote and isolated islands” in mid ocean could not be grouped together and regarded as archipelagos”. *Id.*

<sup>222</sup> C.F. Amerasinghe, “The Problem of Archipelagos in the International Law of the Sea”, *International and Comparative Law Quarterly*, Vol. 23 (1974), pp. 539, 564. SWSP, Vol. XII, Annex LA-197.

<sup>223</sup> Art. 41(1) – (3).

<sup>224</sup> V. Prescott & C. Schofield, *The Maritime Political Boundaries of the World* (2nd ed., 2005), p. 176. SWSP, Vol. XII, Annex LA-208.

<sup>225</sup> United States Central Intelligence Agency, “Spratly Islands”, *CIA World Factbook* (28 May 2014). SWSP, Vol. IX, Annex 502.

<sup>226</sup> *Id.*

**B. Pursuant to General International Law**

16.16. There are examples of States drawing straight baselines around dependent oceanic archipelagos notwithstanding that they appear not to meet the criteria laid down in Article 7, and the States concerned are not entitled to rely on Part IV.<sup>227</sup> Self-evidently, the legal justification for this practice cannot be Articles 7 or 46 of UNCLOS. The argument, such as it is, would have to be that customary law has developed since 1982 and that, in effect, it has supplanted the 1982 Convention.<sup>228</sup> It would be based on the false premises that the Convention does not regulate the drawing of straight baselines by non-archipelagic States around dependent archipelagos, that UNCLOS leaves the question open for subsequent evolution through State practice,<sup>229</sup> and that the matter is therefore governed by general international law.<sup>230</sup>

16.17. The objections to this argument are as obvious as they are compelling. First, it is simply inconsistent with the 1982 Convention. The Convention does not leave the matter open for further development: it regulates it definitively.<sup>231</sup> Article 5 provides that “Except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal state”. The drawing of straight baselines is “otherwise provided” for in Articles 7, 9, 10, and 46 of the Convention. Unless the drawing of straight baselines can be justified by reference to one or more of those provisions, the normal baseline referred to in Article 5 applies. Anything else is contrary to the Convention.

16.18. Second, as noted earlier, the extension of archipelagic status to dependent oceanic archipelagos was discussed at UNCLOS III and rejected. The limitation of Part IV to archipelagic States was part of the consensus package deal.<sup>232</sup> It is not open to States Parties

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<sup>227</sup> See Sophia Kopela, *Dependent Archipelagos in the Law of the Sea* (2013), ch. 3. SWSP, Vol. XII, Annex LA-213.

<sup>228</sup> *Id.*, p. 157.

<sup>229</sup> *Id.*, p. 259.

<sup>230</sup> *Id.*, pp. 154-155.

<sup>231</sup> Contrast Articles 74 and 83, which do leave open the possibility of further development of the law on maritime boundary delimitation through customary international law.

<sup>232</sup> U.N. Conference on the Law of the Sea III, Second Committee, *Summary Records of the 37th Meeting*, U.N. Doc. A/CONF.62/C.2/SR.37 (12 Aug. 1974), p. 267, para. 11. SWSP, Vol. XII, Annex LA-187. See also C. Ku, “The Archipelagic States Concept and Regional Stability in Southeast Asia Case Western Reserve”, *Case Western Reserve Journal of International Law*, Vol. 23 (1991), pp. 471-474. SWSP, Vol. XII, Annex LA-202.

to derogate unilaterally from the Convention's agreed terms.<sup>233</sup> The regime of straight baselines and archipelagic waters set out in Parts II and IV of UNCLOS has not been amended by the States Parties; it is not the subject of any implementing agreement; there are no relevant UN General Assembly resolutions or informal understandings of the States Parties; there are no *inter se* agreements dealing with the matter.

16.19. Third, even if it could be accepted (but only for the sake of argument) that State practice could in theory evolve into customary law displacing provisions of the Convention, a change of this kind cannot be brought about unilaterally, any more than Iceland could change treaty provisions on fisheries jurisdiction unilaterally.<sup>234</sup> It would require, if not the agreement of other States, then at least their tacit consent or acquiescence. There is no such tacit consent or acquiescence to any extension of the archipelagic waters regime. *Inter alia*, the US, UK, and Germany have protested at the straight baselines drawn around the Galapagos Islands.<sup>235</sup> The US, Philippines and Viet Nam have protested the straight baselines China has drawn around the Paracels.<sup>236</sup> The US has also objected to straight baselines drawn around the Faroe Islands and the Azores.<sup>237</sup> At the same time, the United States has conspicuously refrained from drawing straight baselines around the Hawaiian Islands;<sup>238</sup> France has similarly not done so around Polynesia.<sup>239</sup>

16.20. Fourth, the practice of States which have drawn straight baselines around dependent archipelagos is not sufficiently consistent, uniform or widespread to establish

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<sup>233</sup> See Articles 309-311; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, I.C.J. Reports 2001, paras. 211-214. MP, Vol. XI, Annex LA-26.

<sup>234</sup> *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment, I.C.J. Reports 1974, paras. 67, 59. MP, Vol. XI, Annex LA-8.

<sup>235</sup> See Sophia Kopela, *Dependent Archipelagos in the Law of the Sea* (2013), pp. 200-207. The U.S. position is reproduced at United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Seas No 112: United States Responses to Excessive Maritime Claims* (9 Mar. 1992). SWSP, Vol. XII, Annex LA-203.

<sup>236</sup> Daniel J. Dzurek, "The People's Republic of China Straight Baseline Claim," *IBRU Boundary & Security Bulletin*, Vol. 4, No. 2 (1996), pp. 80-85. SWSP, Vol. X, Annex 525; United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Seas No 112: United States Responses to Excessive Maritime Claims* (9 Mar. 1992). SWSP, Vol. XII, Annex LA-203.

<sup>237</sup> United States Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Seas No 112: United States Responses to Excessive Maritime Claims* (9 Mar. 1992). SWSP, Vol. XII, Annex LA-203.

<sup>238</sup> Sophia Kopela, *Dependent Archipelagos in the Law of the Sea* (2013), pp. 141-142. SWSP, Vol. XII, Annex LA-213.

<sup>239</sup> *Id.*, pp. 252-255.

customary international law on the subject.<sup>240</sup> On the contrary, the contours of the alleged rule are fundamentally uncertain. Is it an expression of the requirements of Article 7? Or of Article 47? Or of some mélange of the two? Or is it stricter than either of those provisions? Or less strict? Or just different? Without some authoritative articulation of the rule, State practice alone is not capable of expressing consistent normative content. Moreover, if the practice of non-parties is considered significant, then it supports the consensus agreed at UNCLOS III, not the evolution of some new rule.<sup>241</sup>

16.21. Fifth, if on the other hand we interpret the practice of the States using straight baselines around dependent archipelagos as largely confined to groups of closely linked islands, where not much ocean space is enclosed, and sea routes normally used for international navigation are not affected,<sup>242</sup> then it is clear that the Spratly Islands would fall outside any such rule on all three counts. The features which might be used as archipelagic basepoints are tiny and widely dispersed. There is simply no scenario where a series of straight baselines could cordon off a maritime area whose water/land ratio is anywhere near 9:1. The total land area for the entire Spratly Island region is less than 4 square kilometres, which means that any straight baseline system could only enclose within these features a total of 36 square kilometres of water — less than the territorial sea to which the high-tide features are already entitled. Moreover, the South China Sea, including the area straddled by the Spratlys, is a major international shipping lane, not a remote area of unused ocean. Preventing the enclosure of areas of this kind was exactly the reason for the opposition of maritime States to extending the archipelagic waters regime to dependent archipelagos.<sup>243</sup>

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<sup>240</sup> *Id.*, p. 185: “However, a problem which cannot be addressed clearly from state practice concerns the issue of the conditions for the application of this regime and particularly the question of which groups of islands could be beneficiaries of such [a] regime”.

<sup>241</sup> The most relevant non-party is the United States, with several dependent archipelagos, including Hawaii, the US Virgin Islands, and the Aleutian Islands.

<sup>242</sup> Sophia Kopela, *Dependent Archipelagos in the Law of the Sea* (2013), p. 185, offers this as a possible analysis. SWSP, Vol. XII, Annex LA-213.

<sup>243</sup> E.D. Brown, *The International Law of the Sea: Introductory Manual*, Vol. 1 (1994), p. 108: “[T]he distinction drawn in the UN Convention between archipelagic states and archipelagos is more the result of the opposition of the principal maritime powers to the proliferation of archipelagic waters than of any objective consideration of the need to unify the scattered parts of the non-State archipelago”. SWSP, Vol. XII, Annex LA-205. See also D.P. O’Connell, *The International Law of the Sea* Vol. 1 (1982), ch. 6. SWSP, Vol. XII, Annex LA-199.

**C. Pursuant to Historic Rights and Titles**

16.22. The simple answer to the question whether historic rights and titles may justify straight baselines around the Spratlys is that China has not extended its system of straight baselines to the Spratlys: even if the islands themselves were Chinese, China cannot claim any historic basis for employing straight baselines there.<sup>244</sup> At no time has any State treated the Spratlys as an archipelago for the purpose of drawing straight baselines around the whole archipelago. Regardless of whether historic rights not consistent with UNCLOS continue to exist after entry into force of the Convention, there is no case for relying on them in this context.

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16.23. Part IV of UNCLOS applies only to archipelagic States as defined in Article 46 of the Convention. Oceanic archipelagos that are not archipelagic States may be enclosed by straight baselines only if they conform to the requirements of Article 7 of UNCLOS. Article 7 cannot justify the drawing of straight baselines around the Spratly Islands, and neither China nor the Philippines (nor Viet Nam) has suggested that it could.

16.24. Even if there were an applicable rule of customary law on dependent oceanic archipelagos — and neither China nor the Philippines nor Viet Nam has suggested that there is — it is clear that the Spratlys would fall outside any such rule, however defined, because they are so small and so widely scattered. China has not extended its system of straight baselines to the Spratly Islands and it cannot claim any basis — historic or otherwise — for doing so in conformity with UNCLOS, or under general international law.

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<sup>244</sup> *Anglo-Norwegian Fisheries (United Kingdom v. Norway)*, Judgment, I.C.J. Reports 1951, pp. 133-139, where the Court required evidence of constant and long practice. MP, Vol. XI, Annex LA-2. Contrast Denmark which first employed straight baselines around the Faroes in 1903 and Ecuador which first employed them for the Galapagos in 1934.





## QUESTION 17

*The Tribunal notes the Philippines' reference to certain maritime features in the South China Sea/West Philippine Sea. The Philippines is invited to provide current maps or large-scale nautical charts for all maritime features in the South China Sea/West Philippine Sea that are relevant to the Parties' dispute. The Tribunal would welcome receiving copies of the most recent editions of such maps and charts as prepared by different government mapping authorities, including but not limited to those of:*

- *The People's Republic of China;*
- *The Republic of the Philippines;*
- *The Taiwan Authority of China;*
- *The Republic of Indonesia;*
- *Malaysia;*
- *The Socialist Republic of Vietnam;*
- *Japan;*
- *France (Service hydrographique de la marine);*
- *The Russian Federation (Glavnoe Oupravlenie Navigatsii i Okeanografi);*
- *The United Kingdom (British Admiralty);*
- *The United States of America (U.S. Hydrographic Office, Defense Mapping Agency).*

*The Philippines is also invited to provide the Tribunal with the South China Sea Electronic Navigational Charts prepared by the East Asia Hydrographic Commission.*

### **Response:**

17.1. The Philippines has obtained all of the nautical charts prepared by government mapping agencies requested by the Tribunal. In accordance with the Registry's letter to the Parties dated 5 March 2015, they are provided in loose-leaf as Annexes NC1-NC66. Digital files of all nautical charts are submitted with this Supplemental Written Submission.<sup>245</sup>

17.2. In addition, the Philippines provides excerpts of the pertinent nautical charts for each maritime feature mentioned in Questions 19-24 in the *Atlas* presented as Volume II of this Supplemental Written Submission.

17.3. For the Tribunal's convenience, the table below lists all of the nautical charts submitted by the Philippines, organized by State and year of publication.

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<sup>245</sup> Annexes NC1-NC7 were submitted with the Memorial.

Producing Agency	Title of Chart	Year of Production	Annex Number
<b>JAPAN</b>			
Japan Coast Guard	Chart No. W1676 (Northern Part of Philippine Islands and Adjacent Seas)	2005	NC7
Japan Coast Guard	Chart No. W1500 (Taiwan Strait to Mindoro Strait)	2008	NC8
Japan Coast Guard	Chart No. W1501 (Hainan Dao and Adjacent Seas)	2008	NC9
Japan Coast Guard	Chart No. W1502 (South China Sea: Southern Portion, Western Sheet)	2008	NC10
Japan Coast Guard	Chart No. W1801 (South China Sea: Southern Portion, Eastern Sheet)	2008	NC11
Japan Coast Guard	Chart No. W1677(A) (Southern Part of Philippine Islands and Adjacent Seas)	2009	NC4
Japan Coast Guard	Chart No. W2006 (South China Sea)	2009	NC12
<b>MALAYSIA</b>			
Malaysia National Hydrographic Centre	Chart No. MAL 6 (Sabah - Sarawak)	1996	NC13
Malaysia National Hydrographic Centre	Chart No. MAL 781 (Peninjau) (2013)	2013	NC14
Malaysia National Hydrographic Centre	Chart No. MAL 885 (Beting Mantanani - Selat Balabac)	2013	NC15
Malaysia National Hydrographic Centre	Chart No. MAL 884 (Terumbu UBI - Terumbu Laksamana)	2014	NC16
<b>CHINA</b>			
Navigation Guarantee Department of the Chinese Navy Headquarters	Chart No. 18400 (Zhenghe Qunjiao to Yongshu Jiao)	2005	NC17

Producing Agency	Title of Chart	Year of Production	Annex Number
Navigation Guarantee Department of the Chinese Navy Headquarters	Chart No. 18500 (Nanfang Qiantan to Haikou Jiao)	2005	NC18
Navigation Guarantee Department of the Chinese Navy Headquarters	Chart No. 00104 (South China Sea)	2006	NC2
Navigation Guarantee Department of the Chinese Navy Headquarters	Chart No. 10019 (Huangyan Dao (Minzhu Jiao) to Balabac Strait)	2006	NC3
Navigation Guarantee Department of the Chinese Navy Headquarters	Chart No. 10017 (Zhongsha Qundao to Bashi Chan)	2006	NC19
Navigation Guarantee Department of the Chinese Navy Headquarters	Chart No. 10018 (Xisha Qundao to Nansha Qundao)	2006	NC20
Navigation Guarantee Department of the Chinese Navy Headquarters	Chart No. 18050 (Northern and Central Portions of Nansha Qundao)	2006	NC21
Navigation Guarantee Department of the Chinese Navy Headquarters	Chart No. 10021 (Kep. Natuna to Balabac Strait)	2008	NC22
Navigation Guarantee Department of the Chinese Navy Headquarters	Chart No. 17310 (Huangyan Dao)	2012	NC23

Producing Agency	Title of Chart	Year of Production	Annex Number
Navigation Guarantee Department of the Chinese Navy Headquarters	Chart No. 18600 (Yinqing Qunjiao to Nanwei Tan)	2012	NC24
Navigation Guarantee Department of the Chinese Navy Headquarters	Chart No. 18100 (Shuangzi Qunjiao to Zhenghe Quojiao)	2013	NC25
Navigation Guarantee Department of the Chinese Navy Headquarters	Chart No. 18200 (Liyue Tan)	2013	NC26
Navigation Guarantee Department of the Chinese Navy Headquarters	Chart No. 18300 (Yongshu Jiao to Yinqing Qunjiao)	2013	NC27
Navigation Guarantee Department of the Chinese Navy Headquarters	Chart No. 18700 (Wumie Jiao to Huanglu Jiao)	2013	NC28
<b>PHILIPPINES</b>			
Navigation Guarantee Department of the Chinese Navy Headquarters	Chart No. 18800 (Haikou Jiao to Yuya Ansha)	2013	NC29
Philippine Coast and Geodetic Survey	Chart No. 200 (Republic of the Philippines)		NC30
Philippine National Mapping and Resource Information Authority	Chart No. 4200 (Philippines)	2004	NC31

Producing Agency	Title of Chart	Year of Production	Annex Number
Philippine National Mapping and Resource Information Authority	Chart No. 4803 (Scarborough Shoal)	2006	NC32
Philippine National Mapping and Resource Information Authority	Chart No. 4723 (Kalayaan Island Group)	2008	NC33
Philippine National Mapping and Resource Information Authority	Chart No. 4723(A) (Kalayaan Island Group and Recto Bank including Bajo De Masinloc)	2011	NC5
<b>RUSSIA</b>			
Russian Main Department of Navigation and Oceanography	Chart No. 60360 (Pacific Ocean: Philippines Islands, Luzon Island)	2000	NC34
Russian Main Department of Navigation and Oceanography	Chart No. 60122 (Pacific Ocean: Northern Part of South China Sea)	2004	NC35
Russian Main Department of Navigation and Oceanography	Chart No. 60123 (Pacific Ocean: Northern Part, Southeastern Part of South China Sea)	2005	NC36
Russian Main Department of Navigation and Oceanography	Chart No. 61137 (South China Sea and Sulu Sea; Approaches to Balabac Strait)	2005	NC37
Russian Main Department of Navigation and Oceanography	Chart No. 60359 (Pacific Ocean: Western Part, Luzon Island to Kalimantan Island)	2006	NC38
Russian Main Department of Navigation and Oceanography	Chart No. 61139 (South China Sea: 11°21'N to 14°40'N, 112°35'E to 117°10'E)	2006	NC39
Russian Main Department of Navigation and Oceanography	Chart No. 61138 (South China Sea: 7°01'N to 11°30'N, 112°12'E to 115°35'E)	2007	NC40

Producing Agency	Title of Chart	Year of Production	Annex Number
Russian Main Department of Navigation and Oceanography	Chart No. 61140 (South China Sea: Philippines; Palawan Island and Palawan Pass)	2007	NC31
Russian Main Department of Navigation and Oceanography	Chart No. 61141 (South China Sea: Philippine Islands; Busuanga Island to Luzon Island)	2007	NC42
Russian Main Department of Navigation and Oceanography	Chart No. 61155 (South China Sea: Luzon Island; Arboledan Point to Palauig Point)	2011	NC43
<b>UNITED KINGDOM</b>			
United Kingdom Hydrographic Office	Chart No. 967 (South China Sea; Palawan)	1985	NC44
United Kingdom Hydrographic Office	Chart No. 3488 (Song Sai Gon to Hong Kong)	1997	NC45
United Kingdom Hydrographic Office	Chart No. 3489 (Manila to Hong Kong)	1998	NC46
United Kingdom Hydrographic Office	Chart No. 3483 (South China, Sulu and Celebes Seas; Mindoro Strait to Luconia Shoals and Selat Makasar)	2002	NC1
United Kingdom Hydrographic Office	Chart No. 4508 (South China Sea)	2003	NC47
United Kingdom Hydrographic Office	Chart No. 3482 (Singapore Strait to Song Sai Gon)	2012	NC48
United Kingdom Hydrographic Office	Chart No. 4411 (Cabra Island to Cape Bojeador)	2012	NC49
<b>UNITED STATES</b>			
United States Defense Mapping Agency	Chart No. 93061 (Reefs In the South China Sea)	1944	NC50
United States Defense Mapping Agency	Chart No. 93043 (Tizard Bank South China Sea)	1950	NC51

Producing Agency	Title of Chart	Year of Production	Annex Number
United States Defense Mapping Agency	Chart No. 93046 (Indonesia; South China Sea; Palawan Passage; Mantangule Island to Eran Bay)	1982	NC52
United States Defense Mapping Agency	Chart No. 93048 (Duhu Ansha to Kimanis Bay)	1982	NC53
United States Defense Mapping Agency	Chart No. 93044 (Indonesia South China Sea: Yongshu Jiao to Yongdeng Ansha)	1983	NC6
United States Defense Mapping Agency	Chart No. 93045 (Heng Jiao (Livock Reef) to Haima Tan (Routh Shoal/Seahorse Shoal))	1984	NC54
United States Defense Mapping Agency	Chart No. 93047 (South China Sea: Yongshu Jiao to P'o-Lang Chiao)	1984	NC55
United States Defense Mapping Agency	Chart No. 93042 (Plans In the South China Sea)	1985	NC56
United States Defense Mapping Agency	Chart No. 92033 (Palawan, Philippines)	1986	NC57
United States Defense Mapping Agency	Chart No. 92006 (Philippine Islands: Southern Part)	1989	NC58
United States Defense Mapping Agency	Chart No. 91005 (Philippines: Central Part)	1996	NC59
United States Defense Mapping Agency	Chart No. 93030 (Mui Da Nang to Mui Bai Bung)	1996	NC60
United States Defense Mapping Agency	Chart No. 93049 (Vanguard Bank to Spratly Island)	1997	NC61
United States Defense Mapping Agency	United States Defense Mapping Agency, Chart No. 71027 (Pulau Bintan to Mui Ca Mau Including North Coast of Borneo and Adjacent Islands)	1998	NC62
United States Defense Mapping Agency	Chart No. 91004 (South China Sea: Scarborough Shoal)	2012	NC63

Producing Agency	Title of Chart	Year of Production	Annex Number
Vietnamese People's Navy	Chart No. I-1000-04 (Cam Ranh - Quần Đảo Trường Sa)	2008	NC64
Vietnamese People's Navy	Chart No. I-2500-01 (Việt Nam)	2010	NC65
Vietnamese People's Navy	Chart No. I-2500-04 (Phi-Líp-Pin Và Dao Dài Loan)	2010	NC66

17.4. The Philippines has also obtained the South China Sea Electronic Navigational Charts (“ENCs”) prepared by the East Asia Hydrographic Commission and requested by the Tribunal. The ENCs are submitted electronically herewith in their original file format. They represent the second edition of this dataset.<sup>246</sup>

17.5. The ENC files can be viewed using an Electronic Chart Display and Information System or other, similar software. This particular dataset includes:

- EA200001.000
- EA200002.000
- EA200003.000
- EA200004.000

17.6. The “.000” files are of S-57 file type; each represents a different section of the South China Sea. For example, “EA200002.000” includes the Kalayaan Island Group but does not extend far enough north to include Scarborough Shoal. Scarborough Shoal is included within “EA200001.000”. To view the South China Sea in its entirety, all four files must be loaded into the software viewer.

17.7. It is possible to view the ENCs with a number of different pieces of software. One is CARIS Easy View, which was created by a reputable name in the hydrographic and marine community, and is available free of charge.<sup>247</sup> S-57 files are loaded into Easy View software, and the “View” and “Selection” toolbars are used to navigate, zoom to features and query data contained in the ENCs. The “Layers” window shows the S-57 ENC files that are currently loaded in Easy View.

<sup>246</sup> They are available at <http://scsenc.eahc.asia>.

<sup>247</sup> The software can be downloaded at <http://www.caris.com/products/easy-view/>.



17.8. When an interactive element is selected, it appears highlighted bright blue, and information pertaining to that element is populated in the “Properties”, “Attributes” and “Selection” windows. This information might include the type of feature selected, and any attribute information (such as names or comments) associated with it.



## QUESTION 18

*The Tribunal notes the Philippines' Submission 4, requesting a declaration that "Mischief Reef, Second Thomas Shoal and Subi Reef are low-tide elevations ... and are not features that are capable of appropriation by occupation or otherwise". The Philippines is invited to address whether, as a matter of international law, low-tide elevations constitute territory and are subject to appropriation pursuant to the rules and principles of territorial acquisition.*

### **Response:**

#### **I. Summary of the Law**

18.1. The short answer to the question is no: low tide elevations (LTEs) do not constitute territory and are not subject to appropriation pursuant to the rules and principles of territorial acquisition. That was the clear conclusion of the International Court of Justice in the *Territorial and Maritime Dispute (Nicaragua/Colombia) Case*.<sup>248</sup>

18.2. The *Nicaragua/Colombia Case* follows a consistent line of earlier judgments.<sup>249</sup> *Effectivités*, however strong, will not establish sovereignty over or title to low-tide elevations.<sup>250</sup> In this respect LTEs cannot be compared to islands or rocks that are permanently above water. The more appropriate comparison is with the seabed, and title to the seabed does not depend on occupation, effective or notional.<sup>251</sup> Instead, the sovereignty of

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<sup>248</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Merits, Judgment, I.C.J. Reports 2012, para. 26. MP, Vol. XI, Annex LA-35. ("It is well established in international law that islands, however small, are capable of appropriation (see, e.g., *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, I.C.J. Reports 2001, p. 102, para. 206). By contrast, low-tide elevations cannot be appropriated, although 'a coastal State has sovereignty over low-tide elevations which are situated within its territorial sea, since it has sovereignty over the territorial sea itself' (*ibid.*, p. 101, para. 204) and low-tide elevations within the territorial sea may be taken into account for the purpose of measuring the breadth of the territorial sea (see paragraph 182 below)"). *Id.*

<sup>249</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2001, paras. 205-209. MP Vol. XI, Annex LA-26; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Merits, Judgment, I.C.J. Reports 2007, p. 659, paras. 141-142. SWSP, Vol. XII, Annex LA-177; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Merits, Judgment, I.C.J. Reports 2008, paras. 295-297. MP, Vol. XI, Annex LA-31.

<sup>250</sup> Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-4: Points of Substantive Law, Part II", *British Yearbook of International Law*, Vol. 32 (1956), pp. 46-47. SWSP, Vol. XII, Annex LA-193 ("It is a well-established rule of international law that territory, in order to be capable of appropriation in sovereignty, must be situated permanently above high-water mark, and not consist e.g., of a drying-rock, only uncovered at low tide, unless it is already within the territorial waters of appropriable territory").

<sup>251</sup> See Hersch Lauterpacht, "Sovereignty Over Submarine Areas", *British Yearbook of International Law*, Vol. 27 (1950), pp. 394, 415-419, 423, 431-432. SWSP, Vol. XII, Annex LA-194; Gilbert Gidel, *The Continental Shelf in the Law* (1951), p. 124. SWSP, Vol. XII, Annex LA-195; D.P. O'Connell, *The International Law of the*

the coastal state extends by operation of law to the seabed and subsoil of the territorial sea.<sup>252</sup> An LTE within the territorial sea will thus be subject to the sovereignty of the state of whose seabed it forms part.<sup>253</sup> Sovereignty in these cases is a function of proximity to land territory. It follows location, not occupation or appropriation.<sup>254</sup>

18.3. Although the point has never been explicitly addressed in the case law, it should follow that, within the exclusive economic zone or continental shelf, an LTE will be subject to the regime provided for in Articles 56(3) and 77 of UNCLOS.<sup>255</sup> Sovereign rights over natural resources and the jurisdiction attributed by Article 56 will belong to the appurtenant coastal state.<sup>256</sup> This conclusion is consistent with the treatment of non-proximate LTEs in the *Nicaragua/Colombia* case.<sup>257</sup> The Court applied the same logic to all LTEs, whether located on the continental shelf or EEZ, or within the territorial sea, *i.e.* that they are not capable of

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*Sea* Vol. 1 (1982), pp. 472-475. SWSP, Vol. XII, Annex LA-199. The point is explicit with respect to the continental shelf in Article 77(3) of UNCLOS. In the *North Sea Cases*, the Court held that: “the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right”. *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, Judgment, I.C.J. Reports 1969, para. 19. MP, Vol. XI, Annex LA-4.

<sup>252</sup> UNCLOS, Art. 2(2); *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, I.C.J. Reports 2001, p. 101, para. 204. MP, Vol. XI, Annex LA-26; *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, UNCLOS Annex VII Tribunal (7 July 2014), para. 191. SWSP, Vol. XII, Annex LA-179; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)*, Judgment, I.C.J. Reports 1984, paras. 193-194. MP, Vol. XI, Annex LA-12.

<sup>253</sup> *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia /Singapore)*, Merits, Judgment, I.C.J. Reports 2008, p. 12, para. 299. MP, Vol. XI, Annex LA-31.

<sup>254</sup> *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Merits, Judgment, I.C.J. Reports 2008, p. 12, paras. 295-299. MP, Vol. XI, Annex LA-31; Roberto Lavalle, “The Rights of States over Low-tide-elevations: A Legal Analysis”, *International Journal of Marine and Coastal Law*, Vol. 29 (2014), pp. 468-469. SWSP, Vol. XII, Annex LA-214.

<sup>255</sup> Clive R. Symmons, *The Maritime Zones of Islands in International Law* (1979), p. 140. SWSP, Vol. XII, Annex LA-198 (“So it may at most be argued that a low-tide elevation, situated on the continental shelf, is in essence part of the seabed and of the same juridical status”). The same conclusion was reached by the U.S. Court of Appeals in *United States v. Ray*, 423 F.2d 16, 20 (U.S. Court of Appeals, 5th Cir. 1970). SWSP, Vol. XII, Annex LA-219. See also Roberto Lavalle, “The Rights of States over Low-tide-elevations: A Legal Analysis”, *International Journal of Marine and Coastal Law*, Vol. 29 (2014), p. 476. SWSP, Vol. XII, Annex LA-214.

<sup>256</sup> See Treaty between Australia and Papua New Guinea concerning sovereignty and maritime boundaries in the area between the two countries, including the area known as Torres Strait, and related matters (“Torres Strait Treaty”), 1429 U.N.T.S. 208 (18 Dec. 1978), entered into force 15 Feb. 1985, Art. 1(1)(i). SWSP, Vol. XII, Annex LA-186, (treating low-tide elevations as a part of the seabed, stipulating that: “‘seabed jurisdiction’ means sovereign rights over the continental shelf in accordance with international law, and includes jurisdiction over low-tide elevations, and the right to exercise such jurisdiction in respect of those elevations, in accordance with international law”).

<sup>257</sup> See *infra* para. 18.7.

appropriation.<sup>258</sup> That had been Nicaragua's argument in the case, and the Court was evidently responding positively to it. Since even the coastal state lacks sovereignty over the seabed beyond 12 NM, it follows that no state may claim sovereignty over an LTE located within the EEZ or continental shelf.<sup>259</sup>

18.4. Beyond areas of national jurisdiction an LTE would become part of the deep seabed, subject to the regime set out in Part XI of the Convention. Article 89 of UNCLOS would preclude any state from purporting to subject such elevations to its sovereignty.<sup>260</sup>

## II. Jurisprudence

18.5. In the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)* case Bahrain claimed sovereignty over Fasht ad Dibal, a low-tide elevation. It argued that it had carried out "acts of authority" on the elevation, and that this was sufficient to confer title. The Court rejected this argument, holding instead that low-tide elevations are not subject to the normal rules on appropriation of land territory.<sup>261</sup> It gave three reasons. First, the apparent absence of widespread and uniform state practice supporting the claim that LTEs may be appropriated by "acts of authority".<sup>262</sup> Writers have not subsequently identified any state practice that casts doubt on the Court's conclusion.<sup>263</sup> Second, unlike islands, LTEs are not entitled to a territorial sea unless they are located within the territorial sea of the mainland or of an island.<sup>264</sup> When they are located beyond that distance they have no territorial sea of their own.<sup>265</sup> Third, the rules on straight baselines in UNCLOS and the Territorial Sea Convention do not apply to LTEs unless lighthouses or

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<sup>258</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Merits, Judgment, I.C.J. Reports 2012, para. 26. MP, Vol. XI, Annex LA-35. See also Roberto Lavalle, "The Rights of States over Low-tide-elevations: A Legal Analysis", *International Journal of Marine and Coastal Law*, Vol. 29 (2014), p. 473. SWSP, Vol. XII, Annex LA-214.

<sup>259</sup> Roberto Lavalle, "The Rights of States over Low-tide-elevations: A Legal Analysis", *International Journal of Marine and Coastal Law*, Vol. 29 (2014), p. 476. SWSP, Vol. XII, Annex LA-214.

<sup>260</sup> *Id.*, p. 477.

<sup>261</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, I.C.J. Reports 2001, paras. 205-206. MP, Vol. XI, Annex LA-26.

<sup>262</sup> *Id.*, para 206.

<sup>263</sup> See, e.g., Roberto Lavalle, "The Rights of States over Low-tide-elevations: A Legal Analysis", *International Journal of Marine and Coastal Law*, Vol. 29 (2014), p. 462. SWSP, Vol. XII, Annex LA-214.

<sup>264</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, I.C.J. Reports 2001, para. 207. MP, Vol. XI, Annex LA-26; UNCLOS, Art. 13(1).

<sup>265</sup> UNCLOS, Art. 13(2).

similar installations have been built on them.<sup>266</sup> The court emphasised that “the difference in effects which the law of the sea attributes to islands and low-tide elevations is considerable”.<sup>267</sup>

18.6. In the *Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, the Court held that “a low-tide elevation belongs to the State in the territorial waters of which it is located”.<sup>268</sup> This conclusion — which echoes *Qatar/Bahrain* — is not consistent with the idea that LTEs within 12 NM of the baseline may be appropriated in the same way as islands or other land territory. It supports the theory that sovereignty over LTEs within the territorial sea is a function of proximity, not of occupation.

18.7. Unlike the earlier cases, the *Territorial and Maritime Dispute (Nicaragua/Colombia)* judgment involved LTEs some of which lay beyond 12 NM from the low water line of the nearest land<sup>269</sup> — what the literature calls “non-proximate elevations”. In that context it is significant that the Court nevertheless followed the reasoning relied upon in the *Qatar/Bahrain Case* and that it unambiguously affirmed that “low-tide elevations cannot be appropriated”. Here the court recognizes explicitly that LTEs located beyond 12 NM cannot be the appropriated as territory by any state.

18.8. There is one further precedent that deals with sovereignty over low-tide elevations — the *Eritrea-Yemen Arbitration*. In that case Eritrea claimed territorial sovereignty over “islands, rocks and low-tide elevations” in the Red Sea.<sup>270</sup> The tribunal went on to hold, inter

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<sup>266</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, I.C.J. Reports 2001, para. 208. MP, Vol. XI, Annex LA-26; UNCLOS, Art. 7(4); Convention on the Territorial Sea and Contiguous Zones, 516 U.N.T.S. 205 (19 Apr. 1958), entered into force 10 Sept. 1964, Art 4(3). MP, Vol. XI, Annex LA-76. In the *Bangladesh/India Arbitration*, the arbitrators also held that “base points located on low-tide elevations do not fit the criteria elaborated by the International Court of Justice in the *Black Sea* case and confirmed in more recent cases”. However, there are special rules in UNCLOS Article 47 allowing “drying reefs” to be used when drawing straight baselines around archipelagic states. *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, UNCLOS Annex VII Tribunal (7 July 2014), para. 261. SWSP, Vol. XII, Annex LA-179.

<sup>267</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, I.C.J. Reports 2001, para. 206. MP, Vol. XI, Annex LA-26

<sup>268</sup> *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia v. Singapore)*, Merits, Judgment, I.C.J. Reports 2008, paras. 295-299. MP, Vol. VI, Annex LA-31.

<sup>269</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Merits, Judgment, I.C.J. Reports 2012, para. 183. MP, Vol. XI, Annex LA-35.

<sup>270</sup> *Eritrea v. Yemen*, First State of the Proceedings (Territorial Sovereignty and Scope of the Dispute), Award (9 Oct. 1998), paras. 30, 75. MP, Vol. XI, Annex LA-48.

alia, that “after examination of all relevant historical, factual and legal considerations, the Tribunal unanimously finds in the present case that the islands, islet, rocks, and low-tide elevations forming the Mohabbakah islands, including but not limited to Sayal Islet, Harbi Islet, Flat Islet and High Islet are subject to the territorial sovereignty of Eritrea”.<sup>271</sup> It made similar findings of sovereignty with respect to other groups of islands, islets, rocks and low-tide elevations.<sup>272</sup> The award says nothing about the basis on which sovereignty over low-tide elevations was determined. Unlike the *Nicaragua/Colombia* case it does not say which features are LTEs, nor is it possible to identify their precise location in relation to adjacent land territory or islands. But the dispositive and the relevant paragraphs all refer to groups of “islands, islets, rock and low-tide elevations”, as if each group formed a contiguous whole. The implication appears to be that, as in the ICJ cases, sovereignty over LTEs follows location and is a function of proximity to islands or land territory.<sup>273</sup> Correctly understood, this case is not out of line with the ICJ judgments.

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18.9. It follows that in the present case China cannot have sovereignty over any LTE within the area in dispute unless that LTE is located within 12 NM from Chinese islands or land territory. It also follows that the Philippines necessarily enjoys sovereignty over those LTEs which are within 12 NM of its own territory. Sovereign rights over LTEs within the Philippines’ continental shelf and EEZ are exercisable only by the Philippines, but no state can acquire full territorial sovereignty by any means over LTEs located beyond 12 NM from the nearest land.

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<sup>271</sup> *Id.*, para. 475.

<sup>272</sup> *Id.*, paras. 482, 508, 524. *See also Id.*, para. 527 (the *dispositive*).

<sup>273</sup> Roberto Lavalle, “The Rights of States over Low-tide-elevations: A Legal Analysis”, *International Journal of Marine and Coastal Law*, Vol. 29 (2014), p. 473. SWSP, Vol. XII, Annex LA-214; W. Michael Reisman, “The Government of the State of Eritrea and the Government of the Republic of Yemen Award of the Arbitral Tribunal in the First Stage of the Proceedings”, *American Journal of International Law*, Vol. 93 (1999), p. 680. SWSP, Vol. XII, Annex LA-206; Yoshifumi Tanaka, “Low-tide Elevations in International Law of the Sea: Selected Issues”, *Ocean Yearbook*, Vol. 20 (2006), p. 190. SWSP, Vol. XII, Annex LA-209.





## QUESTIONS 19 THROUGH 24

19. *The Tribunal notes the Philippines' reference to nine maritime features in the South China Sea/West Philippine Sea and its position that –*

*Scarborough Shoal ... is permanently below water, except for six small protrusions that are above sea level at high tide, and which are properly classified as “rocks” under Article 121(3) that do not generate entitlement to an EEZ or a continental shelf.*

*[...] Second Thomas Shoal, Mischief Reef and Subi Reef – are low-tide elevations under Article 13, which are part of the seabed and subsoil, are not subject to appropriation and do not generate any maritime entitlement, even to a territorial sea... . McKennan Reef and Gaven Reef, are also low-tide elevations but because they are situated within 12 M of small, high-tide features they may each serve as a base point for the measurement of the high-tide feature's territorial sea... . Johnson Reef, Cuarteron Reef and Fiery Cross Reef – are “rocks” that do not generate entitlement to an EEZ or a continental shelf under Article 121(3).*

*(Memorial, paras. 5.2, 5.3)*

*The Philippines is invited to provide further detailed geographic and hydrographic information, photographs, and any other technical data relevant to the assessment of the status (as a submerged feature, low-tide elevation, rock, or island) of the following features:*

- Scarborough Shoal;*
- Second Thomas Shoal;*
- Mischief Reef;*
- Subi Reef;*
- McKennan Reef (including Hughes Reef);*
- Gaven Reef;*
- Johnson Reef;*
- Cuarteron Reef; and*
- Fiery Cross Reef.*

20. *The Tribunal notes the Philippines' argument that “none of the features in the Spratlys – not even the largest among them – is capable of generating entitlement to an EEZ or a continental shelf” (Memorial, para. 5.96). The Philippines is invited to provide additional*

*historical and anthropological information, as well as detailed geographic and hydrographic information, regarding the following features:*

- Itu Aba;*
- Thitu; and*
- West York.*

*21. The Tribunal notes the Philippines’ Submission 6, requesting a declaration that “Gaven Reef and McKennan Reef (including Hughes Reef) ... may be used to determine the baseline from which the breadth of the territorial sea of Namyt and Sin Cowe, respectively, is measured.” The Philippines is invited to provide historical and anthropological information, as well as detailed geographic and hydrographic information, regarding Namyt and Sin Cowe. The Philippines is also invited to elaborate on the implications of the proximity of Gaven Reef and McKennan Reef (including Hughes Reef) to Namyt and Sin Cowe.*

*22. The Tribunal notes the Philippines Submissions 4 and 5, requesting a declaration that –*

*4) Mischief Reef, Second Thomas Shoal and Subi Reef are low-tide elevations that do not generate entitlement to a territorial sea, exclusive economic zone or continental shelf, and are not features that are capable of appropriation by occupation or otherwise;*

*5) Mischief Reef and Second Thomas Shoal are part of the exclusive economic zone and continental shelf of the Philippines;*

*The Tribunal further notes the Philippines’ Submission 8 and 9, relating to rights claimed by the Philippines to the living and non-living resources of the exclusive economic zone and continental shelf and the alleged violations of these rights by China in the area of Scarborough Shoal and Reed Bank, and in areas designated as Philippines oil blocks “Area 3” and “Area 4” (Memorial, paras. 6.15-6.47).*

*The Philippines is invited to provide written argument on the status (as a submerged feature, low-tide elevation, rock, or island) of any maritime feature claimed by China – whether or not occupied by China – that could potentially give rise to an entitlement to an exclusive economic zone or to the continental shelf extending to any of Mischief Reef, Second Thomas Shoal, Subi Reef, Scarborough Shoal, Reed Bank, or the areas designated as Philippines oil blocks “Area 3” and “Area 4”. In so doing, the Philippines is invited to provide historical and anthropological information, as well as detailed geographic and hydrographic information, regarding at least the following features:*

- Spratly Island;*
- Northeast Cay (North Danger Reef);*
- Southwest Cay (North Danger Reef);*
- Nanshan Island;*
- Sand Cay;*
- Loaita Island;*
- Swallow Reef;*

- Amboyna Cay;
- Flat Island;
- Lankiam Cay;
- Great Discovery Reef;
- Tizard Bank reefs (e.g., Petley Reef; Eldad Reef);
- Union Bank reefs (e.g., Collins Reef; Whitsun Reef; Grierson Reef; Landsdowne Reef);

23. The Tribunal notes the Philippines' account of a meeting in which Chinese officials allegedly took the position that Scarborough Shoal "is part of Zhongsha 'islands' (Macclesfield Bank) over which China has an indisputable claim based on historical and jurisprudential grounds" (Memorandum from Rodolfo C. Severino, Undersecretary, Department of Foreign Affairs of the Republic of the Philippines, to the President of the Republic of the Philippines (27 May 1997) (Annex 25)), and the Philippines' position that "[n]otwithstanding China's reference to it as the Zhongsha 'Islands', no part of Macclesfield Bank is above water" (Memorial, para. 2.10). The Philippines is invited to provide detailed geographic and hydrographic information regarding Macclesfield Bank, as well as any other technical data relevant to the assessment of its status (as a submerged feature, low-tide elevation, rock, or island).

24. The Tribunal notes the Philippines argument that China has "interfere[d] with the lawful exercise of [the Philippines'] sovereign rights in the area of Reed Bank". The Philippines is invited to provide detailed geographic and hydrographic information regarding Reed Bank, as well as any other technical data relevant to the assessment of its status (as a submerged feature, low-tide elevation, rock, or island).

### **Response:**

1. In response to the Tribunal's Questions 19 through 24, the Philippines is pleased to provide all of the information requested pertaining to each of the maritime features identified in these Questions. Specifically, the response of the Philippines includes the geographic and hydrographic information sought by the Tribunal in all six Questions, as well as the historical and anthropological information sought in Questions 20 through 22. In addition, based on the geographic, hydrographic, historical and anthropological information that is presented in its responses to the Tribunal's Questions, and in the Memorial, the Philippines provides its views on the status of each feature under UNCLOS (*i.e.*, whether it is a submerged feature, low-tide elevation, rock or island).

2. For the Tribunal's convenience, all of the requested information is provided in the *Atlas* that is submitted herewith as Volume II to the Philippines' Supplemental Written Submission. The *Atlas* lists every feature mentioned in the Tribunal's Questions 19 through 24 in alphabetical order, and for each feature provides: a geographic and hydrographic description, including its coordinate location, distance to the Philippines (either to Luzon or

Palawan, depending on which is closer) and China (to Hainan Island or the Chinese mainland, whichever is closer); distance to the nearest high-tide feature; its position on a locator map; a satellite image; photographs; excerpts from various sailing directions and nautical charts; a summation of the pertinent geographic and hydrographic information by Dr. Robert W. Smith, an expert who served as Geographer for the United States Department of State from 1975 to 2006 and who was co-author of its Limits in the Seas studies<sup>274</sup>; historical and anthropological information on the feature (if requested by the Tribunal); and the views of the Philippines on its status under UNCLOS. The Philippines considers that the *Atlas* presents all of the information requested by the Tribunal in the most readily-accessible and user-friendly format.

3. In evaluating the status of the different features under UNCLOS, the Philippines has adhered faithfully to the language of the Convention, especially Articles 13 and 121, and has applied the relevant text to the particular geographic, hydrographic, historical and anthropological facts pertaining to each feature to form a view on whether it is a submerged feature, low-tide elevation, rock or island. In forming its views on the status of the features, the Philippines has also benefitted from the *Appraisal of the Geographical Characteristics and Status of Certain Insular Features in the South China Sea* prepared by Professors Victor Prescott and Clive Schofield, with the assistance of Dr. Robert van de Poll, attached as Annex 513 to this Submission. Professors Prescott and Schofield are two of the world's leading academic authorities on the islands of the South China Sea. Professor Prescott is Professor Emeritus of Geography at the University of Melbourne (Australia) and was elected a Fellow of the Academy of Social Sciences in Australia in 1979. Professor Schofield is Professor and Director of Research at the Australian Centre for Ocean Resource and Security at the University of Wollongong (Australia). He is a Fellow of the Royal Geographical Society and serves as an International Hydrographic Office-nominated Observer on the Advisory Board on the Law of the Sea. Their *curricula vitae* are attached to their report.

4. The views of the Philippines in regard to the status of each of the features named in Questions 19 through 24 are consistent with the conclusions reached by Professors Prescott and Schofield in regard to all but two features: Central London Reef and Erica Reef.

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<sup>274</sup> Dr. Smith's *curriculum vitae* is attached to this Submission as Annex 573, in Volume XI.

5. In regard to Central London Reef, the Philippines concludes, on the basis of nautical charts and the sailing directions, that the feature is a low-tide elevation.<sup>275</sup> Professors Schofield and Prescott note that “[s]ailing directions indicate the presence of a sandbank that covers at high tide” on the feature. They further note that “construction activities have occurred” making it “unclear to what extent a naturally formed feature above high tide existed prior to such artificial interventions taking place”.<sup>276</sup> They conclude that it would “be appropriate to, at most, treat this feature in the same manner as an UNCLOS Article 121(3) rock. ... Further investigation including fieldwork may be required to ascertain if the feature met with the terms of Article 121(1) prior to island-building activities taking place there”.<sup>277</sup>

6. Finally, the Philippines concludes, on the basis of nautical charts and sailing directions, that Erica Reef is a low-tide elevation.<sup>278</sup> Professors Schofield and Prescott’s “[a]nalysis of satellite imagery ... suggest[s] the presence of drying areas and, potentially, rocky areas ... that may be elevated above high water”. Accordingly, they believe “this feature is an Article 121(3) ‘rock’ at most”.<sup>279</sup>

7. In regard to the status of all other features named in Questions 19 through 24, the views of the Philippines and Professors Prescott and Schofield match.

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<sup>275</sup> See SWSP, Vol. II, p. 100.

<sup>276</sup> C. Schofield, et al., *An Appraisal of the Geographical Characteristics and Status of Certain Insular Features in the South China Sea* (Mar. 2015), p. 60. SWSP, Vol. IX, Annex 513.

<sup>277</sup> *Id.*, p. 61.

<sup>278</sup> See SWSP, Vol. II, p. 46.

<sup>279</sup> C. Schofield, et al., *An Appraisal of the Geographical Characteristics and Status of Certain Insular Features in the South China Sea* (Mar. 2015), p. 74. SWSP, Vol. IX, Annex 513.



## QUESTION 25

*The Tribunal notes the Philippines' comment that it "would not oppose a decision by the Tribunal to request Viet Nam's opinion as to whether the disputed features in the South China Sea are capable of generating entitlement to an EEZ or a continental shelf." (Memorial, para. 5.135 n. 588). The Philippines is invited to elaborate further on the participation or intervention by Viet Nam or other interested States in these proceedings.*

### **Response:**

25.1. The Philippines submitted its observations concerning the participation or intervention by Viet Nam in its 26 January 2015 letter responding the Tribunal's 11 December 2014 letter soliciting the Parties' views on the Statement Viet Nam submitted to the Tribunal. The Philippines respectfully incorporates the contents of its 26 January letter into this response by reference. For the Tribunal's convenience, a copy of the Philippines' letter is attached again hereto as Annex 469.

25.2. In the view of the Philippines, the most important point to note on the subject of Viet Nam's potential participation or intervention is that Viet Nam is not an indispensable third party. Viet Nam itself underscored this fact in its December 2014 Statement in which it expressly stated that it "has no doubt that the Tribunal has jurisdiction in these proceedings",<sup>280</sup> and encouraged the Tribunal to render a decision

providing a legal basis for the parties in this case to settle their disputes, contributing to clarifying the legal positions of the parties in the present case and interested third parties, and contributing to preserving and maintaining peace and stability, maritime security and safety and freedom of navigation and overflight in the South China Sea.<sup>281</sup>

25.3. The Philippines echoes these views.

25.4. In addition to Viet Nam, the Tribunal's question also asks about the participation or intervention by "other interested States". For the avoidance of doubt, the Philippines wishes to make clear that the views expressed in its 26 January letter concerning the participation or intervention by Viet Nam apply equally to any other interested State.

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<sup>280</sup> Socialist Republic of Viet Nam, *Statement of the Ministry of Foreign Affairs of the Socialist Republic of Viet Nam Transmitted to the Arbitral Tribunal in the Proceedings Between the Republic of the Philippines and the People's Republic of China* (14 Dec. 2014), para. 1. SWSP, Vol. VIII, Annex 468.

<sup>281</sup> *Id.*, para. 1.





## QUESTION 26

*The Tribunal notes that, although China has not submitted a Counter-Memorial, some issues relating to the Tribunal's jurisdiction and the merits of the dispute have been publicly addressed by Chinese government officials and by others. The Philippines is invited to comment as it considers appropriate on any statements that have been made on any aspects of the dispute.*

### **Response:**

26.1. On 7 December 2014, shortly before the Tribunal communicated its Request for Further Written Argument by the Philippines, China's Ministry of Foreign Affairs issued a formal "Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Issued by the Republic of the Philippines" (the "Position Paper"). Paragraph 2 of the Position Paper states: "This Position Paper is intended to demonstrate that the arbitral tribunal established at the request of the Philippines ('Arbitral Tribunal') does not have jurisdiction over this case". In a letter to the Tribunal dated 6 February 2015, China underscored that its Position Paper "comprehensively explains why the Arbitral Tribunal ... manifestly has no jurisdiction over the case".<sup>282</sup>

26.2. The Philippines considers China's Position Paper to be significant and helpful in at least two respects. *First*, insofar as China has now made its views on the Tribunal's jurisdiction explicit, the Tribunal is no longer in a position of having to surmise what China's position may be. This is especially true given that China itself has described its Position Paper as "comprehensively" explaining why the Tribunal has no jurisdiction. That being the case, the Tribunal need not look beyond the views stated in China's Paper for the purposes of determining whether it has jurisdiction.

26.3. In this respect, the Philippines takes note of the recent Award on Jurisdiction rendered by the Annex VII tribunal in the *Arctic Sunrise* case. Like China here, the Russian Federation elected not to participate in the proceedings. Nevertheless, it presented its views on jurisdiction to the tribunal in a 27 February 2014 *Note Verbale* to the Registry, appending an earlier *Note Verbale* to the Netherlands.<sup>283</sup> In the latter note, the Russian Federation stated

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<sup>282</sup> Letter from H.E. Ambassador Chen Xu, Embassy of the People's Republic of China in The Hague, to H.E. Judge Thomas A. Mensah (6 Feb. 2015), p. 1. SWSP, Vol. VIII, Annex 470.

<sup>283</sup> *Arctic Sunrise Arbitration (Kingdom of the Netherlands v. Russian Federation)*, Award on Jurisdiction, UNCLOS Annex VII Tribunal (26 Nov. 2014), para. 9. SWSP, Vol. XII, Annex LA-180.

its position that there was no jurisdiction by virtue of its statement upon ratification of UNCLOS that it does not accept compulsory procedures entailing binding decisions under Section 2 of Part XV with respect to disputes concerning “law enforcement activities in regard to the exercise of sovereign rights and jurisdiction”.<sup>284</sup> In its Award on Jurisdiction, the Annex VII arbitral tribunal (which had been constituted without Russia’s participation) referred to Russia’s *Note Verbale* as “Russia’s Plea Concerning Jurisdiction”, which it addressed — and rejected — under the heading “Submissions of Russia” in Part III(A) of the Award.<sup>285</sup> The Philippines considers that it would be appropriate to treat China’s 7 December 2014 Position Paper in the same manner here.

26.4. *Second*, China’s Position Paper is as notable for what it does *not* argue as for what it does. Among the points that China does not deny are the following:

- That there is a dispute between the Parties over China’s claim to “historic rights” beyond the limits of its potential entitlements under UNCLOS in all areas located within the nine-dash line;
- That China is not claiming “historic title” over any maritime areas in the South China Sea, as distinguished from “historic rights”<sup>286</sup>;
- That the optional “historic bays or titles” exception does not apply to any aspect of the Philippines’ claims;
- That there is a dispute between the Parties over the extent of the potential entitlements that the insular features in the South China Sea generate;
- That the Tribunal has jurisdiction over the Philippines’ claims concerning China’s violations of its obligations to protect and preserve the marine environment;
- That the law enforcement activities exception does not apply to any aspect of the Philippines’ claims; and

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<sup>284</sup> *Id.*

<sup>285</sup> *Id.*, para.48.

<sup>286</sup> Indeed, China makes clear that it is not claiming historical title — *i.e.*, sovereignty — over the maritime areas in the South China Sea when it states: “It should be particularly emphasized that China always respected the freedom of navigation and overflight enjoyed by all States in the South China Sea in accordance with international law”. China’s Position Paper, para. 28. SWSP, Vol. VIII, Annex 467.

- That the military activities exception likewise does not apply to any aspect of the Philippines' claims.

26.5. Rather than dispute any of the points listed above, China's Position Paper limits itself to making three arguments: (1) the "essence of the subject-matter of the arbitration is territorial sovereignty";<sup>287</sup> (2) there is "an agreement between China and the Philippines to settle their disputes in the South China Sea through negotiations";<sup>288</sup> and (3) the subject-matter of the arbitration is "an integral part of maritime delimitation" excluded by virtue of China's declaration under Article 298.<sup>289</sup> The Philippines will address each of these points in turn.

## **I. The Subject-Matter of the Arbitration Is Not Territorial Sovereignty**

26.6. The Philippine Memorial made clear that this case does not require the Tribunal to decide among competing claims to territorial sovereignty. It stated:

For the avoidance of all doubt, the Philippines does not seek any determination by the Tribunal as to any question of sovereignty over islands, rocks or any other maritime features. *The Tribunal is not invited, directly or indirectly, to adjudicate on the competing sovereignty claims to any of the features at issue (or any others).*<sup>290</sup>

26.7. Nevertheless, China contends that that the "subject-matter of the Philippines' claims is in essence one of territorial sovereignty over several maritime features in the South China Sea, which is beyond the scope of the Convention and does not concern the interpretation or application of the Convention".<sup>291</sup> China is wrong.

26.8. As a threshold matter, the Philippines observes that, China's objection appears to misconceive the nature of international adjudication. The Philippines does not deny that its disputes with China in the South China Sea have more than one layer. It also does not dispute that one of those layers relates to competing claims of sovereignty over a number of features

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<sup>287</sup> *Id.*, Section II.

<sup>288</sup> *Id.*, Section III.

<sup>289</sup> *Id.*, Section IV.

<sup>290</sup> Memorial, para. 1.16 (emphasis added).

<sup>291</sup> China's Position Paper, para. 9. SWSP, Vol. VIII, Annex 467.

in the area. That fact is, however, without consequence to the Tribunal's jurisdiction to adjudicate the law of the sea matters the Philippines has submitted to it.

26.9. In the case concerning the *United States Diplomatic and Consular Staff in Tehran*, Iran (which also chose not to appear formally in the case) submitted a letter to the ICJ setting forth its views on why the Court did not have jurisdiction. Among other things, it argued that “the case submitted to the Court by the United States is ‘confined to what is called the question of ‘the hostages of the American Embassy in Tehran’”.<sup>292</sup> Iran went on to contend that

this question represents only a marginal and secondary aspect of an overall problem, one such that it cannot be studied separately ....

The problem involved in the conflict between Iran and the United States is thus not one of the interpretation and the application of the treaties on which the American Application is based, but results from an overall situation containing much more fundamental and more complex elements. Consequently, the Court cannot examine the American Application divorced from its proper context ....<sup>293</sup>

26.10. The Court rejected Iran's argument without hesitation. Referring to its own prior Order on Provisional Measures in the case, the Court observed that it had “made it clear that the seizure of the United States Embassy and Consulates and the detention of internationally protected persons as hostages cannot be considered as something ‘marginal’ or ‘secondary’, having regard to the importance of the legal principles involved”.<sup>294</sup> Referring again to its Provisional Measures Order, the ICJ stated:

The Court, at the same time, pointed out that no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important.<sup>295</sup>

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<sup>292</sup> *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, Merits, Judgment, I.C.J. Reports 1980, para. 35. SWSP, Vol. XII, Annex LA-175.

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*, para. 36.

<sup>295</sup> *Id.*

26.11. This observation has been echoed in a number of cases since<sup>296</sup> and applies fully to the dispute the Philippines has submitted to this Tribunal. As described more fully below, the Philippines has presented only those of the Parties' disputes that relate to law of the sea matters over which the Tribunal has jurisdiction. The questions concerning the interpretation and application of UNCLOS presented in this case cannot be considered either marginal or secondary. The fact that the Parties also have territorial sovereignty disputes, "however important", is not pertinent to the determination of the matters over which the Tribunal does have jurisdiction.

26.12. China's argument about the essence of the Philippines' case being territorial sovereignty is presented by reference to "three categories" of the Philippines' claims.<sup>297</sup> China characterizes the first category of claims as relating to "China's assertion of the 'historic rights' to the waters, sea-bed and subsoil within the 'nine-dash line' (*i.e.*, China's dotted line in the South China Sea) beyond the limits of its entitlements under the Convention ...".<sup>298</sup> According to China, "whatever logic is to be followed, only after the extent of China's territorial sovereignty in the South China Sea is determined can a decision be made on whether China's maritime claims in the South China Sea have exceeded the extent allowed under the Convention".<sup>299</sup>

26.13. China has failed — whether intentionally or otherwise — to correctly appreciate the true nature of the Philippines' claims. The "essence" of the Philippines' position is that *even assuming that China is sovereign over all of the insular features it claims*, its claim to "historic rights" within the areas encompassed by the nine-dash line exceeds the limits of its potential entitlement under the Convention. They are therefore inconsistent with, and violate, UNCLOS. In other words, China's claim to historic rights within the areas encompassed by the nine-dash line exceeds its potential entitlement under UNCLOS *regardless* of what view one takes on questions of territorial sovereignty. The Tribunal therefore has no need to address or resolve competing claims to territorial sovereignty to address this issue.

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<sup>296</sup> See, e.g., *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 431, para. 105. MP, Vol. XI, Annex LA-13.

<sup>297</sup> China's Position Paper, para. 8. SWSP, Vol. VIII, Annex 467.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*, para. 10.

26.14. China characterizes the second category of the Philippines' claims as relating to "China's claim to entitlements of 200 M and more, based on certain rocks, low-tide elevations and submerged features in the South China Sea ...".<sup>300</sup> As China sees it, "the nature and entitlements of certain maritime features in the South China Sea cannot be considered in isolation from the issue of sovereignty".<sup>301</sup> China continues: "without determining the sovereignty over a maritime feature, it is impossible to decide whether maritime claims based on that feature are consistent with the Convention".<sup>302</sup>

26.15. Here too, China is mistaken. The status of a given maritime feature as a low-tide elevation, rock or island capable of generating entitlement to an EEZ and continental shelf is a matter of interpreting and applying Articles 13 and 121 of UNCLOS, a task that is plainly within the jurisdiction of the Tribunal by virtue of Article 288(1). There is nothing in the text of either provision that suggests that the determination of a feature's status is in any way dependent on which State is sovereign over it. To the contrary, the plain terms of both provisions make clear that the matter is one for objective determination by reference to the physical characteristics of the features in question. The maritime entitlement that feature may generate is therefore also a matter for objective determination. Simply put, the same feature could not be a "rock" if it pertains to one State but an island capable of generating entitlement to an EEZ and continental shelf if it pertains to another. The issue of sovereignty is wholly irrelevant.

26.16. In connection with making its argument that the status of any given feature "cannot be considered in isolation from the issue of sovereignty", China also contends that "in order to determine China's maritime entitlements based on the Nansha [Spratly] Islands under the Convention, all maritime features comprising the Nansha Islands must be taken into account".<sup>303</sup> The Philippines offers two responses to this assertion.

26.17. *First*, it is of no relevance in the Northern Sector. In that area, there is only a single insular feature at issue in these proceedings that is claimed by China: Scarborough Shoal (the maritime entitlements of which the Philippines has directly placed at issue in this arbitration). Scarborough Shoal is, moreover, substantially more than 200 M from the nearest other high-

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<sup>300</sup> *Id.*, para. 8.

<sup>301</sup> *Id.*, para. 15.

<sup>302</sup> *Id.*, para. 16.

<sup>303</sup> *Id.*, para. 21.

tide feature over which China claims sovereignty (Flat Island, located at a distance of 280 M). There is therefore no impediment to the Tribunal's determination of China's, or the Philippines', maximum possible entitlements in the Northern Sector.

26.18. *Second*, with respect to China's contentions about the Spratly Islands in the Southern Sector, the Philippines showed in its Memorial that none of the insular features in the Spratly area are capable of generating a potential entitlement to an EEZ or continental shelf.<sup>304</sup> This includes even the "largest" among them, like Itu Aba, Thitu and West York. At the Tribunal's request, the Philippines has elaborated on these views in connection with its responses to Question 20. Also at the Tribunal's request, it has shown in response to Questions 21 and 22 that none of the other features in the Southern Sector can be characterized as anything more than Article 121(3) rocks. There is therefore no obstacle to the Tribunal declaring that China has no entitlement to an EEZ or continental shelf anywhere in the Southern Sector of the South China Sea.

26.19. China also argues that the Tribunal is precluded from addressing the Philippines' so-called second category of claims relating to "China's claim to entitlements of 200 M and more, based on certain rocks, low-tide elevations and submerged features" because, it says, "whether or not low-tide elevations can be appropriated is plainly a question of territorial sovereignty".<sup>305</sup> The Philippines has already addressed this issue in its response to Question 6 above, in which it demonstrated that even if this question can be said to implicate questions of territorial sovereignty, they are not the sort of territorial sovereignty questions which could be argued to be beyond the Tribunal's jurisdiction. Rather than repeat those arguments again here, the Philippines respectfully incorporates its response to Question 6 by reference.<sup>306</sup>

26.20. China also contends that determining "whether or not low-tide elevations can be appropriated is not a question concerning the interpretation or application of the Convention".<sup>307</sup> Even accepting this as true (*quod non*), it is irrelevant to the Tribunal's jurisdiction. The Tribunal undoubtedly has jurisdiction under Article 288(1) to determine whether the various maritime features are low-tide elevations under Article 13 or islands (including rocks) under Article 121. To be sure, a consequence of the Tribunal's

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<sup>304</sup> See Memorial, paras. 5.57-5.114.

<sup>305</sup> China's Position Paper, para. 23. SWSP, Vol. VIII, Annex 467.

<sup>306</sup> See *supra* paras. 6.1-6.10.

<sup>307</sup> China's Position Paper, para. 25. SWSP, Vol. VIII, Annex 467.

determination may be that certain features — those it deems low-tide elevations — will not be capable of appropriation; but that product of its decision cannot deprive the Tribunal of its jurisdiction to decide. Moreover, the Tribunal is specifically authorized by Article 293(1) of the Convention to apply not only the rules specifically stated in UNCLOS but also “other rules of international law not incompatible with this Convention”.<sup>308</sup> The rule against the appropriation of low-tide elevations plainly constitutes such a rule.

26.21. Lastly, China characterizes the third category of the Philippines’ claims as relating to “the legality of China’s actions in the waters of the Nansha Islands and Huangyan Dao [Scarborough Shoal]”.<sup>309</sup> According to China, “[u]ntil and unless the sovereignty over the relevant maritime features is ascertained and maritime delimitation completed, this category of claims of the Philippines cannot be decided upon”.<sup>310</sup>

26.22. Here once more, China is mistaken. It is incorrect in the first instance because quite apart from the sovereignty issues, China’s purported exercise of sovereign rights and jurisdiction beyond the limits of its maximum permissible entitlement under the Convention (even assuming it has sovereignty over everything it claims) is plainly inconsistent with the Convention. Where China has no potential entitlement under the Convention, it has no basis on which to assert sovereign rights and jurisdiction. The Tribunal’s jurisdiction to make that determination cannot seriously be questioned.

26.23. China’s assertion is also incorrect even as to those areas where China’s claim to potential entitlements may not exceed those permitted by the Convention. In the territorial sea around Scarborough Shoal, for example, the Philippines challenges China’s actions in three respects: (1) its violations of its obligation to protect and preserve the marine environment; (2) its dangerous navigational practices that have run serious risk of collisions at sea; and (3) its prevention of Philippine fishermen from pursuing their traditional livelihood in the waters around Scarborough Shoal. The Philippines explained the basis of the Tribunal’s jurisdiction over these claims in its Memorial,<sup>311</sup> and China makes no effort in its Position Paper to refute any of the Philippines’ arguments as set forth therein. The Philippines has also elaborated

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<sup>308</sup> The full text of Article 293(1) provides: “A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention”.

<sup>309</sup> China’s Position Paper, para. 26. SWSP, Vol. VIII, Annex 467.

<sup>310</sup> *Id.*, para. 27.

<sup>311</sup> *See* Memorial, paras. 7.105-7.111.



further on the Tribunal's jurisdiction over these issues in response to other questions, to which it respectfully refers the Tribunal.<sup>312</sup>

26.24. For all of these reasons, the dispute the Philippines has submitted to the Tribunal neither concerns competing claims to territorial sovereignty nor requires the Tribunal to express any views on those issues. To the contrary, this dispute concerns China's assertion and exercise of sovereign rights and jurisdiction where UNCLOS gives it none, and, indeed, where the Convention gives entitlements only to other States. And even in those limited areas that are the subject of the Philippines' claims and where China may have entitlement, the Tribunal has jurisdiction to address China's violations of the Convention.

## **II. Neither the 2002 DOC Nor Any Other of the Joint Statements China Cites Operate to Impair the Tribunal's Jurisdiction, or Affect the Admissibility of the Philippines' Claims, under Article 281**

26.25. In its Memorial, the Philippines explained that the 2002 DOC, and in particular paragraph 4 thereof,<sup>313</sup> poses no obstacle to the Tribunal's jurisdiction under Article 281 for four reasons. *First*, the DOC is political document only. It does not create legal rights and obligations, and hence does not constitute an "agreement" under Article 281.<sup>314</sup> *Second*, even if the DOC could be considered an "agreement" falling within the ambit of Article 281, no settlement has been reached through the means contemplated in it (consultations and negotiations).<sup>315</sup> *Third*, the DOC neither expressly nor impliedly excludes recourse to the dispute settlement procedures established in Part XV of the Convention.<sup>316</sup> *Fourth*, and in any event, China cannot assert rights under the DOC due to its own actions in flagrant disregard of the requirements of the DOC.<sup>317</sup>

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<sup>312</sup> See *supra* Responses to Questions 3, 4 and 9.

<sup>313</sup> The provision reads: "The Parties concerned undertake to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea". Association of Southeast Asian Nations, *Declaration on the Conduct of Parties in South China Sea* (4 Nov. 2002), para. 4. MP, Vol. V, Annex 144.

<sup>314</sup> Memorial, paras. 7.50-7.58.

<sup>315</sup> *Id.*, paras. 7.59-7.63.

<sup>316</sup> *Id.*, paras. 7.64-7.73.

<sup>317</sup> *Id.*, paras. 7.74-7.76.

26.26. In its 7 December 2014 Position Paper, China takes issue with the above, and maintains its objection to the Tribunal's jurisdiction based on the DOC and Article 281 of the Convention.<sup>318</sup> According to China, the DOC and certain other joint statements are "mutually reinforcing and form an agreement between China and the Philippines ... to settle their relevant disputes through negotiations".<sup>319</sup> The Philippines addresses the import of the other instruments invoked by China in Section II(E) below. Because the heart of China's argument concerns the DOC itself, the Philippines will first focus on that document.

**A. The 2002 DOC Is a Non-Binding Political Instrument**

26.27. China bases its argument that the DOC constitutes a binding agreement on the fact that paragraph 4 thereof "employs the term 'undertake', which is frequently used in international agreements to commit the parties to their obligations".<sup>320</sup> China cites as support the Judgment of the ICJ in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* case, where the Court observed that the word "undertake" is "regularly used in treaties setting out the obligations of the Contracting Parties".<sup>321</sup>

26.28. The Court's observation is correct but inapposite to the 2002 DOC. The status of the Genocide Convention as a source of legal obligations was not questioned by the parties in that case; nor indeed could it be seriously be disputed in any case.<sup>322</sup> The mere fact that the DOC employs a term that is also sometimes used in treaties that state legal obligations does not, by itself, warrant the conclusion that paragraph 4 of the DOC too is legally binding. The

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<sup>318</sup> China's Position Paper, paras. 41-42, 44. SWSP, Vol. VIII, Annex 467.

<sup>319</sup> *Id.*, para. 39. This argument has been a consistent theme of China's objections to the Tribunal's jurisdiction over the Philippines' claims. See Memorial, paras. 7.45-7.47 and statements cited therein.

<sup>320</sup> China's Position Paper, para. 38. SWSP, Vol. VIII, Annex 467.

<sup>321</sup> *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, para. 162. SWSP, Vol. XII, Annex LA-176.

<sup>322</sup> The term "undertake" appears in Article 1 of the Genocide Convention. The Court analyzed this and the other terms of that provision in order to identify whether Article 1 "creates obligations distinct from those which appear in the subsequent Articles". *Id.*, para. 162.

crucial question is, as China itself admits,<sup>323</sup> whether the DOC was intended to create legal rights and obligations.<sup>324</sup>

26.29. The intention of the parties may be inferred from (1) the terms of the instrument itself; (2) the circumstances of its conclusion; and (3) the subsequent acts of the parties. *Ex post* statements of intent made in the context of litigation are irrelevant.<sup>325</sup>

26.30. As regards the language of the DOC, including paragraph 4, it is notable that it does not use the term “agree”. This omission reflects an intent not to create legally binding obligations. In two cases where, unlike the Genocide case, the legal status of an international instrument was disputed, the ICJ seized on the specific use of that word to infer an intent to be legally bound.<sup>326</sup>

26.31. In any event, even if the terms of the DOC do not entirely foreclose formalistic arguments like the one China now makes, the circumstances of the document’s conclusion and the subsequent conduct of the parties, taken individually and together, do. In this respect, the Philippines notes that China does not deny that, as the Philippines discussed in its Memorial,<sup>327</sup> the DOC was intended to be a political stop-gap measure to reduce tensions in the area in light of the inability of the ASEAN countries and China to achieve consensus on a

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<sup>323</sup> China’s Position Paper, para. 39. SWSP, Vol. VIII, Annex 467.

<sup>324</sup> This requirement is widely thought to be subsumed in the definitional element of a “treaty” in Article 2(1)(a) of the Vienna Convention on the Law of Treaties that it must be “governed by international law”. Vienna Convention on the Law of Treaties (23 May 1969), 1155 U.N.T.S. 332, entered into force 27 Jan. 1980, Art. 31. MP, Vol. XI, Annex LA-77. See also International Law Commission, Draft Articles on the Law of Treaties with Commentaries, in *Report of the International Law Commission on the work of its eighteenth session* (4 May-19 July 1966), in *Yearbook of the International Law Commission*, Vol. II (1966), p. 189. SWSP, Vol. XII, Annex LA-184. (“The Commission concluded that, in so far as it may be relevant, the element of intention is embraced in the phrase ‘governed by international law’, and it decided not to make any mention of the element of intention in the definition”).

<sup>325</sup> *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1994, p. 112, para. 27. MP, Vol. XI, Annex LA-21. See also Memorial, para. 7.51.

<sup>326</sup> *Id.*, p. 112, para. 25. MP, Vol. XI, Annex LA-21; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Merits, Judgment, I.C.J. Reports 2002, pp. 410-412, para. 214, p. 429, para. 263. MP, Vol. XI, Annex LA-27.

<sup>327</sup> See Memorial, para. 7.50-7.55.

legally-binding code of conduct,<sup>328</sup> which is specifically anticipated in paragraph 10 of the DOC.<sup>329</sup>

26.32. In its Memorial, the Philippines referred to a 2010 article authored by the former Secretary-General of ASEAN, Rodolfo Severino, stating that a range of disagreements over the geographic scope of a code of conduct, the parties' *modus operandi* vis-à-vis occupied and unoccupied features, the conduct of military activities in the area, and the treatment of fishermen fishing in disputed waters reduced the originally envisioned legally binding code of conduct to a mere "political declaration".<sup>330</sup>

26.33. Neutral commentators agree. In an article published in March-April 2003 shortly after the DOC's conclusion, the Taiwanese scholar, Professor Song Yann-huei, gives a detailed account of the origin and development of the DOC. As regards the nature and status of the instrument, Professor Song is explicit:

[The DOC] is not a legal instrument and therefore does not have legal binding force.<sup>331</sup>

Professor Song explains the reasons for adopting a non-binding instrument. Among these is the fact that "the governments of member states of ASEAN and the PRC *simply [did] not want to be bound and pinned down as it were to a definite legal commitment*".<sup>332</sup>

26.34. China itself has consistently expressed the same view, at least until the initiation of this arbitration. The record is replete with examples of China stating that the DOC was not intended to create legally binding obligations. In a 30 August 2000 statement published, among other places, in the *China Daily*, for example, the spokesperson for China's Ministry of Foreign Affairs stated unequivocally: "The Code of Conduct will be a *political document* to promote good neighborliness and regional stability *instead of a legal document to solve*

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<sup>328</sup> China argues that "its positions on negotiations was made clear and well known to the Philippines and other relevant parties during the drafting and adoption of [...] the DOC". China's Position Paper, para. 40. SWSP, Vol. VIII, Annex 467. China, however, points to no evidence to that effect.

<sup>329</sup> The provision reads: "The Parties concerned reaffirm that the adoption of a code of conduct in the South China Sea would further promote peace and stability in the region and agree to work, on the basis of consensus, towards the eventual attainment of this objective". Association of Southeast Asian Nations, *Declaration on the Conduct of Parties in South China Sea* (4 Nov. 2002), para. 10. MP, Vol. V, Annex 144.

<sup>330</sup> Rodolfo Severino, "ASEAN and the South China Sea", *Security Challenges*, Vol. 6, No. 2 (2010), p. 45. MP, Vol. IX, Annex 293.

<sup>331</sup> Yann-huei Song, "The South China Sea Declaration on Conduct of Parties and Its Implications: Taiwan's Perspective", *Maritime Studies* (Mar.-Apr. 2003), pp. 13-17. SWSP, Vol. XII, Annex LA-207.

<sup>332</sup> *Id.* (emphasis added).

*specific disputes*”.<sup>333</sup> In keeping with these views, during the 16th ASEAN-China Summit in October 2010, H.E. Li Keqiang, then Premier of China’s State Council, characterized the DOC as “an important *political* agreement reached among China and ASEAN countries”.<sup>334</sup>

26.35. China was still articulating these same views as late as 22 July 2012, six months before the Philippines initiated this arbitration. In an interview with the *New Straits Times*, China’s Ambassador to ASEAN Tong Xiaoling was asked for China’s views on the code of conduct, then and still under negotiation. His response included the following statement:

Disputes over the South China Sea should be settled peacefully through friendly consultations and negotiations by sovereign states directly involved. This is a major consensus reached by China and ASEAN countries in the DOC. *The DOC and COC are not dispute settlement mechanisms*. Rather, they are confidence building measures intended for greater cooperation and mutual trust as well as peace and stability in the South China Sea.<sup>335</sup>

26.36. China’s views on the political, not legal, character of the DOC reflect the consensus of the signatory States. A 21 December 1999 internal memorandum from the Philippine Assistant Secretary of Foreign Affairs for Asia and Pacific Affairs to the Philippines Secretary of Foreign Affairs contains the following comments on a recently received Chinese draft of the DOC:

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*.<sup>336</sup>

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<sup>333</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.

<sup>334</sup> Ministry of Foreign Affairs of the People’s Republic of China, *Remarks by H. E. Li Keqiang, Premier of the State Council of the People’s Republic of China, at the 16th ASEAN-China Summit* (16 Oct. 2013), p. 2. MP, Vol. V, Annex 128 (emphasis added).

<sup>335</sup> “‘We should find our own solutions’”, *New Straits Times* (26 May 2012), p. 2 (emphasis added). SWSP, Vol. XI, Annex 563.

<sup>336</sup> Memo of China’s Position Regarding the Latest Draft Code of Conduct by the ASEAN (December 18, 1999), para. 2 (emphasis added). Enclosed in *Memorandum* from the Assistant Secretary of Foreign Affairs for Asia and Pacific Affairs of the Republic of the Philippines to the Secretary of Foreign Affairs of the Republic of the Philippines (21 Dec. 1999). SWSP, Vol. VIII, Annex 471.

26.37. The same consensus view is reflected in a Meeting Report on the Third Meeting of the Working Group of ASEAN-China Senior Officials on the Code of Conduct on 11 October 2000 in Ha Noi, Viet Nam. Among other things, the Report states:

The Meeting reaffirmed that *the Code of Conduct is a political and not legal document and is not aimed at resolving disputes in the area*. It would serve as a political guideline for behavior and conduct of activities among parties concerned which will make an important contribution to confidence-building and good neighborliness between ASEAN and China.<sup>337</sup>

26.38. Beyond the evident intent of the parties *not* to create a legally binding instrument, their subsequent conduct confirms that the DOC reflects only political commitments.<sup>338</sup> As described in the Philippines' Memorial, in paragraph 10 of the DOC the signatory States undertook to continue working toward the "the adoption of a code of conduct in the South China Sea [that] would further promote peace and stability in the region and agree to work, on the basis of consensus, towards the eventual attainment of this objective".<sup>339</sup> They have been working towards that objective ever since, so far without success.<sup>340</sup> If the DOC itself was intended to bind the parties to legal commitments, why would ASEAN member States and China invest more than 10 years of effort negotiating the subsequent code of conduct contemplated by the DOC?

26.39. It is therefore clear that the DOC does not constitute a legally binding agreement to seek settlement of the dispute "through friendly consultations and negotiations", let alone an agreement to exclude the compulsory procedures in section 2 of Part XV of UNCLOS, as shown in the following section.

***B. The DOC Does Not Exclude Recourse to Other Means of Dispute Settlement***

26.40. China argues that despite the absence in the DOC of an express exclusion of other dispute settlement procedures, the DOC "obviously ha[s] produced the effect of excluding

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<sup>337</sup> Association of Southeast Asian Nations, *Report of the Third Meeting of the Working Group of ASEAN-China Senior Official Consultations on the Code of Conduct in the South China Sea* (11 Oct. 2000), para. 3 (emphasis added). SWSP, Vol. VIII, Annex 498. .

<sup>338</sup> See also Memorial, Chapter 3, Section IV.

<sup>339</sup> *Id.*, para. 7.57 (citing ASEAN Declaration of Conduct, para. 10. MP, Vol. V, Annex 144.)

<sup>340</sup> *Id.*

any means of third-party settlement”.<sup>341</sup> The Philippines does not consider this obvious at all. To the contrary, as discussed in the Philippines’ response to Question 1 above, the fact that paragraph 4 of the DOC specifically refers to UNCLOS suggests that it is intended to be read consistently with the Convention, including Section 2 of Part XV.<sup>342</sup> Notably, the only support China cites is the arbitral tribunal’s decision in *Southern Bluefin Tuna* finding that, when it comes to determining whether a dispute settlement procedure was intended to exclude others, the “absence of an express exclusion of any procedure ... is not decisive”.<sup>343</sup>

26.41. The Philippines showed in its Memorial that the reasoning of the *Southern Bluefin Tuna* tribunal is inconsistent with that of ITLOS in its provisional measures order in the same case.<sup>344</sup> It is therefore not surprising that Judge Keith filed a very forceful dissenting opinion to the Award, pointing out that the ordinary meaning of the term “exclude” in Article 281(1) requires specific “opting out” from the dispute settlement mechanisms in Section 2 of Part XV, not merely positive agreement to another procedure by “opting in”.<sup>345</sup> Judge Keith supported this conclusion by reference to the well-established “presumption of ... parallel and overlapping existence of procedures for the peaceful settlement of disputes” in international law,<sup>346</sup> the context, and the *travaux préparatoires* of UNCLOS.<sup>347</sup> It is Judge Keith’s dissent, and not the arbitral tribunal’s decision, that has been favoured in subsequent jurisprudence and academic commentary.

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<sup>341</sup> China’s Position Paper, para. 40. SWSP, Vol. VIII, Annex 467.

<sup>342</sup> See *supra* para. 1.7.

<sup>343</sup> *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, Award on Jurisdiction and Admissibility, UNCLOS Annex VII Tribunal (4 Aug. 2000), para. 57. MP, Vol. XI, Annex LA-50.

<sup>344</sup> *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, para. 55. MP, Vol. XI, Annex LA-37 (“Considering that, in the view of the Tribunal, the fact that the Convention of 1993 applies between the parties does not preclude recourse to the procedures in Part XV, section 2, of the Convention on the Law of the Sea”).

<sup>345</sup> *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, Award on Jurisdiction and Admissibility, Separate Opinion of Justice Sir Kenneth Keith, UNCLOS Annex VII Tribunal (4 Aug. 2000), para. 17. MP, Vol. XI, Annex LA-51.

<sup>346</sup> *Id.*, para. 18. Such presumption renders imperative that when States intend to exclude a certain class of disputes from adjudication or settlement in any other fora, they state so expressly. See Memorial, para. 7.70 (referring to Article 344 of the Treaty on the Functioning of the European Union, see Consolidated Version of the Treaty on the Functioning of the European Union, *Official Journal of the European Union*, Vol. 55, p. 47 (2012), Art. 344. MP, Vol. XI, Annex LA-83.

<sup>347</sup> *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, Award on Jurisdiction and Admissibility, Separate Opinion of Justice Sir Kenneth Keith, UNCLOS Annex VII Tribunal (4 Aug. 2000), paras. 19-29. MP, Vol. XI, Annex LA-51.

26.42. Lastly, in addition to all the above, the Philippines observes that the *Southern Bluefin Tuna* Award is at odds with the context in which Article 281 appears, including provisions found in close proximity to it. Article 282 of the Convention provides:

If the States Parties, which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that *entails a binding decision*, that procedure shall apply in lieu of the procedures provided for in this Part, *unless the Parties to the dispute otherwise agree*.<sup>348</sup>

26.43. Logically, this can only mean that where the agreed procedure does *not* entail a binding decision (as in the case of the DOC), it shall *not* apply in lieu of the proceedings of section 2 of Part XV, “unless the Parties to the dispute otherwise agree”. There can be no agreement “otherwise”, unless such agreement is specifically stated.

26.44. Article 281 must be read consistently with Article 282. It must therefore mean that the dispute settlement procedures of section 2 of Part XV can be displaced only by an express agreement to that effect.

26.45. Paragraph 4 of the DOC plainly does not reflect such an express agreement. Nowhere does it state that UNCLOS-related disputes must be resolved *only* through friendly consultations or negotiations. It therefore does not establish an “agreement between the parties [to] exclude any further procedure” within the meaning of Article 281. On this basis alone the Tribunal can reject China’s objection to jurisdiction based on the DOC.

### ***C. No Settlement Has Been Reached Pursuant to the DOC***

26.46. Even if the DOC encompassed legally binding obligations (*quod non*), and even if it were intended to exclude the compulsory procedures established in section 2 of Part XV of UNCLOS (also *quod non*), Article 281 would still impose no obstacle to the Tribunal’s jurisdiction because the Parties have not settled their dispute through negotiation.

26.47. In its Memorial, the Philippines explained that Article 281 is premised on the assumption that the “other” means of dispute settlement envisaged would actually prove

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<sup>348</sup> UNCLOS, Art. 282 (emphasis added)



successful,<sup>349</sup> and that, consistent with international jurisprudence, a party that came to believe that such means were no longer likely to lead to a settlement would have the right to submit the case to the procedures specified in the Convention.<sup>350</sup>

26.48. This position is affirmed in the jurisprudence. Even in *Southern Bluefin Tuna*, the case on which China's objection rests, the arbitral tribunal relied on the parties' "prolonged, intense and serious" negotiations to conclude that the negotiation provision in question (Article 16 of Convention for the Conservation of the Southern Bluefin Tuna) did not require the parties "to negotiate indefinitely while denying a party the option of concluding, for purposes of both Articles 281(1) and 283, that no settlement has been reached".<sup>351</sup>

26.49. Similarly here, taking account of the long-standing nature of the dispute and the numerous unsuccessful diplomatic exchanges, negotiations and consultations between the Parties,<sup>352</sup> it is evident that no settlement has been reached. To the contrary, China's increasing assertiveness since 2009<sup>353</sup> has exacerbated the dispute, threatening to reduce the DOC to a dead letter. In these circumstances, the Philippines was entirely justified in concluding that continued negotiation would be futile.

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<sup>349</sup> *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 5 (M. Nordquist, et. al., eds., 2002), para. 281.1, p. 23. SWSP, Vol. XII, Annex LA-148(bis).

<sup>350</sup> *Id.*, para. 281.3.

<sup>351</sup> *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, Award on Jurisdiction and Admissibility, UNCLOS Annex VII Tribunal (4 Aug. 2000), para. 55. MP, Vol. XI, Annex LA-50. In that regard, the arbitral tribunal concurred with ITLOS, which, in the provisional measures phase of the case, held that "[a] State Party is not obliged to pursue procedures under Part XV, section 1 of the Convention when it concludes that the possibilities of settlement have been exhausted". *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, para. 60. MP, Vol. XI, Annex LA-37. See also *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)*, Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003, para. 47. MP, Vol. XI, Annex LA-41; *The MOX Plant Case (Ireland v. United Kingdom)*, Provisional Measures, Order of 3 December 2001, ITLOS Reports 2001, para. 60. MP, Vol. XI, Annex LA-39; *Arctic Sunrise (Netherlands v. Russia)*, Provisional Measures, para. 76. MP, Vol. XI, Annex LA-45; *The "ARA Libertad" Case (Republic of Argentina v. Ghana)*, Provisional Measures, Order of 15 December 2012, ITLOS Reports 2012, para. 71. MP, Vol. XI, Annex LA-44.

<sup>352</sup> See Memorial, Chapter 3, Sections III-IV and Chapter 7, Section II(B). As the ICJ pointed out in its Advisory Opinion in the *Interpretation of Peace Treaties* case, diplomatic exchanges between two States could demonstrate the existence of a situation "in which the two sides hold clearly opposite views concerning the performance or non-performance of certain treaty obligations", and lead to the conclusion that an "international dispute[] [has] arisen" and that the "parties have not succeeded in settling their disputes by direct negotiations". *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion, I.C.J. Reports 1950, pp. 74, 76. MP, Vol. XI, Annex LA-1.

<sup>353</sup> Memorial, paras. 3.51-3.54. See Letter from Francis H. Jardeleza, Solicitor General of the Republic of the Philippines, to Judith Levine, Registrar, Permanent Court of Arbitration (30 July 2014). SWSP, Vol. VIII, Annex 466.

26.50. In its Position Paper, China implausibly maintains that the Parties have never engaged in negotiations with regard to the subject-matter of the arbitration.<sup>354</sup> It argues that the voluminous diplomatic exchanges between the Parties have merely pertained to “responding to incidents at sea in the disputed areas and promoting measures to prevent conflicts, reduce frictions, maintain stability in the region, and promote measures of cooperation”.<sup>355</sup> These arguments do not withstand scrutiny. In the first place, the exchanges China sites all relate to matters arising precisely as a result of the Parties’ differing conceptions of their entitlements in the area. China itself refers to these problems as resulting from the existence of “disputed areas”. The Philippines fails to see how this is anything other than the heart of the subject matter of the arbitration.

26.51. Moreover, China itself cites to elements of the record that only confirm the fact that the Parties have negotiated over the subject-matter raised in this case. At paragraph 60 of its Position Paper, for example, China observes that in September 2004, the two sides issued a Joint Press Statement in which they “reaffirmed their commitment to peace and stability in the South China Sea and their readiness *to continue discussions* to study cooperative activities like joint development *pending the comprehensive settlement of* territorial disputes and overlapping *maritime claims in the area*”.<sup>356</sup> The Philippines submits that this statement, without more, demonstrates that as of 2004 the Parties had already engaged in substantial discussions concerning their competing claims in the South China Sea, the subject that is, of course, at the heart of this dispute.

26.52. China’s Position Paper also overlooks the Parties’ diplomatic exchanges over its public assertion of its nine-dash line claim in May 2009;<sup>357</sup> its obstructionist actions vis-à-vis

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<sup>354</sup> China’s Position Paper, para. 45. SWSP, Vol. VIII, Annex 467.

<sup>355</sup> *Id.*, para. 47. The only support for this argument that China cites stems from a 1997 statement of the Chinese Ministry of Foreign Affairs, which the Philippines cited, along with other documents, in the Memorial as evidence of the Parties’ exchange of views over the scope of their respective maritime jurisdictions and entitlements in the vicinity of Scarborough Shoal. According to China, that statement was rather “centered on the issue of sovereignty”. *Id.*, para. 49. To that effect, China accuses the Philippines of having “deliberately omitted” a passage from the statement which purportedly establishes China’s understanding. *Id.* However, the Philippines did not cite the statement in question because it is plainly irrelevant. Indeed, it merely communicates China’s position on the nature of the Parties’ dispute over their respective maritime entitlements in the vicinity of Scarborough Shoal. It is other statements in the same document that unequivocally record that the Parties’ were already engaged in a conflict of views concerning their claims of maritime jurisdiction in the area that make it relevant to the Philippines’ showing of the futility of further exchanges of views. 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>356</sup> China’s Position Paper, para. 60 (emphasis added). SWSP, Vol. VIII, Annex 467.

<sup>357</sup> See Memorial, paras. 3.41-3.44.

Philippine oil and gas development projects and fishing in the disputed area;<sup>358</sup> and its promulgation of regulations that purport to allow it to exercise greater administrative control over the waters it claims within the so-called nine-dash line.<sup>359</sup> These exchanges concern all of the various issues in dispute<sup>360</sup> and are plainly sufficient to meet the threshold required by Article 281 (and, for that matter, Article 283).<sup>361</sup>

26.53. China further asserts that the Philippines could not have exchanged views with China on matters concerning the interpretation and application of the Convention before 2009 when the Philippines “start[ed] to abandon its former maritime claims in conflict with the Convention”.<sup>362</sup> This is illogical. The Philippines signed UNCLOS the day it was opened for signature (10 December 1982) and was one of the first States to submit its instrument of ratification (8 May 1984). As early as 1988, the Philippines declared its intention to “harmonize its domestic legislation with the provisions of the Convention”, and “to abide by the provisions of the said Convention”.<sup>363</sup> Although domestic constraints delayed such harmonization until March 2009, the Philippines has consistently formulated its maritime claims in the South China Sea by reference to UNCLOS.<sup>364</sup> In any event, there could be no doubt on China’s part that *after* March 2009 the Philippines was exchanging views on matters that directly implicated the interpretation and application of the provisions of the Convention. China’s recalcitrance since then is more than sufficient to justify the Philippines’ conclusion that continued negotiation would be futile.

***D. In Any Event, China Is Not Entitled To Invoke the DOC Due to Its Own Breaches***

26.54. In its Memorial, the Philippines pointed out that in addition to the reasons stated already above, China is not entitled to invoke the DOC as a bar to the Tribunal’s jurisdiction

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<sup>358</sup> *Id.*, paras. 3.46-3.54.

<sup>359</sup> *See Id.*, paras. 3.55-3.58.

<sup>360</sup> *See also Id.*, paras. 7.83-7.92.

<sup>361</sup> *See Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)*, Award on Jurisdiction and Admissibility, UNCLOS Annex VII Tribunal (4 Aug. 2000), para. 55. MP, Vol. XI, Annex LA-50.

<sup>362</sup> China’s Position Paper, para. 50. SWSP, Vol. VIII, Annex 467.

<sup>363</sup> Declaration of the Republic of the Philippines in response to Australia’s Objection to the Declaration of the Philippines upon Signature of the United Nations Convention on the Law of the Sea (26 Oct. 1988), *Multilateral Treaties Deposited with the Secretary-General*, Vol. 3, Part 1, Chapters 12-29, and Part 2, U.N. Doc. ST/LEG/SER.E/26 (1 Apr. 2009), p. 484. MP, Vol. XI, Annex LA-67.

<sup>364</sup> *See Memorial*, paras. 3.28-3.40.

due to its persistent non-compliance with its terms,<sup>365</sup> in particular paragraph 5, pursuant to which the parties’ undertake “to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability in [the region]”.<sup>366</sup>

26.55. China’s Position Paper seeks to justify its disregard of the DOC by misrepresenting the facts. In its Memorial, the Philippines demonstrated China’s recalcitrance by reference to its actions in and around Scarborough Shoal and Second Thomas Shoal.<sup>367</sup> China counters that it was the Philippines that “first resorted to the threat of force” in Scarborough Shoal “by dispatching on 10 April 2012 a naval vessel to detain and arrest Chinese fishing boats and fishermen”.<sup>368</sup> In fact, the evidence shows that Scarborough Shoal had long been subject to Philippine fisheries jurisdiction, as attested by the significant number of Philippine arrests of Chinese fishermen harvesting endangered species between 1995 and 2012.<sup>369</sup> The exercise of Philippine fisheries jurisdiction in the vicinity of Scarborough Shoal was generally uncontested by China until April 2012, when Chinese government vessels interfered for the first time with Philippine law enforcement activity to prevent the arrest of Chinese fishermen engaging in unlawful fishing practices.<sup>370</sup> In light of these uncontested facts, it is disingenuous for China to argue that it was the Philippines that “first resorted to the threat of force” in Scarborough Shoal.

26.56. China also argues that it was the Philippines that “illegally ran a naval ship aground” at Second Thomas Shoal in May 1999.<sup>371</sup> However the vessel came to be there, it is located at a low-tide elevation that is an integral part of the seabed over which the Philippines has sovereign rights and jurisdiction.<sup>372</sup> Moreover, the Philippines acted less aggressively than China which in 1995 seized Mischief Reef, over the protest of the Philippines.<sup>373</sup> In any

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<sup>365</sup> *Id.*, paras. 7.74-7.76.

<sup>366</sup> Association of Southeast Asian Nations, *Declaration on the Conduct of Parties in South China Sea* (4 Nov. 2002), para. 5. MP, Vol. V, Annex 144.

<sup>367</sup> See Memorial, paras. 3.59-3.67; 6.148-6.152.

<sup>368</sup> China’s Position Paper, para. 51. SWSP, Vol. VIII, Annex 467.

<sup>369</sup> See Memorial, para. 3.51 and accompanying footnote.

<sup>370</sup> *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People’s Republic of China in Manila, No. 12-0894 (11 Apr. 2012). MP, Vol. VI, Annex 205.

<sup>371</sup> China’s Position Paper, para. 51. SWSP, Vol. VIII, Annex 467.

<sup>372</sup> *Note Verbale* from the Department of Foreign Affairs of the Republic of the Philippines to the Embassy of the People’s Republic of China in Manila, No. 13-1585 (9 May 2013). MP, Vol. VI, Annex 217.

<sup>373</sup> Memorial, para. 5.65.

event, the DOC postdates these actions by three years and does not seek to resolve these issues. It merely exhorts the parties to “exercise self-restraint in the conduct of activities that would complicate or escalate disputes”.<sup>374</sup> China’s more recent actions at Second Thomas Shoal are inconsistent with this commitment.<sup>375</sup>

26.57. China’s more recent massive land reclamations activities at features throughout the South China Sea constitute an even more flagrant breach of the undertaking to exercise self-restraint. The Philippines has previously made the Tribunal aware of China’s actions,<sup>376</sup> which have attracted the attention of the international press and the concern of States throughout the region and, indeed, throughout the world. The inconsistency between these actions and the DOC could scarcely be more stark.

26.58. Accordingly, even if the commitments the signatory States to the DOC undertook were legally binding (which they are not), China’s flagrant disregard of paragraph 5 would deprive it of any entitlement to claim the benefit of its alleged rights under paragraph 4.

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26.59. For the reasons presented above, the DOC poses no obstacle to the Tribunal’s jurisdiction. The arguments to the contrary in China’s 7 December 2014 Position Paper are unavailing.

### ***E. The Other Bilateral Documents China Cites Are Irrelevant***

26.60. In addition to the DOC, China cites a number of other bilateral documents and statements that it claims support the conclusion that the Parties agreed to settle their disputes through consultations and negotiation to the exclusion of other means. It cites two categories of documents and statements: some pre-dating the DOC and some post-dating the DOC.

26.61. China’s attempt to invoke documents post-dating the DOC can be dismissed summarily. It cites (1) a September 2004 Joint Press Statement issued on the occasion of the visit to China by the then-President of the Philippines, and (2) a September 2011 Joint

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<sup>374</sup> Association of Southeast Asian Nations, *Declaration on the Conduct of Parties in South China Sea* (4 Nov. 2002), para. 5. MP, Vol. V, Annex 144.

<sup>375</sup> Memorial, para. 3.67.

<sup>376</sup> See Letter from Francis H. Jardeleza, Solicitor General of the Republic of the Philippines, to Judith Levine, Registrar, Permanent Court of Arbitration (30 July 2014). SWSP, Vol. VIII, Annex 466.

Statement issued on the occasion of a visit to China by the current President of the Philippines.<sup>377</sup> In both statements, the Parties reaffirmed their commitment to the implementation of the DOC.<sup>378</sup> Whatever force these statements may have can therefore extend no further than that of the DOC itself. As explained at length above, the DOC is without consequence to the Tribunal's jurisdiction. So too are the after-the-fact statements on which China seeks to rely.

26.62. China's efforts to enlist the statements it cites pre-dating the DOC do not fare any better. China cites four:

(a) An August 1995 Joint Statement concerning Consultations on the South China Sea and Other Areas of Cooperation in which, among other things, both sides "agreed to abide by" the principle that "[d]isputes shall be settled in a peaceful manner through consultations on the basis of equality and mutual respect";<sup>379</sup>

(b) A March 1999 Joint Statement of the China-Philippines Experts Group on Confidence-Building Measures in which the two sides, among other things, "agreed that the dispute should be peacefully settled through consultation";<sup>380</sup>

(c) A May 2000 Joint Statement on the Framework of Bilateral Cooperation in the Twenty-First Century in which the two sides "agree[d] to promote a peaceful settlement of disputes through friendly consultations and negotiations *in accordance with universally recognized principles of international law, including the 1982 United Nations Convention on the Law of the Sea ...*";<sup>381</sup> and

(d) An April 2001 Joint Press Statement of the Third China-Philippines Experts' Group Meeting on Confidence Building Measures in which the "two sides noted that the bilateral consultation mechanism to explore ways of cooperation in the South China Sea has been effective".<sup>382</sup>

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<sup>377</sup> China's Position Paper, paras. 36, 37. SWSP, Vol. VIII, Annex 467.

<sup>378</sup> *Id.*

<sup>379</sup> *Id.*, para. 31.

<sup>380</sup> *Id.*, para. 32.

<sup>381</sup> *Id.*, para. 33.

<sup>382</sup> *Id.*, para. 34.

26.63. None of these joint statements, whether taken individually or collectively, can be taken as an agreement to exclude recourse to the procedures specified in Section 2 of Part XV of the Convention. Joint statements like these are commonplace in international practice and, at best, constitute aspirational political statements. They do not purport to establish binding legal obligations. States everywhere would undoubtedly be dismayed to learn otherwise.

26.64. Moreover, there is nothing in any of the statements cited above that even arguably reflects an intent to exclude recourse to compulsory proceedings entailing a binding decision. Particularly telling in this respect, is the reference in the May 2000 statement to negotiations conducted “in accordance with universally recognized principles of international law, including the 1982 United Nations Convention on the Law of the Sea”. Inasmuch as Section 2 of Part XV constitutes an integral part of the Convention, the reference to UNCLOS plainly reflects an understanding that, while negotiations are to be encouraged, recourse to alternative procedures, including compulsory procedures, is entirely appropriate when negotiation has failed or is futile.

26.65. China’s attempts to raise doubts about the Tribunal’s jurisdiction by invoking the statements listed above or, indeed, the DOC itself, reflect a larger misunderstanding about the relationship between negotiations, on the one hand, and adjudication, on the other. China’s arguments posit a contradiction that does not exist. Negotiation and adjudication play complimentary roles in the international system.

26.66. In the *Nicaragua v. United States* case, the United States sought to deny the admissibility of Nicaragua’s claims based on the fact that active, regional negotiations were on-going under the auspices of the so-called Contadora Process. The Court denied the objection of the United States, holding that it “considers that even the existence of active negotiations in which both parties might be involved should not prevent both the Security Council and the Court from exercising their separate functions under the Charter and the Statute of the Court”.<sup>383</sup>

26.67. The Court then proceeded to recall that in the *Aegean Sea Continental Shelf* case it had stated:

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<sup>383</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, para. 106. MP, Vol. XI, Annex LA-13.

The Turkish Government's attitude might thus be interpreted as suggesting that the Court ought not to proceed with the case while the parties continue to negotiate and that the existence of active negotiations in progress constitutes an impediment to the Court's exercise of jurisdiction in the present case. The Court is unable to share this view. Negotiation and judicial settlement are enumerated together in Article 33 of the Charter of the United Nations as means for the peaceful settlement of disputes. The jurisprudence of the Court provides various examples of cases in which negotiations and recourse to judicial settlement have been pursued *pari passu*. ... Consequently, the fact that negotiations are being actively pursued during the present proceedings is not, legally, any obstacle to the exercise by the Court of its judicial function.<sup>384</sup>

If active negotiations are no impediment to the exercise of the judicial function, *a fortiori* failed or futile negotiations are not either.

26.68. Finally, the Philippines observes that a rule that an agreement to negotiate could, without more, preclude recourse to compulsory means of dispute settlement would lead to manifestly absurd results. Negotiation depends for its success on the good faith of both parties to work cooperatively toward a compromise solution that takes account of the perspectives and interests of both States. Even when good faith is present, negotiations may not lead to a settlement of the dispute. Political or other circumstances may prevent one or both States from making the accommodations necessary to arrive at a solution. And where good faith is absent, a rule converting an agreement to negotiate into a bar to compulsory dispute settlement could easily be exploited by one State to put the disputed matters into a permanent state of limbo by refusing to agree on anything. Indeed, not only would this result be absurd, it would create a grave threat to the international system for resolving disputes among States.

### **III. The Subject-Matter of This Dispute Is Not “An Integral Part of Maritime Delimitation”**

26.69. China's final argument is that the Tribunal does not have jurisdiction because the “issues presented by the Philippines for arbitration constitute an integral part of maritime delimitation between China and the Philippines and, as such, can only be considered under

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<sup>384</sup> *Id.* (citing *Aegean Sea Continental Shelf (Greece v. Turkey)*, Jurisdiction, Judgment, I.C.J. Reports 1978, para. 29. MP, Vol. XI, Annex LA-9).



the over-arching framework of maritime delimitation between China and the Philippines”.<sup>385</sup> According to China: “The Philippines’ approach of splitting its maritime delimitation dispute with China and selecting some of the issues for arbitration, if permitted, would destroy the integrity and indivisibility of maritime delimitation and contravene the principle that maritime delimitation must be based on international law as referred to in Article 38 of the ICJ Statute and that ‘all relevant factors must be taken into account’”.<sup>386</sup>

26.70. The Philippines anticipated — and refuted — just this argument in its Memorial, in which it showed that the mere fact that some of the questions presented in this case may have potential implications for a future delimitation between the Philippines and China does not render China’s Declaration under Article 298 applicable.<sup>387</sup> China’s Position Paper notably makes no effort to respond to any of those points.

26.71. Article 298(1)(a) is specific and limited. By its terms, it applies in relevant part only to “disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations”. It does not purport to apply to any dispute that might (or might not) later have implications for subsequent delimitations conducted in accordance with the referenced articles.

26.72. The scope of Article 298(1)(a) must be evaluated in light of the place of Article 298 in the scheme of UNCLOS. Part XV is a critical part of the Convention. It has been described as “the pivot upon which the delicate equilibrium of the compromise must be balanced”.<sup>388</sup> Moreover, Article 309 is emphatic: “No reservations or exceptions may be made to this Convention unless expressly permitted”. Relevant too is the maxim *exceptiones sunt strictissimae interpretationis*. Given Article 309’s prohibition on reservations that are not expressly permitted, this principle must apply with particular force in the case of UNCLOS.

26.73. The exception “expressly permitted” applies only to “disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations”. The case the Philippines has presented does not concern any of these Articles. The Tribunal is not called upon to express any views on them, let alone the portions thereof relating to sea

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<sup>385</sup> China’s Position Paper, para. 68. SWSP, Vol. VIII, Annex 467.

<sup>386</sup> *Id.*

<sup>387</sup> See Memorial, paras. 7.114-7.126.

<sup>388</sup> Memorial, para. 7.4.

boundary delimitations. Accordingly, to deem Article 298(1)(a) applicable, and to apply it to disputes beyond those expressly stated, would not only be inconsistent with Article 309, it would also have the practical effect of creating a broad new exception that the Convention does not contemplate.

26.74. In its response to Question 6, for example, the Philippines adverted to a hypothetical case relating to the validity of a coastal State's straight baselines.<sup>389</sup> If China's position were correct, a declaration under Article 298 by the State whose baselines were the subject of challenge would prevent the court or tribunal from exercising jurisdiction, even though such a case would present only issues arising under Article 7 of the Convention. This is because the baselines of the State in question might be relevant to the delimitation between the disputing States. To accept China's reading of Article 298(1)(a) would therefore convert it from an exception of limited scope into a jurisdictional Trojan Horse of unpredictable dimensions.

26.75. The core of the Philippines' case relates to China's assertion of sovereign rights and jurisdiction, including "historic rights", beyond the limits of its permissible entitlements under the Convention. It thus raises questions of *entitlement*, not the *delimitation* of any maritime areas where China has entitlements that overlap with those of the Philippines or other States. As the Philippines showed in its Memorial (and China's Position Paper nowhere disputes), entitlement and delimitation are fundamentally different.<sup>390</sup> ITLOS made the point clear in its Judgment in *Bangladesh v. Myanmar*, in which it unambiguously observed that entitlement and delimitation are "distinct concepts".<sup>391</sup> The ICJ adopted the same approach in *Nicaragua v. Colombia*, in which it analyzed the issues of entitlement and delimitation in separate sections of its Judgment.<sup>392</sup>

26.76. Even though questions of entitlement may be relevant also to issues of delimitation, they are also of independent significance. In particular, in maritime areas where China has no entitlement under UNCLOS, no question of delimitation involving China arises.

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<sup>389</sup> See *supra* para. 6.6.

<sup>390</sup> See Memorial, paras. 7.120-7.126.

<sup>391</sup> *Dispute Concerning Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment of 14 March 2012, ITLOS Reports 2012, para. 398. MP Vol. XI, Annex LA-43.

<sup>392</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Merits, Judgment, I.C.J. Reports 2012, paras. 167-183. MP, Vol. XI, Annex LA-35.

Thus, with respect to China's assertion of "historic rights" in vast areas within the nine-dash line beyond the limits of its entitlement under the Convention, no issues of delimitation can even conceivably arise. Without entitlement, there is no basis for a delimitation. Moreover, China's assertion of such expansive rights where it has no entitlement call into question the Philippines' rights and freedoms in areas immediately adjacent to its coast. The Tribunal therefore has jurisdiction to address them whether or not they have implications for any subsequent delimitation between the Philippines and China.

26.77. China also asserts that "[a]lthough the Philippines professes that the subject matter of the arbitration does not involve any dispute covered by China's 2006 declaration, since China holds a different view in this regard, the Philippines should first take up this issue with China, before a decision can be taken on whether it can be submitted for arbitration. Should the Philippines' logic in its present form be followed, any State may unilaterally initiate compulsory arbitration against another State Party in respect of a dispute covered by the latter's declaration in force simply by asserting that the dispute is not excluded from arbitration by that declaration".<sup>393</sup>

26.78. This aspect of China's argument finds no support in the Convention. In the first place, China's views presume that the parties to a dispute must agree on whether any of the Article 298 exceptions apply before either may resort to compulsory procedures. This is absurd, and is tantamount to making the exceptions self-judging, which, as the Philippines showed in its Memorial, they plainly are not.<sup>394</sup> If they were accepted as such, any State could side-step its obligation to submit to compulsory procedures entailing binding decisions under Section 2 of Part XV merely by asserting that the dispute is covered by its Article 298 Declaration. The danger such an approach would pose to the Convention's dispute resolution mechanisms is self-evident.

26.79. China's nominal concerns about a flood of vexatious lawsuits are unfounded. The Convention came into force nearly 20 years ago. In the years since, this is the first case in which it has been argued that jurisdiction is barred by virtue of the delimitation exception set forth in Article 298 declaration. Moreover, the decision to resort to international litigation is a matter of utmost solemnity. The Philippines considers that the States Parties to UNCLOS can

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<sup>393</sup> China's Position Paper, para. 73.

<sup>394</sup> See Memorial, para. 7.116.

and must be presumed to be acting in good faith in having recourse to a court or tribunal. In any event, if the respondent State considers commencement of arbitration manifestly unfounded, it has the right to submit preliminary objections to jurisdiction. In the circumstances China hypothesizes, the Philippines has no doubt that the court or tribunal would not hesitate to take appropriate action.

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26.80. For all of these reasons, China's 7 December 2014 Position Paper fails to show that the Tribunal lacks jurisdiction over any aspect of the claims of the Philippines has presented in this arbitration. To the contrary, for the reasons first articulated in the Philippines' Memorial, reiterated in its answers to Questions 1 through 12 above, and once more underscored in its response to this Question 26, the Tribunal plainly has jurisdiction to decide the issues raised in the Philippines' Statement of Claim and provide appropriate relief consistent with the Submissions in the Memorial.

## APPENDIX TO RESPONSE TO QUESTION 13

A13.1. In this Appendix, the Philippines presents additional historical evidence, supplementing what it presented with the Memorial, that demonstrates China has not exercised sovereignty, sovereign rights, historic title, or historic rights over the maritime area enclosed by the nine-dash line.

### I. Early History

A13.2. During the first millennium C.E. the South China Sea was regularly traversed by the Malay peoples, a subset of the Austronesian group, who settled in present-day Malaysia, Indonesia, Brunei and the Philippines, as well as by inhabitants of present-day Viet Nam. Those living in China also made use of the Sea.<sup>395</sup> There are references to fishermen, reportedly from Hainan, who plied the waters, annually visiting the Paracel Islands and going as far as the island of Borneo.<sup>396</sup> Fishermen from elsewhere, especially modern-day Malaysia and the Philippines, also exploited these fishing grounds.

#### A. China

A13.3. Chinese navigators were aware of the many dangerous features in the South China Sea as early as the Eastern Han period (around 100 C.E.),<sup>397</sup> and believed the area was inhabited by demons.<sup>398</sup> They sought to avoid these hazards by hugging the east and west coasts,<sup>399</sup> which were identified as separate regions referred to as the “Oriental and Occidental Seas”.<sup>400</sup>

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<sup>395</sup> Memorial, paras. 2.19-2.25.

<sup>396</sup> Charles Gutzlaff, “Geography of the Cochinchina Empire”, *Journal of the Royal Geographical Society of London*, Vol. 19 (1849), p. 93. SWSP, Vol. IX, Annex 516.

<sup>397</sup> Stein Tønnesson, “An International History of the dispute in the South China Sea”, *East Asian Institute Working Paper Series*, No. 71 (16 Mar. 2001), p. 5. MP, Vol. VIII, Annex 273. See also Brantly Womack, “The Spratlys From Dangerous Ground to Apple of Discord”, *Contemporary Southeast Asia*, Vol. 33, No. 3 (Dec. 2011), pp. 370, 373. MP, Vol. IX, Annex 300; Dieter Heinzig, *Disputed Islands in the South China Sea: Paracels - Spratlys - Pratas - Macclesfield Bank* (1976), p. 22. SWSP, Vol. IX, Annex 520.

<sup>398</sup> Stein Tønnesson, “The History of the Dispute”, in *War or Peace in the South China Sea?* (T. Kivimäki, ed., 2002), p. 7. SWSP, Vol. X, Annex 532.

<sup>399</sup> B. Catley & M. Keliat, *Spratlys: The Dispute in the South China Sea* (1997), p. 36. SWSP, Vol. X, Annex 526.

<sup>400</sup> Nobuo Muroga, “The Philippines in Old Chinese Maps”, *Philippine Historical Review*, Vol. 2 (1969), p. 266. SWSP, Vol. IX, Annex 518.

A13.4. By the ninth and tenth centuries, private Chinese merchants had become involved in trade with Southeast Asia,<sup>401</sup> but it was “[n]ot until the twelfth century [that the] Chinese t[ook] a significant role themselves in [] trade”,<sup>402</sup> establishing commercial routes with the polities surrounding the South China Sea. For example, in the eleventh and twelfth centuries, Chinese traders established entrepôts along the western coasts of Luzon, Mindoro, Cebu and Mindanao in what is now the Philippines.<sup>403</sup> There is documentation of direct trading between Luzon, the main island of the Philippine archipelago, and Fujian in southern China as of the thirteenth century.<sup>404</sup>

A13.5. In addition to trading with predecessor polities in present-date Philippines, Chinese “ships carried [Chinese] commercial ventures to states on the perimeter of the ... South China Sea[]” and beyond.<sup>405</sup> Early in the Yuan (Mongol) Dynasty,<sup>406</sup> towards the end of the 13th century, China set up a “maritime superintendenc[e]” in Quanzhou, in Fujian, opposite Taiwan, which “focused on trade into the South China Sea, [Quanzhou] being the most important trading port for maritime Muslim merchants from abroad”.<sup>407</sup> The establishment of these commercial routes, however, was not accompanied by an assertion of sovereignty or rights to the South China Sea waters.

A13.6. The use of the Sea was open to all; neither China nor any other polity claimed ownership or sovereignty over the waters. The only polity that was ever excluded from the Sea was China, by virtue of its own imperial edicts. Fearful of foreign influence, China’s emperors imposed bans on overseas trade, and on navigation by Chinese vessels, beginning in the early 1300s.<sup>408</sup> When the ban of the Yuan era was lifted, in 1322, the local economy of

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<sup>401</sup> Kenneth R. Hall, *A History of Early Southeast Asia: Maritime Trade and Societal Development, 100-1500* (2011), p. 214. Annex SWSP, Vol. XI, Annex 297(bis).

<sup>402</sup> Anthony Reid, *Charting the Shape of Early Modern Southeast Asia* (2000), p. 44. MP, Vol. VIII, Annex 265.

<sup>403</sup> Kenneth R. Hall, *A History of Early Southeast Asia: Maritime Trade and Societal Development, 100-1500* (2011), p. 332. Annex SWSP, Vol. XI, Annex 297(bis).

<sup>404</sup> Anthony Reid, *Charting the Shape of Early Modern Southeast Asia* (2000), p. 47. MP, Vol. VIII, Annex 265.

<sup>405</sup> Lo Jung-pang, *China as a Sea Power 1127-1368: A Preliminary Survey of the Maritime Expansion and Naval Exploits of the Chinese People During the Southern Song and Yuan Periods* (2012), p. 312. SWSP, Vol. XI, Annex 546.

<sup>406</sup> The Yuan Dynasty ruled China from 1271-1368 C.E.

<sup>407</sup> Timothy Brook, *The Troubled Empire: China in the Yuan and Ming Dynasties* (2010), p. 219. SWSP, Vol. X, Annex 541.

<sup>408</sup> *Id.*, pp. 219-220.

Quanzhou quickly became dominated by foreigners.<sup>409</sup> By the rise of the Ming Dynasty in China in the mid-14th century,<sup>410</sup> private trading by Chinese had again been forbidden.<sup>411</sup>

A13.7. During the Middle Ages, China was not a significant power in the South China Sea. Nor did it maintain a significant presence. Indeed, “[i]n Ming-dynasty records ... [the South China Sea was] conceptualized as part of a diffuse frontier between the Chinese and non-Chinese worlds of navigation and trade, one of those maritime spaces where the civilized world encountered the barbarian world”.<sup>412</sup> China’s position is illustrated by the decision of the Yongle Emperor (1402-24) to send the well-known admiral Zheng He on a series of cruises, in the first half of the 1400s,<sup>413</sup> along the western edge of the South China Sea.<sup>414</sup> Faced with the dominance of the Java-based Majapahit Empire over the southern part of the South China Sea and potential tributaries, the Emperor felt compelled to make a show of strength.<sup>415</sup>

A13.8. Although Zheng He’s charts “identified some coral islands in the South China Sea”, knowledge about these maritime features continued to be sparse.<sup>416</sup> This persisted for hundreds of years. According to one historian, in an early 17th century Chinese text entitled *Studies on the Ocean East and West*, “the South China Sea Islands are absent, which likely

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<sup>409</sup> *Id.*, p. 220.

<sup>410</sup> The Ming Dynasty ruled China from 1368-1644 C.E.

<sup>411</sup> See Martin Stuart-Fox, *A Short History of China and Southeast Asia: Tribute, Trade and Influence* (2003), pp. 75-77. MP, Vol. IX, Annex 276.

<sup>412</sup> Ulises Granados, “The South China Sea and Its Coral Reefs During the Ming and Qing Dynasties: Levels of Geographical Knowledge and Political Control”, *East Asia History*, Vol. 32/33 (Dec. 2006/Jan. 2007), p. 114. SWSP, Vol. X, Annex 537.

<sup>413</sup> See Martin Stuart-Fox, *A Short History of China and Southeast Asia: Tribute, Trade and Influence* (2003), p. 82. MP, Vol. IX, Annex 276.

<sup>414</sup> Stein Tønnesson, “An International History of the dispute in the South China Sea”, *East Asian Institute Working Paper Series*, No. 71 (16 Mar. 2001), p. 5. MP, Vol. VIII, Annex 273. See also Brantly Womack, “The Spratlys From Dangerous Ground to Apple of Discord”, *Contemporary Southeast Asia*, Vol. 33, No. 3 (Dec. 2011), pp. 370, 373. MP, Vol. IX, Annex 300.

<sup>415</sup> Lo Jung-pang, *China as a Sea Power 1127-1368: A Preliminary Survey of the Maritime Expansion and Naval Exploits of the Chinese People During the Southern Song and Yuan Periods* (2012), p. 334. SWSP, Vol. XI, Annex 546.

<sup>416</sup> Ulises Granados, “The South China Sea and Its Coral Reefs During the Ming and Qing Dynasties: Levels of Geographical Knowledge and Political Control”, *East Asia History*, Vol. 32/33 (Dec. 2006/Jan. 2007), pp. 114-115. SWSP, Vol. X, Annex 537.

confirms that the central section of the [Sea] was largely avoided by sailors and lay outside the main trading routes”.<sup>417</sup>

A13.9. Shortly after Zheng He’s voyages, private trading by Chinese was again outlawed,<sup>418</sup> heralding a general suppression of Chinese maritime activities that persisted for the remaining two centuries of the Ming Dynasty. Whether “[t]o open the coast or close it was a perennial question at [the Ming Emperor’s] court right down to the end of the 1630s”.<sup>419</sup>

A13.10. During the Ming era, China regularly suppressed maritime activities. For example, a 1525 closure of the southern coast “promot[ed] ... piracy by driving traders into smuggling ... re-escalating violence along the coast”. This continued until maritime trade was allowed to reopen in 1567.<sup>420</sup> The impact of China’s restrictions on seafaring is described by a petitioner in Fujian, who reported the difficulties that had been caused by the institution of such a ban in 1638: “The seas are the fields of the Fujianese, for the people living along the coast have no other way to make a livelihood ... The poorest always band together and go to sea to make a living. The moment coastal restrictions are tightened, they have no way to get food, so they turn to plundering the coast”.<sup>421</sup>

A13.11. As discussed in greater detail in the Philippines’ response to Question 14, contemporaneous maps produced in China confirm that China did not consider the islands or waters of the South China Sea to fall under its sovereignty.<sup>422</sup> A “large and exact map of China” prepared during the Yuan Dynasty, the original of which has been lost, did not include the littoral states of the South China Sea, or the Sea itself.<sup>423</sup> It was only later, during the Ming Dynasty, in the mid-1500s, that a “map of th[o]se countries called *Tung-nan hai-i tsung-t’u* (General map of the Barbarians in the Southeast Seas)” was added to an atlas based

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<sup>417</sup> *Id.*, p. 116.

<sup>418</sup> See Martin Stuart-Fox, *A Short History of China and Southeast Asia: Tribute, Trade and Influence* (2003), pp. 75-77. MP, Vol. IX, Annex 276.

<sup>419</sup> Timothy Brook, *The Troubled Empire: China in the Yuan and Ming Dynasties* (2010), p. 224. SWSP, Vol. X, Annex 541.

<sup>420</sup> *Id.*, pp. 223-224.

<sup>421</sup> *Id.*, p. 225.

<sup>422</sup> See *infra* paras. A14.7-A14.12.

<sup>423</sup> Nobuo Muroga, “The Philippines in Old Chinese Maps”, *Philippine Historical Review*, Vol. 2 (1969), p. 266. SWSP, Vol. IX, Annex 518.



on the Yuan Dynasty map,<sup>424</sup> which depicted the South China Sea.<sup>425</sup> As the maps of that era confirm, China claimed no land or sea south of Hainan Island. Indeed, as more fully discussed in the Philippines' response to Question 14, Chinese maps did not depict any islands south of Hainan as subject to Chinese sovereignty until the mid-twentieth century.<sup>426</sup> And before 2009, no Chinese map reflected a Chinese claim to the waters of the South China Sea.

### ***B. Other Polities***

A13.12. Other native peoples regularly traversed and exploited the South China Sea prior to the arrival of Europeans and conducted trade across it. As explained by one historian: "Some of the first coastal communities of Southeast Asia actively engaged in long-distance maritime trade".<sup>427</sup> Merchants and seamen in Southeast Asia realized that they could capitalize upon the "need for a maritime link between East and West",<sup>428</sup> and played an important role in a maritime trade network for transporting Chinese goods to depots to the south.<sup>429</sup> By the second century C.E., the realm of Funan, located on the southern tip of Indochina, had become a major trading entrepôt,<sup>430</sup> and prospered as a trading centre for some five hundred years.

A13.13. The Cham peoples, living along what is now the southeastern coast of Viet Nam, also played a significant role in the maritime trade of Southeast Asia during the first millennium C.E. At Champa's height, its seafarers were involved in nearly all shipping between China and the rest of the world.<sup>431</sup> As one historian has explained, throughout this period "Champa had to be heavily involved in the trade, tribute, and voyages of pilgrimage moving to and from China ... Most of this shipping was manned by Austronesian-

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<sup>424</sup> *Id.*

<sup>425</sup> *Id.*

<sup>426</sup> See *infra* paras. A14.5-A14.23.

<sup>427</sup> Pierre-Yves Manguin, "The Archaeology of Early Maritime Polities of Southeast Asia" in *SOUTHEAST ASIA: FROM PREHISTORY TO HISTORY* (I. Glover & P. Bellwood eds., 2004), pp. 282, 285. SWSP, Vol. X, Annex 534.

<sup>428</sup> Kenneth R. Hall, *A History of Early Southeast Asia: Maritime Trade and Societal Development, 100-1500* (2011), p. 42. Annex SWSP, Vol. XI, Annex 297(bis).

<sup>429</sup> *Id.*, p. 45.

<sup>430</sup> Lynda Norene Shaffer, *Maritime Southeast Asia to 1500* (1996), p. 22. MP, Vol. VIII, Annex 257.

<sup>431</sup> Anthony Reid, *Charting the Shape of Early Modern Southeast Asia* (2000), p. 44. MP, Vol. VIII, Annex 265.

speakers”.<sup>432</sup> During the era of Champa’s pre-eminence, “Philippine trade and tribute ... appear[s] to have reached China via Champa”,<sup>433</sup> presumably through inhabitants of the Philippine archipelago shipping goods across the South China Sea to Champa, and then onwards to China.

A13.14. At the beginning of the second millennium C.E., a polity named Srivijaya, based on Sumatra in present-day Indonesia, dominated the southwestern part of the South China Sea. It “built ... alliances with Malay coastal populations” and kept “goods moving into south China ports by servicing vessels voyaging throughout the Southeast Asian archipelago”. In addition, its ports “were utilized as centers of exchange”.<sup>434</sup>

A13.15. Srivijaya’s downfall “increased the significance of the southern Vietnam coastline as a commercial power”.<sup>435</sup> By the 1200s, there was a vibrant trade in Southeast Asia, carried out by “Southeast Asians and Southeast Asia-based traders”.<sup>436</sup> The most powerful polity of these times was the Majapahit Empire,<sup>437</sup> which, by 1377, could claim ports extending “from the furthest tip of Sumatra in the west to New Guinea in the east and as far north as the southern islands of the Philippines”. Its navy, comprised of “multiethnic resident sailors”, were both traders and providers of maritime security.<sup>438</sup>

A13.16. Immediately prior to the arrival of Europeans, the South China Sea was viewed by the merchant community as “a series of seas, bays, islands, and coastal markets that stretched from and connected the south coast of China, including Taiwan, the Philippines, the Indonesian archipelago, to the west coast of Malaya and Sumatra”.<sup>439</sup> There was a considerable amount of exchange between “Chinese merchants coming from the north and

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<sup>432</sup> *Id.*

<sup>433</sup> *Id.*, p. 47. See also Kenneth R. Hall, *A History of Early Southeast Asia: Maritime Trade and Societal Development, 100-1500* (2011), p. 242. Annex SWSP, Vol. XI, Annex 297(bis).

<sup>434</sup> Kenneth R. Hall, *A History of Early Southeast Asia: Maritime Trade and Societal Development, 100-1500* (2011), p. 32. Annex SWSP, Vol. XI, Annex 297(bis).

<sup>435</sup> *Id.*, p. 33.

<sup>436</sup> *Id.*, p. 34.

<sup>437</sup> *Id.*, p. 35.

<sup>438</sup> *Id.*, p. 258.

<sup>439</sup> George Bryan Souza, “Maritime Trade and Politics in China and the South China Sea” (1987), in *Portuguese, Dutch and Chinese in Maritime Asia, c. 1585-1800: Merchants, Commodities and Commerce* (2014), p. 318. SWSP, Vol. X, Annex 523.

Muslim merchants coming from the south”.<sup>440</sup> Merchants from Java and Malacca, located on the west coast of present-day peninsular Malaysia, plied the South China Sea with armed ships carrying goods to China in the early 1500s.<sup>441</sup> In 1493, the Supreme Commander of Guangdong, the Chinese province along the northeastern shore of the South China Sea, expressed concern about “huge number[s] of foreign ships landing in China without reporting their arrival to officials without any regard for the tribute schedule”.<sup>442</sup>

A13.17. In short, prior to the arrival of Europeans, the South China Sea was used freely by all the various polities located along its littoral. Although China, like other littoral States, made use of the South China Sea, it did not exercise sovereignty or jurisdiction over the Sea, or claim special rights. Indeed, at various times, it expressly forbade its people from navigating the waters in question.

## **II. The Colonial Era**

A13.18. The South China Sea continued to be used by various States, including the European powers, after their arrival in Southeast Asia. At no point during this period did China exercise, or claim, sovereignty or rights in respect of its waters.

### ***A. Maritime Activities of the Colonial Powers***

A13.19. The period of European expansion in Southeast Asia commenced when the Portuguese captured Malacca at the western entrance to the South China Sea in 1511. They aimed “to gain entry to China in order to trade, and use that access to dominate trade all around the South China Sea. They did not succeed, but the disruption [in trade they caused] was sufficient to paralyze trade by others”.<sup>443</sup> Although the Portuguese were unsuccessful in

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<sup>440</sup> Timothy Brook, *The Troubled Empire: China in the Yuan and Ming Dynasties* (2010), p. 227. SWSP, Vol. X, Annex 541.

<sup>441</sup> See Luis Filipe F.R. Thomaz, “Melaka and Its Merchant Communities at the Turn of the Sixteenth Century”, in *Asian Merchants and Businessmen in the Indian Ocean and the China Sea* (D. Lombard & J. Aubin, eds., 2000), pp. 26, 29-31. SWSP, Vol. X, Annex 530.

<sup>442</sup> Timothy Brook, *The Troubled Empire: China in the Yuan and Ming Dynasties* (2010), p. 220. SWSP, Vol. X, Annex 541.

<sup>443</sup> *Id.*, p. 223.

their attempt to dominate the South China Sea, they paved the way for the entry of other non-Asian powers to operate in the area.<sup>444</sup>

A13.20. The Dutch arrived in Indonesia in 1596,<sup>445</sup> where the Majapahit Empire had exercised control. By 1601, they were sailing along the Chinese coast,<sup>446</sup> attempting to gain access to local markets.<sup>447</sup> Although the *Comprehensive Atlas of the Dutch East India Company* observes that the littoral around the South China Sea was “only slightly influenced by Dutch expansion”,<sup>448</sup> the Dutch mapped the South China Sea in relatively fine detail during the 17th century.<sup>449</sup>

A13.21. The survey work they carried out assisted the Dutch East India Company in its expansive transshipment operations, by which its ships regularly traversed the South China Sea.<sup>450</sup> The Company sometimes captured Chinese ships to use for its cargo transport operations, apparently without consequence, and hired Chinese crews to sail those vessels.<sup>451</sup>

A13.22. Spain gained influence in the South China Sea in the sixteenth century. Spanish explorer Miguel Lopez de Legazpi encountered and attacked “Moro” trading ships off of the Philippines in 1565.<sup>452</sup> China made no effort to control, let alone prevent, Spanish maritime activities. In 1572, Spain declared a colony in the Philippines.<sup>453</sup> A Spanish ship reportedly

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<sup>444</sup> Portugal’s pretensions to control navigation routes to East and Southeast Asia promoted Grotius to write *Mare Liberum* and its ultimate triumphant assertion of freedom of the seas.

<sup>445</sup> Martin Stuart-Fox, *A Short History of China and Southeast Asia: Tribute, Trade and Influence* (2003), p. 103. MP, Vol. IX, Annex 276.

<sup>446</sup> Timothy Brook, *The Troubled Empire: China in the Yuan and Ming Dynasties* (2010), p. 233. SWSP, Vol. X, Annex 541.

<sup>447</sup> George Bryan Souza, “Maritime Trade and Politics in China and the South China Sea” (1987), in *Portuguese, Dutch and Chinese in Maritime Asia, c. 1585-1800: Merchants, Commodities and Commerce* (2014), pp. 322-324. SWSP, Vol. X, Annex 523.

<sup>448</sup> J. Gommans & R. van Diessen, *Comprehensive Atlas of the Dutch United East India Company*, Vol. VII (2010), 23. SWSP, Vol. XI, Annex 543.

<sup>449</sup> See *infra* paras. A14.27, A14.29, A14.33-A14.34.

<sup>450</sup> Robert Parthesius, *Dutch Ships in Tropical Waters: The development of the Dutch East India Company (VOC) shipping network in Asia 1595-1660* (2010), pp. 58-60. Annex SWSP, Vol. X, Annex 292(bis).

<sup>451</sup> *Id.*, p. 59.

<sup>452</sup> Robert J. Antony, “Turbulent Waters: Sea Raiding in Early Modern South East Asia”, *The Mariner’s Mirror*, Vol. 99, No. 1 (Feb. 2013), p. 26. SWSP, Vol. XI, Annex 548.

<sup>453</sup> Luis H. Francia, *A History of the Philippines: From Indios Bravos to Filipinos* (2010), p. 59. MP, Vol. IX, Annex 291.

was sent by the Admiral from Manila to survey Scarborough Shoal in 1800,<sup>454</sup> which was also explored in 1806 by Spanish captain Don Francisco Reguelme.<sup>455</sup> Spain's ongoing presence in the area is evidenced by the Spanish steam vessel, the *Mariveles*, reportedly striking a reef in the South China Sea in 1879.<sup>456</sup> In that year, a captain in the Spanish Directorate of Hydrography published a pilot for the Philippine archipelago, describing numerous South China Sea features as located in the Palawan Passage.<sup>457</sup> China did not make any documented attempts to restrict or otherwise regulate Spanish navigational and surveying activities, just as it made no effort to control the maritime activities, away from the immediate vicinity of the Chinese coast, of the Portuguese or Dutch.

A13.23. British, French and American ships also traversed the Sea unimpeded by China. Various British ships sailed through the South China Sea between the late 1600s and early 1800s. William Dampier, the first person to circumnavigate the globe three times, sailed between Manila and the coast of China during the summer of 1687.<sup>458</sup> The *Bombay Merchant* was recorded in 1800 as sighting an “extensive reef of breakers, in the form of the letter A”, believed to be the Paracels.<sup>459</sup> Charles Darwin navigated the Sea during his five-year voyage on the *HMS Beagle*, recording his observation of several features, including the Paracel Islands, Scarborough Shoal, Macclesfield Bank, and Swallow Shoal.<sup>460</sup> Other British voyages undertaken in the late eighteenth and early nineteenth centuries include those made by the *Middlesex* and *Earl Lincoln*.<sup>461</sup> As discussed in greater detail in the Philippines' response to Question 14, British hydrographers and cartographers engaged in extensive surveying and mapping of the South China Sea and its insular features during the nineteenth century. There

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<sup>454</sup> John Purdy, *The Oriental Navigator: Directions for Sailing to, from, and upon the coasts of, the East-Indies, China, Australia, &c.* (3rd ed., 1816), p. 145. SWSP, Vol. IV, Annex 386.

<sup>455</sup> Lawrence D. Campbell, *The Asiatic Annual Register: Or, A View of the History of Hindustan, and of the Politics, Commerce and Literature of Asia, For the Year 1804* (1806), 474. SWSP, Vol. XI, Annex 553.

<sup>456</sup> U.S. Hydrographic Office, *Sunda Strait and the Southern Approaches to China Sea with West and North Coasts of Borneo and Off-Lying Dangers*, Vol. V (1915), p. 375. SWSP, Vol. IV, Annex 395.

<sup>457</sup> See Capt. Camilo de Arana, Spanish Directorate of Hydrography, *Pilot of the Philippine Archipelago* (1879). SWSP, Vol. XI, Annex 556.

<sup>458</sup> Samuel Prior, *All the Voyages Round the World from the First by Magellan, in 1520 to that of Freycinet in 1820* (1848), p. 81. SWSP, Vol. XI, Annex 554.

<sup>459</sup> James Horsburgh, *Memoirs: Comprising the Navigation to and from China* (1805), p. 33. SWSP, Vol. XI, Annex 552.

<sup>460</sup> Charles Darwin, *Geological Observations on Coral Reefs, Volcanic Islands and on South America* (1851), p. 182, *passim*. SWSP, Vol. XI, Annex 555.

<sup>461</sup> James Horsburgh, *Memoirs: Comprising the Navigation to and from China* (1805), p. 33. SWSP, Vol. XI, Annex 552.

is no indication of protest from China in regard to any of these British activities; nor did China protest, or seek to restrict, any of the maritime activities of the other European powers.

A13.24. The French arrived in the South China Sea in the late 1600s; the *Amphirite* is the first French vessel recorded as appearing in the South China Sea, in 1701.<sup>462</sup> Several expeditions followed. Jean François de Galaup, comte de Lapérouse, commanded the ship the *Boussole* from 1785-1788.<sup>463</sup> The ship sailed from Manila in the spring of 1787, stopping at Luconia Shoals in the South China Sea before sailing on for the coasts of Korea and Japan.<sup>464</sup> Captain Etienne Marchand of the ship the *Solide* circumnavigated the globe in the last decade of the 18th century. On 8 December 1790, he set sail from Macao with the purpose of sounding on Macclesfield Bank and exploring the South China Sea, including the area around Pulo Sapata.<sup>465</sup>

A13.25. American ships navigated the waters of the South China Sea as well, although some were apparently lost. The clipper ship *Flying Cloud* reported encountering dangerous weather on a voyage from China to New York in 1854.<sup>466</sup> The *Cole* was reported wrecked on the Pratas Shoal in 1858 when traveling from Hong Kong to New York.<sup>467</sup> Shortly thereafter, a Boston ship, *Courser*, was reported lost on the Pratas Shoal.<sup>468</sup> The *Alfred Hill* was reported lost after running aground on the Paracels en route to Hong Kong from Boston in 1861.<sup>469</sup>

A13.26. A 19th century British account of the South China Sea, by the East India Company's hydrographer James Horsburgh, observed that "vessels which navigate on the China Sea belonging to different countries, and even those belonging to the Chinese empire, are probably of greater magnitude, and more valuable, than any other commercial vessels used in other parts of the globe".<sup>470</sup> There is no evidence that China attempted to exclude or

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<sup>462</sup> Marwyn S. Samuels, *Contest for the South China Sea* (1982), p. 44. SWSP, Vol. V, Annex 246(bis).

<sup>463</sup> Samuel Prior, *All the Voyages Round the World from the First by Magellan, in 1520 to that of Freycinet in 1820* (1848), p. 298. SWSP, Vol. XI, Annex 554

<sup>464</sup> *Id.*, pp. 303-306.

<sup>465</sup> *Id.*, pp. 346, 352.

<sup>466</sup> "Arrival of the Flying Cloud-Interesting Sketch of the Passage from China to New York", *New York Times* (25 Nov. 1854), p. 1. SWSP, Vol. XI, Annex 558.

<sup>467</sup> "Marine Intelligence", *New York Times* (16 June 1858), p. 1. SWSP, Vol. XI, Annex 559.

<sup>468</sup> "Marine Intelligence", *New York Times* (19 June 1858), p. 1. SWSP, Vol. XI, Annex 560.

<sup>469</sup> "Loss of the Ship Alfred Hill", *New York Times* (31 July 1861), p. 1. SWSP, Vol. XI, Annex 561.

<sup>470</sup> James Horsburgh, *Memoirs: Comprising the Navigation to and from China* (1805), p. 1. SWSP, Vol. XI, Annex 552.

place conditions on non-Chinese ships from using the South China Sea for transit or trade, or for any other purpose.

### ***B. Efforts To Combat Piracy***

A13.27. For a long time, the South China Sea was plagued by piracy. As one historian has explained, “[t]he first recorded incidence of piracy in the South China Sea took place in AD 589 ... However, it is almost a certainty that piracy flourished long before...”.<sup>471</sup> In the 1500s and 1600s, “South East Asian trading ports, such as Hoi An, Malacca, Pahang and Manila, became thriving emporia frequented by Chinese and Japanese smugglers and pirates”.<sup>472</sup> In the 1570s, a pirate based in Taiwan “sallied forth with the monsoons each year to plunder shipping across the entire South China Sea”.<sup>473</sup> In the 17th century, the pirate fleet of the “Chinese warlord Cheng Chi-Lung ... [was] expand[ed]... into what was effectively the most powerful maritime power in the South China Sea”.<sup>474</sup> They exacted protection from ships sailing in the “wide zone” between “China, Japan, and South East Asia”.<sup>475</sup>

A13.28. Europeans also engaged in piratical activities: “Throughout the late sixteenth and seventeenth centuries, European pirates and privateers continually pillaged shipping in South East Asia. Any vessel was a potential target”.<sup>476</sup> China did not attempt to suppress these activities, even though its vessels were sometimes victimized:

During the seventeenth century, Dutch, English, French, and Danish sea rovers repeatedly robbed indigenous, Chinese, Japanese, and Arab trading vessels around Sumatra, Java, and the Malay Peninsula. In the 1620s the heavily armed ships of the British and Dutch East India Companies joined forces to attack Chinese junks trading at Manila.<sup>477</sup>

A13.29. The prevalence of piracy in the South China Sea prompted European powers, from an early date, to attempt to suppress it. The Portuguese and Dutch, for example, were

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<sup>471</sup> Angus Konstam, *Piracy: The Complete History* (2008), p. 288. SWSP, Vol. X, Annex 538.

<sup>472</sup> Robert J. Antony, “Turbulent Waters: Sea Raiding in Early Modern South East Asia”, *The Mariner’s Mirror*, Vol. 99, No. 1 (Feb. 2013), p. 29. SWSP, Vol. XI, Annex 548.

<sup>473</sup> *Id.*, p. 29.

<sup>474</sup> Angus Konstam, *Piracy: The Complete History* (2008), p. 290. SWSP, Vol. X, Annex 538.

<sup>475</sup> Robert J. Antony, “Turbulent Waters: Sea Raiding in Early Modern South East Asia”, *The Mariner’s Mirror*, Vol. 99, No. 1 (Feb. 2013), p. 30. SWSP, Vol. XI, Annex 548.

<sup>476</sup> *Id.*, p. 27.

<sup>477</sup> *Id.*

particularly active in suppressing piracy, which threatened their ambitions to monopolize the spice trade.<sup>478</sup>

A13.30. By the late 18th century, the problem “seemed to have got out of control in the South China Sea”; evidently, by 1802 there were “more than 50,000 pirates roving around the South China Sea”.<sup>479</sup> Contemporary sources described their pervasive presence. The *New York Times* published a letter in 1853 from the U.S.S. *Supply* detailing the extent of piracy in the South China Sea:

In the China Sea we passed numerous picturesque islands, with which nothing of interest is connected, except that Malay pirates lurk around them, ready to pounce upon any vessel unprepared for them. In truth, the whole sea, from the mouths of the Tigris to every quarter, is a nest of pirates, who can only be swept from their cruising grounds by a force of light-draft steamers, carrying a long gun or two each. This class of vessels would be of more actual service here than all the sailing vessels that ever were on the station.<sup>480</sup>

A13.31. In response, “European maritime powers brought their naval might to bear on the problem of piracy ... [A] combination of colonial police work, maritime steam power and shell-firing naval ordnance brought an end to a thousand years of pirate domination in the South China Sea”.<sup>481</sup> In 1824, the Netherlands and the U.K. signed a treaty agreeing to “engage to concur effectually in repressing piracy”.<sup>482</sup> And “[b]eginning in 1836 the British and other European powers began to adopt effective piracy-suppression campaigns” in the South China Sea.<sup>483</sup> As a demonstration of the depth of its commitment to suppressing piracy, Britain went so far as to acquire Labuan Island off the coast of Brunei “as a base ... for the

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<sup>478</sup> *Id.*, p. 24.

<sup>479</sup> Robert J. Antony, “Giang Binh: Pirate Haven and Black Market on the Sino-Vietnamese Frontier, 1780-1802” in *Pirates, Ports, and Coasts in Asia: Historical and Contemporary Perspectives* (J. Kleinen & M. Osseweijer, eds., 2010), p. 33. SWSP, Vol. X, Annex 542.

<sup>480</sup> “China: The Voyage - The China Sea - Macao - Cumsingmoon, &c. &c.”, *New York Times* (10 Feb. 1853), p. 1. SWSP, Vol. XI, Annex 557.

<sup>481</sup> Angus Konstam, *Piracy: The Complete History* (2008), p. 290. SWSP, Vol. X, Annex 538.

<sup>482</sup> Treaty between United Kingdom and the Netherlands, respecting Territory and Commerce in the East Indies (17 Mar. 1824), reprinted in *The Edinburgh Annual Register, for 1824*, Vol. 17, Parts 1-3 (1825), Arts. 2, 27. SWSP, Vol. IX, Annex 503.

<sup>483</sup> Robert J. Antony, “Turbulent Waters: Sea Raiding in Early Modern South East Asia”, *The Mariner’s Mirror*, Vol. 99, No. 1 (Feb. 2013), p. 36. SWSP, Vol. XI, Annex 548.



suppression of piracy...”.<sup>484</sup> The European campaigns were “so successful” by 1860 “that piracy ceased being a serious problem in South East Asia”.<sup>485</sup>

A13.32. China, by contrast, was not engaged in anti-piracy activities in the South China Sea.<sup>486</sup> There is no evidence that it ever attempted to exercise jurisdiction over the Sea’s waters beyond the immediate area of its mainland coast.

### ***C. Viet Nam’s Control of Part of the South China Sea***

A13.33. Prior to France’s establishment of a protectorate in Viet Nam in 1884,<sup>487</sup> as an independent Vietnamese kingdom exercised control in the northern part of the South China Sea. This began when the *Doi Hoang Sa* society was founded in the early 1800s to exploit the Paracels for commercial purposes.<sup>488</sup> Among other things, it exercised a degree of control over the adjacent maritime space, as indicated by the fact that it forced passing vessels to provide goods. The society’s flotilla was comprised of

70 sailors selected from An Vinh commune on a rotational basis. Selected sailors receive their conscription-labor order in the first lunar month of the year. The Hoang Sa Flotilla’s sailors are provided individually with food sufficient for six months, and they sail on five small fishing boats for three full days to reach the islands (that is Hoang Sa archipelago). Once settled down on the islands, they are free to catch as many birds and fish as they like for food. They collect goods such as bronze sabres and copper horses, jewelries, silver money, silver rings, copper products, tin ingots, black lead, guns, ivory, golden beeswax, fur and porcelain items, and so on. They also collect plenty of sea turtle shells, sea cucumbers, and volute shells.

The Hoang Sa Flotilla returns to the mainland in the eighth month through Eo seaport. On their return trip, they sail to Phu

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<sup>484</sup> A. V. M. Horton, “British Administration in Brunei 1906-1959”, *Modern Asian Studies*, Vol. 20, No. 2 (1986), p. 355. SWSP, Vol. X, Annex 522.

<sup>485</sup> Robert J. Antony, “Turbulent Waters: Sea Raiding in Early Modern South East Asia”, *The Mariner’s Mirror*, Vol. 99, No. 1 (Feb. 2013), p. 36. SWSP, Vol. XI, Annex 548.

<sup>486</sup> Hong-kay Lung, “Britain and the Suppression of Piracy on the Coast of China, with Special Reference to the Vicinity of Hong Kong 1842-1870” (2001), pp. 47-48. SWSP, Vol. X, Annex 531.

<sup>487</sup> Treaty between France and Annam (“Patenote Treaty”), 6 June 1884, Art. 1(2). MP, Vol. XI, Annex LA-68.

<sup>488</sup> *Note Verbale* from Ministry of Foreign Affairs, Republic of France, to the Chinese Legation to Paris (4 Jan. 1932), p. 2. SWSP, Vol. IX, Annex 504.

Xuan Citadel to submit the goods they have collected offshore.<sup>489</sup>

Records from detail the booty collected during the expeditions.<sup>490</sup> Chinese documents from the time also appear to recognize a link between the Paracels and Viet Nam.<sup>491</sup> This tradition was continued by the Nguyen Emperor, Gia Long,<sup>492</sup> under whose authority the Vietnamese flag was planted on the Paracels in 1816.<sup>493</sup>

A13.34. In 1834, the Nguyen court issued a chart indicating that the area in which the Paracel Islands are located belonged to the Nguyen lords.<sup>494</sup> The following year, Emperor Minh Mang ordered that a pagoda and a stele be erected on one of the islands.<sup>495</sup> In the mid-1800s, foreigners recognized that the Paracels and their adjacent maritime area were claimed by the “King of Cochin-China”, the ruler of part of present-day Viet Nam, who “ke[pt] revenue cutters and a small garrison [in the Paracels] to collect the duty on all visitors, and to ensure protection to its own fishermen”.<sup>496</sup> These patrol boats were observed as early as the 1750s by a French explorer in the Paracels.<sup>497</sup>

A13.35. Vietnamese individuals and government officials were also involved in rescuing European ships in distress. In 1714, Vietnamese fishermen in the Paracel Islands rescued Dutch sailors who were the victims of a shipwreck; the Dutch sailors were later brought to meet the rulers of the area.<sup>498</sup> In 1830, sailors on a European boat wrecked in the Paracels

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<sup>489</sup> D.K. Phuc, et al., *Vietnam’s National Sovereignty over Hoang Sa (Paracel) and Truong Sa (Spratly) Archipelagoes*, p. 39. SWSP, Vol. XI, Annex 551.

<sup>490</sup> *See id.*

<sup>491</sup> See Nha Nguyen, *Process of Establishing Vietnam’s Sovereignty over the Hoang Sa (Paracel) and Truong Sa (Spratly) Archipelagoes* (2002), pp. 47-50. SWSP, Vol. X, Annex 533.

<sup>492</sup> Socialist Republic of Viet Nam, National Boundary Commission, “On Viet Nam’s Sovereignty over Hoang Sa and Truong Sa Archipelagoes”, in *Paracel & Spratly Islands Belong to Viet Nam: Historical Evidence and Legal Grounds*, p. 18. SWSP, Vol. VIII, Annex 499.

<sup>493</sup> *Note Verbale* from Ministry of Foreign Affairs, Republic of France, to the Chinese Legation to Paris (4 Jan. 1932), p. 2. SWSP, Vol. IX, Annex 504.

<sup>494</sup> Dieter Heinzig, *Disputed Islands in the South China Sea: Paracels - Spratlys - Pratas - Macclesfield Bank* (1976), p. 24-25. SWSP, Vol. IX, Annex 520.

<sup>495</sup> *Note Verbale* from Ministry of Foreign Affairs, Republic of France, to the Chinese Legation to Paris (4 Jan. 1932), p. 2. SWSP, Vol. IX, Annex 504.

<sup>496</sup> Charles Gutzlaff, “Geography of the Cochin-Chinese Empire”, *Journal of the Royal Geographical Society of London*, Vol. 19 (1849), p. 93. SWSP, Vol. IX, Annex 516.

<sup>497</sup> Vu Phi Hoang, *Hoang Sa (Paracel) and Truong Sa (Spratly) Archipelagoes: Vietnam’s Territory* (1988), p. 46. SWSP, Vol. X, Annex 524.

<sup>498</sup> *Id.*, p. 45.

were rescued by Vietnamese.<sup>499</sup> Following another disaster in 1836, Viet Nam's Nguyen rulers attempted to save a British merchant ship carrying 90 sailors.<sup>500</sup> There is no evidence that China or its rulers challenged the assertion or exercise of authority by the Vietnamese over these South China Sea waters.

#### ***D. Chinese Activities During the Colonial Era***

A13.36. Had China continuously exercised sovereignty or rights in the South China Sea, this would be expected to manifest itself in the historic record. There are no such records, however. As one historian has observed, “[f]or the entire Ming [Dynasty, from 1368 to 1644,] until the late Qing [Dynasty, which lasted from 1644 to 1911], records of government-sanctioned activities [in] the [South China Sea] archipelagos are absent in Chinese sources, representing a consistent silence in Chinese historiography”.<sup>501</sup>

A13.37. In fact, for much of this period, China forbade its people from engaging in maritime trade. When the Qing (Manchu) dynasty came to power, “trade was severely inhibited in part by a prohibition on sea commerce promulgated in 1661”. The closure of the coast from 1662 to 1683 “severed the trade links between Guangdong and the Nanyang [the old Chinese term for the countries of Southeast Asia]”.<sup>502</sup> A brief “period (1684-1759) of openness followed, only to be reversed ... in 1760 when the government restricted all relations with Western traders to the port of Canton (Guangzhou)”.<sup>503</sup>

A13.38. China maintained, at best, a minimal presence in the South China Sea during in the 19th century. As one historian has observed:

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<sup>499</sup> Socialist Republic of Viet Nam, National Boundary Commission, “On Viet Nam’s Sovereignty over Hoang Sa and Truong Sa Archipelagos”, in *Paracel & Spratly Islands Belong to Viet Nam: Historical Evidence and Legal Grounds*, pp. 20-21. SWSP, Vol. VIII, Annex 499.

<sup>500</sup> *Id.*, p. 25.

<sup>501</sup> Ulises Granados, “The South China Sea and Its Coral Reefs During the Ming and Qing Dynasties: Levels of Geographical Knowledge and Political Control”, *East Asia History*, Vol. 32/33 (Dec. 2006/Jan. 2007), p. 122. SWSP, Vol. X, Annex 537.

<sup>502</sup> Robert B. Marks, “Maritime Trade and the Agro-Ecology of South China, 1685-1850”, in *Pacific Centuries: Pacific and Pacific Rim history since the sixteenth century* (D.O. Flynn, et al., eds., 1999), p. 89. SWSP, Vol. X, Annex 529.

<sup>503</sup> Ulises Granados, “Modernization and Regionalism in South China: Notes on Coastal Navigation in Guangdong Province During the Late Nineteenth and Early Twentieth Century”, *International Journal of Maritime History*, Vol. XXIV, No. 1 (June 2012), p. 95. SWSP, Vol. XI, Annex 545.

In ... Southeast Asian countries where the [Chinese] junk trade previously flourished, Chinese participation by the end of the nineteenth century was limited to activities other than transport, which increasingly was in foreign hands. By 1870, [for example,] the Chinese junk trade had ceased to the Philippines

<sup>504</sup>  
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### III. The Late Nineteenth and Early Twentieth Centuries

A13.39. The beginning of the 20th century saw a surge of activity with regard to claims to maritime features in the South China Sea. Even Germany, which had no colony in Southeast Asia, “sent a military detachment to the Spratlys in 1883 to carry out survey work”.<sup>505</sup>

A13.40. Britain, having established a sphere of influence in northern Borneo in the 1860s,<sup>506</sup> sought to extend its naval and commercial dominance deeper into the South China Sea afterwards. For example, British vessels circumvented trade restrictions imposed by the Spanish and carried out commerce with the nearby island of Sulu, in present-day Philippines.<sup>507</sup> In 1877, Britain authorised the hoisting of the Union Jack over Spratly Island and Amboyna Cay.<sup>508</sup> The British Admiralty surveyed the entire area; in 1888, the U.K. published a chart showing the principal reefs in the Spratly Islands.<sup>509</sup> There are no recorded protests from China.

A13.41. In the latter part of the 19th century, France, as colonial power in Viet Nam, took interest in some of the Spratly Islands, and in the Paracel Islands. It made plans to build a lighthouse in the Paracels in 1899.<sup>510</sup> China made no protest over French activity in the Spratlys or the adjacent waters. Around the turn of the century, however, the “Qing government ordered the regional authorities in Guangdong to organize ... [a] patrol to” the

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<sup>504</sup> *Id.*, p. 110.

<sup>505</sup> Dieter Heinzig, *Disputed Islands in the South China Sea: Paracels - Spratlys - Pratas - Macclesfield Bank* (1976), p. 25. SWSP, Vol. IX, Annex 520.

<sup>506</sup> Leigh R. Wright, *The Origins of British Borneo* (1970), pp. 30, 38. SWSP, Vol. IX, Annex 519.

<sup>507</sup> *Id.*, pp. 31, 39.

<sup>508</sup> Letter from Foreign Office, United Kingdom, to the Law Officers of the Crown, United Kingdom (29 July 1932), pp. 1-2. SWSP, Vol. III, Annex 361.

<sup>509</sup> D. Hancox and V. Prescott, “A Geographical Description of the Spratly Islands and an Account of Hydrographic Surveys Amongst Those Islands”, *IBRU Maritime Briefing*, Vol. 1, No. 6 (1995), p. 35. MP, Vol. VIII, Annex 256.

<sup>510</sup> Ulises Granados, “As China Meets the Southern Sea Frontier: Ocean Identity in the Making, 1902-1937”, *Pacific Affairs*, Vol. 78, No. 3 (2005), pp. 445-447. SWSP, Vol. X, Annex 535.

Pratas and Paracel Islands.<sup>511</sup> In 1902 or 1909 (the date is unclear), China reportedly sent an expedition to the Paracels, allegedly hoisting Chinese flags on some islands and erecting a stone monument on one of them.<sup>512</sup> However, there was no accompanying claim of rights in the adjacent maritime area, let alone to the other islands or waters of the South China Sea. France persisted in its claims. In 1925, the Vietnamese royal court, under French protection, claimed the islands as part of the territory of Annam.<sup>513</sup> And in 1927, “the French Indochina authorities sent the ship *De Lanessan* to the [Spratlys], and later in 1929 the ship *La Malicieuse* anchored in [the] waters [around the Paracels] and surveyed Triton Island, North Reef, Lincoln Island and Bombay Island”.<sup>514</sup> In 1933 it claimed sovereignty over Spratly Island, Amboyna Cay, Itu Aba, North Danger Reef, Loaita and Thitu.<sup>515</sup>

A13.42. Japan also established a presence in the South China Sea. In 1917, “a Japanese company began to fish the waters around the Spratlys”.<sup>516</sup> In the Pratas Islands, Japanese vessels also undertook fishing activities.<sup>517</sup> By the mid-1930s, Japanese companies were claiming special rights over the Spratlys for the purpose of exploiting whatever economic potential could be derived from them.<sup>518</sup> In 1937, Japan moved to occupy some of the Paracel Islands, reportedly shooting at Chinese fishermen present in the area, which prompted a Chinese field investigation.<sup>519</sup>

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<sup>511</sup> *Id.*, p. 447.

<sup>512</sup> See Dieter Heinzig, *Disputed Islands in the South China Sea: Paracels - Spratlys - Pratas - Macclesfield Bank* (1976), p. 26. SWSP, Vol. IX, Annex 520; and Ulises Granados, “The South China Sea and Its Coral Reefs During the Ming and Qing Dynasties: Levels of Geographical Knowledge and Political Control”, *East Asia History*, Vol. 32/33 (Dec. 2006/Jan. 2007), p. 109. SWSP, Vol. X, Annex 537.

<sup>513</sup> Ulises Granados, “As China Meets the Southern Sea Frontier: Ocean Identity in the Making, 1902-1937”, *Pacific Affairs*, Vol. 78, No. 3 (2005), p. 451. SWSP, Vol. X, Annex 535.

<sup>514</sup> *Id.*

<sup>515</sup> Republic of France, Ministry of Foreign Affairs, “Notice relating to the occupation of certain islands by French naval units”, *Official Journal of the French Republic* (26 July 1933), at 7837. MP, Vol. VI, Annex 159.

<sup>516</sup> Dieter Heinzig, *Disputed Islands in the South China Sea: Paracels - Spratlys - Pratas - Macclesfield Bank* (1976), p. 27. SWSP, Vol. IX, Annex 520.

<sup>517</sup> Ulises Granados, “As China Meets the Southern Sea Frontier: Ocean Identity in the Making, 1902-1937”, *Pacific Affairs*, Vol. 78, No. 3 (2005), p. 450. SWSP, Vol. X, Annex 535.

<sup>518</sup> *Id.*, p. 459.

<sup>519</sup> Republic of China, Republican Government Military Commission, *Letter Regarding the Current Conditions on Xisha Islands and Enhancement of Construction and Management* (31 Aug. 1937), reprinted in *Archival Compilation on South China Sea Islands by Ministry of Foreign Affairs*, Vol. 1, Doc. No. II(1):072 (Republic of China Ministry of Foreign Affairs Research & Planning Committee ed.) (1995), p. 370. SWSP, Vol. VIII, Annex 477.

A13.43. Between the two world wars, Britain focused on exploiting the military utility of the South China Sea, especially in order to protect Singapore from potential Japanese designs. The British Admiralty surveyed parts of the South China Sea between 1931<sup>520</sup> and 1938<sup>521</sup> to identify shipping routes and a “safe concealed fleet anchorage”.<sup>522</sup> In 1937, the *H.M.S. Herald* surveyed a number of the larger Spratly features for military purposes during a voyage between Hong Kong and Singapore.<sup>523</sup>

A13.44. China did not protest any of the British, French or Japanese activities south of the Paracels, or claim to enjoy sovereignty over, or to have historic rights to, the waters of the South China Sea. Indeed, a late 1920s official Chinese mission to the Paracel Islands to survey their economic potential reported that they were “the southernmost point of the country”.<sup>524</sup> A 1933 memorandum from the Republic of China’s National Defence Committee Secretariat similarly recognized that “the southernmost territory of China is Triton Island of Xisha [Paracel] Islands”.<sup>525</sup> The memorandum also stated that although “Chinese people have long utilized the [Spratlys] for their livelihood, ... it is neither clear whether there have been political, transportation or commercial facilities on the islands, nor whether any declaration has been made to the outside world”.<sup>526</sup> In the 1930s, a Chinese Foreign Ministry document admitted that China’s “doubts concerning [Viet Nam’s] territorial claims” to the Paracels were of “[r]ecent” vintage.<sup>527</sup>

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<sup>520</sup> D. Hancox and V. Prescott, *Secret Hydrographic Surveys in the Spratly Islands* (1999), p. 59. MP, Vol. VIII, Annex 261.

<sup>521</sup> *Id.*, p. 115.

<sup>522</sup> *Id.* pp. 184-185.

<sup>523</sup> See generally Memorandum from Commanding Officer, H.M.S. “Herald”, to Commander-in-Chief, China Station, British Royal Navy (3 May 1937). SWSP, Vol. III, Annex 370.

<sup>524</sup> Ulises Granados, “As China Meets the Southern Sea Frontier: Ocean Identity in the Making, 1902-1937”, *Pacific Affairs*, Vol. 78, No. 3 (2005), p. 450 (emphasis in original). SWSP, Vol. X, Annex 535.

<sup>525</sup> Republic of China, National Defense Committee Secretariat, *Statement of Opinions Based on Research of Military Relevance and Methods Regarding the Nine French-Occupied Islands* (1 Sept. 1933), reprinted in *Archival Compilation on South China Sea Islands by Ministry of Foreign Affairs*, Vol. 1, Doc. No. II(1):072 (Republic of China Ministry of Foreign Affairs Research & Planning Committee, ed.) (1995), p. 103. SWSP, Vol. VIII, Annex 475.

<sup>526</sup> *Id.*, pp 103-104.

<sup>527</sup> Letter from the Embassy of the Republic of China in Paris to the Ministry of Foreign Affairs of the Republic of China (20 Jan. 1947), reprinted in *Archival Compilation on South China Sea Islands by Ministry of Foreign Affairs*, Vol. 1, Doc. No. II(2):199 (Republic of China Ministry of Foreign Affairs Research & Planning Committee, ed.) (1995), p. 446. SWSP, Vol. VIII, Annex 483.

A13.45. A 1937 report by the Republican Government Military Commission again confirmed China's position that the Paracels were the "southernmost territory of our country".<sup>528</sup> Research undertaken by the Chinese government in 1947 proved unable to support a Chinese claim to sovereignty further south than Hainan Island.<sup>529</sup> To the contrary, research carried out in the 1940s in response to a request from the Chinese Ministry of Foreign Affairs revealed that "[a]ll records and maps about [China's] national territory suggest[] that the country extended to Qiongzhou [Hainan] Island in the south".<sup>530</sup>

#### IV. The Period Since World War II

A13.46. At the outset of World War II, Japan claimed all the features in the South China Sea.<sup>531</sup> It incorporated the Spratlys into its jurisdiction in March 1939.<sup>532</sup> And the Japanese

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<sup>528</sup> Republic of China, Republican Government Military Commission, *Letter Regarding the Current Conditions on Xisha Islands and Enhancement of Construction and Management* (31 Aug. 1937), reprinted in *Archival Compilation on South China Sea Islands by Ministry of Foreign Affairs*, Vol. 1, Doc. No. II(1):072 (Republic of China Ministry of Foreign Affairs Research & Planning Committee, ed.) (1995), p. 370. SWSP, Vol. VIII, Annex 477.

<sup>529</sup> *Telegram* from Special Agent Office of the Ministry Foreign Affairs of the Republic of China in Pingjin to the Ministry of Foreign Affairs of the Republic of China (7 Feb. 1947), reprinted in *Archival Compilation on South China Sea Islands by Ministry of Foreign Affairs*, Vol. 1, Doc. No. II(2):248 (Republic of China Ministry of Foreign Affairs Research & Planning Committee, ed.) (1995), p. 514. SWSP, Vol. VIII, Annex 484.

<sup>530</sup> *Id.* Other Chinese government documents indicate that various government ministries were not confident in the accuracy of their knowledge about certain of the island groups. See *Letter* from Ministry of the Foreign Affairs of the Republic of China to the Ministry of Interior and the Ministry of Defense of the Republic of China (20 Sept. 1946), reprinted in *Archival Compilation on South China Sea Islands by Ministry of Foreign Affairs*, Vol. 2, Doc. No. III(1):006 (Republic of China Ministry of Foreign Affairs Research & Planning Committee, ed.) (1995), pp. 762-763. SWSP, Vol. VIII, Annex 478; Republic of China, Executive Yuan [Branch], *Order* (29 Sept. 1946), reprinted in *Archival Compilation on South China Sea Islands by Ministry of Foreign Affairs*, Vol. 2, Doc. No. III(1):007 (Republic of China Ministry of Foreign Affairs Research & Planning Committee, ed.) (1995). SWSP, Vol. VIII, Annex 479; *Letter* from Ministry of the Foreign Affairs of the Republic of China to the Ministry of Interior of the Republic of China (1 Oct. 1946), reprinted in *Archival Compilation on South China Sea Islands by Ministry of Foreign Affairs*, Vol. 2, Doc. No. III(1):008 (Republic of China Ministry of Foreign Affairs Research & Planning Committee, ed.) (1995). SWSP, Vol. VIII, Annex 481; *Letter* from Ministry of the Interior of the Republic of China to the Ministry of Foreign Affairs of the Republic of China (9 Oct. 1946), reprinted in *Archival Compilation on South China Sea Islands by Ministry of Foreign Affairs*, Vol. 2, Doc. No. III(1):009 (Republic of China Ministry of Foreign Affairs Research & Planning Committee, ed.) (1995). SWSP, Vol. III, Annex 351.

<sup>531</sup> *Memorandum* from Japan to the United States (31 Mar. 1939). SWSP, Vol. III, Annex 381.

<sup>532</sup> *Note Verbale* from the Embassy of Japan in Washington to the United States Department of State (31 Mar. 1939), in *Papers relating to the Foreign Relations of the United States, Japan: 1931-1941*, Vol. 2 (1943), pp. 278-80. MP, Vol. VI, Annex 172.

navy took effective control of the Sea shortly after the war began.<sup>533</sup> When Japan was defeated, it renounced its claims to the Spratlys and the Paracels.<sup>534</sup>

A13.47. As the war was ending, the Chinese nationalist government began to assert territorial claims to the South China Sea. As is discussed in more detail in the Philippines' response to Question 14,<sup>535</sup> in 1947 the Chinese nationalist government circulated a map internally which indicated the features that should be included within "scope of takeover,"<sup>536</sup> planned by the government. This followed upon the government's occupation of Itu Aba in 1946.<sup>537</sup> The nationalist government did not occupy any other features, and abandoned Itu Aba in 1950, only to return in 1956.<sup>538</sup>

A13.48. After the war, all coastal States resumed their normal navigational, fishing and other commercial activities. Vessels from the Philippines fished freely in the South China Sea, primarily within 200 M of the main Philippine islands, including at Scarborough Shoal and in the Spratlys. Fishing vessels from Viet Nam concentrated their efforts off the Vietnamese coast and in the Paracel Islands,<sup>539</sup> as well as the Spratlys.<sup>540</sup> Vessels from Malaysia also fished in the Spratlys.<sup>541</sup> Chinese fishermen also fished throughout these waters. But China made no documented effort to control or regulate these activities, and, in fact, it did not control or regulate the activities of non-Chinese fishermen or vessels.

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<sup>533</sup> See Stein Tønnesson, "An International History of the dispute in the South China Sea", *East Asian Institute Working Paper Series*, No. 71 (16 Mar. 2001), p. 8. MP, Vol. VIII, Annex 273.

<sup>534</sup> Treaty of Peace with Japan ("Treaty of San Francisco"), 136 U.N.T.S. 45 (8 Sept. 1951), entered into force 28 Apr. 1952, Art. 2(f). MP, Vol. XI, Annex LA-72.

<sup>535</sup> See *infra* para. A14.22.

<sup>536</sup> Letter from Ministry of the Interior of the Republic of China to the Ministry of Foreign Affairs of the Republic of China (9 Oct. 1946), reprinted in *Archival Compilation on South China Sea Islands by Ministry of Foreign Affairs*, Vol. 2, Doc. No. III(1):009 (Republic of China Ministry of Foreign Affairs Research & Planning Committee, ed.) (1995), pp. 767-768. SWSP, Vol. III, Annex 351; Letter from the Ministry of Foreign Affairs of the Republic of China to the Ministry of the Interior of the Republic of China (1 Oct. 1946), reprinted in *Archival Compilation on South China Sea Islands by Ministry of Foreign Affairs*, Vol. 2, Doc. No. III(1):008 (Republic of China Ministry of Foreign Affairs Research & Planning Committee, ed.) (1995), pp. 767-768. SWSP, Vol. VIII, Annex 480.

<sup>537</sup> Bill Hayton, *The South China Sea: The Struggle for Power in Asia* (2014), p. 58. SWSP, Vol. V, Annex 459.

<sup>538</sup> *Id.*, p. 70; Marwyn S. Samuels, *Contest for the South China Sea* (1982), p. 76-77. SWSP, Vol. V, Annex 246(bis).

<sup>539</sup> See Ha Anh Tuan, "The Tragedy of Vietnamese Fishermen: The Forgotten Faces of Territorial Disputes in the South China Sea", *Asia Journal of Global Studies*, Vol. 5, No. 2 (2012-2013), pp. 100-101. MP, Vol. IX, Annex 305.

<sup>540</sup> See Nguyen Dang Thang, "Fisheries Co-operation in the South China Sea and the (Ir)relevance of the Sovereignty Question", *Asian Journal of International Law*, Vol. 2, No. 1 (2011), p. 63. MP, Vol. IX, Annex 299.

<sup>541</sup> See *id.*



A13.49. In the 1970s, the Philippines and Viet Nam began sending their armed forces to occupy some of the larger features in the Spratlys;<sup>542</sup> Malaysia followed suit later in the decade.<sup>543</sup> In particular, the Philippines occupied Commodore Reef, Flat Island, Lankiam Cay, Loaita, Nanshan, Northeast Cay, Second Thomas Shoal, Thitu and West Work; Viet Nam occupied Alison Reef, Amboyna Cay, Barque Canada Reef, Central London Reef, Collins Reef, Cornwallis South Reef, East London Reef, Great Discovery Reef, Grierson Reef (Sin Cowe East), Ladd Reef, Landsdowne Reef, Namyit Island, Pearson Reef, Petley Reef, Pigeon (Tennent) Reef, Sand Cay, Sin Cowe Island, Southwest Cay, Spratly Island and West London Reef; and Malaysia took over Ardasier Reef, Dallas Reef, Erica Reef, Investigator Shoal, Mariveles Reef, and Swallow Reef.<sup>544</sup>

A13.50. China was a latecomer to the scene. It sent its armed forces to establish a presence in the Spratlys for the first time only in 1988. In that year, it commenced its occupation of five features, all of which were either low-tide elevations or small rocky protrusions: McKennan Reef,<sup>545</sup> Gaven Reef,<sup>546</sup> Johnson Reef,<sup>547</sup> Cuarteron Reef<sup>548</sup> and Fiery Cross Reef.<sup>549</sup> At Johnson Reef Chinese forces displaced the Vietnamese troops who had previously occupied the feature, reportedly killing dozens of Vietnamese in the process.<sup>550</sup>

A13.51. Although the PRC claimed sovereignty over all the Spratlys, it extended its presence beyond these five features only to Mischief Reef, a low-tide elevation, in 1995,<sup>551</sup> and to Second Thomas Shoal, a low tide elevation, in 2013 (after these proceedings were commenced).<sup>552</sup> China has not been able to exercise sovereignty, sovereign rights or historic rights in respect of any other maritime feature in the Spratlys, or over the adjacent waters, beyond those its armed forces have physically occupied.

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<sup>542</sup> Zhiguo Gao, “The South China Sea: From Conflict to Cooperation?”, *Ocean Development and International Law*, Vol. 25, No. 3 (1994), p. 346. MP, Vol. VII, Annex 255.

<sup>543</sup> *Id.*

<sup>544</sup> *See* SWSP, Vol. II.

<sup>545</sup> Memorial, para. 5.67.

<sup>546</sup> *Id.*, para. 5.72.

<sup>547</sup> *Id.*, para. 5.90.

<sup>548</sup> *Id.*, para. 5.92.

<sup>549</sup> *Id.*, para. 5.94.

<sup>550</sup> E. Wong & J. Ansfield, “To Bolster Its Claims, China Plants Islands in Disputed Waters”, *New York Times* (16 June 2014). SWSP, Vol. XI, Annex 565.

<sup>551</sup> *See* Memorial, paras. 5.63-5.65.

<sup>552</sup> *See id.*, paras. 3.59-3.67, 5.61-5.62.

A13.52. In respect of the waters, China did not make public or explicit claims to sovereignty, sovereign rights or historic rights in the maritime area encompassed by the nine-dash line until 2009. The original dashed line, dating from 1947, was understood internationally, to the extent other States were aware of it, only as asserting a Chinese claim to the insular features of the South China Sea, not to all of the waters.<sup>553</sup> China's 1958 Declaration on the Territorial Sea recognized that the islands south of Hainan that it then claimed, including the Spratly Islands, were "separated from the mainland ... by the high seas".<sup>554</sup> This was reaffirmed in China's 1992 law on the Territorial Sea and Contiguous Zone.<sup>555</sup> China 1998 Law on the Exclusive Economic Zone and Continental Shelf was the first to claim *any* historic rights, and even then China did not expressly claim any such rights in South China Sea.<sup>556</sup> The Law simply stated in general terms: "The provisions of this Act shall not affect the historical rights of the People's Republic of China".<sup>557</sup> There was no explanation of what those rights were, or where they were located.

A13.53. As the Philippines has explained in the Memorial, China's first public claim to sovereignty, sovereign rights and historic rights in the waters of the South China Sea encompassed by the nine-dash line was contained in two *Notes Verbales* to the Secretary General of the United Nations dated 7 May 2009. One was in response to the joint submission of Malaysia and Viet Nam to the CLCS, the other to a separate submission of Viet Nam, in which those States provided information on their continental shelf beyond 200 M. China's *Notes Verbales* stated that China has "indisputable sovereignty over the islands of the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof (*see attached map*)".<sup>558</sup>

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<sup>553</sup> See *supra* para. 15.13. See also *infra* paras. A14.22-A14.23.

<sup>554</sup> People's Republic of China, *Declaration of the Government of the People's Republic of China on China's Territorial Sea* (4 Sept. 1958), in *Collection of the Sea Laws and Regulations of the People's Republic of China* (3rd ed. 2001), Art. 1. MP, Vol. V, Annex 103.

<sup>555</sup> Memorial, para. 3.15.

<sup>556</sup> People's Republic of China, *Exclusive Economic Zone and Continental Shelf Act* (26 June 1998), Art. 14. MP, Vol. V, Annex 107.

<sup>557</sup> *Id.*

<sup>558</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), p. 2 (emphasis in original). 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), p. 2 (emphasis in original). MP, Vol. VI, Annex 192.

A13.54. China's claim met strong reactions by the other South China Sea coastal States. The Philippines, observing that China's *Notes Verbales* touched "not only on the sovereignty of the islands *per se* and '*the adjacent waters*' in the South China Sea, but also on the other '*relevant waters as well as the seabed and subsoil thereof*' as indicated in the map attached", stated that China's claims "have no basis under international law, specifically UNCLOS".<sup>559</sup> Viet Nam protested that "China's claim over the islands and adjacent waters in the Eastern Sea (South China Sea) as manifested in the map ... has no legal, historical or factual basis, therefore is null and void".<sup>560</sup> Indonesia also rejected the Chinese map, emphasizing that, in the absence of a "clear explanation as to [its] legal basis, the method of drawing, and the status of those separated dotted-lines", the "so called 'nine-dotted-lines map' ... clearly lacks international legal basis and is tantamount to upset the UNCLOS 1982".<sup>561</sup> Malaysia opposed China's claims by insisting that its joint submission with Viet Nam "conform[s] to the pertinent provisions of UNCLOS 1982".<sup>562</sup> Since these protests were made, no South China Sea State has agreed to, or accepted, or acquiesced in China's claim. Nor has any other State endorsed or supported China's claim.

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<sup>559</sup> *Note Verbale* from the Permanent Mission of the Republic of the Philippines to the United Nations to the Secretary-General of the United Nations, No. 000228 (5 Apr. 2011), pp. 2, 4 (emphasis in original). MP, Vol. VI, Annex 200.

<sup>560</sup> *Note Verbale* from the Permanent Mission of the Socialist Republic of Vietnam to the United Nations to the Secretary-General of the United Nations, No. 86/HC-2009 (8 May 2009). MP, Vol. VI, Annex 193.

<sup>561</sup> *Note Verbale* from the Permanent Mission of the Republic of Indonesia to the United Nations to the Secretary-General of the United Nations, No. 480/POL-703/VII/10 (8 July 2010), pp. 1-2. MP, Vol. VI, Annex 197.

<sup>562</sup> *Note Verbale* from the Permanent Mission of Malaysia to the United Nations to the Secretary-General of the United Nations, No. HA 24/09 (20 May 2009), p. 1. MP, Vol. VI, Annex 194. The United States has taken a similar position. Citing "an incremental effort by China to assert control over the area contained in the so-called 'nine-dash line', despite the objections of its neighbors", the United States stated that under international law "all maritime claims must be derived from land features and otherwise comport with the international law of the sea ... [C]laims in the South China Sea that are not derived from land features are fundamentally flawed ... Any use of the 'nine-dash line' by China to claim maritime rights not based on claimed land features would be inconsistent with international law". United States, House Committee on Foreign Affairs, Subcommittee on Asia and the Pacific, "Testimony of Daniel Russel, Assistant Secretary of State Bureau of East Asian and Pacific Affairs at the U.S. Department of State" (5 Feb. 2014), pp. 2-3. MP, Vol. VI, Annex 170.



## APPENDIX TO RESPONSE TO QUESTION 14

A14.1. The Philippines has prepared this Appendix to assist the Tribunal in interpreting the maps that are presented in the historic atlas found in Volume VI.

A14.2. Section I describes the history of Chinese cartography as it relates to China's historical relationship, or lack thereof, with the South China Sea, demonstrating that for more than 700 years, until at least 1933, China did not consider the insular features of the South China Sea south of Hainan Island, or the waters themselves, to be part of China. Nor did China claim any rights to those waters during those seven centuries. The first map purporting to show Chinese sovereignty or rights in the South China Sea below Hainan Island was not prepared until 1933.

A14.3. Section II describes maps produced by the current littoral States of the South China Sea other than China, and their colonial predecessors. These maps confirm that, in the area south of Hainan Island, China was not understood to have claimed, or exercised, sovereignty or rights to the insular features or waters of the South China Sea.

A14.4. Finally, Section III describes maps showing oil and gas concessions in the South China Sea offered by countries in the region. It demonstrates that, until very recently, China had not issued offshore concessions beyond the areas immediately adjacent to Hainan Island. It also demonstrates that, whether before or after 2009 when China submitted its nine-dash line claim to the U.N., other countries did not consider China to have sovereign or historic rights to the seabed and subsoil of the South China Sea.

### **I. Maps Produced by China**

A14.5. Until the mid-twentieth century, the official maps produced by China did not make any claims to Chinese rights or sovereignty over the waters of the South China Sea or its various maritime features.

A14.6. The earliest map of China that the Philippines has been able to identify is a stone etching in Xi'an that was prepared in 1136, apparently based on the work of the geographer Jia Dan (贾耽), who lived from 729-805 C.E.<sup>563</sup> It depicts China during the Southern Song

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<sup>563</sup> Hyunhee Park, "A Buddhist Woodblock-printed Map in 13th Century China", *Crossroads: Studies on the History of Exchange Relations in the East Asian World*, Vol. 1/2 (2010), p. 17. SWSP, Vol. X, Annex 539.

Dynasty,<sup>564</sup> and is entitled the *Hua Yi Tu* (华夷图), which means *The Map of China and the Barbarian Countries*. The Philippines presents a copy, based on a rubbing done in 1933.<sup>565</sup> The map shows Hainan as the southernmost part of China. The South China Sea is not depicted.

A14.7. This is also the case for a map of China produced in 1389, the *Universal Map of the Great Ming Empire* (*Da Ming hun yi tu*, 大明混一图).<sup>566</sup> It depicts the Ming Empire as extending no further south than Hainan, and does not show the South China Sea.

A14.8. The *Territorial Atlas of the Great Ming Empire* (*Da Ming yu di tu*, 大明輿地图), produced between 1547 and 1559, depicts the Chinese empire during the reign of the Jiajing Emperor (1507-1567).<sup>567</sup> The two relevant panels of the Atlas are reproduced in Volume VI. The first is an overview map of the entire Chinese empire, which shows it did not extend further south than Hainan. The second panel shows Hainan in detail. None of the maritime features of the South China Sea are depicted.

A14.9. Another Ming atlas produced in 1601 during the reign of the Wanli Emperor (1563-1620) shows the same thing. It includes a map of what are now China's Guangdong and Hainan provinces,<sup>568</sup> but does not include a map indicating ownership of any of the South China Sea maritime features or the Sea itself. One of its panels depicts the South China Sea as being beyond China's boundary (*jie*, 界). It does this by depicting an undulating coastline at the top, the five arcs of which are labelled 云南界 (Yunnan boundary), 广西界 (Guangxi boundary), 琼崖界 (Qingya boundary), 广东界 (Guangdong boundary), and 福建界 (Fujian boundary), thereby indicating that the area beyond those lines, including the Sea, lies outside the listed imperial provinces.<sup>569</sup>

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<sup>564</sup> *Hua Yi Tu* [Map of China and the Barbarian Countries] (China, 1136 [c. 1933 rubbing]), available at <http://www.loc.gov/item/gm71005081/> (accessed 4 Mar. 2015). SWSP, Vol. VI, Annex M24.

<sup>565</sup> *Id.*

<sup>566</sup> Author unknown or unavailable, *Da Ming Hun Yi Tu* [Universal Map of Great Ming Empire] (China, 1389?). SWSP, Vol. VI, Annex M25.

<sup>567</sup> *Da Ming yu di tu* [The Territorial Atlas of the Great Ming Empire] (China, 1547 to 1559), available at <http://www.loc.gov/item/2002626776> (accessed 4 Mar. 2015). SWSP, Vol. VI, Annex M26.

<sup>568</sup> Junheng Zuo, "Leaf 20", in *Tian di tu* [Atlas of Heaven and Earth] (China, 1601), available at <http://www.loc.gov/resource/g7820m.gct00225/?sp=20> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M28.

<sup>569</sup> Junheng Zuo, "Leaf 6", in *Tian di tu* [Atlas of Heaven and Earth] (China, 1601), available at <http://www.loc.gov/resource/g7820m.gct00225/?sp=6> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M27.

A14.10. The 1602 *Map of the Ten Thousand Countries of the Earth* (*kun yu wan guo quan tu*, 坤輿万国全图), also known as the Matteo Ricci World Map,<sup>570</sup> which was produced in Beijing as part of a collaboration between Jesuit missionaries in China and Chinese imperial cartographers,<sup>571</sup> depicts the littoral of the South China Sea, but does not indicate or purport to claim Chinese sovereignty over the South China Sea or its features. The map identifies Hainan as the southernmost part of China.

A14.11. A circa 1619 map depicts China and insular Southeast Asia.<sup>572</sup> It illustrates trade route lines emanating from a point off of Quanzhou in Fujian Province. One route extends “southwest (*kunshen*, 坤申 or 232.5°) toward the Da Nang Peninsula (在港) and Hoi An (会安), off the coast of modern Viet Nam (Nguyen Cochinchina) between Thi Nai or Qui Nhon (新州) and Quang Nam (广南), the launching point for Southeast Asian trade”.<sup>573</sup> Another “is marked *bing* (丙, 165°) and heads toward Luzon and Manila”.<sup>574</sup> A third route goes from Guangzhou to Manila.<sup>575</sup>

A14.12. According to a cartographic expert, the map confirms that the “South China Sea [was] the central area for trade” among various Southeast Asian polities at the time.<sup>576</sup> The “Southern Sea or *Nanhai* is not identified at all”,<sup>577</sup> let alone identified as being Chinese. Consistent with the map’s purpose to show trade routes is the inclusion of hazards to navigation, specifically, “the outlines of the reefs and island of Pratas (南澳氣, *Nan’ao qi*), the Paracel Islands (萬里長沙似船帆樣, *Wanli chang sha si chuan fan yang*, ‘The Paracels

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<sup>570</sup> Matteo Ricci, Li Zhizao, engraver, *Kunyu wanguo quantu* [*Map of the Ten Thousand Countries of the Earth*] (China, 1602), available at <https://www.lib.umn.edu/bell/riccimap> (accessed 3 Mar. 2015) (western panel). SWSP, Vol. VI, Annex M29.

<sup>571</sup> Jerry Brotton, *Great Maps: The world’s masterpieces explored and explained* (2014), p. 127. SWSP, Vol. XI, Annex 550.

<sup>572</sup> *The Selden Map of China [East Asian Shipping Routes]* (China, c. 1609). SWSP, Vol. VI, Annex M30. This is referred to as the Selden Map because it was brought to Europe by the legal theorist John Selden.

<sup>573</sup> Robert Batchelor, “The Selden Map Rediscovered: A Chinese Map of East Asia Shipping Routes, c. 1619”, *Imago Mundi: The International Journal for the History of Cartography*, Vol. 65, No. 1 (24 Jan. 2013), p. 48. SWSP, Vol. XI, Annex 547.

<sup>574</sup> *Id.*

<sup>575</sup> *Id.*, p. 50.

<sup>576</sup> *Id.*

<sup>577</sup> *Id.*

resembling the shape of a sail'), and the Spratleys (萬里石塘, *Wanli shitang*)".<sup>578</sup> The islands are not indicated as belonging to China.

A14.13. This is consistent with a 1647 Chinese atlas, entitled *Look at Distant Places in the Palm of Your Hand* (*xia lan zhi zhang*, 暇览指掌), which does not depict the South China Sea; the southernmost area shown as being part of China is Hainan.<sup>579</sup>

A14.14. Unlike maps produced by European powers beginning in the mid-17th century, which demonstrate an increasing awareness of the various features in the South China Sea,<sup>580</sup> relatively few Chinese maps from this period show the Sea or its features in comparative detail.

A14.15. None of the Chinese maps indicate that the waters of the South China Sea or its features were part of the Chinese empire. An example is the *Kangxi Provincial Atlas of China* (*huang yu quan lan fen sheng tu*, 皇輿全覽分省图), named after the emperor during whose rule it was produced (from 1661 to 1722).<sup>581</sup> According to Professor Laura Hostetler, an expert on Chinese cartography, the Kangxi Atlas "does not depict and makes no mention of regions beyond the southern scope of the map (or empire)",<sup>582</sup> namely Hainan, which is depicted in the plate showing modern-day Guangdong and Hainan provinces.<sup>583</sup> This is notable because the atlas was intended to be a "comprehensive atlas" produced by a "survey [of] the entire empire".<sup>584</sup> The absence of the South China Sea is therefore indicative that the Sea and its features were not considered to fall within the Chinese empire. This is confirmed by the 1754-1760 *Provincial Atlas of the Great Qing Dynasty* (*Da Qing fen sheng yu tu*, 大清

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<sup>578</sup> *Id.*, p. 52.

<sup>579</sup> "Leaf 12", *Xia lan zhi zhang* [*Look at Distant Places in the Palm of Your Hand*] (China, 1647?), available at <http://www.loc.gov/resource/g7820m.gct00226/?sp=12> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M31.

<sup>580</sup> See *infra* Section A14.II.B.

<sup>581</sup> *Huang yu quan lan fen sheng tu* [*The Kangxi provincial atlas of China*] (China, 1721 to 1722), available at <http://www.loc.gov/item/2002626779/> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M32.

<sup>582</sup> Laura Hostetler, "Early Modern Mapping at the Qing Court: Survey Maps from the Kangxi, Yongzheng, and Qianlong Reign Periods" in *Chinese History in Geographical Perspective* (Y. Du and J. Kyong-McClain, eds., 2013), p. 25. MP, Vol. X, Annex 308.

<sup>583</sup> *Huang yu quan lan fen sheng tu* [*The Kangxi provincial atlas of China*] (China, 1721 to 1722), available at <http://www.loc.gov/item/2002626779/> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M32.

<sup>584</sup> Laura Hostetler, "Early Modern Mapping at the Qing Court: Survey Maps from the Kangxi, Yongzheng, and Qianlong Reign Periods" in *Chinese History in Geographical Perspective* (Y. Du and J. Kyong-McClain, eds., 2013), p. 27. MP, Vol. X, Annex 308.



分省輿图), which was designed to show the provinces under the control of the Qing Dynasty.<sup>585</sup>

A14.16. The Philippines has identified four Chinese maps from this period showing the Paracels and Spratlys. Two were produced in the 1790s. They are entitled, respectively, the *Complete Map of Astronomy and the Qing Empire* (*jing ban tian wen quan tu*, 京板天文全图)<sup>586</sup> and the *Complete Map of Imperial Territory* (*Yu di quan tu*, 輿地全图).<sup>587</sup> Both show a long spit of land to the south of Hainan, labelled 万里石塘 (*wan li shi tang*) and 万里长沙 (*wan li chang sha*), old Chinese names for the Spratlys and Paracels, respectively. The islands are located between lines that appear to depict sailing routes; the route to the west of the spit of land connects to features labelled 满刺加 (*man la jia*), 三齐国 (*san qi guo*), and 丁机宜 (*ding ji yi*). These are Ming Dynasty-era names for Malacca, Palembang (in Java), and Indragiri (in Sumatra).<sup>588</sup> This suggests that these maritime features were included to warn navigators to circumvent them whilst traveling to foreign ports. Two other maps, an 1811 map entitled *The Great Qing Dynasty's Complete Map of All Under Heaven* (*Da Qing wan nian yi tong tian xia quan tu* 大清万年一统天下全图)<sup>589</sup> and an 1814-1816 *Complete Geographical Map of the Great Qing Dynasty* (*Da Qing wan nian yi tong di li quan tu*, 大清万年一统地理全图),<sup>590</sup> also show the Spratlys and Paracels as lying between trade routes extending south from Hainan.

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<sup>585</sup> *Da Qing fen sheng yu tu* [Provincial Atlas of the Great Qing Dynasty] (China, 1754-1760), available at <http://www.loc.gov/item/2002626726/> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M33.

<sup>586</sup> Junliang Ma, *Jing ban tian wen quan tu* [Complete Map of Astronomy and the Qing Empire] (China, after 1790), available at <http://www.loc.gov/item/gm71005137/> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M34.

<sup>587</sup> *Yu di quan tu* [Complete Map of Imperial Territory] (China, 1798-1800), available at <http://www.loc.gov/item/gm71002353/> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M35.

<sup>588</sup> Zhang Xie, *Compilation of Historical Books on the History of Chinese-Foreign Exchange: Investigation of Eastern and Western Oceans* (1981, modern edition), pp. 293, 259. SWSP, Vol. IX, Annex 521.

<sup>589</sup> *Da Qing wan nian yi tong tian xia quan tu* [The Great Qing Dynasty's Complete Map of All Under Heaven] (China, 1811), available at <http://www.loc.gov/item/gm71005018/> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M36.

<sup>590</sup> *Da Qing wan nian yi tong di li quan tu* [Complete Geographical Map of the Great Qing Dynasty] (China, 1814-1816), available at <http://www.loc.gov/item/gm71005060/> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M37.

A14.17. Chinese maps from the 1800s through the appearance of the 11-dash line map in 1947<sup>591</sup> do not indicate Chinese claims to any of the South China Sea features or to the Sea itself. These include maps that were intended to depict the extent of the Chinese empire, which do not show Chinese claims south of Hainan. Examples include:

- the Qing Empire's 1842 *Complete Map of all Under Heaven* (*huang chao yi tong yu di quan tu*, 皇朝一统舆地全图),<sup>592</sup>
- the 1864 complete map of Guangdong Province,<sup>593</sup>
- a post-1885 Complete Map of The Twenty-Three Provinces of the Great Qing Dynasty (*Da Qing er shi san sheng yu di quan tu*, 大清二十三省舆地全图),<sup>594</sup>
- the 1896 *Complete Map of All Provinces* (*huang chao zhi sheng yu di quan tu*, 皇朝直省舆地全图),<sup>595</sup>
- the 1929 Republican-era China Humiliation Map (*Zhong hua guo chi di tu*, 中华国耻地图),<sup>596</sup> and
- the circa 1933 New Provincial Map of the Republic of China (*zhonghua min guo fen sheng xin tu*, 中华民国分省新图).<sup>597</sup>

<sup>591</sup> Boundary Department of the Ministry of Interior, *Nanhai shu dao wei shi tu* [Map Showing The Location of The Various Islands in The South Sea] (China, 1947). SWSP, Vol. VI, Annex M20.

<sup>592</sup> Li Zhaoluo & Yan Liu, *Huang chao yi tong yu di quan tu* [Qing Empire's Complete Map of all Under Heaven] (China, 1842), available at <http://www.loc.gov/item/gm71005054/> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M39.

<sup>593</sup> Li Zhaoluo & Yan Liu, *Guangdong quan tu* [Complete Map of Guangdong Province] (China, 1864), available at <http://www.loc.gov/item/gm71005120/> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M40.

<sup>594</sup> *Da Qing er shi san sheng yu di quan tu* [Complete Map of the Twenty-Three Provinces of the Great Qing Dynasty] (China, after 1885), available at <http://www.loc.gov/item/gm71005068/> (accessed 4 Mar. 2015). SWSP, Vol. VI, Annex M43.

<sup>595</sup> Peilan Li, *Huang chao zhi sheng yu di quan tu* [Qing Empire's Complete Map of All Provinces] (China, 1896), available at <http://www.loc.gov/item/gm71005083/> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M45.

<sup>596</sup> *Zhong hua guo chi di tu* [China Humiliation Map] (China, 1929), available at <http://www.loc.gov/item/2007628129/> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M46.

<sup>597</sup> *Zhonghua min guo fen sheng xin tu* [New Provincial Map of the Republic of China] (China, c. 1933), available at <http://www.loc.gov/item/2006629696/> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M47.

A14.18. Other Chinese maps that depict the southern reaches of the empire are no different in this respect; they also stop at Hainan. This is true for:

- a post-1815 Chinese map of the waterways in Guangdong province,<sup>598</sup>
- an 1870 coastal map of South China,<sup>599</sup> and
- an 1887 map of the waterways and roads in Guangdong Province.<sup>600</sup>

A14.19. There is an 1870 *Territorial Map of the Joint Borders Between Yunnan, Guangdong Provinces and Vietnam* (*dian yue yue nan lian jie yu tu*, 滇粵越南联界舆图) which depicts two Chinese provinces and Viet Nam. It also includes the northwestern part of the South China Sea. There is no indication of the Sea's incorporation into the Qing Empire.<sup>601</sup>

A14.20. Chinese maps prepared since the early 20th century confirm that China's claim to the South China Sea is of recent vintage.

A14.21. The first Chinese map identified that could be construed as indicating a Chinese claim to any South China Sea feature is a circa 1933 map<sup>602</sup> that shows the Paracel Islands, labeled Triton Island 土莱塘岛 (*tu lai tang dao*) in an inset with Hainan Island. This is an older Chinese name for the feature, and it appears with 查里屯岛 (*cha li tun dao*) in parentheses, which is the transliteration of the English name. The inset does not extend further south. A later Chinese map of the East Indies from around 1941<sup>603</sup> does not depict

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<sup>598</sup> *Guangdong tong sheng shui dao tu* [Map of the Waterways in Guangdong Province] (China, after 1815), available at <http://www.loc.gov/item/gm71002467/> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M38.

<sup>599</sup> Li Zhaoluo, Yan Liu, *Nan yang fen tu* [South Sea Portion Map] (China, 1870), available at <http://www.loc.gov/item/gm71005139/> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M42.

<sup>600</sup> Zhongpei Li, *Guangdong quan sheng shui lu yu tu* [Map of the Waterways and Roads in Guangdong Province] (China, c. 1887), available at <http://www.loc.gov/item/gm71005159/> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M44.

<sup>601</sup> Li Zhaoluo, Yan Liu, *Dian yue yue nan lian jie yu tu* [Territorial Map of the Joint Borders Between Yunnan, Guangdong Provinces and Vietnam] (China, 1870), available at <http://www.loc.gov/item/gm71005069/> (accessed 4 Mar. 2015). SWSP, Vol. VI, Annex M41.

<sup>602</sup> *Zhonghua min guo fen sheng xin tu* [New Provincial Map of the Republic of China] (China, c. 1933), available at <http://www.loc.gov/item/2006629696/> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M47.

<sup>603</sup> Ya Kwang Geographical Society, *Tai yue quan tu* [The Map of the East Indies] (China, c. 1941). SWSP, Vol. VI, Annex M48.

lines suggesting any Chinese claims. It labels the South China Sea features in English, and uses Chinese characters to transliterate or translate the English names; Chinese characters are *not* used to label the features with Chinese names.<sup>604</sup>

A14.22. A map containing the dashed line was reportedly first introduced in a 1947 atlas circulated internally within the Chinese Nationalist Government.<sup>605</sup> This was subsequently published in February 1948.<sup>606</sup> The Chinese Ministry of Interior prepared the map in response to an order from the Executive *Yuan*, the executive branch of the Republic of China, ordering various government agencies to consult “for assisting [the] takeover of the South China Sea”.<sup>607</sup> This shows that China did not then consider itself to be exercising sovereignty or sovereign rights or jurisdiction in the area encompassed by the dashed line, but was preparing to assert a claim; the novelty of the claim was confirmed by the fact that many of the features in the South China Sea still did not have Chinese names.<sup>608</sup> Other accounts indicate that the Ministry of the Interior may have based the map on privately-drawn maps produced between 1936 and 1945,<sup>609</sup> or on an internal government map produced in 1935 indicating that the southernmost feature of the South China Sea was James Shoal, at the southern edge of today’s nine-dash line.<sup>610</sup>

A14.23. Whatever the original dashed line was intended to show, it is clear that no other State understood it to represent a claim to the maritime areas it encompassed. As related in

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<sup>604</sup> In the Paracels, 林康岛 (*lin kang dao*) is used for Lincoln Island and 蒲利孟滩 (*pu li meng tan*) for Bremen Bank. In the Spratlys, the map labels Tizard Bank as 铁沙礁 (*tie sha jiao*), Spratly Island as 斯巴拉说? 岛 (*si ba ra shuo dao*), and North Luconia Shoal as 北卢康尼亚滩 (*bei lu cong ni ya tan*). It also labels Northwest Investigator Reef as 西北调查礁 (*xi bei diao cha jiao*). 调查 (*diao cha*) means “investigate”.

<sup>605</sup> Zou Keyuan, “The Chinese Traditional Maritime Boundary Line in the South China Sea and Its Legal Consequences for the Resolution of the Dispute over the Spratly Islands”, *International Journal of Marine and Coastal Law*, Vol. 14, No. 27 (1999), p. 33. MP, Vol. VIII, Annex 264; L. Jinming and L. Dexia, “The Dotted Line on the Chinese Map of the South China Sea: A Note”, *Ocean Development & International Law*, Vol. 34, No. 3-4 (2003), pp. 288-290. MP, Vol. VIII, Annex 275.

<sup>606</sup> Boundary Department of the Ministry of Interior, *Nanhai shu dao wei shi tu [Map Showing The Location of The Various Islands in The South Sea]* (China, 1947). SWSP, Vol. VI, Annex M20.

<sup>607</sup> Letter from the Ministry of Foreign Affairs of the Republic of China to the Ministry of the Interior of the Republic of China (1 Oct. 1946), reprinted in *Archival Compilation on South China Sea Islands by Ministry of Foreign Affairs*, Vol. 2, Doc. No. III(1):008 (Republic of China Ministry of Foreign Affairs Research & Planning Committee, ed.) (1995), p. 765. SWSP, Vol. VIII, Annex 480.

<sup>608</sup> See *id.*, p. 766 (indicating that the government needed to decide “[h]ow to name the islands, reefs, and beaches after takeover”).

<sup>609</sup> *Compilation of Historical Materials on the South China Sea Islands of China* (H. Zhenhua et al., eds), pp. 321-322, 353-360. SWSP, Vol. IX, Annex 515.

<sup>610</sup> L. Jinming and L. Dexia, “The Dotted Line on the Chinese Map of the South China Sea: A Note”, *Ocean Development & International Law*, Vol. 34, No. 3-4 (2003), p. 289. MP, Vol. VIII, Annex 275.

the Memorial,<sup>611</sup> although the dashed line was included in official Chinese maps published between 1950 and 2013,<sup>612</sup> it was not until China transmitted two notes to the U.N. Secretary General in May 2009 that China explained that it depicted the breadth of its alleged “sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof”.<sup>613</sup>

## II. Maps Produced by the Other Littoral States of the South China Sea

A14.24. Maps produced by the other littoral States in the South China Sea confirm that no other State or polity considered that China claimed, or exercised sovereignty or rights over, the Sea’s waters or maritime features.

### A. Maps Predating the Mid-17th Century

A14.25. Early European maps are consistent with contemporaneous Chinese cartography in not depicting the waters of the South China Sea or its maritime features as being part of China.

A14.26. The first European printed map to show Southeast Asia with some semblance of accuracy, the 1548 *India Tercera Nova Tabula*, by Giacomo Gastaldi, does not connect the

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<sup>611</sup> Memorial, paras. 4.25-4.36.

<sup>612</sup> China Cartographic Publishing House, Hanging Map of the People’s Republic of China (1950). MP, Vol. II, Annex M1; Ya Guang Yu De Xue She, Large Map of the People’s Republic of China (1951). MP, Vol. II, Annex M2; Ya Guang Yu De Xue She, Large Map of the People’s Republic of China (1952). MP, Vol. II, Annex M3; China Cartographic Publishing House, Hanging Map of the People’s Republic of China (1956). PM, Vol. II, Annex M4; China Cartographic Publishing House, Map of the People’s Republic of China (1971). MP, Vol. II, Annex M5; China Cartographic Publishing House, Map of the People’s Republic of China (Jan. 1973). MP, Vol. II, Annex M6; China Cartographic Publishing House, Map of the People’s Republic of China (May 1973). MP, Vol. II, Annex M7; China Cartographic Publishing House, Map of the People’s Republic of China (May 1978). MP, Vol. II, Annex M8; China Cartographic Publishing House, Map of the People’s Republic of China (1980). MP, Vol. II, Annex M9; China Cartographic Publishing House, Map of the People’s Republic of China (June 1981). MP, Vol. II, Annex M10; China Cartographic Publishing House, Map of the People’s Republic of China (June 1982). MP, Vol. II, Annex M11; China Cartographic Publishing House, Map of the People’s Republic of China (June 1984). MP, Vol. II, Annex M12; China Cartographic Publishing House, Map of the People’s Republic of China (Mar. 1987). MP, Vol. II, Annex M13; China Cartographic Publishing House, Map of the People’s Republic of China (Aug. 1988). MP, Vol. II, Annex M14; China Cartographic Publishing House, Map of the People’s Republic of China (June 1992). MP, Vol. II, Annex M16; China Cartographic Publishing House, Map of the People’s Republic of China (Aug. 1995). MP, Vol. II, Annex M17; SinoMaps Press, Map of the People’s Republic of China (2007). MP, Vol. II, Annex M18; China Cartographic Publishing House, *Map of the People’s Republic of China* (China, 2013). SWSP, Vol. VI, Annex M19 (originally produced as Memorial, Figure 4.4).

<sup>613</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.

South China Sea with China.<sup>614</sup> Six years later, a map by the same mapmaker arguably depicted the Paracel Islands, but in an incorrect location.<sup>615</sup> In 1570, another map produced in what is now Italy corrected this, depicting them as a sail off the coast of Viet Nam.<sup>616</sup> Neither map connected them with China.

A14.27. A Dutch map published in 1569 map shows the Paracel Islands off the coast of Viet Nam, without attributing them to China;<sup>617</sup> it labels them “Baixos de Chapar” and likely was intended to include the Spratlys. The same is true for a 1609 map, which refers to them as the “Pracel Ins”.<sup>618</sup> They are similarly depicted in a 1594 Dutch map of the *Insulae Moluuccae*<sup>619</sup> and a 1606 Dutch map of insular Southeast Asia.<sup>620</sup> A Dutch map from 1570<sup>621</sup> neither shows any features in the South China Sea, nor indicates Chinese ownership over the Sea itself.

A14.28. That the South China Sea was not considered to fall under Chinese sovereignty is confirmed by a 1600 British map of the Pacific Ocean and Asia that depicts the coasts of what are now all of the littoral States, as well as what appear to be the Paracel Islands. It does not indicate those, or any other islands south of Hainan, as belonging to China.<sup>622</sup>

A14.29. Early maps of the Philippines demonstrate cartographic awareness of features in the South China Sea but do not attribute them or the Sea to China. A 1601 Spanish map of

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<sup>614</sup> Giacomo Gastaldi, *India Tercera Nova Tabula* (Italy, 1548), in *Early Mapping of Southeast Asia* (1999). SWSP, Vol. VI, Annex M72. Although Italy was not “the sponsor of ocean voyages to Southeast Asia, [it] was a major cartographic ‘think-tank’ for digesting and sorting out the data that those expeditions brought back”. Thomas Suárez, *Early Mapping of Southeast Asia: The Epic Story of Seafarers, Adventurers, and Cartographers Who First Mapped the Regions Between China and India* (1999), p. 130. SWSP, Vol. X, Annex 528.

<sup>615</sup> G.B. Ramusio, *Southeast Asia* (Italy, 1554), in *Early Mapping of Southeast Asia* (1999). SWSP, Vol. VI, Annex M73.

<sup>616</sup> Abraham Ortelius, *Indiae orientalis [East Indies]* (Netherlands, 1570), available at <http://catalogue.nla.gov.au/Record/587925> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M86.

<sup>617</sup> Gerardus Mercator, *Nova et aucta orbis terrae [New and enlarged world]* (Netherlands, 1569). SWSP, Vol. VI, Annex M85.

<sup>618</sup> Abraham Ortelius, *Chinae [China]* (Netherlands, 1609), available at <http://catalogue.nla.gov.au/Record/3356686> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M89.

<sup>619</sup> Petrus Plancius, *Insulae Moluccae [Molucca Islands]* (Netherlands, 1594), in *Early Mapping of Southeast Asia* (1999). SWSP, Vol. VI, Annex M87.

<sup>620</sup> Jodocus Hondius, *Insulae Indiae orientalis praecipuae [East Indies Islands]* (Netherlands, 1606), available at <http://catalogue.nla.gov.au/Record/3424253> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M88.

<sup>621</sup> Abraham Ortelius, *Indiae orientalis [East Indies]* (Netherlands, 1570), available at <http://catalogue.nla.gov.au/Record/587925> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M86.

<sup>622</sup> Gabriel Tatton, *Chart of the Pacific Ocean* (United Kingdom, 1600). SWSP, Vol. VI, Annex M121.

insular Southeast Asia and the Chinese coast depicts the Philippines and other island groups.<sup>623</sup> Some dots off the coast of Indochina may refer to South China Sea features, but there is no linkage with China. A 1616 Dutch map showing the Philippines includes a sail-shaped collection of dots labeled “Pracel”, presumably the Paracels, without suggesting any connection to China.<sup>624</sup>

### ***B. Maps from the Mid-Seventeenth Century to 1800***

A14.30. Many non-Chinese maps produced in the middle of the 17th century illustrate a growing awareness of the various features in the South China Sea. None indicates that China exercised sovereignty or had rights over the various features of the South China Sea or over the Sea itself.

A14.31. A 1626 British map of “the Kingdome of China” depicts territories abutting the South China Sea,<sup>625</sup> including “Luconia”, an early name for Luzon, as well as “El. Pracel”, likely a reference to the Paracel Islands. It does not, however, indicate that these islands belonged to China. In 1641, an atlas entitled *Idrographisiae Nova Descriptio* was produced in Portugal showing the South China Sea and some of its features, but does not indicate Chinese ownership of them or the Sea.<sup>626</sup>

A14.32. A 1676 French map, the *Carte Generale des Indes Orientales et des Îles Adacentes*,<sup>627</sup> which maps Southeast Asia, depicts the “El Pracel” as a parallelogram containing three columns of exes stretching along much of the coast of “Tsiompia”, with a tail at its southwestern end. Notably, the island group is coloured in a different colour from the colours used to indicate the surrounding countries. Specifically, China is depicted in

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<sup>623</sup> Antonio de Herrera y Tordesillas, *Descripcion de las Indias del Poniente [Description of the Indies of Poniente]* (Spain, 1601), available at <http://catalogue.nla.gov.au/Record/366908> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M109.

<sup>624</sup> Petrus Bertius, *Philippinae Insulae [Philippine Islands]* (Netherlands, 1616), in *Early Mapping of Southeast Asia* (1999). SWSP, Vol. VI, Annex M90.

<sup>625</sup> John Speed, *The Kingdome of China* (United Kingdom, 1626), available at <http://catalogue.nla.gov.au/Record/3081294> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M122.

<sup>626</sup> Antonio Sanches, *No title [Portolan chart of southeast Asia]*, in *Idrographisiae Nova Descriptio* (Portugal, c. 1641). SWSP, Vol. VI, Annex M108.

<sup>627</sup> Pierre Mariette, *Carte generale des Indes Orientales et des isles adiacentes [General map of the East Indies and Adjacent Islands]* (France, 1676), available at <http://catalogue.nla.gov.au/Record/2424185> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M50.

yellow, Viet Nam in light red, and the Philippines in green. The island group is not coloured, indicating that it is not associated with any particular littoral State or polity.

A14.33. Similar use of colour is present in a 1662 Dutch map of the *Tabula Indiae Orientalis*,<sup>628</sup> and a 1676 British map,<sup>629</sup> all of which depict some small insular features and shoals off the coast of Palawan, likely indicating the Spratlys. Four of these five maps, those dated 1626, 1650, 1662, and 1676, also depict what is likely Scarborough Shoal with the label “P. de Mandato”.<sup>630</sup> None connect the Sea or its insular features with China.

A14.34. In 1655, a Dutch map of the “Imperii Sinarum” was published; it does not show any South China Sea features, nor does it indicate Chinese ownership of or rights in the Sea.<sup>631</sup> The same is true for a 1656 French map.<sup>632</sup> A 1700 French map of China does not show the South China Sea, and even fails to include the entire island of Hainan.<sup>633</sup> A 1723 British map of China<sup>634</sup> depicts Hainan and the “I. de Pruala” (likely the Pratas islands), but does not show the South China Sea or any of its insular features. A 1751 French map of “*L’Empire de la Chine*” shows Hainan but no small insular features.<sup>635</sup>

A14.35. Maps of the Philippines from this period show features in the South China Sea, but do not indicate any Chinese claim over them or to the Sea. A 1723 Spanish map depicts the Philippine archipelago, as well as the South China Sea and its littoral, in relatively good

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<sup>628</sup> Joannes L’Huillier, Frederick De Wit, *Tabula Indiae Orientalis [Map of East Indies]* (Netherlands, 1662), available at <http://catalogue.nla.gov.au/Record/2637169> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M92.

<sup>629</sup> John Speed, *A New Map of East India* (United Kingdom, 1676), available at <http://catalogue.nla.gov.au/Record/3428400> (accessed 3 Mar. 2015) (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M123.

<sup>630</sup> The inscription “P. de Mandato” likely refers to Spanish control of the feature. The phrase is closely related to *punto de mando*, which is a widely-used military term referring to a point of command. The use of a Spanish phrase on a non-Spanish map permits the inference that the point of command in this case is Manila, the capital of the Spanish colony in the Philippines.

<sup>631</sup> Martino Martini, *Imperii Sinarum Nova Descriptio [New Chinese Empire]*, in *Novus atlas Sinensis [New Chinese Atlas]* (Netherlands, 1655), available at <http://www.loc.gov/item/2002625249/> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M91.

<sup>632</sup> Nicolas Sanson, *La Chine royaume [The Chinese Kingdom]* (France, 1656). SWSP, Vol. VI, Annex M49.

<sup>633</sup> Johannes Nieuhof, *Carte exacte de toutes les provinces, villes, bourgs, villages et rivières du vaste et puissant empire de la Chine [Exact map of all the provinces, cities, burghs, villages and rivers of the vast and powerful Chinese Empire]* (Netherlands, 1700), available at <http://www.loc.gov/item/87691057/> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M93.

<sup>634</sup> Herman Moll, *China* (United Kingdom, 1723), available at <http://lccn.loc.gov/2006629363> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M124. . This was reprinted in 1736. Herman Moll, *The Empire of China and Island of Japan, Agreeable to Modern History* (United Kingdom, 1736). SWSP, Vol. VI, Annex M125

<sup>635</sup> Robert de Vaugondy, *L’Empire de la Chine [The Empire of China]* (France, 1751). SWSP, Vol. VI, Annex M51.



detail.<sup>636</sup> It shows the Paracel Islands, some shoals off of Palawan which might be the Spratlys, and a feature off of Luzon which could be Scarborough Shoal. Unlike the mainland features, which are depicted with vegetation and markers of civilization, these features appear blank.

A14.36. The “most accurate and largest [map] ever drawn of the [Philippine] archipelago” as of its production, the 1734 *Carta Hydrographica y Chorographica de la Yslas Filipinas*,<sup>637</sup> served as a model for later maps of the Philippines.<sup>638</sup> Produced by the Jesuit priest Pedro Murillo Velarde, it depicts Scarborough Shoal and indicates certain hazards off of the coast of Palawan, likely the Spratly Islands.<sup>639</sup> It is the first map to refer to Scarborough Shoal as “Panacot”, the Tagalog word for threat or danger. No reference is made to China.

A14.37. This pattern is repeated in many subsequently published maps, including:

- a 1752 French map that shows Scarborough Shoal and part of a feature which is likely Macclesfield Bank;<sup>640</sup>
- a 1755 map of “The Philippin, Carolin, Molucka, and Spice Islands” that shows both “Panacot” and a bank named “English Bank”, which is likely Macclesfield Bank, off the coast of Luzon, as well as a small feature named “Low Rock” near Palawan<sup>641</sup>;
- a 1790 map of the Philippines that shows “banks of 11 and 12 fathoms” off the coast of Palawan, as well as “B.jo de Masingolo o Panacot” (Scarborough Shoal).<sup>642</sup>

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<sup>636</sup> Francisco Diaz Romero and Antonio D. Ghandia, *Carta Chorographica Del Archipielago de las Islas Philipinas [Chorographic Map of the Archipelago of the Philippine Islands]* (Spain, 1727). SWSP, Vol. VI, Annex M110.

<sup>637</sup> Pedro Murillo Velarde, *Carta hydrographica y chorographica de las Yslas Filipinas [Hydrographic and Chorographic Map of the Philippines Islands]* (Spain, 1734), available at <http://www.loc.gov/item/2013585226/> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M111.

<sup>638</sup> Carlos Quirino, *Philippine Cartography: 1320-1899* (3d ed., 2010), p. 57. SWSP, Vol. X, Annex 540.

<sup>639</sup> This map was reproduced a number of times, including in 1760 in Nuremberg. Pedro Murillo Velarde & George Maurice Lowitz, *Carta Hydrographica y Chorographica de las Ysles Filipinas [Hydrographic and Chorographic Map of the Philippine Islands]* (Germany, 1760). SWSP, Vol. VI, Annex M68, and in 1785 in Venice, Antonio Zatta, *Isole Filippine [Philippine Islands]* (Italy, 1785). SWSP, Vol. VI, Annex M74.

<sup>640</sup> Nicholas Bellin, *Carte Reduite des Isles Philippines [Simplified Map of the Philippine Islands]* (France, 1752). SWSP, Vol. VI, Annex M52.

<sup>641</sup> Solomon Bolton, *The Philippin, Carolin, Molucka, and Spice Islands*, in *Dictionnaire universel de commerce [The universal dictionary of trade and commerce]* (United Kingdom, 1755). SWSP, Vol. VI, Annex M127.

<sup>642</sup> Duque de Almodóvar, *Mapa de las Islas Filipinas [Map of the Philippine Islands]* (Spain, 1790). SWSP, Vol. VI, Annex M114.

A14.38. During this period, regional maps began to include more detail about the smaller features in the South China Sea, although none indicated that China had any claim to those features or the maritime area. For example, a 1726 Dutch map of the *Indiae Orientalis et Regnorum adjacentium*<sup>643</sup> shows the Paracels in a sail shape, along with some scattered features off the coast of Palawan, but does not attribute them, or the sea area, to any State. The same is true for a 1745 British “Chart of ye East-Indies”.<sup>644</sup> A 1760 map produced in Amsterdam shows the Paracels, Scarborough Shoal, Macclesfield Bank, and the Spratly Islands. The Paracels (“Baixos de Pracels”) are depicted along the coast of “Cochichine”. Off Palawan are scattered a number of banks and “*klippe*” (reefs). To their north is “de Engelische Banc of Macelsfields”, and to the east of that is “B.jo de Marsingola ou Panacot”, clear references to Macclesfield Bank and Scarborough Shoal, respectively.<sup>645</sup> Another Dutch map, from 1765, shows the Paracels in their traditional depiction off the Vietnamese coast as well as some shoals off Palawan.<sup>646</sup>

A14.39. Emmanuel Bowen’s 1766 map of insular Southeast Asia depicts the “Pracel Shoals”, the “Prata Shoals”, and a feature in between them named “The Triangles”.<sup>647</sup> It was later clarified that the Triangles were part of the Paracels; they were known “by the different names of Triangles, Amphitrite, Spectacles, St. Anthony’s Girdle, [and] Lincoln”.<sup>648</sup> The map is annotated in some places with historical information, such as observing that “[t]he

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<sup>643</sup> François Valentijn, *Tabula Indiae Orientalis et Regnorum adjacentium* [Map of East Indies and Adjacent Kingdoms] (Netherlands, 1726), available at <http://www.loc.gov/item/2014588025/> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M94.

<sup>644</sup> Herman Moll, *A chart of ye East-Indies with the coast of Persia, China also the Philipina, Moluca and Sunda Islands, &c.* (United Kingdom, 1745), available at <http://catalogue.nla.gov.au/Record/3426835> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M126.

<sup>645</sup> Covens and Mortier, *Carte d’une partie de la Chine, les Isles Philippines, de la Sonde, Moluques, de Papoesie, &c.* [Map of a part of China, the Philippine Islands, Sunda, Moluccas, Papoesie, etc.] (Netherlands, c.1760), available at <http://catalogue.nla.gov.au/Record/916139> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M95.

<sup>646</sup> Issak Tirion, *Nieuwe Kaart van de Filippynsche, Ladrones, Moluccos of Specery Eilanden als mede Celebes etc.* [New Map of the Philippines, Ladrones, Moluccas, Spice Islands and Celebes, etc.] (Netherlands, 1765). SWSP, Vol. VI, Annex M96.

<sup>647</sup> Emanuel Bowen, *A New and Accurate Map of the East India Islands*, in *Maps and Charts of the Modern Part of Universal History* (United Kingdom, 1766). SWSP, Vol. VI, Annex M129.

<sup>648</sup> James Horsburgh, *Memoirs: Comprising the Navigation to and from China* (1805), p. 33. SWSP, Vol. XI, Annex 552.

Philippine Islands took their [n]ame from Philip II. K. of Spain...”.<sup>649</sup> It does not provide any information regarding Chinese claims.

A14.40. A map of the Far East produced in 1761 by the distinguished British hydrographer Thomas Kitchin<sup>650</sup> appears to show the Paracels, Macclesfield Bank, “Panacot” (Scarborough Shoal), and “Lowe Rock” (likely a feature in the Spratlys). To the northeast of the Paracels is a triangular figure labelled “The Lunets”, recognizable as “The Triangles” in Bowen’s map. The map places three circles with crosses inside of them just off the coast of Palawan, labelling them “Shelves of Parago [Palawan]”. According to the Oxford English Dictionary, “shelf” was commonly used in that era to refer to a “sandbank in the sea ... rendering the water shallow and dangerous”.<sup>651</sup> This suggests that these depictions are intended to refer to the Spratly Islands. Moreover, these features were associated with the island of Palawan by naming them “Shelves of Parago [Palawan]”. Kitchin’s 1769 map of the Philippines also includes the “Shelves of Parago” and “Panacot”.<sup>652</sup>

A14.41. In 1770, by which point Mr. Kitchin had become “Hydrographer to his Majesty”, he prepared what appears to be a reproduction of his 1761 map.<sup>653</sup>

A14.42. Other maps from the late 1700s similarly show the South China Sea in detail without attributing the Sea or its features to China. A 1770 Spanish chart of the part of the South China Sea between the Philippines and Viet Nam shows various features where one would expect to find the Spratlys,<sup>654</sup> the Paracel Islands as they had been traditionally depicted, and Macclesfield Bank, Scarborough Shoal, and the “Lunetous”. According to the legend, it also depicts a sailing route between the shoals that a French ship sailed in 1759. A

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<sup>649</sup> Emanuel Bowen, *A New and Accurate Map of the East India Islands*, in *Maps and Charts of the Modern Part of Universal History* (United Kingdom, 1766). SWSP, Vol. VI, Annex M129.

<sup>650</sup> Thomas Kitchin, *A general map of the East Indies and that part of China where the Europeans have any Settlements or commonly any Trade* (United Kingdom, 1761). SWSP, Vol. VI, Annex M128.

<sup>651</sup> “Shelf,” *Oxford English Dictionary* (accessed 5 Feb. 2015). SWSP, Vol. XI, Annex 572.

<sup>652</sup> Thomas Kitchin, *A New Map of the Philippine Islands* (United Kingdom, 1769). SWSP, Vol. VI, Annex M130.

<sup>653</sup> Thomas Kitchin, *East Indies* (United Kingdom, 1770), available at <http://catalogue.nla.gov.au/Record/3620673> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M131.

<sup>654</sup> *Carta plana que contiene parte del Archipelago de las Philipinas y ... parte de la costa de Cochinchina* [Flat Map that Contains Part of the Archipelago of the Philippines and Part of the Coast of Cochinchina] (Spain, 1770). SWSP, Vol. VI, Annex M112.

1784 map of the Pacific Ocean depicts those features in the South China Sea,<sup>655</sup> as does a Japanese map from the following year.<sup>656</sup> None of these maps indicates Chinese possession or control of any of the features, let alone of the surrounding sea.

A14.43. A French chart from 1775 has similar detail; it is the earliest that the Philippines has identified which refers to Scarborough Shoal as such (here, it is “Scarboro”).<sup>657</sup> In a 1778 British “Chart of the China Sea and Philippine Islands”,<sup>658</sup> Scarborough Shoal is depicted, as are certain of the Spratly Islands. They are referred to as “Paragua Shoals”, and are linked with Palawan, as was done in the Kitchin maps. That chart was “composed from an original drawing” of Captain Robert Carr. In 1794, a “New Chart of the Oriental Seas and Island” was published in London, showing the Paracels, “Macclesfield Shoal”, Scarborough Shoal, and a number of scattered features off the coast of Palawan.<sup>659</sup> A 1792 map of the East Indies published in Amsterdam showed those features as well.<sup>660</sup> None identifies the South China Sea or its features with China.

A14.44. At the beginning of the 19th century, a series of charts produced by Aaron Arrowsmith were published. Arrowsmith’s maps, “more than any others, provide reliable and valuable historical records of his own time”.<sup>661</sup> His 1798 chart of the Pacific Ocean<sup>662</sup>

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<sup>655</sup> No title [Map of Pacific Ocean between the coast of California and Mexico and Japan, Philippines, and the coast of China] (Spain, c. 1784), available at <http://www.loc.gov/item/91680984/> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M113.

<sup>656</sup> Sekisui Nagakubo, *Sankai yochi zenzu [A complete map of mountain and sea territories]* (Japan, 1785?), available at <http://www.loc.gov/item/gm71005079/> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M75.

<sup>657</sup> Manneville, *Chart of the China Sea* (France, 1775). SWSP, Vol. VI, Annex M53. Another French map, produced in the 1760s, depicts Scarborough Shoal but does not name it. It also shows the Paracel islands without connecting them to China. Covens and Mortier, *Carte d'une partie de la Chine, les Isles Philippines, de la Sonde, Moluques, de Papoesie, &c. [Map of a part of China, the Philippine Islands, Sunda, Moluccas, Papoesie, etc.]* (Netherlands, c.1760), available at <http://catalogue.nla.gov.au/Record/916139> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M95. The same is the case for a 1778 French map P. Santini, Gilles Robert de Vaugondy, *Archipel des Indes Oriental* (France, 1778), available at <http://catalogue.nla.gov.au/Record/5883615> (accessed 4. Mar. 2015). SWSP, Vol. VI, Annex M54.

<sup>658</sup> R. Sayer & J. Bennett, *A chart of the China Sea and Philippine Islands with the Archipelagos of Felicia and Soloo* (United Kingdom, 1778), available at <http://catalogue.nla.gov.au/Record/3667413> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M132.

<sup>659</sup> Robert Laurie & James Whittle, *A New Chart of the Oriental Seas and Islands with the coasts of the continent from the Isle of Ceylon to Amoye in China* (United Kingdom, 1794). SWSP, Vol. VI, Annex M133.

<sup>660</sup> Jan B. Elwe, *Partie de la Nouvelle Grande Carte des Indes Orientales [Part of the New Large Map of the East Indies]* (Netherlands, 1792). SWSP, Vol. VI, Annex M97.

<sup>661</sup> Greg Wood, “Successive States: Aaron Arrowsmith’s *Chart of the Pacific Ocean*, 1798-1832”, *The Globe: Journal of The Australian and New Zealand Map Society Inc.*, No. 70 (2012), p. 6. SWSP, Vol. XI, Annex 544.

<sup>662</sup> Aaron Arrowsmith, *Chart of the Pacific Ocean* (United Kingdom, 1798), available at <http://catalogue.nla.gov.au/Record/2941716> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M134.

(reissued in 1826<sup>663</sup>) and 1800 chart of the East Indies<sup>664</sup> depict the South China Sea in considerable detail. Whereas the 1800 chart depicted the Paracels as a sail along the Vietnamese coast (albeit in somewhat more detail than earlier maps), the 1825 chart better approximated its position and shape. Both charts show Macclesfield Bank, Scarborough Shoal, and some of the Spratly features. Neither indicates any Chinese claim or jurisdiction over the features or the surrounding waters.

A14.45. Another British chart, produced in 1802,<sup>665</sup> provides greater detail than the 1800 Arrowsmith chart. It names and describes a number of the Spratly features, and shows Macclesfield Bank and Scarborough Shoal, and provides soundings in a number of places, as well as routes taken by certain ships.

A14.46. Nineteenth century regional maps do not depict China as having sovereignty or rights in the South China Sea. Examples include British maps produced in 1811 of the East India Islands;<sup>666</sup> in 1836 of the Eastern Islands of the Malay Archipelago;<sup>667</sup> in 1844 of the “S.E. Peninsula and Malaysia”;<sup>668</sup> in 1850 of the “Indian Archipelago”;<sup>669</sup> in 1861 of Oceania and Southeast Asia;<sup>670</sup> in 1870 in a nautical chart of the “East India Archipelago”;<sup>671</sup> and in 1881 by the Royal Atlas of Modern Geography.<sup>672</sup> Each of these maps depicts various features in the South China Sea without attributing them to China.

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<sup>663</sup> Aaron Arrowsmith, *Chart of the Pacific Ocean* (United Kingdom, 1826). SWSP, Vol. VI, Annex M139

<sup>664</sup> Aaron Arrowsmith, *Chart of the East India Islands exhibiting the several passages between the Indian and Pacific Oceans* (United Kingdom, 1800), available at <http://catalogue.nla.gov.au/Record/3422795> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M135.

<sup>665</sup> Robert Laurie & James Whittle, *A new chart of the China Sea and its several entrances* (United Kingdom, 1802), available at <http://catalogue.nla.gov.au/Record/3620691> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M136.

<sup>666</sup> W. Darton, Jr., *The East India Islands* (United Kingdom, 1811). SWSP, Vol. VI, Annex M138.

<sup>667</sup> J. & C. Walker, Society for the Diffusion of Useful Knowledge, *Eastern Islands or Malay Archipelago* (United Kingdom, 1836), available at <http://catalogue.nla.gov.au/Record/3621228> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M140.

<sup>668</sup> A.K. Johnston, *S.E. Peninsula and Malaysia* (United Kingdom, 1844). SWSP, Vol. VI, Annex M141.

<sup>669</sup> John Bartholomew, *Indian Archipelago* (United Kingdom, 1850), in *The Royal illustrated atlas of modern geography*. SWSP, Vol. VI, Annex M142.

<sup>670</sup> Keith Johnston, *Oceania*, in *Keith Johnston's General Atlas* (United Kingdom, 1861). SWSP, Vol. VI, Annex M144.

<sup>671</sup> James Imray & Son, *East India Archipelago, Western Route to China, Chart No. 6* (United Kingdom, 1870). SWSP, Vol. VI, Annex M145.

<sup>672</sup> Keith Johnston, *Oceania*, in *Royal Atlas of Modern Geography* (United Kingdom, 1881). SWSP, Vol. VI, Annex M147.

A14.47. This is also the case for French maps of the region produced in 1838<sup>673</sup> and 1897,<sup>674</sup> and for an 1865 Spanish map, which shows the western Pacific and the Indian Oceans.<sup>675</sup> None indicates Chinese claims or jurisdiction.

A14.48. Other maps indicate control of parts of the South China Sea by powers other than China. An 1834 Vietnamese map, *A Complete Map of Unified Viet Nam* (大南一統全圖; *Đại Nam Nhất thống toàn đồ*)<sup>676</sup> shows Viet Nam, with a depiction of a group of features stretching along its coast, in the shape of a long box with a tail. The northern set is labeled 黃沙, which transliterates to *Hoàng Sa*, the Vietnamese term for the Paracel Islands. The southern set is labelled 萬里長沙, which transliterates to *Vạn lý Trường Sa*, the Vietnamese term for the Spratly Islands. These both indicate a Vietnamese claim to those features. That said, another map of Viet Nam produced between 1885 and 1890 does not depict any South China Sea features other than Hainan in the periphery.<sup>677</sup>

A14.49. An 1840 French map of Oceania produced in the *Atlas Geographique*<sup>678</sup> shows colour bands grouping islands and dividing the Pacific into different zones, likely intended to show the different island groups of the Pacific. It does not link the South China features with China, although the Spratlys are grouped with insular Southeast Asia, while the Paracels are not.

A14.50. An 1881 Dutch map of the “Indischen Archipel” depicts the South China Sea with lines indicating the extent of control of various colonial powers over islands and sea areas. Some features off of Palawan and what appears to be Scarborough Shoal are included within

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<sup>673</sup> Jean Louis Taberd, *Annam Đại Quốc Họa Đồ/Tabula Geographica Imperii Anamitici* [Map of the Annamite Empire], in *Dictionarium latino-anamiticum* (France, 1838). SWSP, Vol. VI, Annex M56; Auguste-Henri Dufour, *Océanie* [Oceania] (France, 1838). SWSP, Vol. VI, Annex M57.

<sup>674</sup> E. Giffault, et al., *Archipel Asiatique* [Asian Archipelago], in *Atlas Universel* [Universal Atlas] (France, 1897). SWSP, Vol. VI, Annex M59.

<sup>675</sup> Spain, Hydrographic Directorate, *Carta esférica del Océano Indio, Hoja III* [Nautical Chart of the Indian Ocean, Page III] (Spain, 1865), available at <http://nla.gov.au/nla.map-rm2237> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M117.

<sup>676</sup> Phan Huy Chú, *Đại Nam nhất thống toàn đồ* [Complete Map of Unified Great Nam] (Vietnam, 1834). SWSP, Vol. VI, Annex M171.

<sup>677</sup> Author unknown or unavailable, *Việt Nam toàn cảnh dư đồ* [Complete map of Vietnam] (Vietnam, 1885-1890), available at <http://www.loc.gov/item/84696159/> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M172.

<sup>678</sup> Thunot Duvotenay, *Océanie* [Oceania] (France, c. 1840), available at <http://catalogue.nla.gov.au/Record/2933080> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M58.

the Spanish zone of control, but the rest of the Sea is not associated with any particular State.<sup>679</sup>

A14.51. Maps of China during this period depict Chinese territory ending at Hainan. This is the case with the following British maps: an 1808 map of China,<sup>680</sup> an 1851 map of China and Burma,<sup>681</sup> an 1881 Encyclopedia Britannica map,<sup>682</sup> and an 1895 map produced by the London Geographical Institute.<sup>683</sup> An 1880 map produced by the London Geographical Institute depicts the Paracel Islands and Scarborough Shoal without attributing them to China, showing Hainan as the southernmost point of China.<sup>684</sup> Maps of China produced in France in 1880<sup>685</sup> and the United States in 1893<sup>686</sup> also do not extend southward past Hainan Island.

A14.52. Maps of the Philippines confirm that China's sovereignty did not extend southward past Hainan. An 1808 general map of the Philippines, produced by the Spanish Hydrographic Directorate,<sup>687</sup> depicts both Scarborough Shoal, including the route of a ship that apparently surveyed it, and many of the Spratlys, some with English names. Official Spanish maps and nautical charts produced later in the century, including those in 1852,<sup>688</sup> 1865,<sup>689</sup> 1875,<sup>690</sup> and

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<sup>679</sup> Jacques Eduard Sturler, *Overzichts Kaart der Nederlandsche en Vreemde Bezittingen in den Indischen Archipel [Oversize Map of the Dutch Overseas Possessions in the Indian Archipelago]* (Netherlands, 1881). SWSP, Vol. VI, Annex M98.

<sup>680</sup> Aaron Arrowsmith, *China* (United Kingdom, 1808). SWSP, Vol. VI, Annex M137.

<sup>681</sup> J. Rapkin, *China and Birmah* (United Kingdom, 1851?), in *The illustrated atlas and modern history of the world, geographical, political, commercial and statistical*, from Library of Congress, <http://catalogue.nla.gov.au/Record/3427546> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M143.

<sup>682</sup> W. & A.K. Johnston, *China*, in *Encyclopaedia Britannica, Ninth Edition* (United Kingdom, 1889). SWSP, Vol. VI, Annex M148.

<sup>683</sup> George Philip & Son Ltd., *China and Tibet*, in *Harmsworth Atlas and Gazetteer* (United Kingdom, 1895). SWSP, Vol. VI, Annex M149.

<sup>684</sup> London Geographical Institute, *China, Corea and Japan* (United Kingdom, 1880). SWSP, Vol. VI, Annex M146.

<sup>685</sup> Conrad Malte-Brun, *Empire Chinois et Japon [Chinese Empire and Japan]* (France, 1837). SWSP, Vol. VI, Annex M55.

<sup>686</sup> E.F. Fisk, Hunt & Eaton, *China*, in *The Columbian Atlas of the World We Live In* (United States, 1893). SWSP, Vol. VI, Annex M159.

<sup>687</sup> Spain, Hydrographic Directorate, *Carta General del Archipiélago de Filipinas [General Map of the Archipelago of the Philippines]* (Spain, 1808). SWSP, Vol. VI, Annex M115.

<sup>688</sup> Antonio Morata, *Islas Filipinas [The Philippine Islands]*, in *Atlas de España y sus posesiones de ultramar [Atlas of Spain and its Overseas Possessions]* (Spain, 1852). SWSP, Vol. VI, Annex M116.

<sup>689</sup> Spain, Hydrographic Directorate, *Carta esférica del Océano Indio, Hoja III [Nautical Chart of the Indian Ocean, Page III]* (Spain, 1865), available at <http://nla.gov.au/nla.map-rm2237> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M117.

1897,<sup>691</sup> show the South China Sea features in detail. The English names for the features, with the exception of Scarborough Shoal, are given. None shows China as having claims or jurisdiction over the sea or its insular features.

A14.53. American maps produced after the United States became the colonial power in the Philippines are no different in this respect. These include maps produced by the U.S. Coast and Geodetic Survey in 1899,<sup>692</sup> 1918,<sup>693</sup> 1924,<sup>694</sup> and 1935,<sup>695</sup> and by the U.S. War Department in 1903,<sup>696</sup> which show Scarborough Shoal, but no other South China Sea features. None indicates Chinese sovereignty or rights. Similarly, a 1933 detailed hydrographic map of the Philippines produced by the U.S. Coast and Geodetic Survey shows a number Spratly features and Scarborough Shoal; China is not mentioned.<sup>697</sup>

A14.54. French maps of Viet Nam from this era also fail to indicate a Chinese claim in regard to the adjacent waters. Maps produced by the French Ministries of Foreign Affairs and of Colonies in 1902<sup>698</sup> and 1914,<sup>699</sup> and by the Indochina Geographic Service in 1928<sup>700</sup> and

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<sup>690</sup> Spain, Hydrographic Directorate, *Carta General (en dos hojas) del Archipiélago Filipino, Hoja I [General Chart (two pages) of the Philippine Archipelago, Page I]* (Spain, 1875). SWSP, Vol. VI, Annex M118; Spain, Hydrographic Directorate, *Carta General (en dos hojas) del Archipiélago Filipino, Hoja II [General Chart (two pages) of the Philippine Archipelago, Page II]* (Spain, 1875). SWSP, Vol. VI, Annex M119.

<sup>691</sup> Chofré & Compa., *Carta General del Archipiélago Filipino [General Map of the Philippine Archipelago]* (Spain, 1897). SWSP, Vol. VI, Annex M120.

<sup>692</sup> United States, Coast and Geodetic Survey, *Islas Filipinas, Mapa General [The Philippine Islands, General Map]*, in *Atlas de Filipinas* (United States, 1899). SWSP, Vol. VI, Annex M160.

<sup>693</sup> United States, Coast and Geodetic Survey, *Philippine Islands* (United States, 1918). SWSP, Vol. VI, Annex M162.

<sup>694</sup> United States, Coast and Geodetic Survey, *Contour Map of the Philippine Islands and Waters, USCGS Map 102* (United States, 1924). SWSP, Vol. VI, Annex M163.

<sup>695</sup> United States, Coast and Geodetic Survey, *Commonwealth of the Philippines* (United States, 1935). SWSP, Vol. VI, Annex M164.

<sup>696</sup> United States, War Department, *Map of the Philippine Islands* (United States, 1903). SWSP, Vol. VI, Annex M161.

<sup>697</sup> United States, Coast and Geodetic Survey, *Philippine Islands* (United States, 1940), available at <http://www.loc.gov/item/2011592026> (accessed 3 Mar. 2015). SWSP, Vol. VI, Annex M165.

<sup>698</sup> French Republic, Ministry of Foreign Affairs and Ministry of Colonies, *Indo-Chine [Indochina]* (France, 1902). SWSP, Vol. VI, Annex M60.

<sup>699</sup> French Republic, Ministry of Foreign Affairs and Ministry of Colonies, *Indo-Chine [Indochina]* (France, 1914). SWSP, Vol. VI, Annex M61.

<sup>700</sup> French Republic, Indochina Geographic Service, *Indochine [Indochina]* (France, 1928). SWSP, Vol. VI, Annex M63.



1936,<sup>701</sup> show maritime space off the Vietnamese coast, but indicate no Chinese claim to that area.

A14.55. Some maps do attribute sovereignty over certain maritime features to a State, but not to China. An early 20th century map of the East India Islands, published in London, labels Amboyna Cay and Spratly Island as British possessions.<sup>702</sup> So does a British 1910 atlas of Oceania and the Pacific Ocean.<sup>703</sup> A 1922 British atlas of the Pacific Ocean indicates zones of control over the South China Sea; China is not mentioned, although Britain, France, and the United States, all colonial powers at the time, are given zones.<sup>704</sup> This is also done in a 1923 French map; in that case, however, China is given a small zone that ends in the south at the approximate location of Macclesfield Bank.<sup>705</sup> A 1936 Dutch map of the “Pacific Ocean and Surrounding Countries” shows lines of control pertaining to colonial powers in the South China Sea. In this case, a “3-dash line” appears to enclose the Spratly and Paracel Islands. It is coloured blue, as is French Indochina. No feature or the sea is coloured lime green, the colour assigned to China.<sup>706</sup>

### ***C. World War II to the Present***

A14.56. Cartographic materials from the post-World War II period continue to evidence the fact that neither the South China Sea nor its insular features were considered to be subject to Chinese sovereignty or rights.

A14.57. A 1940 map of “The Pacific Area” produced by the U.S. War Department labels the Paracel Islands as Chinese.<sup>707</sup> This was likely intended to counter Japan’s claim in favour of the Republic of China, which enjoyed U.S. support at the time. No other American maps—

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<sup>701</sup> French Republic, Indochina Geographic Service, *Indochine [Indochina]* (France, 1936). SWSP, Vol. VI, Annex M64.

<sup>702</sup> T. Fisher Unwin, *East India Islands with parts of Lower Burma, Siam & Anam* (United Kingdom, c. 1900). SWSP, Vol. VI, Annex M150.

<sup>703</sup> George Philip & Son, Ltd., The London Geographical Institute, *Oceania and Pacific Ocean* (United Kingdom, 1910). SWSP, Vol. VI, Annex M152.

<sup>704</sup> Edward Stanford, Ltd., *The Pacific Ocean* (United Kingdom, 1922). SWSP, Vol. VI, Annex M153.

<sup>705</sup> French Republic, Colonial Geographic Service, *Les Grand Nations dans l’Océan Pacifique [Full Nations of the Pacific Ocean]* (France, 1923). SWSP, Vol. VI, Annex M62.

<sup>706</sup> Topografische dienst in Nederlandsch-Indië [Netherlands Indies Topographic Survey], *Kaart van den Grooten of Stillen Oceaen en Omliggende Landen [Map of the Great or Pacific Ocean and Surrounding Countries]* (Netherlands, 1936). SWSP, Vol. VI, Annex M99.

<sup>707</sup> United States, War Department, *The Pacific Area* (United States, 1940). SWSP, Vol. VI, Annex M166.

and no contemporaneous Chinese maps—attribute the Paracels to China, including a map of naval and air facilities in the Western Pacific produced by the U.S. Hydrographic Office in 1941.<sup>708</sup> Nor do other non-Chinese maps reflect a Chinese claim to the Paracels. These include a 1941 British map that indicates that the Japanese then occupied Spratly Island and Amboyna Cay.<sup>709</sup>

A14.58. Britain produced maps showing the region in 1942<sup>710</sup> and 1953,<sup>711</sup> which do not indicate Chinese sovereignty or rights. Nor does a 1959 map of North Borneo, which depicts the Colony's administrative boundaries.<sup>712</sup> The same is true concerning a 1962 map of Brunei.<sup>713</sup>

A14.59. France, which was the colonial power in Viet Nam, produced general maps of its colony, French Indochina in 1946,<sup>714</sup> 1948<sup>715</sup> and 1953.<sup>716</sup> These all identify some of the Paracel Islands, labelling them with French names. They do not indicate Chinese sovereignty or rights with respect to the features or surrounding maritime area.

A14.60. With regard to Japanese maps, a 1940 “Detailed Map of the South Seas” labels the Spratly features, which it identifies as 新南群島 (*shinnan gunto*), the Japanese name for the Spratly Islands. It identifies them as belonging to 大日本 (*dai nippon*), the Japanese Empire. The features are labelled in Japanese with Japanese names and are enclosed in a polygon. Another 1940 map labels the features in Japanese. A 1941 large-scale chart produced by the

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<sup>708</sup> United States, Hydrographic Office, *Pacific Ocean, Naval and Air Facilities in the Western Pacific* (United States, 1941). SWSP, Vol. VI, Annex M167.

<sup>709</sup> George Philip & Son, Ltd., The London Geographical Institute, *Philip's War Map of the Far East* (United Kingdom, 1941). SWSP, Vol. VI, Annex M154.

<sup>710</sup> United Kingdom, War Office, *North Borneo* (United Kingdom, 1942). SWSP, Vol. VI, Annex M155.

<sup>711</sup> Federation of Malaya, Survey Department, *Sarawak and Brunei* (United Kingdom, 1953). SWSP, Vol. VI, Annex M156.

<sup>712</sup> United Kingdom, Directorate of Overseas Surveys, *North Borneo* (United Kingdom, 1959). SWSP, Vol. VI, Annex M157.

<sup>713</sup> United Kingdom, War Office and Air Ministry, Directorate Surveys, *Brunei* (United Kingdom, 1962). SWSP, Vol. VI, Annex M158.

<sup>714</sup> French Republic, National Geographic Institute, *Carte Générale de l'Indochine Française [General Map of French Indochina]* (France, 1946). SWSP, Vol. VI, Annex M65.

<sup>715</sup> French Republic, Indochina Geographic Service, *Carte Générale de l'Indochine Française [General Map of French Indochina]* (France, 1948). SWSP, Vol. VI, Annex M66.

<sup>716</sup> French Republic, Indochina Geographic Service, *Carte Générale de l'Indochine Française [General Map of French Indochina]* (France, 1953). SWSP, Vol. VI, Annex M67.

Japan Hydrographic Office labels the features in Japanese and English.<sup>717</sup> A 1943 Japanese map of the Philippines shows Spratly features off the coast of Palawan enclosed by three grey dashes, indicating possession, likely by Japan.<sup>718</sup>

A14.61. American maps of the Philippines produced during World War II do not show Chinese jurisdiction over any of the adjacent waters or features. A 1944 set of maps by the Army Mapping Service shows Scarborough Shoal but no Spratly features.<sup>719</sup> A 1949 map produced by the Army Mapping Service does show those features, along with the Treaty of Paris line.<sup>720</sup>

A14.62. Maps published post-independence by the South China Sea's littoral States do not indicate that China possessed sovereignty or sovereign rights in the South China Sea. These include:

- maps produced by the Philippine Coast and Geodetic Survey in 1950,<sup>721</sup> 1957,<sup>722</sup> 1960,<sup>723</sup> 1974,<sup>724</sup> and 1984,<sup>725</sup> and by the Philippine National Mapping and Resource Information Authority in 2006<sup>726</sup>;
- a 1958 general map of “Malaya and Adjacent Territories” produced by the Malayan Surveyor General,<sup>727</sup> a 1963 map from same (then Malaysian) source,<sup>728</sup>

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<sup>717</sup> Japanese Hydrographic Office, *Taiheiyo [Pacific Ocean]* (Japan, 1941). SWSP, Vol. VI, Annex M76.

<sup>718</sup> Toseisha, *Hyojun daitoa bunzu [Separate Map of Standard Greater East Asia - the Philippines]* (Japan, 1943). SWSP, Vol. VI, Annex M77.

<sup>719</sup> United States, Army Map Service, *Philippines (North)* (United States, 1943). SWSP, Vol. VI, Annex M168; United States, Army Map Service, *Philippines (South)* (United States, 1943). SWSP, Vol. VI, Annex M169.

<sup>720</sup> United States, Army Map Service, *Philippine Islands* (United States, 1949). SWSP, Vol. VI, Annex M170.

<sup>721</sup> Philippine Bureau of Coast and Geodetic Survey, *Republic of the Philippines* (Philippines, 1950). SWSP, Vol. VI, Annex M100.

<sup>722</sup> Philippine Bureau of Coast and Geodetic Survey, *Republic of the Philippines* (Philippines, 1957). SWSP, Vol. VI, Annex M101.

<sup>723</sup> Philippine Bureau of Coast and Geodetic Survey, *Philippines, PCGS Map 100* (Philippines, 1960). SWSP, Vol. VI, Annex M102; Philippine Bureau of Coast and Geodetic Survey, *Republic of the Philippines* (Philippines, 1960). SWSP, Vol. VI, Annex M103.

<sup>724</sup> Philippine Bureau of Coast and Geodetic Survey, *Philippines* (Philippines, 1974, 2nd ed.). SWSP, Vol. VI, Annex M105.

<sup>725</sup> Philippine Bureau of Coast and Geodetic Survey, *Administrative Map, Republic of the Philippines, PCGS Map 201* (Philippines, 1984, 1st ed.). SWSP, Vol. VI, Annex M106.

<sup>726</sup> Philippines National Mapping and Resource Information Authority (NAMRIA), *Philippines, NAMRIA Map 170* (1st ed., Philippines, 2006). SWSP, Vol. VI, Annex M107.

<sup>727</sup> Federation of Malaya, Survey Department, *Malaya* (Malaysia, 1958). SWSP, Vol. VI, Annex M78.

<sup>728</sup> Federation of Malaya, Survey Department, *Malaysia* (Malaysia, 1963). SWSP, Vol. VI, Annex M79.

maps from 1973,<sup>729</sup> 1976,<sup>730</sup> and 1996<sup>731</sup> by the Malaysian Directorate of National Mapping, and two maps produced in 1979 by the same source, which show the territorial sea and continental shelf claimed by Malaysia<sup>732</sup>;

- two mid-century Indonesian maps that show the southern reaches of the South China Sea but do not include the bottom dashes of the nine-dash line,<sup>733</sup> as well as one produced in 2002<sup>734</sup>;
- maps published by Viet Nam in 1960,<sup>735</sup> 1964,<sup>736</sup> 1976,<sup>737</sup> 1989,<sup>738</sup> and 1998<sup>739</sup>; and
- maps from 1987<sup>740</sup> and 2003<sup>741</sup> showing the territorial waters of Brunei, and a 2011 official map of Brunei.<sup>742</sup>

<sup>729</sup> Malaysia Jabatanarah Pemetaan Negara [Malaysian Directorate of National Mapping], *Map of Malaysia* (Malaysia, 1973). SWSP, Vol. VI, Annex M80.

<sup>730</sup> Malaysia Jabatanarah Pemetaan Negara [Malaysian Directorate of National Mapping], *Malaysia* (Malaysia, 1976). SWSP, Vol. VI, Annex M81.

<sup>731</sup> Malaysia Jabatanarah Pemetaan Negara [Malaysian Directorate of National Mapping], *Malaysia* (Malaysia, 1996). SWSP, Vol. VI, Annex M84.

<sup>732</sup> Diterbitkan oleh Pengarah Pemetaan Negara [Malaysian Directorate of National Mapping], “Sheet 1”, in *Peta Menunjukkan Sempadan Perairan dan Pelantar Benua Malaysia [Map Showing Territorial Waters and Continental Shelf Boundaries of Malaysia]* (Malaysia, 1979). SWSP, Vol. VI, Annex M82; Diterbitkan oleh Pengarah Pemetaan Negara [Malaysian Directorate of National Mapping], “Sheet 2”, in *Peta Menunjukkan Sempadan Perairan dan Pelantar Benua Malaysia [Map Showing Territorial Waters and Continental Shelf Boundaries of Malaysia]* (Malaysia, 1979). SWSP, Vol. VI, Annex M83.

<sup>733</sup> Penerbit Fasco [Fasco Publisher], *Indonesia* (Indonesia, c. 1950). SWSP, Vol. VI, Annex M69; Universal, *Indonesia* (Indonesia, c. 1960). SWSP, Vol. VI, Annex M70.

<sup>734</sup> Bakosurtanal [Indonesia Coordinating Agency for Surveys and Mapping], *Batas negara kesatuan Republik Indonesia [Limit of the Unitary Republic of Indonesia]* (Indonesia, 2002). SWSP, Vol. VI, Annex M71.

<sup>735</sup> Tổng Nha điền địa [General Department of Land Administration], *Việt-Nam Cộng-Hòa [Republic of Vietnam]* (Vietnam, 1960). SWSP, Vol. VI, Annex M173; Tổng Nha điền địa [General Department of Land Administration], *Việt-Nam Cộng-Hòa, Vị-Trí Các Khu-Trù-Mật [Republic of Vietnam, Map of Agrovill]* (Vietnam, 1960). SWSP, Vol. VI, Annex M174.

<sup>736</sup> Tổng Nha Điền-Địa Phát-Hành, *Việt-Nam Cộng-Hòa [Republic of Vietnam]* (Vietnam, 1964). SWSP, Vol. VI, Annex M175.

<sup>737</sup> Cục đo đạc và bản đồ Việt Nam [Department of Surveying and Mapping of Vietnam], *Bản đồ Hành chính Việt Nam [Administrative map of Vietnam]* (Vietnam, 1976). SWSP, Vol. VI, Annex M176.

<sup>738</sup> Cục đo đạc và bản đồ Việt Nam [Department of Surveying and Mapping of Vietnam], *Cộng hòa xã hội chủ nghĩa Việt Nam [Socialist Republic of Vietnam]* (Vietnam, 1989). SWSP, Vol. VI, Annex M177.

<sup>739</sup> Tổng cục quản lý đất đai [General Department of Land Administration], *Cộng hòa xã hội chủ nghĩa Việt Nam [Socialist Republic of Vietnam]* (Vietnam, 1998). SWSP, Vol. VI, Annex M178.

<sup>740</sup> Brunei Darussalam, Surveyor General, *Map showing territorial waters of Brunei Darussalam* (Brunei, 1987). SWSP, Vol. VI, Annex M21.

<sup>741</sup> Brunei Darussalam, Surveyor General, *Map showing the limits of the territorial sea, continental shelf and exclusive economic zone of Brunei Darussalam* (Brunei, 2003). SWSP, Vol. VI, Annex M22.

### III. Oil & Gas Concession Maps

A14.63. In its May 2009 *Notes Verbales* to the U.N. Secretary General, China claimed “sovereign rights and jurisdiction ... [to the] seabed and subsoil” of the waters enclosed by the nine-dash line.<sup>743</sup> The Deputy Director of China’s National Institute for South China Sea Studies, Mr. Liu Feng, explained in August 2012 that China claims rights to oil and gas extraction in “all the waters within the nine-dash line”.<sup>744</sup>

A14.64. In order to assist the Tribunal in assessing China’s claim over the seabed and subsoil, the Philippines submits maps showing the location of the various littoral States’ offshore oil and gas fields and/or concessions beginning in the 1970s. These maps demonstrate that States other than China have long claimed rights to the seabed and subsoil within China’s nine-dash line. They also show that none of the States offering such blocks recognized China’s alleged sovereign or historic rights to the seabed.

A14.65. While it is difficult to find evidence of China’s offshore offerings prior to the 1980s, the Philippines submits two privately-produced maps of offshore areas to demonstrate that, at that point, China had not offered areas far from its mainland coast for oil or gas exploration. (This is in contrast to the blocks offered by the China National Offshore Oil Corporation in 2012, which were all within, or at least partially within, 200 M of Viet Nam’s coast.<sup>745</sup>) For example, a 1984 map published by the Asian Research Service that purports to show “China’s Hydrocarbon Potential” depicts contract areas no further south than the sea immediately surrounding Hainan.<sup>746</sup> A map produced the following year by *Petroleum News* similarly indicates that China had not opened up for exploration or exploitation any areas beyond those immediately south of Hainan (in the Yinggehai Basin).<sup>747</sup>

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<sup>742</sup> Brunei Darussalam, Surveyor General, *Negara Brunei Darussalam* (Brunei, 2011). SWSP, Vol. VI, Annex M23.

<sup>743</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>744</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>745</sup> See Memorial, para. 4.11.

<sup>746</sup> Asian Research Service, *China’s Hydrocarbon Potential* (1984). SWSP, Vol. VII, Annex M182.

<sup>747</sup> Bai Yiliang, *Oil and Gas Map of China* (1985). SWSP, Vol. VII, Annex M183.

A14.66. Maps showing other States' blocks demonstrate that, before 2009, those States did not understand China to claim exclusive rights to the seabed within the nine-dash line, or that they rejected China's claim by offering for exploration and exploitation areas within the line that they considered to be part of their own continental shelf. These maps include:

- Maps produced by private companies in 1981,<sup>748</sup> 1989,<sup>749</sup> 1990,<sup>750</sup> 1993,<sup>751</sup> 1996,<sup>752</sup> 1997,<sup>753</sup> and 2004,<sup>754</sup> and by the Philippine Department of Energy in 1994,<sup>755</sup> showing Philippine blocks along the west coast of Palawan and in the area where China has sought to interfere with the Philippines' oil exploration activities<sup>756</sup>;
- Maps produced in by private companies in 1982,<sup>757</sup> 1990,<sup>758</sup> 1996,<sup>759</sup> and 2003,<sup>760</sup> showing Vietnamese blocks off of the southeast coast of Viet Nam;
- Maps produced in 1977 by the U.S. Central Intelligence Agency,<sup>761</sup> and by private companies in 1980,<sup>762</sup> 1986,<sup>763</sup> 1998<sup>764</sup> and 2004,<sup>765</sup> showing Malaysian blocks along its northern Borneo and eastern peninsular coasts; and

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<sup>748</sup> Petroconsultants, S.A., *Philippines* (1981). SWSP, Vol. VII, Annex M203.

<sup>749</sup> Petroconsultants, S.A., *Philippines* (1989). SWSP, Vol. VII, Annex M204.

<sup>750</sup> Petroconsultants, S.A., *Philippines* (1990). SWSP, Vol. VII, Annex M205.

<sup>751</sup> Petroconsultants, S.A., *Philippines* (1993). SWSP, Vol. VII, Annex M206.

<sup>752</sup> Petroconsultants, S.A., *Philippines* (1996). SWSP, Vol. VII, Annex M208.

<sup>753</sup> Petroconsultants, S.A., *Philippines* (1997). SWSP, Vol. VII, Annex M209.

<sup>754</sup> IHS Energy, *Philippines: General* (2004). SWSP, Vol. VII, Annex M210.

<sup>755</sup> Philippines Department of Energy, *Consolidated Well Location Map* (1994). SWSP, Vol. VII, Annex M207.

<sup>756</sup> See Memorial, paras. 6.15-6.28.

<sup>757</sup> Petroconsultants, S.A., *Vietnam* (1982). SWSP, Vol. VII, Annex M212.

<sup>758</sup> Petroconsultants, S.A., *Vietnam, Kampuchea and Laos* (1990). SWSP, Vol. VII, Annex M213.

<sup>759</sup> Petroconsultants, S.A., *Vietnam* (1996). SWSP, Vol. VII, Annex M214.

<sup>760</sup> IHS Energy, *Vietnam: Offshore South Vietnam* (2003). SWSP, Vol. VII, Annex M215.

<sup>761</sup> U.S. Central Intelligence Agency, *Malaysia: Oil and Gas Prospects* (1977). SWSP, Vol. VII, Annex M194.

<sup>762</sup> Petroconsultants, S.A., *Federation of Malaysia (Eastern Malaysia)* (1980). SWSP, Vol. VII, Annex M195.

<sup>763</sup> Petroconsultants, S.A., *Malaysia: Eastern Sheet* (1986). SWSP, Vol. VII, Annex M197.

<sup>764</sup> Petroconsultants, S.A., *Malaysia: General* (1998). SWSP, Vol. VII, Annex M198.

<sup>765</sup> IHS Energy, *East Malaysia, Sabah / Sarawak* (2004). SWSP, Vol. VII, Annex M199.

- Maps produced in 1977,<sup>766</sup> 1986,<sup>767</sup> and 2002<sup>768</sup> by the Indonesian Director of Oil and Gas, as well as a privately-produced map from 1997,<sup>769</sup> showing Indonesian blocks along its northern coast.

A14.67. Even after China's 2009 *Notes Verbales*, other coastal States continued to maintain offerings in areas located within the nine-dash line. A 2011 map of the Asia Pacific region produced by Quest Offshore Resources, Inc., for example, shows that, as of that date, the Philippines, Malaysia, Brunei, Indonesia and Viet Nam all maintained blocks in areas encompassed by China's claim.<sup>770</sup>

A14.68. The oil and gas concessions maps thus indicate that none of the other South China Sea littoral States recognized or accepted China's claim to sovereign or historic rights to the seabed and subsoil within the nine-dash line. To the contrary, they show that these States have claimed and offered for contract their own areas within that line.

### Conclusion

A14.69. In short, the cartographic evidence confirms that, historically, China did not claim or possess sovereignty or sovereign rights in the South China Sea or over any of its insular features south of Hainan Island, with the possible exception of its contested (by Viet Nam, preceded by France) claim to the Paracels, and that its claims in regard to other insular features are of recent vintage, dating back no farther than 1947. China's claim of sovereignty or sovereign rights over the maritime areas within its dashed line is of even more recent heritage; the cartographic evidence confirms that it was made for the first time in 2009.

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<sup>766</sup> Indonesian Direktorat Minyak dan Gas Bumi (DMGB), Rusmadi, *Peta situasi wilayah kerja pertambangan minyak dan gas bumi Indonesia* (1977). SWSP, Vol. VII, Annex M187.

<sup>767</sup> Indonesian Direktorat Minyak dan Gas Bumi (DMGB), Rusmadi, *Peta situasi wilayah kerja pertambangan minyak dan gas bumi Indonesia* (1986). SWSP, Vol. VII, Annex M189.

<sup>768</sup> Indonesian Direktorat Jenderal Minyak dan Gas Bumi, *Peta wilayah kerja perminyakan Indonesia* (2002). SWSP, Vol. VII, Annex M192.

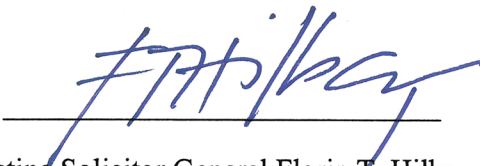
<sup>769</sup> Petroconsultants, S.A., *Indonesia* (1997). SWSP, Vol. VII, Annex M190.

<sup>770</sup> Quest Offshore Resources, Deloitte Petroleum Services, *Asia Pacific* (2011). SWSP, Vol. VII, Annex M220.





16 March 2015



Acting Solicitor General Florin T. Hilbay

*Agent of the Republic of the Philippines*



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- Annex 344 United Kingdom Hydrographic Office, *Admiralty Sailing Directions: China Sea Pilot (NP30)*, Vol. 1 (5th ed., 2001)
- Annex 232(bis) Navigation Guarantee Department of the Chinese Navy Headquarters, *China Sailing Directions: South China Sea (A103)* (2011)

#### PHILIPPINE GOVERNMENT DOCUMENTS

- Annex 345 Republic of the Philippines, Municipality of Kalayaan, “The First 100 Days: Accomplishment Report of Mayor Eugenio B. Bito-Onon, Jr.”
- Annex 346 Republic of the Philippines, Municipality of Kalayaan, *Brochure: Municipality of Kalayaan, Palawan, Philippines*
- Annex 347 Republic of the Philippines, Naval Defense Forces, *Philippine Ports and Harbors, Special Edition: Kalayaan Island Group* (Mar. 1988)
- Annex 92(bis) Republic of the Philippines, Municipality of Kalayaan, *The Comprehensive Development Plan 2010-2016* (5 Apr. 2013)
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