
Permanent Court of Arbitration
Peace Palace
The Hague
The Netherlands

Day 3 Thursday, 26th November 2015

Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility

Before:

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

BETWEEN:

THE REPUBLIC OF THE PHILIPPINES

-and-

THE PEOPLE’S REPUBLIC OF CHINA

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

The People’s Republic of China was not represented.

Transcript produced by Trevor McGowan, Georgina Vaughn and Lisa Gulland
www.thecourtreporter.eu
ALSO APPEARING

FOR THE PERMANENT COURT OF ARBITRATION

Registry:
Judith Levine, Registrar and Senior Legal Counsel
Garth Schofield, Senior Legal Counsel
Nicola Peart, Assistant Legal Counsel
Julia Solana, Assistant Legal Counsel
Philipp Kotlab, Assistant Legal Counsel
Iuliia Samsonova, Assistant Legal Counsel
Gaëlle Chevalier, Case Manager/Translator

EXPERT APPOINTED TO ASSIST THE ARBITRAL TRIBUNAL

Grant Williams Boyes

FOR THE REPUBLIC OF THE PHILIPPINES

Agent:
Florin T Hilbay, Solicitor General of the Philippines

Members of the Delegation:
Albert F Del Rosario, Secretary of Foreign Affairs
Gretchen V Del Rosario
Ronaldo M Llamas, Presidential Advisor on Political Affairs
Rodolfo G Biazon, Chair of the Committee on National Defence and Security of the House of Representatives
Francis H Jardeleza, Special Advisor and Associate Justice of the Supreme Court
Antonio T Carpio, Associate Justice of the Supreme Court
Jaime Victor B Ledda, Ambassador of the Philippines to the Kingdom of the Netherlands
Veredigna M Ledda
Victoria S Bataclan, Ambassador of the Philippines to the Kingdom of Belgium and the Grand Duchy of Luxembourg and Head of the Mission of the Philippines to the European Union
Melita S Sta.Maria-Thomeczek, Ambassador of the Philippines to the Federal Republic of Germany
Carlos C Salinas, Ambassador of the Philippines to the Kingdom of Spain and the Principality of Andorra
Isabelita T Salinas
Joselito A Jimeno, Ambassador of the Philippines to Switzerland and the Principality of Liechtenstein
Enrique A Manalo, Ambassador of the Philippines to the Court of St James
Menardo I Guevarra, Deputy Executive Secretary for Legal Affairs
Teofilo S Pilando Jr, Deputy Executive Secretary for General Administration
Emmanuel T Bautista, Undersecretary, Executive Director of the Cabinet Cluster on Security, Justice and Peace
Abigail DF Valte, Undersecretary, Deputy Presidential Spokesperson
Henry S Bensurto Jr, Consul General, Department of Foreign Affairs
Igor G Bailen, Minister, Department of Foreign Affairs
Dinno M Oblena, Minister and Consul General, Department of Foreign Affairs
Ana Marie L Hernando, Director, Department of Foreign Affairs
Zoilo A Velasco, Second Secretary and Consul, Department of Foreign Affairs
Ma. Theresa M Alders, Third Secretary and Vice Consul, Department of Foreign Affairs
Oliver C Delfin, Third Secretary and Vice Consul, Department of Foreign Affairs
Josel N Mostajo, Attorney, Department of Foreign Affairs
Maximo Paulino T Sison III, Attorney, Office of the Solicitor General
Ma. Cristina T Navarro, Attorney, Supreme Court
Elvira Joselle R Castro, Associate Solicitor, Office of the Solicitor General
Margret Faye G Tañgan, Attorney, Office of the Executive Secretary
Maria Graciela D Base, Associate Solicitor, Office of the Solicitor General
Melbourne D Pana, Associate Solicitor, Office of the Solicitor General
Ma. Rommin M Diaz, Presidential Communications Development and Strategic Planning Office
Rene Fajardo, Department of Foreign Affairs
Counsel:
Joseph Klingler, Foley Hoag LLP, Washington DC
Yuri Parkhomenko, Foley Hoag LLP, Washington DC
Nicholas M Renzler, Foley Hoag LLP, Washington DC
Remi Reichhold, University of Cambridge, UK
Melissa Stewart, Foley Hoag LLP, Boston, MA

Technical Experts:
Scott Edmonds, International Mapping
Alex Tait, International Mapping
Dr Robert W Smith

Assistants:
Elizabeth Glusman, Foley Hoag LLP, Washington DC
Nancy Lopez, Foley Hoag LLP, Washington DC

Expert witnesses:
Professor Kent E Carpenter, PhD, Department of Biological Sciences, Old Dominion University
Professor Clive Schofield, PhD, Australian Centre for Ocean Resource and Security, University of Wollongong

OBSERVERS

The Socialist Republic of Vietnam:
Trinh Duc Hai, Vice-Chairman of the National Boundary Commission, Ministry of Foreign Affairs
Nguyen Duy Chien, Ambassador of Vietnam to the PCA
Nguyen Minh Vu, Director-General, Department of International Law and Treaties, Ministry of Foreign Affairs
Nguyen Dang Thang, Deputy Director-General, National Boundary Commission, Ministry of Foreign Affairs
Thomas Grant, Counsel

Malaysia:
Ahmad Nazri Yusof, Ambassador of Malaysia to the Kingdom of the Netherlands,
Azfar Mohamad Mustafar, Director-General, Department of Maritime Affairs, Ministry of Foreign Affairs
Mohd Helmy Ahmad, Principal Assistant Secretary, National Security Council, Prime Minister’s Department
Kamarul Azam Kamarul Baharin, Principal Assistant Director of Survey, International Maritime Boundary Section, Department of Survey and Mapping
Intan Diyana Ahamad, Senior Federal Counsel, Attorney General’s Chambers
Nor’airin Abd Rashid, Second Secretary, Embassy of Malaysia in The Hague

**The Republic of Indonesia:**
Ibnu Wahyutomo, Deputy Chief of Mission, Embassy of Indonesia
Damos Dumoli Agusman, Ministry of Foreign Affairs
Andy Aron, Ministry of Foreign Affairs
Andreano Erwin, Office of the President
Haryo Budi Nugroho, Office of the President
Ayodhia GL Kalake, Coordinating Ministry of Maritime Affairs
Sora Lokita, Coordinating Ministry of Maritime Affairs

**Japan:**
Masayoshi Furuya, Embassy of Japan in the Netherlands
Nobuyuki Murai, Embassy of Japan in the Netherlands
Kaori Matsumoto, Embassy of Japan in the Netherlands
Yuri Suzuki, Consular Office of Japan in Hamburg

**The Kingdom of Thailand:**
Ittiporn Boonpracong, Ambassador, Royal Thai Embassy
Sorayut Chasombat, Director, Legal Affairs Division, Department of Treaties and Legal Affairs, Ministry of Foreign Affairs
Asi Mamanee, Minister Counsellor, Royal Thai Embassy
Tanyarat Mungkalarungsi, Counsellor, Department of Treaties and Legal Affairs, Ministry of Foreign Affairs
Kanokwan Ketchaimas, Counsellor, Royal Thai Embassy
Natsupang Poshyananda, First Secretary

**The Republic of Singapore:**
Luke Tang, Deputy Senior State Counsel, Attorney-General’s Chambers
Vanessa Lam, Desk Officer, Ministry of Foreign Affairs
Lin Zhiping, Desk Officer, Ministry of Foreign Affairs
John Cheo, Desk Officer, Ministry of Foreign Affairs

**Australia:**
Indra McCormick, Deputy Head of Mission and Counsellor, Australian Embassy in The Hague

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

PROFESSOR CLIVE SCHOFIELD (called)........................... 3

Statement by PROFESSOR SCHOFIELD........................... 4

First-round submissions by PROFESSOR BOYLE.................. 10

Tribunal questions........................................ 46

PROFESSOR KENT CARPENTER (called)........................... 47

Statement by PROFESSOR CARPENTER........................... 48

First-round submissions by PROFESSOR BOYLE................. 54

First-round submissions by PROFESSOR OXMAN................. 74

Tribunal questions........................................ 102
THE PRESIDENT: Yes, Mr Reichler, you may proceed.

MR REICHLER: Good morning, Mr President and members of the Tribunal. It will be our pleasure this morning to present, in addition to the speeches of counsel, the statements of two independent expert witnesses. We understand that it had been the Tribunal's preference to hear from the witnesses in the first round, and so of course we have accommodated.

Our intention is to begin this morning's session, with your permission, with the statement of Professor Clive Schofield. After Professor Schofield delivers his statement, Professor Boyle will then speak on behalf of the Philippines in regard to violations of China's environmental obligations. After Professor Boyle, Professor Kent Carpenter will then deliver his statement on the subject of environmental impacts of certain activities conducted in the South China Sea.

Then Professor Boyle will return to speak about violations of the international regulations concerning avoidance of collisions at sea. Professor Oxman will then deliver the final presentation on behalf of the Philippines this morning with respect to aggravation
and extension of the dispute, and addressing some of
the remaining jurisdictional questions that the
Tribunal has put to the Philippines.

We consider the two experts to be independent, and
specifically in the sense that they have been asked to
give their own statements, based on their own views
and their own expertise. They will be speaking in
that context, and they will also be available on
Monday to respond to any questions that the Tribunal
would like to put directly to them as experts.

So, with that introduction, I would like, with
your permission, for Professor Schofield to deliver
his statement.

THE PRESIDENT: Thank you very much. I think it is very
clear now. As I understand it, we will have the two
experts called by the Philippines,
Professor Schofield, who will then be followed by
Professor Boyle, and then Professor Carpenter will
come on; and then after his statement he will be
followed by Professor Boyle, and then after that we
will have Professor Oxman.

MR REICHLER: That's exactly right, Mr President.

THE PRESIDENT: Any questions that the Tribunal wishes to
put to the Philippines' team, including the experts,
will be provided tomorrow.

MR REICHLER: Excellent. Thank you very much. I assume
the Tribunal will designate which questions are for
counsel and which questions are for the expert. If
you care to ask questions directly to the experts, of
course they are available for that purpose. We will
see what the questions are tomorrow.

THE PRESIDENT: Thank you. That is very clear.

MR REICHLER: Thank you, Mr President.

(10.04 am)

PROFESSOR CLIVE SCHOFIELD (called)

THE PRESIDENT: Good morning, Professor Schofield. Thank
you for being with us today. As has been said by
Mr Reichler, you are appearing here as an expert
independent witness. We believe you appreciate that
testifying before an international tribunal such as
this is a very serious matter. Accordingly, the
Tribunal would like you to make the solemn declaration
which is in front of you before you make your
statement.

PROFESSOR SCHOFIELD: Certainly. Thank you. I solemnly
declare upon my honour and conscience that I will
speak the truth, and that my statement will be in
accordance with my sincere belief.

THE PRESIDENT: Thank you very much. Please proceed.

PROFESSOR SCHOFIELD: Thank you.
Mr President, distinguished members of the Tribunal, good morning. I am Professor Clive Schofield and I serve as director of research at the Australian National Centre for Ocean Resources and Security at the University of Wollongong in Australia. Concurrently I am the leader of the University of Wollongong's Global Challenges Program on Sustaining Coastal and Marine Zones.

It is a great honour and pleasure to be here before you to provide testimony as an independent expert witness. My task this morning is to summarise the findings of my report on the Geographical Characteristics and Status of Certain Insular Features in the South China Sea. This was included as Annex 513 and it also appears as tab 4.1 in your folders.

I prepared this report in partnership, in collaboration with Professor Emeritus J.R. Victor Prescott. As I suspect you may be well aware, he has been one of the leading commentators on international boundaries on both land and sea for the past five decades and more.

My other co-author was Mr Robert Van de Poll, who
is a geologist, geodesist and geographical information systems (GIS) expert with the leading surveying company Fugro Group, who are headquartered here in the Netherlands.

The objective of the report was to provide a critical assessment of the geographical characteristics and appropriate categorisation and status of all 49 features identified by the Tribunal in its Request for Further Written Evidence and Argument on 16 December 2014.

We expressed our independent view in regard to the following categories of maritime feature: that is, islands that are capable of generating a continental shelf and exclusive economic zone rights, in keeping with Article 121, paragraphs 1 and 2 of the United Nations Convention on the Law of the Sea; rocks which are unable to sustain human habitation or an economic life of their own, consistent with Article 121, paragraph 3 of the same Convention; low-tide elevations covered at high tide and exposed at low tide; and features which are entirely and permanently covered by water.

In summary, we found that of the 49 features identified by the Tribunal, 22 are permanently above water at high tide. We determined that 18 features are low-tide elevations, and a further two are
permanently submerged under water. This leaves seven further features where the evidence was insufficiently conclusive to determine whether they could be categorised as above-high-tide features or should be more properly accounted for as low-tide elevations. I will return to this category of features towards the end of my remarks.

Concerning the above-high-tide features, we conclude that it is appropriate to consider all of them as "rocks" within the meaning of Article 121(3) of the Convention. A small number of these features do have vegetation on them, and host government and/or military personnel which are stationed on them. But none of them have a indigenous population, and the personnel stationed on them are reliant on supplies from outside. There is no evidence of meaningful economic activity, either now or in the past.

In preparing our opinion, we adopted the following methodology or approach. First, we examined the nautical charts of China, the Philippines, Viet Nam, Malaysia, the United Kingdom, the United States, Japan and Russia. Excerpts of these charts are contained in the Atlas compiled by the Republic of the Philippines. Based on this examination, we determined that the charts are remarkably consistent in their depictions of the insular features of the South China Sea. This
is supported by the description of these features in the relevant Sailing Directions, particularly those produced by the charting authorities of China, the Philippines, the United Kingdom and the United States.

Second, we analysed high-resolution satellite imagery which provides recent and large-scale depiction of the features in question. This satellite imagery allows for multi-spectral image analysis, which involves different red, green and blue -- R+G+B -- band combinations from within the satellite image. This enables us to more easily distinguish between those features that are above water and those which are entirely submerged, by either maximising or minimising the degree of penetration of the water column in the image presented.

A example of this approach is illustrated on the screen now. This is a Landsat 7 image of Scarborough Shoal. The left-hand image before you is designed to maximise penetration of the water, and therefore shows those shallow subsurface features in close proximity to the surface of the water, whereas the right-hand image is intended to show only features that are above high tide. And in the context of Scarborough Shoal, that is a minimal amount, since there are only a scattering of half a dozen features -- small rocks -- which are above high tide on that feature.
Third, we used the digital elevation model -- or DEM -- component of Landsat 8 satellite imagery to conduct a three-dimensional advanced mapping and image analysis exercise. This precision mapping technique was also used to produce optically-derived bathymetry. On screen now is a depiction of this technique in action. There we have a close-up image of a Landsat 8 image for Barque Canada Reef, with shaded relief, contours draped on, and an interpreted normal baseline at the seaward edge of the reef feature, which is depicted by a purple line on the image in front of you.

Based on this methodology, I can confirm the following findings.

First, that of the 49 insular features in regard to which the Tribunal requested further information, 22 features meet the requirements for being considered an island, in keeping with Article 121(1) of the Convention. These are displayed on the map on screen, and they are also listed in the report. As I noted earlier, we do not consider it appropriate to treat any of these features as anything other than an Article 121(3) "rock".

Second, the following 18 features depicted on the screen now were determined to be low-tide elevations. These are also listed in the report.
Third, we identified seven features which we consider to be potential insular features -- that is, potentially above the high-tide mark -- but the available evidence was insufficiently conclusive. These features are shown on the map on the screen now, and are likewise listed in my report.

This group of features predominantly consists of reefs and shoals that are reported as being submerged or awash at high tide, but there may be individual or small groups of rocks or very small islets which are visible above the high-tide mark. However, analysis of best high-resolution satellite imagery of these features proved to be inconclusive in confirming whether any parts of these features indeed do emerge above the high-tide mark.

In short, if parts of these features do emerge above high tide, they must be so small that they are indetectable using high-resolution satellite imagery. It follows from this that, in our view, this means that these features can be considered, at most, to be categorised as Article 121(3) "rocks".

Finally, the report identified two features that are entirely and permanently submerged under water, namely Macclesfield Bank and Reed Bank.

In conclusion, our findings are consistent not only with the unanimous view of multiple hydrographic
authorities, but also with the recently acquired EOMAP satellite imagery and analysis that Professor Sands presented to you yesterday.

Mr President, distinguished members of the Tribunal, my profound thanks to you for the opportunity to address you. This concludes my presentation to you this morning. Thank you.

THE PRESIDENT: Thank you very much.

(10.15 am)

First-round submissions by PROFESSOR BOYLE

PROFESSOR BOYLE: Mr President, members of the Tribunal, it is an honour to appear before you once more on behalf of the Philippines. You have listened patiently to my colleagues talking about rocks, the nine-dash line, historic rights, maritime entitlements. In this speech I will invite you to turn your attention to the damage that China has done to the marine environment, and more specifically to the complex ecosystem of coral reefs, biodiversity, and the living resources of the South China Sea. This is, I believe, the first case to address the scope and application of Part XII of UNCLOS on the merits. As such, it gives you a unique opportunity to amplify and interpret the framework that was negotiated in the 1970s, when international environmental law was still
an infant.

It is an obvious truism that life on earth does not exist in isolation - species interact with each other and with their physical environment in order to survive and to grow. The term "ecosystem" describes this interaction. Ecosystem is defined by Article 2 of the Convention on Biological Diversity in these terms:

"a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit."

In summary, our case is that China has damaged that ecosystem and, if unchecked, its activities will continue to pose a significant threat to the marine environment of the South China Sea, and of all of the states which border that Sea.

May I remind you that Submission 11 in the Philippines’ Memorial reads follows:

"China has violated its obligations under the Convention to protect and preserve the marine environment at Scarborough Shoal and Second Thomas Shoal."

Our claim in this respect is that:

"China's toleration, encouragement of and failure to prevent environmentally destructive fishing practices violate its duty ... to protect and preserve
the marine environment."¹

We say that China has allowed its fishermen to harvest coral, giant clams, turtles, sharks and other threatened or endangered species which inhabit the reefs; that it has allowed them to use dynamite to kill fish and destroy coral, and to use cyanide to harvest live fish.

Submission 12(b), which I will also be dealing with, concerns the marine environmental effects of land creation and construction activities on Mischief Reef.² It is convenient to deal with both of these claims in this speech. I will also address the questions posed by the Tribunal in sections I(H) and I(I)(2) of the Annex sent to the Parties on 10th November.

Let me stress right at the outset that in our view the obligation of China to protect and preserve the marine environment is not dependent on deciding which Party, if any, has sovereignty or sovereign rights or jurisdiction over Scarborough Shoal or Second Thomas Shoal or Mischief Reef. What matters is whether China has jurisdiction or control over the harmful fishing practices, the land creation and the construction activities which threaten the marine environment at

¹ Memorial of the Philippines (hereinafter “MP”), para 7.35.
² See id., paras. 6.108-6.113.
those locations and elsewhere in the South China Sea. We say that it does, and I will come back to that point later in this speech.

Mr President, members of the Tribunal, if at the conclusion of this case you do decide, as we have argued, that any of these disputed features are part of the Philippines' EEZ or its continental shelf, then our case on the marine environment could be put differently. It would resemble the responsibility of Iraq for environmental damage and lost natural resources arising out of its illegal invasion and occupation of Kuwait. The illegality in this case, of course, would be the violation of Article 77 with respect to destruction of coral reefs and the harvesting of giant clams or other sedentary species, and the violation of the Philippines' sovereign rights with respect to Chinese fishing in the EEZ. States are, of course, responsible for the violation of their international obligations, and that includes those obligations with respect to natural resources and the environment, and the damage caused by illegal construction and unauthorised fishing. In his speech yesterday, Professor Sands has already laid out the

---

elements of that case, and I will not repeat them.
I will therefore focus on the alternative thesis that
China has violated its obligations to protect and
preserve the marine environment.

The South China Sea is home to one of the largest
and most productive coral reef ecosystems in the
world. Second Thomas Shoal, Mischief Reef and
Scarborough Shoal are, of course, part of that coral
reef system. Geologically, they are submerged
seamounts on which coral reefs have formed over many
thousands of years. Most coral reefs remain low-tide
elevations, but in the South China Sea the build-up of
sand has turned some of them into sandy cays above sea
level; but, as you have just heard, not very many.

In his first expert report, Professor Kent
Carpenter describes how the area stretching eastwards
from Malaysia through the South China Sea towards New
Guinea and the Solomon Islands is home to what he says
is the "greatest concentration of marine life on the
planet". He goes on to explain in his report how:

"the central Philippines is well established as

---


the one place in the world with more species of marine
life per unit area than [are found in] any other place
on Earth." And he refers to the waters near the
Philippines as "the global epicentre of marine
biodiversity".\(^6\) The tropical rainforests of the
Amazon region would perhaps be an apt terrestrial
analogy.\(^7\)

Professor Carpenter also points out that the
Spratly Islands and Scarborough Shoal have:
"an extreme diversity of coastal fishes and a high
percentage of ... seagrasses, corals, giant clams,
marine turtles and many other marine groups."\(^8\)
Some of these species are on IUCN's Red List of
threatened species, including the giant clams taken by
Chinese fishermen. Their loss, he says:
"results in a reduction in the structure of the
reef and reduces its ability to support life."\(^9\)

The importance of coral reefs to marine ecosystems
cannot be overstated. It is explained in a paper by
Professors Moberg and Folke, which is reproduced as
Annex 262(bis) in the Philippines' Supplemental

\(^6\) Id., p. 4.


\(^9\) Carpenter Report, p. 6.
In summary, the professors make the following points. They say that:

- Coral reefs create favourable conditions for the growth of sea-grasses and mangrove ecosystems.
- They function as important spawning, nursery, breeding and feeding areas for fish stocks and other marine species.
- They enhance the productivity of plankton and marine organisms on which commercially important fish stocks feed.
- They sustain other species that regulate and maintain the productivity of the marine ecosystem.
- They go on to point out that coral reefs have biogeochemical effects: they precipitate about half the annual calcium input of the oceans, and they help detoxify waste products.
- They also note that they assist in monitoring changes in the state of the marine environment and climate change.
- Finally, they point out that ocean currents

---

and the life-cycles of marine species create 
a high degree of interconnectivity between 
the different ecosystems throughout the South 
China Sea and the Philippine archipelago; and 
this, they point out, helps replenish 
fisheries and reef species across the entire 
region. Professor Carpenter will have more 
to say on this later this morning.

In their most recent report, which you will find 
at tab 4.4 in your bundle, Professors Carpenter and 
Chou explain that:

"[t]he loss of seven major reef features to land 
creation within 1.5 years will have a huge impact on 
the ecological integrity of not only the Spratly reefs 
but also of the South China Sea."¹¹

The Tubbataha World Heritage Site in the Sulu Sea, 
which is to the east of Palawan, is rather similar to 
the reef systems of the eastern South China Sea.¹² 
Damage to these reef systems is thus equivalent, 
in effect, to damaging a World Heritage Site.

What, then, has China done with these reefs? 
Well, China has carried out or tolerated various 
activities that are significantly harmful to this 


marine environment. Yesterday, you heard
Mr Loewenstein describe the land creation and
construction activity at Mischief Reef and elsewhere
in the South China Sea. I'm sure you will recall the
pictures that he showed, and how graphically they
illustrated the scale of China's land creation.
Carpenter and Chou list the harmful environmental
effects in greater detail in their second report.
Millions of tons of rock and sand have been dredged
from the seabed and deposited on shallow reefs. 13
Land creation on this massive scale inevitably
destroys that part of the reef. 14 Even where the reef
itself is not directly destroyed, the sedimentation
caused by these very large-scale works and the
disturbance of the seabed may eventually smother the
coral, depriving it of sunlight and the ability to
feed and grow. 15 And adjacent reefs may also be
affected. 16 There will be long term and more
widespread effects on the marine ecosystem and
biological diversity. 17

Mr President, the Annex of Issues asks about the

13 See Carpenter and Chou Report, p. 11.
14 See id., p. 24.
16 See id., pp. 32-34.
17 See id., pp. 26-38.
"specific environmental effects of China's installations at Mischief Reef". In answering that question, I can do no better than refer you to the expert reports by Professors Carpenter and Chou. They address this question in more detail and with far more authority than I can do; I am, after all, only a professor of international law. But Professor Carpenter will follow me to the podium and he will be available, as indicated by Mr Reichler, to answer any questions the Tribunal may wish to put to him.

I might perhaps add one caveat. For obvious reasons, the Philippines is unable to investigate conditions at Mischief Reef. It cannot send scientists to investigate and report. There are no independent observers on which to draw. But we can draw the obvious inferences about the harm that large-scale land creation and construction activities will cause, especially when carried out on fragile coral reefs, and so can the Tribunal draw those inferences.

You will see on the screen now two satellite photos of sedimentation caused by land creation works at Mischief Reef. The light blue areas that you see to the left in both pictures are the sedimentation caused by dredging. I think in that picture it's the
light blue area surrounding the dredger which is the evidence of sedimentation.

As I've indicated, of course, we cannot show you the precise effects of that sedimentation on the reef; we simply do not have access, we do not have photos of the reef itself. But we can show -- and the pictures do show -- the obvious disturbance of the seabed and the water column. In his statement later this morning, I expect that Professor Carpenter will reiterate the harm caused by that sedimentation on fragile reefs and their ecosystem.

Blast fishing by Chinese fishermen also damages coral reefs, and the evidence for this activity is set out in the Memorial.\(^\text{18}\) It is carried out by dropping explosives onto a reef.\(^\text{19}\) It has been estimated that a bottle bomb containing half a kilogram of explosive will shatter all of the coral reef structure within just over a metre radius from the reef. It is estimated that a gallon-sized drum filled with explosive will reduce the coral reef to rubble within a 5-metre radius,\(^\text{20}\) and the killing zone for fish and

\(^{18}\) Memorial, para. 6.58.


invertebrates will be much wider.

Blast fishing enables coral to be harvested for sale on the tourist market. It is indiscriminate and wasteful of fish stocks and sedentary species, but its impact is more complex than that, because the biodiversity of coral reefs is due in part to their complex topography. So if you destroy the topography, you destroy the habitat, and you thus reduce the biodiversity.\textsuperscript{21}

Chinese fishermen have also been using cyanide and other poisons. This practice is driven by the demand for live fish from the aquarium trade and from restaurants.\textsuperscript{22} Again, the evidence for this activity is set out at Annex 240 of the Memorial: it's Professor Carpenter's first report.

The use of organic or cyanide-based poisons stuns the fish, which can then be harvested live. The practice obviously encourages unsustainable catch levels, and it may also kill or injure non-target species. And the target species themselves may not actually survive transit to their intended destination. So the use of cyanide results in the


loss of coral if it is sprayed into the reef and the
coral is then broken apart to extract the fish.\(^{23}\)

Finally, paragraphs 6.51 to 6.57 of the Memorial
detail the evidence of Chinese harvesting of giant
clams, turtles and other endangered or protected
species at Scarborough Shoal. Giant clams in
particular are important elements of the reef system
in the South China Sea. The harvesting of all of
these species further damages the coral reef
ecosystem.\(^{24}\) Fish stocks will suffer, endangered
species will be further depleted, again biodiversity
will be reduced, the marine environment will be
harmed.\(^{25}\)

We say that all of this violates the basic rules
and principles set out in Part XII of the Law of the
Sea Convention, starting with Articles 192 and 194.
The Tribunal asked a number of questions in its annex
of 10th November about Articles 192 and 194, and I am
now going to endeavour to answer them.

It is our case that Articles 192 and 194 require
states parties to do five things, and I think they are
the same five things I indicated in my last appearance


\(^{24}\) Memorial, para. 6.58.

and N. Poulmin, "Impacts of Fishing on Tropical Reef Ecosystems", Ambio: A
before you in July: firstly, to protect and preserve marine ecosystems, including coral reefs; secondly, to ensure sustainable use of biological resources, which those coral reefs represent; thirdly, to protect and preserve endangered species found on the reefs; fourthly, to apply a precautionary approach in all of these respects; and finally, to consult and cooperate with the relevant coastal states on the protection and preservation of the biological resources, the ecosystems and the marine environment at Scarborough Shoal, Second Thomas Shoal, Mischief Reef and all the other reef systems in the South China Sea.

Article 192 of course provides that:

"States have the obligation to protect and preserve the marine environment."

It covers areas within national jurisdiction, including the territorial sea, and areas beyond national jurisdiction, including the high seas. In short, Article 192 requires states, among other things, to take measures to conserve marine living resources and preserve the ecological balance of the oceans as a whole.26

Articles 194(1) and 194(2) elaborate the general obligation by requiring parties to control marine pollution and prevent pollution damage to other states from activities under their jurisdiction or control. In the present case, sedimentation resulting from Chinese land-creation activities has created pollution. It is pollution because it has deleterious effects on "living resources and marine life", including the health of coral reefs. It thus fits the definition of "pollution" in Article 1(1)(4) of the Convention.27 Article 194(3)(a) specifically requires states to take additional measures to:

"... minimize to the fullest possible extent ...
the release of toxic, noxious or harmful substances."

The use of cyanide and dynamite by Chinese fishermen rather self-evidently falls into that category.

But Article 194 is not limited to the prevention of pollution. Article 194(5) goes on to provide that:

"[t]he measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of

27 UNCLOS, Art. 1(1)(4) ("pollution of the marine environment’ means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.")
depleted, threatened or endangered species and other forms of marine life." We would suggest that reading Articles 194(3) and 194(5) together, it follows that the marine ecosystem must be protected from the harmful effects of land creation, construction activities, and the use of cyanide and dynamite for fishing.

The recent award of an arbitral tribunal in the Chagos arbitration confirms that Article 194(5) covers the conservation and preservation of marine ecosystems, including coral reefs. The tribunal in that case found that:

"Article 194 is ... not limited to measures aimed strictly at controlling pollution and extends to measures focused primarily on conservation and the preservation of ecosystems."\(^{28}\)

Let me then explain each of my five points in more detail. My first proposition is that China has an obligation to protect and preserve marine ecosystems, including the coral reefs in question in this case. Coral reefs are, as I explained a few moments ago, of course, a vitally important part of

---

the marine ecosystem.\textsuperscript{29}

Does this claim fit the terms of Article 194(5)?

Yes. Coral reefs are always fragile. Some species of
coral taken from Scarborough Shoal are rare.\textsuperscript{30} They
provide a habitat for many species, some of which --
including giant clams, turtles and sharks -- are
depleted, threatened or endangered.\textsuperscript{31} The so-called
"branching coral" extracted by Chinese fishermen at
Scarborough Shoal is the typical habitat of crabs,
shrimps and smaller reef fish on which larger fish
species feed. Destroying this form of coral reduces
the ability of the reef to support viable fish
stocks.\textsuperscript{32} Creating artificial islands out of coral
reefs is the worst possible way to treat these
fundamental ecological building blocks. It will
destroy or smother the reef; you saw the pictures
yesterday. Destroy the reef and you destroy the
ecosystem. And we say that all of that constitutes
a violation of Articles 192 and 194.

Our second proposition is that the living resource
which coral reefs represent must be used sustainably.

\begin{footnotes}
\end{footnotes}
\\textsuperscript{29} See Carpenter Report, p. 15. MP, Vol. VII, Annex 240; Carpenter and Chou
240.
\textsuperscript{31} Id., pp. 19-24.
\textsuperscript{32} Id., p. 14.
The notion of sustainable use is inherent in Article 194(5): to protect and preserve fragile ecosystems necessarily implies that any legitimate use must be non-exhaustive. As early as the Bering Sea Fur Seals Arbitration, the need to conserve living resources was recognised. Similarly in the Icelandic Fisheries case, the ICJ referred inter alia to the "conservation and development of the fishery resources", while in the Pulp Mills case it used the term "optimum and rational utilization" in respect of a shared watercourse. Underlying all of these phrases is a concern for the balanced and sustainable use of natural resources.

That's also reflected in Article 2 of the Biodiversity Convention, which defines sustainable use as:

"use ... in a way and at a rate that does not lead to long-term decline of biological diversity"
The UN Fish Stocks Agreement also refers to: 
"measures to ensure the long-term sustainability of straddling fish stocks and highly migratory fish stocks."\(^37\)

We would suggest that both of these instruments are relevant when interpreting UNCLOS.

Blast fishing and the use of cyanide are obviously wasteful and unsustainable, for all the reasons already given. They are also contrary to the FAO's Code of Conduct for Responsible Fishing,\(^38\) and the Code of Conduct is one of those generally accepted international rules and standards which inform the interpretation of the relevant articles of the Convention. We say that the use of these harmful fishing techniques on any significant scale violates the conservation requirements of Articles 61 and 119 of UNCLOS when employed beyond the territorial sea, but we would also say that China has a comparable obligation to control the use of these techniques in the territorial sea by virtue of Articles 192 and 194.

---


\(^38\) UN Food and Agriculture Organization, Code of Conduct for Responsible Fisheries (31 Oct. 1995), para. 8.4.2. Supplemental Documents, Vol. VI, Annex LA-253 (providing that "States should prohibit dynamiting, poisoning and other comparable destructive fishing practices.").
Our third proposition is that the sustainable use of biological resources implicit in Article 194(5) includes an obligation to protect and preserve threatened and endangered species. Giant clams are listed as a species under threat in Appendix II of the CITES Convention, and they are also on IUCN's Red List. We say that the appendices of the CITES Convention are generally accepted international rules and standards that, again, should inform the interpretation and application of Articles 192 and 194.

The Tribunal did ask, in its Annex of Issues:

"Whether the Philippines alleges a violation of the Convention with respect to Chinese fishing activities at Scarborough Shoal other than during the incidents in and around May 2012."

The events referred to in paragraphs 6.51 to 6.57 of the Memorial all took place in or before April 2012. So I think the answer to the question must therefore be: yes.

Fourthly, although the point is relevant only for the sake of completeness, the precautionary approach as endorsed in Principle 15 of the Rio Declaration is


also an important element of sustainable utilisation, because it addresses the key question of uncertainty. The jurisprudence supports the conclusion that Articles 192 and 194 must be interpreted accordingly.41

But I should stress that in the context of this case, we place no reliance on the precautionary approach. In our view, we do not need to. There is no uncertainty. The risks are obvious.

The obligations created by Articles 192 and 194 are, of course, not absolute. States are only required to take appropriate measures. They must, in other words, act with due diligence. The case law has identified various elements of that obligation, including the "adoption of reasonably appropriate rules and measures", "a certain level of vigilance in their enforcement", and "the exercise of administrative control applicable to public and private operators".42


42 See Pulp Mills on the River Uruguay (Argentina v Uruguay), Judgment, ICJ Reports 2010, paras. 197 & 223. Supplemental Documents, Vol. VI, Annex LA-240. See also Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), Advisory Opinion of 1
The relevant Chinese legislation in this case appears to be the Marine Environment Protection Law of 1999. Mr President, members of the Tribunal, you will find the full text of that law at tab 4.5 in your folder. This law applies to all sea areas under the jurisdiction of the People's Republic of China. It establishes a comprehensive system for regulating and controlling marine pollution, and for maintaining an ecologically balanced marine environment.

Articles 2, 20, and 26 are the most immediately relevant. I am not going to read them out, but will simply observe that what they envisage appears to be a reasonably strict and comprehensive protection for ecologically sensitive sea areas, coral reefs and islands.

So the Chinese authorities do have power, under their own law, to achieve what Articles 192 and 194 of UNCLOS require, including the power to adopt further regulations, and to take the necessary measures to ensure that land creation and construction work and fishing practices do not destroy coral reefs or pollute the marine environment or alter the ecological


44 Id., Art. 2.
balance.

How then can we explain the clear evidence of ecological destruction on the vast scale that we have seen in this case? This is destruction which, on the face of it, cannot be squared with China's own law. Whatever its laws and regulations may provide, China has changed the fundamental ecology of the South China Sea, probably forever. The destruction caused by land creation that you saw yesterday is deliberate, it is irreparable, and it may not even be in Chinese waters. But that is not all.

China is, of course, a flag state for the fishing vessels concerned, and flag states have an obligation to monitor and enforce compliance with their laws by all vessels flying their flag. The facts set out in the Memorial show that China has not even attempted to do so. The use of dynamite and cyanide by Chinese fishermen is widespread; coral has been extracted; giant clams, turtles and endangered species have been caught. And Chinese fisheries enforcement vessels not only do not stop these practices, but actively support, protect and facilitate them. This evidence,

correspond to the vigilance in enforcement or administrative control or monitoring envisaged by the ICJ in the *Pulp Mills* case or by the Tribunal on the Law of the Sea in the *Advisory Opinion on Activities in the Area*. Indeed, it does not demonstrate vigilance or diligence of any kind.

China is not responsible for the actions of its fishermen, but it is responsible for its own failure to control their illegal and damaging activities. I do not need to remind members of this Tribunal that in its most recent *Advisory Opinion*, the Tribunal on the Law of the Sea held that:

"It follows from the provisions of article 94 of the Convention that as far as fishing activities are concerned, the flag State, in fulfilment of its responsibility to exercise effective jurisdiction and control ... must adopt the necessary administrative measures to ensure that fishing vessels flying its flag are not involved in activities which will undermine the flag State's responsibilities under the Convention in respect of the conservation and management of living resources."\(^{46}\)

The Tribunal, at paragraph 119, goes on to say:

"If such violations nevertheless occur and are..."
reported by other States, the flag State is obliged to investigate and, if appropriate, take any action necessary to remedy the situation."  

So, for all of those reasons, we therefore say that at Scarborough Shoal, Second Thomas Shoal and Mischief Reef, and at other reefs throughout the South China Sea, China has singularly failed to protect and preserve the marine environment, the fragile ecosystems, and the habitat of depleted, threatened or endangered species from damage, and it has thereby violated Articles 192 and 194, and most specifically Article 194(5).

Mr President, the Annex of Issues asks the Philippines to address:

"The nature and scope of the obligation pursuant to Article 206 of the Convention to carry out an environmental impact assessment."

This important question merits a reasonably full answer because it goes to the heart of what we say China has not done.

Article 206 requires states parties to carry out an environmental impact assessment:

"whenever activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment."

47 Id.
environment."

It is not limited to activities which may cause transboundary harm to the other states; it covers the marine environment as a whole. The broad scope of Article 206 was confirmed by the Seabed Disputes Chamber in its *Advisory Opinion on the Responsibilities of States with Respect to Activities in the Area*. In that judgment, the Chamber cited the ICJ's judgment in the *Pulp Mills* case, and it then went on to say:

"The [ICJ]'s reasoning in a transboundary context may also apply to activities with an impact on the environment in an area beyond the limits of national jurisdiction; and the Court's references to 'shared resources' may also apply to resources that are the common heritage of mankind."  

We submit that the logic of this conclusion applies equally to large-scale construction activities on fragile coral reefs in the South China Sea. The land creation and construction activities on the scale and character of those undertaken by China at Mischief Reef and elsewhere clearly fall fairly and squarely


within the terms of Article 206. They pose an obvious risk of significant and harmful changes to the marine environment.

In its Pulp Mills judgment, the International Court concluded -- and I will read out this passage because it is important:

"it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment."\(^{50}\)

The Court's formulation in this paragraph requires careful reading. It does not say that the content of an EIA is for the state to decide in its sole discretion. On the contrary, what it says is that an EIA must have regard to "the nature and magnitude of the proposed development and its likely adverse impact on the environment".

In saying that, the International Court was reflecting the arguments of counsel for both parties in this case. And what counsel referred to, and what

---

I believe the court was reflecting, is the views of the International Law Commission, expressed in its commentary to the 2001 Articles on Prevention of Transboundary Harm, and that commentary contains the following explanation. I think the court's statement needs to be read in conjunction with the ILC commentary to get the full picture of what the content of an EIA should be. Here's what the commentary says:

"(7) The specifics of what ought to be the content of assessment is left to the domestic laws of the State conducting such assessment. But for the purposes of Article 7, however, such an assessment should contain an evaluation of the possible transboundary harmful impact of the activity. In order for the States likely to be affected to evaluate the risk to which they might be exposed, they need to know what possible harmful effects that activity might have on them."

They go on to say in the next paragraph:

"(8) The assessment should include the effects of the activity not only on persons and property, but also on the environment of other States."

Also on the environment of other states. And they conclude:

"The importance of the protection of the environment, independently of any harm to individual
human beings or property is clearly recognized."\textsuperscript{51}

That's the ILC's commentary.

It is apparent from that commentary that whatever national law may or may not require, international law requires, at a minimum, that an EIA assess possible effects on people and property and the environment of other states. And if national law says nothing on the subject, if it does not ensure that such an assessment is carried out, for whatever reason, there is inevitably a breach of the obligation to do a transboundary EIA. \textit{Mutatis mutandis}, and taking into account Article 194(5), an EIA for the purposes of Article 206 of UNCLOS must at a minimum, we would argue, assess possible effects on the marine environment,\textsuperscript{52} including:

- the marine ecosystem of the South China Sea,
- the coral reefs at issue in this case,
- the biodiversity and sustainability of living


\textsuperscript{52} Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), \textit{Advisory Opinion of 1 February 2011, ITLOS Reports 2011}, para. 148. Supplemental Documents, Vol. VI, Annex LA-243.
resources there, and

- endangered species.

There is simply no evidence that China has carried out such an EIA. In our view, there is plainly a breach of Article 206.

Mr President, happily that brings me to the final section of my speech, which is about the obligation to consult and to cooperate. In our view, China has entirely failed to consult and cooperate with the Philippines and other relevant states in the protection and preservation of the biological resources, ecosystems and marine environment of Scarborough Shoal, Second Thomas Shoal, Mischief Reef and all the other reef systems in the South China Sea.

Article 197 of UNCLOS requires states to cooperate both globally and regionally for the protection and preservation of the marine environment, and that applies equally to the South China Sea as it applies to other regional seas. In doing so, the states concerned may of course take into account "characteristic regional features". We would suggest that in the South China Sea those characteristic regional features include the fundamental biological and ecological importance and the fragile nature of the coral reef ecosystem of that sea.

The obligations implicit in Article 197 are spelt
out in greater detail by Article 123. This provision applies only to enclosed or semi-enclosed seas, but the South China Sea clearly fits that characterisation. Article 123 refers to cooperation with respect to living resources, protection and preservation of the marine environment and scientific research.

The Tribunal on the Law of the Sea has on three occasions held that:

"the duty to co-operate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law and that rights arise therefrom which the Tribunal may consider appropriate to preserve under Article 290."\(^53\)

In the Mox Plant case and the Land Reclamation case, the parties were thus ordered to cooperate, to consult, to exchange information, and to monitor or assess the risks and effects of their activities. Similarly, in the Southern Bluefin Tuna case, the tribunal emphasised the need for greater cooperation to ensure conservation and optimum utilisation, and it

ordered the parties to resume negotiations for that
purpose "without delay".\textsuperscript{54}

The fundamental importance of co-operation is
recognised in other contexts. In \textit{Pulp Mills}, the ICJ
reiterated:

"that it is by co-operating that the States
concerned can ... manage the risks of damage to the
environment that might be created by the plans
initiated by one or other of them, so as to prevent
the damage in question"\textsuperscript{55}

The ILC commentary to its Draft Articles on
Prevention of Transboundary Harm also states that:

"[t]he principle of cooperation between States is
essential in designing and implementing effective
policies to prevent significant transboundary harm or
... to minimize the risk thereof."\textsuperscript{56}

A particular feature of these articles is the

\textsuperscript{54} Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan),
Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, para. 78

\textsuperscript{55} Pulp Mills on the River Uruguay (Argentina v Uruguay), Judgment, ICJ
also United Nations Environment Programme, Governing Council Approval of
the Report of the Intergovernmental Working Group of Experts on Natural
Resources Shared by Two or More States, UN Doc. GC.6/CRP.2 (19 May 1978),
VI, Annex LA-284.

\textsuperscript{56} International Law Commission, "International Liability for Injurious
Consequences Arising Out Of Acts Not Prohibited By International Law
(Prevention of Transboundary Harm From Hazardous Activities)", in Report of
the International Law Commission on the work of its Fifty-third session (23
continuing character of that obligation to cooperate, even after a project has come into operation.\textsuperscript{57} What can we say about Chinese cooperation on matters of environmental protection in the South China Sea? There is very little evidence of it. There are cursory references in the 2002 DOC.\textsuperscript{58} The FAO Asia-Pacific Fisheries Commission performs essentially technical functions in regard to the South China Sea and other relevant areas within its jurisdiction, but it has adopted no measures for the conservation of anything.\textsuperscript{59} There is no regional seas agreement for the South China Sea.

There is a UNEP Regional Seas Programme for East Asia, which includes the South China Sea,\textsuperscript{60} and China and the Philippines are participants.\textsuperscript{61} The revised


action plan agreed in 1994 covers, inter alia, rehabilitation of vital ecosystems, restoration of ecologically or economically important species and communities, the establishment of a viable network of marine protected areas and an environmental impact assessment.\textsuperscript{62} According to the programme's website:

"[t]he main components of the East Asian Seas Action Plan are assessment of the effects of human activities on the marine environment, control of coastal pollution, [the] protection of mangroves, seagrasses and coral reefs, and waste management."\textsuperscript{63} The website goes on to say that the programme:

"promotes compliance with existing environmental treaties and is based on member country goodwill."\textsuperscript{64} China's current activities in the South China Sea do not resemble the environmental priorities set out here. In the contested parts of the South China Sea, there are no marine protected areas, no areas designated as vulnerable marine ecosystems, no

\footnotesize{Cambodia, China, Indonesia, Malaysia, Philippines, Republic of Korea, Singapore, Thailand and Vietnam.}


\footnotesize{\textsuperscript{64} Id.}
evidence of serious restraints on illegal fishing.
There is precious little evidence of the promised goodwill.

But regional cooperation on environmental protection and sustainable use of living resources is not simply a matter of goodwill. China has a legal obligation under UNCLOS, and under general international law, to cooperate in the protection and preservation of the marine environment. It has done nothing to give effect to that obligation, or to its commitments under other non-binding instruments. On the contrary, its own behaviour towards the Philippines, and towards other states bordering the South China Sea, has been aggressive, and it has sought to exclude others, rather than to cooperate with them. If the duty to cooperate is a fundamental principle under Part XII of the Convention -- and there is no reason to be believe that it is not -- then it is equally fundamental in the South China Sea. China shows no sign of understanding that simple point. Here, too, it has simply ignored the applicable provisions of the Convention.

Mr President, members of the Tribunal,
Submissions 11 and 12(b) of the Philippines' Memorial are, in our submission, substantiated by the evidence presented in the Memorial and by the expert reports
from Professors Carpenter and Chou. They show that China has violated its obligations under Articles 192 and 194 of the Law of the Sea Convention to protect and preserve the marine environment. It has also violated its obligation to cooperate under Articles 123 and 197, and its obligation under Article 206 to carry out an environmental impact assessment before commencing land creation and construction work. It has neither complied with nor sought to enforce its own marine environmental protection law, and it has made no effort to control the harmful activities of its fishermen. This is simply not the behaviour of a party applying the 1982 Convention in good faith.

Mr President, that concludes my submissions on the marine environment. Unless you or your colleagues have any questions, I would ask you to call Professor Kent Carpenter to the podium.

**THE PRESIDENT:** Thank you very much. There is a question from Judge Wolfrum.
JUDGE WOLFRUM: Thank you, Mr President.

Professor Boyle, considering the last statement you referred to from China that there are no rules for the protection of certain species, et cetera, taking this into account, you have said that Chinese fishermen took giant clams, destroyed coral, used explosives, et cetera.

What hard facts do you have that this has been taking place? You said at the beginning there is a caveat: there was no fact-finding you could undertake in this region. But still you must present to us something, that we know that what you qualified as illegal fishing, illegally taking parts of the sea, marine biomass, and destroying the coral, so that we find a factual basis for invoking Articles 192 and 194, et cetera.

Thank you, Professor Boyle.

PROFESSOR BOYLE: Judge Wolfrum, I think what I said in my speech was that the evidence -- of course, there's a range of different activities here: there's the blast fishing, there's the use of cyanide, there's the construction activity, there's the harvesting of sedentary and endangered species.
Leaving aside the construction activity, which I think is in a different category, the evidence for all of the other three is in fact set out in the Memorial and in Professor Carpenter's reports. If you wish, we can of course review that and provide a summary for you on Monday.

JUDGE WOLFRUM: Okay, that would be sufficient. Sure, you referred to that. But please focus on the facts, so that the facts are clearly in front of us on the table. Thank you.

PROFESSOR BOYLE: I'm sure we will be able to do that.

THE PRESIDENT: Thank you very much. Any other questions? No.

Well, there are no other questions, and it is now 11 o'clock. So we will break for tea, and then after that we will call Professor Carpenter.

PROFESSOR BOYLE: Okay. Thank you Mr President.

(11.05 am)

(A short break)

(11.25 am)

PROFESSOR KENT CARPENTER (called)

THE PRESIDENT: Professor Carpenter, it is exactly the same as I told Mr Schofield. And I would ask you, please, to make the declaration which is in front of you.
PROFESSOR CARPENTER: I solemnly declare upon my honour
and conscience that I will speak the truth, and that
my statement will be in accordance with my sincere
belief.

THE PRESIDENT: Thank you very much. You may now
proceed.

(11.26 am)

Statement by PROFESSOR CARPENTER

PROFESSOR CARPENTER: Good morning, Mr President and
members of the Tribunal. It is an honour to appear
before you as a expert witness.

I am Dr Kent Carpenter, professor in biological
sciences at Old Dominion University in Norfolk, 
Virginia. I also serve as manager of the Marine
Biodiversity Unit and Global Marine Species Assessment
of the International Union for Conservation of Nature, 
the IUCN. I studied marine biodiversity and coral
reef ecology in Southeast Asia. I have spent many
years studying the coral reefs in the Philippine
archipelago, and I speak Tagalog.

I prepared two reports in connection with these
proceedings. I reaffirm the conclusion of both
reports.

My first report, entitled "Eastern South China Sea
Environmental Disturbances and Irresponsible Fishing
Practices and their Effects on Coral Reefs and Fisheries", was submitted to accompany the Memorial of the Philippines and included as Annex 240. It highlighted the interconnectivity between the different ecosystems of the South China Sea, and the important role that the Spratly reefs play within this interconnected ecosystem as home to a high diversity of marine life, including a number of threatened species. The report demonstrated that this interconnectivity means that environmental damage to coral reefs in the Spratlys is likely to spread within and beyond the South China Sea.

My second report was co-authored by Professor Loke Ming Chou, who recently retired from his position as professor at the Department of Biological Sciences at the National University of Singapore. The focus of Dr Chou’s scholarship has been coral reef biology, conservation and related issues, including in the South China Sea.

Our joint report, "Environmental Consequences of Land Reclamation Activities on Various Reefs in the South China Sea", was included among the supplemental documents recently provided to the Tribunal as Annex 699. We concluded that the dredging of the seabed and the building of artificial islands on at least seven coral reefs has caused grave harm to the
marine environment, both locally to the individual reefs directly subject to these activities and systematically due to the reefs' importance to the health of the overall South China Sea ecosystem.

I would like to describe in a little more detail some of the main conclusions reached in both reports.

The South China Sea region is home to coral reefs of some of the greatest diversity of species in the world. The image you see is an illustration of the "Coral Triangle" that includes the eastern part of the South China Sea. The Coral Triangle has the highest concentration of corals, marine fishes, mangroves, seagrasses, and most of the tropical invertebrate groups of sea species. Among them are named species that are listed by the International Union for Conservation of Nature as threatened with extinction.

The Philippines is at the apex of the Coral Triangle, and it is acknowledged as having the world's highest concentration and variety of species of marine life per unit area. As the global epicentre of marine biodiversity, the waters around the Philippines are one of the world's most valuable natural resources.

The life-sustaining reef topography that we find in the east South China Sea today formed over many millions of years. The fragile coral reefs ecosystems have been in equilibrium with the processes of wind
and waves for many thousands of years. The fact that most features of this region are shallow reefs and islands with very low to negligible vertical relief is a testimony to the forces of the weather in this region and the constant action of living corals to shape the reefs themselves.

The ocean currents in the region have lead to a high level of interconnectivity between the South China Sea's different ecosystems. This results in a connection of marine life from the coral reefs in the Spratlys and Scarborough Shoal toward the inner seas of the Philippine archipelago. The consequence of this connectivity is that environmental damage occurring on reefs that diminishes parent populations of fishes, corals and other marine animals and plants will influence the number of recruits of these animals to the Greater Philippine archipelago. This will damage both the sustainability of the fisheries and the ability of the coral reefs and other marine communities to sustain productivity and high biodiversity and recover from disturbances.

Abrupt man-made alterations to shallow reef features, such as the construction and artificial island-building that China has done on seven coral reefs in the Spratlys, directly impacts the functioning of these delicate reefs and alters the
The recent process of island-building undertaken by China has resulted in very significant damage to this complex coral reef ecosystem.

The total destruction of a large swathe of reef structures through demolition and burying and landfill is a catastrophic disturbance of the reef. The wholesale removal and destruction of coral reef habitat by the direct destruction and replacement of the shallow portions of the reef ecosystem with manmade structures removes vital components of available reef habitat that have functioned as a single ecosystem for many generations of reef inhabitants. This causes dramatic reductions in populations and local extinction of prominent fishes and invertebrates.

This is of particular concern because there are a number of species listed as threatened with extinction in the South China Sea. The reduction of reef habitat threatens many species that rely on coral reefs as living space during all or part of their life history.

The direct ecosystem harm of reef removal and replacement with manmade islands can be multiplied many times over by the wider effects of sediment plumes caused by island building. The coral organisms
that coral reef ecosystems are built around are sedentary organisms that cannot escape or actively remove the large amounts of sediments that dredging produces. This sediment cloud covers large areas of the reefs, smothers the coral, and results in widespread destruction of the reef. This in turn dramatically reduces overall primary productivity and topography of the reef, limiting its ability to sustain life.

Recovery from these severe disturbances is uncertain. Reef recovery is highly variable in the best of circumstances. Here, demolition and burial and landfill has resulted in the total destruction of large swathes of reef structures that destabilise the reef substrate and negatively impact the potential for recovery. Reefs that have been smothered by sedimentation are unlikely to ever recover if unstable sediments remain in place, because reef building requires hard substrate -- that is, solid foundation -- to recruit and thrive.

The environmental damage China has caused is not limited to its construction of artificial installations and islands. Fishing vessels from China have also engaged in the extraction of vulnerable and endangered species from Scarborough Shoal and Second Thomas Shoal. These species include rare corals,
giant clams, marine turtles, sharks and live reef fish. Based on the evidence that I reviewed, Chinese nationals have also used destructive fishing techniques such as dynamite fishing, as well as the use of poisons such as cyanide. Dynamite and cyanide fishing are considered among the most highly destructive of all fishing methods.

It is my sincere conclusion that China's actions have caused grave harm to the South China Sea marine environment. The potentially irreversible damage to the Spratly reef system will have serious repercussions for the highly interconnected and interdependent South China Sea ecosystem.

Mr President and distinguished members of the Tribunal, thank you for your kind attention. This concludes my presentation.

THE PRESIDENT: Thank you very much indeed.

Professor Boyle.

(11.36 am)

First-round submissions by PROFESSOR BOYLE

PROFESSOR BOYLE: Mr President, members of the Tribunal, I can now turn finally to Submission 13, in which the Philippines alleges that:

"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."

Essentially our argument is that Chinese vessels
have violated Articles 94(4) and 94(5) of UNCLOS, read
in conjunction with the 1972 Convention on the
International Regulations for Preventing Collisions at
Sea.65

The incidents which form the basis of the
Philippines' claims are set out fully in
paragraphs 6.114 to 6.127 of the Memorial. But to
summarise, a series of near collisions took place on
28th April and 26th May 2012 between Chinese and
Philippine vessels, and a collision was only avoided
by the emergency manoeuvres of the Philippine ships.
The Chinese vessels were operated by two government
agencies: the Chinese Marine Surveillance, otherwise
known as "CMS", and the Fisheries Law Enforcement
Command, that I will simply call "FLEC". At tab 4.9
in your folders you will find photos of the Chinese
vessels referred to in my speech. I think you will
find all of them in there.

We don't have precise coordinates for each
incident, but the available information shows that

65 Convention on the International Regulations for Preventing Collisions at
Sea (hereinafter "COLREGS"), 1050 UNTS 18 (20 Oct. 1972), entered into
they took place in the territorial sea of Scarborough Shoal. That said, it is important to stress at the outset that the location is irrelevant to the claims presented here, because the Philippines is arguing that China has violated its obligations as a flag state, and that the relevant rules of international law are applicable on that basis, regardless of where the ships were located at any particular point in time.

There are three parts to the argument. I will deal first with the legal basis of Submission 13. Secondly, I will show how the behaviour of the Chinese vessels amounted to a violation of the collision regulations. Then finally, I will explain how China's failure to exercise effective jurisdiction and control over its vessels amounts to a violation of the Convention on the Law of the Sea.

Your annex of 10th November posed a number of questions concerning Submission 13. My intention is to answer all of them in the course of giving this speech, but I won't necessarily identify which question I am answering at any particular point. I think you will find by the end of the speech that I have dealt with all of them.

The principal legal basis of Submission 13 is Article 94 of UNCLOS. In its recent Fisheries
Advisory Opinion, the Tribunal on the Law of the Sea held that:

"[t]he Convention contains provisions concerning general obligations which are to be met by the flag state in all marine areas regulated by the Convention."

And it went on to specify that:

"[t]hese general obligations are set out in articles 91, 92 and 94 of the Convention."\[^{66}\]

So it follows from that that China has obligations under the Convention when its own vessels are operated in the territorial sea of Scarborough Shoal or anywhere else. Which state has sovereignty over that territorial sea is irrelevant for those purposes.

For the sake of clarity, Article 21 of UNCLOS is also irrelevant, and the Philippines is not alleging a violation of Article 21.

Article 94(1) of the Convention requires the flag state to:

"effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."

Subsequent paragraphs of that article indicate

what this means. In particular, Article 94(3)(c) requires the flag state to:

"take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, \textit{inter alia}, to ... the prevention of collisions."

What are these measures? Paragraph 4(c) of Article 94 goes on to specify that the flag state shall take the necessary steps to ensure that:

"the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea, the prevention of collisions ... and the maintenance of communications by radio."

The reference to "applicable international regulations" in Article 94 incorporates the regulations annexed to the 1972 Convention on the International Regulations for Preventing Collisions. Both China and the Philippines are parties to this Convention. So the conclusion is that China must therefore ensure that vessels flying its flag are "required to observe" the regulations set out in the 1972 Convention.

If there were any doubt in the matter, that conclusion is further reinforced by Article 94(5) of UNCLOS, which places a duty on the flag state to:
"conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance."

The scope of the term "generally accepted international regulations, procedures and practices" is the subject of some debate. No doubt several members of the panel, including also myself, have written on that question. But happily, there's no need to enter into that discussion here. With 156 contracting parties, representing 98.59% of global tonnage, there can be little doubt that the 1972 Convention and its regulations are generally accepted for the purposes of Article 94.

Indeed, the 1972 Convention is one of the most widely accepted treaties concluded under the auspices of the International Maritime Organization. According to one leading authority on marine law, it provides "a universal system of sea traffic rules", whose Collision Regulations "have been introduced into the national law of every shipping nation in the world".68 I might say that they also resemble entirely the rules of the air, with which I have some familiarity in

---


a different context. But on this basis, any breach of
the 1972 Convention and the regulations amounts to
a breach of Article 94 of UNCLOS.

Article 94 -- to deal with one possible
argument -- makes no distinction between government
ships and non-government ships. Rather, the text
simply refers in general terms to "ships flying
[a state's] flag". So the obligation imposed by
Article 94 extends to all ships, including vessels in
government service, and including those operated by
the CMS and FLEC.

The Collision Regulations themselves also apply
expressly to "all vessels",\(^6^9\) and the term "vessel" is
described as:

"every description of water craft ... used or
capable of being used as a means of transportation on
water."\(^7^0\)

The application of those regulations to government
ships is further confirmed by the inclusion of special
rules with respect, \textit{inter alia}, to "signal lights or
whistle signals for ships of war",\(^7^1\) to "vessel[s]
engaged in the launching or recovery of aircraft",\(^7^2\)

\(^7^0\) COLREGS, Rule 3(a). MP, Vol. XI, Annex LA-78.
\(^7^1\) COLREGS, Rule 1(c). MP, Vol. XI, Annex LA-78.
\(^7^2\) COLREGS, Rule 3(g)(iv). MP, Vol. XI, Annex LA-78.
or to "vessel[s] engaged in minesweeping operations".\textsuperscript{73} These would, obviously, typically be government or military vessels.

Unlike other treaties, which recognise that special rules may have to apply to government ships,\textsuperscript{74} there is therefore no exclusion in the 1972 Convention or its regulations for warships or other ships in governmental non-commercial service. And this makes sense. It accords with the basic purpose of the regulations, which is to achieve as widespread and uniform a practice in relation to safety of navigation as possible. There would be no point having different rules on collision for warships and commercial ships, any more than there would be for military aircraft and commercial airliners.

Turning now to the second part of my argument, our case is that the Chinese vessels involved in the incidents of 28th April and 26th May 2012 violated the International Regulations for the Prevention of Collisions at Sea.

These regulations are legally binding rules, each specifying the particular action that vessels "shall"

\textsuperscript{73} COLREGS, Rule 3(g)(v). MP, Vol. XI, Annex LA-78.

take in the prescribed circumstances. Rule 2(b) does
recognise that there may be:

"special circumstances, including the limitations
of the vessels involved, which may make a departure
from [the] Rules necessary to avoid immediate danger."

But the inclusion of this exception does not
undermine the otherwise mandatory nature of the
regulations, nor does it appear relevant in the
present case.

The regulations are regularly applied by national
courts in determining civil claims and criminal
charges arising from collisions,\textsuperscript{75} and national courts
have taken the view that the exception in Rule 2(b)
should be interpreted in a strict sense.\textsuperscript{76} So the
regulations can be considered as mandatory, and they
set an obligatory standard against which to judge the
actions of all vessels when navigating at sea.

China has itself relied on the International
Collision Regulations in its own diplomatic practice.

\textsuperscript{75} See, e.g., Crowley Marine Services Inc. v Maritrans Inc., 530 F.3d 1169
(9th Cir. 2008), 1177. Supplemental Documents, Vol. VI, Annex LA-292
("[L]ike the other rules of the COLREGs that employ the word 'shall,' Rule
17(b) is mandatory. This interpretation of the word 'shall' is consistent
with our earlier opinion in Crowley I, that the Allegiance, as the
overtaking vessel, despite the coordinated nature of the tug escort, was
required to abide by the compulsory COLREGS Rules 8(e) and 13(a), which
also use the term 'shall'".).

\textsuperscript{76} Crowley Marine Services Inc. v Maritrans Inc., 447 F.3d 719 (9th Cir.
2006), 725. Supplemental Documents, Vol. VI, Annex LA-291. ("By its terms,
Rule 2 limits 'special circumstance[s]' to those circumstances 'which may
make departure... necessary to avoid immediate danger.' In other words,
vessels may justify departure from the COLREGS in order to avoid immediate
danger, but not for more generic special circumstances").
Following a collision between a vessel called the *Ernst Thaelmann*, a vessel flying the flag of the then Soviet Union, and a Chinese fishing vessel on 3rd March 1971, China invoked a previous version of the Collision Regulations, and it claimed the accident was:

"entirely caused by the fact that [the] Soviet ship failed to observe the internationally established rules on the prevention of collisions of sea vessels."\(^{77}\)

Exactly the same could be said about the Chinese vessels which violated the current rules during the incidents that occurred in the vicinity of Scarborough Shoal in 2012. The essence of these claims is explained in the expert report by Professor Craig Allen which is contained in Annex 239 of the Philippine Memorial.\(^{78}\) Professor Allen identifies several rules which were breached by the Chinese vessels on these two dates.

Firstly, he argues that there is a violation of Rule 8, which provides that:

"[a]ny action taken to avoid collision shall ... be positive, made in ample time, and with due regard to

---


the observance of good seamanship."

The language of this rule suggests that it should be characterised as an obligation of conduct, rather than one of result.\textsuperscript{79} In other words, it is not concerned with attributing responsibility in cases of actual collision; what it is concerned with is ensuring that steps are taken by ships in order to avoid the risk of collision.\textsuperscript{80} That proposition is supported by national court decisions. The US Court of Appeals for the Second Circuit has held, for example, in a case called \textit{Ocean SS v United States}, the court said:

"it must always be remembered that it is the risk of collision, not the collision itself, that masters must avoid."\textsuperscript{81}

The fact that no collision actually occurred between the Chinese and Philippine vessels does not diminish in any way the conclusion that the Chinese vessels on 28th April and 26th May 2012 violated Rule 8. Far from taking positive action to avoid


a collision, the evidence showed that the Chinese vessels actually increased the risk.

Let me illustrate this point by describing the relevant actions of these vessels. The first violation of Rule 8 took place at 9 o'clock in the morning on 28th April 2012, when the Chinese vessel FLEC-310 intentionally closed at high speed to within 600 yards of the Philippine vessel Pampanga, a Philippine coast guard vessel. 15 minutes later, the same Chinese vessel for a second time undertook a similar dangerous manoeuvre in relation to another Philippine coast guard vessel, the BRP Edsa II, passing within 200 yards of the Philippine vessel.82

Similar observations can be made concerning the actions of the three Chinese vessels involved in the incident on 26th May 2012 -- that's CMS-71, FLEC-303 and CMS-84 -- all of which undertook dangerous manoeuvres in which the Chinese vessels passed Philippine vessels at high speed at a distance of 100 yards or less.83

Perhaps the most flagrant violation of Rule 8 occurred later in the day on 26th May in the basin of Scarborough Shoal when the Philippine vessel MCS 3008

---

82 These incidents are described in paragraphs 6.125-6.126 of the Memorial of the Philippines.

83 These incidents are described in paragraphs 6.121-6.123 of the Memorial of the Philippines.
narrowly avoided a collision with the Chinese vessel FLEC-306, which appeared determined to ram it.\(^84\)

None of the manoeuvres that I have described, and which are set out in more detail in the Memorial, can be described as taking positive and timely action to avoid a collision. What these incidents demonstrate is a deliberate violation of Rule 8.

Chinese vessels involved in these incidents also breached Rule 6, which provides that:

"[e]very vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions."

The collision regulations do not specify what is a safe speed; that is going to depend on the circumstances of each case. One would obviously have to look at the visibility, the traffic density, the manoeuvrability of the vessel, the state of the wind, sea and current, and any other navigational hazards.\(^85\)

But you don't have to be a sailor to appreciate that manoeuvring in close proximity to other vessels at speeds up to 22 knots cannot be considered safe.

---

\(^84\) This incident is described in paragraph 6.124 of the Memorial of the Philippines.

As emphasised in the expert report of Professor Allen, the failure to proceed at a safe speed was aggravated in this case by the size of the Chinese vessels compared with their rather smaller Philippine counterparts. And the wake created by the manoeuvres of the Chinese ships caused an additional threat to those Philippines vessels.

The third breach of the rules occurred during the first incident on 26th May, when the Chinese vessel CMS-71 breached Rule 15 of the Collision Regulations. Rule 15 provides that:

"[w]hen two power-driven vessels are crossing so as to [involve] a risk of collision, the vessel which has the other on her ... starboard ... shall keep out of the way and shall, if the circumstances of the case admit, avoid crossing ahead of the other vessel."

That's rather a complex piece of wording, and it's actually the same as the rules that apply to aircraft, and there is an infinitely simpler way to put it: in the right, on the right. In other words, it's the vessel on the left that should turn away.

As described in paragraphs 6.116 to 6.117 of the Philippine Memorial, CMS-71 approached the Philippine vessel MCS 3008 at speed from the left and attempted to cross MCS 3008. So as the Chinese vessel was...
approaching from the port side, it should have avoided
crossing ahead of the Philippine vessel. That's what the rules would require.

That's reinforced by Rule 16, which provides that:
"[e]very vessel which is directed ... to keep out of the way of another vessel shall, so far as possible, take early and substantial action to keep well clear."

In this instance, the Chinese vessel increased speed and did the exact opposite of what is required by the rules.

Not only did the Chinese vessels commit violations of the technical rules contained in the collision regulations, they also violated the so-called "good seamanship rule" found in Rule 2(a) of those rules, which provides that:
"[n]othing in these Rules shall exonerate any vessel, or the owner, master or crew thereof, from the consequences of any neglect to comply with these Rules or of the neglect of any precaution which may be required by the ordinary practice of seamen."

This rule supplements the more technical rules, and it has been described by one leading author on maritime law as playing a gap-filling role.87 It

---

could therefore be an entirely separate ground for establishing a breach of the regulations.

It would be difficult to describe the behaviour of the Chinese vessels as being a practice required by the ordinary practice of seamen, so in this case the actions of the Chinese vessels fell far short of what would be required. And as noted by Professor Allen in his expert report:

"intentionally endangering another vessel through high-speed 'blocking' or harassment maneuvers constitutes [in his view] a flagrant disregard of the tenets of good seamanship." 88

Professor Allen also notes, it is worth emphasising here, that we are not dealing with negligent actions on the part of part of the Chinese vessels, but with intentional, deliberate behaviour that demonstrated a reckless disregard for the safety of Philippine ships. 89

Is there any possible defence that China could make to these claims? The short answer is: no. There are no "special circumstances" to make the exception in Rule 2(b) applicable. Far from avoiding immediate danger, the actions of the Chinese vessels increased it. Nor does the nature of the vessels as government

ships charged with carrying out law enforcement functions alter that conclusion. As I have previously explained, the Collision Regulations leave no doubt that they apply to government vessels.

Moreover, even if they were engaged in legitimate policing operations, government vessels are required to respect rules relating to safety at sea. In the *Saiga (No. 2)* case, the Tribunal on the Law of the Sea held that actions of law enforcement vessels must take into account "[c]onsiderations of humanity", and "all efforts should be made to ensure that life is not endangered". In this case, we would submit that the conduct of the FLEC and CMS vessels cannot be said to conform to these basic international standards.

That brings me then to the question why these navigation incidents violate China's obligations under Article 94 of the Law of the Sea Convention.

In most circumstances, Article 94 does not require a flag state to guarantee that all of its vessels comply with the applicable regulations, wherever they are. Rather, Article 94 requires a flag state to take the measures necessary “to ensure” that:

"the master, officers and ... crew are fully

---

conversant with and required to observe [those] regulations."

This language indicates a due diligence obligation.

As noted by the Seabed Disputes Chamber in their Advisory Opinion on Activities in the Area, the obligation "to ensure" is:

"an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain [the] result." 91

This reading of Article 94 was confirmed by the tribunal in the 2015 Fisheries Advisory Opinion referred to earlier. 92

However, these are government vessels, so the flag state is not only able to exercise legislative and enforcement jurisdiction over those vessels, as it can do with privately owned vessels flying its flag, but it can also exercise operational control: it can give them instructions, it can give them operating rules.

Indeed, from the perspective of state responsibility, the actions of government vessels owned and controlled


by a government agency are, for that reason, directly attributable to the state.93

The Chinese vessels involved in the incidents in question were controlled by CMS and FLEC, both of which are governmental agencies. So China was in a position to ensure that these vessels fully complied with the Collision Regulations, yet it failed to do so. This omission puts it, we would submit, in breach of Article 94. It does not matter whether the actions were carried out under official orders from the Chinese government. Article 7 of the International Law Commission's Articles on State Responsibility make it clear that:

"[t]he conduct of an organ of a State or of a person or entity empowered to exercise elements of ... governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions."

China has not denied the allegations of "provocative and extremely dangerous manoeuvres",94

---


protests made by the Philippines. Its response to
those protests simply ignores the request by the
Philippines that China "instruct its ships to observe
the Convention on the International Regulations for
Preventing Collision".95

Instead, China's only reaction was to reassert its
territorial claims, and to point the finger of blame
at the Philippines for allowing its vessels into these
water[s] in the first place. This reply falls well
short of what one would expect from a flag state
complying with its obligations under Article 94. Nor
does it seem that the Chinese even contemplated taking
any action to remedy the situation.

So, even from the perspective of a due diligence
standard, the actions of China, we would submit, fall
far short of what Article 94 requires of a flag state.

Mr President, members of the Tribunal, let me
conclude. The Chinese Government has displayed
a deliberate disregard for international law on the
safety of maritime navigation. The Chinese vessels
involved in the incidents which took place in the
vicinity of Scarborough Shoal on 28th April and
26th May 2012 committed a number of violations of the
applicable collision regulations. For that reason,

95 See Note Verbale from the Department of Foreign Affairs of the
Philippines to the Embassy of the People’s Republic of China in Manila, No.
China has breached its obligations under Article 94 of the Law of the Sea Convention to ensure that its law enforcement vessels observe those International Regulations on the Prevention of Collisions.

Mr President, members of the Tribunal, that concludes the Philippines argument on Submission 13. I'm grateful to you this morning for your patience in listening to me. Unless you have any further questions, I would ask you to call Professor Oxman to the podium.

THE PRESIDENT: Thank you very much. I think we don't have any questions at the moment, so we will call Professor Oxman to the podium now. Thank you.

(12.03 pm)
First-round submissions by PROFESSOR OXMAN

PROFESSOR OXMAN: Mr President, distinguished members of the Tribunal, it is an honour to return to the podium this morning. I plan to address Submissions 14 and 15, as well as certain jurisdictional issues.

I note at the outset that the specific items listed in Submission 14 all relate to Second Thomas Shoal. But the words "among other things" preceding the list make clear that the list is not exhaustive. Unfortunately, events have made it necessary to consider other actions that aggravate and extend the
dispute, including those with respect to which the Philippines reserved its rights in these proceedings in its letter of 30th July 2014\textsuperscript{96} to which the Tribunal's Award on Jurisdiction adverts.\textsuperscript{97}

Mr President, as the Permanent Court of International Justice observed, it is:

"... [a] principle universally accepted by international tribunals ... that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute."\textsuperscript{98}

This principle is commonly invoked in the context of provisional measures. But there is nothing in the Law of the Sea Convention or international law that limits the principle's application to provisional measures, that requires a party to seek provisional measures in order to invoke the principle, or that restricts application of the principle only to the limited circumstances in which it may be appropriate.


\textsuperscript{97} Award on Jurisdiction (29 Oct. 2015), para. 53.

to prescribe provisional measures.

Article 279 of the Convention requires the parties to settle disputes by peaceful means in accordance with Article 2, paragraph 3 of the Charter of the United Nations. Article 300 prohibits abuse of rights.

Aggravation and extension of the dispute is inconsistent with both articles. The United Nations General Assembly's Friendly Relations Declaration, which is at tab 4.10 of your folders, specifically refers to the duty to refrain from aggravating the situation in the context of the principle that states shall settle their international disputes by peaceful means. 99

In the November 2002 Declaration of Conduct, which is at tab 4.11 of your folders, the signatories similarly undertook "to exercise self-restraint in the context of activities that would complicate or escalate disputes or affect peace and stability" in the South China Sea. 100

Articles 279 and 300 of the Convention apply independently of the means chosen to settle the


dispute. But they operate with particular force once
a dispute has been submitted to arbitration or
adjudication. In that event, aggravation or extension
of the dispute prejudices not only the rights of the
parties and international relations, but the integrity
of the adjudicative process and the ability of the
Tribunal to render effective relief.

Notwithstanding what were, in the court's words,
the "understandable preoccupations" of the United
States "with respect to the well-being of its
nationals held hostage in its embassy for over five
months", the International Court of Justice stated
that the rescue attempt undertaken by the United
States while the court was in the course of preparing
its judgment in the United States Diplomatic and
Consular Staff case:

"... is of a kind calculated to undermine respect
for the judicial process in international
regulations."^{101}

In this regard, the International Court of Justice
recalled its order indicating that no action was to be
taken by either party that might aggravate the tension
between the two countries.^{102}

^{101} United States Diplomatic and Consular Staff in Tehran (United States v
Iran), Merits, Judgment, ICJ Reports 1980, para. 93. SWSP, Vol. XII, Annex
LA-175.

^{102} Id.
The behaviour that constitutes an aggravation or extension of the dispute may also constitute a breach of other duties. But that need not be the case. In the Diplomatic and Consular Staff case, the judgment makes clear that the question of the legality of the United States' rescue operation was not before the court.103

Accordingly, the act that constitutes an aggravation or extension of the dispute need not arise from a breach of any substantive duty under the Convention. From this it follows that restrictions on jurisdiction over disputes arising from those duties are irrelevant. The disrespect for the process itself is the gravamen of the breach of duty.

Jurisdictional constraints, such as those in Articles 297 and 298 of the Convention, have no relevance to the question of acts that aggravate and extend a dispute that is before a court or tribunal. The question of the status and entitlements, if any, generated by a feature is not relevant to the question of the Tribunal's jurisdiction to determine whether China's activities at that feature aggravated or extended the dispute.

Since 1999, following China's seizure of Mischief Reef, the Philippines had maintained a peaceful and

---

103 Id., para. 94.
continuous presence at Second Thomas Shoal by deploying a small detachment of sailors and marines to the Sierra Madre, an old naval ship that was run aground there. Second Thomas Shoal is 104 miles west of Palawan. It is completely submerged at high tide.\textsuperscript{104} A copy of the description of the shoal from the Atlas submitted by the Philippines is contained in your folders at tab 4.12.

Beginning on 11th April 2013, after the dispute was submitted to the Tribunal, the Chinese Foreign Ministry repeatedly summoned the Philippine ambassador to insist that the Philippines remove its presence from Second Thomas Shoal. The Philippines thereafter learned of the presence of at least three Chinese government vessels in the vicinity of the Second Thomas Shoal. To the knowledge of the Philippines, no such vessels had ever deployed to the shoal before.\textsuperscript{105}

On 9th May 2013, the Philippines sent the first of several diplomatic notes protesting China's actions at Second Thomas Shoal.\textsuperscript{106} Notwithstanding these protests, China continued to deploy vessels to Second Thomas Shoal, although in reduced numbers.

\textsuperscript{104} SWSP, Vol. II, pp. 162-164.

\textsuperscript{105} Memorial, paras. 3.59-3.60.

Then on 9th March 2014, China blocked the Philippines from approaching the shoal. On that occasion, two Chinese coastguard vessels chased away two civilian vessels chartered by the Philippine Navy that were on their way to Second Thomas Shoal to deliver food, water and other essential supplies to the Philippine personnel stationed there, and to conduct a rotation of personnel.107

In a May 2013 interview broadcast on Chinese television, one of China's senior military officials, Major General Zhang Zhaozhong, explained that China was employing what he called a "cabbage strategy" at Second Thomas Shoal.108 This was a technique it had used successfully in taking over two other features in the South China Sea, Mischief Reef and Scarborough Shoal. Pursuant to the "cabbage strategy", China would seal and control a maritime feature by surrounding it with fishing administration vessels, marine surveillance ships and navy warships until the feature is, to use the general's words, "wrapped layer by layer like a cabbage". General Zhang continued:

"If we carry out the 'cabbage' strategy, you will not be able to send food and drinking water onto the

107 Memorial, paras. 3.59 – 3.66.

islands. Without the supply for one or two weeks, the
troopers stationed there will leave the islands on
their own. Once they have left, they will never be
able to come back."\textsuperscript{109}

In other words, China's denial of access to Second
Thomas Shoal forms part of a deliberate policy of
physically expelling the Philippines and its nationals
from disputed features and the surrounding waters.
That constitutes a paradigm of aggravation and
extension of the dispute. And China expressly retains
the option to continue this.

In July 2015, the Philippines announced that it
would be making repairs to the hull of the
\textit{Sierra Madre}. In response, China's Foreign Ministry
said that:

"China reserves the right to take further
actions."\textsuperscript{110}

Chinese Coast Guard and other vessels continue to
patrol the waters around Second Thomas Shoal, and the
Philippines takes special measures to avoid those
patrols in order to deliver supplies and rotate
personnel.

\textsuperscript{109} Id.

\textsuperscript{110} Ministry of Foreign Affairs of the People's Republic of China, \textit{Foreign
Mr President, all of this occurred while the dispute was before this Tribunal.

What's more, the context is made clear by China's assertion, in a public document delivered to members of the Tribunal, that the submission of this dispute to arbitration "cannot be taken as a friendly act", and will "further complicate the bilateral relations".\textsuperscript{111} It is made clear by China's direct warning on 28th June of this year that:

"If the Philippine side once again invades the waters and airspace of the Nansha Islands stationed by the Chinese side, the Chinese side will take all necessary defensive measures ..."

And that:

"... the Philippines side must bear all the consequences arising therefrom."\textsuperscript{112}

Finally, it is made clear by the tone and content of the extraordinary statement issued by China on the day following the Tribunal's Award on Jurisdiction.\textsuperscript{113}

China has also greatly intensified its programme

\textsuperscript{111} China’s Position Paper, para. 90. SWSP, Vol. VIII, Annex 467.


of building artificial islands and installations since the commencement of the arbitration. Mr Loewenstein yesterday showed what has been done at Mischief Reef, Subi Reef and Fiery Cross Reef. In tabs 3.13, 3.16 and 3.18 to 3.22 of your folders, he placed satellite imagery images showing the progression of island-building and construction at these reefs, as well as Gaven Reef, Johnson South Reef, Cuarteron Reef and McKennan (Hughes) Reef.

In addition, the new expert report submitted by Professors Carpenter and Chou contains a wealth of information on China's artificial island-building since this dispute was submitted to arbitration.\textsuperscript{114} The report indicates that:

"... it appears that reclamation has not stopped, although it may have slowed and there is an increase in activities focused on the large-scale construction of permanent infrastructure on the artificial islands."\textsuperscript{115}

It also states that:

"The loss of seven major reef features ... within 1.5 years will have a huge impact on the ecological integrity of not only the Spratlys reefs but also the


\textsuperscript{115} Id., p. 23.
South China Sea."\textsuperscript{116}

Professor Carpenter elaborated on the environmental damage in his statement this morning.

Mr President, after thousands of years of development, these coral reefs are no longer in the condition in which they were found at the time this dispute was submitted to arbitration. The Tribunal's capacity to render effective relief has been prejudiced. The direct evidence of the natural state of these features, which is relevant to several issues in this case, has been destroyed or covered over, and this following China's rejection of a site visit by the Tribunal. The rights of the Philippines have been impaired. The marine environment has been damaged. China has presented the Tribunal with a \textit{fait accompli} of unprecedented proportions.

Mr President, there can be no doubt that these actions constitute an aggravation and extension of the dispute. We respectfully submit that they merit a stern response. China should not be permitted to benefit from them. Its actions form a significant part of the context of the other issues in this case.

Mr President, as I indicated earlier, Articles 297 and 298 do not apply to aggravation and extension of the dispute. But even if they did, it would make no

\textsuperscript{116} \textit{Id.}, p. 26.
difference. In this connection, I turn now to the
issues identified by the Tribunal that refer at
various points to the exceptions for military
activities and law enforcement activities set out in
Article 298(1)(b) of the Convention.

We believe that the application of this provision
should focus on the nature and purpose of the
activity. Our views are developed more fully in our
earlier written and oral pleadings.\textsuperscript{117} I will here
limit myself to a few points that are pertinent to the
issues identified by the Tribunal.

A convenient starting point for the enquiry may be
the nature of the state organ that is conducting the
activity. Absent evidence to the contrary, it is
reasonable to proceed on the basis that activities
that are carried out by a law enforcement or other
civilian organs of a state are not to be regarded as
military in character. The reverse, however, is not
true. Many states also use naval and other military
units for law enforcement purposes, or for
infrastructure and other civilian projects.\textsuperscript{118} The
Chinese Constitution expressly so provides with
respect to the People's Liberation Army.\textsuperscript{119}

\textsuperscript{117} Memorial, para. 7.148; SWSP, para. 9.5; Jurisdictional Hearing Tr. (Day
2), p. 76.

\textsuperscript{118} Jurisdictional Hearing Tr. (Day 2), p. 81-82; (Day 3), p. 54.

\textsuperscript{119} Id., (Day 2), p. 82.
Article 298(1)(b) distinguishes between military activities and law enforcement activities. Law enforcement activities are excluded only in the specific instances provided for in the two paragraphs of Article 297 to which Article 298(1)(b) refers. Accordingly, it is necessary to draw a distinction between military and law enforcement activities, whether or not the activity is conducted by a naval vessel or other military unit.

In this regard we note that implementation of legal restrictions on entry is typically a law enforcement activity. China has not asserted otherwise regarding its attempts to prevent access to Second Thomas Shoal or other features. In any event, as previous noted, Article 298 is not relevant to Submission 14.

Political, legal and strategic objectives do not in themselves render an activity military. Nor does the desire to solidify a claim to a feature render the means chosen military.

The presence of a military garrison or a warship does not render the activity being protected a military activity. Fortifications and military garrisons have long been used to protect civilian ports. Naval vessels have long been used to protect other vessels.
Since ancient times, much of the world's infrastructure has been built to accommodate both civilian and military uses. Mixed-use projects are not subject to the exclusion for military activities. The construction of a port or airfield to be used for civilian and military purposes is not excluded, whether or not naval or military units participate in the construction.

China's occasional use of naval or military units in this case falls within one or more of the situations that I have outlined above, namely a law enforcement activity, or an activity by those protected by the naval or military unit, or a mixed-use project. Accordingly, the military activities exclusion does not apply.

In addition, China has not only declined to invoke the military activities exception in its Position Paper, it has repeatedly emphasised, in public statements and diplomatic communications, the non-military nature of its artificial island-building and construction activities in the Spratly Islands.\textsuperscript{120} The furthest China has gone in suggesting a possible military function for the facilities it is constructing in the Spratly Islands is to intimate

\textsuperscript{120} See, e.g., Memorial, para. 7.151; SWSP, Vol. 1, paras. 10.2-10.3; Jurisdictional Hearing Tr. (Day 3), p. 48-51; 53; 55-57.
possible mixed uses, while emphasising that the uses will be mainly civilian.\textsuperscript{121}

Two months ago, at a press conference with President Obama, President Xi Jinping stated, with reference to China's construction activities in the Spratly Islands:

"... China does not intend to pursue militarization."\textsuperscript{122}

It is useful in this regard to recall the importance that the International Court of Justice attached to a public statement of intention by the head of state of a non-participating party.\textsuperscript{123}

There are significant political, legal and other consequences to characterising activities as "military". The state that conducts the activities determines the policies that inform the nature and purpose of its activities. That state has superior access to information relevant to their nature and purpose, and that state is in the best position to evaluate the consequences of characterising its activities.


activities as military.

When that State repeatedly insists on the civilian rather than military character of the activity, when the other party to the case has not contested these assurances, and when the effect is solely to proceed without regard to an exclusion from jurisdiction that the respondent chose not to invoke in its comprehensive objections to jurisdiction,¹²⁴ it would seem reasonable for a tribunal to proceed in that manner; and this quite apart from the other reasons for reaching exactly the same conclusion.

Fisheries enforcement is, of course, a law enforcement activity, whether or not a naval vessel is standing by or otherwise participating in the activity. Fisheries enforcement is excluded from jurisdiction only when it is conducted by the coastal state in its own exclusive economic zone.

The Award on Jurisdiction has already determined that the exclusion does not apply to the territorial sea.¹²⁵ The exclusion also does not apply if the waters in which the enforcement activity took place are not part of the exclusive economic zone because


¹²⁵ Award on Jurisdiction (29 October 2015), paras. 395, 406.
the coastal state enjoys no entitlement to
an exclusive economic zone in those waters.
In addition, the exclusion does not apply as between
two coastal states where they have overlapping
entitlements to an exclusive economic zone.

In sum, Mr President, the military activities and
the law enforcement exceptions in Article 298(1)(b) do
not apply to any of the Philippines' submissions in
this case.

Mr President, let me turn now to Submission 15.
The Award on Jurisdiction directs the Philippines to
clarify the content and narrow the scope of that
submission. The Philippines has accordingly revised
Submission 15 to read as follows:

"China shall respect the rights and freedoms of
the Philippines under the Convention, shall comply
with its duties under the Convention, including those
relevant to the protection and preservation of the
marine environment in the South China Sea, and shall
exercise its rights and freedoms in the South China
Sea with due regard to those of the Philippines under
the Convention."

The focus of this submission is prospective. It
is clear from the record in this case that there have
been significant, persistent and continuing violations
by China of the Philippines' rights under the
Convention. Its statements and conduct in this regard provide ample justification for ordering China to respect the rights and freedoms of the Philippines in the future, and to honour its environmental obligations.

The submission also anticipates particular issues that may arise as between the parties. The Law of the Sea Tribunal has given broad application to the requirement of "due regard" as one of the basic organising principles of the Law of the Sea under the Convention. The tribunal in the Mauritius v United Kingdom arbitration has done the same. We hope that this Tribunal will do so as well. The Tribunal might, of course, provide further elaboration in light of China's actions.

Mr President, the record in this case demonstrates that China regards its entitlements in the South China Sea as excluding those of the Philippines and other states. It has systematically sought to prevent Philippine fishing or hydrocarbon activities in areas within 200 miles of the Philippines. At the same time, it has proceeded -- without Philippine consent -- to conduct its own activities within.


127 Memorial, paras. 6.16-6.38.
200 miles of the Philippines. The only evidence of a request for Philippine consent is for marine scientific research in an area that China does not claim.\textsuperscript{128}

This record of behaviour, which has intensified since the dispute was submitted to arbitration, is particularly unsettling in light of the Tribunal's invitation in the Annex of Issues to address the hypothesis that one or more of the small insular features claimed by China might be entitled to an exclusive economic zone and continental shelf under paragraph 2 of Article 121.

Mr President, I will address this hypothesis only as such: a hypothesis. I do so only because the Tribunal has requested the Philippines to comment on it. But let me be clear at the outset: it is our firm view that the situation hypothesised does not arise. As Mr Reichler showed yesterday, there is no basis for determining that any of the tiny Spratly features generates an entitlement to an exclusive economic zone or continental shelf. All of the evidence and all of the jurisprudence is to the contrary.

Mr President, the object and purpose of paragraph 3 of Article 121 is to avoid perverse effects of the major extensions of coastal state

\textsuperscript{128} See Memorial, para. 4.31 & Figure 4.6.
jurisdiction beyond the territorial sea. Not only the foresight of the framers of the Convention, who were well aware of the geometric formula $\pi r^2$, but the experience since the conclusion of the Convention, makes clear what those perverse effects are.

There are three principal perverse effects: irrational encroachment on the sovereign rights of coastal states as well as the global commons; dangerous amplification of sovereignty disputes over tiny insular features that would otherwise command no such attention; and gratuitous harm to the environment occasioned by efforts to solidify claims. No sound interpretation or application of the Convention could countenance such effects.

To envisage any entitlement to an exclusive economic zone and continental shelf generated by the tiny insular features of the Spratlys would necessarily require concomitant constraints that would avoid those perverse effects. To achieve that, the constraints, by one means or another, would have to bring us back to the same stable and just outcome as that provided by paragraph 3 of Article 121.

The record in this case affords the Philippines reason to fear that it would face, within the entire area of any hypothetical 200-mile entitlement generated by one of the tiny insular features in the
Spratlys, a situation in which the Philippines and its nationals would be able to benefit from the natural resources of substantial parts of its exclusive economic zone and continental shelf entitlements, if at all, only on terms dictated by China. It would perpetuate and potentially freeze in another form precisely the danger, disputes and instability that China currently exploits as it pleases.

Let me demonstrate the effect, Mr President, with a series of drawings on the screen, and in your folders at tab 4.13.

On the screen is a schematic representation of a state with a coastline that is 400 nautical miles or 741 kilometres long. We now add a 12-mile territorial sea. We now add a 200-mile exclusive economic zone and continental shelf.

Now let us suppose that there is a tiny island off the coast under the sovereignty of another state. For ease of analysis, we can place it 212 miles off the coast. This tiny island generates a territorial sea of 12 miles.

Now let us suppose three things: first, that this tiny island is not governed by paragraph 3 of Article 121, and accordingly is entitled to an exclusive economic zone and continental shelf under paragraph 2 of that article; second, that there is no
delimitation; and third, that the state that is
sovereign over the tiny island asserts and exercises
all of its exclusive sovereign rights and jurisdiction
in all of the 200-mile zone generated by that tiny
island, without regard to the entitlement of the other
state.

Mr President, this is the result.

If the tiny feature is located far inside
a semi-enclosed sea, the same impact might well be
felt by more than one state.

Mr President, this turns decades of jurisprudence
on its head. What the case law teaches is that the
tiny insular features of the Spratlys generate no
entitlement to an exclusive economic zone or
continental shelf that is opposable to the Philippines
or, I might add, the other states whose coasts
surround the South China Sea.

What is shown in this slide is precisely the
opposite. It cannot be what the law provides pending
delimitation. An earlier draft of paragraph 3 of
Articles 74 and 83 once referred to the use of
an equidistance line as an objective means to manage
states with small foreign islands off their coast felt that even that was excessive, and could discourage just and peaceful resolution of the matter. The irony here is that the risk facing the Philippines is much worse than that.

What is shown on the screen is surely beyond the pale of plausibility; a patent abuse of right. Even leaving open this possibility would discourage peaceful resolution of the dispute and endanger justice. When a powerful state attempts to impose this very result by massive landfill operations and by intimidation designed to discourage any resource activity by the other party or its nationals and licensees, the need for legal constraints is evident.

There are no obstacles to the Tribunal finding jurisdiction to address these problems. To be sure, the Tribunal could not proceed to delimit any areas of overlapping entitlements, given China's invocation of Article 298's exclusion in respect of sea boundary delimitation. But the Tribunal would retain jurisdiction in respect of the rights and obligations of the parties in the area of overlap pending such a delimitation.

As we pointed out in the Memorial, paragraph 3 of Articles 74 and 83 is not a delimitation provision to
which Article 298(1)(a) applies. Rather, the paragraph invites the structuring of a binding code of conduct pending delimitation of overlapping entitlements. As such, that paragraph 3 is a specific manifestation of the obligation to settle disputes peacefully, set forth in Article 279, and of the prohibition on abuse of rights set forth in Article 300. Paragraph 1(a) of Article 298 does not apply to those articles either; they are not specifically mentioned, and they are not delimitation provisions.

Since delimitation of the area is unlikely, given the record of China's behaviour, a declaration of the parties' respective rights and obligations in any area of overlapping entitlements that may be found to exist would be essential for the establishment and maintenance of legal order and the avoidance of risks to international peace and security. Still more would such a declaration be required in the current situation.

China and the ASEAN states have been unable, for at least the past 13 years, to agree on a code of conduct for the reservation of their respective rights, respect for the rule of law, including the Convention, and minimisation of the risk of armed

---

130 Memorial, para. 6. 277
conflict. The current prospects for reaching such
an agreement with China do not appear to be bright.
We have seen all too clearly, in the past year and
a half, the chaos and insecurity that result from
unilateral actions in the absence of a precisely
defined legal order.

In this regard it is important to bear in mind
that, in terms of its practical effects on the parties
and on the region, reaching a negative jurisdictional
decision as a consequence of a finding of
an entitlement would be the functional equivalent of
finding the entitlement on the merits and failing to
address the very serious problems this finding
creates.

Assuming the Tribunal found jurisdiction to
address the problems created by a hypothetical finding
of entitlement, the substantive challenges that would
be posed are formidable. A facially equal declaration
would not eliminate the perverse effects that
Article 121(3) was designed to avoid; it could well
exacerbate them. Such a declaration would almost
inevitably result in a situation that is manifestly
unjust in the geographic and geopolitical context of
this case, namely a situation in which China would be
able to block, throughout the area of overlapping
entitlements, the implementation of rules or the
conduct of activities that are not to its liking.

Let us consider, for example, a constraint rooted in the *Guyana v Suriname* award\(^{131}\) or the *Ghana v Côte d’Ivoire* provisional measures order,\(^ {132}\) to the effect that neither party may engage in any drilling without the consent of the other. This would mean that the Philippines would be unable to develop the natural resources of the seabed and subsoil except on terms agreeable to China in the entire area within 200 miles of a tiny insular feature that comprises less than half a square kilometre and that has no civilian population.

To avoid this manifestly unjust outcome, we must recognise that the hypothesis of extended entitlement for such tiny features is the cause of the problem; it is not the solution. To solve that problem, we need to find means to avoid all of the perverse effects of according extended jurisdiction to a tiny high-tide feature, both as between the parties and in the region that is affected by any decision to accord a hypothetical entitlement.

To do so, a declaration regulating conduct pending


delimitation would need to prohibit, in form and in fact, the exercise beyond the territorial sea of sovereign rights or jurisdiction generated by any insular feature of the Spratly Islands. This, Mr President, would be a very circuitous route, fraught with the risks of instability and injustice occasioned by a hypothesis of overlapping entitlements, simply to arrive at a stable and just equilibrium that could be achieved with far less difficulty by other means.

We respectfully submit that the dilemma posed by permitting overlapping entitlements in the circumstances of this case is best avoided by recognising that none of the tiny insular features in the Spratlys generates entitlement to an exclusive economic zone or continental shelf. As my colleagues have shown, that result is entirely consistent with the language of Article 121(3), as well as its object and purpose. Such a determination by this Tribunal would firmly elevate the rule of law, promote restoration of order, reduce the risk of armed conflict, and remove perverse legal incentives for intensification of disputes and gratuitous damage to the environment.

Indonesia, Malaysia and Vietnam have made clear, in word and deed, that they share the conviction that
such an approach would further peace, stability, and justice in the region. There is no state in the world, save China, that proposes an entitlement greater than 12 nautical miles for any of the Spratly features. And even China has not indicated which, if any, of these features falls outside Article 121(3).

Mr President, the Philippines has no doubts about the nature and entitlement of these tiny insular features. The Philippines submits, and believes it has demonstrated, that none of them is capable of sustaining human habitation or economic life of its own. The evidence overwhelmingly supports such a finding. No question of overlapping exclusive economic zones or continental shelves arises. No doubt about the Tribunal’s jurisdiction exists. We respectfully urge the Tribunal to find that paragraph 3 of Article 121 precludes the assertion of entitlement to an exclusive economic zone or continental shelf in respect of any of the insular features of the Spratlys.

Mr President, this concludes our presentations for this morning. We thank the Tribunal for its kind attention, and look forward to the opportunity to respond on Monday to any questions or requests for elaboration that the Tribunal may consider useful.

THE PRESIDENT: Thank you very much indeed,
Judge Pawlak has a question.

(12.51 pm)

Tribunal questions

JUDGE PAWLAK: Professor, it was a very interesting statement, and I was very impressed by the facts you have put to us. But I would like to know: is there any objective way to check what really is going on on those seven features of the South China Sea where China is doing their land reclamation works? The Minister of Foreign Affairs of China, in the quoted statement of 6th August this year, stated that the land reclamation activity there has been completed. Do you have or could you present to us some objective information on that? You said that the activity has slowed down. How far can we go with the reality of today? Thank you very much.

PROFESSOR OXMAN: Absolutely. I was quoting the expert report in saying that the activity has slowed down; I have not been out there to observe it myself. But I will be very happy to respond to that with such information as we may have that informed that statement in the expert report.

THE PRESIDENT: Thank you very much, Professor Oxman. It means that, as you stated yourself, this brings us to
the end of the first round of the hearing. The second round will take place on Monday. So we will adjourn now and come back on Monday. Thank you very much.

(12.53 pm)

(The hearing adjourned until 10.00 am on Monday, 30th November 2015)