

**LÈSE-MAJESTÉ BY THE SOVEREIGN'S**

**OWN INSTRUMENTALITY:**

**The Government's Violations of the Supreme Law in the  
Non-enforcement of the Philippine Entitlements in the West Philippine  
Sea.**

Entry by:

Angelette C. Bulacan

Far Eastern University

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## ABSTRACT

*Salus populi suprema lex — Welfare of the people shall be the supreme law. A legal maxim so basic that the need for its invocation is not thought of to arise until now when the Philippines reached the implementation stage of the arbitral award that solidified our rights in the West Philippines Sea.*

*The magnifying assaults on the Philippine environment, sea creatures, and century-formed marine systems; the brazen and open punches pulled against local fishermen's livelihood and security rights; and the escalating palpable dominance exerted upon the country that shackles its freedom to have full exercise of its rights are clear green lights that forthwith call the government's performance of its constitutional duties to protect the sovereign and the latter's territories, resources, and interests. It is a cardinal duty that the government is expected and required to do as the nature and gravity of these violations target the very core of Philippine liberty and economic prosperity in the West Philippine Sea.*

*But despite the stark fundamentality of upholding Filipinos' interest, the actions and inactions of the present government and its proclivities in dealing with the West Philippine Sea issue paint nothing but doubt on the purpose of the strategy and for whose benefit the actions are for. As such, a need to place the government's approach under scrutiny arose, to check its validity under the constitutional lens and establish the repercussions on Philippine claims and rights.*

*For over 350 years, the natural resources of this nation have been under the control and domination of foreign powers – whether political or corporate. Philippine mineral wealth, viciously wrenched from the bosom of the motherland, has enriched foreign shores while the Filipino people, to whom such wealth justly belongs, have remained impoverished and unrecompensed.*

*It is even understandable, however regrettable, that a government, strapped for cash and in the midst of a self-proclaimed fiscal crisis, would be inclined to turn a blind eye to the consequences of unconstitutional legislation in the hope, however false or empty, of obtaining fabulous amounts of hard currency.*

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*But these considerations should not outweigh the Constitution...As always, the one overriding consideration of this Court should be the will of the sovereign Filipino people as embodied in their Constitution.*

**-Chief Justice Artemio Panganiban**

*La bugal-b'laan Tribal Association, Inc. v. Ramos*

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## CHAPTER I: INTRODUCTION

### A. Background of the Study

“South China Sea” (SCS) is the international appellation for the partly-encased sea inside the Western Pacific Ocean that measures to nearly 1.4 million square miles.<sup>1</sup> The South China Sea offers a wide array of treasures extending from natural resources to strategic trade connections. It provides vast marine wealth comprised of rich fishing grounds and highly biodiverse coral reef ecosystem<sup>2</sup>. SCS is also believed to hold substantial oil and gas resources.<sup>3</sup> On top of the natural resources, the marginal sea also serves as a vital shipping channel for East Asian trade to the rest of the world.<sup>4</sup>

The prospect of big economic advantage fueled different nations’ desire to act in pursuit of gaining ownership, or at least, sovereign rights over the maritime features they claim based on either historic rights, legal rights under United Nations Convention of the Laws of the Sea (UNLCOS), or both.

Hence, the affected nations — China, Philippines, Vietnam, Brunei, Singapore, and Indonesia — whose territories share geographical proximity with certain portions of the South China Sea, have adamantly advanced their claims from the time they discovered their potential entitlement until the present.

The Philippines has long been an open claimant. The Philippines has recognized its potential claim in the South China Sea as early as post Second World War.<sup>5</sup>The government initially took an equivocal stance when it

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<sup>1</sup> In the matter of the South China Sea arbitration, (Philippines v. China), Award, PCA Case No. 2013-19, 1, (12 July 2016).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Melissa Castan, *Adrift in the South China Sea: International Dispute Resolution and the Spratly Islands Conflict*, 6 ASIAN-PAC. LAW REV. 93, 99 (1998)..

<sup>5</sup> CHI-KIN LO, CHINA’S POLICY TOWARDS TERRITORIAL DISPUTES: THE CASE OF THE SOUTH

CHINA SEA ISLANDS 140 (2005 ed.).

excluded the seven-island group known internationally as the Spratlys from the the islands, islets, coral reefs, shoals, and sand cays in the "Freedomland" (Kalayaan) which it considered as "unoccupied and uninhabited."<sup>6</sup>

The government then shifted to a forward approach when the Philippines made, for the first time, an official claim to the Spratlys on 10 July 1971 by virtue of a statement<sup>7</sup> of Philippines' "effective occupation and control of some of the islands" since 1968.<sup>8</sup> In September 1979, the Philippines thereafter boldly proclaimed its sovereignty over "Kalayaan Island Group."<sup>9</sup>

In modern times, the Philippines has steadily protected its claim and took actions pursuant to its stance. In 2011, the Department of Foreign Affairs began using the name "West Philippine Sea" to refer to our claimed maritime territory.<sup>10</sup> The name was made official the following year through Administrative Order No. 29, renaming the SCS as the "West Philippine Sea." On January 22, 2013, a historic move was made by the Philippines. It initiated arbitration proceedings against China by filing Notification and Statement of Claim, pursuant to Articles 286 and 287 of UNCLOS and in accordance with Article 1 of Annex VII of the same convention.<sup>11</sup>

The step taken in 2013 came into fruition in 2016 — the year that has become the highlight of the Philippine claim; a historic year not only for the Philippines but also for the international community. On July 12, 2016, the Permanent Court of Arbitration (PCA) issued its final award in the dispute between the Philippines and China over maritime claims in the South China Sea, in favor of the Philippines. The award clarified whose coastal State the disputed islands, rocks and features belonged. It ultimately rejected China's

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<sup>6</sup> *Id.* at 143.

<sup>7</sup> LO, at 145.

<sup>8</sup> *Id.* at 146.

<sup>9</sup> *Id.* at 152.

<sup>10</sup> Rendell Sanchez, *TIMELINE: The Philippines-China maritime dispute*, RAPPLER, Jul 12, 2016, available at <https://www.rappler.com/world/regions/asia-pacific/139392-timeline-west-philippine-sea-dispute>(last accessed July 10, 2019).

<sup>11</sup> *The South China Sea arbitration*, 2013-19 P.C.A. at 1.

historic right claim, as a basis not lawfully recognized by UNCLOS,<sup>12</sup> to which China is a signatory.

The Philippines has taken the consistent position that the “West Philippine Sea is ours.” The actions of government of different eras have manifested what “ours” really means: that is, the Sovereign’s. It signifies that the claimed territory belongs to “Filipinos” of the past, present, and future generations. The history portrayed that as the sovereign’s instrumentality, the various administrations had, and have acted, according to the duties imposed by the supreme law. These duties include the most basic of all: the protection and defense of our territory and territorial rights and actions for the benefit of the Sovereign.

The advantages, disadvantages, and repercussions of governmental actions have been felt and will continue to be felt by Filipinos. In short, an inter-generational concern. Consequently, governmental actions should be guided by the Supreme law, crafted by the Sovereign, for the Sovereign, whose existence is not limited by time nor of generations, but of the will of its creators. After all, the government’s discretion cannot surmount that of its principal, from whom its powers emanate. To do so would be a violation of its duty, an inexcusable transgression that deserves the wrath of the sovereign.

## **B. Objective of the Study**

This thesis has a four-fold objective:

1. *ISSUE*. Discuss the present government’s actions, particularly that of the executive department’s, with respect to the WPS issue, which borders on the illegal as it violates the Philippine Constitution.
2. *AXIOM*. Establish the primacy of Filipinos’ interest and power as a sovereign in matters pertaining to its exclusive sovereign rights in the WPS.
3. *ANALYSIS*. Discuss how the current circumstances call for the government’s proactive fulfillment of its duties and how the consequent government’s response is unconstitutional. Elucidate on the repercussions of the constitutional violations on the sovereign’s rights and interests in the WPS, in particular, to the nation’s liberty in exercising our legal rights and

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<sup>12</sup> *The South China Sea arbitration*, 2013-19 P.C.A. at 116.

the nation's prospective economic prosperity that comes along with the enjoyment of these rights.

4. *SUGGESTION*. Recommend how the government can advance Philippine interests and protect its rights within the bounds of domestic and international law.

### **C. Statement of the Problem**

UNCLOS lacks an enforcement arm and depends on the general unwritten precepts of enforcement. Thus, the decision under UNCLOS rendered by the PCA is left primarily to its member parties and the members of international community to enforce. Paragraph 1, Article 296 of the convention explicitly provides that “[a]ny decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be *complied with by all the parties to the dispute.*”<sup>13</sup> (emphasis supplied)

The article clearly establishes that the enforcement of the Philippines v. China decision is not only dependent on the losing party, China, but also on Philippines’ assertion of its implementation. The Philippines shares the burden of compliance. The proponent therefore finds it problematic when the winning party itself digresses from asserting respect and implementation of the decision. The present government’s approach ultimately raises the issue of whether the current government’s past actions and inactions, with regard to protection and advancement of Philippine sovereign rights over the WPS, violate the constitution. The proponent, taking the affirmative position, consequently raises the sub-issue: why the violations are detrimental to the welfare of Filipinos of the past, present, and future.

### **D. Significance of the Study**

The PCA’s decision cemented the Philippines’ basis of its assertion of sovereign rights over the West Philippine Sea after a long-winded dispute in the South China Sea. The arbitral award granted majority of the Philippines’ submissions, including the pronouncement that Mischief Reef and Second Thomas Shoal are within the Philippines’ coastal sea and exclusive economic zone.<sup>14</sup>

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<sup>13</sup> U.N. Convention on the Law of the Sea art. 296 ¶ 1, *opened for signature* December 10, 1982, U.N.T.S. 397 (entered into force Nov. 16, 1994).

<sup>14</sup> *The South China Sea arbitration*, 2013-19 P.C.A. at 260.

## **RELEVANCE and TIMELINESS**

Having gained the historic favorable decision, its enforcement is crucial in making the Philippine's victory transform from words to actuality. Philippines is currently in a period of transitioning from winning an international decision to implementing the judgment. During this period, governmental actions of the Philippines are in the spotlight. Government actions are seen as a measure of our country's recognition of the award and firmness of our claim. It is thus vital for Filipinos to get a critical view of how the current government acts on the award. It is essential to educate Filipinos as to the repercussions of the government approach and its legality in domestic law. This analysis is especially important as the trend of the present government's strategy portrays a very passive and acquiescent approach which inadvertently compromises the Philippines' natural resources and wealth, and the primacy of Filipinos and Filipino interests. There is a need for scrutiny as the sovereign deserves more than just a vague claim of "threat of war" as justification for this approach. It is crucial that Filipinos are enlightened of what Filipinos deserve and what its agent ought to do. Because ultimately, the biggest consequence of these actions is the loss of our sovereign rights.

### **E. Scope and Limitations**

This thesis will discuss the general concepts of domestic policies, particularly that of the Philippine constitution, with respect to government's obligations on matters relating to the protection of territorial rights, promotion of Filipino interest, and limitation of executive discretion in foreign policy relations, in light of the WPS issue. The main focus of this thesis is to establish the illegality of the paradigm of the government, as measured against its compliance with domestic policies. In discussing the sovereign rights of the Philippines, the scope will encompass rights over disputed waters in the West Philippine Sea, particularly, rights over its exclusive economic zone, continental shelf, and maritime features within its maritime entitlements. The discussion will exclude the exclusive right of the Philippines to construct, operate, and use artificial islands, installations, and structures over maritime features within the country's EEZ. Territorial disputes over islands and rock features in the WPS are likewise not within the ambit of this paper.

This paper will revolve under the status quo's setting, where the decision of the PCA in the Philippines v. China case is generally recognized as valid and binding; hence, the judgment's validity, jurisdiction or merit, will not be probed into. Further, this thesis will be limited to examination of the Philippine government's actions in response to China's escalating aggressive approach in the WPS dispute; as such, this paper will not delve into the relation of Philippines with other SCS claimants.

Further, the issue of enforcement of Philippine sovereign rights over the WPS only involves the Philippine territory and domestic laws; no foreign element exists. Although the issue concerns the present government's foreign policy with China, the executive is bound to act only for Filipinos' best interest. Hence, this paper will not involve a Conflict of Laws discussion.

## **F. Methodology**

This study involves qualitative library and online research. Information-gathering of this thesis heavily relies on internet-based resources such as, electronic documents of international conventions, news articles, law journal publications, and international book publications. The library research is mostly for Philippine legal references.

The methodology employed suits best the outcome that the proponent seeks to establish, that is, evidence-based conclusion on the illegality of the government's approach in the West Philippine Sea.

## **G. Structure of the Paper**

This thesis consists of **six** chapters. Chapter one lays down the framework of the paper. It gives the preview of what the research will be about. Chapter two will elucidate some basic concepts to give readers a better grasp of the discussion of the main argument of the paper. Chapter three provides the setup from which the main issue arose. Chapter four discusses the main issue the paper seeks to answer: establishing the illegality of the government approach, in light of the government's constitutional duties. Chapter five shows the consequences of the constitutional violations on different aspects. Chapter six wraps up the entire discussion of the main

and sub-issues and provides recommendation on how Philippine sovereign rights can be advanced within the bounds of law.

## CHAPTER II: Preliminary Concepts

### A. Limitations on Governmental Powers

In today's modern society, States are governed through governments acting as the former's agent or instrumentality by which the will of the State is formulated, expressed and realized.<sup>15</sup> The very nature of the relationship establishes the government's duties, circumscribes the extent of the government's power, and sets clear the purpose of the government's creation.

As an agent, the government must act for the benefit of its principal. Beyond the unwritten limitations, government actions are also set within the confines of the inscribed rules, principles, and policies in the constitution enacted by the State. Constitutions are specially crafted to ensure that States are governed in such a manner that will protect and advance the interest of the State as the sovereign. Consequently, they serve as the primary written limitation to which governments must conform. As such, actions beyond the constitutional limitations are considered *ultra vires* actions.

The restrictions on the Philippine government, in particular, consist of the 1987 Constitution, domestic laws, domestic jurisprudence, and its inherent duties as a government—e.g, its role as *parens patriae*. The strict adherence to the Philippine constitution is impelled by the principle of constitutional supremacy which provides that the constitution is “supreme, imperious, absolute” and unalterable except by the authority from which it emanates.<sup>16</sup>

### B. Maritime Entitlements

The maritime entitlements of different States are sourced from their respective internal laws and international treaties and conventions. Philippine maritime entitlements, in particular, are bestowed by its Constitution providing for the nation's rights to its internal waters and territorial sea extending up to 12 nautical miles from the baseline.<sup>17</sup> Supplementary thereto is UNCLOS, to which the Philippines is a State party,

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<sup>15</sup> ISAGANI A. CRUZ & CARLO CRUZ, PHILIPPINE POLITICAL LAW 33 (2014 ed.).

<sup>16</sup> Manila Prince Hotel v. GSIS, 267 SCRA 402 (1997).

<sup>17</sup> PHIL. CONST. art. I.

which provides for the Philippine entitlements in its Contiguous zone (24 nautical miles), Exclusive Economic Zone (200 nautical miles), and Continental Shelf (200 nautical miles) measured from its archipelagic baselines. The maritime entitlements that States enjoy differ based on the area involved—it can either be *sovereignty* or *sovereign rights*. Sovereignty pertains to the “full right and power of a governing body or political actor, such as a state, over itself, without any interference and restriction from outside bodies or sources.”<sup>18</sup> It is exercised by a State over its territorial waters<sup>19</sup> which extends to the “air space over the territorial sea as well as to its bed and subsoil.”<sup>20</sup> On the other hand, sovereign rights pertain to the rights of specific functional purpose not derived from sovereignty.<sup>21</sup> It functions “like usufruct, a right to use and enjoy property. You don’t need to be an owner of property to be able to use and enjoy it.”<sup>22</sup> Sovereign rights of a State are exercised over its EEZ and Continental Shelf.<sup>23</sup> Under UNCLOS, it particularly refers to the rights laid down in Article 56 of the convention:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:

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<sup>18</sup>Haroun Alfarsi, *Sea Dispute: Sovereignty vs. Sovereign Rights*, available at <https://www.profolus.com/topics/sovereignty-vs-sovereign-rights-difference/> (last accessed Jul. 12, 2019).

<sup>19</sup> Jean Christou, ‘Sovereignty’ versus ‘sovereign rights’, available at <https://cyprus-mail.com/2015/04/08/sovereignty-versus-sovereign-rights/> (last accessed Jul. 12, 2019).

<sup>20</sup> UNCLOS, *supra* note 13, art. 49.

<sup>21</sup> Christou, *supra* note 19.

<sup>22</sup> Paterno Esmaquel II, *Sovereignty vs sovereign rights: What do we have in West PH Sea?*, RAPPLER, June 29, 2019, available at <https://www.rappler.com/newsbreak/iq/234145-explainer-sovereignty-sovereign-rights-westphilippine-sea> (last accessed Jul. 12, 2019).

<sup>23</sup> Alfarsi, *supra* note 18.

- (i) the establishment and use of artificial islands, installations and structures;
  - (ii) marine scientific research;
  - (iii) the protection and preservation of the marine environment;
- (c) other rights and duties provided for in this Convention.<sup>24</sup>

Sovereign rights as used in the article suggest that the State's rights are exclusive, not preferential. These are exclusive rights and all other rights necessary for the exercise of such exclusive rights.<sup>25</sup> For the Philippines, it has legal right to exercise sovereign rights over the marine wealth within its EEZ since the PCA's ruling established that majority of the maritime features within its EEZ are either low-tide elevations or rocks that do not generate their own EEZ, as such, the Philippines does not have overlapping maritime zones with these features.

### **C. Enforcement of International ruling**

Disputes between States can be resolved through international mechanisms including the resort to arbitration. The enforcement of international decisions issued depends on the international law under which the decision was rendered. If it has an enforcement mechanism, the implementation will be done pursuant thereto. Otherwise, the decisions are enforced indirectly since the international community does not have an international sheriff who can perform the task of implementing international decisions. Indirect enforcement entails large dependence on the parties' "conscience" or "compelling morality."<sup>26</sup> It presumes compliance.<sup>27</sup> The enforcement of the decision is left to the parties and to the members of the international community to undertake. Unlike domestic judgment,

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<sup>24</sup> UNCLOS, *supra* note 13, art. 56.

<sup>25</sup> Christou, *supra* note 19.

<sup>26</sup> Michael W. Reisman, *The Enforcement of International Judgments and Awards*, AM. J. INT'L. LAW., 1969, at 2.

<sup>27</sup> *Id.* at 3.

international decisions have no enforcement apparatus. At best, the prevailing state party can seek aid from the United Nations (UN) which, in turn, can direct the Security Council to enforce the decision. But for United Nations' to render assistance, all the members of the Security Council must agree thereto.<sup>28</sup>

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<sup>28</sup> Frank E. Lobrigo, How to enforce the PCA ruling, *available at* <https://opinion.inquirer.net/105721/enforce-pca-ruling> (last accessed Jul. 12, 2019).

## **CHAPTER III: PHILIPPINE GOVERNMENT'S APPROACH IN THE WEST PHILIPPINE SEA ISSUE**

### **A. Bilateral Strategy: Integrating Acquiescent and Conciliatory Approach.**

The present government has chosen a bilateral strategy in dealing with China concerning the West Philippine Sea. In acting under the bilateral framework, the present government has opted to work closely with China in resolving the maritime dispute to the exclusion of other interested powers, the international community, and concerned international organizations. In working under this framework, the government has employed an acquiescent and conciliatory approach which it deemed necessary to effectively earn China's favor in hopes of getting aids and economic investments and to avoid China's aggression.

Under the acquiescent approach, the government has turned a blind eye in times of reported abuses of our sovereign rights and of Filipinos by Chinese nationals. It remained passive when the conditions called for the need for diplomatic protests. On the other hand, under the conciliatory approach which is interrelated with the former, the arbitral award was shelved to appease China who has openly denounced the validity of the ruling. The government has also shifted its foreign policy from relying on its long-standing foreign allies and international laws to strengthening ties with its former enemy, China. From vigorously challenging China's expansive territorial claims, the government now sporadically and openly admit China's control over the disputed features. The government has also weakened the military protection over the maritime waters and features in the WPS.

To justify its strategy, the government has consistently raised the threat of an unwinnable war should the Philippines decide to forward with its claims.

## CHAPTER IV: THE GOVERNMENT’S ACQUIESCENT AND CONCILIATORY APPROACH VIOLATES THE CONSTITUTION.

### A. SUBJECTS WHOSE CONSTITUTIONALITY CAN BE QUESTIONED.

Under the Constitutional Supremacy principle, the Philippine Constitution must ever remain supreme.<sup>29</sup> The principle rightfully applies even to subjects not embraced within the realm of law, treaties, and contracts, such as acts of public officers in the exercise of their function. In *Oposa v. Factoran*, the issue did not involve the invalidity of the Timber License Agreements (TLAs), but of the DENR’s official act of granting them for being violative of the petitioners’ intergenerational right to a balanced and healthful ecology as enshrined in the Constitution.<sup>30</sup> The constitutional supremacy was also upheld in testing the validity of government-formed systems. In *Belgica v. Ochoa*, the issue involved the constitutionality of the Pork Barrel System which allowed legislators to appropriate individually in vital areas of budget execution. The court ruled the system’s unconstitutionality as it violated the Constitutional mandate limiting the exercise of power to appropriate to the Congress as a whole.<sup>31</sup>

The track of subjects that have been nullified for nonconformity to the Constitution share a common denominator — that is, they all involve *positive acts*. Constitutional infractions however also embrace inactions—better termed as *omissions*. This is necessarily implied from the Constitutional Supremacy principle. The constitution, as the instrument of the Sovereign, all matters that affect the sovereign’s interest must submit to the limitations and duties of the government inscribed thereon. Consequently, the non-performance of constitutionally given duties is an omission that violates the constitution. The binary of punishing positive acts and omissions is well-entrenched in our system of laws. In Philippine Political Law, the Constitution requires duly elected members of Congress to make full disclosure of their financial and business interests upon assumption of office.<sup>32</sup> The omission of such duty constitutes a violation of the Constitution

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<sup>29</sup> *Araullo v. Aquino III*, G.R. No. 209287, February 3, 2015.

<sup>30</sup> *Oposa v. Factoran*, 224 SCRA 792 (1993).

<sup>31</sup> *Belgica v. Ochoa*, 710 SCRA 1 (2013).

<sup>32</sup> PHIL CONST. art. VI § 12.

which may be a ground for their removal from office. In Environmental Law, the Rules of Procedure for Environmental Cases provide a remedy of a writ of continuing mandamus whenever the government or its officers unlawfully neglect to perform their duty in connection with the enforcement or violation of an environmental law or regulation or a right therein.<sup>33</sup> Lastly, jurisprudence also recognizes the omission of positive duty as a proper subject of controversy. In *MMDA v. Concerned Citizens of Manila Bay*, the court ordered petitioner to cleanup Manila Bay as its continued neglect constitutes a violation of several environmental laws which require the petitioner to put up and maintain adequate sanitary landfill and solid waste and liquid disposal system as well as other alternative garbage disposal systems.<sup>34</sup>

Under the constitutional scrutiny, the subjects are considered to be *ultra vires* when they contravene the Constitution's express written provisions and unwritten doctrinal guidelines. The contravention occurs when the subjects have been created or performed by a public official who acted beyond his vested powers or by non-performance of his positive duty. However, omission of a positive duty is not always constitutionally invalid. The Constitution does not provide for all the details necessary to invoke constitutional duties. As such, guided by the rules on constitutional construction, the ultimate intent behind each mandate and the sovereign's interests should be the threshold in determining when a duty is required to be performed.

## **B. VIOLATIONS OF THE CONSTITUTION THROUGH UNJUSTIFIED INACTIONS.**

### **1. Constitutional Duty:** To protect Filipinos' right to fish exclusively in the WPS.

**Section 2, Article XII:** "The State shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, *and reserve its use and enjoyment exclusively to Filipino citizens.*"<sup>35</sup> (emphasis supplied)

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<sup>33</sup> 2010 RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, rule 8, § 1.

<sup>34</sup> Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay, 574 SCRA 661 (2008).

<sup>35</sup> PHIL. CONST. art. XII, §2.

**Section 7, Article XIII:** “The State shall also protect, develop, and conserve such resources. *The protection shall extend to offshore fishing grounds of subsistence fishermen against foreign intrusion.* Fishworkers shall receive a just share from their labor in the utilization of marine and fishing resources.”<sup>36</sup> (emphasis supplied)

**Section 18, Article II:** “The State affirms labor as a primary social economic force. It shall *protect the rights of workers and promote their welfare.*”<sup>37</sup> (emphasis supplied)

**Section 3, Article XIII:** “The State shall *afford full protection to labor,* local and overseas, organized and unorganized, and promote full employment and equality of employment opportunities for all.”<sup>38</sup>  
(emphasis supplied)

Under the 1987 Constitution, the State’s extended responsibilities toward Philippine natural resources and Filipino fishermen beyond our national territory were solidified. Under the *Parens Patriae* doctrine, States are obliged to protect and look after the welfare of its people especially those who are unable to care for themselves.<sup>39</sup> As such, it has the right to seek redress on behalf of the collective interests of its people.<sup>40</sup> The constitutional provisions providing for the protection of local fishermen within and beyond the country’s territory are manifestations of the government’s exercise of its duty as *parens patriae*.

**a. When the performance of duty is required.** Under the *verba legis* construction, the words used in the Constitution must be given their ordinary meaning except where technical terms are employed.<sup>41</sup>

Hence, the Constitutional duty to “protect” and “reserve” should be construed in their ordinary sense; to protect is to “cover or shield from

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<sup>36</sup> PHIL. CONST. art. XIII, §7.

<sup>37</sup> PHIL. CONST. art. II, §18.

<sup>38</sup> PHIL. CONST. art. XIII, §3.

<sup>39</sup> *Southern Luzon Drug Corporation v. Department of Social Welfare and Development*, 824 SCRA 164 (2017).

<sup>40</sup> *Id.*

<sup>41</sup> *Francisco v. House of representatives*, 415 SCRA 44 (2003).

exposure, injury, damage, or destruction, to guard or defend”<sup>42</sup> and to reserve is “to set or have set aside or apart.”<sup>43</sup> Both duties need no explanation as there is no ambiguity. The State’s duty to protect normally arises when the thing or persons ought to be protected are threatened and/or actually harmed. For instance, the government’s duty to protect by calling out the Armed Forces arises whenever it becomes necessary because lawless violence, invasion or rebellion<sup>44</sup> threaten public safety. As an analogy, the duty to protect Filipino fishermen arises when they themselves and their means of livelihood are put at risk or harm. On the other hand, the State’s duty to reserve exclusive use and enjoyment of natural resources by Filipinos arose from the onset—from the time the Constitution took effect. From the nature of this duty, the government is called upon to keep aliens from taking and enjoying resources within our EEZ even before threats to this right arise.

The influx of Chinese fishermen in the West Philippine Sea without permit, their escalating aggression towards Filipino fishermen as shown by the recent Recto Bank incident, the escalating harsh fishing conditions being faced by our locals, and the lack of maritime protection are only some of the circumstances that call for the exercise of the Government’s constitutional duty to protect. In April 2019, the Karagatan Patrol has recorded a tremendous increase in the number of foreign vessels within the country’s EEZ particularly within the WPS including two fisheries management areas in the Recto Bank and Panatag Shoal since 2012, counting an average of 11,261.<sup>45</sup> The foreign vessels’ entry not only encroaches upon waters within our EEZ but even our municipal waters to the detriment of our local fishermen and local communities that are dependent on marine resources.<sup>46</sup> Circumstances show that Filipino fishermen are not only facing a constant threat, but they have already suffered which call for the performance of the government’s

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<sup>42</sup> Merriam Dictionary *available at* <https://www.merriam-webster.com/dictionary/protect> (last accessed Aug. 10, 2019).

<sup>43</sup> *Id.*

<sup>44</sup> PHIL. CONST. art. VII, § 18.

<sup>45</sup> Jhesset O. Enano, *Foreign fishing vessels crowd PH waters*, PHIL. DAILY INQ., July 05, 2019, *available at* <https://globalnation.inquirer.net/177516/foreign-fishing-vessels-crowd-ph-waters> (last accessed Aug. 10, 2019).

<sup>46</sup> *Id.*

constitutional duty to protect Filipino fishermen and to reserve the country's natural resources exclusively for Filipinos.

**b. Violation by acquiescence.** As the foreign relations is committed by the Constitution to the political departments of the government, specifically the President, the government exercises discretion whether it would espouse claims of its nationals against a foreign government.<sup>47</sup> When espousing a claim, the government should always consider the constitutional doctrine on the sovereign's ultimate supremacy and interest.

Here, the sovereign's interest calls for the protection and advancement of local fishermen's rights as continued acquiescence will not only deprive them of today's catch but also of the future's. However, the government has opted to downplay Chinese harassments and encroachments in the WPS and refrained from resorting to diplomatic measures. In the 2018 incident of the Chinese Coast Guard's seizure of catch from local fishermen, the government chose to justify the seizure by treating it as a "barter" and not an outright seizure of fish.<sup>48</sup> According to Justice Carpio, the Philippines could have filed another case before the UN-backed tribunal to demand damages for the economic loss the fishermen suffered<sup>49</sup> and for China's continued violation of the ruling which has found China's violation of its duty to give due regard for the Philippines' sovereign rights with respect to fisheries.<sup>50</sup> But the government preferred to rely on China's words that it will take the matter seriously.<sup>51</sup> In another incident where Chinese nationals have denied access to Filipino fishermen in the

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<sup>47</sup> *Vinuya v. Romulo*, 732 SCRA 595 (2010).

<sup>48</sup> Alexis Romero, *Duterte wants China out of West Philippine Sea, but no war*, PHIL. STAR, June 19, 2018, available at <https://www.philstar.com/headlines/2018/06/19/1825891/duterte-wants-china-out-west-philippine-sea-no-war> (last accessed Jul. 17, 2019).

<sup>49</sup> Patricia Lourdes Viray, *Carpio: Philippines can file another case against China's harassment of fishermen*, PHIL. STAR, June 8, 2018, available at <https://www.philstar.com/headlines/2018/06/08/1822777/carpio-philippines-can-file-another-case-against-chinas-harassment-fishermen> (last accessed Aug. 10, 2019).

<sup>50</sup> *The South China Sea arbitration*, 2013-19 P.C.A. at 297.

<sup>51</sup> Ian Nicolas Cigaral, *China vows 'serious investigation' into Chinese seizures of fish catch in Philippine waters*, PHIL. STAR, June 12, 2018, available at <https://www.philstar.com/headlines/2018/06/12/1823959/china-vows-serious-investigation-chinese-seizures-fish-catch-philippine-waters> (last accessed Aug. 10, 2019).

sandbars near the Pag-asa Island and in the Panatag Shoal area,<sup>52</sup> the government did not act and only justified its inaction by saying that China already has control over the area.<sup>53</sup> The Philippines could have invoked the arbitral award which has granted Philippines' submission that China has breached its UNCLOS obligation when it unlawfully prevented Filipino fishermen who have the right to fish in the territorial sea of Scarborough Shoal from engaging in their traditional fishing.<sup>54</sup> Lastly, during the Recto Bank incident where Filipino fishermen were left afloat when their boat was ransacked by a Chinese vessel, the executive department has opted to dismiss the incident as mere maritime incident<sup>55</sup> and just agreed to China's terms in its proposed "joint investigation" to resolve the matter through friendly consultation.<sup>56</sup> These inactions are ultra vires omissions that violate the Constitution's express mandate and doctrinal supremacy of Filipino interest.

## **2. Constitutional Duty: Protection of marine wealth in the WPS**

**Section 2, Article XII:** "The State shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone."<sup>57</sup>

**Section 16, Article II:** "The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature."<sup>58</sup>

The duty of the State to protect the environment was affirmed in *Oposa v. Factoran* as a duty so important and is assumed to exist from the inception of humankind that it need not even be written in the Constitution. The right

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<sup>52</sup> Patricia Lourdes Viray, *Palace: China controls West Philippine Sea*, PHIL. STAR, March 25, 2019, available at <https://www.philstar.com/headlines/2019/03/25/1904421/palace-china-controls-west-philippine-sea> (last accessed Jul. 17, 2019).

<sup>53</sup> *Id.*

<sup>54</sup> *The South China Sea arbitration*, 2013-19 P.C.A. at 318.

<sup>55</sup> Chad de Guzman, *Duterte to fishermen in Recto Bank incident: 'Sorry, that's how it is'*, CNN PHIL., Jun 24, 2019, available at <https://cnnphilippines.com/news/2019/6/24/Rodrigo-Duterte-Recto-Bank-fishermen-orrythats-how-it-is.html> (last accessed Jul. 17, 2019).

<sup>56</sup> *Id.*

<sup>57</sup> PHIL.CONST. art. XII, § 2.

<sup>58</sup> PHIL. CONST. art. II, § 16.

to a balanced and healthful ecology imports a concomitant duty to avoid damaging the environment and its prudent management and protection.<sup>59</sup> The government's duty comprehends protection of the environment in its entirety including the marine environment. The constitutional duty to protect marine environment is also a manifestation of the government's duty as *parens patriae*. In *Massachusetts v. EPA*, the court reiterated the doctrine of *parens patriae* by recognizing Massachusetts' legal standing to challenge the respondent's refusal to reduce greenhouse gas emissions. The Court held that the state has a special position and interest in the unlawful inaction of EPA which widely affected its territory.<sup>60</sup> As such, under the government's *parens patriae* duty, the state must protect the citizen's environmental rights.

**a. When the performance of duty is required.** The duty to protect our nation's marine wealth should also be understood in its ordinary meaning under the *verbal legis* construction. That is, to protect is to "cover or shield from exposure, injury, damage, or destruction, to guard or defend."<sup>61</sup> The duty arises when the existence and health of the environment is facing injury, damage, or destruction.

Here, the marine wealth required to be protected is already suffering from escalating damage, particularly our reef ecosystems in Panatag (Scarborough) Shoal and in Spratly Islands. The damage is caused mainly by China's mass harvesting of giant clams, China's massive reclamations to build artificial islands, and illegal fishing operations. Such damage costs the Philippines about P33.1 billion annually.<sup>62</sup> Our marine environment is also facing a constant threat of destruction and deterioration leading to further depletion of our marine resources. These realities clearly call for the performance of the government's constitutional duty to protect our marine wealth and Filipinos' right to a balanced and healthful ecology. The Philippine marine wealth also embraces maritime features such as Mischief Reef and Second Thomas Shoal—LTes confirmed by the arbitral award as part of our EEZ and

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<sup>59</sup> *Oposa*, 224 SCRA 792.

<sup>60</sup> *Massachusetts v. EPA*, 549 U.S. 497 (2007).

<sup>61</sup> Merriam Dictionary, *supra* note 42.

<sup>62</sup> Jhesset O. Enano and Karl R. Ocampo, *Cost of China damage to PH reefs: P33B a year*, PHIL. DAILY INQ., July 04, 2019, available at <https://globalnation.inquirer.net/177462/cost-of-china-damage-to-ph-reefs-p33b-a-year> (last accessed Aug. 10, 2019).

Continental Shelf. As such, they also need to be guarded against foreign abuses. The massive and increasing reclamation activities of China over these features not only harm the marine environment in the process but also destroy the naturally-formed features themselves.

**b. Violation by acquiescence.** Since the violations are committed by foreign nationals and by a foreign government, the Philippines can only act on the environmental damage through its President as the chief architect of foreign policy.

In protecting its marine environment, the government has previously included similarly environment-damaging activities of China in its submission before the arbitral tribunal in the *Philippine v. China* case. In that case, the PCA declared China's breach of its obligation under UNCLOS to protect and preserve the marine environment through its toleration and protection of, and failure to prevent Chinese fishing vessels from engaging in harmful harvesting activities of endangered species in the WPS.<sup>63</sup> The government can also resort to filing of diplomatic protests. Under the government's inter-generational responsibility as highlighted in *Oposa v. Factoran*, the government is called upon to protect the Sovereign's right to enjoy our marine environment in the WPS. Similar duty is also found in UNCLOS;<sup>64</sup> however, despite the deliberate degradation of our marine wealth, the government has opted to acquiesce.

## **C. VIOLATIONS OF THE CONSTITUTION THROUGH ULTRA VIRES ACTIONS**

**1. Constitutional Duty:** Full control and supervision of the State in the exploration, development, and utilization (EDU) of natural resources.

### **Section 2, Article XII:**

The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino

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<sup>63</sup> *The South China Sea arbitration*, 2013-19 P.C.A. at 397.

<sup>64</sup> UNCLOS, *supra* note 13, art. 194.

citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens.<sup>65</sup>

Upon the effectivity of the 1987 Constitution, the State assumed a more dynamic role in the exploration, development and utilization (EDU) of the natural resources of the country.<sup>66</sup> In *Cruz v. DENR*, the Court has affirmed that the State's full control and supervision in EDU can either be direct or indirect. As *owner of the natural resources*, the State may directly undertake the EDU by itself, or opt to undertake the same in three other ways: a) Entering into co-production, joint venture or production-sharing agreements with Filipino citizens or qualified corporations; b) Small-scale utilization of natural resources by Filipino citizens as may be provided by law; and c) For large-scale EDU, through agreements with foreign-owned corporations involving technical or financial assistance entered into by the President.<sup>67</sup> (emphasis supplied)

**a. When the performance of duty is required.** Under the *verba legis* construction, the constitutional duty imposed by this article must be understood in its ordinary meaning. From the words of the provision, the full control and supervision by the State are required whenever an exploration, development, or utilization of Philippine natural resources will be conducted.

In line with this constitutional duty, the government has enacted laws that must be complied with before any EDU can be undertaken. It has also provided for areas which should be preserved and prohibited from being explored, developed, or utilized. Jurisprudence provides examples when the government exercises full control and supervision whenever EDU of our natural resources are undertaken. In *Resident Marine Mammals v. Reyes*,<sup>68</sup> the government, through the Department of Energy, had to be the principal party in the Exploration Contract with JAPEX<sup>69</sup> and in the conduct of oil exploration activities. Likewise, the DENR should have

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<sup>65</sup> PHIL. CONST. art. XII, § 2.

<sup>66</sup> *Minors Association of the Philippines v. Factoran, Jr.*, 240 SCRA 100 (1995).

<sup>67</sup> *Cruz v. Secretary of Environment and Natural Resources*, 347 SCRA 128 (2000).

<sup>68</sup> *Resident Marine Mammals of the Protected Seascape Tañon Strait v. Reyes*, 756 SCRA 513 (2015).

<sup>69</sup> *Id.*

issued the necessary Environmental Compliance Certificate (ECC) upon prior review of the project.

Here, the EDU of our natural resources in the West Philippines Sea is sought to be undertaken by the Philippine government with the Chinese government. The Kalayaan Island Group (KIG) found in the West Philippine Sea is part of Philippine national territory,<sup>70</sup> over which the Philippines exercises sovereignty. In relation thereto, UNCLOS also grants the Philippines exclusive sovereign rights in its EEZ where the WPS is situated. Hence, the EDU of natural resources therein calls for the exercise of full control and supervision by the government under the Constitution.

**b. Violation by contravention of Constitutional limitations.** In the exercise of full control and supervision, the government should either directly undertake the EDU or it can enter into the contracts allowed by the Constitution. As to the EDU of minerals, the Constitution has allowed the participation of foreign-owned corporations through agreements with the President but limited only to either *technical or financial assistance* and only for *large-scale* exploration, development, and utilization of *minerals, petroleum, and other mineral oils*.<sup>71</sup> (emphasis supplied).

In *La Bugal-B'laan v. Ramos*, the Court emphasized the following restrictions on the participation of foreign corporations to safeguard Filipinos' interests:

- 1) Only the President may enter into these agreements, and *only with corporations*;
- 2) *Only large-scale* EDU is allowed which usually refers to very capital-intensive activities;
- 3) It is restricted to *minerals, petroleum and other mineral oils*;
- 4) The Financial or Technical Assistance Agreements (FTAAs) must be in accordance with the terms and conditions provided by law;

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<sup>70</sup> Republic Act No. 9522 ; PHIL. CONST. art. I.

<sup>71</sup> PHIL. CONST. art. XII, § 2, ¶ 4.

- 5) Entry in FTAAAs should be based on real contributions to economic growth and general welfare of the country;
- 6) FTAAAs must have rudimentary stipulations for the promotion of the development and use of local scientific and technical resources;
- 7) The President must notify Congress of every FTAAAs entered into within thirty days from its execution;
- 8) It should involve only either financial or technical assistance.<sup>72</sup> (emphasis supplied).

The EDU of oil and gas in the WPS is sought to be undertaken by the Philippine government through “Joint Exploration” with the Chinese government. In line with this project, representatives of both nations entered into a preliminary agreement by signing a Memorandum of Understanding (MOU) which provided for the framework of conducting the joint oil and gas development in the area.<sup>73</sup> This clearly violates the restrictions imposed by the Constitution.

First, it violated the first rule which only allows agreements between the President and foreign-owned *corporations*. Here, the other party in the contract is the Chinese government itself. Although the MOU provided that the Inter-Governmental Joint Steering Committee would implement the agreement by working through Inter-Entrepreneurial Working Group composed of the parties-petroleum companies,<sup>74</sup> the China-owned corporation will only participate in the implementation of the agreement. The Chinese government remains to be the party with active involvement through its energy and foreign ministers who will be part of the Joint Steering committee alongside ours.

Second, it failed to comply with the domestic statutes governing EDU as required by the fourth rule. There is no showing that required permits

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<sup>72</sup> La Bugal-B’Laan Tribal Association, Inc. vs. Ramos 421 SCRA 148 (2004).

<sup>73</sup> *EXCLUSIVE: Locsin shows copy of PH-China joint oil exploration deal*, CNN PHIL., November 23, 2018, available at <http://nine.cnnphilippines.com/news/2018/11/22/teddy-boy-locsin-mou-philippines-china-joint-oil-exploration.html> (last accessed Jul. 17, 2019).

<sup>74</sup> Jay Batongbacal, A closer look at China’s proposal for Joint exploration with the Philippines, available at <https://amti.csis.org/closer-look-chinas-proposal-joint-exploration-with-philippines/> (last accessed Aug. 20, 2019).

like the Environmental Compliance Certificate from DENR have been issued nor was there any showing that reference was made to relevant Philippine laws, specifically, the Oil Exploration and Development Act of 1972 and Department of Energy Circulars. There was even no application for such DENR permits and consideration of any Philippine laws since China, which is the other party to the contract, does not recognize the Philippines' ownership over the natural resources to be explored which would entitle it to enforce compliance of its domestic laws.

Third, it violates the fifth rule. The MOU and the intended Joint Exploration Contract do not appear to contribute to the general welfare of the Philippines. Aside from the agreements being unconstitutional, entry into such agreements will also weaken the Philippines' claim over the areas where joint exploration will be conducted. This is because of the nature of "joint exploration" intended by both parties. In international law, joint exploration is a general term used to refer to an international agreement between states intended to provide for the "co-operative exploitation of hydrocarbon resources that come *under the jurisdiction of two states.*"<sup>75</sup> (emphasis supplied) The Joint development concept has been one of the options of States for co-operation in the exploration and exploitation of *shared* offshore mineral resources.<sup>76</sup> In the *North Sea Continental Shelf* case, the International Court of Justice held that joint development solution was appropriate when there is a question of preserving the unity of a deposit when *overlapping claims or transboundary deposit* is the subject of an international dispute.<sup>77</sup>(emphasis supplied) Clearly, joint exploration is contemplated as an option for two or more States which "share" ownership over the natural resources. The parties enter into a Joint exploration agreement as co-owners. Here, the Philippines cannot enter into such an agreement as it would mean recognizing China as co-owner of Philippine natural resources. The arbitral award has been clear in establishing that there are no overlapping maritime zones in the disputed features in the West Philippine Sea and that the Philippines has the exclusive sovereign rights in its EEZ which includes the EDU of natural resources therein. Moreover, as an agent of the State, the government

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<sup>75</sup> DAVID M. ONG, EXPLOITATION OF NATURAL RESOURCES IN THE 21ST CENTURY 116-117 (Malgosia Fitzmaurice & Milena Szuniewicz, 2003).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

cannot enter into agreements that will diminish Filipinos' rights over its resources.

- 2. Constitutional Duties:** Give paramount consideration to Sovereign's interest in pursuing independent foreign policy.

**Section 7, Article II:**

“The State shall pursue an independent foreign policy. In its relations with other states the *paramount consideration* shall be *national sovereignty, territorial integrity, national interest, and the right to self-determination.*”<sup>78</sup> (emphasis supplied).

The mandate to pursue independent foreign policy does not require the Philippines to disengage associating with other countries. Rather, it requires the president who is the chief architect of foreign relations to always abide by the constitutionally enshrined principles that uphold the sovereign's interest in making foreign policy decisions. The State bestows upon its agent the authority to represent its interests to other countries and the international community.<sup>79</sup>

Paramount consideration of “national sovereignty” requires that any assistance the Philippines receives must not diminish our national sovereignty.<sup>80</sup> Our sovereignty should not also be impaired whenever “special relations” is invoked by another State.<sup>81</sup> On the other hand, the “national interests” requires that international agreements entered into should not pose harm or degradation of the interests that relate to the most important values of national community and those vital to the survival and protection of the State, to the security of the lives and properties of the people.<sup>82</sup> As for “territorial integrity,” it requires the safeguarding of our territorial waters and the exclusive economic zone against those who prey on our natural

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<sup>78</sup> PHIL. CONST. art. II, § 7.

<sup>79</sup> *Saguisag v. Ochoa, Jr.*, 779 SCRA 241 (2016).

<sup>80</sup> INTERNATIONAL STUDIES INSTITUTE OF THE PHILIPPINES, FOR AN INDEPENDENT FOREIGN POLICY 22 (1988).

<sup>81</sup> *Id.* at 23.

<sup>82</sup> *Id.*

resources.<sup>83</sup> Lastly, the “right to self-determination” means that the Philippines must allow itself to venture on more opportunities and consider options other than continued subservience to another State.<sup>84</sup> The government’s decision should be based on its own assessment of what best caters to Filipino interests.

**a. When performance of duty is required.** From the plain words of the constitution the duty to give paramount consideration to national sovereignty, territorial integrity, national interest, and the right to self-determination arises whenever the government will develop or create foreign policy in forming relations with other States and international organizations.

Here, the government has been vocal and consistent in its intention to establish a “friendlier” tie with China under its bilateral strategy in dealing with the WPS dispute. In line with this strategy, the government entered into one-on-one negotiations with the Chinese government and employed a conciliatory approach.

**b. Violation by contravention of Constitutional mandate.** First, the government unilaterally decided to shelve the *Philippine v. China* arbitral award. Although the president is given a wide degree of discretion in the conduct of foreign affairs, his discretion is circumscribed by the Constitution.<sup>85</sup>

Here, by the president’s decision not to enforce the PCA decision three years after its award in exchange for China’s promise to lessen its aggression, investments in the Philippines, and support for the drug war, the president disregarded the territorial integrity and national interest of the Philippines. In disregarding Philippine national interest, it overlooked the exclusive Philippine entitlements laid down in the ruling that could boost the country’s economy. Exercise of our sovereign rights and the protection thereof are clearly matters of national interest. They pertain to the rights of Filipinos over the natural resources in the WPS that the present and future generations can enjoy. In disregarding our territorial

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<sup>83</sup> *Id.* at 24.

<sup>84</sup> *Id.* at 26.

<sup>85</sup> *Saguisag*, 779 SCRA 24.

integrity, the government has also overlooked the detrimental effect of prolonged stagnation of the ruling. Shelving the ruling that solidified our claim over the disputed maritime features will harm the country's territorial integrity. Deliberate non-enforcement of the ruling over a long period of time can weaken its "enforcement force" upon the losing party who might view the non-assertion as a waiver of rights. Therefore, the executive has exercised its discretion beyond the limit provided by the Constitution by not asserting the ruling in its negotiations and discussions with China..

Second, the Chief Executive has not only decided to cease joint patrol with the US in the West Philippine Sea but has also terminated the Visiting Forces Agreement (VFA) with the US. These actions were based on a seemingly personal justification. The decision to cease joint patrol was made after the president received criticisms from the US regarding the violation of human rights in the controversial war on drugs. The decision to terminate the VFA was made after the US visa of one of its vocal supporters, Sen. Ronald "Bato" Dela Rosa, was cancelled.<sup>86</sup>

These justifications do not show how cutting off military ties with the US will benefit the country's interest and security, especially amidst the intensifying dispute in the WPS. Rather, these decisions appear to harm the Philippines' interest, particularly when dealing with China whose military armaments and vessels are admittedly superior to ours. The cessation of joint patrol and termination of VFA relaxed our military defenses over the disputed waters; making the WPS more prone to intrusion, our marine resources prone to alien exploitation, and our local fishermen prone to harassment. These decisions stripped us off of the additional military protection against China's escalating aggression. The repercussion is demonstrated by the recent sighting of Chinese military aircraft in Kagitingan Reef in the WPS amidst the COVID-19 pandemic.<sup>87</sup> Clearly, in making these decisions, our national interest in the WPS was disregarded; it was a decision made in excess of authority.

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<sup>86</sup> Darryl John Esguerra, *Philippines officially terminates VFA with US*, PHIL. DAILY INQ., February 11, 2020, available at <https://globalnation.inquirer.net/185186/fwd-breaking-philippines-officially-terminates-vfa-with-us> (last accessed April 29, 2020).

<sup>87</sup> Frances Mangosing, *As world is on edge over COVID-19, it's 'business as usual' for China in West Philippine Sea*, PHIL. DAILY INQ., March 30, 2020, available at <https://globalnation.inquirer.net/>

Third, the Government has closed off potential contract offers from other foreign-owned companies in the EDU of Philippine natural resources in the WPS. Under its bilateral strategy which necessitated the use of a conciliatory approach, the government has been firm in having the agreement with China alone. The decision to entertain China's proposal to the exclusion of others was made based on unfounded fear of the government of the alleged threat of war from China if the Philippines would pursue the EDU on its own or with other foreign-owned corporations.<sup>88</sup> The decision was based on what will be acceptable to the other State rather than which partnership would engender more benefits to the Philippines — a clear manifestation of the derogation of the Philippines' right to self-determination.

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186412/ as-world-is-on-edge-over-covid-19-its-business-as-usual-for-china-in-west-philippine-sea#ixzz6KtjO8lSX (last accessed April 28, 2020).

<sup>88</sup> Nestor Corrales, *PH, China to have joint venture in West Philippine Sea — Duterte*, PHIL. DAILY INQ., July 25, 2017, available at <https://globalnation.inquirer.net/159003/ph-china-joint-venture-west-philippine-sea-duterte> (last accessed Jul. 17, 2019).

## **CHAPTER V: EFFECTS OF CONSTITUTIONAL VIOLATIONS OF THE GOVERNMENT**

### **A. Diminution of Philippines' Liberty in asserting its Legal Claim in the West Philippines Sea.**

The Constitutional violations of the present government will have a long-lasting effect on the Philippines regardless of whether these violations are legally validated or invalidated by the judiciary. This is because internal recognition of the actions and inactions bears no significance under international law. These violations will bind the Philippines even if later recognized as having no effect under our national laws. The conduct of State organs —the officials, offices, agencies, and instrumentalities, is deemed conduct of the State under international law whether its internal laws recognize them as such.<sup>89</sup> This international law principle is codified in Article 7 of the Responsibility of States for Internationally Wrongful Acts.<sup>90</sup>

Here, the actions and inactions were made under the executive's capacity as the chief architect of foreign relations. Being so, they are considered acts of the Philippines under international law whether deemed *ultra vires* in the Philippines or not. Consequently, the governmental acts performed in addressing the West Philippine Sea issue and China's violations of the country's sovereign rights will bind the Philippines.

#### **1. Preclusive Effect on International Community's involvement.**

International judicial decisions affect not only the parties to the controversy but also other States and international organizations as these decisions influence international relations and set examples of repercussions of international violations. More so, the enforcement or non-enforcement of these decisions might influence the views and actions of other States similarly situated. As such, the international community is inherently interested and concerned in the enforcement of these decisions. This natural interest of the international community, in turn, creates pressure for compliance on the part of the losing party

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<sup>89</sup> MERLIN M. MAGALLONA, *FUNDAMENTALS OF PUBLIC INTERNATIONAL LAW* 65 (2005).

<sup>90</sup> ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Ch. IV.E.1 at art. 7, U.N. Doc. Supp. No.10 (A/56/10) (Nov. 2001).

to obey the ruling; otherwise, it will damage its international reputation—a value essential in a State’s conduct of foreign relations. However, the gravity of pressure is diminished when the winning party itself does nothing to push for the decision’s implementation. In the absence of initiative from the winning party, there is nothing for the international community to support. The winning party’s decision to enforce the decision, waive or acquiesce on its rights can be considered as a discretion exercised in regulating its internal affairs which the international community cannot question. By itself, the international community cannot call for the losing party’s compliance despite its inherent interest as it would tantamount to undue interference on the winning State’s internal decision in violation of the principle of non-interference. The UN General Assembly Resolution 2625 has codified this principle as follows: “No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.”<sup>91</sup> The principle is adhered to by the international community for the preservation of each State’s independence and States’ friendly relations, hence, the members of the international community cannot contravene it without repercussions.

The absence of enforcement mechanism in UNCLOS especially calls for the Philippines’ reliance on the help of the international community in enforcing the award especially since the enforcement is sought against China which wields stronger political power in the international arena. However, because of the government’s unlawful acts and omissions, the Philippines has been portrayed as unwilling to enforce the decision in the eyes of the international community. Being so, the Philippines cannot expect the members of the international community to extend aid in enforcing the award as the latter is precluded by the principle of non-interference.

This preclusive effect on the international community which resulted from the government’s approach in dealing with the WPS issue has made it harder for the country to benefit from and enjoy the indisputable entitlements it already has in exchange for the unknown and unsure economic benefits engendered by the approach employed.

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<sup>91</sup> G.A. Res 2625 (XXV), at 123, U.N. Doc. A/8029 (Oct. 24, 1970).

Instead, the unlawful actions and inactions allowed these entitlements to be slowly taken away from present and future Filipino generations and render the international community immobile.

**B. Blockage of prospective Philippine economic prosperity from the use of WPS resources.**

The exclusivity of Philippines' sovereign rights in its EEZ, which includes the right to "explore and exploit, conserve and manage the natural resources of the waters superjacent to the seabed and of the seabed and its subsoil, and other activities for the economic exploitation and exploration" of the EEZ<sup>92</sup> will be compromised if outside intervention is continuously tolerated by the Philippines. UNCLOS, as confirmed by the arbitral award, has also vested upon the Philippines exclusive sovereign rights over its continental shelf. The exclusivity of such rights means that no one may undertake activities pertaining to the exercise of sovereign rights without the express consent of the Philippines.<sup>93</sup> As such, the entry of the Philippine government in an agreement with China which authorizes the latter's presence and EDU activities in the WPS will serve as an express consent for the latter to exercise our rights, even if the form of agreement (joint exploration) to which they intend to enter into, is later declared invalid for contravening the Philippine Constitution.

In effect, the prospect riches from the WPS that come from the exercise of our sovereign rights such as, creation of stable source of oil, gas, minerals, and petroleum for internal use or external trade and generation of job opportunities, cannot fully reach the Filipinos. Instead, the marine wealth will be filtered first by China. This repercussion is an inter-generational detriment as it will tie the hands of future generations, if left as is.

The violations also affect the jurisdiction of the Philippines over marine scientific research and the protection and preservation of the marine environment in the EEZ.<sup>94</sup> The government's prolonged acquiescence despite the numerous reclamation activities, attempts to conduct Marine

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<sup>92</sup> UNCLOS, *supra* note 13, art. 56.

<sup>93</sup> UNCLOS, *supra* note 13, art. 57.

<sup>94</sup> UNCLOS, *supra* note 13, art. 56.

Scientific Research (MSR), and illegal coral harvesting of the Chinese government might hinder future efforts to stand up to these abuses.

In effect, the opportunity to enrich scientific knowledge on marine resources, to make discoveries, and to enjoy the beauty of marine ecosystem are impliedly conceded to China. The Philippines continue to suffer from the irreversible and irreparable damages caused by illegal Chinese activities while China reaps the benefits.

The governmental actions not only blocked our opportunity to elevate our economic standing, but also make it easier to add more blockage. The tolerations and inactions despite the blatant abuses only embolden China's confidence in intensifying its illegal activities in the WPS. For instance, it has accelerated the reclamation and weaponization of reefs, rocks, and LTEs.<sup>95</sup> The laxity in protecting our fishermen has also enabled China to re-impose the moratorium in fishing in the WPS and continue its harassment against the local fishermen.

### **C. Diminution of Philippines' Liberty in asserting reparation rights for the International Wrongs committed in the WPS: *Implied Waiver***

China has violated the sovereign rights of the Philippines in the West Philippine Sea, rights that were granted by the UNCLOS, recognized by the international community, and affirmed by the 2016 arbitral award. However, UNCLOS has not provided for a mechanism that addresses a situation when a member-State violates the convention's provisions to the prejudice of another member-State as well as determination on how or whether the latter will receive any reparation. As such, the general rules under international law may be referenced. In the *Chorzow Factory* case, the Permanent Court of International Justice (PCIJ) has applied one of the basic principles of international law which provides that any breach of an engagement involves an obligation to make reparation.<sup>96</sup> This basic principle is also codified under International Law Commissions' (ILC) Article on the Responsibility of

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<sup>95</sup> Richard Javad Heydarian, Duterte's 'red lines' in the West Philippine Sea, *available at* [https:// www.gmanet.com/news/opinion/content/655200/duterte-s-red -lines -in-the-west-philippinsea/story/](https://www.gmanet.com/news/opinion/content/655200/duterte-s-red-lines-in-the-west-philippinsea/story/) (last accessed Jul. 17, 2019).

<sup>96</sup> *The Factory at Chorzow (Germ. v. Pol.)*, 1928 P.C.I.J. (ser. A) No.9 (Sept. 13, 1928).

States for Internationally Wrongful Acts which is of general application.<sup>97</sup> The international obligations and breach thereof depend on the treaties and other commitments of the States, however, the “underlying concepts of State responsibility—attribution, breach, excuses, and consequences—are general in character which are assumed and applied subject to variation by treaties.”<sup>98</sup>

Here, the UNCLOS provides for the obligations of State parties which have been violated by China as confirmed by the arbitral award, particularly the rule requiring other States to give due regard to the Philippines exclusive sovereign rights in its EEZ<sup>99</sup> and to prevent, reduce and control pollution of the marine environment.<sup>100</sup> The arbitral award has found that China unlawfully prevented Filipino fishermen from fishing in the WPS in violation of Philippines’ sovereign rights over the living and non-living resources in the area of Reed Bank. The violations were committed through the operation of marine surveillance vessels, the promulgation of a moratorium on fishing in the SCS including the areas in the WPS, and the extension of such moratorium to Filipinos. These violations rightfully entitle Philippines reparations from China. However, the actions and inactions of the government on these issues might be construed as a waiver of reparation rights. Although the Responsibility of States for Internationally Wrongful Acts provide that “every internationally wrongful act of a State entails the international responsibility of that State,”<sup>101</sup> it also provides the instance when the reparation responsibility of the erring State may be waived. Article 45 thereof provides that:

The responsibility of a State may not be invoked  
if:

(a) the injured State has validly waived the claim;

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<sup>97</sup> James R Crawford, *State Responsibility*, available at <https://opil.ouplaw.com/view/10.1/law:epil/9780199231690/law-9780199231690-e1093> (last accessed Aug. 20, 2019).

<sup>98</sup> *Id.*

<sup>99</sup> UNCLOS, *supra* note 13, art. 58.

<sup>100</sup> UNCLOS, *supra* note 13, art. 194.

<sup>101</sup> *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, *supra* note 156, at art. 1.

(b) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.<sup>102</sup>

The past actions and continuing acquiescence of the government whenever the Philippines' sovereign rights are trampled on constitute an implied waiver under the second ground.

The continued flagrant employment of conciliatory and acquiescent approach, despite their obvious detrimental implications, confirms that the alleged step back for the sake of Filipinos is only a façade to hide whatever may be the real intentions in taking a subservient stance.

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<sup>102</sup> *Id.* at art. 45.

## **CHAPTER VI: Conclusion and Recommendations**

### **I. CONCLUSION.**

The government's approach in addressing the WPS issue is critical to the country's preservation and protection of its sovereign rights in relation to the enforcement of the arbitral award. The current approach of the government is proved unconstitutional, ineffective, and even fatal to the nation's interest. This is emphasized by the escalating infractions by China of Philippine entitlements, in numbers and in degree and the gravity of domestic and international implications of prolonged acquiescence and unlawful violations of the government.

The governmental violations pull the Philippines several steps back from what generations of Filipinos worked hard for. Despite the historic grant of legal rights in the WPS, the government managed to maneuver the nation back. The nation's liberty from the shackles of foreign dominance and control is indirectly and slowly being taken away. Blindfolds in the form of weakened military defense, isolation from international community, downplay of illegal Chinese activities, and non-use of legal diplomacies, among others, are placed to make an appearance of the need to rely on China. The nation's path to prosperity is being blocked by the very government that swore to uphold Filipino's primacy. Chains in the form of unconstitutional agreements, shelved arbitral award, and tolerated abuse are placed over the country's natural resources to render the Philippine exclusive sovereign rights and its concomitant enjoyment thereto, illusory. These violations shake the very core of our country's independent exercise of rights in the WPS.

The extent and recurrence of the constitutional infractions illustrate a flagrant disregard of the Constitutional mandates and of the government's position as mere agent of the State. Worse, these violations are manifestations of the clandestine but intentional betrayal of the Filipino people by its instrumentality.

## **II. RECOMMENDATIONS**

### **A. Proactive approach through assertion and exercise of Philippine rights and multilateral approach through resort to international diplomacies.**

#### **1. Precondition of shift in the Governmental approach.**

It is of utmost importance to educate Filipinos of the Philippine rights in the WPS. Foremost, Filipinos must become aware of their position as the sovereign whose interest the government should always prioritize. Filipinos must understand the urgency of resolving the effects of the unlawful governmental acts and of stopping the continuing violations which create a bigger crack in the Philippine entitlements in the WPS. By having an informed citizenry, the government's actions and omissions in addressing the WPS issues are monitored. With internal vigilance, internal pressure can be created to push the government to align itself with the protection of the sovereign's rights.

To engender a scrutinizing public, the legal foundation establishing constitutional violations can be asserted in various ways. First, official complaint against governmental actions and omissions through the available procedural remedies such as writ of mandamus and Rule 65 for grave abuse of discretion, among others. Second, impeachment of the President, directly initiated by any member of the House of Representatives or by any citizen upon resolution or endorsement by any Member thereof.

These legal actions will open public discussion of the government's violations. As the subject of these legal actions are of paramount importance, the interest of the public is naturally piqued. Whether these legal actions yield positive result, they have already fueled the engine to start thorough public monitoring. Moreover, the Philippines already has a history of the sovereign's direct use of its power to correct and end the wrongs done to the country by its agent. People power was already exercised by the sovereign twice: to stop the dictatorship and to show the extent of its dissatisfaction with the then seating officials' actions.

Ultimately, the sovereign must wield its supreme authority in leading the direction the country should navigate.

## **2. Proactive assertion by the Philippines itself.**

By itself, the best manner by which the Philippines can protect and preserve its rights in the WPS is the exercise of its entitlements. It manifests a recognition of the Philippines of its rights, precludes doubts on its intention to retain such rights, and prevents the formation of implied waiver thereof. The exercise of sovereign rights can come in the form of governmental actions that align with the Philippine claim. For instance, in official statements, especially before an international audience, the government must refrain from use of words that in any way imply abandonment of our claim. It can be done as well by strengthening defenses and increasing patrols in the WPS through entry into agreements with other countries interested in preventing unwarranted and illegal Chinese intrusions. The international community already expressed concern over the continuing Chinese violations of international law. More so, the other claimants in parts of the SCS with close proximity to their respective countries, are naturally interested in keeping China from strengthening its hold in the SCS.

Through the Senate, the Philippines can also guard against potential infractions of Philippine entitlements by exercising vigilance and scrutiny to any agreements that the President may enter into regarding the EDU of the country's natural resources in the WPS under its concurrence power,<sup>103</sup> ensuring compliance with domestic laws.

Lastly, by objecting, either through official statements or official acts, or formal diplomatic protests, in every violation of the country's entitlements, the Philippines can be protected from the operation of any international laws, norms, and customs that consider prolonged acquiescence and passivity as tantamount to abandonment of right. In the *Anglo Norwegian Fisheries Case*, the International Court of Justice (ICJ) has used the principle of a "persistent objector" to negate the application of one customary international law (CIL) to Norway. Norway's consistent and sustained expression of its opposition to the application of the ten-mile rule CIL in delimiting its fisheries was considered as a persistent objection which frees it from being bound by the CIL.<sup>104</sup>

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<sup>103</sup> PHIL. CONST. art. VI, § 21.

<sup>104</sup> *Anglo-Norwegian Fisheries (U.K. V. Nor.)* 1951 I.C.J. Rep. 117. (Jan. 18).

### **3. Multilateral assertion by the Philippines and the international community.**

Philippines can also assert its rights in the WPS by availing of measures available in international law. In *Nicaragua v. US*, the International Court of Justice found the US liable for violating its customary international law obligation not to use force against another State when it laid mines in Nicaraguan ports. The US was also found to have breached its CIL obligation not to intervene in the affairs of another when it provided support and aid to the rebel groups for the latter's military and paramilitary activities against the Nicaraguan government.<sup>105</sup> Like China, the US has also vowed not to comply with the ruling, so to enforce the ruling, Nicaragua called upon the UN Security Council for the implementation of the ICJ ruling. But because of the US' veto power, the proposal for the implementation failed. However, Nicaragua eventually succeeded when it appealed to the UN General Assembly which ruled in its favor.<sup>106</sup>

The Philippines can pattern its actions to what Nicaragua did to enforce an international ruling rendered in its favor. In the same way, China has also breached its international obligations under the UNCLOS and an international ruling has been rendered against it. Moreover, UNCLOS also does not have an enforcement mechanism the same way that no enforcement mechanism other than the international community's intervention was available to Nicaragua since the source of the US' obligation arose from customary international law. Lastly, like the US, China is a permanent member of the UN Security Council who wields veto power. Hence, even if China initially vetoes the proposal, the Philippines can still appeal.

Pulling in the United Nations would put the Philippines in the same footing, if not higher, in so far as the enforcement of the award is concerned. It renders inoperative any preclusive effect on the international community that the unlawful actions and omissions of the Philippine government caused. Although China has strong economic and political powers, it can be pressured into compliance by the United Nations which concerns itself with sustaining peaceful and civilized relations by ensuring adherence and respect to international laws and norms. The State parties of UNCLOS, which

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<sup>105</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar V. U.S.), 1986 I.C.J. 14 (June 27).

<sup>106</sup> G.A. Res. 42/18, ¶ 6-8, U.N. Doc. A/RES/42/18 (Nov. 12, 1987).

include almost all states except the US, are particularly concerned since the UNCLOS was created to establish a legal order for the seas and oceans, to promote the peaceful uses of the seas and oceans, and to realize a just and equitable international economic order, among others.<sup>107</sup> The codification of the law of the sea was also for “strengthening of peace, security, cooperation and friendly relations among all nations in conformity with the principles of justice and equal rights.”<sup>108</sup> China’s continued non-compliance would go against this very purpose. Moreover, some of the powerful countries like the US, Australia, Japan, and Singapore have already manifested their strong stance insisting that China should respect the PCA’s ruling and international law. Otherwise, “law of the jungle would prevail in the South China Sea, with small nations falling under the control of big ones.”<sup>109</sup>

The Philippines can also opt to join forces with other States that share similar interests like other SCS claimants and Southeast Asian states in pressuring China into compliance.<sup>110</sup> Justice Carpio has suggested several ways. First, through a convention that “can declare that no geologic feature in the Spratly Islands generates an exclusive economic zone (EEZ) and that there are only territorial seas from the geologic features that are above water at high tide, as ruled by the arbitral tribunal.”<sup>111</sup> By doing so, China will be the only country to claim EEZs from the Spratly Islands.<sup>112</sup> Second, through joining freedom of navigation and overflight operations (FONOPs) of naval powers like the US, UK, France, Australia, India, Japan, and Canada in the WPS.<sup>113</sup>

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<sup>107</sup> UNCLOS, *supra* note 13, art. pmb1.

<sup>108</sup> *Id.*

<sup>109</sup> Steve Mollman, Rodrigo Duterte may hand China the strategic piece it needs to take control of the South China Sea, *available at* <https://qz.com/805474/under-rodrigo-duterte-the-philippines-may-hand-china-the-strategic-piece-it-needs-to-take-control-of-the-south-china-sea/> (last accessed Aug. 26, 2019).

<sup>110</sup> Paterno Esmaguel II, *Philippines loses to China 3 years after Hague ruling*, RAPPLER, July 13, 2019, *available at* <https://www.rappler.com/newsbreak/in-depth/235263-philippines-loses-china-3-years-hague-ruling> (last accessed Aug. 26, 2019).

<sup>111</sup> Sofia Tomacruz, *Carpio rebuts Duterte, offers at least 6 ways to enforce Hague ruling*, RAPPLER, July 15, 2019, *available at* <https://www.rappler.com/nation/235397-carpio-rebuts-duterte-ways-enforce-hague-ruling> (last accessed April 30, 2020).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

Although great powers like China have often resorted to the use of force in the past to achieve their political objectives, they also do not want to live in a “chaotic and lawless world.”<sup>114</sup> As such, they continue to concern themselves with maintaining a good reputation in the international community. To avoid degrading its image by being branded as a power with no respect for international law and Treaty provisions, China will be pressured to comply.

## **B. Balancing Philippines’ interest with comity with China.**

### **1. Tapping the international community’s support.**

The Philippine government must balance the Philippine rights in the WPS with the maintenance of peace with China. It can do so by first leveling itself with China by, re-opening to the international community and tapping it for support. It heightens the country’s defenses against vulnerability from abuse, harassment, and aggression and opens more avenues by which the Philippines can assert its rights. The government must position the Philippines in a strategic manner surrounded by allies. By doing so, China cannot easily raise a threat of war against the Philippines to coerce submission of its entitlements.

### **2. Maintaining peace with China.**

The Philippine government must always resort to internationally accepted norms in dealing with foreign relations matters. Siding with the international law which binds and adhered to by most, if not all the countries, assures the Philippines of support. The primary purpose of a big power like China in taking control over the SCS, to which the WPS forms part, is to benefit from the marine resources found therein. The Philippines can meet halfway with China by way of a Financial or Technical Assistance Agreement (FTAA) with a China-owned corporation. However, the terms of the agreement must comply with the restrictions imposed by the Constitution as emphasized in *La Bugal-B’laan v. Ramos* and other domestic law requirements like ECC from DENR. Unlike the current MOA and the proposed joint exploration, the terms of reference of which were

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<sup>114</sup> Tommy Koh, The great powers and the rule of law *available at* <https://www.straitstimes.com/opinion/the-great-powers-and-the-rule-of-law> (last accessed Aug. 26, 2019).

based solely on China's version, the agreement must contain the constitutional safeguards that ensure that the full control and supervision of EDU activities in the WPS remain with the Philippines. Moreover, Philippines must accept proposals from other countries and choose that proposal which will be most fair and favorable to the Philippines as required by the "self-determination" rule in the Constitution.<sup>115</sup> Opening negotiations with other countries will drive China to offer better terms on the table.

If China's proposal proves most beneficial, the government and the China-owned corporation can agree upon the profit-sharing scheme like in other FTAA's. Under this agreement, the sharing can even be fifty-fifty as compared to the proposed joint exploration's sharing scheme of 60-40 in favor of the Philippines as allowed under DAO 99-56.<sup>116</sup> Here, China's interest in benefiting from the marine resources is realized but only after Philippine entitlements and interests are safeguarded.

While disagreements may arise in the negotiations and the resort to diplomatic avenues might cause China's fury, it cannot easily threaten the Philippines with war as the international community naturally sides with the party who abides by international law.

More importantly, China is bound by the principle of *Pacta Sunt Servanda* as codified in the Vienna Convention on the Law of Treaties providing that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."<sup>117</sup> Further, as an UNCLOS State party, China has to comply with its provisions which include the obligation to settle disputes by peaceful means.<sup>118</sup> Furthermore, as a member of the UN, especially, as a permanent member of the Security Council thereof, China is bound by the UN Charter prohibiting the use of force in settling international disputes.<sup>119</sup> The existence of numerous international decisions and advisory opinions pertaining to the use of force also illustrates the

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<sup>115</sup> PHIL. CONST. art. II, § 7.

<sup>116</sup> *La Bugal-B'Laan Tribal Association, Inc.*, 421 SCRA 148.

<sup>117</sup> Vienna Convention on the Law of Treaties art 26 *opened for signature* May 23, 1969, U.N.T.S. 115. p. 331.

<sup>118</sup> UNCLOS, *supra* note 13, art. 279.

<sup>119</sup> U.N. Charter art 2, ¶ 3-4.

international community's firm stance against it, such that, violation thereof by China will not sit well with the former. Lastly, China has bound itself to forswear war as its policy when it ratified the Kellogg-Briand Pact— a treaty between the United States and other Powers providing for the renunciation of war as an instrument of national policy.<sup>120</sup>

These binding international laws, norms and, treaties are insignia of the international community's rejection of the use of force and war as instruments of national or foreign policy — an unsurmountable barrier that holds back China from waging war to end the long-standing disputes in the SCS. The more laws and treaties there are, the more violations and concomitant accountabilities there are for China if it pursues the forbidden road of war and use of force.

With all these feasible options that are patently more aligned with the constitutional mandates, the Philippine government's justification of "threat of unwinnable war" is proven nugatory.

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<sup>120</sup> Kellogg-Briand Peace Pact art I-II, *signed* August 27, 1928.

## **BIBLIOGRAPHY**

### **I. PRIMARY SOURCES**

#### **A. Constitution**

The 1987 Philippine Constitution

#### **B. Statutes**

An Act To Amend Certain Provisions Of Republic Act No. 3046, as amended by Republic Act No. 5446, To Define the Archipelagic Baseline of the Philippines and for Other Purposes, Republic Act No. 9522 (2009).

Establishing an Environmental Impact Statement System including other Environmental Management related Measures and for other purposes, Presidential Decree No. 1586 (1978).

#### **C. Philippine Cases**

Araullo v. Aquino III, G.R. No. 209287, February 3, 2015.

Belgica v. Ochoa, 710 SCRA 1 (2013).

Cruz v. Secretary of Environment and Natural Resources, 347 SCRA 128 (2000).

Francisco v. House of representatives, 415 SCRA 44 (2003).

La Bugal-B'Laan Tribal Association, Inc. vs. Ramos 421 SCRA 148 (2004).

Manila Prince Hotel v. GSIS, 267 SCRA 402 (1997).

Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay, 574 SCRA 661 (2008).

Minors Association of the Philippines v. Factoran, Jr., 240 SCRA 100 (1995).

Oposa v. Factoran, 224 SCRA 792 (1993).

Resident Marine Mammals of the Protected Seascape Tañon Strait v. Reyes, 756 SCRA 513 (2015).

Saguisag v. Ochoa, Jr., 779 SCRA 241 (2016).

Southern Luzon Drug Corporation v. Department of Social Welfare and Development, 824 SCRA 164 (2017).

Vinuya v. Romulo, 732 SCRA 595 (2010).

#### **D. Rules of Procedure**

2010 RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, rule 8, § 1.

## **II. SECONDARY SOURCES**

### **A. Books**

Chi-Kin Lo, *China's Policy Towards Territorial Disputes: The Case of The South China Sea Islands* (2005 Ed.).

David M. Ong, *Exploitation Of Natural Resources In The 2st Century*, (Malgosia Fitzmaurice & Milena Szuniewicz, 2003).

International Studies Institute of The Philippines, *For An Independent Foreign Policy* (1988).

Isagani A. Cruz & Carlo Cruz, *Philippine Political Law* (2014 Ed.).

Merlin M. Magallona, *Fundamentals of Public International Law* (2005).

### **B. Journals and Periodical Articles**

Melissa Castan, *Adrift in the South China Sea: International Dispute Resolution and the Spratly Islands Conflict*, 6 *ASIAN-PAC. LAW REV.* 93, 99 (1998).

Michael W. Reisman, *The Enforcement of International Judgments and Awards*, *AM. J. INT'L. LAW.*, 1969, at 2.

## E. Dictionaries Online

Merriam Dictionary available at  
<https://www.merriamwebster.com>

## F. News Articles Online

Alexis Romero, *Duterte wants China out of West Philippine Sea, but no war*, PHIL. STAR, June 19, 2018, available at <https://www.philstar.com/headlines/2018/06/19/1825891/duterte-wants-china-out-west-philippine-sea-no-war>

Chad de Guzman, *Duterte to fishermen in Recto Bank incident: 'Sorry, that's how it is'*, CNN PHIL., Jun 24, 2019, available at <https://cnnphilippines.com/news/2019/6/24/Rodrigo-Duterte-Recto-Bank-fishermen-orrythats-how-it-is.html>

Darryl John Esguerra, *Philippines officially terminates VFA with US*, PHIL. DAILY INQ., February 11, 2020, available at <https://globalnation.inquirer.net/185186/fwd-breaking-philippines-officially-terminates-vfa-with-us>

EXCLUSIVE: Locsin shows copy of PH-China joint oil exploration deal, CNN PHIL., November 23, 2018, available at <http://nine.cnnphilippines.com/news/2018/11/22/teddy-boy-locsin-mou-philippines-china-joint-oil-exploration.html>

Frank E. Lobrigo, *How to enforce the PCA ruling*, PHIL. DAIL. INQ., available at <https://opinion.inquirer.net/105721/enforce-pca-ruling>

Ian Nicolas Cigaral, *China vows 'serious investigation' into Chinese seizures of fish catch in Philippine waters*, PHIL. STAR, June 12, 2018, available at <https://www.philstar.com/headlines/2018/06/12/1823959/china-vows-serious-investigation-chinese-seizures-fish-catch-philippine-waters>

Jhesset O. Enano and Karl R. Ocampo, *Cost of China damage to PH reefs: P33B a year*, PHIL. DAILY INQ., July 04, 2019, available at <https://globalnation.inquirer.net/177462/cost-of-china-damage-to-ph-reefs-p33b-a-year>

Jhesset O. Enano, *Foreign fishing vessels crowd PH waters*, PHIL. DAILY INQ., July 05, 2019, available at <https://globalnation.inquirer.net/177516/foreign-fishing-vessels-crowd-ph-waters>

Nestor Corrales, *PH, China to have joint venture in West Philippine Sea — Duterte*, PHIL. DAILY INQ., July 25, 2017, available at <https://globalnation.inquirer.net/159003/ph-china-joint-venture-west-philippine-sea-duterte> (last accessed Jul. 17, 2019).

Paterno Esmaguél II, *Philippines loses to China 3 years after Hague ruling*, RAPPLER, July 13, 2019, available at <https://www.rappler.com/newsbreak/in-depth/235263-philippines-loses-china-3-years-hague-ruling>

Paterno Esmaguél II, *Philippines loses to China 3 years after Hague ruling*, RAPPLER, July 13, 2019, available at <https://www.rappler.com/newsbreak/in-depth/235263-philippines-loses-china-3-years-hague-ruling>

Paterno Esmaguél II, *Sovereignty vs sovereign rights: What do we have in West PH Sea?*, RAPPLER, June 29, 2019, available at <https://www.rappler.com/newsbreak/iq/234145-explainer-sovereignty-sovereign-rights-west-philippine-sea>

Patricia Lourdes Viray, *Carpio: Philippines can file another case against China's harassment of fishermen*, PHIL. STAR, June 8, 2018, available at <https://www.philstar.com/headlines/2018/06/08/1822777/carpio-philippines-can-file-another-case-against-chinas-harassment-fishermen>

Patricia Lourdes Viray, *Palace: China controls West Philippine Sea*, PHIL. STAR, March 25, 2019, available at <https://www.philstar.com/headlines/2019/03/25/1904421/palace-china-controls-west-philippine-sea>

Rendell Sanchez, *TIMELINE: The Philippines-China maritime dispute*, RAPPLER, Jul 12, 2016, available at <https://www.rappler.com/world/regions/asia-pacific/139392-time-line-west-philippine-sea-dispute>

Sofia Tomacruz, Carpio rebuts Duterte, offers at least 6 ways to enforce Hague ruling, RAPPLER, July 15, 2019, available at <https://www.rappler.com/nation/235397-carpio-rebuts-duterte-ways-enforce-hague-ruling>

Steve Mollman, *Rodrigo Duterte may hand China the strategic piece it needs to take control of the South China Sea*, QUARTS, October 13, 2016, available at <https://qz.com/805474/under-rodrigo-duterte-the-philippines-may-hand-china-the-strategic-piece-it-needs-to-take-control-of-the-south-china-sea/>

## G. Online Sources

Haroun Alfarsi, *Sea Dispute: Sovereignty vs. Sovereign Rights*, available at <https://www.profolus.com/topics/sovereignty-vs-sovereign-rights-difference/>

James R Crawford, *State Responsibility*, available at <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1093>

Jay Batongbacal, *A closer look at China's proposal for Joint exploration with the Philippines*, available at <https://amti.csis.org/closer-look-chinas-proposal-joint-exploration-with-philippines/>

Jean Christou, *'Sovereignty' versus 'sovereign rights'*, available at <https://cyprus-mail.com/2015/04/08/sovereignty-versus-sovereign-rights/>

Richard Javad Heydarian, *Duterte's 'red lines' in the West Philippine Sea*, GMA NEWS, May 31, 2018, available at

<https://www.gmanetwork.com/news/opinion/content/655200/duterte-s-red-lines-in-the-west-philippine-sea/story/>

Steve Mollman, Rodrigo Duterte may hand China the strategic piece it needs to take control of the South China Sea, *available at* <https://qz.com/805474/under-rodrigo-duterte-the-philippines-may-hand-china-the-strategic-piece-it-needs-to-take-control-of-the-south-china-sea/>

Tommy Koh, The great powers and the rule of law *available at* <https://www.straitstimes.com/opinion/the-great-powers-and-the-rule-of-law>.

### III. INTERNATIONAL DOCUMENTS

#### A. Resolutions

ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Ch. IV.E.1 at art. 7, U.N. Doc. Supp. No.10 (A/56/10) (Nov. 2001).

G.A. Res 2625 (XXV), at 123, U.N. Doc. A/8029 (Oct. 24, 1970).

G.A. Res. 42/18, ¶ 6-8, U.N. Doc. A/RES/42/18 (Nov. 12, 1987).

#### B. Treaties

Kellogg-Briand Peace Pact art I-II, *signed* August 27, 1928.

U.N. Convention on the Law of the Sea art. 296 ¶ 1, *opened for signature* December 10, 1982, U.N.T.S. 397 (entered into force Nov. 16, 1994).

Vienna Convention on the Law of Treaties art 26 *opened for signature* May 23, 1969, U.N.T.S. 115. p. 331.

### **C. International Law Cases**

Anglo-Norwegian Fisheries (U.K. V. Nor.) 1951 I.C.J. Rep. 117. (Jan. 18).

Commonwealth of Puerto Rico v. The SS Zoe Colocotroni, 456 F. Supp. 1327, ( D.P.R.1978) (U.S.).

In the matter of the South China Sea arbitration, (Philippines v. China), Award, PCA Case No. 2013-19, 1, (12 July 2016).

Massachusetts v. EPA, 549 U.S. 497 (2007).

Military and Paramilitary Activities in and Against Nicaragua (Nicar V. U.S.), 1986 I.C.J. 14 (June 27).

The Factory at Chorzow (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No.9 (Sept. 13, 1928).