Judicial Activism or Judicial Restraint: The Justiciability of Unilateral Acts of States in the Context of Duterte's Declarations Toward the South China Sea Dispute

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Abstract

In an abrupt break from his predecessor, Duterte has effectively shelved the arbitral award in pursuit of warmer ties with Beijing. Early into the presidency, he declared, "In the play of politics now, I will set aside the arbitral ruling. I will not impose anything on China."

Halfway into his term, Duterte publicly announced that he had entered into an oral fishing agreement with his Chinese counterpart allowing the latter's fishermen to trawl in Philippine waters thus, "They asked [me], 'Will you allow the Chinese to fish?' I said, 'Of course. We talked about that before, that's why we are talking.'"

The above-quoted statements may take the form of unilateral acts of states. Public declarations manifesting the intention to be bound may create legally binding obligations in international law. When the conditions for their validity are fulfilled, the addressee state may take them into consideration and may require that such obligations be respected.

It is the purpose of this paper to examine the justiciability of unilateral acts of states in the context of Duterte's declarations toward the South China Sea dispute. More specifically, the study aims to address two issues: *First,* whether the declarations of Duterte concerning the SCS dispute may constitute as unilateral acts and if so; *Second,* whether such unilateral acts may give rise to a justiciable controversy.

To this end, the paper looks at the historical and theoretical underpinnings of unilateral acts by exploring ICJ cases and ILC

Reports. The study argues that his pronouncements may constitute as unilateral acts and may be proper subjects of judicial review by virtue of the judiciary's expanded power to review grave abuse of discretion.

Nurturing the prosperity of the people starts from within. It begins with the protection of the country's national territory and extends to the preservation of our marine and mineral resources for the exclusive enjoyment of the Filipinos. Far from being a foreign relations matter, the SCS controversy overlaps with the Filipino's struggle for economic sustainability and livelihood security. The real impact of this foreign policy conundrum materializes with the actual effects to the daily lives of Filipinos. The ramifications of these issues immeasurably affect the social and economic well-being of the Filipino people.

Outline

Chapter I provides an overview of Duterte's pronouncements on the SCS dispute as well as the legally binding obligations that may arise from unilateral statements which will be discussed thoroughly in the succeeding chapters.

Chapter II traces the historical and doctrinal underpinnings of unilateral acts of states. Having its roots in uncodified international custom, the study resorts to ICJ cases, ILC Reports and scholarly articles dealing with unilateral acts.

Chapter III examines whether Duterte's unilateral undertakings may constitute as unilateral acts. It will utilize as framework the requisites of unilateral acts laid down in the case of *Province of North Cotabato v. Republic*.

Chapter IV underpins the indispensability of constitutional supremacy in a tripartite system of government before it transitions to a thorough discussion of judicial review in the next chapter.

Chapter V focuses on the expanded power of judicial review and the narrowing reach of the political question doctrine. It highlights the so-called judicial activism as exemplified by a plethora of cases where the Supreme Court took cognizance of matters involving political questions by virtue of its power to review grave abuse of discretion.

The final chapter concludes with an elucidation of the justiciability of Duterte's unilateral acts by virtue of the broadening of judicial power enabling courts of justice to review what was before forbidden territory, to wit, the discretion of the political departments of the government.

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The duty to protect the territorial integrity, political unity and national sovereignty of the nation in accordance with the Constitution is not the duty alone of the Executive branch. Where the Executive branch is remiss in exercising this solemn duty in violation of the Constitution, this Court, in appropriate cases, […] must step in because every member of this Court has taken a sworn duty to defend and uphold the Constitution.

— Carpio, *J.*[1]

INTRODUCTION

On July 12, 2016, the Permanent Court of Arbitration in the Hague ruled in favor of the Philippines in its maritime dispute against China, concluding that the latter has no legal basis to claim historic rights to the bulk of the South China Sea (SCS).[2] The decision delivered a sweeping rebuke of China's behavior in the SCS, including its construction of artificial islands,[3] and an invalidation to its expansive claim to waters within the nine-dash line encircling as much as ninety percent of the area.[4]

The Tribunal decisively declared that there is no basis for China's claim to historic rights to resources in the SCS as it contravenes the detailed and comprehensive allocation of rights and maritime zones under the United Nations Convention on the Law of the Sea

[1] Province of North Cotabato v. Republic of the Philippines, G.R. Nos. 183591, 183752, 183893 and 183951, October 14, 2008, (J. Carpio, separate concurring opinion).
[2] South China Sea Arbitration (Philippines v China), 2016 P.C.A. (July 12).
[3] *Id. at* ¶ 1181.
[4] *Id. at* ¶ 278.

(UNCLOS).[5] In no uncertain terms, the Tribunal held that "to the extent China had historic rights to resources in the waters of the South China Sea, such rights were extinguished by the entry into force of the Convention to the extent they were incompatible with the Convention's system of maritime zones."[6] It also ruled that China had violated the Philippines sovereign rights in its Exclusive Economic Zone (EEZ) by interfering with Philippine fishing and petroleum exploration and allowing its fishermen to illegally engage in environmentally destructive harvesting of endangered species.[7]

In an abrupt policy shift from that of his predecessor, President Rodrigo Duterte (Duterte) has effectively set aside the arbitral award in pursuit of warmer ties with Beijing. Early into his presidency, he declared "In the play of politics now, I will set aside the arbitral ruling. I will not impose anything on China."[8] The declaration immediately caught the attention of West Philippine Sea advocates and members of the academe.[9]

Halfway into his term, Duterte publicly announced an oral fishing agreement with his Chinese counterpart allowing the latter's fishermen to fish in Philippine's EEZ, thus, "They asked, 'Will you allow the Chinese to fish?' I said, 'Of course.' We talked about that

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[5] *South China Sea Arbitration* 2016 P.C.A. ¶ 277-278.
[6] *South China Sea Arbitration*, 2016 P.C.A. Award, Press Release ¶ 1.
[7] *South China Sea Arbitration*, 2016 P.C.A. at ¶ 716.
[8] *See* Philippines to 'set aside' South China Sea tribunal ruling to avoid imposing on Beijing, THE GUARDIAN, December 16, 2016 *available at* https://www.theguardian.com/world/2016/dec/17/philippines-to-set-aside-south-china-sea-tribunal-ruling-to-avoid-imposing-on-beijing (last accessed August 19, 2019).
[9] Justice Antonio Carpio sounded the alarm to Department of Foreign Affairs to immediately clarify the President's statement. His concern is based on the well-recognized principle in international law that unilateral declarations of heads of state can create legally binding obligations in favor of another state. *See* Antonio Carpio," A Culture of Respect for, and Understanding of, International Law" (Foundation for Liberty and Prosperity Awards Ceremony, March 23, 2018); *See also* Duterte remark to 'set aside' arbitral award ruling 'very dangerous' – law dean, PDI., December 22, 2016, *available at* https://globalnation.inquirer.net/151012/duterte-remark-set-aside-arbitral-ruling-dangerous-priest (last accessed September 8, 2019).

before, that's why we are talking. And that was why we were allowed to fish again. It was a mutual agreement."[10]

The above-quoted are some of Duterte's notable pronouncements[11] on the SCS issue since he assumed the presidency. In his almost four years at the helm, he has made constantly changing, and at times, unfounded statements which include *traditional fishing under UNCLOS*[12] in support of the fishing deal and *prevention of an all-out war*[13] as the moving motive for such deal.[14]

Declarations from a head of state may constitute unilateral acts of states. Public declarations manifesting the intention to be bound may create legally binding obligations and commitments in international law.[15]

Although the President as head of state and government, by constitutional fiat and by the intrinsic nature of his office, is the sole organ in the conduct of foreign relations,[16] unilateral declarations in contravention of the arbitral award may have significant repercussions to the country's national sovereignty and territorial integrity in view of the legal obligations that may arise therefrom.

This presents a quagmire of both legal and political intrigue necessitating an inquiry as to whether there is a recourse available in our legal system. Are we helpless when the President acts contrary to his constitutional mandate to protect the national sovereignty and

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[10] Pia Ranada, Duterte says he can't ban Chinese from fishing in PH waters, RAPPLER, June 27, 2019 *available at* https://www.rappler.com/nation/234008-duterte-says-cannot-ban-chinese-from-fishing-philippine-waters (last accessed Sept. 6. 2019).
[11] The terms 'pronouncement', 'statement' & 'declaration' are used interchangeably in the paper.
[12] Traditional fishing is limited only to territorial seas and archipelagic waters in relation to Art. 51 of UNCLOS. The *Arbitral Award* expressly held that "traditional fishing rights are extinguished" by the entry into force of the UNCLOS albeit subject to Art. 62 (3) of the same. *See South China Sea Arbitration*, 2016 P.C.A. *at* ¶ 804.
[13] Agreements made under threat of war is invalid under international law. *See* Vienna Convention on the Law of Treaties, United Nations (Vienna, May 23, 1969) art. 52.
[14] SONA *infra* note 18.
[15] Guiding Principles *infra* note 52.
[16] Akbayan v. Aquino, G.R. No. 170516, July 16, 2008.

territorial integrity? Can the people invoke the jurisdiction of the court, considered to be the last bulwark of democracy, in order to rectify these mistakes?

This study explores the principle of unilateral acts of states in international law vis-à-vis the expanded concept of judicial review vesting courts of justice the power to nullify acts committed with grave abuse of discretion.[17]

The study involves a two-tiered approach:

(1) it shall first resolve whether the declarations of Duterte toward the SCS dispute may constitute as unilateral acts of states; and if so,

(2) it shall next determine whether such unilateral acts of states may give rise to a justiciable controversy.

The paper will look back at some of Duterte's notable pronouncements on the SCS before delving into the nature of unilateral acts. It shall then focus on judicial review vis-à-vis political question doctrine.

The study argues that his pronouncements may constitute as unilateral acts of states and may be proper subjects of judicial review by virtue of the judiciary's expanded power to review grave abuse of discretion.

[17] PHIL. CONST. art. VI, § 1. xxx Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.

II. DUTERTE AND THE SOUTH CHINA SEA

"There is no ifs and buts. It is ours. But we have been acting along that legal truth and line. But we have to temper it with the times and the realities that we face today."[18] This statement represents Duterte's view on the SCS issue since ascending to power.

More than three years after the arbitral award, not only has the current administration effectively set aside the ruling, Duterte himself has become so accustomed to making formal declarations in contravention thereof.

In his State of the Nation Address (SONA), Duterte reiterated his stance on the oral fishing agreement. Coinciding with the formal opening of Congress and at a time when a sitting president is supposed to apprise the nation of the current situation, Duterte defended his decision to allow Chinese fishermen to trawl in Philippine waters in front of lawmakers, diplomats, military generals and Filipinos watching on national television. Going off script, Duterte made the following remarks:

> *Anong sabihin ko sa kanila? Kaya sinabi ko*, "Let us do this mutually." Of course, when Xi says, "I will fish," who can prevent him? And *sabi ko naman*, "We will fish because we claim it." . . . *And sabi ko*, "Please allow because..." Before that, they were driving away our fishermen.[19]

In the aftermath of the alleged ramming of a Philippine vessel by Chinese fishermen in the SCS[20] and amidst accusations that he is being

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[18] Duterte, Rodrigo. "State of the Nation Address." *Presidential Communications Operations Office*, The Philippine Government, July 22, 2019, https://pcoo.gov.ph/wp-content/uploads/2019/07/4th-State-of-the-Nation-Address-of-President-Rodrigo-Roa-Duterte.pdf; https://pcoo.gov.ph/presidential-speech/4th-state-of-the-nation-address-of-president-rodrigo-roa-duterte/.

[19] *Id.*

[20] Jason Gutierrez, Sinking of Philippine Boat Puts South China Sea Back at Issue, July 13, 2019 *available at* https://www.nytimes.com/2019/06/13/world/asia/south-china-sea-philippines.html (last accessed Sept. 6, 2019).

too soft on China, Duterte stood his ground and tried to justify his actions, to wit:

> Our ownership of the Philippine --- West Philippine Sea is internationally recognized. However, both the United Nations Convention on the Law of the Sea (UNCLOS) and the Arbitral Award in the case of People --- "Republic of the Philippines vs. People's Republic of China" recognize instances where another state may utilize the resources found within the coastal state's Exclusive Economic Zone.[21]

Malacañang has consistently maintained that the fishing deal is legally binding.[22] This, notwithstanding, the absence of a written agreement evidencing such deal and the lack of reciprocal commitment from China.

Interestingly, Malacañang's supposition finds basis in international law. Oral agreements and declarations as well as unilateral undertakings have long been accorded with legal significance.[23] Oral agreements or declarations between states with binding legal effects have existed since time immemorial.[24] In fact, unilateral acts have become a normal and natural occurrence in a society of sovereign states.[25] It has become the most frequent tool in international relations. [26]

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[21] SONA *supra* note 18.
[22] Azer Parrocha, Duterte-Xi verbal fishing deal still legally binding – Palace, PNA, July 1, 2019 *available at* https://www.pna.gov.ph/articles/1073792 (last accessed Sept. 27, 2019); Arianne Merez, Verbal fishing deal 'legally bindng' for Duterte – Palace, ABS-CBN NEWS, July 4, 2018 *available at* https://news.abs-cbn.com/news/07/04/19/verbal-fishing-deal-legally-binding-for-duterte-palace (last accessed Sept. 8, 2019).
[23] *See* Legal Status of Eastern Greenland (Den. v. Nor), 1933 P.C.I.J. (ser. A/B) No. 53 (Apr. 5); Nuclear Tests Cases (Australia v. France), 1974, Judgement, I.C.J. (December 20).
[24] James Garner, "The International Binding Force of Unilateral Oral Declarations," The American Journal of International Law 27, no. 3 (1933). p. 494.
[25] Krzyszto Skubiszewski, "Unilateral Acts of States" in Mohammed Bedjaoui, International Law: Achievements and Prospects. Dordrecht, Martinus Nijhoff, (1991), p. 221–240.
[26] Karl Zemanek, "Unilateral Legal Acts Revisited/Ed. Karl Wellens," International law: theory and practice. Essays on honour of Eric Suy–The Hague: Kluwer law international (1998). p. 210.

In view of the obligatory nature of unilateral acts, Duterte's unilateral pronouncements on the SCS issue could have tremendous repercussions especially when taken into account his constitutional mandate to secure the sovereignty and territorial integrity of the Philippines,[27] to serve and protect the people, promote their welfare and advance national interest[28] and to reserve the use and enjoyment of marine resources exclusive to the Filipino people[29] not to mention his duty as chief executive to ensure the enforcement of the arbitral award under the faithful execution clause[30] yet he vigorously set aside.

SCS holds thousands of species of aquatic life, 55 per cent of global marine fishing vessels operate in the area, and some 12 per cent of global fishing catches take place in the area.[31] It is also a prominent shipping passage of more than half of the world's merchant shipping cruising through its waters every year.[32] The U.S. Energy Information Agency put the estimates of minerals lying on the SCS at 190 trillion cubic feet of natural gas and 11 billion barrels of oil in proved and probable reserves.[33] State-owned China National Offshore Oil Company, on the other hand, placed the figure closer to 500 trillion cubic feet of natural gas and 125 billion barrels of oil in undiscovered areas.[34]

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[27] PHIL. CONST. art. II, § 3.
[28] PHIL. CONST. art. XII, § 4 and § 5.
[29] PHIL. CONST. art. XII, § 2.
[30] PHIL. CONST. art. VII, § 17; *See* Saguisag v. Executive Secretary *infra* note 134.
[31] Fish, not oil, at the heart of the South China Sea conflict, *available at* https://www.fni.no/news/fish-not-oil-at-the-heart-of-the-south-china-sea-conflict-article1556-330.html (last accessed September 1, 2019).
[32] Max Fisher. The South China Sea: Explaining the Dispute, The New York Times, July 14, 2016, available at https://www.nytimes.com/2016/07/15/world/asia/south-china-sea-dispute-arbitration-explained.html citing the US Energy Information Administration report (last accessed September 1, 2019) *available at* https://www.eia.gov/beta/international/analysis_includes/regions_of_interest/South_China_Sea/south_china_sea.pdf (last accessed September 1, 2019).
[33] South China Sea Energy Exploration and Development Report *available at* https://amti.csis.org/south-china-sea-energy-exploration-and-development/ (last accessed September 25, 2019).
[34] Tim Dais, Why The South China Sea Has More Oil Than You Think, Forbes, May 22, 2016, *available at* https://www.forbes.com/sites/timdaiss/2016/05/22/why-the-south-china-sea-has-more-oil-than-you-think/#7404a257dd8f (last accessed September 1, 2019).

As the state performs its constitutional mandate of protecting and preserving these resources, it likewise guarantees the prosperity of its people. Nurturing the prosperity of the people starts from within. It begins with the protection of the country's national territory and extends to the preservation of marine and mineral resources within the EEZ.

The SCS conflict overlaps with the Filipino's struggle for economic sustainability and livelihood security. The real impact of this foreign policy conundrum materializes with the actual effects to the daily lives of Filipinos i.e. incidents of harassment of local fishermen, proliferation of harmful fishing practices and harvesting of endangered species.

The ongoing inaction of the Philippine government deprives the Filipino people of the valuable resources that rightfully belong to them. Far from offering solutions, unilateral undertakings sanctioning illegal acts of a foreign power over our EEZ exacerbate the situation. The ramifications of these issues immeasurably affect the social and economic well-being of the Filipino people.

II. THE NATURE OF UNILATERAL ACTS

Conventional agreements in the form of treaties and executive agreements are the usual way of acquiring rights and incurring obligations in international relations[35] as they enable sovereign states to reconcile conflicting interests through negotiations that are codified in documents governing the rights of state parties thereto. It is likewise recognized that nation-states may also acquire legal rights and obligations through an expression of will other than conventional arrangements.[36]

International conventions, international customs, the general principles of law, and judicial decisions and the teachings of the most highly qualified publicists are the sources of law under the ICJ Statute.[37] However, the list is by no means exhaustive of the sources of obligation. The reconfiguration of international relations subsequent to the drafting of the Statute renders the traditional sources insufficient to address the far-ranging transactions occurring in the international plane. These sources of international law no longer reflect the realities of international relations today.[38]

Aside from the fact that a state is obliged to comply with its treaty obligations, it is likewise recognized both in case law and in principle that a state can also bind itself unilaterally.[39] In fact, unilateral acts have become the "most frequent tool of State interaction."[40] Goodman opined that unilateral acts although considered as 'informal transactions of states' insofar as they occur outside the normal treaty-

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[35] First Report on Unilateral Acts of States, International Law Commission, ILC Doc. A/CN.4/486 (March 5, 1998) (by Mr. Víctor Rodríguez Cedeño) ¶ 59 p 327.

[36] *Id.*

[37] *See* Article 38 of the International Court of Justice Statute, San Francisco, June 26, 1945.

[38] Eric Suy, Some Unfinished Thoughts on unilateral acts of states as a source of international law, 2001 Journal for Juridical Science 26(3): 1-11.

[39] *See Nuclear Tests Cases; Temple of Preah Vihear Case.*

[40] Karl Zemanek, "Unilateral Legal Acts Revisited/Ed. Karl Wellens," International law: theory and practice. Essays on honour of Eric Suy–The Hague: Kluwer law international (1998). p. 210.

making process stand on equal footing with conventional agreements.[41]

Historically, the concept of unilateral acts of states as a source of obligation first gained legal prominence in the early case of the *Legal Status of Eastern Greenland.*[42] In connection with the dispute over sovereignty in Eastern Greenland, Denmark desired to obtain from Norway that the latter would refrain from interfering with Danish plans in regard to Greenland. In response thereto, the Norwegian Foreign Minister made what has become known as the Ihlen Declaration that remains to this day a classic example of unilateral declaration, viz:

> I told the Danish Minister today that the Norwegian Government would not make any difficulty in the settlement of this question.[43]

In resolving the issue concerning the binding effect of the Ihlen Declaration on the part of Norway, the Permanent Court of International Justice ruled that an oral reply (although later transcribed) of that nature from the foreign minister of Norway in response to a request by the diplomatic representative of Denmark with respect to a question falling within his authority binds the country to which the minister belongs.[44] Although the Ihlen declaration could not be interpreted as tantamount to an acknowledgement of Danish sovereignty over Eastern Greenland, in the words of the Court it was "beyond all dispute" a binding promise not to contest or place difficulties in the way of Danish claims and

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[41] Camille Goodman, "Acta Sunt Servanda? A Regime for Regulating the Unilateral Acts of States at International Law" [2006]; Australian Yearbook of International Law *available at* http://www5.austlii.edu.au/au/journals/AUYrBkIntLaw/2006/3.html#fnB24 (last accessed April 1, 2020).

[42] Legal Status of Eastern Greenland (Den. v. Nor), 1933, Judgement, PCIJ. (Apr. 5).

[43] *Legal Status of Eastern Greenland,* 1933 P.C.I.J.

[44] *Legal Status of Eastern Greenland,* 1933 P.C.I.J.

therefore takes the form of a unilateral act. The declaration in question amounted to a renunciation of a Norwegian claim to sovereignty.[45]

In *Nuclear Test Cases*, the ICJ definitively held that "interested States may take cognizance of unilateral declarations and place confidence in them and are entitled to require that the obligation thus created be respected."[46] Australia instituted a proceeding against France in respect of a dispute concerning the latter's act of holding continued atmospheric tests of nuclear weapons in the Pacific Ocean. Essential to the ruling is the determination of the status on the international plane of unilateral declarations.[47] In doing so, the ICJ effectively concluded that unilateral acts of states may give rise to an international obligation.[48]

Despite the fact that the principle of unilateral acts of states has yet to be codified in a single document defining and setting the parameters thereof in customary international law to which a state may refer to when formulating unilateral declarations, it has already been defined in nearly all scholarly literature, without so much variations. As one author states: "Unilateral legal acts are an expression of will ... envisaged in public international law as emanating from a single subject of law and resulting in the modification of the legal order"[49] while another defines it as, "emanating from a single expression of will … and create norms intended to apply to subjects of law who have not participated in the formulation of the act."[50]

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[45] K. Zemanek, "Unilateral Legal Acts Revisited/Ed. K. Wellens." p. 215.
[46] *Nuclear Tests Cases,* 1974 I.C.J. ¶ 46.
[47] *Nuclear Tests Cases,* 1974 I.C.J. ¶ 46.
[48] First Report on Unilateral Acts of States s*upra* note 35.
[49] Fifth Report on Unilateral Acts of States, International Law Commission, ILC Doc. A/CN.4/525 (April 4, 17 and May 10, 2002) (by Mr. Víctor Rodríguez Cedeño) ¶ 57 p. 99 *citing* Urios Moliner, "Actos unilaterales y derecho internacional público: delimitación de una figura susceptible de un régimen jurídico común".
[50] *Id. citing* Rigaldies, "Contribution à l'étude de l'acte juridique unilatéral en droit international public", p. 451.

The ILC at its 48th session in 1996, identified the topic of "Unilateral acts of States" suitable for codification and progressive development. The ILC noted that while the topic was well delimited, it had never been studied by any official international body; that states had abundant recourse to unilateral acts and their practice can be drawn upon in establishing general legal principles in relation to them; although it has been touched upon in several judgments of the International Court of Justice (ICJ), the dicta still left room for uncertainties and questions; and that the law of treaties could provide a point of departure for the work.[51] The ILC's Special Rapporteur, Victor Cedeño came up with eight reports primarily aimed at drawing up a definition of unilateral acts and identifying its constituent elements. His works which offer an encompassing discussion on the nature and scope of unilateral acts are often cited in the study.

At its 58th session in 2006, the ILC adopted ten 'Guiding Principles applicable to unilateral declarations of states capable of creating legal obligations' (Guiding Principles).[52] As the term implies,

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[51] Yearbook of the ILC (vol II, part two, 1996) [245] and annex II, addend 3.

[52] Text of the Guiding Principles adopted by the ILC at its fifty-eighth session.

1. Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations. When the conditions for this are met, the binding character of such declarations is based on good faith; States concerned may then take them into consideration and rely on them; such States are entitled to require that such obligations be respected.
2. Any State possesses capacity to undertake legal obligations through unilateral declarations.
3. To determine the legal effects of such declarations, it is necessary to take account of their content, of all the factual circumstances in which they were made, and of the reactions to which they gave rise.
4. A unilateral declaration binds the State internationally only if it is made by an authority vested with the power to do so. By virtue of their functions, heads of State, heads of Government and ministers for foreign affairs are competent to formulate such declarations. Other persons representing the State in specified areas may be authorized to bind it, through their declarations, in areas falling within their competence.
5. Unilateral declarations may be formulated orally or in writing.
6. Unilateral declarations may be addressed to the international community as a whole, to one or several States or to other entities.
7. A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. In the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner. In interpreting the content of such obligations, weight shall be given first and foremost to the

the Guiding Principles are not binding as international law. The ILC is not even an authoritative body in that its works require translation into treaties in order to be binding. Nonetheless, the studies conducted by the ILC with participation from member-states carry weight in matters falling within its jurisdiction. Hence, the study relies to a great degree on the Guiding Principles applicable to unilateral acts as well as ILC Reports.

The ILC has defined a 'unilateral act of a state' as "an unequivocal expression of will which is formulated by a State with the intention of producing legal effects in relation to one or more other States or international organizations, and which is known to that State or international organization."[53] In this formulation, the definition applies only to unilateral acts stricto sensu, i.e. those taking the form of formal declarations formulated by a State with the intent to produce obligations under international laws.[54] In dealing with unilateral acts, a restrictive approach is therefore needed. Accordingly, certain conditions must be met before a declarant state could bind itself unilaterally.

2.1 Conditions for Validity

Having its roots in uncodified international custom, the study employs as point of reference the Vienna Convention on the Law of

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text of the declaration, together with the context and the circumstances in which it was formulated.

8. A unilateral declaration which is in conflict with a peremptory norm of general international law is void.
9. No obligation may result for other States from the unilateral declaration of a State. However, the other State or States concerned may incur obligations in relation to such a unilateral declaration to the extent that they clearly accepted such a declaration.
10. A unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily. In assessing whether a revocation would be arbitrary, consideration should be given to: (a) Any specific terms of the declaration relating to revocation; (b) The extent to which those to whom the obligations are owed have relied on such obligations; (c) The extent to which there has been a fundamental change in the circumstances.

[53] Third Report on Unilateral Acts of States, International Law Commission, ILC Doc. A/CN.4/505 (February 17, 1998) (by Mr. Víctor Rodríguez Cedeño), art 1.

[54] *Guiding Principles* supra note 52.

Treaties (Law of Treaties) being the convention governing most of the international legal transactions.[55] The conditions that give rise to unilateral acts are: (1) formulation of the act by a State, by a representative authorized or qualified to act on its behalf and commit it at the international level; (2) lawfulness of the object and purpose, which must not conflict with a peremptory norm of international law; and (3) the manifestation of will, free of defects.

Capable subject

It is required that a unilateral act be formulated by a capable subject, that is, subject of public international law acting through an organ competent to engage the state.[56] Here, the capacity of a state as a bearer of rights and duties[57] as well as the repositories of authority and responsibility for official actions[58] in international relations is beyond question.

In this regard, the capacity of the Head of State, Head of Government, and Minister for Foreign Affairs to undertake binding obligations in the name of the state is a generally accepted doctrine, practice and jurisprudence as being applicable to unilateral acts.[59] Moreover, there appears to be no issue on the capacity of certain high-ranking officials to engage the state unilaterally in matters falling under their jurisdiction.[60] In addition to the statements made by the French President concerning the conduct of nuclear tests in the Pacific, the ICJ also considered the statements made by the French Embassy in Wellington and those of the French Defense Minister as relevant in the determination of the accompanying obligation France had put upon itself.[61]

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[55] Vienna Convention on the Law of Treaties, United Nations (Vienna, 23 May 1969).
[56] *Nuclear Tests Cases,* 1974 I.C.J.
[57] Georg Schwarzenberger, A Manual on International Law, 6th ed. 1976, p. 53.
[58] Friedman, Wolfgang, The Changing Structure of International Law, 1964, p. 213.
[59] Goodman *supra* note 41.
[60] Second Report on Unilateral Acts of States, International Law Commission, ILC Doc. A/CN.4/525 (April 4, May 10, 1999) (by Mr. Víctor Rodríguez Cedeño) ¶ 88.
[61] *Nuclear Tests Cases,* 1974 I.C.J.¶ 35, 37, 40, 41. *See also* Uio Det Jurisdike Facultet, Unilateral Acts anno 2017 with Special Consideration of Social Media Usage (2017). Retrieved from

Lawful object

Unilateral act must be appropriate in the sense that it is not forbidden by law. Essentially, states are free to formulate any unilateral act provided that its object does not contravene any peremptory norm of international law (*jus cogens).* Cedeño distinguished the invalidity of the act on the ground that it contravenes with a peremptory norm or jus cogens from a situation when a unilateral act contradicts a previous act, be it conventional or unilateral.[62] The first cannot be done; to the latter, no valid objection can be made. For instance, unilateral acts relating to an unlawful threat or use of force embodied in the United Nations (UN) Charter is void ab initio; whereas, unilateral acts with the effect of reversing a policy or stance of a state is valid. The latter scenario is evident when a new government disregards a policy of its predecessor.

Requisite intention

The final condition for validity of a unilateral acts concerns that manifestation of declarant's will, that is, legal obligation may attach only when the unilateral act was made with the intention to have legally binding effect in favor of another state or to the international community at large. This finds support on the *Nuclear Tests Cases,* to wit:

> When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration.[63]

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https://www.duo.uio.no/bitstream/handle/10852/60477/715.pdf?sequence=1&isAllowed=y (last accessed September 3, 2019).

[62] *Fifth Report on Unilateral Acts of States supra* note 49 ¶ 94.

[63] *Nuclear Tests Cases,* 1974 I.C.J.

On this basis, an act may only be binding if the state intends to be bound. In the said case, the ICJ went on to state that the French Statements must be examined "within the general framework of the security of international intercourse, and the confidence and trust which are so essential in the relations of states."[64] Because it is only through the consideration of the statements vis-à-vis the attending circumstance when they were made can the Court make a deduction of their legal significance.[65] Here, the ICJ created an objective standard whereby the requisite intention must be viewed in light of the trust and confidence reposed in them by the international community. This is consistent with the Law of Treaties which provides an objective standard for treaties thus, "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[66]

As to how the requisite intention is expressed, the ICJ does not seem to suggest a rigid standard. The form in which a unilateral act is made does not affect its binding character. In the case concerning the *Temple of Preah Vihear,* the ICJ stated:

> Where . . . as is generally the case in international law, which places the principal emphasis on the intentions of the parties, the law prescribes no particular form, parties are free to choose what form they please provided their intention clearly results from it.[67]

Affirming the immateriality of form when dealing with the validity of unilateral acts, the ICJ stated:

> With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements. Whether a

[64] *Nuclear Tests Cases,* 1974 I.C.J.
[65] *Nuclear Tests Cases,* 1974 I.C.J.
[66] Goodman *supra* note 41.
[67] Temple of Preah Vihear (Cambodia v Thailand), 1962 I.C.J. (June 15).

> statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form. Thus the question of form is not decisive.[68]

International law requires no special requirement with respect to the form. In fact, it could be made in a variety of means as what history has taught us. The Ihlen declaration in the *Legal Status of Eastern Greenland Case* was made orally though confirmed in writing. The French Statements in the *Nuclear Test Cases* were made through different channels i.e. in the course of interview on national television, press conference and by a declaration delivered at the UN Assembly.

2.2 Classification of Unilateral Acts

There are inherent limitations in classifying unilateral acts. Many scholars have attempted to classify unilateral acts based mainly on their legal effects. Cedeño, in his fourth report,[69] dedicated a whole section on the issue of classification of unilateral acts based on their legal effects most commonly used in state practice which he termed as "classic acts", i.e. legal effects of promise, protest, waiver and recognition. According to him, promise is an act by which a state assumes an obligation or undertakes a particular course of action or conduct towards another state. Similarly, a waiver relates to an act whereby the waiving state assumes an obligation in international law through the abandonment of a right. For instance, a waiver creates an obligation on the part of the waiving state not to contest the rights that another state has acquired through the waiver. Moreover, recognition carries with it an obligation for the recognizing state to accept certain legal facts and situations including claims from another state. Lastly, through protest, in contrast with the afore-mentioned unilateral acts, a state prevents the emergence of a particular fact or issue that may be

[68] *Nuclear Tests Cases,* 1974 I.C.J.
[69] Fourth Report on Unilateral Acts of States, International Law Commission, ILC Doc. A/CN.4/519 (May 30, 2001) (by Mr. Víctor Rodríguez Cedeño).

detrimental to its interest. In conclusion, Cedeno made two groupings: (1) acts whereby the State undertakes obligations; and (2) acts whereby the State reaffirms a right.

There is no doubt that a classification of unilateral acts based on their legal effects is very useful; however, there still arises a situation whereby the nature and effect of one act overlaps with that of the other. For instance, the Ihlen Declaration is considered as a binding promise not to contest the sovereignty over Eastern Greenland but prior to such promise, it may be considered as a recognition of the existence of fact or situation, that is, the sovereignty of Denmark over the disputed territory. In the same vein, the declaration may also be construed as waiver of any title to a territory on the part of Norway.

Another notable example is the assumption of compulsory jurisdiction of the ICJ which creates both rights and obligations for the declarant state. By virtue of the declaration under Art. 36.2 of the ICJ Statue, the concerned state acquires the right to bring a case before the Court against any state that has accepted the same obligation and at the same time assumes the obligation to accept the compulsory jurisdiction of the Court in all legal disputes referred therein.[70]

In effect, the difficulties in classifying unilateral acts makes it quite impossible to make a clear-cut distinction with one another where each operates in its exclusive sphere.

Conclusion

ILC reports and numerous studies on unilateral acts utilized the Law of Treaties as a point of reference. As the official regime governing international legal transactions, the Law of Treaties may also serve as a guide in the formulation of a framework for unilateral acts of states. Hence, any discussion about unilateral acts must consider the relevant legal regimes governing international transactions.

[70] Eva Kassoti, The Juridical Nature of Unilateral Acts of States in International Law p. 45 (2015).

Past scholarly articles have studied the nature of unilateral acts which could aid in the development of a codified regime governing said transactions. But none has been written so far, dealing with the binding effects of unilateral acts to the internal affairs of a state. There exist to date no scholarly work that examines the interplay between unilateral acts and judicial review. It is therefore necessary to examine the subject from a different perspective. One that involves the other coequal branch – the Judiciary.

III. REQUISITES OF UNILATERAL ACTS

In *North Cotabato*, the Supreme Court had occasion to discuss the concept of unilateral declaration, viz:

> [P]ublic statements of a state representative may be construed as a unilateral declaration only when the following conditions are present: the statements were clearly addressed to the international community, the state intended to be bound to that community by its statements, and that not to give legal effect to those statements would be detrimental to the security of international intercourse.[71]

The above-quoted ruling, aside from touching upon the principle of unilateral acts of states through a discussion of several international law cases dealing with the matter, laid down the requisites of unilateral acts of states. These requisites will serve as framework in determining whether Duterte's pronouncements may constitute unilateral acts thereby creating legally binding obligations in favor of China. *North Cotabato* did not elaborate on the elements; hence, excerpts from ICJ cases shall be discussed in support of each.

3.1 The statements were clearly addressed to the international community

For unilateral acts to be valid it is indispensable that it is sufficiently addressed to its intended audience. Characterized as public statements, unilateral acts require as a condition, inter alia, that it must be made public. This finds basis in *Nuclear Tests Cases* thus, "an undertaking of this kind, if given publicly and with an intent to be bound, even though not made within the context of international negotiations, is binding."[72]

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[71] *North Cotabato*, G.R. Nos. 183591.
[72] *Nuclear Tests Cases*, 1974 I.C.J.

Publication is a rational requirement for no obligation can arise from an act done in seclusion. Publication confers to the declaration a "definitive form and legal effect, [which may] be invoked against the declarant state by all interested states, if made publicly *erga omnes*, or by the pre-determined states to which it was communicated in private."[73] In a sense, publication of unilateral act takes the form of signature and ratification to a conventional agreement.[74]

The public nature of acts may take different forms.[75] French declarations in the *Nuclear Tests Cases* were delivered in different channels i.e. in the form of a communique from the Office of the President, in the course of interview on national television, through a press conference and by a declaration delivered at the UN General Assembly. The Ihlen Declaration in the *Eastern Greenland Case* was made orally, the *Suez Declaration* was registered by the United Nations Secretariat as an instrument under the UN Act and Jordan's waiver of claims to the West Bank Territories.[76]

In the *Nuclear Test Cases*, the ICJ stated:

> . . . nothing in the nature of a quid pro quo nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made."[77]

The characterization of unilateral acts as autonomous acts is vital to the study for if unilateral acts could automatically bind the state

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[73] Goodman *supra* note 41 *citing* Krzyszto Skubiszewski, "Unilateral Acts of States" in Mohammed Bedjaoui, International Law: Achievements and Prospects. Dordrecht, Martinus Nijhoff, 1991, p. 53.
[74] Goodman *supra* note 41.
[75] *Nuclear Tests Cases,* 1974 I.C.J.
[76] Guiding Principles *supra note* 52 art, 1 ¶ 2.
[77] *Nuclear Tests Cases,* 1974 I.C.J.

then it follows that a mere declaration is sufficient to create legally binding obligations without any reciprocal commitment or acceptance from another state. Put it differently, the fact of declaration inevitably creates commitments notwithstanding the absence of acquiescence or acceptance coming from the addressee. It is therefore worth noting that every time Duterte makes a unilateral statement toward the SCS with the intent to be bound, such could automatically create legally binding obligations in favor of China without the need of any reciprocal commitment or acceptance from the latter provided it satisfies the conditions for validity

The subject statements of Duterte could very well satisfy the first requisite as most of them, if not all, were made publicly. Others were delivered in media interviews and even during his SONA. In the former, he promised that he would not enforce the arbitral award nor impose anything on China, among others; in the latter, he declared in front of the Congress and foreign diplomats that he was allowing Chinese fishermen to fish in our EEZ.

3.2 The state intended to be bound to that community by its statements

Intention is an essential condition in the creation of a valid legal act. The surrounding circumstances attending the making of unilateral acts must be used to assess the legal implications of the act. [78] Essential to this requisite is the capacity of the author to formulate unilateral acts on behalf of the state he represents. As discussed, heads of states, heads of government and ministers of foreign affairs are competent to represent the state by virtue of their functions.[79]

Unilateral undertakings bind the state only if is made by an authority vested with the power to do so."[80] Citing the *Case of Armed*

[78] Frontier Dispute Case, (Burkina Faso v. Mali) 1986 I.C.J. 574, ¶ 40.
[79] Law of Treaties *supra* note 54 Art. 7.
[80] Guiding Principles *supra* note 52.

Activities on the Territory of the Congo,[81] it was noted that it is a well-recognized principle in international law that head of state and foreign ministers are considered to represent the state merely by virtue of their official functions.[82] State practice confirms this.[83]

In fact, unilateral declarations are often made by heads of state or government or minister for foreign affairs without their capacity to commit the State they are representing being questioned.[84] This goes without saying that an act made by the said persons could bind the state even if it is *ultra vires* under the Constitution or any local law of the concerned state. As in the case of the declaration made by the Colombian Minister over the issue on Venezuelan sovereignty on the Los Monjes archipelago where the note was set aside by a local law because the author had no authority to bind the state yet the local authorities did not assail the resulting commitment in the international plane.[85]

At this juncture, it is noteworthy to consider the pronouncement of the ICJ acknowledging the weight accorded to statements made by a head of state, to wit:

> "Of the statements by the French Government now before the Court, **the most essential are clearly those made by the President of the Republic; that in view of his functions, his public communications or statements, oral or written, as Head of State, are in international relations act of the French State."** Thus in whatever form these statements were expressed, they must held to constitute an

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[81] Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction of the Court and Admissibility of the Application, para. 49.
[82] Guiding Principles *supra* note 52.
[83] *See* Nuclear Tests Cases (Australia v. France), 1974, Judgement, I.C.J. (December 20); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II), p. 622, para. 44; Legal Status of Eastern Greenland (Den. v. Nor), 1933 P.C.I.J. (ser. A/B) No. 53 (Apr. 5).
[84] Guiding Principles *supra* note 52.
[85] *Id.*

> engagement of the state, having regard to their intention and to the circumstances in which they were made." (emphasis supplied)[86]

The court concluded that from the statements made by several French Authorities including those of the President himself, France had made public its intention to stop its conduct of atmospheric test in the Pacific. In fact, the above-quoted pronouncement of the court emphasized the weight accorded to statements coming from a head of state.

Admittedly, many might find it quite challenging to decide if Duterte is serious whenever he makes a statement.[87] Most often than not, his statements leave the people as well as the international community stunned and bewildered.[88] Malacañang has even advised the public to use their "creative imaginations" in construing his pronouncements.[89] The public may have become accustomed already with his pronouncements that they tend to think twice before taking them at face value.

Be that as it may, the President of the Philippines is the country's head of state, chief executive and commander in chief of the armed forces. His powers are overwhelming. His office is the highest position in the land. His words carry the weight of his influential position. He is our top diplomat. He is the chief architect of our foreign policy.

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[86] *Nuclear Tests Cases,* 1974 I.C.J.

[87] Duterte admits only 2 out of 5 of his statements are true, February 8, 2017, PHILSTAR, *available at* https://www.philstar.com/headlines/2017/02/08/1670434/duterte-admits-only-2-out-5-his-statements-are-true (last accessed at August 21, 2019); Duterte 'not serious' on EJKs remark, says palace, September 28, 2018, SUNSTAR, *available at* https://www.sunstar.com.ph/article/1766537 (last accessed at August 21, 2019); Rep. Castro says Duterte not serious in blasting Constitution, July 1, 2019, GMANETNEWS, available at https://www.gmanetwork.com/news/news/nation/699431/rep-castro-says-duterte-not-serious-in-blasting-constitution/story/ (last accessed at August 21, 2019).

[88] Ellen Tordesillas, OPINION: Explaining Dutete, July 22, 2017,ABS-CBN NEWS, *available at* https://news.abs-cbn.com/blogs/opinions/07/22/17/opinion-explaining-duterte (last accessed September 8, 2019).

[89] Abella to media: Use 'creative imagination' when decoding Duterte, October 5, 2016, ABS-CBN NEWS, *available at* https://news.abs-cbn.com/news/10/05/16/abella-to-media-use-creative-imagination-when-decoding-duterte (last accessed September 8, 2019).

Needless to state, it is imperative for the President to exercise prudence in his pronouncements. He cannot just simply speak up his mind without considering the repercussions it could bring. Contrary to what he said,[90] it is not the duty of every Filipino much less the international community to analyze every now and then his confusing pronouncements. If the time comes that his declarations have amounted to unilateral acts of states, the country cannot hide behind the veil of duplicity by the simple expedient of disowning his statements.

One need not look further to see how to Duterte committed or obliged himself to perform or refrain from performing certain acts thereby evidencing his intention to be bound. Failure of a state to express its objection or non-recognition in the form of diplomatic protest is tantamount to a waiver[91] as in the *Temple of Preah Vihear Case*.[92] Just as a state may acquire rights and obligations of its own accord, so can it renounce and waive a legal claim of its own volition.[93] Unlike the previous administration who had continuously objected to Chinese incursions in our territory and EEZ,[94] Duterte has decided to keep mum and let almost every issue on Chinese incursions die down as highlighted by his silence and inaction following the alleged ramming of Philippine fishing vessel by Chinese fishermen who are illegally trawling in our EEZ.[95] When he finally made a statement, he

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[90] Duterte: Don't take my preposterous statements serious, May 26, 2016, GMANEWS, *available at* https://www.gmanetwork.com/news/news/nation/567755/duterte-don-t-take-my-preposterous-statements-seriously/story/, (last accessed August 21, 2019).
[91] Goodman *supra note* 41.
[92] *Id. citing Temple of Preah Vihear, 1962 IC.J.* 6, 21.
[93] *Fifth Report on Unilateral Acts of States* 49 ¶ 160.
[94] Aurea Calica, PNoy tells China to leave Scarborough, July 06, 2012, ABS-CBN NEWS, *available at* https://news.abs-cbn.com/nation/07/05/12/pnoy-tells-china-leave-scarborough (last accessed at September 27, 2019).
[95] Patricia Roxas, Mum on Filipino boat sinking? Panelo says Duterte a 'very cautious, calibrated man', June 14, 2019 *available at* https://globalnation.inquirer.net/176314/mum-on-filipino-boat-sinking-panelo-says-duterte-a-very-cautious-calibrated-man (last accessed September 27, 2019).

spared China from criticisms by dismissing the ramming as a mere 'maritime incident'.[96]

3.3 Giving no legal effect to those statements would be detrimental to the security of international intercourse

Although a sovereign state or the international community may take unilateral statement at face value or disregard it if it deems it detrimental to the security of international intercourse, the well-established international law principle of *pacta sunt servanda* comes in no matter what for "good faith is the over-arching and reconciling principle of law that founds and legitimizes other rules."[97] While states being sovereign have the free will to construe an act of another sovereign, *pacta sunt servanda*, as a cornerstone of international law, inevitably sets in in all international law dealings including unilateral acts of states.

The ICJ noted that the well-entrenched principle of unilateral acts of states must be "considered within the general framework of the security of international intercourse, and the confidence and trust which are so essential in the relations of states.[98] In this formulation, the ICJ created an objective standard by which to examine the intention of the state:

> One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith … Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration.[99]

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[96] SONA, *supra* note 18; Paterno Espaquel, Duterte dismisses PH boat sinking as 'maritime incident', June 19, 2019 *available at* https://www.rappler.com/nation/233282-duterte-statement-chinese-sinking-filipino-boat-recto-bank (last accessed September 27, 2019).
[97] J F O'Connor, Good Faith in International Law (1991).
[98] *Nuclear Tests Cases,* 1974 I.C.J.at 11 ¶ 43.
[99] *Nuclear Tests Cases,* 1974 I.C.J.at 11 ¶ 46.

From the foregoing, it can be deduced that the condition of intention must give way to the fundamental norm of good faith. Otherwise put, the principle of good faith takes precedence over the requisite intention of the state making the unilateral act. What governs therefore is not really the intent of the authorities, but that deducible from good faith which inheres in state interactions.[100]

Arguably, it is in the best interest of the international community not to give legal effect to those declarations as the arbitral award rebuked China's claim to a massive area covered by the nine-dash line thereby upholding freedom of navigation in the SCS. It is even plausible to state that to give legal effect to those declarations would be detrimental to the security of international intercourse considering the importance of the SCS to the international community both economically and politically.

The foregoing notwithstanding, the determination as to whether the issue of giving legal effect to unilateral acts would be detrimental to the security of international intercourse is a subjective one. What remains objective though is the principle of *pacta sunt servanda* as a point of reference in dealing with unilateral acts. For *pacta sunt servanda* is "necessary to ensure reliability and predictability in all forms of conduct of states, and thus it is suggested that the meaning of the term *pactum* should be extended in today's international law to apply not only to bilateral and multilateral agreements freely arrived at, but also to unilateral acts of a legal nature."[101] Suy's take on the applicability of pacta sunt servanda to unilateral acts is enlightening, to wit:

> If this norm, according to which engagements must be respected, is key to international legal relations, then to consider conventional agreements obligatory because they are founded on the concordant will of two or more states,

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[100] Goodman *supra note* 41 *citing* M Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (1989) 307.

[101] *Id citing* M Lachs, 'General Course in Public International Law' (1980 IV) 169 *Recueil des Cours* 198.; Suy, *Les Actes Juridiques Unilatéraux en Droit International Public* (1962), 45; M Lachs, 'Pacta Sunt Servanda' in (2000) III *Encyclopedia of Public International Law* 852.

> while refusing to ascribe the same value to unilateral acts because the will is not met by another will, is a rigid and formalistic approach that does away with the very aim of regulation: the security and harmony of international relations.[102]

Therefore, the statements of the President must be accorded with trust and confidence. As a representative of the Philippines in our relations with other states, it is presumed that good faith inheres in all his declarations.

Conclusion

In summary it is only when the three requisites are satisfied can we consider that Duterte's declarations may constitute unilateral acts in international law. Without a doubt, his statements are addressed to the international community. Most of them, if not all, were made publicly though media interviews and through the SONA. On the requisite intention, as discussed, while many might find it hard to decipher his intentions, President Duterte being the head of state and chief architect of our foreign policy carries the imprimatur of the state. By virtue of his office, it is not for the international community to interpret the intention behind his pronouncements. In view of his functions, his public communications or statements, oral or written, as head of state, are acts of the state he represents. Even the failure to take a specific course of action on the face of China's incursions in our EEZ evinced his intention to be bound. Lastly, a determination of the legal effect of those statements to the security of international intercourse must be viewed in light of the well-entrenched international law principle of *pacta sunt servanda*.

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[102] Goodman *citing* Suy, aE Suy, *Les Actes Juridiques Unilatéraux en Droit International Public* (1962); A P Rubin, 'The International Legal Effects of Unilateral Declarations' (1977) 71 *American Journal of International Law* 1; R Jennings and A Watts (eds), *1 Oppenheim's International Law 1187-96* (1996); G Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951-4: Treaty Interpretation and Other Treaty Points' (1957) XXXIII *British Yearbook of International Law* 203; *Nuclear Tests Cases*; *Burkina Faso v Mali* [39].

Having thus determined that Duterte's pronouncements may constitute as unilateral acts of states thereby creating legally binding commitments, the next question to resolve is whether these may give rise to a justiciable controversy.

IV. CONSTITUTIONAL SUPREMACY

The Philippine government operates under the complementary principles of separation of powers and checks and balances,[103] where each branch has exclusive cognizance of matters within its jurisdiction, and is supreme within its own sphere yet subject to certain restrictions and limitations from the other co-equal branches to secure coordination in the exercise of their respective functions.[104]

The three (3) functions of government are concentrated in its three branches: the Legislature possesses the power to enact laws[105] which the Executive has the duty to execute and enforce.[106] The Judiciary,[107] on the other hand, is tasked to resolve conflicts and controversies that may arise from the implementation of these laws and, in certain instances, invalidates acts of either branch that have been committed with grave abuse of discretion under the Court's expanded jurisdiction. In doing so, the Judiciary ensures that the supremacy of the Constitution in the workings of the government is always upheld.

The principle of constitutional supremacy was first elucidated in the landmark case of *Marbury v. Madison*[108] where the court held that an act of Congress repugnant to the Constitution cannot become a law. It is equally recognized that constitutional supremacy applies not only to laws but to every act of government.[109]

Consequently, all government acts must conform to the Constitution, it being the supreme and paramount law of the land. Its

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[103] *See* Philippine Coconut Producers Federation, Inc. v. Republic, G.R. Nos. 177857-58, September 17, 2009; Angara v. Electoral Commission, G.R. No. L-45081, July 15, 1936; Bengzon v. Drilon, G.R. No, 103524, April 15, 1992.
[104] *Angara v. Electoral Commission*, G.R. No. L-45081, July 15, 1936.
[105] PHIL. CONST. art. VI, S 1.
[106] PHIL. CONST. art. VII, S 1.
[107] PHIL. CONST. art. VIII, S 1.
[108] 5 U.S. (1 Cranch) 137 (1803).
[109] Joaquin G. Bernas, S.J., The 1987 Constitution of the Republic of the Philippines: A Commentary 32 (1996) *citing* Committee on Declaration of Principles and Ideologies, Report No. 1, as Amended.

supremacy extends to and are deemed written in both the laws enacted by the legislature and acts implemented by the executive. Expounding on the concept of "constitutional supremacy", the Supreme Court held:

> . . . if a law or contract violates any norm of the constitution that law or contract whether promulgated by the legislative or by the executive branch or entered into by private persons for private purposes is null and void and without any force and effect. Thus, since the Constitution is the fundamental, paramount and supreme law of the nation, it is deemed written in every statute and contract.[110]

From this fundamental postulate, it follows that the three branches of government must discharge their respective functions within the limits of authority conferred by the Constitution. It stands to reason that the officials of the government must exercise their functions within the bounds of the Constitution for it is the supreme law "to which all persons, including the highest official of this land, must defer [because] it cannot be simply made to sway and accommodate the call of situations and much more tailor itself to the whims and caprices of government and the people who run it."[111] To maintain the supremacy of the Constitution, it is therefore the bounden duty of the judiciary to nullify acts committed with grave abuse of discretion by the officers of its co-equal branches including those of the President.

[110] Manila Prince Hotel v. Government Service Insurance System, G.R. 122156, February 3, 1997.
[111] Biraogo v. Philippine Truth Commission, G.R. No. 192935, December 7, 2010.

V. JUDICIAL REVIEW

Among the three branches of the government, the judiciary is considered the weakest[112] and the least dangerous[113] for it has neither influence over the 'sword nor the purse.'[114] Its power is inherently passive for it can only be exercised when its jurisdiction is invoked; and even so, the Court may decide to exercise judicial restraint in deference to the other branches as when the matter brought before it involves the exercise of discretionary powers. Yet the Constitution has ushered in an era of judicial activism by virtue of its expanded authority to review even the exercise of political discretions of the other branches of the government. Judicial activism is defined as the "philosophy which motivates judges to depart from strict adherence to judicial precedent in favor of progressive and new social policies[.]"[115]

Judicial power includes the duty to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.[116] In every case calling for the application of the Constitution it is inevitable to come across the issue of political question.[117]

5.1 Political Question Doctrine

Political questions are defined as "those questions which, under the Constitution, are to be decided by the people in their sovereign capacity, or in regard to which full discretionary authority has been delegated to the legislative or executive branch of the government."[118]

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[112] In the Matter of: Save the Supreme Court Judicial Independence v. Abolition of Judiciary Development Fund, UDK-15143, January 21, 2015.
[113] Biraogo v. Philippine Truth Commission, G.R. No. 192935, December 7, 2010.
[114] Isagani A. Cruz, *Philippine Political Law*, 466-467 (2014).
[115] Black's Law *available at* http://blacks_law.enacademic.com/14616/judicial_activism
[116] PHIL. CONST. art. VIII, § 1.
[117] Louis Henkin, Is there a 'Political Question' Doctine. 85 YALE L.J. 597, 598 (1976).
[118] Tanada v. Cuenco, G.R. No. L-10520, February 28, 1957; Vera v. Avelino, G.R. No. L-543, August 31, 1946.

In simple terms, the political question doctrine holds that certain issues or matters should not be passed upon by the Court as it is the province of the other co-equal branches.

In *Baker v. Carr,*[119] Justice William Brennan discussed the ingredients of a political question, which were then cited in Philippine jurisprudence[120], to wit:

> (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department;
> (2) a lack of judicially discoverable and manageable standards for resolving it;
> (3) the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion;
> (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;
> (5) an unusual need for unquestioning adherence to a political decision already made; or
> (6) the potentiality of embarrassment from multifarious pronouncements by various departments on question.

Broadly, it characterized the political question doctrine as essentially a function of the separation of powers among the three (3) branches of the government.[121] Read narrowly, the rationale for the invocation of the political question doctrine "emanates solely from the Constitution, [or simply the lack of it] or finds a foundation in prudential considerations about the proper role of the judiciary."[122] In

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[119] 369 U.S.186 (1962).
[120] See Marcos v. Manglapus, G.R. No. 88211, September 15, 1989; Garcia v. Executive Secretary, G.R. No. 157584, April 2, 2009; Belgica v. Executive Secretary, G.R. No. 208566, November 19, 2013; Republic v. Sereno, G.R. No. 237428, May 11, 2018.
[121] Jared P. Cole, The Political Question Doctrine: Justiciability and the Separation of Powers, December 23, 2014.
[122] *Id.*

the first, an express constitutional commitment of a matter to either executive or legislative branch calls for an application of the doctrine. In the second, the political question permits the Court to exercise deference to the wisdom of the political branches based on prudential considerations.[123]

Admittedly, the attributes of what constitute a political question in various settings overlap,[124] yet the above-enumerated standards may be classified into at least two categories. The first and second factors concern questions which are subject to the full discretion of the other co-equal branches either because of a clear textually demonstrable commitment to coordinate political departments or because of the absence of a judicially discoverable or manageable standard by which the Court may rely on in resolving the issue. The final four falls under the prudential consideration approach which demands the Court to refrain from interfering with the actions of the political branches in order to afford the latter wide latitude in the exercise of their functions such as when dealing with internationally recognized entities.

5.2 Judicial Activism

In the years following the promulgation of the 1987 Constitution, the Supreme Court was confronted with numerous cases calling for a concrete delineation of the limits and parameters of political question.[125]

In *Marcos v. Manglapus*, the Supreme Court acknowledged that it is within the full discretion of the President to bar the return of the Marcoses and in doing so, it admitted that the act complained of is

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[123] J. Cole *citing.* Alexander M. Bickel, The Supreme Court 1960 Term Foreword: The Passive Virtues, 75 Harv. L. Rev. 40, 74-80 (1961); see CRS Report R43706, The Doctrine of Constitutional Avoidance: A Legal Overview, by Andrew Nolan.

[124] *Id.*

[125] *See* e.g., Integrated Bar of the Philippines v. Hon. Zamora, et al., GR No. 141284, 15 August 2000; Miranda v. Aguirre, G.R. No. 133064, September 16, 1999; Santiago v. Guingona, G.R. No. 134577, November 18, 1998; Tatad v. Secretary of the Department of Energy, G.R. No. 124360, December 3, 1997; Marcos v. Manglapus, G.R No. 88211.

political in nature. However, it did not stop there as it went on to consider the surrounding facts and circumstances behind the decision of the President, to wit:

> There is nothing in the case before us that precludes our determination thereof on the political question doctrine. . . When political questions are involved, the Constitution limits the determination to whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of the official whose action is being questioned[126]

In *Daza v. Singson* involving the validity of the petitioner's removal from the Commission on Appointments and the assumption from his seat of the respondent following the political realignment in the House of Representatives, the Court in discarding the issue on political question stated:

> . . .the jurisdictional objection [based on political question doctrine] becomes even less tenable and decisive. The reason is that, even if we were to assume that the issue presented before us was political in nature, we would still not be precluded from resolving it under the expanded jurisdiction conferred upon us that now covers, in proper cases, even the political question.[127]

In *Bengzon, Jr. v. Senate Blue Ribbon Committee,* the Supreme Court rejected the argument that it cannot inquire into the motives of the lawmakers in conducting legislative investigation thus "the jurisdiction to delimit constitutional boundaries has been given to this Court [and] it cannot abdicate that obligation mandated by the Constitution, although said provision by no means does away with the

[126] G.R. 88211, September 15, 1989.
[127] G.R. 86344, December 21, 1989.

applicability of the principle [of political question] in appropriate cases."[128]

In *Integrated Bar of the Philippines v. Zamora*[129] involving the invocation of the calling out power of the President to suppress or prevent lawless violence, the Supreme Court stressed that while it does not possess that authority to substitute its judgment for that of Congress or of the President, it may inquire into the surrounding factual circumstances to determine whether such exercise of judgment was made in grave abuse of discretion.[130] While expressly acknowledging that the exercise of the President's calling out power is discretionary upon him, that does not prevent the Court from examining whether such power was exercised within permissible constitutional limits.[131] It even emphasized that "a showing that plenary power is granted [to] either department of government, may not be an obstacle to judicial inquiry, for the improvident exercise or abuse thereof may give rise to justiciable controversy."[132]

In all these cases, the Supreme Court took cognizance of the matter brought before it by virtue of its expanded power to review grave abuse of discretion. The political question is no longer an obstacle to judicial determination of controversy.

Matters implicating foreign relations is no different. The same is within the purview of the Supreme Court's expanded jurisdiction to review acts committed with grave abuse of discretion.

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[128] G.R. 89914, November 20, 1991.
[129] G.R. 141284, August 15, 2000.
[130] *IBP v. Zamora,* GR No. 141284, 15 August 2000.
[131] *Id.*
[132] *Id.*

5.3 Foreign Relations and the Courts

Notwithstanding the *Baker v. Carr* standards on political question subsequently transposed to our jurisdiction,[133] the US Supreme Court recognized that not all cases implicating foreign relations call for an application of the doctrine. It did not foreclose the prospect that the courts may take cognizance of matters involving foreign relations thus, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[134]

Corollarily, the limits to the foreign relations power of the President is likewise recognized in our jurisprudence. In *Saguisag v. Executive Secretary*, the Supreme Court explicitly held that the President's role in foreign affairs is not without limit being "qualified by the Constitution in that the Chief Executive must give paramount importance to the sovereignty of the nation, the integrity of its territory, its interest, and the right of the sovereign Filipino people to self-determination."[135]

Our constitutional design vests with the President the sole and exclusive authority in the conduct of foreign relations. But it likewise assigns to Congress certain powers and prerogatives in this domain. Congress, as a collective body, is granted with the sole power to declare the existence of war;[136] the power to concur with treaties or international agreements in general;[137] the power to concur with treaties entered into prior to the Constitution and on the presence of foreign military troops, bases, or facilities, among others.[138]

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[133] *See* Marcos v. Manglapus, G.R. No. 88211, September 15, 1989; Garcia v. Executive Secretary, G.R. 157584, April 2, 2009; Belgica v. Executive Secretary, G.R. 208566, November 19, 2013; Republic v. Sereno, G.R. No. 237428, May 11, 2018.
[134] *Baker v. Carr*, 369 US 186.
[135] Saguisag v. Executive Secretary, G.R. No. 212426, January 12, 2016.
[136] PHIL. CONST. art. VI, § 23.
[137] PHIL. CONST. art. VII, § 21.
[138] PHIL. CONST. art. XVII, § 25.

The judiciary similarly plays a significant role in foreign relations albeit in a passive manner. Courts certainly possess the authority to construe or invalidate treaties and executive agreements done in contravention of the supreme law of the land.

In *Bayan v. Executive Secretary,* involving the constitutionality of the Visiting Forces Agreement, the Supreme Court recognized that the acts of ratification and entering into a treaty and those necessary or incidental thereto squarely falls within the sphere of the constitutional powers of the president and in doing so, it admitted that his acts or judgment calls are political in nature – not justiciable. It even stressed that the present constitution has not altogether done away with political questions such as those that arise in the field of foreign relations. However, the Supreme Court still went on to consider whether the acts complained of were committed with grave abuse of discretion, to wit:

> . . . absent any clear showing of grave abuse of discretion on the part of respondents, this Court- as the final arbiter of legal controversies and staunch sentinel of the rights of the people - is then without power to conduct an incursion and meddle with such affairs purely executive and legislative in character and nature."

Verily, when political question is involved as when it concerns the diplomatic power of the president, the inquiry is limited to the existence of grave abuse of discretion. Court is thus not prohibited from determining whether the exercise thereof was made in a capricious and whimsical manner as to amount to grave abuse of discretion.

In *Tanada v. Angara*, the Supreme Court was confronted with the constitutionality of the concurrence of the Senate in the ratification of the President of the WTO Agreement. Chief Justice Artemio Panganiban (CJ Panganiban) writing for the Court highlighted the

expanded concept of judicial power to strike down grave abuse of discretion, viz:

> As this Court has repeatedly and firmly emphasized in many cases, it will not shirk, digress from or abandon its sacred duty and authority to uphold the Constitution in matters that involve grave abuse of discretion brought before it in appropriate cases, committed by any officer, agency, instrumentality or department of the government.[139]

Certainly, the Court recognized the supremacy of the judiciary to check on the exercise the powers of the other branches of the government including those of political complexion. Even if the act complained of touches on foreign relations, the Court could still inquire into the validity of the exercise of such act and nullify if needed in case it amounts to grave abuse of discretion.

Conclusion

In sum, the Supreme Court brushes aside the political question doctrine and assumes jurisdiction after finding constitutionally imposed limits on the exercise of powers albeit the exercise of judicial review is limited only to the determination of the existence of grave abuse of discretion. This can be attributed mainly to the present Constitution which restricts the application of the political question doctrine and broadens the scope of judicial inquiry into areas normally left to the province of the other branches.[140] The expansion of judicial power under the present constitution has made the political question doctrine "no longer the insurmountable obstacle to the exercise of judicial power or the impenetrable shield that protects executive and legislative actions from judicial inquiry or review."[141] In effect, it effectively narrowed the reach of the political question doctrine.

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[139] G.R. 118295, May 2, 1997.
[140] Marcos v. Manglapus, G.R. No. 88211, October 27, 1989.
[141] Oposa v. Factoran, G.R. No. 101083, July 30, 1993.

The political question doctrine does not interpose an obstacle to judicial determination of the controversies involving the interpretation of the Constitution for the jurisdiction to delimit constitutional boundaries has been committed to the Courts.[142] It is thus apparent that the Supreme Court cannot abdicate the obligation to settle actual controversies involving grave abuse of discretion on the part of any branch or instrumentality of the government. By conferring to the Supreme Court, a duty to review grave abuse of discretion, "the Constitution thus drawn in deft and bold strokes the path [it] must take."[143] By conferring the duty to review grave abuse of discretion, as aptly explained by CJ Panganiban, the judiciary are mandated to be activist courts:

> The Constitution imposes this intervention as a duty, not just as a power or as an authority. A power can be relinquished but a duty cannot, under any circumstance, be evaded. The judiciary, especially the Supreme Court, must uphold the Constitution at all times. It cannot shirk, waver, or equivocate. Otherwise, it will be censured with dereliction and abandonment of its solemn duty.[144]

Where the President is not only remiss in his duty of protecting the country's national sovereignty and territorial integrity but is also committing unilateral acts detrimental to the interest of the people, it is imperative for the Court to exercise its power of judicial review to keep in check the acts of the President.

5.4. Requisites of Judicial Review

Before a litigant can challenge the constitutionality of an act, the following requisites must be met:

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[142] Guingona v. Carague, G.R. No. 94571, April 22, 1991.
[143] Edda Marie Sastine, Judicial Review and the Myth of the Majority, 83 PHIL. L.J. 775, (2009).
[144] Artemio V. Panganiban, Judicial Activism in the Philippines, 79 PHIL. L.J. 265, 268 (2004).

(a) there must be an actual case or controversy calling for the exercise of judicial power;
(b) the person challenging the act must have the standing to question the validity of the subject act or issuance;
(c) the question of constitutionality must be raised at the earliest opportunity; and
(d) the issue of constitutionality must be the very lis mota of the case.[145]

Of these requisites, case law[146] states that the first two are the most important and therefore, shall be discussed forthwith.

Actual Controversy

An aspect of the case or controversy requirement is the requisite of ripeness. In our jurisdiction, the issue of ripeness is generally treated in terms of actual injury to the plaintiff. CJ Panganiban discussed what an actual controversy is:

> [T]he existence of a live case or controversy means that an existing litigation is ripe for resolution and susceptible of judicial determination; as opposed to one that is conjectural or anticipatory, hypothetical or feigned. A justiciable controversy involves a definite and concrete dispute touching on the legal relations of parties having adverse legal interests.[147]

In the case of *North Cotabato* involving the constitutionality of an unimplemented Memorandum Agreement on the Ancestral Domain (MOA-AD), it was argued that the Court cannot take cognizance of the case as there was no concrete act performed that could possibly violate the petitioners' rights. Nonetheless, the Court passed upon the question and ruled that the fact of the law being not effective does not

[145] Joya v. Presidential Commission on Good Government, G.R. No. 96541, August 24, 1993.
[146] Belgica v. Ochoa, G.R. No. 208566, November 19, 2013.
[147] Sanlakas v. Executive Secretary, G.R. No. 159085, February 3, 2004, (Separate Opinion).

negate ripeness. In support thereof, the Court added that "concrete acts under a law are not necessary to render the controversy ripe for even a singular violation of the Constitution and/or the law is enough to awaken judicial duty."[148] The Court went on to stress that:

> The law or act in question is not yet effective does not negate ripeness. . .. The assertions that MOA-AD is subject to further legal enactments including possible constitutional amendments more than even provides impetus for the Court to formulate controlling principles to guide the bench, the public and, in this case, the government and its negotiation authority.[149]

Considering that the issue based on the legally binding obligations arising from Duterte's unilateral acts are seriously alleged to have infringed the Constitution, it is submitted that it raises an actual controversy cognizable by the Court. For the Court to restrain itself from taking cognizance of the issue brought before it on the mere excuse that there exists no actual case or controversy would reduce the Court as a mere "reactive branch of government."[150] It is but illogical to await the adverse consequences of an act in order to consider the controversy actual and ripe for judicial resolution.

When the time comes that Duterte's unilateral statements and declarations have amounted to legally binding obligations as contemplated in international law, the country cannot hide behind the veil of duplicity by the simple expedient of disowning whatever he has said. By that time, we have no one to blame but ourselves. In seeking to the subject to the power of judicial review the unilateral declarations of the President, on the ground that it is violative of the Constitution, to the mind of the author, the petition no doubt raises an actual and justiciable controversy.

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[148] *North Cotabato,* G.R. No. 183591.
[149] *Id.*
[150] Imbong v. Ochoa, G.R. No. 204819, April 8, 2014.

Furthermore, the justiciability of unilateral acts must be viewed in tandem with the current state of affairs in the SCS. Incidents of Chinese incursions in Philippine waters and harassment of Filipino fishermen are well- documented. In 2019 alone, there were numerous reports of Chinese incursions in Philippine territorial seas and exclusive economic zones.[151]

In February 2019, there were reports that China deployed its maritime militia to the vicinity of Pag-asa Island.[152] Two months after, it was reported that four China Coast Guard vessels were spotted guarding the Panatag Shoal preventing the Filipino fishermen from entering the shoal's lagoon.[153] In August 2019, the Armed Forces of the Philippines Western Command based in Palawan reported the presence of China Coast Guard Ship around Ayungin Shoal.[154]

Incidents of Chinese warships plying Philippine waters without permission are also documented.[155] In June 2019, a Chinese Naval Ship was seen patrolling around the area of Panatag Shoal.[156] Justice Carpio also raised the alarm on the presence of Chinese Navy's first aircraft carrier passing through the Sibutu Straight in Tawi-Tawi sometime in May 2019.[157] The Philippine government initially denied the report but

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[151] Incident of Chinese incursions are mostly based on Sofia Tomacruz and JC Gotinga's article entitled "LIST: China's incursions in Philippine waters *available at* https://www.rappler.com/newsbreak/iq/238236-list-china-incursions-philippine-waters.

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *Id;* China warships plying PH waters without permission irked Duterte – Locsin, September 11, 2019, ABS-CBN NEWS, *available at* https://news.abs-cbn.com/news/09/11/19/china-warships-plying-ph-waters-without-permission-irked-duterte-locsin (last accessed at September 27, 2019); Pathricia Roxas, Mum on Filipino boat sinking? Panelo says Duterte a 'very cautious, calibrated man', June 14, 2019 *available at* https://globalnation.inquirer.net/176314/mum-on-filipino-boat-sinking-panelo-says-duterte-a-very-cautious-calibrated-man (last accessed September 27, 2019).

[156] Tomacruz *supra note* 151.

[157] *Id.*

later on confirmed that warships albeit smaller ones did traverse the strait on four instances.[158]

On June 9, 2019, a Chinese trawler rammed a Philippine fishing boat causing it to sink and putting the lives of the crew at risk. Worse, the Chinese ship abandoned the fishermen onboard the boat in the open sea. Fortunately, a Vietnamese fishing vessel came to the rescue of the Filipino fishermen. Public outcry immediately followed only to be dismissed by Duterte as a mere 'maritime incident'.[159]

As of this writing, according to the Washington-based Asia Maritime Transparency Initiative (AMTI) of the Washington-based Center for Strategic and International Studies (CSIS), China has 7 outposts in the Kalayaan Group of Islands.[160] It also has control over the Scarborough Shoal through a constant coast guard presence.[161]

While it cannot be ascertained if the current state of affairs in the SCS was due to Duterte's inactions alone, it is fair to conclude that his pronouncements, far from offering solution, even exacerbate the situation. Unilateral undertakings coupled with the grave violations of the constitution presents an actual controversy.

Locus Standi

Citizen may only raise a constitutional question only when he can show that he has personally suffered some actual or threatened injury as a result of the allegedly illegal conduct of the government; the injury is fairly traceable to the challenged action; and the injury is likely to be redressed by a favorable action.[162]

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[158] Tomacruz *supra note* 151.
[159] Paterno Espaquel, Duterte dismisses PH boat sinking as 'maritime incident', June 19, 2019 *available at* https://www.rappler.com/nation/233282-duterte-statement-chinese-sinking-filipino-boat-recto-bank (last accessed September 27, 2019).
[160] China Island Tracker, Asia Maritime Transparency Initiative (AMTI) of the Washington-based Center for Strategic and International Studies *available at* https://amti.csis.org/island-tracker/china/ (last accessed April 15, 2020).
[161] *Id.*
[162] Lozano v. Nograles, G.R. No. 187883, June 16, 2009.

In a catena cases[163] the Supreme Court relaxed the locus standi requirement in view of the transcendental importance of the constitutional question raised. It has time and again relaxed the requirement of locus standi and has accorded some individuals not otherwise directly injured or with material interest affected, by an act committed by the Government, standing in view of the transcendental importance of the matter brought before it. Taxpayers, voters, concerned citizens, and legislators may be accorded standing to sue, provided that the following requirements are met:

> (1) the cases involve constitutional issues;
> (2) for taxpayers, there must be a claim of illegal disbursement of public funds or that the tax measure is unconstitutional;
> (3) for voters, there must be a showing of obvious interest in the validity of the election law in question;
> (4) for concerned citizens, there must be a showing that the issues raised are of transcendental importance which must be settled early; and
> (5) for legislators, there must be a claim that the official action complained of infringes upon their prerogatives as legislators.[164]

In enumerating the rules on legal standing, this study does not aim to identify who among the taxpayers, voters, concerned citizens, and legislators has legal standing to challenge Duterte's pronouncement before the courts. It is enough that in assailing the constitutionality of a governmental act, any person suing in whatever capacity may overcome the locus standi requirement if the issue involves a matter of transcendental importance or of paramount interest. They need not establish a direct and personal interest if they

[163] David v. Arroyo, G.R. 171396, G.R. 171409, May 3, 2006; Tañada v. Tuvera, G.R. No. 63915, April 24, 1985; Legaspi v. Civil Service Commission, G.R. No. 72119, May 29, 1987.
[164] David v. Arroyo, May 3, 2006.

show that the act affects a public right.[165] Hence, even if it fails to hurdle the procedural requisite, the Court may take a liberal stance towards the requirement of legal standing, especially when paramount interest is involved.[166]

The author submits that an issue involving the national sovereignty and territorial integrity of the country, with all the rights and resources appertaining thereto, is a matter of transcendental importance. The legal effects of Duterte's unilateral statements and the alleged infringement of the Constitution has obviously "far-reaching implications" not just on the way the executive conducts foreign relations but on the Filipino people themselves, to whom the President is sworn to serve and protect. As such, it is but imperative to afford any citizen the legal standing to challenge the unilateral declarations of Duterte before the courts.

5.5. Petition for Certiorari and Prohibition

Settled is the rule that a Petition for Certiorari and Prohibition is the proper remedies to raise constitutional issues and to review and/or prohibit or nullify acts exercised in grave abuse of discretion.[167] These remedies are not limited to the determination of grave abuse of discretion to quasi-judicial or judicial acts but extends to any act involving the exercise of discretion on the part of the government. Hence, petitions for certiorari and prohibition are the appropriate remedies to raise the constitutionality of the unilateral acts of the president.

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[165] *See* Bayan Muna v. Romulo, G.R. No. 159618, February 1, 2011; Akbayan Citizens Action Party v. Aquino, G.R. No. 170516, July 16, 2008;

[166] *See* Bayan Muna v. Romulo, G.R. No. 159618, February 1, 2011; Francisco v. House of Representatives, G.R. No. 160261, November 10, 2003; Agan v. Philippine International Air Terminals Co., Inc, G.R. No. 155001, May 5, 2003; Del Mar v. Philippine Amusement and Gaming Corporation, G.R. No. 138298, November 29, 2000; Integrated Bar of the Phil. v. Zamora, GR No. 141284, August 15, 2000.

[167] Araullo v. Aquino, G.R. 209287, July 1, 2014; Judge Villanueva v. Judicial and Bar Council, G.R. 211833, April 7, 2015; Agcaoili v. Marcos, G.R. No. 232395, July 3, 2018.

VI. CONCLUSION AND RECOMMENDATION

Conclusion

At a time when the chief diplomat's acts are increasingly defended in the name of executive prerogative, exercising the power of judicial review makes a case for a zealous and fervent judicial defense of national sovereignty, territorial integrity and national interest.

By conferring the duty to review grave abuse of discretion, the Constitution created an activist judiciary. To exercise judicial deference amid the transgressions to the fundamental law is to renounce this constitutional duty. It is precisely in these times that the judiciary must be most wary, lest it permit the diminution of our territory and sovereignty.

While the one voice principle in the field of foreign relations remains, the notion of executive domination in foreign policy is a thing of the past. Far from being the sole responsibility of the executive, the judiciary plays an equally important role. When the executive sanctions a policy so unwise and so destructive of national interest, the judiciary must step it as when a proper petition is brought before it.

Recommendation

This paper's recommendation is that the judiciary must take cognizance of the matter when an appropriate case is presented before it. By virtue of its expanded power to review grave abuse of discretion, the courts certainly possess the requisite authority to rule on the matter. It is no coincidence that the provision on judicial power is "couched in general terms."[168] This is precisely to make it susceptible to judicial interpretation when the exigency of the situation arises.[169]

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[168] Santiago v. Sandiganbayan, G.R. 128055, April 18, 2001.
[169] *Id*

The justiciability of Duterte's statement towards the SCS is anchored on the binding character of unilateral acts of states recognized in international law. It becomes even more apparent with the grave violations of the Constitution based on the findings of the Tribunal in the *South China Sea Arbitration*.

Where an act of the executive branch is seriously alleged to have infringed the Constitution, it becomes not only the right but in fact the duty of the judiciary to resolve the controversy.[170] The courts will not review the wisdom of President. Neither will it rule on the merits of the current administration's foreign policy pivot towards China. Rather, it will only exercise its bounden duty of preserving the supremacy of the Constitution. What is in the heels of the courts is not the wisdom of the President in the conduct of our foreign relations, but the constitutional limits in the exercise thereof.

In the words of Justice Cruz, "an assertive and activist Supreme Court is likely to venture boldly into the realm of political questions and claim the right to resolve them according to its own lights even at the risk of antagonizing the other departments. On the other hand, a timorous judiciary will probably cling to the conventions and in the interest of harmony, or perhaps its own convenience and security, choose not to rush in where angels fear to thread."[171]

In the end, the simple fact remains - nowhere can it be found in the Constitution that the President should exclusively formulate our foreign policy. Stated otherwise, the formulation of our foreign policy is a shared responsibility of the three branches of the government. It behooves the Court, in Justice Laurel's words, "to make the hammer fall, and heavily" where the acts of the President betray the people's will as enshrined in the Constitution.

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[170] *North Cotabato v. Republic*, G.R. No. 183591.
[171] Isagani A. Cruz, *Philippine Political Law*, 470-471 (2014).

BIBLIOGRAPHY

PRIMARY SOURCES

Constitution

The 1987 Constitution

Case Law

Abogado v. DENR
G.R. No. 246209, May 3, 2019

Agcaoili v. Marcos
G.R. No. 232395, July 3, 2018

Agan v. Philippine International Air Terminals Co., Inc
G.R. No. 155001, May 5, 2003

Akbayan v. Aquino
G.R. No. 170516, July 16, 2008

Angara v. Electoral Commission
G.R. No. L-45081, July 15, 1936

Bayan Muna v. Romulo
G.R. No. 159618, February 1, 2011

Bengzon v. Drilon
G.R. No, 103524, April 15, 1992

Belgica v. Executive Secretary,
G.R. No. 208566, November 19, 2013

Biraogo v. Philippine Truth Commission
G.R. No. 192935, December 7, 2010

David v. Arroyo

G.R. No. 171396, G.R. 171409, May 3, 2006

Del Mar v. Philippine Amusement and Gaming Corporation
G.R. No. 138298, November 29, 2000

Francisco v. House of Representatives
G.R. No. 160261, November 10, 2003.

Garcia v. Executive Secretary
G.R. No. 157584, April 2, 2009

Guingona v. Caragüe
G.R. No. 94571, April 22, 1991

Imbong v. Ochoa
G.R. No. 204819, April 8, 2014.

Integrated Bar of the Philippines v. Hon. Zamora, et al.
GR No. 141284, 15 August 2000

In the Matter of: Save the Supreme Court Judicial Independence v. Abolition of Judiciary Development Fund
UDK-15143, January 21, 2015.

Joya v. Presidential Commission on Good Government
G.R. No. 96541, August 24, 1993

Judge Villanueva v. Judicial and Bar Council
G.R. No. 211833, April 7, 2015.

Legaspi v. Civil Service Commission
G.R. No. 72119, May 29, 1987

Lozano v. Nograles
G.R. No. 187883, June 16, 2009

Manila Prince Hotel v. Government Service Insurance System
G.R. No. 122156, February 3, 1997

Miranda v. Aguirre
G.R. No. 133064, September 16, 1999

Marcos v. Manglapus
G.R. No. 88211, September 15, 1989

Oposa v. Factoran
G.R. No. 101083, July 30, 1993

Province of North Cotabato v. Republic of the Philippines
G.R. Nos. 183591, 183752, 183893 and 183951, October 14, 2008

Philippine Coconut Producers Federation, Inc. v. Republic
G.R. Nos. 177857-58, September 17, 2009

Republic v. Sereno
G.R. No. 237428, May 11, 2018

Santiago v. Guingona
G.R. No. 134577, November 18, 1998

Saguisag v. Executive Secretary
G.R. No. 212426, January 12, 2016.

Sanlakas v. Executive Secretary
G.R. No. 159085, February 3, 2004

Santiago v. Sandiganbayan
G.R. 128055, April 18, 2001

Tanada v. Cuenco
G.R. No. L-10520, February 28, 1957

Tañada v. Tuvera
G.R. No. 63915, April 24, 1985

Tatad v. Secretary of the Department of Energy
G.R. No. 124360, December 3, 1997

Vera v. Avelino
G.R. No. L-543, August 31, 1946

Treaties

Convention respecting the Free Navigation of the Suez Maritime Canal (Constantinople, 29 October 1888)

International Court of Justice Statute (San Francisco, June 26, 1945)

United Nations Convention on the Law of the Sea (Montego Bay, December 10, 1982)

Vienna Convention on the Law of Treaties, United Nations (Vienna, May 23, 1969)

ICJ Cases

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. (1996)

Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Rwanda, Jurisdiction of the Court and Admissibility, I.C.J. (2002)

Frontier Dispute (Burkina Faso v. Republic of Mali)
1986, Judgment, I.C.J. (December 22)

Nuclear Tests Cases (Australia v. France)

1974, Judgement, I.C.J. (December 20)

Temple of Preah Vihear (Cambodia v Thailand)
1962, Judgement, I.C.J. (June 15)

PCIJ Case

Legal Status of Eastern Greenland (Den. v. Nor)
1933 P.C.I.J. (ser. A/B) No. 53 (Apr. 5)

Arbitration Case

South China Sea Arbitration (Philippines v China)
2016 P.C.A. (July 12)

SECONDARY SOURCES

US Cases

Baker v. Carr
369 U.S.186 (1962)

Marbury v. Madison
5 U.S. 137 (1803)

Books

Eva Kassoti, The Juridical Nature of Unilateral Acts of States in International Law (2015)

Friedman, Wolfgang, The Changing Structure of International Law, (1964)

Georg Schwarzenberger, A Manual on International Law, 6th ed. (1976)

J F O'Connor, Good Faith in International Law (1991)

Isagani A. Cruz, Philippine Political Law (2014)

Joaquin G. Bernas, S.J., The 1987 Constitution of the Republic of the Philippines: A Commentary 32 (1996)

Commentaries and News Articles

Abella to media: Use 'creative imagination' when decoding Duterte, October 5, 2016, ABS-CBN NEWS, *available at* https://news.abs-cbn.com/news/10/05/16/abella-to-media-use-creative-imagination-when-decoding-duterte (last accessed September 8, 2019)

Arianne Merez, Verbal fishing deal 'legally bindng' for Duterte – Palace, ABS-CBN NEWS, July 4, 2018 *available at* https://news.abs-cbn.com/news/07/04/19/verbal-fishing-deal-legally-binding-for-duterte-palace (last accessed Sept. 8, 2019)

Aurea Calica, PNoy tells China to leave Scarborough, July 06, 2012, ABS-CBN NEWS, *available at* https://news.abs-cbn.com/nation/07/05/12/pnoy-tells-china-leave-scarborough (last accessed at September 27, 2019)

Azer Parrocha, Duterte-Xi verbal fishing deal still legally binding – Palace, PNA, July 1, 2019 *available at* https://www.pna.gov.ph/articles/1073792 (last accessed Sept. 27, 2019)

China warships plying PH waters without permission irked Duterte – Locsin, September 11, 2019, ABS-CBN NEWS, *available at* https://news.abs-cbn.com/news/09/11/19/china-warships-plying-ph-waters-without-permission-irked-duterte-locsin (last accessed at September 27, 2019)

Duterte admits only 2 out of 5 of his statements are true, February 8, 2017, PHILSTAR, *available at* https://www.philstar.com/headlines/2017/02/08/1670434/duterte-admits-only-2-out-5-his-statements-are-true (last accessed at August 21, 2019)

Duterte: Don't take my preposterous statements serious, May 26, 2016, GMANEWS, *available at* https://www.gmanetwork.com/news/news/nation/567755/duterte-don-t-take-my-preposterous-statements-seriously/story/, (last accessed August 21, 2019)

Duterte 'not serious' on EJKs remark, says palace, September 28, 2018, SUNSTAR, *available at* https://www.sunstar.com.ph/article/1766537 (last accessed at August 21, 2019)

Duterte remark to 'set aside' arbitral award ruling 'very dangerous' – law dean, PDI., December 22, 2016, *available at* https://globalnation.inquirer.net/151012/duterte-remark-set-aside-arbitral-ruling-dangerous-priest (last accessed September 8, 2019)

Ellen Tordesillas, OPINION: Explaining Dutete, July 22, 2017,ABS-CBN NEWS, *available at* https://news.abs-cbn.com/blogs/opinions/07/22/17/opinion-explaining-duterte (last accessed September 8, 2019)

Fish, not oil, at the heart of the South China Sea conflict, *available at* https://www.fni.no/news/fish-not-oil-at-the-heart-of-the-south-china-sea-conflict-article1556-330.html (last accessed September 1, 2019)

Jason Gutierrez, Sinking of Philippine Boat Puts South China Sea Back at Issue, July 13, 2019 *available at*

https://www.nytimes.com/2019/06/13/world/asia/south-china-sea-philippines.html (last accessed Sept. 6, 2019)

Max Fisher. The South China Sea: Explaining the Dispute, The New York Times, July 14, 2016, available at https://www.nytimes.com/2016/07/15/world/asia/south-china-sea-dispute-arbitration-explained.html citing the US Energy Information Administration report (last accessed September 1, 2019) *available at* https://www.eia.gov/beta/international/analysis_includes/regions_of_interest/South_China_Sea/south_china_sea.pdf (last accessed September 1, 2019)

Paterno Espaquel, Duterte dismisses PH boat sinking as 'maritime incident', June 19, 2019 *available at* https://www.rappler.com/nation/233282-duterte-statement-chinese-sinking-filipino-boat-recto-bank (last accessed September 27, 2019)

Patricia Roxas, Mum on Filipino boat sinking? Panelo says Duterte a 'very cautious, calibrated man', June 14, 2019 *available at* https://globalnation.inquirer.net/176314/mum-on-filipino-boat-sinking-panelo-says-duterte-a-very-cautious-calibrated-man (last accessed September 27, 2019)

Pia Ranada, Duterte says he can't ban Chinese from fishing in PH waters, RAPPLER, June 27, 2019 *available at* https://www.rappler.com/nation/234008-duterte-says-cannot-ban-chinese-from-fishing-philippine-waters (last accessed Sept. 6. 2019)

Philippines to 'set aside' South China Sea tribunal ruling to avoid imposing on Beijing, THE GUARDIAN, December 16, 2017 *available at* https://www.theguardian.com/world/2016/dec/17/philippi

nes-to-set-aside-south-china-sea-tribunal-ruling-to-avoid-imposing-on-beijing (last accessed August 19, 2019)

Rep. Castro says Duterte not serious in blasting Constitution, July 1, 2019, GMANETNEWS, available at https://www.gmanetwork.com/news/news/nation/699431/rep-castro-says-duterte-not-serious-in-blasting-constitution/story/ (last accessed at August 21, 2019)

Sofia Tomacruz and JC Gotinga, LIST: China's incursions in Philippine waters, August 22, 2019, *available at* https://www.rappler.com/newsbreak/iq/238236-list-china-incursions-philippine-waters (last accessed September 27, 2019)

South China Sea Energy Exploration and Development Report *available at* https://amti.csis.org/south-china-sea-energy-exploration-and-development/ (last accessed September 25, 2019)

Tim Dais, Why The South China Sea Has More Oil Than You Think, Forbes, May 22, 2016, *available at* https://www.forbes.com/sites/timdaiss/2016/05/22/why-the-south-china-sea-has-more-oil-than-you-think/#7404a257dd8f (last accessed September 1, 2019)

Official Speeches

Antonio Carpio," A Culture of Respect for, and Understanding of, International Law" (Foundation for Liberty and Prosperity Awards Ceremony, March 23, 2018)

Duterte, Rodrigo. "State of the Nation Address." *Presidential Communications Operations Office*, The Philippine Government, July 22, 2019, https://pcoo.gov.ph/wp-content/uploads/2019/07/4th-State-of-the-Nation-Address-of-President-Rodrigo-Roa-Duterte.pdf;

https://pcoo.gov.ph/presidential-speech/4th-state-of-the-nation-address-of-president-rodrigo-roa-duterte/

International Law Commission Documents

Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto, ILC Doc. (A/61/10).

First Report on Unilateral Acts of States, International Law Commission, ILC Doc. A/CN.4/486 (March 5, 1998) (by Mr. Víctor Rodríguez Cedeño)

Second Report on Unilateral Acts of States, International Law Commission, ILC Doc. A/CN.4/525 (April 4, May 10, 1999) (by Mr. Víctor Rodríguez Cedeño)

Third Report on Unilateral Acts of States, International Law Commission, ILC Doc. A/CN.4/505 (February 17, 1998) (by Mr. Víctor Rodríguez Cedeño)

Fourth Report on Unilateral Acts of States, International Law Commission, ILC Doc. A/CN.4/519 (May 30, 2001) (by Mr. Víctor Rodríguez Cedeño)

Fifth Report on Unilateral Acts of States, International Law Commission, ILC Doc. A/CN.4/525 (April 4, 17 and May 10, 2002) (by Mr. Víctor Rodríguez Cedeño)

Journal Articles

Artemio V. Panganiban, Judicial Activism in the Philippines, 79 PHIL. L.J. 265, 268 (2004)

Bhagirath Ashiya Vikhyat Oberoi, The Conundrum of Unilateral Declarations: Moving Beyond the Congo Case, Cambridge International Law Journal, (2017)

Camille Goodman, "Acta Sunt Servanda? A Regime for Regulating the Unilateral Acts of States at International Law", Australian Yearbook of International Law (2006)

Edda Marie Sastine, Judicial Review and the Myth of the Majority, 83 PHIL. L.J. 775, (2009)

Eric Suy, Some Unfinished Thoughts on unilateral acts of states as a source of international law, 2001 Journal for Juridical Science (2001)

James Garner, "The International Binding Force of Unilateral Oral Declarations," The American Journal of International Law 27, no. 3 (1933)

Jared P. Cole, The Political Question Doctrine: Justiciability and the Separation of Powers, December 23, 2014

Jean Charpentier, 'Engagements unilatéraux et engagements conventionnels: Différences et Convergences' in J Makarczyk (ed), Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzystof Skubiszewski (1996)

Karl Zemanek, "Unilateral Legal Acts Revisited/Ed. Karl Wellens," International law: theory and practice. Essays on honour of Eric Suy–The Hague: Kluwer law international (1998)

Krzyszto Skubiszewski, "Unilateral Acts of States" in Mohammed Bedjaoui, International Law: Achievements and Prospects. Dordrecht, Martinus Nijhoff, (1991)

Louis Henkin, Is there a 'Political Question' Doctine. 85 Yale Law Journal 597, 598 (1976)

Uio Det Jurisdike Facultet, Unilateral Acts anno 2017 with Special Consideration of Social Media Usage (2017)