

How the Sea was Won

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I. INTRODUCTION

For the past few years, as Solicitor General and then Agent for the Republic of the Philippines in Permanent Court of Arbitration Case No. 2013-19 (South China Sea Arbitration Case),¹ I have been engaging select schools, law associations, think tanks, *kapihans*, government agencies, and groups, both in and outside the Philippines, in a conversation on our country's maritime claims to the West Philippine Sea, as viewed in the context of the Rule of Law.²

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1. In the Matter of the South China Sea Arbitration (Phil. v. China), P.C.A. Case No. 2013-19 (July 12, 2016).
2. Contents of this Article were originally articulated in speeches and lectures given before the following previous fora: 2016 Integrated Bar of the Philippines Western Visayas Regional Convention; Palawan State University School of Law; Ateneo de Manila University School of Law; University of the Philippines

This has been my fervent advocacy since we filed our Notification and Statement of Claim against China on 22 January 2013. Although I now wear judicial robes, I continue to be a fervent supporter of our country's arbitration, and will continue to explain the same, for as long as there are Filipinos who are interested to know what our claim is about.

The South China Sea Arbitration Case is a landmark ruling that laid to rest certain issues pertaining to the conflicting claims of the Republic of the Philippines (Philippines) and the People's Republic of China (China) to the West Philippine Sea.³ This Article discusses the Philippine Government's maritime claims to the West Philippine Sea, viewed in the context of the Rule of Law. It is composed of five parts. Part I is this introduction. For context and understanding, Part II provides a short factual background and exposition on the United Nations Convention on the Law of the Sea⁴ (UNCLOS) and its mechanisms insofar as they are relevant to the South China Sea Arbitration Case. Part III discusses the Philippine case and the challenges to, and considerations behind, the Philippines' chosen course of action. Part IV summarizes the salient points of the landmark ruling of the Arbitral Tribunal (Tribunal), and Part V discusses the next steps that the Philippine Government may take in light of our victory in the South China Sea Arbitration Case.

II. BACKGROUND ON THE FILING OF THE PHILIPPINE CASE

The South China Sea is a semi-enclosed sea bounded by China, Indonesia, Vietnam, Malaysia, Singapore, Brunei, Taiwan, and the Philippines.⁵ It is subject of major interest and overlapping maritime claims due to its

(Diliman); New York State Bar Association Seasonal Meeting in Hanoi; Kapihan sa Greenhills; University of Cebu College of Law; University of the Philippines (Visayas); University of San Agustin (Iloilo); Integrated Bar of the Philippines (Iloilo Chapter); Philippine Association of Law Schools (Cebu City); Harvard University (Cambridge, Massachusetts, USA); New York University (New York, USA); Council on Foreign Relations (New York, USA); Department of Foreign Affairs (Manila); University of the Philippines College of Law Institute of International Legal Studies (Diliman, Manila); & Center for a New American Security (Washington D.C., USA); Philippine Navy Headquarters (Manila).

3. See *South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award.
4. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 3 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].
5. *South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award, ¶ 3.

importance with regard to navigation, fishing, and energy production.⁶ Within it are three major groups of insular features subject of conflicting claims among the different nation-States — the Spratly Islands, the Parcel Islands, and the Scarborough Shoal.⁷

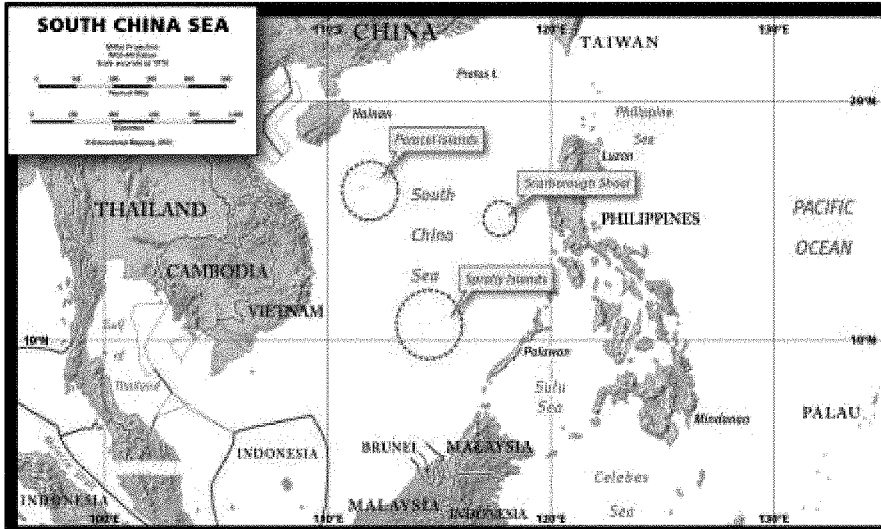


Figure 1. South China Sea and Groups of Insular Features⁸

The West Philippine Sea, on the other hand, refers to only a portion of the South China Sea, particularly the maritime areas on the western side of the Philippine archipelago, such as the Luzon Sea and the waters around, within, and adjacent to the Kalayaan Island Group and *Bajo de Masinloc*, internationally known as Scarborough Shoal.⁹

In a formal notification to the United Nations in 2009,¹⁰ China, through its so-called nine-dash line, laid claim to more than 80% of the South China Sea.¹¹

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6. See *South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award on Jurisdiction and Admissibility, ¶ 3.
 7. Why is the South China Sea contentious?, available at <http://www.bbc.com/news/world-asia-pacific-13748349> (last accessed Mar. 1, 2017).
 8. Image provided by the Legal Team of the Philippines (on file with Author).
 9. Office of the President, Naming the West Philippine Sea of the Republic of the Philippines, and for Other Purposes, Administrative Order No. 29, Series of 2012 [A.O. No. 29, s. 2012], § 1 (Sep. 5, 2012).
 10. *South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award on Jurisdiction and Admissibility, ¶ 160.

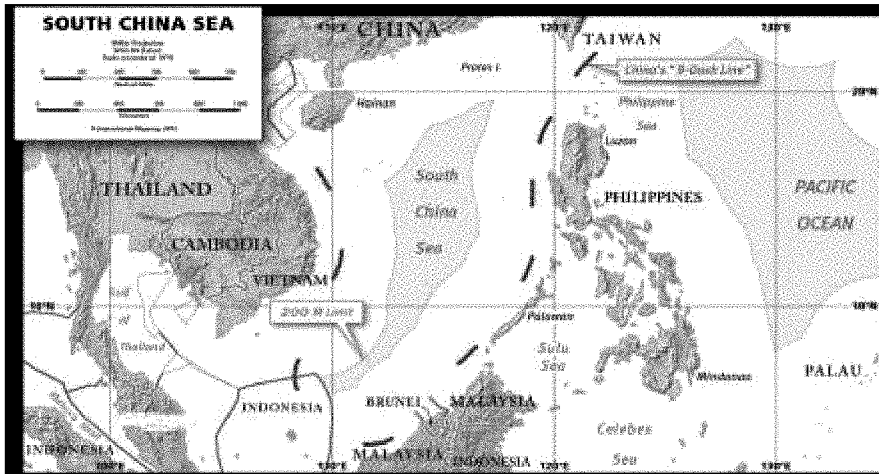


Figure 2. China's Nine-Dash Line Claim¹²

This claim was promptly disputed by the Philippines and other affected nation-States in the region for being inconsistent with the UNCLOS.¹³

A. Maritime Entitlements Under the UNCLOS

Adopted in 1982, the UNCLOS is, in the words of Ambassador and former President of the Third United Nations Conference on the Law of the Sea Tommy Thong Bee Koh, “a Constitution for the Oceans.”¹⁴ It is a bold attempt by mankind to set up rules to govern the sea, a body that constitutes two-thirds of the area of our planet. As a treaty, it codifies erstwhile customary norms on the law of the sea. With its 320 Articles and nine Annexes, the UNCLOS covers all areas of ocean space,¹⁵ including

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11. David Tweed & Ting Shi, *China's South China Sea Claims Dashed by Hague Court Ruling*, available at <https://www.bloomberg.com/news/articles/2016-07-12/china-no-historic-right-to-south-china-sea-resources-court-says> (last accessed Mar. 1, 2017).
 12. Image provided by the Legal Team of the Philippines (on file with Author).
 13. *South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award, ¶ 184.
 14. Tommy T.B. Koh, ‘A Constitution for the Oceans’, Remarks at the final session of the United Nations Conference on the Law of the Sea at Montego Bay (Dec. 6 & 11, 1982), at xxxiii (transcript available at http://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf (last accessed Mar. 1, 2017)).
 15. Final Act of the Third United Nations Conference on the Law of the Sea, Annex VI, para. 2, concluded Dec. 10, 1982, U.N. Doc. A/CONF.62/121.

delimitation of maritime boundaries,¹⁶ environmental control,¹⁷ scientific research,¹⁸ economic and commercial activities,¹⁹ technology,²⁰ and the settlement of disputes relating to ocean matters.²¹

As a Constitution for the Oceans, it lays down substantive rules on the entitlements of a coastal State to the seas.²² These rules on entitlement are best summed up under the shorthand formulation, “the land dominates the sea.”²³ Otherwise stated, all entitlements to the sea start, and are measured, from land.²⁴ These entitlements are as follows: a 12-nautical mile (NM) territorial sea (TS), a 200-NM exclusive economic zone (EEZ), continental shelf (CS), and, if geography allows, an extended CS.²⁵ Beyond the outer CS are the so-called “Area” and the high seas, both of which belong to mankind.²⁶

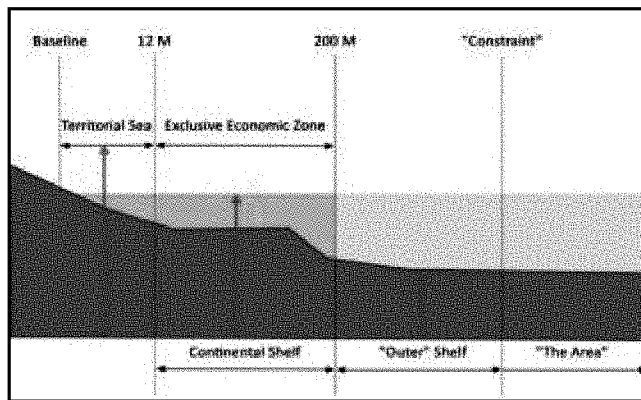


Figure 3. Maritime entitlements under the UNCLOS²⁷

16. UNCLOS, *supra* note 4, arts. 15, 50, 74, 83, & 298.

17. *Id.* arts. 192-237.

18. *Id.* arts. 238-265.

19. *Id.* arts. 27-28.

20. *Id.* arts. 266-278.

21. *Id.* arts. 279-299.

22. UNCLOS, *supra* note 4, arts. 2-33.

23. Robert C. Beckman, *The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea*, 107 AM. J. INT'L L. 142, 149-50 (2013).

24. UNCLOS, *supra* note 4, arts. 3, 57, & 76.

25. *Id.*

26. *Id.* arts. 86-87 & 137.

27. Image provided by the Legal Team of the Philippines (on file with Author).

Maritime entitlements depend, in turn, on the type of land feature from which the entitlement would be generated.²⁸ Under Articles 13 and 121 of the UNCLOS, there are three types of features for purposes of determining maritime entitlements: islands, rocks, and low-tide elevations.²⁹

An island is defined as a “naturally formed area of land, surrounded by water, and which is above water at high tide.”³⁰ It is entitled to a 12-NM TS, and either a 200-NM EEZ or CS, or both.³¹

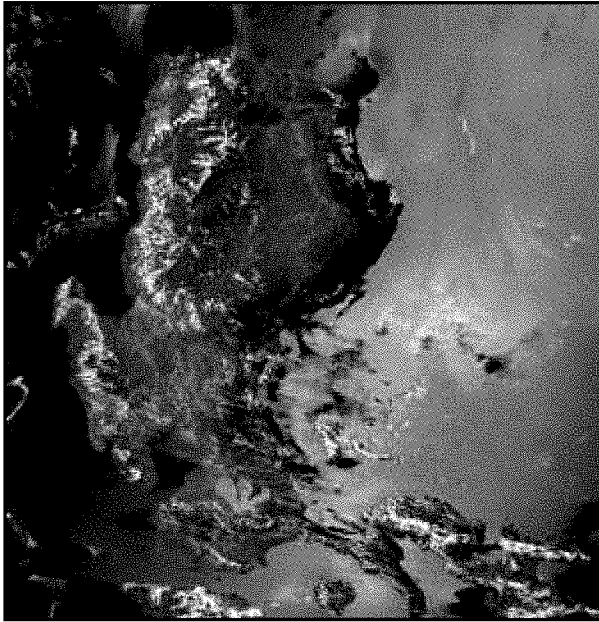


Figure 4. Luzon Island (Island)³²

Rocks, on the other hand, are land features mainly below water with rocky promontories that protrude at high tide.³³ They cannot, however,

28. Beckman, *supra* note 23, at 142.

29. UNCLOS, *supra* note 4, arts. 13, 121 (1), & 121 (3).

30. *Id.* art. 121 (1).

31. *Id.* arts. 3, 57, 76, & 121 (2).

32. National Aeronautics and Space Administration, Northern Philippines (Luzon), available at <http://visibleearth.nasa.gov/view.php?id=55648> (last accessed Mar. 1, 2017).

33. Matikas Santos, *UNCLOS explained: Why China's claims in South China Sea are invalid*, PHIL. DAILY INQ., Feb. 28, 2014, available at <https://globalnation.com>.

“sustain human habitation or economic life of their own[.]”³⁴ Under the UNCLOS, these features are entitled to, at most, only a 12-NM TS.³⁵ They are not entitled to an EEZ, a CS, or both.³⁶



Figure 5. Scarborough Shoal (Rock)³⁷

Finally, features that are not visible or otherwise completely below water at high tide are low-tide elevations which do not generate any maritime entitlement.³⁸ These include submerged reefs or artificial islands.³⁹ They are not entitled to a TS, an EEZ, or a CS.⁴⁰

inquirer.net/99689/unclos-explained-why-chinas-claims-in-south-china-sea-are-invalid (last accessed Mar. 1, 2017).

34. UNCLOS, *supra* note 4, art. 121 (3).

35. *Id.* arts. 121 (2) & (3).

36. *Id.* art. 121 (3).

37. *Scarborough Shoal ‘concrete’ looks just like rocks*, SOUTH CHINA MORNING POST, Sep. 14, 2013, available at <http://www.scmp.com/news/china/article/1309410/scarborough-shoal-pictures-cast-doubt-concrete-structure-claims> (last accessed Mar. 1, 2017).

38. UNCLOS, *supra* note 4, art. 13 (1) & (2).

39. *See South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award, ¶¶ 1203 (A) (3) & (B) (14).

40. UNCLOS, *supra* note 4, art. 13 (2).

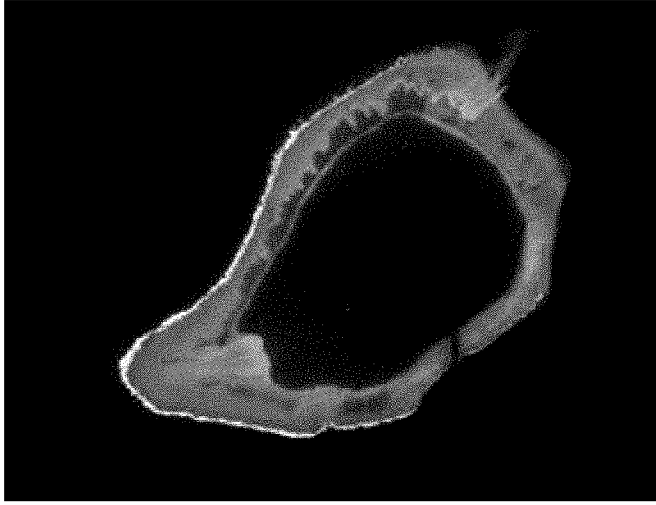


Figure 6. Subi Reef (Low-tide elevation)⁴¹

B. Events Leading up to the Filing of the Case by the Republic of the Philippines

For more than 17 years, the Philippines has sought — rather unsuccessfully — to engage China through several bilateral meetings and numerous exchanges of views and diplomatic correspondences to resolve the disputes concerning entitlements to maritime areas in the West Philippine Sea.⁴²

In 2012, China sent vessels to take control of Scarborough Shoal,⁴³ which is 448.2 NM from its mainland and only 116.2 NM from the Philippines — well within the Philippines' EEZ.⁴⁴ It has since prevented all Philippine vessels, including fishing vessels, from approaching.⁴⁵ Chinese vessels have also prevented the Philippines from exploring for oil at Reed Bank which is only about 85 NM from the Philippine coast.⁴⁶

41. Center for Strategic & International Studies, Subi Reef Tracker: Photo Gallery, available at <https://amti.csis.org/subi-reef> (last accessed Mar. 1, 2017).

42. *South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award on Jurisdiction and Admissibility, ¶¶ 327 & 330-31.

43. *South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award, ¶¶ 1045-58.

44. *Id.* ¶ 284.

45. *Id.* ¶ 1203 (B) (11).

46. *South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award on Jurisdiction and Admissibility, ¶ 169.

China claims that it has rights outside of the UNCLOS based on its historical pre-eminence within this area.⁴⁷ Neither UNCLOS nor customary international law, however, recognizes the concept of “historic rights.”⁴⁸ Towards the end of 2012, and on the heels of China’s increasingly aggressive assertions within the West Philippine Sea, the Philippines, under the leadership of then President Benigno S. Aquino III, was constrained to turn to international law to protect its sovereign rights and heritage. On 22 January 2013, the Philippines filed its Notification and Statement of Claim and brought China to compulsory arbitration under the UNCLOS.⁴⁹

After years and years of unsuccessful bilateral talks, the Philippines came to the conclusion that bilateral diplomacy, by itself, was no longer a viable option.⁵⁰ Diplomatic efforts failed to budge China from its position.⁵¹ For the Philippines, committed as it is to the peaceful resolution of disputes, there was likewise no viable military option.⁵² Thus, under the leadership of then President Aquino III, the country turned to international law and the compulsory and binding dispute settlement procedures of the UNCLOS.⁵³

III. THE PHILIPPINE CASE

A. Notification and Statement of Claim

On 22 January 2013, the Philippines filed its Notification and Statement of Claim.⁵⁴ Its case was carefully crafted as a maritime dispute about the interpretation or application of the UNCLOS.⁵⁵ Essentially, the Philippines sought declarations from the Tribunal in respect of three interrelated matters:

- (1) China is not entitled to exercise ‘historic rights’ over the waters, seabed[,] and subsoil beyond the limits of its entitlements under the Convention in the areas encompassed within its so-called ‘nine-dash line’;

47. *South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award, ¶¶ 186 & 211.

48. *Id.* ¶¶ 224-26.

49. *Id.* ¶ 1114.

50. *South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award on Jurisdiction and Admissibility, ¶ 160.

51. *Id.*

52. Beckman, *supra* note 23, at 163.

53. UNCLOS, *supra* note 4, arts. 286-299.

54. *South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award on Jurisdiction and Admissibility, ¶ 26.

55. *Id.* ¶ 100.

- (2) Various maritime features relied on by China as basis upon which to assert its claims in the South China Sea are not islands that generate entitlement to an [EEZ] or [CS], but are ‘rocks’ within the meaning of [Article 121 (3) of the UNCLOS], or are low-tide elevations or submerged banks incapable of generating such entitlements; and
- (3) China has unlawfully interfered with the exercise of the Philippines’ sovereign rights and freedoms under the UNCLOS and other rules of international law not incompatible with the Convention.⁵⁶

There are more than 600 features in the West Philippine Sea. Given the scarcity of case law interpreting Article 121 of the UNCLOS, our main submission was part of what I called a low-risk strategy, purposely designed to protect the Philippines’ interests in (1) Scarborough Shoal, a traditional fishing ground for Filipino fishermen,⁵⁷ and in (2) Reed Bank, a potentially oil and gas rich area beyond Palawan.⁵⁸

The Philippines’ submissions were, thus, initially limited to Scarborough Shoal and seven features located in the Spratlys Islands, occupied either by the Philippines or by China. These are Cuarteron Reef (Calderon Reef), Gaven Reef (Burgos), McKennan Reef (Chigua Reef), Johnson Reef (Mabini Reef), Fiery Cross Reef (Kagitingan Reef), Mischief Reef (Panganiban), and Subi Reef (Zamora Reef). The Philippines has since sought the Tribunal’s leave to amend its original Statement of Claim to include Second Thomas Shoal,⁵⁹ locally known as Ayungin Shoal,⁶⁰ which has been the locale of tension between Filipino and Chinese forces in the area.⁶¹

56. Memorial of the Philippines, In the Matter of the South China Sea Arbitration (Phil. v. China), P.C.A. Case No. 2013-19, vol. I, ¶ 1.7 (Mar. 30, 2014) [hereinafter Memorial of the Philippines].

57. Gabriel Cardinoza, *Filipino fishermen back from Panatag Shoal with big catch*, PHIL. DAILY INQ., Oct. 30, 2016, available at <https://globalnation.inquirer.net/148316/filipino-fishermen-back-from-panatag-shoal-with-big-catch> (last accessed Mar. 1, 2017).

58. Jaime Laude, *China raring to seize oil-rich Reed Bank — Golez*, PHIL. STAR, Mar. 20, 2014, available at <http://www.philstar.com/headlines/2014/03/20/1302925/china-raring-seize-oil-rich-reed-bank-golez> (last accessed Mar. 1, 2017).

59. *South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award, ¶ 33.

60. *Id.* ¶ 290.

61. *Id.* ¶¶ 1113-17.

The Philippines maintained that five of these features — namely, Gaven Reef, McKennan Reef, Mischief Reef, Second Thomas Shoal, and Subi Reef — are low-tide elevations, thus below water at high tide.⁶² Under the UNCLOS, these are low-tide elevations that do not generate entitlement to any maritime areas.⁶³ While China has built installations on top of some of these submerged features, such as Mischief Reef and Subi Reef,⁶⁴ the Philippines posited that such artificial enhancements do not change the status of the features.⁶⁵ To generate a maritime entitlement, an island has to be naturally-occurring.⁶⁶



Figure 7. Mischief Reef⁶⁷

Further, the Philippines alleged that Scarborough Shoal and the other three Spratly features (Johnson Reef, Cuarteron Reef, and Fiery Cross Reef) occupied or physically controlled by China are rocks,⁶⁸ submerged reefs with tiny parts that project barely above water at high tide,⁶⁹ and are incapable of

62. *Id.* ¶ 292.

63. UNCLOS, *supra* note 4, arts. 13 (1) & (2).

64. *South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award, ¶ 425.

65. *Id.*

66. *Id.* ¶ 481 & UNCLOS, *supra* note 4, art. 121 (1).

67. Kerry Lynn S. Nankivell, China's Most Dangerous Game: Solving the Policy Puzzle of the South China Sea, *available at* <http://apdf-magazine.com/chinas-most-dangerous-game> (last accessed Mar. 1, 2017).

68. *South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award, ¶ 408.

69. *Id.* ¶ 280.

supporting human habitation or economic life of their own.⁷⁰ Under the UNCLOS, these features do not generate maritime entitlements to a 200-NM EEZ or CS.⁷¹



Figure 8. Johnson Reef (Mabini Reef)⁷²

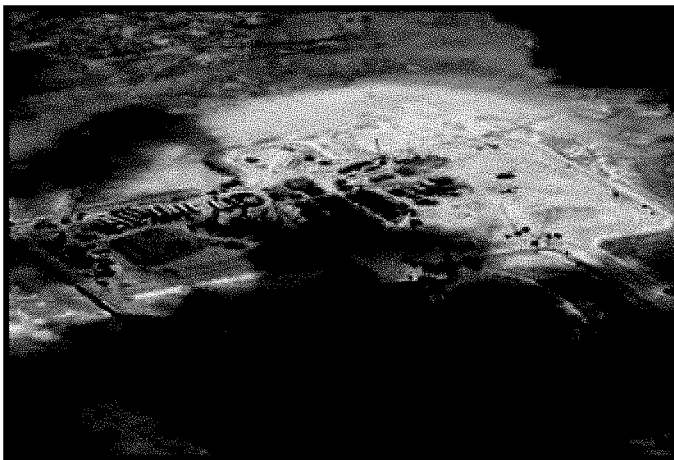


Figure 9. Cuarteron Reef⁷³

70. *Id.*

71. UNCLOS, *supra* note 4, art. 121 (3).

72. Asia Maritime Transparency Initiative & Center for Strategic & International Studies, Johnson Reef Tracker, *available at* <https://amti.csis.org/johnson-reef> (last accessed Mar. 1, 2017).

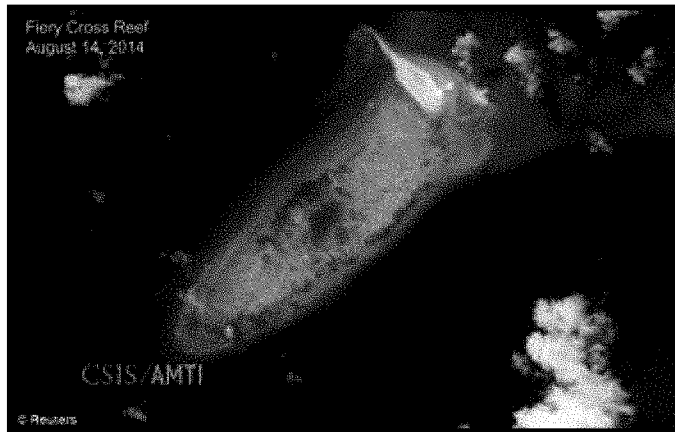


Figure 10. Fiery Cross Reef⁷⁴

It was a low-risk strategy because it presented what we perceived to be an “acceptable” worst case scenario — that is, any or all of the features that the legal team included in the South China Sea Arbitration case would be declared as rocks entitled to a 12-NM TS. Otherwise stated, we were confident that *none* of the features identified by the Philippine legal team would be declared as an island (as defined by the UNCLOS) capable of generating a 200-NM EEZ. More importantly, none of these features would be capable of generating 200-NM EEZ to overlap with *our* EEZ and put Reed Bank at risk.⁷⁵

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73. Asia Maritime Transparency Initiative & Center for Strategic & International Studies, Satellite image of Chinese development on island in Cuarteron reef, available at <http://www.abc.net.au/news/2015-10-10/satellite-image-of-chinese-development-on-island-in-cuarteron-1/6844094> (last accessed Mar. 1, 2017).
74. Jay Akbar, Satellite images reveal China has already constructed 3km runway on island it has formed in disputed ocean territory, available at <http://www.dailymail.co.uk/news/article-3043227/Satellite-images-reveal-China-constructed-3km-runway-island-formed-disputed-ocean-territory.html> (last accessed Mar. 1, 2017).
75. Disagreement within the legal team regarding legal strategy was thereafter used as a basis for a charge against my integrity. Francis H. Jardeleza, Associate Justice of the Supreme Court, *Integrity, Itu Aba and the Rule of Law in the West Philippine Sea Arbitration*, Address at the Integrated Bar of the Philippines Western Visayas Regional Convention in Iloilo City (Oct. 21, 2016).

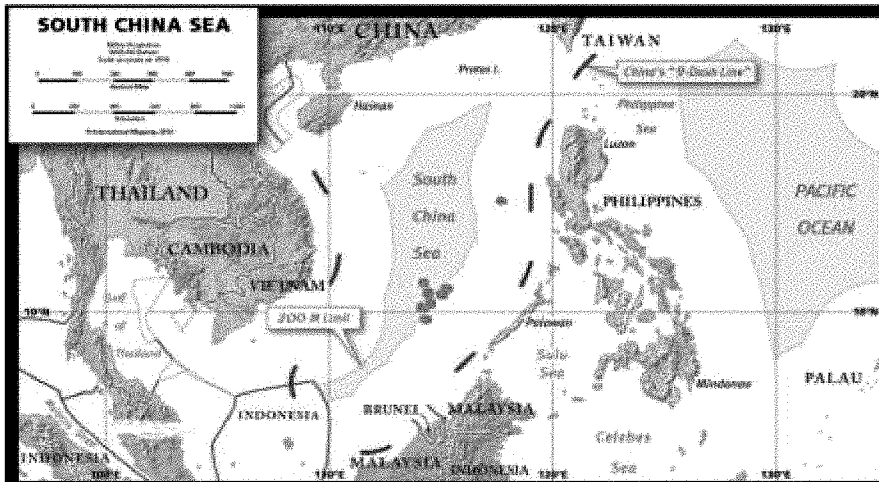


Figure 11. What the Philippines Sought to Achieve⁷⁶

B. Challenges

Generally, all subject matter covered by the UNCLOS is subject to compulsory dispute settlement procedures.⁷⁷ States, however, are permitted to opt out for certain issues, including maritime boundary delimitation under Articles 15, 74, and 83 of the UNCLOS.⁷⁸

In 2006, pursuant to Article 298 of the UNCLOS, China exercised its right to opt out of compulsory dispute settlement for the above issues.⁷⁹ While the Philippines maintained that none of its questions triggers subject matter covered by China's opt-out from compulsory UNCLOS dispute settlement, China has purported to reject the arbitration and return the Notification and Statement of Claim to the Philippines.⁸⁰

China also refused to participate in the proceedings.⁸¹ Despite this, the Tribunal, with the Honorable Judge Thomas A. Mensah sitting as Presiding

76. Image provided by the Legal Team of the Philippines (on file with Author).

77. See UNCLOS, *supra* note 4, art. 279 & U.N. CHARTER art. 33.

78. See UNCLOS, *supra* note 4, arts. 15, 74, 83, & 298.

79. THE SOUTH CHINA SEA: A CRUCIBLE OF REGIONAL COOPERATION OR CONFLICT-MAKING SOVEREIGNTY CLAIMS? 213 (Christopher John Jenner & Tran Truong Thuy eds., 2016).

80. *South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award, ¶ 29.

81. *Id.* ¶ 37.

Arbitrator, was constituted following the procedure set forth under Annex VII of the UNCLOS.⁸²

On 27 August 2013, the Tribunal came out with the Rules of Procedure (Rules) to govern the proceedings.⁸³ Prior to the promulgation of the Rules, the Tribunal sought comments from both China and the Philippines. While the Philippines complied with the Tribunal's requests,⁸⁴ China maintained its decision not to participate.⁸⁵ The Rules have since been published and made available to interested parties through the website of the Permanent Court of Arbitration.⁸⁶

As stated earlier, the Philippines, on 27 February 2013, and pursuant to Article 19 of the Rules, sought leave from the Tribunal to amend its original Statement of Claim to include one additional feature, Second Thomas Shoal.⁸⁷ With this amendment, the Philippines had until 30 March 2014 to file its Memorial, where, as directed by the Tribunal, the Philippines "shall fully address all issues including matters relating to the jurisdiction [of the Tribunal], [the] admissibility [of the Philippines' claim], and the merits of the dispute."⁸⁸

The Tribunal, under the Rules, thereafter determined the further course of the proceedings, including the need for and scheduling of, any other written submissions and hearings, at an appropriate later stage, after seeking the views of the Parties.⁸⁹

China maintained its refusal to participate in the arbitration proceedings.⁹⁰ It did not exercise its right to appoint an arbitrator.⁹¹ Neither did it participate in the appointment of the other three members of the Tribunal.⁹² We maintained, however, that this will not affect the jurisdiction of the Tribunal or the binding nature of its judgment on the merits of the

82. *Id.* ¶ 30.

83. *Id.* ¶ 32.

84. *Id.* ¶¶ 32 & 34.

85. *Id.* ¶ 37.

86. Rules of Procedure, In the Matter of the South China Sea Arbitration (Phil. v. China), P.C.A. Case No. 2013-19 (Aug. 27, 2013).

87. *South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award, ¶ 33.

88. *Id.* ¶ 32.

89. *Id.* ¶¶ 39-40.

90. *Id.* ¶ 42.

91. *Id.* ¶ 30.

92. *Id.*

dispute.⁹³ China will still be legally bound by the Tribunal's ruling, whether it participated or not.⁹⁴

On 7 December 2014, the Chinese Ministry of Foreign Affairs published the "Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines" (Position Paper).⁹⁵ The Position Paper intended to demonstrate that the Tribunal established at the request of the Philippines does not have jurisdiction over the case,⁹⁶ insisting that:

- (1) The essence of the subject-matter of the arbitration is the territorial sovereignty over several maritime features in the South China Sea, which is beyond the scope of the [UNCLOS] and does not concern the interpretation or application of the [UNCLOS];
- (2) China and the Philippines have agreed, through bilateral instruments and the Declaration on the Conduct of Parties in the South China Sea, to settle their relevant disputes through negotiations. By unilaterally initiating the present arbitration, the Philippines has breached its obligation under international law; [and]
- (3) Even assuming[] arguendo[] that the subject-matter of the arbitration [was] concerned with the interpretation or application of the [UNCLOS], that subject-matter would constitute an integral part of maritime delimitation between the two countries, thus falling within the scope of the declaration filed by China in 2006 in accordance with the [UNCLOS], which excludes, inter alia, disputes concerning maritime delimitation from compulsory arbitration and other compulsory dispute settlement procedures[.]⁹⁷

93. *South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award, ¶ 118.

94. *Id.*

95. *Id.* ¶ 13. See Ministry of Foreign Affairs of the People's Republic of China, Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines (Dec. 7, 2014), available at http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml (last accessed Mar. 1, 2017) [hereinafter China's Position Paper].

96. *South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award on Jurisdiction and Admissibility, ¶ 14.

97. China's Position Paper, *supra* note 95, ¶ 3.

After seeking comments from the Philippines, the Tribunal decided to treat the Position Paper, as well as certain communications from China, as constituting, in effect, a plea concerning jurisdiction.⁹⁸ Thus, the Tribunal found it appropriate to bifurcate the proceedings and to convene a hearing to consider the matter of its jurisdiction and, as necessary, the admissibility of the Philippines' submissions.⁹⁹ Accordingly, a hearing which focused on issues of jurisdiction and admissibility was held from 7 to 13 July 2015,¹⁰⁰ while a hearing on the merits was held from 24 to 30 November 2015.¹⁰¹

IV. RULING OF THE ARBITRAL TRIBUNAL

On 29 October 2015, the Tribunal issued its Award on Jurisdiction and Admissibility.¹⁰² It unanimously found, among others, that the Philippines' submissions are not disputes concerning sovereignty or maritime boundary limitation, to which it would not have jurisdiction.¹⁰³

On 12 July 2016, the Tribunal issued its Award on the Merits,¹⁰⁴ agreeing with almost all of the 15 submissions by the Philippines.¹⁰⁵ It found, among others, that:

98. *South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award on Jurisdiction and Admissibility, ¶ 15.

99. *Id.* ¶ 68.

100. Department of Foreign Affairs — Foreign Service Institute, West Philippine Sea Arbitration Update VI: Philippines Presents Oral Arguments on the Arbitral Tribunal's Jurisdiction over the Case against China, at 1, available at <http://www.fsi.gov.ph/wp-content/uploads/2014/07/2015-WPS-Update-6-July-2015-FINAL.pdf> (last accessed Mar. 1, 2017).

101. Department of Foreign Affairs — Foreign Service Institute, West Philippine Sea Arbitration Update VII: The Philippines Presents Merits of the Case before the Arbitral Tribunal, at 1, available at <http://www.fsi.gov.ph/wp-content/uploads/2015/12/2015-WPS-Update-7-Dec-2015-CS6-FINAL.pdf> (last accessed Mar. 1, 2017) [hereinafter DFA, Arbitration Update VII].

102. *South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award, ¶ 97 & DFA, Arbitration Update VII, *supra* note 101, at 1.

103. *South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award, ¶ 170.

104. Permanent Court of Arbitration, PCA Press Release: The South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China) at 6, available at <https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Press-Release-No-11-English.pdf> (last accessed Mar. 1, 2017).

105. *South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award on Jurisdiction and Admissibility, ¶¶ 101 & 390-412. On the basis of the facts and law set forth

in its Memorial, the Philippines requested the Tribunal to adjudge and declare that:

- (1) China's maritime entitlements in the South China Sea, like those of the Philippines, may not extend beyond those expressly permitted by the [UNCLOS];
- (2) China's claims to sovereign rights jurisdiction, and to 'historic rights[,] with respect to the maritime areas of the South China Sea encompassed by the so-called 'nine-dash line' are contrary to the [UNCLOS] and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements expressly permitted by UNCLOS;
- (3) Scarborough Shoal generates no entitlement to an [EEZ] or [CS];
- (4) Mischief Reef, Second Thomas Shoal, and Subi Reef are low-tide elevations that do not generate entitlement to a [TS], [EEZ,] or [CS], and are not features that are capable of appropriation by occupation or otherwise;
- (5) Mischief Reef and Second Thomas Shoal are part of the [EEZ] and [CS] of the Philippines;
- (6) Gaven Reef and McKennan Reef (including Hughes Reef) are low-tide elevations that do not generate entitlement to a [TS], [EEZ,] or [CS], but their low-water line may be used to determine the baseline from which the breadth of the territorial sea of Namyit and Sin Cowe, respectively, is measured;
- (7) Johnson Reef, Cuarteron Reef[,] and Fiery Cross Reef generate no entitlement to an [EEZ] or [CS];
- (8) China has unlawfully interfered with the enjoyment and exercise of the sovereign rights of the Philippines with respect to the living and non-living resources of its [EEZ] and [CS];
- (9) China has unlawfully failed to prevent its nationals and vessels from exploiting the living resources in the [EEZ] of the Philippines;
- (10) China has unlawfully prevented Philippine fishermen from pursuing their livelihoods by interfering with traditional fishing activities at Scarborough Shoal;
- (11) China has violated its obligations under the [UNCLOS] to protect and preserve the marine environment at Scarborough Shoal, Second Thomas Shoal, Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef[,] and Subi Reef;
- (12) China's occupation of and construction activities on Mischief Reef:
 - (a) violate the provisions of the [UNCLOS] concerning artificial islands, installations[,] and structures;
 - (b) violate China's duties to protect and preserve the marine environment under the [UNCLOS]; and

- (1) The nine-dash line is contrary to the UNCLOS and has no basis in law;¹⁰⁶
- (2) The Scarborough Shoal and five other reefs named in the Philippines' submission — Gaven Reef (North), McKennan Reef, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef — are rocks that generate no entitlements to an EEZ or CS;¹⁰⁷
- (3) Mischief Reef, Second Thomas Shoal, and Reed Bank are submerged at high tide, are part of the EEZ and CS of the Philippines, and are not overlapped by any possible entitlement of China;¹⁰⁸ and

(c) constitute unlawful acts of attempted appropriation in violation of the [UNCLOS];

- (13) China has breached its obligations under the [UNCLOS] by operating its law enforcement vessels in a dangerous manner, causing serious risk of collision to Philippine vessels navigating in the vicinity of Scarborough Shoal;
- (14) Since the commencement of this arbitration in January 2013, China has unlawfully aggravated and extended the dispute by, among other things:
 - (a) interfering with the Philippines' rights of navigation in the waters at, and adjacent to, Second Thomas Shoal;
 - (b) preventing the rotation and resupply of Philippine personnel stationed at Second Thomas Shoal;
 - (c) endangering the health and well-being of Philippine personnel stationed at Second Thomas Shoal; and
 - (d) conducting dredging, artificial island-building[,] and construction activities at Mischief Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef, Johnson Reef, Hughes Reef[,] and Subi Reef; and
- (15) China shall respect the rights and freedoms of the Philippines under the [UNCLOS], shall comply with its duties under the [UNCLOS], including those relevant to the protection and preservation of the marine environment in the South China Sea, and shall exercise its rights and freedoms in the South China Sea with due regard to those of the Philippines under the [UNCLOS].

Memorial of the Philippines, *supra* note 56, vol. I, at 271-72.

106. Permanent Court of Arbitration, *supra* note 104, at 2 & *South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award, ¶ 631.

107. *South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award, ¶ 1203 (B) (6).

108. *Id.* ¶¶ 693-95.

- (4) Reed Bank is an entirely submerged reef formation that cannot give rise to maritime entitlements.¹⁰⁹

The Tribunal's ruling thus clarified the respective entitlements as follows:

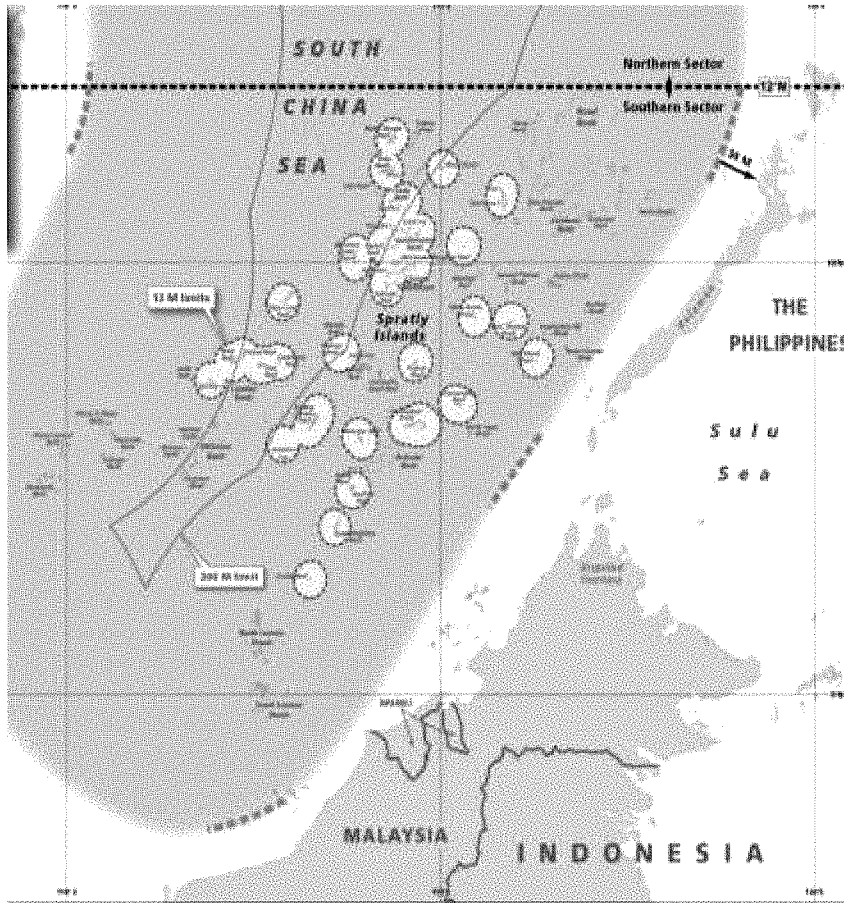


Figure 12. Respective maritime entitlements of Spratlys features as per the ruling of the Tribunal¹¹⁰

The Tribunal also ruled that: (1) Scarborough Shoal has been a traditional fishing ground for fishermen of many nationalities¹¹¹ and that China has unlawfully prevented Filipino fishermen from engaging in

109. *Id.* ¶¶ 1203 (A) (3) (b) & (c).

110. Image provided by the Legal Team of the Philippines (on file with Author).

111. *South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award, ¶¶ 761 & 805.

traditional fishing thereat;¹¹² (2) China violated its obligations under the UNCLOS to protect and preserve the marine environment;¹¹³ and (3) China has engaged in the construction of artificial islands, installations, and structures at Mischief Reef without the authorization of the Philippines.¹¹⁴

With this Award, issued by a distinguished panel of impartial legal experts, the rights and obligations of the parties under the UNCLOS are now clarified.

V. CONCLUSION

From the beginning, the Philippines has always been keenly aware of the possible repercussions — be it political, diplomatic, or economic — any of our actions will have on its relations with its neighbors in Asia, not to mention, to the ultimate resolution of the issues in the South China Sea. Our policymakers have considered and weighed expected gains against possible hardships.

Small, however, we are as a nation, it was prepared to protect its heritage as well as its rights under international law.¹¹⁵ We are committed to the furtherance of the Rule of Law and to the peaceful resolution of the present dispute.¹¹⁶ Pending any agreement between the concerned States as to disposition of maritime rights and entitlements in the disputed areas, it has turned to international law to clarify some of the issues besetting the South China Sea.¹¹⁷

The Award issued pursuant to the compulsory procedure under Section 2 of Part XV of the UNCLOS is binding on China.¹¹⁸ Some have asked — what if China does not accept the Tribunal's ruling? What if it refuses to comply? In the first place, and as a strictly legal matter, China will be obligated to comply with the ruling.¹¹⁹ If it does not, it will be in clear and open violation of its international legal obligations.¹²⁰ That, in turn, would be a large blow to China's international prestige and influence. It would be

112. *Id.* ¶ 814.

113. *Id.* ¶¶ 966 & 983.

114. *Id.* ¶ 1203 (B) (14) (a).

115. DFA, Arbitration Update VII, *supra* note 101, at 3.

116. *Id.* at 1.

117. *Id.* at 3.

118. *See* UNCLOS, *supra* note 4, art. 296 (1).

119. *Id.*

120. *See* UNCLOS, *supra* note 4, art. 235 (1).

difficult for China to present itself as a responsible and law-abiding member of the international community if it were to brand itself as an international outlaw by blatantly defying an international arbitral award that is seen by the rest of the world as fair and just, and as reflecting the established rules of international law. Sooner or later, China will have to find a way to bring itself back within the international legal order, and will have to adjust its policies in the South China Sea to the requirements of the UNCLOS and international law generally.

We are nevertheless aware that, in the final analysis, the disputes in the South China Sea will have to be resolved diplomatically — that is, by agreement between the various States.¹²¹ In fact, nearly 15 years after the Declaration of Conduct of Parties in the South China Sea,¹²² the Philippines has not given up on diplomatic efforts to convince China and the other concerned States, to agree to a binding Code of Conduct to govern relations in the South China Sea pending an acceptable resolution of the disputes.¹²³

It has been the consistent view of the legal team of the Philippines that the Award will be a potent legal platform as the country moves forward to the political and diplomatic phase of our goal of effectively asserting our maritime entitlements under the UNCLOS.¹²⁴ The country's goal of securing its maritime entitlements and, ultimately, its territorial integrity, is a process that will take time. However, with this legal advantage, the Chief Diplomat and Architect of the country's foreign policy, President Rodrigo R. Duterte, can now proceed with the necessary tools at his disposal to get the job done.¹²⁵

121. See Fiona Nicolas, Top Filipino legal minds applaud Arbitral Tribunal's decision, advise Duterte to proceed with caution, *available at* <http://cnnphilippines.com/news/2016/07/12/permanent-arbitration-court-arbitral-tribunal-philippines-south-china-sea-duterte.html> (last accessed Mar. 1, 2017).

122. Association of Southeast Asian Nations, Declaration on the Conduct of Parties in the South China Sea, *available at* http://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2 (last accessed Mar. 1, 2017).

123. *South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award on Jurisdiction and Admissibility, ¶ 14.

124. Nicolas, *supra* note 121.

125. *Id.*