

# The South China Sea PCA Award and Economic Implications for Philippine EEZ Rights

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## I. INTRODUCTION

*The South China Sea Arbitration Award*<sup>1</sup> (SCS Award) of 12 July 2016 is a landmark ruling in terms of defining and providing guidance on how the

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The Authors views are purely personal and academic and do not purport to represent any official views of the Philippine Government.

1. In the Matter of the South China Sea Arbitration (Phil. v. China), P.C.A. Case No. 2013-19 (July 12, 2016).

1982 United Nations Convention on the Law of the Sea<sup>2</sup> (UNCLOS) governs the rights of the parties, particularly economic and related rights, in the South China Sea,<sup>3</sup> including the areas covered by each countries' territorial sea, continental shelf, archipelagic waters, and exclusive economic zone (EEZ).<sup>4</sup>

In 2002, the Philippines, together with all the other ASEAN member States, and China, signed the Declaration on the Conduct of Parties in the South China Sea (ASEAN Declaration),<sup>5</sup> which significantly stated in its premiere paragraph that

[t]he Parties reaffirm their commitment to the purposes and principles of the Charter of the United Nations, the 1982 [UNCLOS], the Treaty of Amity and Cooperation in Southeast Asia, the Five Principles of Peaceful Coexistence, and other universally recognized principles of international law which shall serve as the basic norms governing State-to-State relations.<sup>6</sup>

The ASEAN Declaration was a preliminary step to building trust and confidence. Partly due to the failure of the Parties to agree upon a binding Code of Conduct as called for by Paragraph 10 of the Declaration in 2013,<sup>7</sup> the Philippines was constrained to file an arbitration case to obtain legal clarification of its rights and entitlements under UNCLOS as it relates to its

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2. 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].
  3. See 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, 142 (2013).
  4. See UNCLOS, *supra* note 2, arts. 17, 25, 38, 51-53, 56, 58-59, 69-72, & 77-78.
  5. 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](http://asean.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2) (last accessed Mar. 1, 2017) [hereinafter Declaration].
  6. *Id.*
  7. See Albert F. del Rosario, Secretary of Foreign Affairs, *Why the Philippines Brought This Case to Arbitration and its Importance to the Region and the World*, Address at the Permanent Court of Arbitration Peace Palace, The Hague, Netherlands (July 7, 2015) (transcript *available at* <http://www.dfa.gov.ph/88-the-secretary-s-speeches/6820-statement-before-the-permanent-court-of-arbitration-peace-palace-the-hague-netherlands> (last accessed Mar. 1, 2017)). Paragraph 10 provides that “[t]he Parties concerned reaffirm the adoption of a code of conduct in the South China Sea would further promote peace and stability in the region and agree to work, on the basis of consensus, towards the eventual attainment of this objective.” Declaration, *supra* note 5.

EEZ and features found in the South China Sea, that were subject of increased activity,<sup>8</sup> as well as continuing conflicting claims of sovereignty.<sup>9</sup>

The Tribunal constituted under the auspices of the Permanent Court of Arbitration (PCA), in issuing the SCS Award, made a legal determination on three major economic law questions that required a combined legal and scientific perspective. These would have far-reaching implications for interpreting provisions of the UNCLOS mainly in favor of the Philippines, with some qualifications. The three elemental questions are:

- (1) Whether certain features were owned or capable of ownership or dominion and sovereignty;
- (2) Whether there were any overlapping EEZs, and the related question of which features generate an EEZ; and
- (3) Whether there still existed any legally recognized traditional fishing rights in the EEZs.

These three economic law questions are key and, to any economic law analyst, of foundational importance to finding a political and legal solution to the territorial and maritime disputes. Absent a legal finding or determination that there is, in fact, only one 200-mile EEZ in play — that of the Philippines — the number of potential EEZs in the South China Sea that corresponds to the West Philippine Sea area would continue to be ambiguous,<sup>10</sup> i.e., there would be instability in the areas of sovereign rights jurisdictions, such as whether in fact there were other EEZ entitlements or overlapping economic rights in favor of China or Vietnam.<sup>11</sup> Similarly, should certain low-tide elevations, of which there are many in the South China Sea area, be capable of dominion or ownership, then there would be the unending question of certain features being perennial sources of disputed sovereignty.<sup>12</sup> If, however, they are incapable of sovereign dominion, then they are features belonging to no single State, but rather, to the common heritage of mankind (similar to the Antarctic regions or Outer Space,

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8. See Patrick M. Cronin, *The Rise of Tailored Coercion in the South China Sea*, in PERSPECTIVES ON THE SOUTH CHINA SEA 25 (Murray Hiebert, et al. eds., 2014).

9. See Beckman, *supra* note 3.

10. *Id.* at 151.

11. *Id.* at 152.

12. *Id.*

including the moon).<sup>13</sup> Such features would be subject only to the coastal State's EEZ rights and entitlements.<sup>14</sup>

In sum, should there be an issue of overlapping EEZs, a more complex situation that will require a more complex analysis and determination arises.<sup>15</sup> Should there be no such overlapping issue, then the applicable UNCLOS provisions would more easily resolve rights and obligations among the parties.<sup>16</sup>

In its submissions, it is stated that

the Philippines has asked the Tribunal to resolve a dispute between the Parties concerning the entitlements to maritime zones that would be generated under the Convention by Scarborough Shoal and certain maritime features in the Spratly Islands that are claimed by both the Philippines and China. The Convention provides that submerged banks and low-tide elevations are incapable on their own of generating any entitlements to maritime areas and that '[r]ocks which cannot sustain human habitation or economic life of their own' do not generate an entitlement to an [EEZ] of 200 nautical miles or to a continental shelf. The Philippines seeks a declaration that all of the features claimed by China in the Spratly Islands, as well as Scarborough Shoal, fall within one or the other of these categories and that none of these features generates an entitlement to an [EEZ] or to a continental shelf.<sup>17</sup>

The SCS Award, in turn, provided unprecedented clarity and guidance on which features were permanently *res nullius* (belonging to no one).<sup>18</sup> It also provided that the areas in question in the South China Sea contained no overlaps of EEZs, but rather a *singular* EEZ, that of the Philippines, and capable of identification as the West Philippine Sea<sup>19</sup> —

309. ... *the Tribunal subscribes to the view that* 'low-tide elevations cannot be appropriated, although 'a coastal State has sovereignty over low-tide

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13. See UNCLOS, *supra* note 2, pmb. & arts. 136-137.

14. *Id.* art. 60 & *South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award, ¶ 1041.

15. See Robert C. Beckman & Leonardo Bernard, *Disputed Areas in the South China Sea: Prospects for Arbitration or Advisory Opinion at 6*, available at <http://cil.nus.edu.sg/wp/wp-content/uploads/2009/09/Beckman-Bernard-Paper-DAV-Conf-3-5-Nov-2011.pdf> (last accessed Mar. 1, 2017).

16. See UNCLOS, *supra* note 2, art. 56.

17. *South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award, ¶ 8.

18. *Id.* ¶¶ 307-309.

19. *Id.* ¶ 1203.

elevations which are situated within its territorial sea, since it has sovereignty over the territorial sea itself.’

1203. ...

A. *In relation to its jurisdiction, the Tribunal:*

...

(2) [finds], with respect to the Philippines’ Submission No. 5:

...

- b. that Mischief Reef and Second Thomas Shoal are low-tide elevations and, as such, generate no entitlement to maritime zones of their own;
- c. *that there are no overlapping entitlements to an [EEZ] or continental shelf in the areas of Mischief Reef or Second Thomas Shoal[.]*

...

(3) [finds], with respect to the Philippines’ Submissions No. 8 and 9:

...

- b. that Mischief Reef and Second Thomas Shoal are low-tide elevations and, as such, generate no entitlement to maritime zones of their own;
- c. *that there are no overlapping entitlements to an [EEZ] or continental shelf in the areas of Mischief Reef or Second Thomas Shoal[.]*

...

(5) [finds], with respect to the Philippines’ Submissions No. 12(a) and 12(c):

...

- b. that Mischief Reef and Second Thomas Shoal are low-tide elevations and, as such, generate no entitlement to maritime zones of their own;
- c. *that there are no overlapping entitlements to an [EEZ] or continental shelf in the areas of Mischief Reef or Second Thomas Shoal[.]*

...

B. *In relation to the merits of the Parties’ disputes, the Tribunal:*

(2) [declares] that ... *the Convention superseded any historic rights, or other sovereign rights or jurisdiction, in excess of the limits imposed therein;*

...

(4) [declares] that, as low-tide elevations, *Mischief Reef[,] Second Thomas Shoal[,] ...*

(5) ... *Subi Reef, Gaven Reef (South), and Hughes Reef do not generate entitlements to a territorial sea, [EEZ], or continental shelf and are not features that are capable of appropriation ... ;*

(6) [declares] that *Scarborough Shoal, Gaven Reef (North), McKennan Reef, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef ... generate no entitlement to an [EEZ] or continental shelf;*

(7) [finds] ...

...

b. that *none of the high-tide features in the Spratly Islands generate entitlements to an [EEZ] or continental shelf;* and

c. that *therefore there is no entitlement to an [EEZ] or continental shelf generated by any feature claimed by China that would overlap the entitlements of the Philippines in the area of Mischief Reef and Second Thomas Shoal;* and

[declares] that *Mischief Reef and Second Thomas Shoal are within the [EEZ] and continental shelf of the Philippines[.]*<sup>20</sup>

Hence, this ruling has landmark implications in determining that the Philippines is the only coastal State, in relation to China, that possesses an EEZ within the subject waters of *The South China Sea Arbitration*.<sup>21</sup> At the same time, however, it must be borne in mind that certain features, the low-tide elevations, while subject to Philippine regulation, are not themselves features that are Philippine-owned as they are *incapable of appropriation*.<sup>22</sup> With regard to fishing, as will be discussed later in the Article, the SCS Award affirmed traditional international law principles for regulating

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20. *Id.* ¶¶ 309 & 1203 (emphases supplied).

21. *Id.* ¶ 1203.

22. *Id.* ¶ 1040.

internationally shared fishing rights with a few refinements<sup>23</sup> post-*Eritrea v. Yemen*.<sup>24</sup>

## II. PHILIPPINE EEZ ENTITLEMENTS AND RIGHTS TO LIVING AND NON-LIVING RESOURCES

The conflict in the South China Sea areas arose due, in part, to the interest in utilizing its rich natural resources that ranges from oil and gas to a vast and diverse fishing ground.<sup>25</sup> The resource rich areas of the “Mischief Reef, Second Thomas Shoal, the GSEC101 block, Area 3, Area 4, or the SC58” were ruled to be within the EEZ and continental shelf of the Philippines.<sup>26</sup> The PCA effectively recognized that the Philippines “possesses sovereign rights with respect to resources in these areas.”<sup>27</sup>

The aforementioned application of the UNCLOS affirms the policy of the Convention on “proximity,” or granting the regulatory control over natural resources to the closest coastal State.<sup>28</sup> According to Eric A. Posner and Alan O. Sykes, the logic behind this rule is due to the close distance of coastal seas which makes the said area “easy to patrol, and ... [the] living resources [therein] ... comparatively cheap to exploit for nearby actors ... which gives ... the State closest to the resources ... a cost advantage in exploiting ... and in regulating [them] to prevent overexploitation or excessive search.”<sup>29</sup>

The EEZ system of the UNCLOS was reached as a compromise between two opposing sides,<sup>30</sup> the “territorialists[,] mainly [comprised of] developing countries, [which] saw the EEZ as an extension of national jurisdiction,”<sup>31</sup> and “the maritime powers, led by the United States and the

23. See *South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award, ¶¶ 255-60.

24. See Award of the Arbitral Tribunal in the Second Stage of the Proceedings between Eritrea and Yemen (Maritime Delimitation) (Eri./Yemen), 22 R.I.A.A. 335 (1999).

25. *South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award, ¶ 3.

26. *Id.* ¶ 697.

27. *Id.*

28. Eric A. Posner & Alan O. Sykes, *Economic Foundations of the Law of the Sea*, 104 AM. J. INT'L L. 569, 575-76 (2010).

29. *Id.* at 576.

30. MALCOLM N. SHAW, INTERNATIONAL LAW 420 (7th ed., 2014).

31. Sam Bateman, *The Regime of the Exclusive Economic Zone: Military Activities and the Need for Compromise?*, in LAW OF THE SEA, ENVIRONMENTAL LAW AND

then Soviet Union, who saw the zone as *a part of the high seas* where coastal States had some rights over offshore resources.”<sup>32</sup> Hence, the EEZ is considered as “a separate zone in its own right (*sui generis*),” which is “neither high seas nor territorial sea.”<sup>33</sup>

This led to the now established law and rule in UNCLOS that keeps as entirely distinct, albeit confusing, the two concepts of “sovereignty” (full ownership) and “sovereign rights” (less than full ownership). Article 56 (1) (a) of the UNCLOS provides the key compromise definition of the economic and legal rights of nations in the EEZ —

[S]overeign rights for the purpose of *exploring and exploiting, conserving and managing the natural resources, whether living or non-living*, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents[,] and winds[.]<sup>34</sup>

Non-living resources,<sup>35</sup> such as hydrocarbon deposits found in the seabed of the EEZ,<sup>36</sup> are clearly under the SCS Award, exclusively for disposition and exploitation of the Philippines.<sup>37</sup> This has obviously large and positive economic impact and benefit for the Philippines, having achieved the level of clarity under international law required by major multinational energy companies. This finding of the tribunal, however, avoids ruling, and effectively exempts from its coverage, on the particular landmasses or high-tide elevations that are ipso facto capable of territorial appropriation.<sup>38</sup> Evident from the SCS Award, no finding that high-tide elevations, such as

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SETTLEMENT OF DISPUTES 570 (Tafsir Malick Ndiaye & Rüdiger Wolfrum, eds., 2007).

32. *Id.* (emphasis supplied).

33. *Id.*

34. UNCLOS, *supra* note 2, art. 56 (1) (a) (emphases supplied).

35. Non-living resources include placer deposits, phosphorite deposits, evaporite deposits, polymetallic sulphides, polymetallic manganese nodules and cobalt-rich ferromanganese crusts, hydrocarbons, and gas hydrate. See International Seabed Authority, Non-living Resources of the Continental Shelf Beyond 200 Nautical Miles: Speculations on the Implementation of Article 82 of the United Nations Convention of the Law of the Sea (Technical Study No. 5 of the International Seabed Authority) at 22-28, available at <https://www.isa.org.jm/sites/default/files/files/documents/techstudy5.pdf> (last accessed Mar. 1, 2017).

36. *Id.*

37. *South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award, ¶ 698.

38. See *South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award.



Scarborough Shoal, are part of the Philippine dominion or Philippine EEZ was made, nor was there any ruling on whether or not such features are part of any other nation's dominion or sovereignty.<sup>39</sup>

As regards the second element of EEZ rights, those that relate to living resources in the Philippine EEZ, one must keep in mind that UNCLOS provides conflicting treatment. While utilization for non-living resources, such as oil and gas rights, are generally exclusive to the coastal State,<sup>40</sup> the rules on utilization of living resources lean towards providing regulatory, cooperative, and optimal economic rights,<sup>41</sup> rather than affirm any one country's exclusive utilization.

Living resources within the EEZ, as treated in Articles 61 to 68 of the UNCLOS, pertain "to non-sedentary species found in the water column superjacent to the seabed, including marine mammals, highly migratory species, shared and straddling stocks, anadromous and catadromous species, and sedentary species of the seabed and its subsoil."<sup>42</sup>

Under Articles 61 to 68 of the UNCLOS, the Philippines has the primary right to determine the level of marine life utilization and promoting the optimum utilization of such resources<sup>43</sup> —

Article 61

Conservation of the living resources

1. The coastal State shall determine the allowable catch of the living resources in its [EEZ].
2. The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the [EEZ] is not endangered by over-exploitation. As appropriate, the coastal State and competent international organizations, whether subregional, regional or global, shall cooperate to this end.

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39. *Id.*

40. *See* UNCLOS, *supra* note 2, art. 77.

41. *Id.* art. 62.

42. Zhen Sun, Conservation and Utilization of the Living Resources in the Exclusive Economic Zone — How Far Can We Go? (Paper from the Law of the Sea Institute Conference in 2012) at 3-4, *available at* <https://www.law.berkeley.edu/files/Sun-final.pdf> (last accessed Mar. 1, 2017) (citing UNCLOS, *supra* note 2, arts. 61-68 & 77 (4)).

43. *See* UNCLOS, *supra* note 2, arts. 61-68.

## Article 62

## Utilization of the living resources

1. The coastal State shall promote the objective of optimum utilization of the living resources in the [EEZ] without prejudice to [A]rticle 61.
2. The coastal State shall determine its capacity to harvest the living resources of the [EEZ]. Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall ... give other States access to the surplus of the allowable catch, having particular regard to the provisions of [A]rticles 69 and 70[.]<sup>44</sup>

Resource sharing is, therefore, an important economic law feature of Philippine EEZ rights under UNCLOS, as, for example, the provisions that allow for other nations to participate in utilizing the surplus of the living resources in a coastal state's EEZ.<sup>45</sup> Furthermore, the system of international cooperation for naturally shared resources seems to be encouraged, such as that relating to highly migratory species under Article 64 of the UNCLOS, which impacts on the Philippine EEZ fisheries stock —

## Article 64

## Highly migratory species

1. *The coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall cooperate ... with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the [EEZ].*<sup>46</sup>

Certainly, these highly migratory species, especially tuna and mackerel, are of high value to Philippine economic entitlements and rights in the Philippine EEZ, and are of importance to Philippine fishermen.<sup>47</sup>

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44. UNCLOS, *supra* note 2, arts. 61-62.

45. *Id.* arts. 62 (2)-(3), 69 (1), & 70 (1).

46. *Id.* art. 64 (emphases supplied). Examples of highly migratory species include albacore, bluefin, and yellowfin tuna. See Food and Agriculture Organization of the United Nations Fisheries and Aquaculture Department, Highly Migratory Species, available at <http://www.fao.org/docrep/009/a0653e/a0653e05.htm> (last accessed Mar. 1, 2017).

47. See Food and Agricultural Organization of the United Nations Fisheries and Aquaculture Department, Annex 1. State of fisheries and aquaculture in the Asia-Pacific region, available at <http://www.fao.org/docrep/003/x6951e/x6951e0a.htm> (last accessed Mar. 1, 2017).

Fishing rights have been a contentious subject since the origins of the UNCLOS. This topic was credited as one of the reasons why the concept of the EEZ was developed.<sup>48</sup> The concept started with the European Fisheries Convention of 1964<sup>49</sup> which gave the coastal state an “exclusive right to fish and exclusive jurisdiction in matters of fisheries within the belt of six miles measured from the baseline of its territorial sea.”<sup>50</sup> The International Court of Justice then proclaimed in the Fisheries Jurisdiction Case<sup>51</sup> that “the concept of the fishing zone ... had [crystallized] as customary law in recent years[.]”<sup>52</sup> The aforesaid case, however, stressed that such right is only present when the ones fishing have “special dependence on coastal fisheries.”<sup>53</sup> In *Eritrea v. Yemen*, with regard to artisanal fishing or traditional fishing, the court held that “the traditional fishing regime around the Hanish and Zuqar Islands and the islands of Jabal al-Tayr and the Zubayr group is one of free access and enjoyment for the fishermen of both Eritrea and Yemen.”<sup>54</sup>

The SCS Award, however, held that fishing rights are conferred differing treatment across the different maritime zones, particularly in archipelagic waters and territorial seas where traditional fishing rights are protected, and in the EEZ where the said right is extinguished.<sup>55</sup> Paragraph 804 of the SCS Award states that —

[T]herefore, traditional fishing rights are accorded differing treatment across maritime zones:

...

- (b) In the [EEZ], in contrast, traditional fishing rights are extinguished, except insofar as Article [62 (3)] specifies that ‘the need to minimize economic dislocation in States whose nationals have habitually fished in the zone’ shall constitute one of the factors to be taken into account by the [coastal] State in giving access to any surplus in the allowable catch. ... .

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48. SHAW, *supra* note 30, at 421.

49. Convention on Fishing and Conservation of the Living Resources, *signed* Apr. 29, 1958, 581 U.N.T.S. 57 (entered into force Mar. 15, 1966).

50. *Id.* art. 2.

51. Fisheries Jurisdiction Case (U.K. v. Ice.), Merits Judgment, 1974 I.C.J. 3 (July 25).

52. SHAW, *supra* note 30, at 421 (citing *Fisheries Jurisdiction*, 1974 I.C.J. at 23, ¶ 52).

53. *Fisheries Jurisdiction*, 1974 I.C.J. at 25, ¶ 55.

54. *Maritime Delimitation*, 22 R.I.A.A. at 359, ¶ 101.

55. *See South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award, ¶ 804.

- (c) Finally, in the territorial sea, the Convention continued the existing legal regime largely without change. The innovation in the Convention was the adoption of an agreed limit of 12 nautical miles on the breadth of the territorial sea, not the development of its legal content.<sup>56</sup>

Clearly, then, the Philippines and China must acknowledge traditional fishing rights only in their territorial waters, which is only up to 12 nautical miles from the baseline.<sup>57</sup> Furthermore, the SCS Award also gave significance to Article 62 (3) of the UNCLOS which specifies “the need to minimize economic dislocation in States whose nationals have habitually fished in the zone[.]”<sup>58</sup>

The Tribunal ruled that the inclusion of such statement in the provision demonstrates that the drafters of the UNCLOS did not intend to preserve the aforementioned rights within the EEZ.<sup>59</sup> Nevertheless, the coastal state is not precluded, but is, in fact, encouraged by the SCS Award “to [recognize] traditional fishing rights in the [EEZ] in their legislation, in bilateral fisheries access agreements, or through regional fisheries management organizations” within its EEZ.<sup>60</sup>

In applying the same to the Scarborough Shoal, a high-tide feature “that would generate its own entitlements to a territorial sea,”<sup>61</sup> the SCS Award, while refusing to rule on the question of which country has sovereignty over the same,<sup>62</sup> provided guidance that, in any case, affirmed fishing rights for Philippine fishermen. However, Article 62 (3) of the UNCLOS, which the Tribunal cited, would require the Philippines to also, in the same vein, grant access to fishermen regardless of their nationality, so long as they have been habitually fishing within the said zone.<sup>63</sup>

In sum, therefore, Philippine fisheries rights in the EEZ are certainly clear and were affirmed by the tribunal,<sup>64</sup> but the exercise of these rights under UNCLOS requires a spirit of international and regional cooperation

56. *Id.*

57. *See* UNCLOS, *supra* note 2, art. 3.

58. UNCLOS, *supra* note 2, art. 62 (3).

59. *See South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award, ¶ 243.

60. *South China Sea Arbitration*, P.C.A. Case No. 2013-19, Award, ¶ 804.

61. *Id.* ¶ 750.

62. *Id.* ¶ 793.

63. *See* UNCLOS, *supra* note 2, art. 62 (3).

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

and environmental consciousness. This, therefore, is aligned with the concept of responsible ownership and stewardship that is progressively becoming a standard under international rule of law principles.

### III. CONCLUSION

The SCS Award, while not expressly acknowledged by China,<sup>65</sup> affirms certain established international law principles and, being well-established, should be capable of manifesting themselves through diplomatic dialogue.

On living resources like fish stock utilization, a particular example would be the turn of events in the Scarborough Shoal area in October 2016. As reported in the press, Philippine Defense Secretary Delfin N. Lorenzana was quoted as saying that “there are no longer Chinese ships, coastguard[,] or navy[ ] in the Scarborough [Shoal] area.”<sup>66</sup> The Chinese Foreign Ministry spokesman, Lu Kang, was also quoted as stating that “China and the Philippines were able to work together on issues regarding the South China Sea and appropriately resolve disputes.”<sup>67</sup>

As regards oil and gas and non-living resources, for the Philippines, being the sole possessor of EEZ rights and entitlements, issues of sovereign dominion rights remain alive and unresolved. There remain areas that belong to territorial sea zones under UNCLOS, which are not part of the Philippine EEZ, but may belong to the territory of the Philippines or other claimants, that have not yet been ruled upon by any international tribunal. For this purpose then, one can also recall the question of limitations to the proximity rule. As Posner and Sykes point out, proximity “cannot be the sole consideration in the choices that must be made in devising ... [the] UNCLOS.”<sup>68</sup>

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65. See Tom Phillips, et al., *Beijing rejects tribunal's ruling in South China Sea case*, GUARDIAN, July 12, 2016, available at <https://www.theguardian.com/world/2016/jul/12/philippines-wins-south-china-sea-case-against-china> (last accessed Mar. 1, 2017).

66. Ankit Panda, *South China Sea: What Exactly Has Changed At Scarborough Shoal?*, DIPLOMAT, Nov. 1, 2016, available at <http://thediplomat.com/2016/11/south-china-sea-what-exactly-has-changed-at-scarborough-shoal> (last accessed Mar. 1, 2017).

67. Cal Wong, *Has Duterte Won a South China Sea Concession from China?*, DIPLOMAT, Nov. 1, 2016, available at <http://thediplomat.com/2016/11/has-duterte-won-a-south-china-sea-concession-from-china> (last accessed Mar. 1, 2017).

68. Posner & Sykes, *supra* note 28, at 576.

Given that both living and non-living resources involve different maritime zones (the territorial seas, EEZs, and continental shelves), one must keep in mind that the progressive and ideal principle in international relations is the spirit of cooperation, collaboration, and coordination, together with the United Nations Charter mandates for the prohibition against the use of force and for the peaceful settlement of all disputes among nations.<sup>69</sup>

Certainly, the potential for dialogue, including certain regulated options for joint development, could provide economic law solutions to disputed areas. Under certain circumstances, joint development, in the words of Philippine Supreme Court Justice Antonio T. Carpio, could be fashioned in a manner that is “friendly, fair, practical[,] and durable”<sup>70</sup> and such an approach would certainly allow the rule of law to prevail and reaffirm the ASEAN Declaration that encourages consensus-driven and constructive solutions that provides political and economic benefits to all parties concerned.

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69. See U.N. CHARTER arts. 2 (3) & 2 (4).

70. Antonio T. Carpio, Senior Associate Justice of the Supreme Court of the Philippines, *The Rule of Law in the West Philippine Sea Dispute*, Speech delivered before the Philippine Bar Association (Aug. 29, 2013) (transcript available at <http://sc.judiciary.gov.ph/aboutsc/justices/j-carpio/08-29-13-speech.pdf> (last accessed Mar. 1, 2017)).