

# LEGAL ANALYSIS ON THE LEGAL REASONING OF THE PHILIPPINES IN THE SOUTH CHINA SEA ARBITRATION

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## Abstract

*The South China Sea Arbitration marks as a prominent case in the International Law of the Sea. This paper contributes to the legal analysis of the primary legal reasoning from the Philippines to initiate arbitrary proceedings against the People's Republic of China (China). It also contributes to the legal basis and legal issues that the Philippines used as arguments to held China responsible for maritime entitlements as well as exploitation in the South China Sea. This legal analysis on the legal reasoning of the Philippines discusses both the fair and justifiable legal reasoning and the misleading legal reasoning from the Philippines in the South China Sea Arbitration. In the end, the writer concludes whether the Philippines' legal reasoning was entirely justifiable or not. The writer finds the Philippines' legal reasoning is not entirely justifiable due to several reasons.*

## Intisari

*Kasus Arbitrase Laut Tiongkok Selatan ditandai sebagai kasus yang penting dalam Hukum Laut Internasional. Tulisan ini berkontribusi pada analisis hukum dari penalaran hukum utama dari Filipina ketika memulai proses arbitrase terhadap Republik Rakyat Tiongkok (Tiongkok). Tulisan ini juga berkontribusi pada dasar hukum dan masalah hukum yang digunakan Filipina sebagai argumen untuk menuntut Tiongkok bertanggungjawab atas hak maritim serta eskloitasi di Laut Tiongkok Selatan. Analisis hukum pada penalaran hukum di Filipina ini membahas alasan hukum yang adil dan dapat dibenarkan serta alasan hukum yang menyesatkan dari Filipina dalam Arbitrase Laut Tiongkok Selatan. Pada akhirnya, penulis menyimpulkan apakah alasan hukum Filipina sepenuhnya dapat dibenarkan atau tidak. Penulis menemukan bahwa alasan hukum Filipina tidak sepenuhnya dapat dibenarkan karena beberapa alasan.*

**Keywords:** South China Sea, Arbitration, Philippines, China, UNCLOS.

**Kata Kunci:** Laut Tiongkok Selatan, Arbitrase, Filipina, Tiongkok, UNCLOS.

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## A. Introduction

In the year of 2013, the Philippines declared that China has breached certain rights and obligations under the United Nations Law Of the Sea (**UNCLOS**) that is beyond the control of the Philippines as one of the coastal states in the South China Sea. On 22<sup>nd</sup> January 2013, the Philippines enacted arbitral proceedings against China to support such declaration.<sup>2</sup> China's self-proclaimed jurisdiction has dominated and exploited the South China Sea with maritime entitlement called the "nine-dash line". The nine-dash line extends as far as 2,000 km from the Chinese mainland to the Philippines, Malaysia and Vietnam within a few hundred kilometres.<sup>3</sup> In its *notes verbales*<sup>4</sup>, China claimed that it has "indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil thereof. China's sovereignty, supported by abundant historical and legal evidence"<sup>5</sup> However, the nine-dash line deems to have no legal basis by the Permanent Court of Arbitration (**PCA**) in The Hague.<sup>6</sup> Thus, making this dispute fascinating to analyze the claims made by the Philippines.

The focal point of this case is when the Philippines finally decided to enact arbitral proceedings against China, the People's Republic of China released its Position Paper on the Matter of Jurisdiction in the Philippines' SCS Arbitration initiation.<sup>7</sup> China contended that "the Tribunal has no jurisdiction over the disputes and China was determined that it would not involve in any arbitral proceedings regarding the South China Sea dispute".<sup>8</sup> For this reason, China's Position Paper was not meant to be China's Counter-Memorial<sup>9</sup>, Hence it is not treated as such by the Tribunal.<sup>10</sup> China's absence before the Arbitral Tribunal obligates China to provide its comments towards the questions posed by the Philippines, as the appearing party, as well as China's supplemental arguments in regards to the dispute.<sup>11</sup> However, China did not respond to the Philippines' arguments at all.<sup>12</sup>

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<sup>2</sup> Sa, L. (2017). Sino-Philippine Arbitration on South China Sea Disputes: A Perspective from the Principle of Good Faith. *China Oceans Law Review*, Vol. 2017, No. 1, 2017.

<sup>3</sup> Zhen, L. (2020, April 28). *What's China's 'nine-dash line' and why has it created so much tension in the South China Sea?*. Retrieved from <https://www.scmp.com/news/china/diplomacy-defence/article/1988596/whats-chinas-nine-dash-line-and-why-has-it-created-so>.

<sup>4</sup> A formal diplomatic note.

<sup>5</sup> Beckman, R.. (2013). The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea. *The American Journal of International Law*, Vol. 107, No. 142, p. 148.

<sup>6</sup> Beech, H. (2020, April 30). *Just Where Exactly Did China Get the South China Sea Nine-Dash Line From?*. Retrieved from <https://time.com/4412191/nine-dash-line-9-south-china-sea/>.

<sup>7</sup> Gau, M.S. (2015). The Sino-Philippine Arbitration on the South China Sea Disputes: Ineffectiveness of the Award, Inadmissibility of the Claims, and Lack of Jurisdiction, with Special Reference to the Legal Arguments Made by the Philippines in the Hearing on 7-13 July 2015. *China Oceans Law Review*, Vol. 2015, No. 2, p. 96.

<sup>8</sup> China Daily. (2020, April 28). *China's Position Paper on South China Sea, 7 December 2014*. Retrieved from [http://www.chinadaily.com.cn/china/2014-12/07/content\\_19037946.htm](http://www.chinadaily.com.cn/china/2014-12/07/content_19037946.htm).

<sup>9</sup> *ibid*.

<sup>10</sup> Permanent Court of Arbitration. (2020, April 29). *Press Release by the Tribunal, 17 December 2014*. Retrieved from [http://www.pca-cpa.org/showfile.asp?fil\\_id=2846](http://www.pca-cpa.org/showfile.asp?fil_id=2846).

<sup>11</sup> The Permanent Court of Arbitration Rules 2012, Article 25 (2).

<sup>12</sup> Gau, 'The Sino-Philippine Arbitration on the South China Sea Disputes: Ineffectiveness of the Award, Inadmissibility of the Claims, and Lack of Jurisdiction, with Special Reference to the Legal Arguments Made by the Philippines in the Hearing on 7-13 July 2015' (n 6) 96.

China's actions lead the Arbitral Tribunal to rule in favour of the Philippines. Therefore, it is appealing for the writer to analyze the overall legal reasoning from the Philippines.

It is only natural that the Philippines complained about China considering all of the breaches that China has made over the South China Sea. The Philippines asserted that China's actions over the South China Sea violate the Philippines' rights and sovereignty, based on five reasons. These five reasons are: China's claim to historic rights based on the "nine-dash line" is unlawful, as the claims contradict the UNCLOS<sup>13</sup>, the Mischief Reef that China has occupied belongs to the Philippines' continental shelf<sup>14</sup>, China claims the region means claiming maritime entitlements beyond twelve nautical miles, which is unlawful<sup>15</sup>, China has unlawfully "claimed and exploited the living and non-living resources in the Philippines' Exclusive Economic Zone (EEZ) and continental shelf<sup>16</sup>, and China has unlawfully interfered the Philippines' navigation rights under UNCLOS".<sup>17</sup>

The outcome of the proceedings was overwhelmingly in favour of the Philippines.<sup>18</sup> For that reason, a lot of credits have been given to the Philippines for asserting its claims into the Permanent Court of Arbitration (PCA). Additionally, it is the superpower state that the Philippines was facing. Acknowledging the five legal reasoning from the Philippines, the writer is going to elaborate each of the legal reasoning one by one in the analysis. Given the highlighted violations that China did, the writer decides to analyze both the fair and justifiable legal reasoning and the misleading legal reasoning from the Philippines in the South China Sea Arbitration. In the end, the writer determines whether the legal reasoning asserted by the Philippines was fair and entirely justifiable or not.

## **B. Analysis**

### **Philippines Legal Reasoning in the South China Sea Arbitration**

#### **Nine-dash line as the Landmark to initiate Arbitral Proceedings against China**

The Philippines' based the nine-dash line as the foundation for its claims in the South China Sea Arbitration because China has asserted its historic rights by that line. Specifically, the Philippines requests the Tribunal to claim that "China is entitled only those rights stipulated in the UNCLOS..." meaning rights such as geographic or substantive limits.<sup>19</sup> The Tribunal therefore claimed that the rights stipulated by UNCLOS should not be supplemented or modified by historic rights, including

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<sup>13</sup> The Philippines' Memorial on South China Sea, ¶ 1.28.

<sup>14</sup> Gau, 'The Sino-Philippine Arbitration on the South China Sea Disputes: Ineffectiveness of the Award, Inadmissibility of the Claims, and Lack of Jurisdiction, with Special Reference to the Legal Arguments Made by the Philippines in the Hearing on 7-13 July 2015' (n 6) 92.

<sup>15</sup> *ibid.*, pp. 92-93.

<sup>16</sup> The Philippines' Notification, ¶ 31 (eighth and ninth claims) & 41 (tenth and eleventh reliefs). [SEP]

<sup>17</sup> *ibid.*, ¶ 31 (tenth claims) & 41 (twelfth and thirteenth reliefs). [SEP]

<sup>18</sup> Panda, Ankit. (2020, April 23). *International Court Issues Unanimous Award in Philippines v. China Case on South China Sea*. Retrieved from <https://thediplomat.com/2016/07/international-court-issues-unanimous-award-in-philippines-v-china-case-on-south-china-sea/>.

<sup>19</sup> As noted in the South China Sea Arbitral Tribunal Award on Jurisdiction and Admissibility at p. 62.

those within the “nine-dash line” of China.<sup>20</sup> Hence, UNCLOS does not recognize China’s historic rights and thus, inadmissible by the Tribunal.

Despite never received recognition in the international community, China has long contended “nine-dash line” or the “U-shaped line” as a legitimate claim to their maritime boundary line in the South China Sea.<sup>21</sup> The Philippines counters China’s “nine-dash line” legitimacy by professing, “international law did not historically permit such expansive claim”.<sup>22</sup> Even if one insists on using the historic right as a legal assertion, specific historical records collected by the Tribunal from the *Bibliothèque Nationale de France* and the *Archives Nationales d’Outre-Mer* provide no proof to support the claim of China.<sup>23</sup> Therefore, it is fair and justifiable for the Philippines to claim that there is no legal basis for China’s “nine-dash line” claims and for the Tribunal to dismiss China’s historic claims.

### **China's unlawful occupation on Mischief Reef according to the Philippines**

The Philippines has acknowledged the construction activities conducted by China at Mischief Reef and McKennan Reef. The Philippines argues that “China’s activities at Mischief Reef have breached Articles 60 and 80 of UNCLOS relating to the artificial islands, installations and structures”.<sup>24</sup> Article 60 (1) stipulated that “*In the EEZ, the coastal state shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of artificial islands, installations and structures*”.<sup>25</sup> Moreover, the exclusive right also extends to continental shelf in accordance to Article 80.<sup>26</sup> The Philippines highlighted the fact that “Mischief Reef is located within 200 M of Palawan (archipelagic province of the Philippines) instead of within 200 M of any feature claimed by China”.<sup>27</sup> Therefore, the area shall fall under the Philippines’s jurisdiction and authority.<sup>28</sup>

Moreover, the activities in the area are unlawful acts due to the Philippines’ assertion that it is an attempted appropriation of Mischief Reef and McKennan Reef by China.<sup>29</sup> China’s flag at the Mischief Reef strengthens the attempted appropriation argumentation, which indicates China’s claim of jurisdiction over the area.<sup>30</sup> Finally, the Tribunal found that “Mischief Reef is a low-tide elevation that falls within the Philippines’ jurisdiction and it constitutes part of the EEZ and continental shelf of the Philippines”.<sup>31</sup> Therefore, the Philippines has exclusive rights of the Mischief Reef. However, the

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<sup>20</sup> *ibid.*

<sup>21</sup> Keyuan, Z. (2012). China’s U-Shaped Line in the South China Sea Revisited”, *Ocean Development and International Law*, p. 18.

<sup>22</sup> *Republic of the Philippines v. People’s Republic of China*, PCA Case No. 2013-19, UNCLOS, Award, 12 July 2016, Rep. of Intrl. Arb. Awards, ¶ 192.

<sup>23</sup> *ibid.*, ¶ 198.

<sup>24</sup> *ibid.*, ¶ 1010.

<sup>25</sup> United Nations Convention on the Law of the Sea (UNCLOS) (1982) established by the United Nations Article 60.

<sup>26</sup> The Philippines’ Memorial, ¶ 6.101.

<sup>27</sup> *ibid.*, ¶ 6.103.

<sup>28</sup> *ibid.*

<sup>29</sup> *ibid.*, ¶ 6.105-6.107.

<sup>30</sup> Merits Hearing Tr. (Day 2), p. 211.

<sup>31</sup> *Philippines* (n 21) ¶ 1030.

writer found that there is a lack of jurisdiction in regards to matters on Mischief Reef, which will be explained later on in Section B.

### **1. China Unlawful Claim on Maritime Entitlements beyond its Twelve Nautical Miles**

In this regard, the Philippines submits “Scarborough Shoal, Johnson Reef, Cuarteron Reef and Fiery Cross Reef are rocks as understood in Article 121 (3) of UNCLOS”.<sup>32</sup> Thus, they are only entitled to a twelve Nautical Miles territorial sea. China’s claim is invalid because it is beyond twelve Nautical Miles from these features.<sup>33</sup> Article 121 (3) stipulated, “Rocks which cannot sustain human habitation or economic life of their own, shall have no exclusive economic zone or continental shelf”.<sup>34</sup> In submitting their claim, the Philippines has heavily relied on treaty interpretation to thoroughly established the meaning of rocks under Article 121 (3). The Philippines argues that the text of the provision creates a cumulative requirement where the overall negative structure of the sentence means that there is a cumulative criterion describing the circumstances in which such maritime zones will be denied a feature.<sup>35</sup> It means that, if a feature is capable of sustaining, either “human habitation or economic life of its own”, it will qualify as a fully entitled island.<sup>36</sup>

It is proven that China felt entitled to Scarborough Shoal and insisted that Scarborough Shoal is an island, which may generate an EEZ, through the Chinese Foreign Ministry Statement regarding Huanyan Dao (Scarborough Shoal):

“Huangyandao has always been Chinese territory, and its legal position has been long determined. According to Article 121 of UNCLOS, Huangyandao is surrounded by water on all sides and is a natural dry land area that is higher than the water level during high tide.”<sup>37</sup>

As noted by the Tribunal, China regards Scarborough Shoal as being part of the Zhongsha Islands, hence claiming territorial sovereignty over it.<sup>38</sup> Therefore, China considers “Scarborough Shoal as an island, which may generate an EEZ”.<sup>39</sup> However, this conclusion is inconsistent with the Tribunal’s knowledge because “China has declared its twelve miles territorial sea from the Zhongsha Islands instead of the Scarborough Shoal”.<sup>40</sup> That being said, China has misplaced its parameter in determining the status of Scarborough Shoal.

On the other hand, the Tribunal has respected the Philippines’ submissions. The Tribunal declared that “the high-tide features at Scarborough Shoal, Johnson Reef, Cuarteron Reef and Fiery Cross

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<sup>32</sup> The Philippines’ Notification and Statement of Claim, ¶ 31. <sup>[L]</sup><sub>SEP</sub>

<sup>33</sup> McDorman, T.L. (2017). An International Law Perspective on Insular Features (Islands) and Low-Tide Elevations in the South China Sea. *The International Journal of Marine and Coastal Law*, Vol. 32, No. 2, p. 310.

<sup>34</sup> UNCLOS (n 24) Article 121 (3).

<sup>35</sup> *Philippines* (n 21) ¶ 493.

<sup>36</sup> *ibid.*

<sup>37</sup> Gau, M.S. (2019). The Interpretation of Article 121(3) of UNCLOS by the Tribunal for the South China Sea Arbitration: A Critique. *Ocean Development & International Law*, Vol. 50, No. 1, p. 6.

<sup>38</sup> The South China Sea Merits Award, *supra* note 1, ¶ 459.

<sup>39</sup> *Ibid.*, ¶ 463.

<sup>40</sup> *Ibid.*, ¶ 459-460.

Reef are constitute as rocks that cannot sustain human habitation or economic life on their own under Article 121 (3)". Thus, they are not entitled to EEZ or continental shelf.<sup>41</sup> The fact that the Tribunal considered that Scarborough Shoal, Johnson Reef, Cuarteron Reef and Fiery Cross Reef as rocks consequently means that they generate a total of a maximum twelve nautical territorial sea.<sup>42</sup> It also means that anything beyond is unlawful under UNCLOS; further invalidating China's claim, which stretches beyond the coverage as mentioned earlier. Therefore, it is justifiable for the Philippines to submit this matter.

### **China's Unlawfully Claim and Exploitation of the Living and Non-Living Resources in the Philippines' EEZ and Continental Shelf**

The Philippines contends that "China has illegally interfered with the enjoyment and exercise of the sovereign rights of the Philippines to the living and non-living resources of its EEZ and Continental Shelf".<sup>43</sup> The Philippines have also reported that since 2010, "several incidents have occurred in which China allegedly prevented the Philippines from utilizing the non-living and living resources within the EEZ (the waters that lie within 200 Nautical Miles) of the Philippines' baselines".<sup>44</sup> China's claim over South China Sea leads to it prohibiting Philippine nationals from conducting activities that allow them to utilize the resources, such as fishing, in the area. It also declared a moratorium on fishing by the Nanhai District Fishery Bureau under the Chinese Ministry of Agriculture in the South China Sea.<sup>45</sup> Through this moratorium, the government punished those who carried out fishing activities, it stated that "those who violated the prohibition shall have their fishing catch and any legal gains derived from there confiscated, as well as a fine up to 50,000 yuan".<sup>46</sup> China has also conducted prevention of fishing against Philippine vessels at Second Thomas Shoal.<sup>47</sup> This move impacted the Philippines fishermen's ability to earn for living as they become fearful to continue their means of living.<sup>48</sup> Therefore, the Tribunal stated that this moratorium had breached Article 56 of UNCLOS, which allocates the coastal state, the Philippines, the sovereign rights for exploring.<sup>49</sup>

On the other hand, in regards to the Non-Living Resources, China expressed its dissatisfaction over the appointment of Forum Energy Plc, a "UK-based oil and gas exploration and production company", as the operator of Sterling Energy. This is because the Philippines permits Sterling Energy to explore oil and gas reserves located at Reed Bank through a Service Contract.<sup>50</sup> China delivered

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<sup>41</sup> Philippines (n 21) ¶ 643-644.

<sup>42</sup> Bautista, Lowell. (2016). Philippine Arbitration against China over the South China Sea. *Asia-Pacific Journal of Ocean Law and Policy*, p. 122.

<sup>43</sup> The Philippines' Notification, ¶ 31 (eighth and ninth claims) & 41 (tenth and eleventh reliefs).

<sup>44</sup> Philippines (n 21) ¶ 650.

<sup>45</sup> *ibid.*, ¶ 671.

<sup>46</sup> People's Republic of China, Ministry of Agriculture, South China Sea Fishery Bureau, Announcement on the 2012 Summer Ban on Marine Fishing in the South China Sea Maritime Space (10 May 2012) (Annex 118).

<sup>47</sup> Philippines (n 21) ¶ 679.

<sup>48</sup> Affidavit of A.G. Perez, Director, Bureau of Fisheries and Aquatic Resources, Republic of the Philippines (26 March 2014) (Annex 241).

<sup>49</sup> Philippines (n 21) ¶ 716.

<sup>50</sup> Forum Energy plc. 'SC72 Recto Bank (Formerly GSEC101)' (Annex 342).

its strong objection because it is situated in the waters of China's Nansha Islands.<sup>51</sup> China claimed "it has indisputable sovereign rights and jurisdiction over Nansha Islands and its adjacent waters".<sup>52</sup> However, as the Tribunal has repeatedly claimed it, in the waters of South China Sea there is no legal basis for any historic rights or sovereign rights for China specifically from the basis of "nine-dash line". China is therefore not entitled to announce its objections to Forum Energy. Moreover, China's exploitation over the area is also indicated through the aggressive manoeuvre by China Marine Surveillance vessels when they approached "M/V Veritas Voyager", a Singaporean flagged seismic survey vessel that was surveying for Forum Energy.<sup>53</sup> Seeing the groundless and unjustifiable conduct by China, the Tribunal is in favor of the Philippines.

## **2. China Unlawfully Interfered with the Philippines of its Rights of Navigation under UNCLOS**

In its Relief Sought, the Philippines declared "China has unlawfully interfered with the exercise of Philippines' rights to navigation". It is including other rights under the Convention in areas within and beyond the EEZ of the Philippines.<sup>54</sup> The Philippines professed "China had established *de facto* control over the South China Sea by preventing fishing activities carried out by Philippines vessels while tolerating fishing by Chinese nationals and vessels in areas comprising the EEZ of the Philippines".<sup>55</sup> Chinese fishing vessels have been occupying the Mischief Reef and the Second Thomas Shoal. The Philippines considers Mischief Reef as part of its jurisdiction as it is situated "126 Nautical Miles off the coast of Palawan". However, since 1995, China has prevented Philippines vessels from fishing there.<sup>56</sup> Accordingly, a similar case also happens in Second Thomas Shoal, which is also considered as part of the Philippines' EEZ.<sup>57</sup>

On the other hand, China argues "China does not consider the Philippines to have rights in the area of Second Thomas Shoal and Mischief Reef because it possesses sovereignty over the usage and other activities in the Nansha Islands and its adjacent waters".<sup>58</sup> As the nine-dash line deemed to be lacking of legal basis, the sovereignty that China claims to have is consequently deemed inadmissible. Therefore, the Tribunal concluded that China had breached the Philippines' navigational rights at Mischief Reef and Second Thomas Shoal.<sup>59</sup>

### **The Extent of the Philippines' Legal Reasoning being Fair and Justifiable**

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<sup>51</sup> Note Verbale from the Embassy of the People's Republic of China in Manila to the Department of Foreign Affairs, Republic of the Philippines, No. (10) PG-047 (22 February 2010) (Annex 195). <sup>[1]</sup><sup>[2]</sup>

<sup>52</sup> *ibid.*

<sup>53</sup> *Philippines* (n 21) ¶ 656-659.

<sup>54</sup> Bautista, L. (2014). *The Arbitration Case Between Philippines and China over their Dispute in the South China Sea. Jati*, Vol. 19, p. 18.

<sup>55</sup> *Philippines* (n 21) ¶ 724.

<sup>56</sup> The Philippines' Memorial, ¶ 6.36.

<sup>57</sup> *Ibid.*

<sup>58</sup> Note Verbale from the Ministry of Foreign Affairs, People's Republic of China to the Embassy of the Republic of the Philippines in Beijing, No. (2015) Bu Bian Zi No. 5 (20 January 2015) (Annex 681).

<sup>59</sup> *Philippines* (n 21) ¶ 757.

As abovementioned, the Philippines' claim in the South China Sea Arbitration was admissible in the eye of the Arbitral Tribunal. The five legal reasoning was argued to be fair and justifiable in its claim resulted in the Arbitration Award in favour of the Philippines. However, the writer believes that there are three misleading legal reasoning given by the Philippines that led its claim to be not entirely fair and justifiable.

### **■ The Philippines' Failure to Showcase the Principle of Good Faith before the South China Sea Arbitration**

In regards to its victorious title in the South China Sea Arbitration, the Philippines probably has the narrative that their legal reasoning as the claimant state instituting arbitral proceedings against China was in its entirety correct and flawless. However, there is something that the Philippines were missing before pursuing the arbitral proceedings, which is pursuing the principle of good faith before claiming any disputes.

In the international law sphere, good faith acts as the landmark principle before starting any agreement or any dispute. One of the wise means to achieve good faith in a dispute settlement mechanism is to at least begin with a negotiation that would reach an agreement in order to resolve a dispute.<sup>60</sup> However, it must be done in the most generous way where mutual gain should be the cornerstone to any negotiation. The International Court of Justice (ICJ) stated, "the obligation to negotiate requires that the parties enter into negotiations to arriving at an agreement, as opposed to completing a formal process of negotiation as a sort of prior condition for the sake of proceeding to other procedures".<sup>61</sup> Hence, applying the principle of good faith in the international law of the sea disputes under UNCLOS is no exception for the Philippines to conduct.

Before the Philippines undertaken the measure to institute an arbitral proceedings to the Permanent Court of Arbitration, ASEAN states and China has signed a Declaration on Conduct (DOC) for the South China Sea in November 2002, which was the first time China engaged in a multilateral agreement over the issue.<sup>62</sup> The DOC generates both the Philippines and China's agreement to epitomize the regional approach to carry out peaceful settlement of maritime disputes through friendly consultations and negotiations between the States directly concerned.<sup>63</sup> The approach provided by the DOC is not incompatible with the UNCLOS and rather encouraged as it is qualified as "peaceful means of the parties' own choice" under UNCLOS Part XV, section 1.<sup>64</sup> Consequently, the Philippines had carried out unilateral action when it initiated the arbitral proceedings, which then were firmly rejected by China. The outcome of this initiation was formally responded by China by saying that it will oppose these proceedings, and it will never take part on them.

Article 282 of UNCLOS provides that "If the State Parties which are parties to a dispute concerning the interpretation or application have agreed through a general, regional or bilateral agreement

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<sup>60</sup> Reinhold, S. (2013). Good faith in International Law. *UCL Journal of Law and Jurisprudence*, Vol. 2.

<sup>61</sup> North Sea Continental Shelf Cases, Judgment, ICJ Reports 1969, ¶ 85.<sup>[1]</sup><sup>[2]</sup><sup>[3]</sup><sup>[4]</sup><sup>[5]</sup><sup>[6]</sup><sup>[7]</sup><sup>[8]</sup><sup>[9]</sup><sup>[10]</sup><sup>[11]</sup><sup>[12]</sup><sup>[13]</sup><sup>[14]</sup><sup>[15]</sup><sup>[16]</sup><sup>[17]</sup><sup>[18]</sup><sup>[19]</sup><sup>[20]</sup><sup>[21]</sup><sup>[22]</sup><sup>[23]</sup><sup>[24]</sup><sup>[25]</sup><sup>[26]</sup><sup>[27]</sup><sup>[28]</sup><sup>[29]</sup><sup>[30]</sup><sup>[31]</sup><sup>[32]</sup><sup>[33]</sup><sup>[34]</sup><sup>[35]</sup><sup>[36]</sup><sup>[37]</sup><sup>[38]</sup><sup>[39]</sup><sup>[40]</sup><sup>[41]</sup><sup>[42]</sup><sup>[43]</sup><sup>[44]</sup><sup>[45]</sup><sup>[46]</sup><sup>[47]</sup><sup>[48]</sup><sup>[49]</sup><sup>[50]</sup><sup>[51]</sup><sup>[52]</sup><sup>[53]</sup><sup>[54]</sup><sup>[55]</sup><sup>[56]</sup><sup>[57]</sup><sup>[58]</sup><sup>[59]</sup><sup>[60]</sup><sup>[61]</sup><sup>[62]</sup><sup>[63]</sup><sup>[64]</sup><sup>[65]</sup><sup>[66]</sup><sup>[67]</sup><sup>[68]</sup><sup>[69]</sup><sup>[70]</sup><sup>[71]</sup><sup>[72]</sup><sup>[73]</sup><sup>[74]</sup><sup>[75]</sup><sup>[76]</sup><sup>[77]</sup><sup>[78]</sup><sup>[79]</sup><sup>[80]</sup><sup>[81]</sup><sup>[82]</sup><sup>[83]</sup><sup>[84]</sup><sup>[85]</sup><sup>[86]</sup><sup>[87]</sup><sup>[88]</sup><sup>[89]</sup><sup>[90]</sup><sup>[91]</sup><sup>[92]</sup><sup>[93]</sup><sup>[94]</sup><sup>[95]</sup><sup>[96]</sup><sup>[97]</sup><sup>[98]</sup><sup>[99]</sup><sup>[100]</sup>

<sup>62</sup> Buszynski, L. (2003). ASEAN, the Declaration on Conduct, and the South China Sea. *Contemporary Southeast Asia*, Vol. 25 No. 3, p. 343.

<sup>63</sup> Talmon, S., & Jia, B. B. (2014). *The South China Sea Arbitration: A Chinese Perspective*. Bloomsbury Academic. p. 7.

<sup>64</sup> *ibid.*



or otherwise, that such dispute shall at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.”<sup>65</sup> Although according to the Arbitral Tribunal award on jurisdiction and admissibility, the Tribunal does not consider “the DOC to constitute a legally binding agreement within the meaning of Article 282 of UNCLOS.”<sup>66</sup> The Philippines had broken its commitment to maintain peace and stability in the DOC. Hence, the Philippines’ unilateral submission constitutes a “deliberate act of bad faith” and *pacta sunt servanda* where agreements must be kept.<sup>67</sup> Reflecting on the above explanation, the Philippines seems to be misleading because it forgets that the principle of good faith can resolve a complex dispute. Especially, when China has given preliminary trust and agreements towards the Philippines long before the South China Sea Arbitration.

### **Misleading Claims by the Philippines Led to a Lack of Dispute**

The existence of a dispute is the foundation of any arbitral proceeding and it is found that UNCLOS has limited jurisdiction on what to be constituted as “dispute”. It is restricted to “any dispute concerning the interpretation or application of this Convention.”<sup>68</sup> Nevertheless, according to UNCLOS Section XV, the existence of a dispute concerning the interpretation or application of UNCLOS is among the conditions for initiating the arbitration under Annex VII.<sup>69</sup> Any argument that cannot even constitute a dispute does not fall within the limits of UNCLOS Arbitral Tribunals’ *ratione materiae*<sup>70</sup> and thus inadmissible. Since the subject of the dispute determines the scope of the Arbitral Award, the jurisdiction of the Tribunal must apply in its entirety to the subject-matter of the dispute.<sup>71</sup> However, as stated previously, UNCLOS Arbitral Tribunals can only focus on the “disputes regarding interpretation or application under the UNCLOS”. Hence, the real question is whether the claims made by the Philippines are amount to a real dispute or not.

The result is that there is in fact a lack of dispute by the Philippines. It becomes problematic when the Philippines requests the Tribunal to declare that it “is entitled, under UNCLOS, to a 12 nautical miles Territorial Sea, a 200 nautical miles Exclusive Economic Zone and a Continental Shelf, measured from its archipelagic baselines.”<sup>72</sup> It is problematic because Arbitral Tribunals are not responsible for declaring a maritime area entitlement. The real purpose of arbitration brought by the Philippines, is to make China adheres to the fact that “there is an international legal consensus, based on an interpretation of the UNCLOS, which accepted by China that applies to the dispute”

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<sup>65</sup> UNCLOS (n 24) art. 282.

<sup>66</sup> The South China Sea Arbitral Tribunal Award on Jurisdiction and Admissibility, ¶ 299.

<sup>67</sup> Swaine, Michael D. (2016, August 30). Chinese Views on the South China Sea Arbitration Case between the People’s Republic of China and the Philippines. Retrieved from <https://www.hoover.org/research/chinese-views-south-china-sea-arbitration-case-between-peoples-republic-china-and>

<sup>68</sup> UNCLOS (n 24) arts 286, 288(1).

<sup>69</sup> It is stipulated in Article 283 of UNCLOS the existence of a dispute is required before the dispute settlement mechanism of Part XV of UNCLOS can operate.

<sup>70</sup> By reason of the matter.

<sup>71</sup> Talmon, S. (2014). The South China Sea Arbitration: Is There a Case to Answer?. *Bonn Research Papers on Public International Law*, No. 2, p. 13.

<sup>72</sup> The Philippines’ Relief Sought, bullet point 10, identical with Claims, bullet point 8.<sup>[L, SEP]</sup>

and in this situation China's refusal to engage in the proceedings of the Tribunal also does not shield it from an interpretation of the UNCLOS.<sup>73</sup>

Therefore, the Philippines' request is a hypothetical assertion that is totally stripped from any legal or realistic context. The arbitral tribunals in *Larsen v the Hawaiian Kingdom* confirmed, "the function of international arbitral tribunals in contentious proceedings is to determine disputes between the parties, not to make abstract rulings."<sup>74</sup> The Philippines should have taken into account that there are other coastal states in the South China Sea such as Malaysia, Indonesia, Brunei, and Vietnam. According to Article 57 of UNCLOS, "the Exclusive Economic Zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured."<sup>75</sup> Even if the Tribunal decides to make declarations where the Philippines is entitled to a 12 nm territorial sea or 200 nm EEZ, the distance between the opposite or adjacent coasts of these countries will be less than 400 Nautical Miles.<sup>76</sup> Hence, considering the coastal states in the South China Sea such as Malaysia, Indonesia, Brunei, Vietnam or China, it will thus create potentially conflicting arguments. In conclusion, because the Philippines' was asking for abstract declaration in its claims as explained above, it is devoid of any legal purpose and thus created lack of dispute from the Philippines.

### **■ Lack of Jurisdiction in the Philippines' Claims About Concerning Activities at Mischief Reef**

In the Philippines' Relief Sought, it declared, "Mischief Reef and McKennan Reef are maritime features that form part of the Philippines' Continental Shelf under Part IV of the Convention, and that China's occupation and construction activities on them violate the Philippines' sovereign rights". This declaration concerns the questions of sovereignty and other rights over land territory.<sup>77</sup> At the outset, this is problematic because the Philippines previously stated in its Notification and Statement of Claim that "it does not seek in this arbitration which party enjoys sovereignty over the island claimed by both of them."<sup>78</sup> Moreover, the question of sovereignty and rights over land territory are not dealt with in the UNCLOS and thus fall outside the jurisdiction of the Tribunal.<sup>79</sup>

Furthermore, China announced on June 2015 that, "China would soon complete the formation of islands – shifting sediment from the seafloor to a reef".<sup>80</sup> It seems that China has built on the islands namely; port facilities, military buildings and an airstrip, with recent documentation supporting the

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<sup>73</sup> Wu, S., & Zou, K. (2016). *Arbitration Concerning the South China Sea: Philippines versus China*. New York, USA: Routledge. p. 43.

<sup>74</sup> *Larsen v Hawaiian Kingdom* (2001) 119 ILR 566, 587 [11.3]. The Tribunal comprised James Crawford, Gavan Griffith, and Christopher Greenwood.

<sup>75</sup> UNCLOS (n 24) art. 57.

<sup>76</sup> Talmon, 'The South China Sea Arbitration: Is There a Case to Answer?' (n 75) 16.

<sup>77</sup> Talmon, S., & Jia, B. B., 'The South China Sea Arbitration: A Chinese Perspective' (n 63) 31.

<sup>78</sup> *ibid.*

<sup>79</sup> *ibid.*

<sup>80</sup> Watkins, D. (2020, May 2). *What China Has Been Building in the South China Sea*. Retrieved from <https://www.nytimes.com/interactive/2015/07/30/world/asia/what-china-has-been-building-in-the-south-china-sea.html>.

allegations with images of two more airstrips under construction.<sup>81</sup> The fact that there were so many things being built by China at Mischief Reef elevated the status of the dispute into concerning activities. However, the Tribunal found that the Mischief Reef is a low-tide elevation located within the EEZ of the Philippines and there is no legal basis for China's entitlement to maritime zones in the Mischief Reef area.<sup>82</sup>

Despite the conclusion made by the Tribunal, the writer finds that there was something problematic in the claims made by the Philippines. Firstly, the Philippines focused on the premise that the continental shelf in the South China Sea is delineated, and there are no conflicting continental shelf claims in the South China Sea by the Philippines, China, Vietnam, Brunei nor Malaysia that call for a delimitation.<sup>83</sup> The fact is that the features of Spratly Island (including the Mischief Reef) are a group of islands, islets and cays, including more than 100 reefs located off the coasts of the Philippines, Malaysia and southern Vietnam.<sup>84</sup> Spratly features are the most important archipelagos in the South China Sea; and it is also an attractive island due to its location on strategic shipping routes.<sup>85</sup> With its appeal, it generates a longstanding conflict amongst five littoral coastal parties, which are the Philippines, China, Vietnam, and Malaysia.<sup>86</sup> The conflict has been unresolved for many years, owing to its nuanced existence. However, the Philippines submits that Mischief Reef and McKennan Reef are maritime features that form part of the Philippines' Continental Shelf, this fact implies that the Philippines has abandoned the idea that it is not the only coastal state in the line of the South China Sea. Therefore, it can be concluded that the Philippines' entitlement over the Mischief reef is a total disregard of other coastal states, and it creates a doubt of the jurisdiction that the Philippines claims to have.

Secondly, it is about the problematic of what constitutes "military activities" within the scope of Article 298 (1) (b), which leads to the question whether or not China activities at Mischief Reef are constitute as one.<sup>87</sup> It is stipulated in Article 298 (1) (b) of UNCLOS, "*disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction are excluded from the jurisdiction of a court or tribunal*".<sup>88</sup> Therefore, any dispute with an element pertaining to military activities, the Tribunal would not examine the dispute because it falls outside of the *ratione materiae* of the Tribunal. In deciding whether or not the activities involved in Mischief Reef constitute military activities, the Tribunal has taken into account the claims made by

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<sup>81</sup> *ibid.*

<sup>82</sup> *Philippines* (n 21).

<sup>83</sup> The Note Verbale No. 000819 from the Philippine Mission to the United Nations to the UN Secretary General (4 August 2009) [www.un.org/Depts/los/](http://www.un.org/Depts/los/), protesting against the Joint Submission by Malaysia and Vietnam to the Commission on the Limits of the Continental Shelf concerning the outer limits of the continental shelf beyond 200nm in the South China Sea.

<sup>84</sup> WWF. (2020, 4 May). *South China Sea, between the Philippines, Borneo, Vietnam, and China*. Retrieved from <https://www.worldwildlife.org/ecoregions/im0148>.

<sup>85</sup> Hasan and Jian. Spratly Islands Dispute in the South China Sea: Potential Solutions. *Journal of East Asia and International Law*, Vol. 12 No. 1, p. 146.

<sup>86</sup> *ibid.*

<sup>87</sup> Award on Jurisdiction (n 66), ¶¶ 372, 396, 409.

<sup>88</sup> UNCLOS (n 24) Article 298 (1) (b).

China that the activities involved are intended to serve civilian purposes and have no effect on any nation.<sup>89</sup> In the end, the Tribunal reiterated the clear stance of China that it is intended for civilians and stated that the behavior of China is beyond Article 298 (1) (b).<sup>90</sup>

However, the writer here would like to point out the fact that China was constructing military buildings and the People's Liberation Army (PLA) has carried out the construction.<sup>91</sup> It is reported that the PLA is a "unified organization of China's land, sea, and air forces and it is one of the **largest military forces in the world**".<sup>92</sup> The fact that the PLA has been involved in this construction strengthens the fact that China was not building something merely for civilian purposes. Therefore, depending on the extent to which PLA has been included in the South China Sea dispute, they are subject to an optional exception from the jurisdiction of the Tribunal of disputes relating to military activities under Article 298 (1) (b) of UNCLOS.<sup>93</sup> In conclusion, the Tribunal should have declared that it lacked jurisdiction pertaining to the military activities that China has carried out with the PLA.

### **C. Conclusion and Recommendations**

In conclusion, the writer finds that, out of the five legal reasoning that the Philippines claim to be fair and justifiable, there is one that seems to be misleading which is concerning the military activities by China in the Philippines along with the other two misleading legal reasoning in the Philippines' claims. Therefore, the writer submits that the Philippines' legal reasoning is not entirely fair and justifiable. Although, there were legal reasoning made by the Philippines that are "legitimate", "justifiable" and "well-founded in fact and law". The writer highlights a few misleading legal reasoning. The misleading legal reasoning are the Philippines' failure to showcase the principle of good faith before the South China Sea Arbitration, misleading claims by the Philippines that led to a lack of dispute, and lack of jurisdiction in the Philippines' claims with regard to concerning activities at Mischief Reef.

Firstly, the Philippines' has failed to pursue the principle of good faith because it is proven that the Philippines' has broken China's trust in the DOC agreement and in turn institute a unilateral arbitral proceeding against China regarding the South China Sea. Secondly, the writer finds that there is a lack of dispute in the claims made by the Philippines because it requests "the Arbitral Tribunal to declare that it is entitled, under UNCLOS, to a 12 M Territorial Sea, a 200 M Exclusive Economic Zone and a Continental Shelf". However, asserting UNCLOS Section XV, this request is inadmissible. It is because according to UNCLOS Section XV, to initiate a dispute to an Arbitral Tribunal, the dispute must be concerning the interpretation or application of UNCLOS, and the Arbitral Tribunals are not responsible for a declaration to claim maritime entitlements. Thirdly, the writer finds that

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<sup>89</sup> Xinhua. (2020, May 4). *China not to pursue militarization of Nansha Islands in South China Sea*: Xi. [news.xinhuanet.com/english/2015-09/26/c\\_134660930.htm](https://news.xinhuanet.com/english/2015-09/26/c_134660930.htm).

<sup>90</sup> *Philippines* (n 21) ¶ 1028.

<sup>91</sup> Talmon, 'The South China Sea Arbitration: Is There a Case to Answer?' (n 75) 21.

<sup>92</sup> The Editors of Encyclopaedia Britannica. (2020, May 3). *People's Liberation Army*. Retrieved from <https://www.britannica.com/topic/Peoples-Liberation-Army-Chinese-army>.

<sup>93</sup> Talmon, 'The South China Sea Arbitration: Is There a Case to Answer?' (n 75) 21.

there is a lack of jurisdiction in the Philippines' claims concerning military activities at Mischief Reef. It is because China's construction activities involve the PLA and it is a military group from China. Hence, the Tribunal should have lacked jurisdiction to hear the concerning activities at Mischief Reef in respect to Article 298 (1) (b) of UNCLOS.

Taking into account the fact that the Philippines' claims are not entirely justifiable, the writer recommends that the Philippines' should have conducted joint development. In regards to joint development, it is an excellent approach to resolve the political situation situated in the South China Sea. The issue of South China Sea is sensitive because it contains potential conflict with different national interests from different coastal states.<sup>94</sup> Notably, the joint development would have a significant impact on the Spratly Islands, which is currently under multiple and maritime claims.<sup>95</sup> In order to balance peace and security, joint development is important to know the coastal states' interests as well as cooperation in distributing resources in the South China Sea.

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