

**WHEN DAVID CAN'T DEFEAT GOLIATH: A STRATEGY  
ON HOW THE PHILIPPINES CAN ENFORCE THE  
HAGUE'S ARBITRATION AWARD**

There is a set of advantages that have to do with material resources, and there is a set that have to do with the *absence* of material resources—and the reason underdogs win as often as they do is that the latter is sometimes every bit the equal of the former.<sup>1</sup>

- *Malcolm Gladwell*

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1. MALCOLM GLADWELL, DAVID AND GOLIATH: UNDERDOGS, MISFITS, AND THE ART OF BATTLING GIANTS 24–25 (2013).

## INTRODUCTION

Disputes between sovereign states with an imbalance of power are akin to David battling Goliath: weaker states often have little more than a stone and a prayer that stronger states will acquiesce to the higher power of the law. Such is the nature of the Philippines' dispute with China over the South China Sea. Even when the Permanent Court of Arbitration (PCA) has declared that China has no claim over the Spratly Islands in the South China Sea,<sup>2</sup> the Philippines' inferior economy and military prevent it from asserting its sovereign rights over the area. Consequently, the new Philippine administration has softened its stance on the issue in the hope of persuading China to cooperate.<sup>3</sup>

This Note agrees with the Philippines' less confrontational strategy, but argues that the Philippines can enforce the PCA's decision without circumventing the issue or inviting retaliation from China. China's superior military and economy make ignoring the PCA's decision more efficient in advancing China's goal of becoming a regional leader in Asia.<sup>4</sup> However, remaining in violation of international principles is also at odds with this goal. If the Philippines offers a compromise that advances part of the Philippines' claim to the South China Sea and casts China in a better light, the Philippines may be able to secure China's cooperation.

Part I of this Note provides the background of the dispute, including each country's interest in the South China Sea, the PCA's decisions on the Philippines' submissions during the arbitration, and each country's position and policy on the outcome of the arbitration. Part II argues that the Philippines' best chance at enforcing the PCA's decision is through holding China accountable for its failure to preserve and protect the marine environment. It proposes the use of the *Parens Patriae* Doctrine as the Philippines' grounds for claiming compensation for marine environmental damage in the Spratly Islands. Part III looks into the Polluter-pays Principle and its prevalence in international law. Although the Philippines' claim for environmental damages is consistent with the Polluter-pays Principle, the

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2. Philippines v. China, PCA Case No. 2013-19, Award, ¶ 646 (Perm. Ct. Arb. July 12 2016), <https://www.pcacases.com/web/sendAttach/1506>.

3. Benjamin Kang Lim, *Philippines' Duterte Says South China Sea Arbitration Case to Take "Back Seat,"* REUTERS (Oct. 19, 2016, 9:16 AM), <http://www.reuters.com/article/us-china-philippines-idUSKCN12J10S>; Jun Endo, *Duterte's Pivot to Beijing Brings Calm to South China Sea*, NIKKEI ASIAN REV. (Nov. 9, 2016, 6:31 AM), <http://asia.nikkei.com/Politics/Duterte-s-pivot-to-Beijing-brings-calm-to-South-China-Sea>; Nestor Corrales, *Duterte, Abe Vow Peaceful Resolution of South China Sea Dispute*, PHIL. DAILY INQUIRER (Jan. 12, 2017, 5:51 PM), <https://globalnation.inquirer.net/151484/duterte-abe-vow-peaceful-resolution-south-china-sea-dispute>.

4. Eric A. Posner & Alan O. Sykes, *Efficient Breach of International Law: Optimal Remedies, "Legalized Noncompliance," and Related Issues*, 110 MICH. L. REV. 243, 252 (2011).

Polluter-pays Principle cannot persuade China to cooperate because it rests on recognizing the Philippines' sovereignty over the area. Finally, Part IV explores liability and compensation mechanisms that may serve as models for the Philippines' damages claim.

#### I. BACKGROUND OF THE DISPUTE

The division among the states surrounding the South China Sea began with 11 dashes. In 1948, the infamous Eleven Dash Line first appeared in an official Chinese map demarcating China's sovereignty over four large archipelago groups in the South China Sea: the Pratas Islands, the Paracel Islands, the Macclesfield Bank, and the Spratly Islands.<sup>5</sup> China reduced the Eleven Dashes to Nine Dashes in 1953 after Vietnam and China resolved the Gulf of Tonkin dispute.<sup>6</sup> Out of the four archipelagos China claims as part of its sovereign territory, only the Pratas Islands actually fall within China's 200-nautical-mile exclusive economic zone (EEZ).<sup>7</sup> The Spratly Islands—the focal point of the China-Philippines Arbitration—is 1,000 km from China's Hainan Province and 100 km west of the Philippines' Palawan Island.<sup>8</sup>

Even though disagreement between the Philippines and China existed back in 1948, the dispute between the two countries did not intensify until 1995.<sup>9</sup> In 1995, China occupied Mischief Reef in the Spratly Islands.<sup>10</sup> The Philippine Navy was in such a poor state at the time that the Philippines could only launch a diplomacy- and media-driven campaign against China's aggressions.<sup>11</sup> China, the Philippines, and the other Southeast Asian

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5. See YANN-HUEI SONG, *UNITED STATES AND TERRITORIAL DISPUTES IN THE SOUTH CHINA SEA: A STUDY OF OCEAN LAW AND POLITICS* 15–18 (2002) (discussing the geography of the South China Sea).

6. *Philippines v. China*, ¶ 181.

7. Article 55 of the United Nations Convention on the Law of the Sea defines the Exclusive Economic Zone as “an area beyond and adjacent to the territorial sea . . .” United Nations Convention on the Law of the Sea, art. 55, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. All maritime boundaries are measured from the baseline, “the low-water line,” along the coast of a State or, for localities with indented shores, straight lines joining points of the low-water line. *Id.* at 399. A territorial sea is measured at 12 nautical miles (nm) from the baseline of a coastal state. *Id.* The outer limit of an EEZ is measured at 200 nautical miles from the relevant baseline. *Id.* at 419. The rights, duties, and jurisdiction of the State in EEZs are provided in Article 58, which includes sovereign rights over living and nonliving natural resources and jurisdiction over establishing artificial islands. *Id.*

8. SONG, *supra* note 5, at 18.

9. Lyn Noquil Semeña, *South China Sea Disputes: How Different Domestic Dynamics Impact on Contemporary Philippine Political and Economic Relations with China* 21 (Dec. 12, 2015) (unpublished Masters thesis, Norwegian University of Life Sciences).

10. *Id.*

11. Daniel J. Dzurek, *China Occupies Mischief Reef in Latest Spratly Gambit*, IBRU BOUNDARY & SECURITY BULL., Apr. 1995, 65, 68–69.

countries defused tensions by signing the Declaration on the Conduct of Parties in the South China Sea (DOC) in 2002, but did not resolve the territorial issues.<sup>12</sup>

In 2009, China renewed its Nine Dash Line claim in a *note verbale*<sup>13</sup> sent to the United Nations as a response to Vietnam and Malaysia's Joint Submission to the Commission on the Limits of the Continental Shelf (CLSC).<sup>14</sup> This prompted an objection not only from Vietnam and Malaysia, but also from Indonesia and the Philippines.<sup>15</sup> The Philippines responded by claiming that the Spratly Islands were within the Philippine EEZ as per the boundary provisions in the U.N. Convention on the Law of the Sea (UNCLOS).<sup>16</sup> China then asserted that it had undisputed sovereignty over the Spratly Islands because the Chinese government had publicly claimed the Spratly Islands since the 1930s and had considered the islands part of Chinese territory "over [the] long course of history . . . ."<sup>17</sup>

In 2011, violence between the two countries escalated when China fired three shots on Philippine fishing boats in the vicinity of Jackson Atoll.<sup>18</sup> Jackson Atoll is 140 nautical miles west of Palawan—well within the Philippine EEZ.<sup>19</sup> The Philippines promptly increased its military presence along its western border.<sup>20</sup> Later that year, a Philippine ship

12. Carlyle A. Thayer, *ASEAN, China and the Code of Conduct in the South China Sea*, 32 SAIS REV. INT'L AFFAIRS 75, 76–77 (2013).

13. According to the U.N.'s Correspondence Manual, a *note verbale* is a "formal note written in the third person. . . . [that] may be addressed to: (a) [a] permanent representative or observer; (b) [a] permanent mission; (c) [a] minister for foreign affairs; (d) [a] ministry of foreign affairs." U.N. Correspondence Manual, ST/DCS/4/Rev.1 19, 20 (2000). It is typically used to exchange information between the UN and a Government, or to request for or acknowledge information or documents. *Id.*

14. COMM'N ON THE LIMITS OF THE CONTINENTAL SHELF [CLSC], JOINT SUBMISSION TO THE COMMISSION ON THE LIMITS OF THE CONTINENTAL SHELF PURSUANT TO ARTICLE 76, PARAGRAPH 8 OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982 IN RESPECT TO THE SOUTHERN PART OF THE SOUTH CHINA SEA 3 (May 2009), [http://www.un.org/depts/los/clcs\\_new/submissions\\_files/mys\\_vnm33\\_09/mys\\_vnm2009excutivesummary.pdf](http://www.un.org/depts/los/clcs_new/submissions_files/mys_vnm33_09/mys_vnm2009excutivesummary.pdf). The *note verbale* stated:

China 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. . . . The above position is consistently held by the Chinese Government, and is widely known by the international community.

Philippines v. China, PCA Case No. 2013-19, Award, ¶ 181 (Perm. Ct. Arb. July 12 2016), <https://www.pcacases.com/web/sendAttach/1506>.

15. *Philippines v. China*, ¶ 184.

16. *Id.*

17. *Id.* ¶¶ 185–86.

18. *Timeline: The Philippines-China Maritime Dispute*, RAPPLER (July 12, 2016, 4:35 PM), <http://www.rappler.com/world/regions/asiapacific/139392timelinewestphilippinesadispute>.

19. Ellen T. Tordesillas, *China Makes Sure Jackson Atoll Won't Be Another Ayungin*, ABS-CBN NEWS (Mar. 7, 2016, 12:28 AM), <http://news.abs-cbn.com/blogs/opinions/03/06/16/china-makes-sure-jackson-atoll-wont-be-another-ayungin>.

20. RAPPLER, *supra* note 18.

rammed a small Chinese fishing vessel, which led to a three-month naval standoff in 2012.<sup>21</sup>

In 2013, the Philippines filed the arbitration case against China with the PCA at the Hague.<sup>22</sup> China rejected the PCA's jurisdiction over the issue, and claimed that the Philippines' arguments were "legally infirm and carried unacceptable allegations against Beijing."<sup>23</sup> In the meantime, hostilities continued. The Philippines signed the Enhanced Defense Cooperation Agreement (EDCA) with the United States on April 28, 2014.<sup>24</sup> EDCA allowed the United States to enhance its "rotational presence" in the area and to station supplies at military bases in the Philippines for ten years.<sup>25</sup> Between 2013 and 2015, China completed constructing a runway for its military aircraft on the Paracel Islands and began reclaiming Mischief Reef to create a naval station amidst objections from the Philippines and the United States.<sup>26</sup> After ordering China to respond to the Philippines' case and failing to secure China's cooperation, the PCA heard the Philippines' arguments in July 2015.<sup>27</sup>

#### *A. The Final Decision: The Philippines' Clear but Short-lived Victory*

Five judges reviewed the Philippines' submissions and issued a five-part decision on July 12, 2016.<sup>28</sup> The decision, laid out in approximately 500 pages, is summarized briefly in the following paragraphs.

The PCA found that UNCLOS intended to comprehensively allocate the States' rights to respective maritime areas, rejecting China's claims of historic rights over the South China Sea.<sup>29</sup> UNCLOS does not recognize historic rights that existed prior to its effective date.<sup>30</sup> If China had historic rights over some areas in the South China Sea, UNCLOS extinguished the historic rights that were incompatible with its system of allocating maritime rights.<sup>31</sup> The PCA further found that, prior to UNCLOS, the South China Sea was legally part of the high seas.<sup>32</sup> China's claims of historical

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21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. Amy Searight et al., *Judgment Day: The South China Sea Tribunal Issues Its Ruling*, ASIA MAR. TRANSPARENCY INITIATIVE (July 11, 2016), <https://amti.csis.org/arbitration-ruling-analysis/>.

29. Philippines v. China, PCA Case No. 2013-19, Award, ¶¶ 256–57, 261 (Perm. Ct. Arb. July 12 2016), <https://www.pcacases.com/web/sendAttach/1506>.

30. *Id.* ¶¶ 257–58.

31. *Id.* ¶¶ 262–63.

32. *Id.* ¶¶ 270–71.

navigation and fishing represented a mere exercise of high seas freedom, and not of China's historical and exclusive control over the South China Sea.<sup>33</sup> Accordingly, as between the Philippines and China, China has no legal basis for claiming historical rights over resources in excess of what UNCLOS provided.<sup>34</sup>

On the issue of the status of the features of the South China Sea, the PCA concluded that the Spratly Islands are legally rocks that do not generate their own EEZ or continental shelf.<sup>35</sup> The PCA found that, though the reefs in the Spratly Islands are high-tide features, they cannot—in their natural condition—sustain either (1) a stable community of people, or (2) economic activity that is not dependent on outside resources.<sup>36</sup> Therefore, under UNCLOS, the high-tide features are rocks that generate only a 12-nautical-mile territorial sea.<sup>37</sup>

On the issue of the lawfulness of Chinese activities in the South China Sea, the PCA found that China had violated the Philippines' sovereign rights with respect to the Philippines' EEZ and continental shelf.<sup>38</sup> China interfered with the Philippines' activities in several reefs that the PCA determined to be submerged features at high tide.<sup>39</sup> Submerged features are included in a sovereign state's EEZ.<sup>40</sup> Therefore, China's obstruction of the Philippines' operations violates the Philippines' sovereign rights to explore and exploit the natural resources in its own EEZ.<sup>41</sup>

The PCA also found that China's large-scale land reclamation and artificial island building on seven reefs of the Spratly Islands caused severe harm to the coral reef environment.<sup>42</sup> The PCA thus decided that China violated its obligation under Articles 192 and 194 of UNCLOS to protect and preserve the marine environment with respect to fragile ecosystems and habitats of depleted, endangered, or threatened species.<sup>43</sup>

The PCA also found that Chinese fishermen had harvested endangered sea turtles, corals, and giant clams in the South China Sea using methods that severely damaged the coral reef environment.<sup>44</sup> Chinese authorities knew of these destructive activities, yet failed to act with due diligence by

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33. *Id.* ¶ 270.

34. *Id.* ¶ 278.

35. *Id.* ¶ 646.

36. *Id.*

37. *Id.*

38. *Id.* ¶ 716.

39. *Id.* ¶ 814.

40. *Id.* ¶¶ 717–18, 814.

41. *Id.* ¶ 757.

42. *Id.* ¶¶ 976–79, 982–83.

43. *Id.* ¶¶ 992–93.

44. *Id.* ¶¶ 950, 952–53, 956–58, 960, 964, 966, 968, 970, 972, 975.

not stopping their fishermen.<sup>45</sup> The PCA further found that, in obstructing Philippine vessels at high speeds over short distances, Chinese law enforcement officers created a serious risk of collision with Philippine vessels.<sup>46</sup>

On the issue of whether China's continued land reclamation and island building aggravated the dispute between China and the Philippines, the PCA concluded that China was obligated to refrain from aggravating or extending the parties' disputes during the pendency of the settlement process.<sup>47</sup> Since the beginning of the proceedings, China successfully completed a large artificial island on a reef within the Philippine EEZ, caused permanent environmental damage to the coral reef, and destroyed evidence of the natural condition of that reef.<sup>48</sup> Finally, the PCA found that the dispute between China and the Philippines did not stem from either party's intent to infringe on the other's right.<sup>49</sup> Rather, the dispute originated in each party's fundamentally different understanding of its respective rights in the South China Sea.<sup>50</sup> Therefore, the PCA decided that ordering China to respect the rights and freedoms of the Philippines under UNCLOS was unnecessary.<sup>51</sup>

Thus, the PCA decided in the Philippines' favor.<sup>52</sup> What then is keeping China from cooperating with the Philippines and following the PCA's decision?

### *B. Common but Different Interests in the South China Sea*

The advent of a new Philippine administration saw significant changes in the Philippines' foreign policy. A few months after the PCA issued its Final Decision, newly elected Philippine President Rodrigo Duterte began setting the scene for bilateral negotiations with China.<sup>53</sup> This pivot in foreign policy logically stems from the Philippines' limited military capability. China can easily establish an exclusion zone in the South China Sea: China's superior naval fleet almost guarantees its continued supremacy in the area. However, despite China's strength, China has offered joint

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45. *Id.* ¶ 757.

46. *Id.* ¶¶ 1082, 1085–86, 1088–89, 1094, 1097–98, 1101, 1104–05, 1109.

47. *Id.* ¶ 1181.

48. *Id.* ¶¶ 1112, 1118, 1120–21, 1123–24, 1127–28.

49. *Id.* ¶ 1198.

50. *Id.*

51. *Id.* ¶ 1201.

52. *Id.*

53. Christopher Bodeen, *China: Philippine Bilateral Talks over Sea Dispute to Resume*, PHILSTAR (Oct. 20, 2016, 4:00 PM), <http://beta.philstar.com/headlines/2016/10/20/1635513/china-philippine-bilateral-talks-over-sea-dispute-resume#kheTfhXLsc7Cr9EL.99>.

development, infrastructure investment, and expanded trade linkages to the Philippines in exchange for more favorable relations.<sup>54</sup> This is more than what the Philippines' allies have offered.

Fellow members of the Association of Southeast Asian Nations (ASEAN)<sup>55</sup> did not mention the PCA ruling in its official communiqué issued after the ASEAN Summit in September 2016.<sup>56</sup> Even the United States, the Philippines' strongest military ally, has not clarified its security commitment to the South China Sea.<sup>57</sup> Therefore, it seems only logical for the new Philippine leader to turn to China, the only interested party that has clear and demonstrated intentions.

But is this truly the most strategic decision? Some aspects of the dispute, like energy security, provide platforms for cooperation. However, a closer look at both countries' most salient interest—sovereignty—suggests that the Philippines' shying away from its sovereign claims over the Spratly Islands may be the quickest way for the country to lose control of the territory altogether.

### 1. Oil, Natural Gas, and Energy Security

Energy security is one of the reasons for the continued dispute over the South China Sea. For the Philippines and China, the South China Sea presents the same potential: a new source for natural gas that would address the countries' rapidly growing energy needs.

Rapid development made China the second largest consumer of oil after the United States, with China expected to surpass the United States'

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54. Benjamin Kang Lim, *China, Philippines Agree to Cooperate on 30 Projects Worth \$3.7 Billion*, REUTERS (Jan. 23, 2017, 7:06 AM), <http://www.reuters.com/article/us-china-philippines-idUSKBN1571GJ>; Danica M. Uy, *China Infra Funding to Normalize Relationship with PHL -- HSBC*, BUSINESSWORLD ONLINE (Jan. 21, 2017), <http://www.bworldonline.com/content.php?section=Economy&title=china-infra-funding-to-normalize-relationship-with-phl——hsbc&id=139397>.

55. The Association of Southeast Asian Nations (ASEAN) is a regional bloc composed of ten Southeast Asian countries: Indonesia, Malaysia, Philippines, Singapore, Thailand, Brunei Darussalam, Vietnam, Laos, and Myanmar. It was established on August 8, 1967, with the signing of the ASEAN Declaration in Bangkok, Thailand. *Establishment*, ASS'N SOUTHEAST ASIAN NATIONS, <http://asean.org/asean/about-asean/> (last visited May 4, 2018).

56. Manuel Mogato et al., *ASEAN Deadlocked on South China Sea, Cambodia Blocks Statement*, REUTERS (July 25, 2016, 2:12 AM), <https://www.reuters.com/article/us-southchinasea-ruling-asean/asean-deadlocked-on-south-china-sea-cambodia-blocks-statement-idUSKCN1050F6>.

57. David Alexander, *Obama Urges China to Stop Flexing Muscles over South China Sea*: CNN, REUTERS (Sept. 2, 2016, 4:30 PM), <http://www.reuters.com/article/us-china-obama-relationships-idUSKCN1182KX>; Demetri Sevastopulo et al., *Obama Forced Xi to Back Down over South China Sea Dispute*, FIN. TIMES (July 12, 2016), <https://www.ft.com/content/c63264a4-47f1-11e6-8d68-72e9211e86ab>.



consumption by 2030.<sup>58</sup> In 2016, China imported 64.4% of its crude oil from mega-exporters like Russia and Saudi Arabia.<sup>59</sup> With curbed output from mature domestic oil fields and increasing local demand, the China National Petroleum Corporation (CNPC) projected China's net oil imports to rise by 5.3% or 396 million tons in 2017.<sup>60</sup> This increase in oil imports continues to push China to diversify energy resources by increasing production of natural gas and nuclear power, and exploring new energy resource locations.<sup>61</sup>

At present, China imports more natural gas than it produces, but development remains steady.<sup>62</sup> Though significant issues like geological complexity and infrastructure limitations slow the development of China's natural gas industry, China has successfully drilled 700 shale gas wells in a span of four years.<sup>63</sup> By mid-2015, China reduced the cost of shale gas drilling by 23% from costs in 2013.<sup>64</sup> China will continue to subsidize companies producing shale gas until 2020.<sup>65</sup>

The Philippines also seeks to develop energy self-sufficiency, but is in a worse position. The Philippines imports 90% of its crude oil and petroleum products.<sup>66</sup> Seventy-five percent of these imports come from the Middle East.<sup>67</sup> The Philippines' largest alternative energy source, the Malampalaya natural gas field, generates only 30% of the Philippines' power needs.<sup>68</sup> Further, it is expected to dry by 2030.<sup>69</sup> Meanwhile,

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58. Leszek Buszynski, *The South China Sea: Oil, Maritime Claims, and U.S.–China Strategic Rivalry*, 35 WASH. Q. 139, 141 (2012).

59. Irina Slav, *China's Oil Import Dependency Deepens*, OILPRICE.COM (Jan. 13, 2017, 12:12 PM), <http://oilprice.com/Latest-Energy-News/World-News/Chinas-Oil-Import-Dependency-Deepens.html>.

60. *Id.*

61. Buszynski, *supra* note 58, at 141.

62. *Shale Gas Development in China Aided by Government Investment and Decreasing Well Cost*, U.S. ENERGY INFO. ADMIN. (Sept. 30, 2015) [hereinafter *Shale Gas Development in China*], <https://www.eia.gov/todayinenergy/detail.php?id=23152>. The China Petroleum and Chemical Corporation (SINOPEC) “has developed a set of technologies for [drilling] shale gas reservoir[s] with a burial depth of less than 3500 m, the longest horizontal section can reach as long as 2130 m, and up to 26 stages can be fractured . . . .” Pingli Liu et al., *Technical Status and Challenges of Shale Gas Development in Sichuan Basin, China*, 1 PETROLEUM 1, 6 (2015). SINOPEC expected this development to increase natural gas production in certain reservoirs from 2.5 billion cubic meters (bcm) to 2.6 bcm by the end of 2015. *Id.* at 6.

63. *Shale Gas Development in China*, *supra* note 62.

64. *Id.*

65. *Id.*

66. INT'L CRISIS GRP., STIRRING UP THE SOUTH CHINA SEA (IV): OIL IN TROUBLED WATERS 14, ASIA REP. NO. 275 (Jan. 26, 2016), <https://www.files.ethz.ch/isn/195791/South%20china%20sea4.pdf>.

67. *Id.*

68. *Id.*

69. *Id.*

electricity demand in Luzon, the northern mainland, which houses the nation's capital, is projected to increase by 4.59% annually from 2014.<sup>70</sup>

The Philippines' lack of infrastructure prevents it from importing natural gas like China.<sup>71</sup> Furthermore, developing new energy sources has been extremely challenging. The financial risk, capital requirement, and technological demand of launching energy projects are so enormous that even the largest Philippine companies cannot shoulder the effort.<sup>72</sup> Moreover, the Philippines' attempts at finding foreign partners for exploring natural gas reserves in the South China Sea are constantly thwarted by the tensions in the area.<sup>73</sup>

This shared interest in securing a new energy source for the Filipinos and the Chinese presents an obvious opportunity for cooperation, rather than justifying the ongoing stalemate. One needs support, the other has the capacity to help.<sup>74</sup> Why then have the Philippines and China failed to agree on jointly exploring the natural gas potential of the disputed area in the South China Sea?

## 2. Fisheries and Food Security

The fisheries resource in the South China Sea is a less cited reason for the ongoing dispute over the area, but, on closer inspection, it may be one of two issues on which the dispute hinges. The South China Sea accounts for 12% of the world's total fishing catch, which has a landed value of 21.8 billion U.S. dollars.<sup>75</sup> Further, China's territory in the South China Sea accounts for 45% of the landed value.<sup>76</sup> In addition, 55% of global marine fishing vessels operate in the South China Sea. China's heavily subsidized fishing industry accounts for the majority of those vessels.<sup>77</sup>

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70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. There have been reports that China and the Philippines are planning to enter into a joint exploration agreement for the natural gas potential of the Spratly Islands. Tim Daiss, *China, Philippines Reportedly Set to Agree on Joint South China Sea Oil Exploration*, FORBES (Oct. 18, 2016, 10:43 PM), <https://www.forbes.com/sites/timdaiss/2016/10/18/china-philippines-oil-deal-underway-in-south-china-sea-says-report/#b3b910e73522>. However, a spokesperson for the Philippine president was quick to downplay these reports. Currently, "there is no government policy regarding [joint exploration] . . . [W]hat [the Philippine president] was referring to is the possibility of business-to-business partnerships . . ." Christina Mendes, *Joint Exploration in the South China Sea Not Government Policy*, PHILSTAR (Dec. 21, 2016, 12:00 AM), <http://www.philstar.com/headlines/2016/12/21/1655535/joint-exploration-south-china-sea-not-government-policy>.

75. U. RASHID SUMAILA & WILLIAM W.L. CHEUNG, *BOOM OR BUST: THE FUTURE OF FISH IN THE SOUTH CHINA SEA* 3 (2015).

76. *Id.*

77. *Id.* at 8.

However, China's interest lies in more than just bolstering its booming economy. Pollution and overfishing have depleted fish stocks along China's coastline.<sup>78</sup> Fifty percent of China's coastal waters are seriously polluted with untreated waste, industrial runoff, and shipping accidents, turning abundant fisheries into offshore dead zones.<sup>79</sup> Marine life caught from these dead zones is toxic, often containing DDT pesticide and cadmium at 40% above safe levels and lead at 50% above safe levels.<sup>80</sup> Furthermore, Chinese researchers found that China's four major fisheries—Bohai, Zhoushan, the Chinese coastline, and the Gulf of Tonkin—have become so depleted that they “exist only in name . . . .”<sup>81</sup> Such dire circumstances have pushed China's fishing industry toward dangerous and contested waters like those in the South China Sea.

The Philippines is hardly better off. Unlike China, overfishing—not pollution—is the leading cause for fishery depletion in Philippine fisheries.<sup>82</sup> Ten out of thirteen of the country's designated fishing grounds are overfished, resulting in a decrease in the population of small, pelagic fish species like sardines and scad.<sup>83</sup> Data from the Philippine Bureau of Fisheries and Aquatic Resources reveal that the average daily haul of Filipino fishermen has fallen from 20 kilograms in the 1970s to 4.76 kilograms at present.<sup>84</sup> Increasing pressure on municipal and coastal fisheries drives Filipino fishermen farther out into sea and to destructive methods like blasting and cyanide fishing.<sup>85</sup> In 2012, the Philippines' fish trade surplus amounted to approximately 30.07 billion pesos.<sup>86</sup> The Philippines exports most of its tuna, shrimp, and seaweed—its leading export products—to Japan, the United States, China, and Germany.<sup>87</sup>

Apart from being an alternative source to both countries' collapsing domestic fisheries, the South China Sea also provides significant

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78. Clive Schofield et al., *Fishing, Not Oil, Is at the Heart of the South China Sea Dispute*, CONVERSATION (Aug. 15, 2016, 4:08 PM), <https://theconversation.com/fishing-not-oil-is-at-the-heart-of-the-south-china-sea-dispute-63580>.

79. JAMES R. GORRIE, *THE CHINA CRISIS: HOW CHINA'S ECONOMIC COLLAPSE WILL LEAD TO GLOBAL DEPRESSION* 198 (2013).

80. *Id.* at 198–99.

81. Liang Jialin & Jiang Han, *Overfishing Pushes 80% of Chinese Fishermen Towards Bankruptcy*, CHINADIALOGUE (Oct. 19, 2012), <https://www.chinadialogue.net/article/show/single/en/5221-Overfishing-pushes-8-of-Chinese-fishermen-towards-bankruptcy>.

82. STUART J. GREEN ET AL., *PHILIPPINE FISHERIES IN CRISIS: A FRAMEWORK FOR MANAGEMENT* 7–9 (2003).

83. *South China Sea: Fish Wars*, INQUIRER.NET (Apr. 3, 2016, 1:16 PM), <https://globalnation.inquirer.net/138297/south-china-sea-fish-wars>.

84. *Id.*

85. *Id.*

86. *Fishery and Aquaculture Country Profiles: The Republic of the Philippines*, FOOD & AGRIC. U.N. (May 2014), <http://www.fao.org/fishery/facp/PHL/en>.

87. *Id.*

employment for Chinese and Filipino citizens. Not counting small fishing boats, China has more than 92,000 fishing vessels deployed in the northern South China Sea, employing approximately 650,000 fishermen.<sup>88</sup> In comparison, the Filipino fishery operation deploys more than 115,000 fishing vessels and employs approximately 630,000 fishermen.<sup>89</sup>

The fisheries in the South China Sea are overexploited and are home to extremely valuable resources. The competition for these resources is intense, and the need for them is becoming more urgent. Despite the intensifying level of competition, however, China is relaxing its grip on several areas in the Spratly Islands. China allowed Philippine fishermen access to a disputed shoal in November 2016.<sup>90</sup> Regardless, China knows that it has the military advantage over the Philippines should a “fish war” erupt.<sup>91</sup> Control over the fisheries of the South China Sea bestows control over 12% of the world’s fish trade.<sup>92</sup>

### 3. Nationalism

If awareness about an issue were enough to constitute nationalism, then China and the Philippines would have no problem justifying their respective stances on the South China Sea dispute to domestic and international audiences. Andrew Chubb’s survey on Chinese attitudes toward the South China Sea revealed that 53% of the Chinese population paid close to very close attention to the South China Sea dispute.<sup>93</sup> The 2013 Pew Global Attitudes Survey revealed that 90% of Filipinos believe the dispute with China over the South China Sea is a “big problem.”<sup>94</sup> Yet, despite public awareness about the issue, there has not been widespread, collective action from both nations’ citizens urging the Chinese and the Philippine governments to address the dispute.<sup>95</sup>

Careful crafting of China’s narrative portrayed the Chinese Communist Party as the country’s savior, preventing humiliation at the hands of the West.<sup>96</sup> As a result, discussions of the South China Sea begin with the

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88. SUMAILA & CHEUNG, *supra* note 75, at 8.

89. *Id.*

90. *China Confirms Allowing Philippine Fishermen Access to Shoal*, INQUIRER.NET (Nov. 1, 2016, 6:59 AM), <http://globalnation.inquirer.net/148435/china-confirms-allowing-philippine-fishermen-access-to-shoal>.

91. Schofield et al., *supra* note 78.

92. SUMAILA & CHEUNG, *supra* note 75, at 3.

93. ANDREW CHUBB, EXPLORING CHINA’S “MARITIME CONSCIOUSNESS” 24–25 (2013).

94. *Attitudes Towards China*, PEW RESEARCH CTR. (July 18, 2013), <http://www.pewglobal.org/2013/07/18/chapter-3-attitudes-toward-china/>.

95. BILL HAYTON, THE SOUTH CHINA SEA: THE STRUGGLE FOR POWER IN ASIA 166, 174 (2014).

96. *Id.* at 177.

assumption that the area naturally belongs to China and not some neighboring country.<sup>97</sup> But even when China's "military hawks" have made bellicose statements to the media against neighboring states, popular uproar has mostly been limited to internet fora.<sup>98</sup> That is not to say that the South China Sea dispute does not number among China's top concerns. According to Chubb's survey in China, "island sovereignty disputes" with neighboring countries ranked sixth out of nine issues citizens believed most important to China.<sup>99</sup> Just over 51% of survey respondents listed island sovereignty disputes as one of the top five most important issues the country faces—behind corruption (84.3%), rich-poor disparity (79.7%), food and drug safety (53.1%), social practices and moral issues (55.1%), and environmental pollution (52.9%).<sup>100</sup>

This consciousness has not translated into major street protests because of the Chinese government's control over popular demonstrations. China deployed police to the Philippine Embassy in Beijing after the standoff in 2012 to curb protesters.<sup>101</sup> Days after the PCA issued its final decision in July 2016, China deleted reports of a small protest occurring in the province of Hebei.<sup>102</sup> In the face of high regional tension, China has been cautious in allowing national sentiment to influence Beijing's actions. The Chinese government knows that nationalism is useful for justifying Beijing's choices, but dangerous when allowed so much influence that nationalism would commit Beijing to a certain course of action.<sup>103</sup>

Like the Chinese, Filipinos know that the South China Sea—renamed the West Philippine Sea in Filipino national maps published after 2012—is theirs by sheer proximity.<sup>104</sup> To the Filipinos, there is no dispute. But there is no popular dissent, either. This is so for two reasons.

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97. *Id.* at 178.

98. *Id.* at 176, 179.

99. CHUBB, *supra* note 93, at 24–25.

100. *Id.* Andrew Chubb conducted this survey in 2013, a year after the Philippines filed its claim with the PCA, and three years before the PCA issued its final decision. The survey further revealed that, out of ten policy options presented, Chinese respondents favored warfare and shelving the dispute least. *Id.* at 38–39. They ranked international publicity, popular activism, and economic sanctions as the top three options. *Id.* Surprisingly, respondents also favored submitting the dispute to the United Nations' arbitration process over warfare. *Id.*

101. Damian Grammaticas, *Protest in Philippines Over South China Sea Stand-Off*, BBC (May 11, 2012), <http://www.bbc.com/news/world-asia-18030805>.

102. Lucy Hornby, *Beijing Censors South China Sea Protest*, FIN. TIMES (July 17, 2016), <https://www.ft.com/content/2e3ec4fe-4c8c-11e6-8172-e39ecd3b86fc>.

103. Bethany Allen-Ebrahimian, *After South China Sea Ruling, China Censors Online Calls for War*, FOREIGN POL'Y (July 12, 2016, 5:12 PM), <http://foreignpolicy.com/2016/07/12/after-south-china-sea-ruling-china-censors-online-calls-for-war-unclos-tribunal/>.

104. Hayton, *supra* note 95, at 165.

First, there is little agreement in Philippine politics as to what constitutes “national interest.”<sup>105</sup> The Philippines is a fragmented nation whose citizens identify with their regions more than they identify with the country as a whole.<sup>106</sup> These regions are divided further into provinces that are governed by prominent, local families.<sup>107</sup> As such, Filipinos usually rely on local governments rather than on national officials governing from the nation’s capital.<sup>108</sup>

The national government is hardly better off. Seats in the Cabinet, the Senate, and the House of Representatives are filled by members of powerful families who run the country based on their own interests.<sup>109</sup> Concentrated power at such commanding heights in government often makes the actions of individuals’ impactful and destabilizing.

Second, the majority of Filipinos prioritize daily survival over issues of sovereignty and nationalism. A survey conducted by Pulse Asia in December 2016 shows that the top five most urgent national concerns are improving and increasing worker compensation (45%), controlling inflation (34%), reducing poverty (33%), fighting criminality (35%), and creating more jobs (35%).<sup>110</sup> Defending Philippine territory ranks at the bottom of the list with only 6% of survey respondents agreeing that it is an urgent national concern.<sup>111</sup> These results are consistent with the fact that, as of 2015, 21.9 million Filipinos lived below the poverty line.<sup>112</sup> It would seem that, unlike China, whose citizens consider territorial integrity a national priority, the Philippines’ populace is less concerned about the South China Sea. Time will tell whether the new administration will change this attitude.

## II. ESTABLISHING CHINA’S LIABILITY UNDER INTERNATIONAL LAW

If sovereign states voluntarily adhered to the decisions of tribunals, the clarity and the finality of the PCA decision would have been sufficient to secure China’s compliance. However, disputes between sovereign states do not exist in a vacuum. Weighty interests like oil and fish often pose obstacles to international cooperation.

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105. *Id.* at 166.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *December 2016 Nationwide Survey on Urgent Personal National Concerns and National Administration Performance Ratings*, PULSE ASIA RES. INC., <http://www.pulseasia.ph/december-2016-nationwide-survey-on-urgent-personal-and-national-concerns-and-national-administration-performance-ratings/> (last visited May 4, 2018).

111. *Id.*

112. *2015 Poverty in the Philippines*, PHIL. STAT. AUTHORITY (Oct. 27, 2016), [https://psa.gov.ph/sites/default/files/2015\\_povstat\\_FINAL.pdf](https://psa.gov.ph/sites/default/files/2015_povstat_FINAL.pdf).

Under what theory then can the Philippines successfully persuade China to cooperate? Political theorists posit that a sovereign state will breach its international obligation if the cost of compliance exceeds the value of performing.<sup>113</sup> In China's case, its superior economy and naval fleet guarantee the Philippines' non-retaliation even as China continues to deviate from its international obligations. Thus, the Philippines' task is to raise the cost of China's noncompliance so that China will see compliance with international law as the better option.

The Philippines can raise the cost of China's continued noncompliance in two ways: (1) it can employ retaliatory measures against China, or (2) it can force China to compensate for the damage it inflicted by occupying the Spratly Islands in the South China Sea. Given the imbalance of power between the two countries, it is likely that China will match the Philippines' retaliatory measures with heavier retaliation.<sup>114</sup> Moreover, an incendiary strategy may increase tensions not only for the Philippines, but also for the entire Southeast Asian region. The risks born from retaliation are significant, and will likely necessitate a more comprehensive discussion than this Note can competently cover. Hence, the upcoming sections will focus on the second option: enforcing the PCA's decision through a claim for compensation for the environmental damage China caused in occupying the Spratly Islands. However, prior to expounding on the Philippines' compensation claim, this section will briefly explain how to establish liability under international law.

*A. The Primary Rules of International Law: Duties Under the United Nations Convention on the Law of the Sea*

There are two major bodies of rules that regulate the international conduct of states: the primary rules of international law and the secondary rules of international law.<sup>115</sup> The primary rules consist of the states' obligations under a particular treaty or agreement, or under customary

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113. Eric Posner calls this "efficient noncompliance." Posner & Sykes, *supra* note 4, at 252. Under this theory, international obligations are much like contracts: if a state breaches its obligations, the victim state has the right to retaliate by breaching its own obligations. *Id.* Furthermore, treaties, like contracts, do not cover all contingencies. *Id.* If contingencies increase the cost of compliance beyond a state's valuation of compliance, it will be more efficient for the state to not comply. *Id.*

114. *China Warns of Nuclear War*, INQUIRER.NET (Jan. 14, 2017, 12:58 AM), <http://newsinfo.inquirer.net/862116/china-warns-of-nuclear-war>; Gillian Wong & Jim Gomez, *China Warns Against Threats, May Declare Air Zone over Isles*, PHIL. STAR (July 13, 2016, 2:39 PM), <http://www.philstar.com/headlines/2016/07/13/1602446/china-warns-against-threats-may-declare-air-zone-over-isles>.

115. ANTONIO CASSESE, INTERNATIONAL LAW 244 (2d ed. 2005).

international law.<sup>116</sup> They are substantive rules that form the basis of a breach of an obligation.<sup>117</sup>

Here, UNCLOS is the primary rule from which China and the Philippines draw their obligations. Articles 192, 194(1), and 194(5) of UNCLOS obligate states to adopt measures that control pollution in the marine environment, prevent transboundary pollution damage, and protect and preserve fragile ecosystems as well as habitats for depleted, threatened, or endangered marine life.<sup>118</sup> UNCLOS prohibits the Philippines and China from engaging in activities that jeopardize the ecosystem and marine life in the Spratly Islands area.<sup>119</sup> As the PCA has decided, this prohibition applies to activities that directly harm marine life in the Spratly Islands, such as cyanide fishing.<sup>120</sup> The prohibition also applies to activities that destroy all evidence of the natural condition of features in the area, such as China's artificial island-building projects.<sup>121</sup>

Apart from obligations to preserve and protect the marine environment, UNCLOS also requires signatory states to cooperate with each other in performing their respective duties.<sup>122</sup> Article 123 requires states bordering semi-enclosed seas to coordinate their efforts in preserving and protecting the marine environment.<sup>123</sup> Article 197 requires global and regional cooperation in creating and elaborating international laws and practices protecting and preserving the marine environment.<sup>124</sup>

The Philippines, China, and other Southeast Asian countries border the South China Sea; this makes the South China Sea a semi-enclosed sea.<sup>125</sup> UNCLOS requires all these countries to coordinate their efforts in preserving the marine environment in the South China Sea.<sup>126</sup> At present, the 2002 Declaration on the Conduct of Parties in the South China Sea (DOC) coordinates the behavior of the ASEAN members and China in the South China Sea.<sup>127</sup> The DOC provides that the parties may explore or undertake cooperative measures for marine environmental protection, but does not require the parties to do so.<sup>128</sup> Moreover, ASEAN and China have

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116. *Id.*

117. *Id.*

118. UNCLOS, *supra* note 7, 1833 U.N.T.S. at 477–79.

119. *Id.* at 443.

120. *See* discussion *supra* Section I.A (summarizing the PCA's final decision).

121. UNCLOS, *supra* note 7, 1833 U.N.T.S. at 478.

122. *Id.* at 443.

123. *Id.*

124. *Id.* at 479.

125. CHUBB, *supra* note 93, at 5.

126. UNCLOS, *supra* note 7, 1833 U.N.T.S. at 443.

127. Ass'n of Southeast Asian Nations [ASEAN] Declaration on the Conduct of Parties in the South China Sea ¶¶ 1–5.

128. *Id.* ¶ 6.



flagrantly ignored the DOC since its adoption in 2002.<sup>129</sup> Therefore, DOC is not evidence of China's compliance with Articles 123 and 197.

With respect to China's presently disputed activities in the South China Sea, the PCA held that China's island-building projects on the Spratly Islands violate Articles 123 and 197.<sup>130</sup> The Philippines, Malaysia, and Vietnam have vehemently opposed China's island-building projects since they began.<sup>131</sup> China has not communicated with the ASEAN countries and has ignored these protests, making no effort to coordinate or cooperate with ASEAN or the Philippines.<sup>132</sup>

UNCLOS's binding obligations require signatory states like China and the Philippines to protect and preserve the marine environment and cooperate with each other in doing so.<sup>133</sup> The PCA's decision established that China violated UNCLOS and, thus, also the primary rules of international law.<sup>134</sup> Therefore, China's actions are subject to legal consequences governed by the secondary rules of international law.

*B. The Secondary Rules of International Law: Articles on the Responsibility of States for Internationally Wrongful Acts*

When a state fails to fulfill obligations established by the primary rules, the secondary rules determine the consequences of the state's failure.<sup>135</sup> The secondary rules are rules that presume a breach of a state's obligation and govern the consequences of that breach.<sup>136</sup> They provide the conditions under which a state is considered responsible for wrongful actions.<sup>137</sup>

The secondary rules are creatures of customary law, recently codified in the Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter *State Responsibility*).<sup>138</sup> According to *State Responsibility*, a state that commits an internationally wrongful act is responsible for its actions and is bound to suffer legal consequences.<sup>139</sup> The obligation to cease the wrongful act and assure the injured state(s) that the act will not be

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129. Huy Duong, *A Fair and Effective Code of Conduct for the South China Sea*, ASIA MAR. TRANSPARENCY INITIATIVE (July 1, 2015), <https://amti.csis.org/a-fair-and-effective-code-of-conduct-for-the-south-china-sea/>.

130. Philippines v. China, PCA Case No. 2013-19, Award, ¶ 984 (Perm. Ct. Arb. July 12 2016), <https://www.pcacases.com/web/sendAttach/1506>.

131. *Id.*

132. *Id.* ¶ 986.

133. *Id.* ¶ 1198.

134. *Id.* ¶ 1181.

135. CASSESE, *supra* note 115, at 244.

136. *Id.*

137. *Id.*

138. G.A. Res. 56/83, at 1 (Jan. 28, 2002).

139. *Id.* at 7.

repeated is an example of a legal consequence.<sup>140</sup> *State Responsibility* also requires the responsible state to make reparations for injuries.<sup>141</sup>

Full reparation may come in the form of restitution,<sup>142</sup> compensation,<sup>143</sup> or satisfaction.<sup>144</sup> Restitution re-establishes the situation before the responsible state committed the wrongful act.<sup>145</sup> Restitution is the responsible state's default obligation.<sup>146</sup> Thus, *State Responsibility* requires restitution unless re-establishing pre-injury conditions is materially impossible.<sup>147</sup> The extent of the responsible state's duty to retribute is proportional to the benefit derived by restituting instead of compensating the injured state for damages.<sup>148</sup> Where restitution cannot remedy the injury, *State Responsibility* requires compensation.<sup>149</sup> However, compensation only includes assessable damages.<sup>150</sup> *State Responsibility* requires satisfaction only where restitution or compensation cannot remedy the injury.<sup>151</sup> Satisfaction may take the form of an acknowledgment of the breach, an expression of regret, a formal apology, and any other appropriate modality.<sup>152</sup> However, even a relatively innocuous remedy must not be disproportionate to the injury and cannot humiliate the responsible state.<sup>153</sup>

A state seeking reparations for another state's alleged breach of a primary rule must establish the responsibility of the state in breach.<sup>154</sup> A state is responsible for an internationally wrongful act if the alleged wrongful conduct is attributable to the state and breaches a primary obligation.<sup>155</sup> A wrongful act is attributable to the state if either a state organ duly recognized by the state's internal laws commits the wrongful action, or entities directed, authorized, or empowered by the state or placed at the state's disposal commit the wrongful action.<sup>156</sup> A breach of an obligation is an action of a state that does not conform to the requirements of that obligation regardless of the obligation's origin or character.<sup>157</sup>

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140. *Id.*

141. Injuries include both material and moral damages caused by the action. *Id.* at 8.

142. *Id.*

143. *Id.*

144. *Id.* at 9.

145. *Id.* at 8.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* at 9.

152. *Id.*

153. *Id.*

154. *Id.* at 10.

155. *Id.* at 2.

156. *Id.* at. 2-3.

157. *Id.* at 4.

There is little question that the island-building projects in the South China Sea are attributable to China. In the course of the dispute, China issued several statements affirming the Chinese government's purpose for building artificial islands.<sup>158</sup> Spokespersons for China's Ministry of Foreign Affairs have repeatedly stated that China is, in fact, building artificial islands in the Spratly Islands area to "meet various civilian demands and better perform China's international obligations and responsibilities . . ."<sup>159</sup> China's statements do not identify other actors responsible for the island-building projects.<sup>160</sup> Furthermore, Chinese spokespersons claimed that the Chinese government has taken into account ecological preservation and fishery management in conducting its construction project.<sup>161</sup> The Chinese government also claimed to have enacted ecological measures pursuant to its international obligations.<sup>162</sup> Therefore, the island-building projects in the South China Sea are attributable to China.

Proving breach of a primary obligation is the next step to establishing a state's responsibility for an internationally wrongful act. The PCA's decision that China violated its obligation to protect the marine environment in the Spratly Islands sufficiently established that China breached a primary obligation. The PCA, after receiving expert reports from both parties, conducted its own independent research on the condition of the reefs in the area and the impact of Chinese construction projects.<sup>163</sup> The independent reports stated that, despite agreement from Chinese researchers on the need for conserving the reefs, "available satellite and aerial imagery provides little indication of effective mitigation measures."<sup>164</sup> While the Chinese reports accurately described the condition of the reefs in the area, their assessments of the nature and extent of island-building impacts largely differed from available evidence.<sup>165</sup> The PCA concluded that China's island-building activities permanently damaged seven reefs in the Spratly Islands.<sup>166</sup> It found China in breach of its UNCLOS obligations to "protect and preserve the marine environment" under Article 192, to conduct its dredging operation so as to avoid polluting the marine environment under Article 194(1), and to take measures

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158. *Philippines v. China*, PCA Case No. 2013-19, Award, ¶¶ 919–20 (Perm. Ct. Arb. July 12 2016), <https://www.pcacases.com/web/sendAttach/1506>.

159. *Id.* ¶ 919.

160. *Id.* ¶ 920.

161. *Id.*

162. *Id.*

163. *Id.* ¶ 982.

164. *Id.*

165. *Id.*

166. *Id.* ¶ 983.

“necessary to protect and preserve rare or fragile ecosystems” under Article 194(5).<sup>167</sup>

The PCA’s decision established that China is responsible for the wrongful act of failing to preserve the marine environment in the South China Sea. Therefore, pursuant to *State Responsibility*, China is obligated to make reparations for the damage it caused to the seven reefs.<sup>168</sup>

Theoretically, in situations involving cooperative states, proving a responsible state’s obligation to make reparations is sufficient to advance an environmental damage claim. A cooperative state will settle the compensatory amount or submit to a proceeding to contest the damages claim.<sup>169</sup> The Philippines faces a peculiar situation in having the added challenge of advancing a claim for damages that is based on grounds acceptable to China and adequately compensates for the natural resources lost in the area.

China is unlikely to honor any claim that solidifies the Philippines’ sovereignty over the reefs.<sup>170</sup> Moreover, UNCLOS provides little guidance for determining China’s liability in failing to fulfill its specific international obligations. Article 235(1) merely provides that failure to fulfill obligations under UNCLOS will create state liability “in accordance with international law.”<sup>171</sup> Unfortunately, the articles in *State Responsibility* are too general to be of any help. While *State Responsibility* requires responsible states to make reparations,<sup>172</sup> it does not specify how to determine whether a specific form of reparation is adequate. The only other liability provision in UNCLOS Article 235(3) requires nothing further than for states to cooperate in implementing existing international law and developing international law relating to the assessment of and compensation for damages.<sup>173</sup> Thus, *State Responsibility* and UNCLOS give the Philippines the right to compensation for marine environmental damage, but do not substantiate the Philippines’ claim.

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167. UNCLOS, *supra* note 7, 1833 U.N.T.S. at 477, 478.

168. G.A. Res. 56/83, *supra* note 138, at 8–9.

169. *See generally* Trail Smelter Case (U.S. v. Canada), 3 R.I.A.A. 1905, 1980 (1935) (illustrating the United States’ and Canada’s submission to arbitration and agreement to abide by the tribunal’s decision).

170. Tom Phillips et al., *Beijing Rejects Tribunal’s Ruling in South China Sea Case*, GUARDIAN (July 12, 2016, 1:21 PM), <https://www.theguardian.com/world/2016/jul/12/philippines-wins-south-china-sea-case-against-china>.

171. UNCLOS, *supra* note 7, 1833 U.N.T.S. at 494.

172. G.A. Res. 56/83, *supra* note 138, at 8.

173. *Id.*

### III. THE STONE: COMPENSATION FOR DAMAGE TO THE MARINE ENVIRONMENT AS AN ENFORCEMENT STRATEGY

A compensation claim for international environmental damage has two major elements: state responsibility and reparation for injury.<sup>174</sup> To establish state responsibility, the claimant state must prove that another state's alleged wrongful conduct is attributable to that state and breaches a primary rule.<sup>175</sup> To establish the right to reparation for injury, the claimant state must have *locus standi* and present an acceptable calculation of damages.<sup>176</sup>

As discussed above, the PCA's decision established China's responsibility for failing to preserve and protect the marine environment under UNCLOS. The Philippines' task is to propose a theory of *locus standi* and a calculation for damages that China will recognize. This Part argues that the doctrine of *parens patriae* is an appropriate *locus standi* theory for the Philippines' compensation claim because it does not implicate sovereign issues. This Part also argues that the Philippines can propose two types of calculation for damages: compensation in kind and pure economic loss.

#### A. Establishing Locus Standi: The Doctrine of Parens Patriae

A damage claim in international law does not operate in isolation. It must be based on recognized principles of law. Much like damage claims in the United States legal system, damage claims in international law must be based on a right to sue in relation to the damage suffered or a *locus standi*.<sup>177</sup> Typically, this requires the claimant state to prove ownership over the damaged property and proprietary interest in the matter detrimentally affected by the damaging conduct.<sup>178</sup>

Damage to resources in areas over which states have direct ownership is often sufficient to satisfy the *locus standi* requirement.<sup>179</sup> However, direct ownership is more difficult to argue in the Philippines' case: China (the responsible state) rejects the Philippines' (the claimant state) ownership of the resources in the South China Sea. Therefore, the Philippines should

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174. G.A. Res. 56/83, *supra* note 138, at 2, 8–9.

175. *Id.* at 8.

176. U.N. General Assembly Rep. on the Work of Its Forty-Fifth Session, U.N. Doc. A/CN.4/SER.A, at 68 (1993).

177. Judith Efundem Agbor Enaw, *Actionable and Compensable Damage: The Civil Liability and Fund Conventions in Perspective*, MAR. COMMONS 36 (2000) [http://commons.wmu.se/cgi/viewcontent.cgi?article=1057&context=all\\_dissertations](http://commons.wmu.se/cgi/viewcontent.cgi?article=1057&context=all_dissertations).

178. *Id.*

179. *Id.* at 37, 39.

avoid *locus standi* theories that rely on ownership over natural resources in a given area.

For example, the Philippines should avoid basing its *locus standi* on a principle like the Public Trust Doctrine. The Public Trust Doctrine imposes on the state the fiduciary duty to protect resources held in trust for the public.<sup>180</sup> The Philippines' damages claim under the Public Trust Doctrine would assume that the Filipino people own the damaged natural resources in the Spratly Islands and that the Philippine government is acting merely as a trustee for its public in vindicating the public's rights.<sup>181</sup> *Locus standi* based on the Public Trust Doctrine is unlikely to elicit China's cooperation because cooperating under the Public Trust Doctrine is akin to recognizing the Philippines' sovereign rights over the Spratly Islands.

Therefore, to obtain cooperation from China, the Philippines must establish a basis for *locus standi* that does not require sovereignty over the resources in the Spratly Islands. The doctrine of *parens patriae* is an example of such a basis. *Parens patriae* would allow the Philippines to sue China for the detrimental effects of China's artificial island-building to the Philippine economy and the Filipino people, not the resources in the Spratly Islands.

The doctrine of *parens patriae* originated from English common law.<sup>182</sup> The monarch assumed the role of guardian that protected and acted for those who cannot fend for themselves—namely, minors and mentally incompetent individuals.<sup>183</sup> The present form of *parens patriae* permits states without proprietary interests over the affected resources to sue for damages on behalf of its citizens.<sup>184</sup> Generally, the state's *parens* authority protects the state's quasi-sovereign interest in securing the health, comfort, and welfare of its citizens and the general economy.<sup>185</sup> The interest

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180. Allan Kanner, *The Public Trust Doctrine, Parens Patriae, and the Attorney General as the Guardian of the State's Natural Resources*, 16 DUKE ENVTL. L. & POL'Y 57, 76 (2005).

181. *Id.* at 61.

182. Lawrence B. Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195, 195 (1978).

183. *Id.* at 196. The development of the *parens patriae* doctrine is interesting in itself. Originally, the king only exercised his *parens* authority to act on behalf of lunatics (the temporarily insane) and idiots (the permanently insane). However, due to a printing error in a case later cited as precedent in English courts, the word infant was substituted for idiot, and thus the king's *parens* authority was extended to minors. *Id.* at 203.

184. Kanner, *supra* note 180, at 100–01.

185. See *Louisiana v. Texas*, 176 U.S. 1, 19 (1900) (recognizing that the State of Louisiana was entitled to seek relief on behalf of its citizens because limitations on trade “affect [Louisiana] citizens at large”); *Missouri v. Illinois*, 180 U.S. 208, 241 (1901) (“[I]t must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them.”); *Pennsylvania v. West Virginia*, 262 U.S. 553, 592 (1923) (recognizing that Pennsylvania was the proper representative of its citizens' interests in maintaining access to natural gas in West Virginia because “[t]heir health, comfort and welfare are seriously jeopardized by the

in protecting natural resources is drawn from the quasi-sovereign interest in securing the health and safety of a state's residents.<sup>186</sup> To assert a damages claim based on the doctrine of *parens patriae*, the state must prove: (1) that the state's interests are wholly separate from the injury suffered by individuals of the public, and (2) that a substantial portion of the state's citizens were detrimentally affected by the incident for which damages are demanded.<sup>187</sup>

States have used *parens patriae* to recover for all damages, harm, and loss to the states' environment, economy, people, and people's properties resulting from other states' violating international obligations. In *Croatia v. Serbia*, each state party to the suit—"in its own right and as *parens patriae* for its citizens"—requested the International Court of Justice (ICJ) to declare that the other state is obligated to make reparations for all damage and harm resulting from violations of the Convention on the Prevention and Punishment of the Crime of Genocide (*hereinafter* Genocide Convention).<sup>188</sup> In *Netherlands v. Sweden*, an ICJ judge affirmed the state's capacity as sovereign to act as guardian or representative of citizens in need of protection.<sup>189</sup>

In *Bosnia & Herzegovina v. Serbia & Montenegro*, the ICJ decided that Bosnia and Herzegovina in its own right and as *parens patriae* for its citizens is entitled to reparations from Serbia and Montenegro.<sup>190</sup> The ICJ found that Serbia and Montenegro violated its obligations under the Genocide Convention to prevent and punish acts of genocide.<sup>191</sup> However, the ICJ could not conclude from the totality of circumstances that Serbia and Montenegro could have completely prevented genocide by exercising its influence over the Bosnian Serb military authorities.<sup>192</sup> Therefore, the ICJ decided that Bosnia and Herzegovina is entitled only to satisfaction and not compensation.<sup>193</sup>

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threatened withdrawal of the gas from the interstate stream"); *Georgia v. Pa. R.R. Co.* 324 U.S. 439, 450–51 (1945) (equating unlawful trade barriers with pollution and nuisance, holding that trade barriers "limit[] the opportunities of [Georgia's] people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States").

186. Kanner, *supra* note 180, at 109.

187. Enaw, *supra* note 177, at 45.

188. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Judgment, 2015 I.C.J. Rep. 6 ¶¶ 49, 50, 51 (Feb. 3).

189. Application of the Convention of 1902 Governing the Guardianship of Infants (Nether. v. Swed.), Judgment, 1958 I.C.J. 55, 71 (Nov. 28).

190. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43 ¶ 459 (Feb. 26).

191. *Id.* ¶ 461.

192. *Id.* ¶ 462.

193. *Id.* ¶¶ 462–63.

Cases involving the International Oil Pollution Convention Fund (IOPC) illustrate the use of the *parens patriae* doctrine to recover damages resulting from oil pollution. In the famous case of *Puerto Rico v. M/V Colocotroni*, a U.S. District Court ruled that Puerto Rico could sue for environmental damage in its *parens patriae* capacity.<sup>194</sup> The court determined the damage award included not only the cost of cleanup after the oil spill, but also the cost of a rehabilitation program.<sup>195</sup> The court also allowed recovery for damage to the marine ecosystem and marine organisms.<sup>196</sup>

The *Patmos* Incident involving oil pollution damage shows that the use of *parens patriae* to vindicate actual economic loss (i.e., a state's suffering fishing industry) is not unprecedented. In 1985, the Greek tanker *Patmos* collided with a Spanish tanker, causing 700 tons of oil to spill into the Straits of Messina.<sup>197</sup> Though most of the oil dispersed naturally, some of it hit the Sicilian coast.<sup>198</sup> The Italian government then lodged damages claims in the Court of First Instance in Messina against the owner of *Patmos* and the IOPC.<sup>199</sup> The Italian government based its claim on its *parens* authority to protect the economic interests of its tourism and fishing industries, which suffered losses because the Sicilian coast had to be closed for clean-up.<sup>200</sup> The Court of First Instance did not recognize the Italian government's *parens* claim, but on appeal, the Court of Appeals stated that:

[T]he environment must be considered as a unitary asset, separate from those of which the environment is composed (territory, territorial waters, beaches, fish, etc.), and it includes natural resources, health and landscape. The right to the environment belongs to the State, in its capacity as representative of the collectivities.<sup>201</sup>

Consequently, the Court of Appeals granted the State of Italy compensation for marine environmental damages.<sup>202</sup> The *Patmos* Incident and *M/V Colocotroni* show that the Philippines has a good basis for a

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194. P.R. v. SS Zoe Colocotroni, 456 F.Supp. 1327, 1337 (D.P.R. 1978).

195. *Id.* at 1345.

196. *Id.* at 1344.

197. Note by the Director, Int'l Oil Pollution Compensation Fund [IOPC Fund], Incidents Involving the IOPC Fund, ¶ 1.1 (Sept. 2, 1991).

198. *Id.*

199. *Id.* ¶ 3.1.

200. *Id.* ¶ 3.4.

201. *Id.* ¶ 3.7.

202. *Id.* ¶ 5.1.



marine environmental damage claim should it choose to base such a claim on its *parens* authority.

However, to succeed on a marine environmental damages claim based on *parens patriae*, the Philippines must prove that its interests in obtaining recovery for environmental damage in the Spratly Islands are independent from the interests of the fishermen and the fishing industry affected by China's island building. The Philippines must also prove that the damage from China's island-building activities affected a substantial portion of the Philippine population.

The Philippines is a coastal state, dependent on the availability and variety of fish stock in the surrounding marine waters.<sup>203</sup> The fact that complete fishery collapse has not occurred despite overexploitation in fisheries adjacent to the Spratly Islands suggests that Philippine fish stocks depend on the South China Sea for stock replenishment.<sup>204</sup> Scientists using state-of-the-art computer models perceived high connectivity between the fish stocks in the Spratly Islands and the fish stocks in the Philippine coastline.<sup>205</sup> Scientists further agree that the existence of larval exchange between reefs in the Spratly Islands and reefs in mainland Philippines emphasize the regional role of the Spratly Islands in fishery replenishment.<sup>206</sup> Field-verified models established that "loss of reef habitat complexity reduces the productivity of the fishery threefold."<sup>207</sup> Therefore, there is a very high probability that the destruction of coral reefs in the Spratly Islands area will detrimentally affect the fish stock in mainland Philippines.

The Philippine fishing industry employs over 1.6 million municipal fishermen and 16,500 commercial fishermen nationwide, and contributes approximately 196 billion pesos or 1.8% to the Philippine Gross Domestic Product (GDP).<sup>208</sup> Admittedly, a contribution of only 1.8% to the GDP is small. However, this number remains significant considering that the great number of individuals contributing to that percentage are fishermen who operate with either very small boats or no boats at all.<sup>209</sup> In other words, a majority of fishermen operating in Philippine coastal waters fish in

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203. GREEN ET AL., *supra* note 82, at 6–15.

204. John W. McManus, *Offshore Coral Reef Damage, Overfishing and Paths to Peace in the South China Sea*, 32 INT'L J. MARINE & COASTAL L. 199, 208 (2017); SEBASTIAN C.A. FERSE ET AL., ASSESSMENT OF THE POTENTIAL ENVIRONMENTAL CONSEQUENCES OF CONSTRUCTION ACTIVITIES ON SEVEN REEFS IN THE SPRATLY ISLANDS IN THE SOUTH CHINA SEA 37–38 (2016).

205. Jonathan T. Kool et al., *Connectivity and the Development of Population Genetic Structure in Indo-West Pacific Coral Reef Communities*, 20 GLOBAL ECOLOGY & BIOGEOGRAPHY 695, 700–01 (2011).

206. *Id.* at 700.

207. FERSE ET AL., *supra* note 204, at 39.

208. FOOD & AGRIC. U.N., *supra* note 86.

209. *Id.*

*bancas*—small double-outrigger crafts consisting of a narrow hull stabilized by two bamboo outriggers.<sup>210</sup> These crafts are powered only by small engines when they are not operated with sails or oars.<sup>211</sup> They do not venture further than 15 km from the shoreline.<sup>212</sup> Out of the 1.6 million municipal fishermen, 16,500 are employed in the South China Sea area.<sup>213</sup> These municipal fishermen will be among those detrimentally impacted by the destruction of the reefs in the Spratly Islands area. If the Philippine coastal fish stocks decline any further, the livelihood of these fishermen will be among the first and worst to suffer.

In demanding compensation from China, the Philippines will be asserting its *parens* authority to protect the state's and the Filipino people's economic welfare. The Philippines' argument will be similar to that of the Italian Government in *Patmos*: that a substantial part of the Philippine population and economy was adversely affected by the destruction of reefs in the Spratly Islands.

*B. Proving Compensability: Compensation in Kind or Pure Economic Loss*

Proving compensability is the final element of establishing liability.<sup>214</sup> Compensability is a complex element on its own and necessitates a separate discussion. However, to complete this Note's proposal of advancing an environmental damages claim, this Part will introduce two different kinds of compensation: compensation in kind and pure economic loss.

Once a claimant state establishes state responsibility, international law obligates the responsible state to cease the wrongful action and to guarantee that the responsible state will not repeat the wrongful action.<sup>215</sup> The responsible state must then make full reparations to the injured state in the form of "restitution, compensation and satisfaction, either singly or in combination . . ."<sup>216</sup> However, as in almost all of international law, "[r]eparation is not an inflexible concept," and the appropriateness of the form of reparation will depend on the circumstances of each case.<sup>217</sup> No two cases alleging environmental damage will be the same. This means that international courts and tribunals will determine the appropriate form of reparations on a case-by-case basis, and that similar facts will not necessarily warrant the same remedy.

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210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. G.A. Res. 56/83, *supra* note 138, at 8.

215. *Id.* at 7.

216. *Id.* at 8.

217. PATRICIA BIRNIE ET AL., INTERNATIONAL LAW AND THE ENVIRONMENT 226 (3d ed. 2009).

Compensation is the appropriate remedy for an internationally wrongful act when the responsible state is obligated to compensate for the damage resulting from the wrongful act, and the damage is financially assessable.<sup>218</sup> The wrongful act causes the damage where there is a “clear and unbroken causal link between the unlawful act and the injury for which damages are being claimed.”<sup>219</sup> In other words, the course of events that lead to the damage should logically flow from the wrongful act.<sup>220</sup> Immediate effect is unnecessary.<sup>221</sup> It is sufficient for the injured state to show that an uninterrupted chain of events resulted in the damage.<sup>222</sup> “Financially assessable” damage includes matters that do not have economic value to humans, such as the extinction of endangered species.<sup>223</sup> Moral damages can warrant compensation, but only insofar as the moral damage was suffered by natural persons.<sup>224</sup> But moral damage to the “victim State”<sup>225</sup> does not warrant compensation. The Philippines must prove that China’s island-building activities in the South China Sea are closely linked to the damage Philippine fish stocks will suffer. The Philippines must also prove that damage to Philippine fish stocks is financially assessable.

The PCA’s decision on China’s breach of its obligations under UNCLOS adequately establishes the causal link between the wrongful conduct and the injury. By destroying coral reefs in the process of building artificial islands, China caused irreparable damage to the marine ecosystem in the area, as demonstrated by the findings in an independent report submitted to the PCA.<sup>226</sup> However, the Philippines’ claim for damages must be financially assessable to warrant compensation under international law.<sup>227</sup> The United Nations Compensation Commission’s (UNCC) decision on the environmental damage Iraq caused when it invaded Kuwait is helpful in this respect.

On April 3, 1991, the UNCC issued Resolution 687, restoring Kuwait’s “sovereignty, territorial integrity and political independence” and returning

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218. G.A. Res. 56/83, *supra* note 138, at 8.

219. U.N. General Assembly Rep. on the Work of Its Forty-Fifth Session, U.N. Doc. A/CN.4/SER.A, at 69 (1993).

220. *Id.*

221. *Id.*

222. *Id.* at 70.

223. Int’l L. Comm’n, Report of the International Law Commission on the Work of its Fifty-Second Session, ¶ 193, GAOR A/55/10 (Aug. 18, 2000).

224. *Id.*

225. *Id.*

226. FERSE ET AL., *supra* note 204, at 55.

227. U.N. Comp. Comm’n Governing Council, Rep. and Recommendation Made by the Panel of Commissioners Concerning the Fifth Installment of “F4” Claims, ¶¶ 29–30, U.N. Doc. S/AC.26/2005/10 (June 30, 2005).

Kuwait's legitimate government.<sup>228</sup> Part of this resolution held Iraq liable for "any direct loss, damage, including environmental damage and the depletion of natural resources . . . as a result of Iraq's unlawful invasion and occupation of Kuwait . . . ."<sup>229</sup> The UNCC, in a subsequent resolution, interpreted Iraq's duty to make reparations for the environmental damage it caused to mean compensating military personnel responding to "environmental damage" or the threat of environmental damage;<sup>230</sup> compensating countries in the Persian Gulf region for "losses or expenses resulting from . . . [a]batement and prevention of environmental damage";<sup>231</sup> and compensating other countries assisting countries in the Persian Gulf region to respond to environmental damage or the threat of environmental damage.<sup>232</sup> The UNCC Governing Council also required Iraq to reimburse costs for cleanup assistance and compensate for expenses incurred in establishing reasonable measures to assess and monitor damage to the environment.<sup>233</sup>

Ultimately, the UNCC rejected most of the environmental claims for lacking evidence that the invasion caused the environmental damage.<sup>234</sup> However, the UNCC still allowed substantial claims to restore the environment to its pre-invasion condition.<sup>235</sup> The UNCC further stated that "primary emphasis must be placed on restoring the environment to pre-invasion conditions, in terms of its overall ecological functioning rather than on the removal of specific contaminants or restoration of the environment to a particular physical condition."<sup>236</sup> The UNCC only allowed compensation equivalent to the cost of restoring the area to its natural condition where restoration was impossible or unreasonable.<sup>237</sup> The UNCC's decision can be summarized into five elements:

1. [P]recautionary monitoring to identify and assess long-term risks to public health and the environment
2. [R]eimbursement of mutual assistance costs in environmental emergencies

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228. S.C. Res. 687, pmb. (Apr. 8, 1991).

229. *Id.* ¶ 16.

230. U.N. Comp. Comm'n Governing Council, Rep. and Recommendation Made by the Panel of Commissioners Concerning the Fifth Installment of "F4" Claims, *supra* note 227, ¶ 600.

231. *Id.* ¶ 27.

232. *Id.* ¶ 68.

233. *See id.* ¶ 308 (showing that all states that respond to the environmental damage can be compensated).

234. *Id.* ¶¶ 160, 381, 387, 440, 473, 487, 674.

235. *Id.* ¶ 42.

236. *Id.* ¶ 43.

237. *Id.* ¶ 82.

3. [T]he obligation for claimants to mitigate and contain damage to the environment
4. [V]aluation methods to ensure the remediation of lost ecological services
5. [F]ollow-up tracking to ensure the environmental effectiveness of remediation, making the disbursement of compensation awards conditional upon compliance with agreed environmental objectives and standards ('green conditionality').<sup>238</sup>

Though the UNCC's resolution does not pertain to maritime environmental damage, these decisions remain significant for the Philippines because they create a practical guide to measures for which China can compensate. By just observing the five measures the UNCC approved as warranting compensation, one may conclude that there are specific matters that can be financially assessed and require compensation.

The Philippines can use the same five elements above to establish the compensability of the Philippines' environmental damage claim against China. The Philippines can begin by offering joint development of a valuation method that will allow both China and the Philippines to assess the amount of ecological services lost because of China's island-building projects. At present, the Philippines calculates lost ecological services at \$100 million per year.<sup>239</sup> A valuation method developed by both countries can change this number. The Philippines can also meet China halfway and agree to reduce the amount of compensation if China agrees to rehabilitate significant portions of the Spratly Islands reefs. Rehabilitating the reefs in the Spratly Islands area is beneficial to both countries since both countries depend on the fishing stock in the South China Sea.<sup>240</sup>

The Philippines has another option as to the form of compensation: pure economic loss. Pure economic loss is loss sustained without physical damage.<sup>241</sup> It is a "pecuniary or commercial loss that does not arise from actionable physical, emotional, or reputational injury to person, or physical injury to property."<sup>242</sup> Some theorists construe pure economic loss as a

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238. BIRNIE ET AL., *supra* note 217, at 232.

239. Floyd Whaley, *China's Island-Building Is Ruining Coral Reefs, Philippines Says*, N.Y. TIMES (Apr. 13, 2015), <https://www.nytimes.com/2015/04/14/world/asia/chinas-island-building-is-ruining-coral-reefs-philippines-says.html>.

240. *See supra* Part I.B.2 (discussing the importance of the ecological health for food security).

241. Vernon Valentine Palmer & Mauro Bussani, *Pure Economic Loss: The Ways to Recovery*, 11.3 ELECTRONIC J. COMP. L., Dec. 2007, at 7, <https://www.ejcl.org/113/article113-9.pdf>.

242. Fernando Gomez & Hans-Bernd Schafer, *The Law and Economics of Pure Economic Loss: Introduction to the Special Issue of the International Review of Law and Economics*, 27 INT'L REV. L. & ECON. 1, 1 (2007).

“ricochet loss.”<sup>243</sup> “Ricochet loss” occurs when an individual physically damages the property of another which, in turn, causes a secondary harm to a different individual.<sup>244</sup>

The Philippines’ environmental damage claim for pure economic loss would be consistent with the Philippines’ use of *parens patriae*. In effect, the Philippines would be arguing that China’s artificial island-building has not caused any physical injury to the natural resources in the Philippine coastal waters. However, as shown by the scientific research mentioned earlier, the destruction of the reefs in the Spratly Islands area impacts the fisheries in the Philippines’ territorial waters.<sup>245</sup> Therefore, the Philippines can demand compensation limited to pure economic loss and present to China an assessment of damages that calculates only how much China’s artificial island building is costing domestic fisheries. Philippine officials have calculated economic losses from the destruction of the coral reefs at \$100 million a year.<sup>246</sup> So, China can satisfy its duty to compensate the Philippines by compensating the Philippines for the same amount or less as a deciding body will determine.

A damages claim limited to pure economic loss does not require China to recognize that the Philippines has sovereign rights over the natural resources in the Spratly Islands. China only needs to recognize that its activities, as close as they are to the Philippine coastline, have an effect on the Philippine fish stock. This is a less contentious admission since it can be readily proven through scientific research.

#### IV. THE PRAYER: AN APPEAL TO THE POLLUTER-PAYS PRINCIPLE

##### *A. The Polluter-pays Principle and Its Prevalence in International Environmental Law*

As an alternative, the Philippines can file a damages claim against China for destroying the fragile marine ecosystem in the Spratly Islands based on the Polluter-pays Principle (PPP).<sup>247</sup> The PPP is a principle in international law that places the costs of implementing measures to ensure the environment is in an “acceptable state” on the polluter.<sup>248</sup> The

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243. Palmer & Bussani, *supra* note 241, at 11.

244. *Id.*

245. See discussion *supra* Part II.B. (discussing independent reports on the coral reefs in the South China Sea that PCA relied on in making its Final Decision).

246. Whaley, *supra* note 239.

247. See ORG. FOR ECON. COOPERATION & DEV., THE POLLUTER-PAYS PRINCIPLE: OECD ANALYSES AND RECOMMENDATIONS 5 (1992) [hereinafter POLLUTER-PAYS] (describing the Polluter-pays Principle).

248. *Id.*

Organization for Economic Cooperation and Development (OECD), the first international body to adopt the PPP, did not define what constitutes an environment in an “acceptable state.”<sup>249</sup> However, the OECD recognized that states will have different environmental standards.<sup>250</sup> States will determine tolerable amounts of pollution in their own environments depending on factors, such as the specific environment’s capacity to assimilate pollution, the social objective and priorities attached to environmental protection, and varying degrees of industrialization and population density.<sup>251</sup> In other words, the PPP expects states to regulate the behavior of polluters within their jurisdiction.<sup>252</sup> Upon deciding how states want to regulate polluters, and legislating methods requiring polluters to prevent, mitigate, and clean up after pollution, the PPP discourages states from subsidizing the polluters’ costs for complying with these laws and regulations.<sup>253</sup>

However, the PPP does not harmonize environmental protection laws across different states.<sup>254</sup> It does not even intend to eliminate all forms of pollution.<sup>255</sup> The PPP is merely an economic principle dissuading states from assisting polluters in bearing the costs of pollution control.<sup>256</sup> However, the OECD has made significant strides since the PPP’s adoption. In the PPP’s present iteration, the PPP requires polluters to bear the costs of monitoring pollution, remedying accidental pollution, and repairing damage arising from pollution.<sup>257</sup>

Since the OECD’s adoption of the PPP in 1972, the PPP has been incorporated into several international legal documents, one of which is the 1992 Rio Declaration on Environment and Development (hereinafter Rio Declaration).<sup>258</sup> Principle 16 of the Rio Declaration states that “[n]ational authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due

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249. *See id.* (showing the lack of definition for “acceptable state”).

250. *Id.* at 14.

251. *Id.*

252. *See id.* at 13 (showing how states are responsible for regulating polluters by stating that the PPP should be the state’s objective).

253. *Id.* at 5.

254. NICOLAS DE SADELEER, ENVIRONMENTAL PRINCIPLES: FROM POLITICAL SLOGANS TO LEGAL RULES 25 (2002).

255. *Id.* at 27.

256. POLLUTER-PAYS, *supra* note 247, at 5.

257. *Id.* at 6–7.

258. UN Conference on Environment and Development, *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (Vol. I), annex I (Aug. 12, 1992) [hereinafter *Rio Declaration*].

regard to the public interest and without distorting international trade and investment.”<sup>259</sup>

There are several important things to note here. First, Principle 16 does not reiterate the PPP using normative language. Principle 16 only states that national authorities “should endeavor to promote” the PPP, and that polluters “should . . . bear the cost” of polluting the environment.<sup>260</sup> Second, Principle 16 is aspirational, rather than obligatory.<sup>261</sup> It encourages states to implement the PPP, but does not hold states responsible for failing to do so.<sup>262</sup> Third, Principle 16 limits the application of the PPP to measures that do not distort international trade and investment.<sup>263</sup> The PPP under Principle 16 depends on existing economic requirements since it cannot distort trade and investment relations.<sup>264</sup> Last, Principle 16, in encouraging national authorities to implement the PPP, suggests that the PPP should be enforced in the national context.<sup>265</sup> The Rio Declaration neither encourages nor implements a uniform application of the PPP on an international scale.

The PPP has also been acknowledged in international legal documents specifically referring to marine environmental damage.<sup>266</sup> Chapter 17 of Agenda 21 adopted by the United Nations Conference on the Environment and Development (UNCED) recognizes that the marine environment is a unitary asset essential to the “global life-support system” and valuable for the sustainable development opportunities it presents.<sup>267</sup> Agenda 21 explicitly emphasizes the necessity of developing incentives for applying “means consistent with the internalization of environmental costs, such as the polluter pays principle, so as to avoid degradation of the marine environment.”<sup>268</sup> Agenda 21 mentions the PPP in other portions of the document, but does not expound on the PPP any further.<sup>269</sup>

The OECD’s iterations of the PPP, the Rio Declaration, and the acknowledgment of the PPP in UNCED’s Agenda 21 establish that the international community intends to hold accountable entities that have polluted the marine environment. However, the PPP’s usefulness as

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259. *Id.*

260. *Id.*

261. DE SADELEER, *supra* note 254, at 25.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. UN Conference on Environment and Development, *Rio Declaration on Environment and Development*, UN Doc. A/CONF.151/26 (Vol. II), ¶ 17.1 (Aug. 13, 1992).

268. *Id.* ¶ 17.22(d).

269. *Id.* ¶¶ 17.134, 18.40(b)(i), 20.19(b), 20.22(g), 20.38(b), 21.40(b).



grounds for compensation ends there. The PPP is simple and logical at first glance, but “become[s] more elusive as one attempts to define [it].”<sup>270</sup>

*B. The Weakness of the Polluter-pays Principle as a Theory of Compensation*

The explanation of the PPP above illustrates why the principle is an inadequate theory of compensation for the Philippines' purpose: the PPP is a non-normative, cost-allocation mechanism, not an established liability and compensation mechanism. It remains a non-binding principle.<sup>271</sup> Yet, the PPP is an inadequate theory of compensation for other reasons.

First, since the PPP does not define pollution, the Philippines must find a definition of pollution that includes sedimentation from dredging in a relevant, binding agreement, like UNCLOS. The definition of “pollution of the marine environment” under UNCLOS is expansive: it refers to direct or indirect introduction by man of substances resulting in deleterious effects, such as harm to living resources and marine life, and hindrance to marine activities like fishing (among others).<sup>272</sup> The Philippines could argue that China's artificial island-building projects, which deposited sediments onto the Spratly Islands coral reefs,<sup>273</sup> resulted in pollution of the marine environment. The challenge is in proving that sedimentation occurred at a level that was deleterious to the marine environment in the area. Since the Spratly Islands are still highly contested and inaccessible to the Philippines, the Philippines will have difficulty in gauging how much sedimentation actually occurred and how much damage dredging actually caused to the coral reefs in the Spratly Islands.<sup>274</sup>

Second, the PPP has not risen to the status of customary law.<sup>275</sup> State practice rising to the level of customary law must enjoy consistent and widespread practice, and must generate *opinio juris*.<sup>276</sup> The PPP satisfies neither of these elements. International legal documents that incorporate the PPP leave its implementation to national authorities.<sup>277</sup> National authorities differ in the method in which they apply the PPP.<sup>278</sup> While there are

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270. DE SADELEER, *supra* note 254, at 37.

271. *Id.*

272. UNCLOS, *supra* note 7, 1833 U.N.T.S. at 399.

273. Mike Ives, *The Rising Environmental Toll of China's Offshore Island Grab*, YALE ENVIRONMENT 360 (Oct. 10, 2016), [http://e360.yale.edu/features/rising\\_environmental\\_toll\\_china\\_artificial\\_islands\\_south\\_china\\_sea](http://e360.yale.edu/features/rising_environmental_toll_china_artificial_islands_south_china_sea).

274. *Id.*

275. BIRNIE ET AL., *supra* note 217, at 323.

276. PHILIPPE SANDS ET AL., *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 111–14 (3d ed. 2012).

277. BIRNIE ET AL., *supra* note 217, at 323.

278. *Id.*

examples of the PPP's broad application in national environmental policies, states vary greatly in methods of asserting liability and modes of compensation.<sup>279</sup> Likewise, bilateral and multilateral agreements applying the PPP use different methods and apply the PPP to different fields.<sup>280</sup> Such agreements affect national implementation inconsistently.<sup>281</sup> Moreover, agreements between states tend to be flexible, often giving great regard for national preferences of party states.<sup>282</sup>

In terms of states' responsibility to each other, some broad international agreements reference the PPP without defining the principle, while others apply the PPP to determine polluter liability.<sup>283</sup> International agreements that provide a clear method for applying the PPP—like the Convention on Civil Liability for Oil Pollution Damage—apply the principle only to situations the agreements specifically aim to address.<sup>284</sup> Additionally, definitions of “polluter,” “pollution,” and “damage” vary so greatly that, even though the PPP is considered a general principle in environmental law, the PPP's status remains unclear.<sup>285</sup> Therefore, states have no legal basis for suing each other in the event that one state fails to make polluters within the state's jurisdiction pay, unless a specific treaty or agreement says so.<sup>286</sup>

Last, and perhaps most damning to the Philippines' purpose, is that the PPP assumes that the polluters are subject to the state's control such that the state can compel compensation for the state's injuries.<sup>287</sup> If China truly believes—and there is no reason to suppose that China believes otherwise—that the Spratly Islands belong within Chinese territory, it will not recognize the Philippines' claim under the PPP.

As mentioned above, the PPP expects states to regulate pollution in their own environment as states see fit. To China, its polluting activities in the Spratly Islands do not damage any other marine environment except its own. Therefore, China holds the only right to hold any polluter in the South China Sea accountable. But as the activities in the South China Sea are mostly those of the Chinese government itself, and the government claims to have complied with its international obligations, China will likely refuse

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279. *Id.*

280. *Id.*

281. *Id.*

282. Alice Pernevi, *Reimbursements to Fishermen for Loss of Catches 29* (Directorate of Fisheries, Region Vest, Måløy, Working Paper, 2005).

283. *Id.*

284. *Id.*

285. *Id.*

286. DE SADELEER, *supra* note 254, at 25.

287. POLLUTER-PAYS, *supra* note 247, at 5.

to impose the PPP on its own government to clean up after its own island-building projects.

The very concept of the PPP as a theory of compensation for environmental damage is problematic. The PPP expands the polluter's responsibility to pay not only for the costs of complying with state pollution regulations, but also for remedying damage caused by the polluter's polluting activities.<sup>288</sup> However, the PPP remains non-binding between states.<sup>289</sup> Furthermore, for the Philippines to succeed on a damages claim based on the PPP, the Philippines must convince China that the Spratly Islands area falls within Philippine control. This result is unlikely given China's hard stance on issues of sovereignty in the South China Sea.<sup>290</sup> Therefore, even though the PPP is well recognized in international law, it is an inadequate theory of compensation and liability for the Philippines' environmental damages claim against China.

#### CONCLUSION

Provided that the Philippines is still considering methods through which it can assert its rights pursuant to the PCA's Final Decision, the most desirable method is one that addresses the issue without implicating sovereignty issues. The advantage of seeking reparations through *parens patriae* for damages to the marine environment in the Spratly Islands is that it does not require China to recognize the area as part of the Philippines' EEZ. Therefore, regardless of whether China refuses to accept the Tribunal's decision regarding the maritime boundaries, China is still liable for the damages it caused through land reclamation.

Moreover, seeking enforcement through *parens patriae* allows China to "save face," and lends further legitimacy to its commitment to environmental policies. Issues of sovereignty and maritime boundaries are politically and sentimentally charged. Issues about the environment are less so. Therefore, cooperating in environmental reparation efforts will allow China to show its sincerity in joining the international community without necessarily having to relinquish its perceived historical claims over the area. Whether this result will be enough for the Philippines depends on how long the Philippines is prepared to play the waiting game for China to come into full compliance with the Final Decision.

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288. *Id.*

289. SANDS ET AL., *supra* note 276, at 229.

290. Ben Blanchard & David Brunnstrom, *China Says Will Protect South China Sea Sovereignty*, REUTERS (Jan. 23, 2017, 3:03 PM), <https://www.reuters.com/article/us-usa-china-southchinasea/china-says-will-protect-south-china-sea-sovereignty-idUSKBN1572M4>.

The Philippines remains at a distinct disadvantage in its dispute with China in the South China Sea. However, if the Philippines uses the right strategy and targets areas of the issue that China will not strongly contest, the Philippines may be able to use the PCA's decision to advance Philippine interests. In this instance, the Philippines' lack of material resources may pave the way for the peaceful resolution of the conflict in the South China Sea. In the end, the Philippines may prevail in its dispute with China as David prevailed against Goliath.

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