

Is China Making Waves in International Waters by Building Artificial Islands in the South China Sea?

Suzanne S. Kimble*

| | | |
|-------|---|-----|
| I. | INTRODUCTION | 263 |
| II. | TERRITORIAL SOVEREIGNTY | 264 |
| III. | UNCLOS: RIGHTS TO SURROUNDING WATERS..... | 266 |
| | <i>A. Territorial Sea</i> | 266 |
| | <i>B. Contiguous Zone</i> | 267 |
| | <i>C. Exclusive Economic Zone</i> | 267 |
| | <i>D. Continental Shelf</i> | 268 |
| IV. | LAW OF THE SEA: WHAT IS AN ISLAND?..... | 268 |
| V. | SPRATLY DISPUTE: HISTORY..... | 271 |
| | <i>A. China's Claim to the Islands</i> | 272 |
| | <i>B. The Philippines' Claim to the Islands</i> | 273 |
| | <i>C. Diplomatic Disputes over the Spratly Islands</i> | 275 |
| | <i>D. Militarization of the Dispute</i> | 276 |
| VI. | UNCLOS ARBITRATION..... | 277 |
| | <i>A. The Philippines' Claims</i> | 279 |
| | <i>B. China's Response to the Philippines' Initiation of</i> <i>Tribunal Proceedings</i> | 280 |
| VII. | CHINA'S REFUSAL TO PARTICIPATE IN LAW OF THE SEA ARBITRATION: IMPLICATIONS | 281 |
| VIII. | CHINA'S RECENT RECLAMATION EFFORTS IN THE SCS | 281 |
| IX. | POTENTIAL RESOLUTION TO THE COMPETING SCS CLAIMS..... | 284 |
| X. | ANALYSIS | 284 |
| XI. | CONCLUSION | 289 |

I. INTRODUCTION

This Comment will explore the claims of the Philippines and China to the same territory in the South China Sea (SCS). The Philippines and

* © 2015 Suzanne S. Kimble. J.D. candidate 2016, Tulane University Law School; M.S. 2010, London School of Economics; B.A. 2009, University of South Carolina. The author would like to thank Professor Handl for his assistance. Suzanne would also like to thank her family, her friends, Emeric, and the members of *TJICL*.

China both claim features of the Spratly Islands.¹ The Philippines made its claim to the territory based on the 1982 United Nations Convention on the Law of the Sea (UNCLOS), and it is suggested China rests its claim on the basis of historic title.² On January 22, 2013, the Philippines initiated proceedings against China asserting, among other things, that China's nine-dash line is contrary to UNCLOS and that China has built on features that do not qualify as islands, but rather are part of the Philippine continental shelf or the international seabed.³ Since the commencement of the proceedings China has accelerated the rate of its construction projects on islands in the SCS.⁴ The construction efforts may be an attempt by China to convert the features in the SCS into legal islands before the U.N. Arbitral Tribunal rules on the merits of the case. The construction is in line with the Chinese government's goal of projecting its power.

This Comment will begin by discussing how territorial sovereignty is established and what water rights attach to islands and coastal states in order to provide the reader with a background to examine the competing claims advanced by the Philippines and China. After introducing the Philippines' and China's claims to the Spratly Islands, this Comment will examine the claim submitted by the Philippine government, and the Chinese government's refusal to submit to arbitration. In light of the pending arbitration, this Comment will also discuss China's recent construction efforts in the SCS, and its implications for the Law of the Sea, as well as for diplomatic relations between the sovereign states. Additionally, the option of resolving this dispute through the implementation of a joint development program will be presented.

II. TERRITORIAL SOVEREIGNTY

Certain rights and obligations attach to ocean areas that surround a state's sovereign territory. In order to understand the state's rights over

1. "Features" refers to a land mass surrounded by water that is submerged in water to the extent it may not be considered an island.

2. China has not officially declared its justification for its claims in the SCS. The closest thing to an official statement may be that of Spokeswoman Hua Chunying, who said China's sovereignty and rights in the area have a historical foundation. *China Issues Six-Point Response to US Remark on South China Sea Issue*, CHINA DAILY (May 31, 2015), http://www.chinadaily.com.cn/china/2015-05/31/content_20870308.htm.

3. *SFA Statement on the UNCLOS Arbitral Proceedings Against China*, REPUBLIC PHIL. DEP'T FOREIGN AFF. (Jan 22, 2013), <http://www.dfa.gov.ph/index.php/2013-06-27-21-50-36/unclos/216-sfa-statement-on-the-unclos-arbitral-proceedings-against-china>.

4. Richard Heydarian, *The Other Crisis in the South China Sea*, ASIA MAR. TRANSPARENCY INITIATIVE (Apr. 21, 2015), <http://amti.csis.org/the-other-crisis-in-the-south-china-sea/>.

ocean areas, it must be determined whether a state has sovereignty over the land territory in the first place. Next, it is necessary to explore how the ocean is demarcated and what rights a sovereign state has in those areas as well as what rights other states have in those water areas. The distinction then must be made as to whether the land mass is an island or a rock because the rights and duties of a state vary depending on how the land mass is classified.

Territorial sovereignty extends over land territory, the territorial sea surrounding that land, and the seabed of the territorial sea.⁵ Territorial sovereignty is the “right to exercise [within the territory], to the exclusion of any other [s]tate, the functions of a [s]tate.”⁶ Accompanying this right is the obligation to protect within this territory the right of other states.⁷ The territory may be one of four kinds: territory subject to sovereignty, territory not subject to sovereignty of any state, *res communis*, and *res nullius*. *Res communis* refers to territory that a sovereign state cannot assert jurisdiction over because it belongs to the community of all states.⁸ *Res communis* includes the high seas and outer space;⁹ all states may use these areas, acting within the scope of international law.¹⁰ *Res nullius* refers to territory that is not claimed by any state.¹¹ *Res nullius* is of little significance in international law today because there is practically no *terra nullius*.¹² Islands and rocks are both territory that is subject to state jurisdiction.¹³

There are five ways by which a state can acquire territory: discovery and occupation, cession, accretion, conquest and prescription.¹⁴ Discovery was the primary means of acquiring territory until the end of the eighteenth century.¹⁵ In order to establish a legal title, the state must follow discovery with effective occupation.¹⁶ Cession occurs when a sovereign state transfers any of their territory, which is lawful, provided there is full consent of the governments concerned.¹⁷ Conquest, as a form

5. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 105 (7th ed. 2008).

6. Island of Palmas (U.S. v. Neth.), 11 R.I.A.A. 829 (Perm. Ct. Arb. 1928).

7. BROWNLIE, *supra* note 5, at 105.

8. Leticia Diaz et al., *When Is a “Rock” an “Island”?—Another Unilateral Declaration Defies “Norms” of International Law*, 15 MICH. ST. J. INT’L L. 519, 537 (2007).

9. *Id.*

10. *Id.*

11. *Id.* at 538.

12. ALINA KACZOROWSKA, PUBLIC INTERNATIONAL LAW 263 (4th ed. 2010).

13. BROWNLIE, *supra* note 5, at 183.

14. Fisheries (U.K. v. Nor.), Judgment, 1951 I.C.J. 116, 131 (Dec. 18).

15. CHRISTOPHER C. JOYNER, ANTARCTICA AND THE LAW OF THE SEA 50, 51 (1992).

16. *Id.*

17. Diaz et al., *supra* note 8.

of acquiring territory, was recognized and lawful until World War II.¹⁸ Today, conquest as a title to territorial sovereignty is no longer lawful.¹⁹ Prescription is the acquisition of title by long-continued and undisturbed possession.²⁰ In order to successfully establish territorial sovereignty by prescription, (1) the state must have exercised possession *à titre de souverain*, (2) the possession must have been peaceful and uninterrupted, (3) the possession must have been public, and (4) the possession must have endured for a certain length of time.²¹

In order for a state to establish sovereignty over waters it is imperative that the state demonstrate that it has sovereignty over the land mass.²² If a state does not have territorial sovereignty over an island, then that state does not have rights to the surrounding waters. The rights to the water are often the reason states want to claim sovereignty over islands and land masses in the open waters.

III. UNCLOS: RIGHTS TO SURROUNDING WATERS

Once a state has established sovereignty over an island, there are certain rights that a state has in the surrounding waters. In order to understand these rights, it is necessary to understand how the surrounding water is designated and the rights and obligations that correspond with each of these zones. The water surrounding a coastal state is divided into three zones: the territorial sea, the contiguous zone, and the Exclusive Economic Zone (EEZ).²³ In addition to specific rights in these three zones, the state has rights to the continental shelf.²⁴

A. Territorial Sea

“The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.”²⁵ The territorial sea extends up to twelve nautical miles from the baseline.²⁶ Delineating the territorial sea was one of the main objectives

18. *Id.*

19. ROBERT YEWDALL JENNINGS, ACQUISITION OF TERRITORY IN INTERNATIONAL LAW 56 (1963). Note: Due to the concept of intertemporal law, this cannot be retroactive. *Id.*

20. *Id.* at 20.

21. *See* Kasikili/Sedudu Island (Bots. v. Namib.), 1999 I.C.J. Rep. 1045 (Dec. 13).

22. United Nations Convention on the Law of the Sea art. 2, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

23. *Id.*

24. *Id.* art 77.

25. *Id.* art. 2.

26. *Id.* art. 3.

of the third conference on the Law of the Sea.²⁷ The previous two conferences had been unable to reach a consensus on the permissible width of the territorial sea.²⁸ The 1958 Conference on the Law of the Sea defined the territorial sea as extending up to three nautical miles past the coastal state's baseline.²⁹ The sovereign state has the obligation to allow for the "innocent passage" of foreign ships within its territorial sea.³⁰

B. Contiguous Zone

The contiguous zone is the water extending from the outer perimeter of the state's territorial sea, and may extend up to twenty-four nautical miles from the baseline.³¹ A coastal state may take enforcement measures in a contiguous zone to prevent or punish "infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea."³²

C. Exclusive Economic Zone

The EEZ is an area beyond and adjacent to the territorial sea extending up to 200 nautical miles from the baseline.³³

1. In the exclusive economic zone, the coastal State has:
 - a. sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;³⁴
 - b. jurisdiction as provided for in the relevant provisions of this Convention with regard to:
 - (i) the establishment and use of artificial islands, installations and structures;
 - (ii) marine scientific research;
 - (iii) the protection and preservation of the marine environment;³⁵

27. *The United Nations Convention on the Law of the Sea (A Historical Perspective)*, OCEANS & L. SEA U.N. (2012), http://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm#ThirdConference.

28. *Id.*

29. H.S.K. Kent, *Historical Origin of the Three-Mile Limit*, 48 AM. J. INT'L L. 537, 537 (1954).

30. UNCLOS, *supra* note 22, art. 17.

31. *Id.* art. 33.

32. *Id.*

33. *Id.* arts. 55, 57.

34. *Id.* art. 56.

35. *Id.*

- c. other rights and duties provided for in this Convention.³⁶

D. Continental Shelf

The continental shelf “comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea . . . to a distance of 200 nautical miles from the baseline.”³⁷ The coastal state has the exclusive sovereign rights to explore and exploit the natural resources of the continental shelf.³⁸

It is important to determine whether a land mass is categorized as an island, a rock, a reef, or a land feature because more rights to the waters surrounding the territory are granted to islands than are granted to other land forms. If the land mass is an island, further distinction must be made whether it is a natural island or an artificial island because artificial islands are not granted the same rights as natural islands under international law.

IV. LAW OF THE SEA: WHAT IS AN ISLAND?

In 1956, the International Law Commission made progress in codifying customary international law on territorial seas and promoting acceptance of this law.³⁹ This effort resulted in the following definition of an island: “Every island has its own territorial sea.”⁴⁰ “An island is an area of land, surrounded by water, which in normal circumstances is permanently above high-water mark.”⁴¹ This definition does not differentiate between artificially and naturally formed islands.

The history of international efforts to define and distinguish a rock from an island shows the importance of this distinction and clarifies how international law at present differentiates between these land masses. The 1958 Geneva Convention on the Territorial Sea and Contiguous Zone defines an “island” as a “naturally-formed area of land, surrounded by water, which is above water at high-tide.”⁴² This was the first time that

36. *Id.*

37. *Id.* art. 76(1). Note: the continental shelf extends, *at minimum*, 200 nautical miles.

38. *Id.* art. 77.

39. Terasaki Naomichi Hiro, *The Regime of Islands in International Conventions (Part 1)*, R. ISLAND STUD. (Mar. 13, 2014), <http://islandstudies.oprf-info.org/research/a00010/>.

40. *Id.*

41. UNCLOS, *supra* note 22, art. 77.

42. Convention on the Territorial Sea and the Contiguous Zone art. 10, ¶ 1, Apr. 29, 1958, T.I.A.S. No. 5639, 516 U.N.T.S. 205.

the distinction was made between artificial and natural islands.⁴³ Absent from this definition is the requirement that a land mass be of a certain size, be habitable, or be able to support an economy in order to be considered an island.⁴⁴ This article also did not address the definition or constitution of an island in its own right, but rather addressed the island within the context of the territorial sea.⁴⁵

The definition of an island was a critical topic of discussion at the Third United Nations Conference on the Law of the Sea. Specifically, the regime of islands was the focal point of the second session of the conference, held in 1974.⁴⁶ The composite negotiating text emerged from the sixth session of the conference. It included article 121, which defined an island as:

A naturally formed area of land, surrounded by water, which is above water at high tide. Except as provided for in paragraph three, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of the present Convention applicable to other land territories. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.⁴⁷

Many countries submitted amendments to the regime of islands prior to the final session.⁴⁸ Japan, Greece, France, Venezuela, the United Kingdom, Brazil, Portugal, Iran, Ecuador, and Australia all suggested deleting the third paragraph of article 121.⁴⁹ Japan made three arguments in support of deleting the third paragraph: (1) the size of an island and its habitability are not proper ways to distinguish between a rock and an island, (2) the 1958 Convention on the Continental Shelf made no distinction between habitable and uninhabitable islands, and (3) many states that declared a 200-nautical-mile EEZ did not make such distinction.⁵⁰ The United Kingdom suggested there was no basis in

43. Michael Gagain, *Climate Change, Sea Level Rise and Artificial Islands: Saving the Maldives' Statehood and Maritime Claims Through the "Constitution of the Oceans,"* 23 COLO. J. INT'L ENVTL. L. & POL'Y 77, 104 (2012).

44. Diaz et al., *supra* note 8, at 537.

45. Yann-Huei Song, *The Application of Article 121 of the Law of the Sea Convention to the Selected Geographical Features Situated in the Pacific Ocean,* 9 CHINESE J. INT'L L. 663, 678 (2010).

46. *Id.* at 675.

47. Third U.N. Conference on the Law of the Sea, *Informal Composite Negotiating Text*, 21, U.N. Doc. A/Cong.62/WP.10 (July 15, 1977).

48. Song, *supra* note 45, at 676.

49. *Id.*

50. *Id.*

international law for paragraph three.⁵¹ Despite these reservations, the regime of islands definition in the 1982 Convention tracks the language of the Informal Composite Negotiating Text (ICNT) draft.⁵²

Progress was made in reaching consensus on the delimitation of the territorial sea, the establishment of the EEZ, and the distinction between a rock and an island in the UNCLOS. Provisions on the territorial sea were codified and adopted in 1994.⁵³ Part II, articles 1-4 establish the breadth, outer limit, and normal baseline for measuring the territorial sea.⁵⁴ The existence of an EEZ was previously established in international law and accepted largely due to the special dependence the coastal state has on its fisheries, but was not codified until UNCLOS in 1982.⁵⁵ Article 121 of the Convention states:

1. An island is a naturally formed area of land, surrounded by water, which is above water at high tide.
2. Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory.
3. Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.⁵⁶

While this article provides some guidance in determining whether land is an island or a rock, possible answers to the critical question, “can the land sustain human habitation or economic life?” can be vague and confusing. One might wonder, as if by magic, clever arguments could effectively turn a rock into an island.⁵⁷ The Convention does, however, stipulate that while states have the right to construct artificial islands, installations, and structures, those constructions “do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf.”⁵⁸

51. *Id.*

52. *Id.*

53. UNCLOS, *supra* note 22.

54. *Id.*

55. *Id.* pt. V; Fisheries (U.K. v. Nor.), Judgment, 1951 I.C.J. 116, 131 (Dec. 18); Volga (Russ. v. Austl.), Case No. 11, Order of Dec. 3, 2002, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_11/11_order_021202_en.pdf.

56. UNCLOS, *supra* note 22, pt. V.

57. Diaz et al., *supra* note 8, at 537.

58. UNCLOS, *supra* note 22, art. 60.

V. SPRATLY DISPUTE: HISTORY

Having explored the multifaceted aspects and complexities of establishing a state's sovereign territory and rights to its surrounding waters, this Comment will now examine the claims that China is making in the SCS. The SCS comprises an area of approximately 3.5 million square kilometres and an average depth of over 2000 meters.⁵⁹ Within the SCS there are four archipelagos: the Pratas, the Macclesfield Bank, the Paracels, and the Spratly Islands.⁶⁰ Six countries claim sovereignty over the Spratly Island group: the People's Republic of China (PRC), The Republic of China (Taiwan), Vietnam, Malaysia, Brunei, and the Philippines.⁶¹ In light of the pending arbitration, this Comment will not explore all of the states' competing claims, but rather will focus on the claims to the Spratly Islands made by the Philippines and the PRC.

The exact number and nature of the islets that comprise the Spratly Islands is unclear. There may be more than 170 features in the SCS, the vast majority of which are submerged banks and shoals.⁶² It is estimated that roughly thirty-six islands are above water at high tide.⁶³ Because thirty-six of the features in the Spratly region qualify as "islands" under article 121 of UNCLOS, they generate territorial sea.⁶⁴ The largest of these features is the Itu Aba; measuring 1.4 km in length and 400 meters in width.⁶⁵ Yet even this island, which meets the UNCLOS article 121 requirements of being "naturally formed" and "above water at high tide," is unlikely to generate an EEZ or continental shelf because it is not likely that it can "sustain human habitation or economic life."⁶⁶ States seek to establish sovereignty over the Spratly Islands to benefit from the strategic location for military, commerce, and the abundant natural resources contained in the sea and seabed.⁶⁷ The SCS serves as a "maritime super highway" between the Pacific and Indian Oceans.⁶⁸ The SCS has a vast

59. Guifang (Julia) Xue, *Deep Danger: Intensified Competition in the South China Sea and Implications for China*, 17 OCEAN & COASTAL L.J. 307, 308 (2012).

60. *Id.*

61. *Id.* at 310.

62. Robert Smith, *Maritime Delimitation in the South China Sea: Potentiality and Challenges*, 41 OCEAN DEV. & INT'L L. 237, 237 (2010).

63. *Id.*

64. Jon M. Van Dyke, *Disputes over Islands and Maritime Boundaries in East Asia*, in MARITIME BOUNDARY DISPUTES, SETTLEMENT PROCESSES, AND THE LAW AT THE SEA 65 (2009).

65. Smith, *supra* note 62, at 45.

66. Lee G. Cordner, *The Spratly Islands Dispute and the Law of the Sea*, 25 OCEAN DEV. & INT'L L. 61, 69 (1994).

67. Barry Hart Dubner, *The Spratly "Rocks" Dispute—A "Rockapelago" Defies Norms of International Law*, 9 TEMP. INT'L & COMP. L.J. 291, 295-96 (1995).

68. Xue, *supra* note 59, at 308.

marine ecosystem sustaining a variety of resources due to the fact that it is situated in both tropical and semi-tropical zones.⁶⁹ Given its strategic location both for trade and military operations, and its abundance of fisheries and oil reserves, it is clear that establishing sovereignty over the land, along with its concomitant water rights, is an extremely desirable prospect for nearby countries. China claims sovereignty over the Spratly Islands on the basis of historical use.⁷⁰ The Philippines claims sovereignty over some of the islands and controls eight islands within the Spratly Islands, known as the Kalayaan Island Group (KIG).⁷¹

A. *China's Claim to the Islands*

China has not officially presented the legal basis of its claim of territorial sovereignty over islands in the SCS, but many scholars believe that China claims both water and territorial rights on the basis of historic use. China claims the islets were *terra nullius* prior to China's discovery and the islands have been occupied by Chinese fishermen "since time immemorial."⁷² China's use of the island territories by its fishermen dates back to the Western Han Dynasty (206 BC to AD 23).⁷³ The islands were described in a book published in 1730 written by a Chinese scholar.⁷⁴ While these documented activities support the notion that the Chinese used these island territories, they do not provide evidence that China administered the land or had sovereign control over it.⁷⁵ China may rely on its nine-dash U-Shaped line in asserting sovereignty over the Spratly Islands.⁷⁶ The U-Shaped Line first appeared on a Chinese map in either 1947 or 1948, following the conclusion of World War II.⁷⁷ This appearance constituted an official declaration by the Chinese

69. *Id.*

70. *Id.* at 310.

71. *Id.*

72. Cordner, *supra* note 66, at 62.

73. *Id.*

74. *Id.*

75. Cordner states:

China first asserted effective control of the island territories in March 1988. At this time, there was a brief naval encounter between Vietnamese and Chinese troops, which resulted in the loss of three Vietnamese transport vessels and 72 Vietnamese troops. Upon the conclusion of this skirmish, China took possession of some islands, including Fiery Cross Reef.

Id.

76. Dustin E. Wallace, *An Analysis of Chinese Maritime Claims in the South China Sea*, 63 NAVAL L. REV. 128 (2014).

77. N. Elias Blood-Patterson, *Smoke on the Water: The Role of International Agreements in the Philippine-Chinese Dispute over the South China Sea*, 46 N.Y.U. J. INT'L L. & POL'Y 1207, 1223 (2013).

government. After World War II, Japan renounced any right to islands it had claimed and China took that opportunity to define the areas that it claimed in the region and reassert those territories it had claimed by way of historic title.⁷⁸ Although China published the U-Shaped Line around 1947, China never clarified this U-Shaped Line, nor the status of the waters within the boundaries of the line.⁷⁹ It was not until 2009, in a note verbale submitted to the U.N. Secretary-General, that China publically relied on the nine-dash line to support its claims in the SCS.⁸⁰

There have been multiple instances where China has asserted its claim to sovereignty over the Spratly Islands without specifying the legal basis for its nine-dash line or even addressing its nine-dash line.⁸¹ Shortly after the first U.N. Conference on the Law of the Sea, China released its first national statement regarding its territorial sea claims, the 1958 Declaration on China's Territorial Sea.⁸² In the 1992 Law on the Territorial Sea and Contiguous Zone, and upon acceding to UNCLOS in 1996, China reiterated its ownership of the Spratly Islands and its surrounding waters without referring to the nine-dash line.⁸³ In 1994, senior research fellow at the Institute for International Technological Economic Studies in Beijing, Pan Shiyong, argued that the fact no nation has protested the line since it appeared after World War II supports China's claim based on the nine-dash line.⁸⁴

B. *The Philippines' Claim to the Islands*

The Philippines has put forth at least three arguments in support of its claims to territory in the SCS. Their current claim relies on the legal

78. *Id.*

79. *Id.* at 1243.

80. *Id.* at 1225.

81. *Id.* at 1222-23.

82. *Id.* at 1222.

83. *Id.* at 1222-23.

84. Van Dyke, *supra* note 64, at 64. Pan Shiyong states that international law, at the time this claim was made, recognized such claims to territory and thereby, under the principle of intertemporal law, this claim should be recognized today. Additionally, Pan Shiyong may be suggesting that the nine-dash line has been established as a norm of customary international law. In *Anglo-Norwegian Fisheries*, Norway used a straight baseline to delineate its territorial waters. Norway began using a straight baseline in 1869, and the United Kingdom did not object to the resulting delineation until 1951. The International Court of Justice found that the elements of acquiescence (passage of time, notice on part of the state concerned, and the state concerned had an interest at stake) were met, and held that the United Kingdom had acquiesced to Norway's delineation. It appears that Pan Shiyong is making a similar argument here; the disputing states were on notice that China made this claim to the Spratly Islands, had an interest in the islands and sea, and did not object for a significant period of time. Thus, the validity of the nine-dash line was established. *See Fisheries (U.K. v. Nor.)*, Judgement, 1951 I.C.J. 116 (Dec. 19).

terminology as codified in UNCLOS.⁸⁵ The Philippines' current claim is that each coastal state is entitled to an EEZ of up to twelve nautical miles from its coast, and in the event that the EEZ of one coastal state overlaps with the EEZ of another coastal state, the zones should be determined in an equitable manner, which generally yields the result of extending the EEZ to the median line between the two coastal states.⁸⁶ If this equitable solution were the basis for dividing the maritime zones between China and the Philippines, this would drastically reduce in size the area delineated by the nine-dash line that China uses in justifying its claim.⁸⁷ On March 10, 2009, the Philippines signed into law Republic Act 9522, the Archipelagic Baseline Act, which brought its national laws into compliance with UNCLOS.⁸⁸ Republic Act 9522 treats both the KIG and the Scarborough Shoal as regimes of islands as defined by UNCLOS.

Previously, the Philippines made a historic argument on the basis of *terra nullius* to support its sovereignty over the KIG.⁸⁹ The KIG is a group of islands/islets that forms part of the Spratly Island group.⁹⁰ In 1947, a Filipino businessman, Tomás Cloma, claimed he discovered a group of unoccupied islands and proceeded by proclaiming these islands the state of Kalayaan (Freedomland) in 1956.⁹¹ The Philippines maintained that the 1951 San Francisco Peace Treaty left the island territories *terra nullius*.⁹² In 1974, Cloma transferred ownership of the KIG to the Republic of the Philippines, and in 1978 the Philippine government claimed the Island Group as part of the Philippines.⁹³ Thitu Island, the second largest island in the Spratlys and one of the islands comprising the KIG, has been continuously occupied by the Philippines

85. *SFA Statement on the UNCLOS Arbitral Proceedings Against China*, *supra* note 3.

86. Blood-Patterson, *supra* note 77, at 1232.

87. *Id.* at 1233. Both Article 6 of the 1958 Convention on the Continental Shelf and Article 12 of the 1958 Convention on the Territorial Sea and Contiguous Zone adopted the "equidistance principle" to resolve competing claims. However, no mention is made to this principle in the 1982 UNCLOS. Rather, UNCLOS article 74(1) refers to the goal of creating an "equitable" solution to competing coastal state claims to EEZs. Courts and Tribunals have consistently found that islands do not have a lesser capacity to generate EEZs than do coastal states. Van Dyke, *supra* note 64, at 72-73.

88. An Act To Amend Certain Provisions of Republic Act No. 3046, as Amended by Republic Act No. 5445, To Define the Archipelagic Baseline of the Philippines and for Other Purposes, Rep. Act. No. 9522, (Mar. 10, 2009), <http://www.gov.ph/downloads/2009/03mar/20090310-RA-9522-GMA.pdf> (Phil.).

89. Cordner, *supra* note 66, at 66.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

since the 1970s.⁹⁴ The Philippines built an airstrip, a military base, and a small town hall along with accommodations for some sixty civilians on this island.⁹⁵

The third argument advanced by the Philippines was based on inheriting title from Spain. The Philippines originally based its claim to territory in the SCS on the fact that this territory was seceded to it by the Spanish crown.⁹⁶ The 1935, 1973, and 1987 Philippines Constitution sets forward that “the Philippines comprises all the territory ceded to the United States by the treaty of Paris reached between the United States and Spain . . . together with all the islands embraced in the treaty concluded at Washington, between the United States and Spain.”⁹⁷ This was the original claim that the Philippines made over portions of the Spratly Islands.

C. *Diplomatic Disputes over the Spratly Islands*

As the May 13, 2009 deadline to submit proposals to the U.N. Commission on the Limits of the Continental Shelf to extend the limits of the continental shelf approached, China and the Philippines engaged in a battle of diplomatic notes.⁹⁸ On April 8, 2009, the Philippines made the first move, submitting a claim to extend its continental shelf to include the Benham rise region. China responded on May 7th and submitted two notes verbale, which included maps of its U-Shaped line to indicate the specific boundaries of its SCS claim.⁹⁹ On April 5, 2011 the Philippines responded, protesting China’s U-Shaped Line. Meanwhile, in February 2009, China and the Philippines had a diplomatic feud over the sovereignty of the Scarborough Shoal.¹⁰⁰ The long-standing dispute was intensified when the Philippines enacted its Archipelagic Baseline Act on March 11, 2009. The Archipelagic Baseline Act amended the nation’s baseline act to conform with UNCLOS and claimed sovereignty over the

94. Sam LaGrone, *Confusion Continues to Surround U.S. South China Sea Freedom of Navigation Operations*, USNI NEWS (Nov. 5, 2015).

95. *Id.*

96. Blood-Patterson, *supra* note 77, at 1233.

97. CONST. (1987), art. I (Phil.); CONST. (1973), art. I, § 1 (Phil.); CONST. (1935), art. I, § 1 (Phil.).

98. Yann-Huei Song, *Conflicting Outer Continental Shelf Claims in the East and South China Seas: Proposals for Cooperation and Peaceful Resolution*, 35 U. HAW. L. REV. 485, 515 (2013).

99. *Id.* at 516.

100. *Id.* at 518.

KIG “island regime” using the terminology of UNCLOS article 121.¹⁰¹ China vigorously protested the Archipelagic Baseline Act in its note verbale submitted on April 13, 2009. China argued the Scarborough Shoal and “Nansha [Spratly] Islands have been part of the territory of China since ancient time.”¹⁰²

D. Militarization of the Dispute

The tension over the territorial and water rights of the SCS not only led to diplomatic disputes, but has also led to military confrontations at sea. In 1995, at Mischief Reef, the conflict intensified when Chinese ships arrived at Filipino-occupied Mischief Island and flew the Chinese flag.¹⁰³ After this incident, Manila and Beijing signed an agreement in which they committed to resolving disputes by peaceful means.¹⁰⁴ However, since the agreement was reached, there have been two significant confrontations between the two nations over the SCS. On April 8, 2012 the Philippine Navy discovered eight Chinese fishing vessels off the Scarborough Shoal.¹⁰⁵ The Philippine Navy attempted to arrest the Chinese fishermen, but Chinese maritime ships came to the fishermen’s rescue and stopped the Philippines from taking any action.¹⁰⁶ This two month stand-off resulted in China’s erection of a barrier around the shoal; however, no resolution on the sovereignty or jurisdiction of the territory came about.

Despite negotiations, another confrontation occurred on March 2, 2011, near Reed Bank, between Chinese shipping vessels and Philippine oil exploration vessels, highlighting one of the underlying reasons for the conflict regarding the disputed seas.¹⁰⁷ On March 2nd, two Chinese

101. Clive Schofield, *Defining the ‘Boundary’ Between Land and Sea: Territorial Sea Baselines in the South China Sea*, in THE SOUTH CHINA SEA DISPUTES AND LAW OF THE SEA (2014).

102. Xue, *supra* note 59, at 317.

103. *Id.*

104. NONG HONG ET AL., RECENT DEVELOPMENT IN THE SOUTH CHINA SEA DISPUTE: THE PROSPECT OF A JOINT DEVELOPMENT REGIME 21 (2014). Following the Mischief Reef standoff, negotiations between China and the Philippines resulted in the establishment of an eight point code of conduct released in the Joint Statement of the Republic of China Consultations on the South China Sea and other Areas of Cooperation (August 1995). Through these negotiations, the two nations resolved to permit ASEAN to have a more active role in the dispute. *Id.* at 34.

105. Renato Cruz de Castro, *The 2012 Scarborough Shoal Stand-Off*, in THE SOUTH CHINA SEA MARITIME DISPUTE: POLITICAL AND REGIONAL PERSPECTIVES 11, 118 (2015).

106. *Id.*

107. Xue, *supra* note 59, at 321-22. Scholars have suggested Chinese interference with Philippine exploration activities is a highly volatile trigger for potential conflict, further stating that “although the Philippines has little military capability, its potential backing by the U.S. and

vessels approached a Philippine gas survey ship and ordered it to stop its activities on the basis that the territory is under China's jurisdiction.¹⁰⁸ The Philippine government did not back down from this confrontation, but rather responded by sending a military plane and two coast guard ships to escort the survey ship until it had completed its survey. Additionally, the Philippines strengthened its military presence in the Spratlys; it upgraded its military airfield and increased the number of reconnaissance planes and vessels in the KIG. In addition to this military build-up, Philippine lawmakers visited Pagasa Island and pledged funds to improve its infrastructure.¹⁰⁹

In response to the growing Chinese aggression, competing claims, diplomatic disagreements, and physical confrontations, the Philippines has turned to the arbitral tribunal established by UNCLOS (Tribunal) to assert its claim to the KIG. The Philippines is a small nation and, without international support, no match for China's economic and military power. In turning to the UNCLOS Tribunal, the Philippines took unprecedented action to confront its more powerful neighbor. On January 22, 2013, the Philippines launched an arbitration proceeding under UNCLOS.¹¹⁰

VI. UNCLOS ARBITRATION

The UNCLOS dispute settlement procedure is one of the most complex settlement procedures of any international convention.¹¹¹ The complex procedure was adopted by the contracting parties in part because UNCLOS had to be adopted as a package deal; parties to the Convention could not adopt just those articles of the convention that suited them and disregard the others.¹¹² Part XV of UNCLOS, "Settlement of Disputes" sets forward the "general provisions" of dispute settlement, "compulsory procedures entailing binding decisions," and "limitations and exceptions" to compulsory procedures. Annex VII of UNCLOS sets forward the Tribunal's procedures for arbitration.¹¹³ Because no reservations to UNCLOS are permitted, parties are required

domestic political pressure could force it to make a dangerous miscalculation." HONG ET AL., *supra* note 104.

108. Leszek Buszynski, *The South China Sea: Oil, Maritime Claims, and U.S.-China Strategic Rivalry*, 35 WASH. Q. 139, 142 (2012).

109. Xue, *supra* note 59, at 321-22.

110. *SFA Statement on the UNCLOS Arbitral Proceedings Against China*, *supra* note 3.

111. BEYOND TERRITORIAL DISPUTES IN THE SOUTH CHINA SEA: LEGAL FRAMEWORKS FOR THE JOINT DEVELOPMENT OF HYDROCARBON RESOURCES 79 (Beckman et al. eds, 2013).

112. *Id.*

113. UNCLOS, *supra* note 22.

to accept dispute settlement as established in Part XV.¹¹⁴ There are several ways the UNCLOS Tribunal has jurisdiction over a dispute: (1) if prior to the dispute both parties accept jurisdiction under Part XV, (2) if states confer jurisdiction to the Tribunal in another treaty or agreement, or (3) if parties consent to Jurisdiction after a dispute arises.¹¹⁵ Article 283(1) of section 1 requires the parties “proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means.”¹¹⁶ If no settlement can be reached, then the dispute may be submitted unilaterally. Upon submission, the Tribunal “shall have jurisdiction over any dispute concerning the interpretation of this Convention.”¹¹⁷ In practice, the Tribunal will have jurisdiction in accordance with this article in the following situation: the parties select a different forum and the parties are unsuccessful in reaching a resolution, and the agreed settlement procedure does not set forward further instruction on how to proceed, and the dispute involves the interpretation and/or application of the UNCLOS, then the tribunal has compulsory jurisdiction.¹¹⁸ In addition to this limitation on the scope of compulsory jurisdiction, article 297 sets forth the exceptions to compulsory jurisdiction, and states may also opt of compulsory jurisdiction regarding particular disputes.¹¹⁹ One exception to the Tribunal’s compulsory jurisdiction, which may prove to be an obstacle in this case, is stipulated in article 298 of UNCLOS:

[A] State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes: (a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles.¹²⁰

Beijing views the Philippines’ unilateral move towards arbitration as a breach of the 2002 Declaration on the Conduct of Parties in the SCS. Article 282 of UNCLOS states:

114. John E. Noyes, *The International Tribunal for the Law of the Sea*, 32 CORNELL INT’L L.J. 110, 130 (1999).

115. *Id.* at 118-19.

116. UNCLOS, *supra* note 22, art. 283.

117. *Id.*

118. Jillaine Seymour, *The International Tribunal for the Law of the Sea—A Great Mistake? (The Early Snyder Lecture in International Law)*, 13 IND. J. GLOBAL LEGAL STUD. 1, 4 (2010).

119. UNCLOS, *supra* note 22, art. 298.

120. SFA Statement on the UNCLOS Arbitral Proceedings Against China, *supra* note 3.

[T]hrough a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.¹²¹

The 2002 Association of Southeast Asian Nations (ASEAN) Declaration on the Conduct of Parties in the SCS states parties must “undertake to resolve their territorial and jurisdictional disputes . . . through friendly consultations and negotiations by sovereign states directly concerned, in accordance with universally recognized principles of international law, including the 1982 UN Convention on the Law of the Sea” and “[t]he Parties concerned stand ready to continue their consultations and dialogues concerning relevant issues, through modalities to be agreed by them.”¹²² China prefers dispute resolution through bilateral negotiations as opposed to UNCLOS Tribunal proceedings.¹²³ To this end, China has used its economic power in attempts to persuade the Philippines to settle this dispute bilaterally.

A. *The Philippines’ Claims*

The Department of Foreign Affairs of the Republic of the Philippines presented a note verbale to the Embassy of the PRC stating that the Philippines submitted a Notification and Statement of Claim to initiate compulsory arbitration proceedings under article 287 and annex VII of the UNCLOS.¹²⁴ That day, the Philippine Foreign Minister issued a Press Statement emphasizing some of the major points made in the Philippines Notification and Claim in the West Philippine Sea:

1. The Philippines asserts that China’s so-called *nine-dash line* claim that encompasses virtually the entire SCS/West Philippine Sea *is contrary to UNCLOS and thus unlawful*.
2. Within the maritime area encompassed by the nine-dash line, China has also laid claim to, occupied and built structures on certain submerged banks, reefs and low tide elevations that do not qualify as

121. UNCLOS, *supra* note 22, art. 282.

122. Ass’n of Southeast Asian Nations [ASEAN], *Declaration on the Conduct of Parties in the South China Sea* (Nov. 4, 2002), <http://www.asean.org/asean/external-relations/china/item/declaration-on-the-conduct-of-parties-in-the-south-china-sea>.

123. Sean Mirski, *American Paralysis and Troubles in the South China Sea: A Primer on the Philippines-China Arbitration*, LAWFARE BLOG (Oct. 13, 2013), <http://www.lawfareblog.com/2013/10/american-paralysis-and-troubles-in-the-south-china-sea-a-primer-on-the-philippines-china-arbitration> [hereinafter Mirski, *American Paralysis*].

124. *SFA Statement on the UNCLOS Arbitral Proceedings Against China*, *supra* note 3.

islands under UNCLOS, but are parts of the Philippine continental shelf, or the international seabed.

3. In addition, China has occupied certain small, uninhabitable coral projections that are barely above water at high tide, and which are “rocks” under Article 121 (3) of UNCLOS. China has interfered with the lawful exercise by the Philippines of its rights within its legitimate maritime zones, as well as to the aforementioned features and their surrounding waters.
4. The Philippines is conscious of China’s Declaration of August 25, 2006 under Article 298 of UNCLOS (regarding optional exceptions to the compulsory proceedings), and has avoided raising subjects or making claims that China has, by virtue of that Declaration, excluded from arbitral jurisdiction.¹²⁵

B. *China’s Response to the Philippines Initiation of Tribunal Proceedings*

On February 19, 2013, the Chinese government rejected and returned the Philippines’ note verbale.¹²⁶ The Chinese government refuses to participate in arbitration. The Chinese government failed to meet the December 15th deadline to submit its counter memorial to the Tribunal.¹²⁷ Instead, the Chinese government publically released a position paper on December 7th, and on February 9th presented a Note Verbales to the Philippines.¹²⁸ In its position paper, the Chinese government advances three major arguments justifying its decision not to participate in arbitration.¹²⁹ First, the Tribunal does not have subject matter jurisdiction over the claim because the dispute concerns the question of territorial sovereignty over maritime features.¹³⁰ Second, the Philippines breached its obligations under the 2002 ASEAN Declaration on the Conduct of the Parties in the SCS when it initiated this proceeding, because the 2002 Declaration requires members to settle

125. *Id.*

126. *Position Paper of the Government of the People’s Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines*, MINISTRY FOREIGN AFF. PEOPLE’S REPUBLIC CHINA (Dec. 17, 2014), http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml [hereinafter *Position Paper of the People’s Republic of China*].

127. Sean Mirski, *China Releases a “Position Paper” in the Ongoing Philippines-China Arbitration*, LAWFARE BLOG (Jan. 15, 2015), <http://www.lawfareblog.com/2015/01/china-releases-a-position-paper-in-the-ongoing-philippines-china-arbitration/> [hereinafter Mirski, *China Releases a Position Paper*].

128. *Id.*

129. *Position Paper of the People’s Republic of China*, *supra* note 126.

130. *Id.*

disputes through bilateral negotiations.¹³¹ Third, this dispute revolves around the question of maritime delimitation, an issue which the Chinese government stated it specifically opted out of compulsory jurisdiction when, in 2006, it submitted a letter to UNCLOS rejecting the mandatory arbitration provision of the treaty.¹³² Commentators have noted that this decision to submit a position paper instead was a strategic move by the Chinese government, allowing it to submit its views on the dispute without formally participating in the arbitration.¹³³ By responding to the Philippines' claim outside the auspices of the UNCLOS Tribunal, the Chinese government selectively addressed the claims it wanted to make and avoided clarifying its legal position particularly on the nine-dash line.

VII. CHINA'S REFUSAL TO PARTICIPATE IN LAW OF THE SEA ARBITRATION: IMPLICATIONS

Article 9 of annex VII states:

[I]f one of the parties to the dispute does not appear before the arbitral tribunal . . . the other party may request the tribunal to continue the proceedings and to make its award. Before making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.¹³⁴

Regardless of China's decision not to submit a counter memorial and the tribunal's determination to proceed to the merits of the majority of the claims, if the tribunal rules in favor of the Philippines its decision will likely be unenforceable and ignored by China.¹³⁵

VIII. CHINA'S RECENT RECLAMATION EFFORTS IN THE SCS

"The sheer acreage of China's reclamation work over the past two to three years dwarfs anything and everything other claimants have done by many times over."

—Daniel Russel, Assistant Secretary of State
for East Asian and Pacific Affairs¹³⁶

131. *Id.*

132. Daniel Wagner & Edsel Tupaz, *China, the Philippines and the Rule of Law*, HUFFINGTON POST (Jan. 23, 2015, 10:57 AM), http://www.huffingtonpost.com/daniel-wagner/china-philippines-rule-law_b_2533736.html.

133. Mirski, *China Releases Position Paper*, *supra* note 127.

134. UNCLOS, *supra* note 22, annex VII.

135. Mirski, *China Releases a Position Paper*, *supra* note 127.

136. Jeremy Page & Julian E. Barnes, *China Expands Its Maritime 'Fortresses'*, WALL STREET J., Feb. 19, 2015, at A6.

China has been aggressively pursuing construction efforts on the features of the SCS since at least 2012; China has drastically picked up the pace of building six of the seven features within the last year.¹³⁷ The similarities between the developments on the features suggest that China may be following a systemic development plan with a purpose.¹³⁸ Commentators have speculated that the amplification and timing of the construction efforts suggest that China may be working to undermine a central part of the Philippines' claim.¹³⁹ China may be working to support a future argument that the features are natural islands capable of supporting human and/or economic life. While it seems illogical to suggest a nation can build a natural island, if the original state of the feature is not well documented, it may be difficult to prove that the original feature was a rock, and not an island.

Fiery Cross Reef serves as a good example of China's reclamation efforts.¹⁴⁰ Between August and November 2014 China's construction on the reef increased its size elevenfold.¹⁴¹ Its area increased from .08 sq km to .96 sq km, making it the largest of the Spratly Islands.¹⁴² It has been suggested that China is also building an airstrip on the Reef.¹⁴³ In addition to the construction efforts, China has been more aggressive in claiming its rights within its nine-dash line by military occupation of islets and administrative control over the features.¹⁴⁴ The Chinese government created a new administrative unit to govern the region.¹⁴⁵ They have begun to assess taxes from fishing and extraction enterprises.¹⁴⁶ Chinese naval vessels have been making more frequent "tours" of the waters surrounding the disputed islands.¹⁴⁷ In January 2015, the largest shipping vessel yet left the administrative Hainan Province with supplies bound for island features in the SCS.¹⁴⁸

137. Mira Rapp-Hooper, *Is China Reclaiming the Law of the Sea?*, LAWFARE BLOG. (Feb. 23, 2015), <http://www.lawfareblog.com/2015/02/is-china-reclaiming-the-law-of-the-sea>.

138. *Id.*

139. *Id.*

140. Mira Rapp-Hooper, *Before and After: The South China Sea Transformed*, ASIA MAR. TRANSPARENCY INITIATIVE (Feb. 18, 2015), <http://amti.csis.org/before-and-after-the-south-china-sea-transformed/>.

141. *Id.*

142. *Id.*

143. *Id.*

144. Yang Yi, *New Vessel To Supply South China Sea Islands*, XINHUA NET (Jan. 5, 2015), http://news.xinhuanet.com/english/china/2015-01/05/c_133897993.htm.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*



Show only before

Photo credit: ©CNES 2014, Distribution Airbus DS/IHS

Fiery Cross Reef: Before & After Construction (<http://amti.csis.org/before-and-after-the-south-china-sea-transformed/>)

Irrespective of the question of whether the Tribunal is the proper forum to determine a resolution to the conflict over the SCS, China's construction in the area while there is a pending claim is clearly in violation of the UNCLOS. Articles 74.3 and 83.3 of UNCLOS (pertaining to the delimitation of the EEZ and the continental shelf, respectively) state that "pending agreement . . . the States concerned, in a spirit of understanding and cooperating, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not jeopardize or hamper the reaching of the final agreement."¹⁴⁹ The Chinese government maintains that "China is carrying out necessary construction on its own islands and reefs. The construction does not target or affect anyone."¹⁵⁰

149. UNCLOS, *supra* note 22, arts. 74(3), 83(3).

150. An Lu, *China Says Island, Reef Construction in South China Sea Lawful, Justified*, XINHUA NET (Mar. 8, 2015), http://news.xinhuanet.com/english/china/2015-01/05/c_133897993.htm.

IX. POTENTIAL RESOLUTION TO THE COMPETING SCS CLAIMS

Since the 1980s, scholars have suggested that joint development is the best approach to resolving the competing claims in the SCS.¹⁵¹ A joint development program calls for allowing the features to generate a “regional zone” that is shared and jointly managed by the claimants.¹⁵² The precedent for this development strategy was established in the Gulf of Fonseca Case, where Honduras, Nicaragua, and El Salvador jointly share ownership of the waters which each of the three nations claimed on the basis of historic use.¹⁵³ A joint development proposal would be consistent with China’s past public statements.¹⁵⁴ It would be in the interest of all parties involved to seriously consider a joint development program for several reasons. First, it is unlikely that an agreement will be reached through other forums.¹⁵⁵ Second, there are significant potential economic benefits to be derived from the exploration and extraction of oil (which will not be able to proceed lawfully while the sovereignty of the territory is in dispute).¹⁵⁶ Third, if an amicable solution is not reached this would not only lead to a deterioration of political relations but also will likely create significant instability in the region.¹⁵⁷

X. ANALYSIS

Prior to publication, on October 29, 2015, the Tribunal rendered an award on jurisdiction and admissibility.¹⁵⁸ Two of the preliminary matters the Tribunal addressed include whether China’s nonparticipation deprives the Tribunal of Jurisdiction and whether the 2002 China-ASEAN Declaration on Conduct of the Parties in the South China Sea precludes recourse to the compulsory dispute settlement procedures.¹⁵⁹ The

151. Van Dyke, *supra* note 64, at 69.

152. *Id.*

153. *Id.* at 70.

154. Deng Xiaoping stated:

[T]he Nansha (Spratly) Islands have been an integral part of China’s territory since the ancient times. But disputes have occurred over the islands since the 1970s. Considering the fact that China has good relations with the countries concerned, we would like to set aside this issue now and explore later a solution acceptable to both sides. We should avoid military conflict over this and should pursue an approach of joint development.

HONG ET AL., *supra* note 104, at 51.

155. *Id.* at 57.

156. *Id.* at 59-61.

157. *Id.*

158. Case No. 2013-9 (Phil. v. China), Award on Jurisdiction and Admissibility (Perm. Ct. Arb. 2015), <http://www.pcacases.com/web/sendAttach/1506>.

159. *Id.* ¶ 413.

Tribunal found it has jurisdiction to consider the Philippines Submissions No. 3, 4, 6, 7, 10, 11, and 13.¹⁶⁰ These submissions included the following claims made by the Philippines:

- Submission No. 3: Scarborough Shoal is a rock
- Submission No. 4: Mischief Reef, Second Thomas Shoal, and Subi Reef are low-tide elevations that do not generate maritime zones
- Submission No. 6: Gaven Reef and McKeenan Reef are low-tide elevations that do not generate maritime zones
- Submission 7: Johnson Reef, Cuarteron Reef, and Fiery Cross Reef do not generate an entitlement to an EEZ or continental shelf
- Submission No. 10: China has unlawfully prevented Philippines fishermen from carrying out fishing activities within the territorial sea of Scarborough Shoal
- Submission No. 11: China has failed to protect and preserve the marine environment of Scarborough Shoal and Second Thomas Shoal
- Submission No. 13: relates to the Philippines' protest against China's purported law enforcement activities as violating the Convention on the International Regulations for the Prevention of Collisions at Sea and also violating UNCLOS and China's rejection of those protests.¹⁶¹

The Tribunal will proceed to the merits of Submissions No. 1, 2, 5, 8, 9, 12, and 14 to determine whether it has jurisdiction.¹⁶² The Tribunal further directed the Philippines to clarify Submission number 15, in which the Philippines requests a declaration that "China shall desist from further unlawful claims and activities."¹⁶³ Oral hearing on the merits will take place at the headquarters of the Permanent Court of Arbitration from November 24, 2015 to November 30, 2015.¹⁶⁴

The Philippines brought its claim to the UNLOS Tribunal in an effort to compel China, a formidable economic and military power, to define its legal claim and cease its operations in the KIG. The Chinese

160. *Id.*

161. *Id.* ¶ 147.

162. *Id.* ¶ 143.

163. *Id.* ¶ 412.

164. Statement of the Philippine Arbitration Case, REP. PHIL. DEP'T FOREIGN AFFAIRS (Nov. 10, 2015), <http://www.dfa.gov.ph/newsroom/dfa-releases/7836-statement-on-the-philippine-arbitration-case>.

government's construction efforts may be indicative of its belief that it does not have a strong legal claim to territorial sovereignty.¹⁶⁵ Several actions the Chinese government has taken suggest that it may recognize the weakness of its legal argument. The Chinese government has flexed its economic muscle in hopes of persuading the Philippine government to abandon efforts to resolve the dispute through the international tribunal. China attempted to encourage the Philippine government to undertake bilateral negotiations in two instances. First, the Chinese government offered the Philippine government \$20 billion in loans conditioned on resolving the dispute through bilateral negotiations.¹⁶⁶ The Chinese government also attempted to influence the Philippines' decision with the stick of excluding it from China's Maritime Silk Road Initiative.¹⁶⁷ If the Chinese government felt confident in its legal claim to features in the SCS it might be more inclined to submit to the Tribunal's jurisdiction, or at the very least, not build on the land features, which effectively undermines the Tribunal proceeding.

An important aspect of the SCS dispute is China's use of the land features for its military build-up. The first public Chinese Military strategy paper, released on May 26, 2015, led noted political analysts to think the most important use of these islands will be to increase China's military power and to extend it beyond its current region. China has constructed a military-sized air strip on Fiery Cross Reef, and it is believed that China is in the process of constructing a second military-sized air strip on another reef.¹⁶⁸ The potential for China to set up an air defense identification and interfere with any efforts the United States may take to come to the aid of its allies, such as the Philippines, is worrisome to U.S. officials and allies.¹⁶⁹ China is working to strengthen its military and its power. The Chinese Military Strategy paper released May 26, 2015, states "the basic point for the preparation for military

165. Mira Rapp-Hooper, *supra* note 140.

166. Simon Webb, *China Offers ASEAN Friendship, Loans as South China Sea Tension Bubbles*, REUTERS (Nov. 13, 2014), <http://www.reuters.com/article/2014/11/13/us-myanmar-asean-china-idUSKCN0IX0W920141113>. In November 2014, Chinese Prime Minister Li offered \$20 billion in preferential and special loans to develop infrastructure while reiterating that the Spratly dispute should be settled bilaterally. *Id.*

167. *Id.*

168. David Brunnstrom & Michael Martina, *U.S., China Clash over Disputed South China Sea*, REUTERS (May 16, 2015), <http://www.reuters.com/article/2015/05/16/us-usa-kerry-china-southchinasea-idUSKBN0O104Q20150516>; Isaac Stone Fish & Keith Johnson, *China's New Airstrip in the South China Sea Is Almost Complete*, FOREIGN POL'Y (Apr. 16, 2015), <http://foreignpolicy.com/2015/04/16/chinas-new-airstrip-in-the-south-china-sea-is-almost-completed/>.

169. Edward Wong, *China Says It Could Add Defense Zone over Disputed Waters*, N.Y. TIMES, June 1, 2015, at A8.

struggle will be placed on winning informationalized local wars, highlighting maritime military struggle and maritime preparation for military struggle.” It is evident the buildup in the SCS is in line with the Chinese government’s aim to project its power.¹⁷⁰ The director of the Asian Maritime Transparency Initiative, Mira Rapp-Hooper, stated the claims China is making in the SCS will “allow Beijing to conduct regular, sustained patrols of the airspace and water, and to attempt to press its far-flung maritime claims as many as 1,000 miles from its shores.”¹⁷¹ In support of increasing its naval strength and power, the Chinese government has made an agreement with civilian shipbuilders that ships being built meet criteria that enable them to be used by the military in times of emergency.¹⁷² It is clear that China is working to strengthen its military and its power, and that its construction in the SCS is part of this effort.

Another contentious element in the SCS is the navigable use of the EEZ. The United States and China dispute the lawfulness of military activities in another country’s EEZ.¹⁷³ If China’s view prevails and China is successful in establishing sovereignty in the SCS, then other countries will be precluded from exerting military presence in this region. The U.S. position is that military activities in another country’s EEZ are legal and points to state practice to support its position.¹⁷⁴ Whereas, China’s position is that military activities breach the spirit of the UNCLOS and are thus not legal. Already, several confrontations between the two states have resulted from this profound disagreement. In March 2001, a U.S. oceanographic survey ship, the USNS BOWDITCH, came within China’s claimed EEZ.¹⁷⁵ A Chinese Military ship met the BOWDITCH and ordered it to leave the area, which BOWDITCH did.¹⁷⁶ The U.S.

170. “The Chinese Dream is to make the country strong. China’s armed forces take their dream of making the military strong as part of the Chinese Dream. Without a strong military, a country can be neither safe nor strong.” *Document: China’s Military Strategy*, USNI NEWS (May 26, 2015), <http://news.usni.org/2015/05/26/document-chinas-military-strategy>.

171. David E. Sanger & Rick Gladstone, *Piling Sand in a Disputed Sea, China Literally Gains Ground*, N.Y. TIMES, Apr. 9, 2015, at A1.

172. *China Approves Plan for Civilian Ships To Be Used by the Military*, REUTERS (June 17, 2015, 10:51 PM), <http://www.reuters.com/article/2015/06/18/us-china-defence-shipping-idUSKBN00Y08N20150618>.

173. *Document: China’s Military Strategy*, *supra* note 170.

174. Addressing U.S. activity in China’s claimed EEZ, Caster said, “The United States will fly, sail, and operate wherever international law allows, as we do all around the world.” Tyrone C. Marshall, *Carter: Asia-Pacific Will Continue to ‘Rise’ With Strong Security Architecture*, U.S. DEP’T DEF. (May 30, 2015), <http://www.defense.gov/News-Article-View/Article/604750>.

175. Raul Pedrozo, *Close Encounters at Sea: The USNS Impeccable Incident*, 62 NAVAL WAR C. REV. 109, 109 (2009).

176. *Id.*

embassy filed a diplomatic protest with the Chinese Ministry of Foreign Affairs and BOWDITCH returned to the area alongside an armed U.S. ship. In March 2009, the USNS IMPECCABLE came within China's claimed EEZ.¹⁷⁷ Five Chinese vessels, including a navy intelligence ship, surrounded and harassed the USNS IMPECCABLE.¹⁷⁸ More recently, in May 2015, a CNN reporter was permitted by the Pentagon to accompany a surveillance flight over the SCS.¹⁷⁹ The video captures Chinese military personnel ordering the aircraft to leave the military zone.¹⁸⁰ The U.S. pilot responded stating the plane was in international airspace and permitted to be there under international law.¹⁸¹ Speaking at the Shangri-La Dialogue in May 2015, Ashton B. Carter, the Secretary of Defense, stated, "turning an underwater rock into an airfield simply does not afford the rights of sovereignty or permit restrictions on international air or maritime transit."¹⁸² Prior to publication, on October 26, 2015, a U.S. Navy destroyer passed through the Spratly Islands.¹⁸³ The vessel came within twelve nautical miles of Subi Reef.¹⁸⁴ This conflict regarding lawful navigation can be viewed as another facet of the struggle for power in the region.

The Chinese government rejects the U.S. involvement in the SCS dispute.¹⁸⁵ In the first official comments made by China regarding the SCS, Spokeswoman Hua Chunying said, "China's sovereignty and rights in the area have a historical foundation, and do not require land reclamation as justification."¹⁸⁶ Chunying also warned that other states should not abuse freedom of navigation and called on states to allow China and ASEAN nations to resolve the SCS dispute without their interference.¹⁸⁷ The Military Strategic Paper states, "[S]ome external countries are also busy meddling in South China Sea affairs It is

177. *Id.*

178. *Id.*

179. Jim Sciutto, *Behind the Scenes: A Secret Navy Flight over China's Military Buildup*, CNN (May 26, 2015, 8:09 AM), <http://www.cnn.com/2015/05/26/politics/south-china-sea-navy-surveillance-plane-jim-sciutto/>.

180. *Id.*

181. Maria Rapp-Hooper, *In Defense of Facts in the South China Sea*, ASIA MAR. TRANSPARENCY INITIATIVE (June 2, 2015), <http://amti.csis.org/in-defense-of-facts-in-the-south-china-sea/>.

182. Marshall, *supra* note 174.

183. *US Navy Destroyer Passes Disputed China Islands*, BBC NEWS (Oct. 27, 2015), <http://www.bbc.com/news/world-us-canada-34641131>.

184. *Id.*

185. Brunnstrom & Martina, *supra* note 168.

186. *China Issues Six-Point Response to US Remark on South China Sea Issue*, *supra* note 3.

187. *Id.*

thus a long-standing task for China to safeguard its maritime rights and interests.¹⁸⁸

XI. CONCLUSION

The Philippine government has been struggling to maintain what it believes to be its rights to the contiguous zones, EEZ, and continental shelf off the KIG islands, while the Chinese government has claimed the majority of the SCS, including this island grouping. UNCLOS attempted to establish a mechanism for equitably settling such disputes. This dispute is not new and there is great uncertainty as to how it will conclude. The ramification of this dispute may be particularly profound given China's reclamation efforts. It is likely that China will continue to encourage the Philippines to reach an agreement through bilateral negotiations; as China is in a stronger economic and military position. This has significant implications for the law of the sea, and regional stability. Meanwhile, if an international agreement is not reached soon the Philippines will be losing ground both literally and figuratively.

188. Document: *China's Military Strategy*, *supra* note 170.