

4-1-2015

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### Recommended Citation

Emma Kingdon, *A Case for Arbitration: The Philippines' Solution for the South China Sea Dispute*, 38 B.C. Int'l & Comp. L. Rev. 129 (2015), <https://lawdigitalcommons.bc.edu/iclr/vol38/iss1/5>

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# A CASE FOR ARBITRATION: THE PHILIPPINES' SOLUTION FOR THE SOUTH CHINA SEA DISPUTE

EMMA KINGDON\*

**Abstract:** Arbitration under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS) would be the most effective resolution method and would lead to the most favorable outcome for the Philippines against China in the South China Sea (SCS) Dispute. The Philippines will likely not pursue adjudication in the International Court of Justice (ICJ) because the court would likely grant sovereignty over any islands to China, thus legitimizing China's aggressive actions in the SCS. Furthermore, continued negotiations are also not a viable option for the Philippines because any agreement would be inadequate to deter China from future actions in the SCS. Under the Annex VII approach, a holding by an arbitral tribunal in the Philippines' favor would enable the states of the Association of Southeast Asian Nations (ASEAN) to present a united front to China that the only acceptable basis for maritime claims in the SCS must be under UNCLOS and would ensure access to the abundance of natural resources in the SCS that are central to the Southeast Asian economies. Overall, not only will arbitration lead to the most efficient and favorable outcome for the Philippines, it will also lay the groundwork for future stability among all claimant states in the SCS.

## INTRODUCTION

In January 2013, the Philippines submitted for arbitration a claim against the People's Republic of China for violations of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) after more than a decade of unsuccessful bilateral and multilateral negotiations over territorial claims in the South China Sea (SCS).<sup>1</sup> The Philippines is one of five countries challenging China's claims of ownership over the area, rumored to be rich not only in liv-

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<sup>1</sup> Greg Torode, *Philippines South China Sea Legal Case Against China Gathers Pace*, REUTERS (Sept. 27, 2013), <http://www.reuters.com/article/2013/09/27/us-china-philippines-idUSBRE98Q0BX20130927>, archived at <http://perma.cc/8P67-CXGP>; Audio tape: A Discussion on the Philippines' South China Sea Arbitration Case, held by the Center for Strategic & International Studies (Dec. 3, 2013), available at <https://csis.org/multimedia/audio-discussion-philippines-south-china-sea-arbitration-case>, archived at <http://perma.cc/5XE7-SY35> [hereinafter Discussion on the Philippines' Arbitration Case] (arguing that the Philippines engaged in negotiations with China over this dispute since 1995 and that at no point was any progress made).

ing resources, but also in non-living resources.<sup>2</sup> China responded to the claim in an unprecedented manner and refused to participate in the UN arbitration process, becoming the first state to decline taking part in an inter-state arbitration under UNCLOS.<sup>3</sup> The Philippines submitted its formal case to the UN arbitration tribunal of judges, an arbitral body, in March 2014 and China must submit a Counter-Memorial responding to the Philippines by December 2014.<sup>4</sup>

The Philippines has three options under UNCLOS for resolving the SCS conflict.<sup>5</sup> Although these proceedings default to arbitration when neither state selects a dispute resolution mechanism, the parties could agree to either adjudication or negotiation.<sup>6</sup> This Note argues that arbitration would be the most effective and favorable course of action for the Philippines because a decision may be issued as early as May 2015, and its binding effect will deter China from future actions while strengthening the legal basis for other Southeast Asian states' claims in this critical area.<sup>7</sup>

Part I of this Note addresses the historical backdrop against which the effectiveness of the arbitration must be assessed. Part II discusses the Philippines' claims against China, as well as the current state of maritime law under UNCLOS. It lays out a framework by which the arbitral tribunal will likely assess the Philippines' claims by comparison to comparable maritime territorial disputes that have been resolved through the Annex VII arbitral tribunal proceedings, as well as compares this assessment to adjudication and negotiation proceedings. Part III argues that the Philippines will be most successful against China under the Annex VII arbitration process as opposed to resolution through other mechanisms. Part III further contends that arbitration best enables the other nations embroiled in the South China Sea conflict to hold China accountable to the decision and force China to fully respect their rights under UNCLOS.

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<sup>2</sup> Paul Lewis, *China Pulls Out of UN Process over Territorial Dispute with Philippines*, GUARDIAN, Dec. 6, 2013, at 1; see also Jeff Himmelman, *A Game of Shark and Minnow*, N.Y. TIMES MAGAZINE, Oct. 27, 2013, at 32.

<sup>3</sup> Lewis, *supra* note 2, at 2.

<sup>4</sup> Press Release, Permanent Court of Arbitration, Arbitration between the Republic of the Philippines and the People's Republic of China: The Arbitral Tribunal Sets Further Proceedings, PCA 121063 (June 3, 2014) [hereinafter Press Release, PCA 121063].

<sup>5</sup> See United Nations Convention on the Law of the Sea arts. 279, 287(1), Dec. 10, 1982, 1833 U.N.T.S. 397, 508, 509–10, 561 [hereinafter UNCLOS].

<sup>6</sup> See *id.* at 510, art. 287(5).

<sup>7</sup> See GREGORY B. POLING, CTR. FOR STRATEGIC & INT'L STUD. [CSIS], THE SOUTH CHINA SEAIN FOCUS: CLARIFYING THE LIMITS OF MARITIME DISPUTE 4 (2013), available at [http://csis.org/files/publication/130717\\_Poling\\_SouthChinaSea\\_Web.pdf](http://csis.org/files/publication/130717_Poling_SouthChinaSea_Web.pdf), archived at <http://perma.cc/9UVC-MBGS>. But cf. Himmelman, *supra* note 2, at 43 (arguing that although a decision may be rendered as early as March 2015, China would unlikely be deterred by an unfavorable outcome).

## I. BACKGROUND

*A. The History of the Territorial Dispute*

The SCS is a large, semi-enclosed marginal ocean basin bordered by Vietnam, the Philippines, Malaysia, Brunei, Indonesia, China, and Taiwan.<sup>8</sup> It is approximately 550–650 nautical miles (nm) wide and more than 1200 nm long, covering a total area of 3.5 million square kilometers.<sup>9</sup> The SCS is located on the major international shipping route between the Pacific and the Indian Oceans, and thus serves as a “vital international passageway.”<sup>10</sup> It is bordered by several of the world’s most rapidly industrializing countries, and is therefore, central to the Southeast Asian economies, namely due to its abundance of natural resources.<sup>11</sup> The SCS has a large and complex marine ecosystem that has attracted coastal states to develop fishing industries.<sup>12</sup> In addition, the SCS is rich in oil and gas.<sup>13</sup> Ensuring access to these vital resources is an important consideration that sparked the territorial dispute between China and the other coastal states, including the Philippines.<sup>14</sup>

The area in dispute that is most hotly contested is the Spratlys Islands, located on the east side of the SCS.<sup>15</sup> The Spratlys Islands consist of more than 140 islets, rocks, reefs, shoals, and sandbanks, including a reef the Philippines call Ayungin, the most recent site of conflict with China.<sup>16</sup> Less than forty of the features are above water at high tide; instead, they are either completely submerged or are only above water at low tide.<sup>17</sup> The Spratlys Islands are believed to be sitting atop vast oil and gas reserves.<sup>18</sup> All of the Spratly Islands are claimed by China, Taiwan, and Vietnam.<sup>19</sup> Malaysia also lays claim over certain parts of the islands and reefs and controls eight islands that fall within its continental shelf.<sup>20</sup> In addition, Brunei claims two reefs and a maritime zone based on its continental shelf.<sup>21</sup> The Philippines maintains separate claims to a portion of the Spratlys Islands, known as the Kalayaan Island Group

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<sup>8</sup> Robert Beckman, *The UN Convention on the Law of the Sea and the Maritime Disputes in the South China Sea*, 107 AM. J. INT’LL. 142, 143 (2013).

<sup>9</sup> *Id.*; Guifang Xue, *Deep Danger: Intensified Competition in the South China Sea and Implications for China*, 17 OCEAN & COASTAL L.J. 307, 308 (2012).

<sup>10</sup> Beckman, *supra* note 8, at 143; Xue, *supra* note 9, at 308.

<sup>11</sup> Xue, *supra* note 9, at 309.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Beckman, *supra* note 8, at 143; Xue, *supra* note 9, at 311.

<sup>16</sup> Beckman, *supra* note 8, at 143; see Himmelman, *supra* note 2, at 26.

<sup>17</sup> Beckman, *supra* note 8, at 143.

<sup>18</sup> Xue, *supra* note 9, at 311.

<sup>19</sup> Beckman, *supra* note 8, at 144.

<sup>20</sup> Xue, *supra* note 9, at 311.

<sup>21</sup> *Id.*

(KIG), which includes Ayungin Reef.<sup>22</sup> The Philippines is currently fending off Chinese pressure to claim this area.<sup>23</sup> To maintain its sovereignty, the Philippine government permanently stations eight troops on a warship that was run aground on the reef in 1999.<sup>24</sup> The Chinese, however, have stationed two coast guard boats at either side of the reef, preventing the Philippine Navy from resupplying their troops.<sup>25</sup> The Chinese Army has made it clear that when the troops leave the reef to resupply, they will never be allowed to return.<sup>26</sup> The Chinese are sure this will eventually happen, given the lack of food and drinking water on the reef and China's restriction on access to the reef; thus, the Philippines will lose its claim.<sup>27</sup>

The Scarborough Shoal is another disputed feature in the SCS, claimed by China, the Philippines, and Taiwan.<sup>28</sup> It is a large atoll with a lagoon surrounded by a reef.<sup>29</sup> Most of the reef is completely submerged or above water only at low tide, but there are several small rocks that are above water at high tide.<sup>30</sup> China and the Philippines engaged in a standoff at Scarborough Shoal in 2012.<sup>31</sup> The Philippines caught the Chinese harvesting coral and endangered species within the Philippines' Exclusive Economic Zone (EEZ) and sent a warship to expel the fishing boats.<sup>32</sup> The Chinese responded with its own civilian boats and the situation escalated into a two-month standoff.<sup>33</sup> The United States facilitated an agreement for both countries' ships to leave the shoal peacefully, but China never withdrew its presence.<sup>34</sup> In contrast, China's Army has implemented a "cabbage strategy"—basically blocking access to the shoal by surrounding the area with a nest of boats that includes a combination of civilian and military ships—in order to ward off any foreign fishermen.<sup>35</sup>

The final disputed feature between the Philippines and China is Mischief Reef.<sup>36</sup> Mischief is another submerged reef, located 20 nm west of Ayungin.<sup>37</sup> It previously belonged to the Philippines, as the reef is within its EEZ; however, in 1994, the Chinese took advantage of the Philippine Navy's hiatus due to

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<sup>22</sup> *Id.*

<sup>23</sup> See Himmelman, *supra* note 2, at 26, 29.

<sup>24</sup> *Id.* at 26.

<sup>25</sup> *Id.*

<sup>26</sup> See *id.* at 30.

<sup>27</sup> See *id.*

<sup>28</sup> Beckman, *supra* note 8, at 145.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*; Himmelman, *supra* note 2, at 29.

<sup>32</sup> Himmelman, *supra* note 2, at 29.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Discussion on the Philippines' Arbitration Case, *supra* note 1.

<sup>37</sup> Himmelman, *supra* note 2, at 33.

a typhoon and erected a structure.<sup>38</sup> The Chinese have since built a large military structure and have made it clear that they are not going to leave.<sup>39</sup>

On November 4, 2002, the foreign ministers of the Association of South-east Asian Nations (ASEAN), including delegates from each of the claiming states, signed a declaration regarding the dispute in the SCS entitled "Declaration on the Conduct of Parties in the South China Sea" (DOC).<sup>40</sup> In the DOC, the parties decided to resolve their territorial and jurisdictional disputes by peaceful means, including an agreement to engage in direct negotiations with the sovereign states concerned and to not resort to the threat or use of force.<sup>41</sup> The DOC does not exclude any further procedure, but instructs the parties to commit to exercising self-restraint and refrain from conducting activities that could escalate the dispute, such as inhabiting previously uninhabited islands, reefs, shoals, and other features.<sup>42</sup> The hope for the DOC was that it would create the conditions necessary to establish a peaceful and durable solution in the SCS.<sup>43</sup>

After several years of negotiations, however, the territorial dispute escalated sharply in 2009 as a result of the submission of claims to the United Nation's Commission on the Limits of Continental Shelf (CLCS) for an extended continental shelf by the Philippines, Malaysia, and Vietnam.<sup>44</sup> Under Article 4 of Annex II to UNCLOS, a coastal state intending to extend its continental shelf entitlements beyond 200 nm is obligated to submit those limits to the CLCS.<sup>45</sup> The Philippines made the first submission on April 8, 2009, but it only concerned the Benham Rise region, located east of the Philippines in the Philippine Sea.<sup>46</sup> On May 6, 2009, Malaysia and Vietnam submitted a joint proposal regarding the southern part of the SCS, and Vietnam submitted an additional proposal regarding the area north of that stipulated in the joint proposal.<sup>47</sup>

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Declaration on the Conduct of Parties in the South China Sea*, ASSOC. OF S.E. ASIAN NATIONS [ASEAN], <http://www.asean.org/news/item/declaration-on-the-conduct-of-parties-in-the-south-china-sea>, archived at <http://perma.cc/9SYB-Y34F> (adopted Nov. 4, 2002) [hereinafter *DOC*]. Members of ASEAN include Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Viet Nam. *Member States*, ASEAN, <http://www.asean.org/asean/member-states> (last visited Nov. 2, 2014), archived at <http://perma.cc/L9GB-Z8M8>.

<sup>41</sup> *DOC*, *supra* note 40, ¶ 4.

<sup>42</sup> *Id.* ¶ 5.

<sup>43</sup> *Id.* at pmb1.

<sup>44</sup> Xue, *supra* note 9, at 313.

<sup>45</sup> UNCLOS, *supra* note 5, at Annex II, art. 4.

<sup>46</sup> U.N. Secretary-General, Receipt of the Submission Made by the Republic of the Philippines to the Commission on the Limits of the Continental Shelf, U.N. Doc. 09/132 (Apr. 8, 2009), available at [http://www.un.org/depts/los/clcs\\_new/submissions\\_files/phl22\\_09/clcs22\\_2009e.pdf](http://www.un.org/depts/los/clcs_new/submissions_files/phl22_09/clcs22_2009e.pdf), archived at <http://perma.cc/32DR-4ZZJ>; Xue, *supra* note 9, at 313.

<sup>47</sup> Xue, *supra* note 9, at 313.

China immediately objected to the Malaysian and Vietnamese submissions, and on May 7, 2009, submitted two *note verbales* to the CLCS.<sup>48</sup> China stated that it possessed “indisputable sovereignty over the islands in the [SCS] and the adjacent waters, and enjoy[ed] sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsoil.”<sup>49</sup> China further asserted that the Malaysian and Vietnamese submissions “seriously infringed [on] China’s sovereignty, sovereign rights and jurisdiction in the [SCS]” and attached its Nine-Dash Line map to specify the boundaries of its claim.<sup>50</sup> The language in these notes and the attached map severely escalated the territorial disputes and sparked protests from many of the coastal states.<sup>51</sup>

### B. China’s Claim Under the Nine-Dash Line

In its assertion to the UN Secretary General, China claimed that everything, including both land and sea, encompassed within the Nine-Dash Line is area over which it exercises sovereignty.<sup>52</sup> This encompasses 70–75 percent of the SCS.<sup>53</sup> The Nine-Dash Line is derived from ancient Xia and Han dynasty records and a map produced in 1947, known as the Eleven-Dash Line, that indicated the geographical scope of its authority over the SCS.<sup>54</sup> Two dashes were removed from the Eleven-Dash Line, establishing the current Nine-Dash Line, in 1953.<sup>55</sup> In 1956, China issued a statement in response to a suggestion by the Philippines that some of the SCS islands “should” belong to the Philippines because of their proximity.<sup>56</sup> This statement reiterated that the SCS islands, including the Spratlys Islands, were inherently Chinese territory, as they had fallen during World War II to the Japanese and were recovered by the Chinese government upon Japan’s surrender.<sup>57</sup>

In 1992, China promulgated its Law on the Territorial Sea and the Contiguous Zone.<sup>58</sup> Article 2 of this law includes the four island groups in the SCS, including Scarborough Shoal and the Spratlys, within the land territory of China.<sup>59</sup> When China ratified UNCLOS in 1996, China stated that it “reaffirm[ed]

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<sup>48</sup> *Id.* at 314.

<sup>49</sup> *Id.* (quoting People’s Republic of China, Note Verbale CML/17/2009 (May 7, 2009)).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 315.

<sup>52</sup> Discussion on the Philippines’ Arbitration Case, *supra* note 1.

<sup>53</sup> *Id.*

<sup>54</sup> Zhiguo Gao & Bing Bing Jia, *The Nine-Dash Line in the South China Sea: History, Status, and Implications*, 107 AM. J. INT’L L. 98, 102 (2013); Himmelman, *supra* note 2, at 28.

<sup>55</sup> Gao & Jia, *supra* note 54, at 103.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 104.

<sup>59</sup> *Id.*

its sovereignty over all its archipelagos and islands as listed in Article 2” of the 1992 law.<sup>60</sup>

### C. The Philippines' Decision to Submit to Arbitration

All of the claimants to the SCS territorial dispute rarely find agreement, but there was near universal support of the coastal states about the illegitimacy of the Nine-Dash Line.<sup>61</sup> China's *note verbale* to the CLCS objecting to the Malaysian and Vietnamese submissions and introducing the map with the Nine-Dash Line sparked a furious exchange of diplomatic notes.<sup>62</sup> In its *note verbale* on May 8, 2010, Vietnam reasserted the claim to its territory and stated that the map had no legal, historical, or factual basis.<sup>63</sup> In July 2010, Indonesia submitted its own *note verbale* focusing on the implications of the Chinese map, stating that it “clearly lack[ed] international legal basis and is tantamount to upset the UNCLOS.”<sup>64</sup>

On April 5, 2011, the Philippines submitted a *note verbale* responding to the Chinese map.<sup>65</sup> First, it claimed that the KIG constitutes a part of the Philippines.<sup>66</sup> Second, it asserted “sovereignty and jurisdiction over the waters around or adjacent to each relevant geological feature in the KIG as provided for” by UNCLOS.<sup>67</sup> Third, it stated that “the relevant waters as well as the seabed and subsoil” claimed as shown in the “so-called 9-dash line map . . . would have no basis under international law, specifically UNCLOS.”<sup>68</sup> In the Philippines' view, sovereignty and jurisdiction over those areas belong to the appropriate coastal or archipelagic state to which those bodies of waters, as well as seabed and subsoil, are next to, either as part of the territorial sea or the 200 nm EEZ and Continental Shelf in accordance with Articles 3, 4, 55, 57, and 76 of UNCLOS.<sup>69</sup>

In the case of the Philippines, the Nine-Dash Line comes within 50 nm of the island of Luzan and within 30 nm of the island of Palawan.<sup>70</sup> At its farthest, the Nine-Dash Line is more than 800 nm from China's mainland coast.<sup>71</sup> The

<sup>60</sup> *Id.*

<sup>61</sup> Xue, *supra* note 9, at 312, 315, 316.

<sup>62</sup> *See id.* at 315.

<sup>63</sup> *See* Gao & Jia, *supra* note 54, at 106.

<sup>64</sup> *Id.* at 107 (quoting Note Verbale No. 480/POL-703/VII/10 from the Permanent Mission of the Republic of Indonesia to the UN Secretary-General (July 8, 2010)).

<sup>65</sup> *See id.*

<sup>66</sup> *Id.* (quoting Note Verbale No. 000228 from the Permanent Mission of the Republic of the Philippines to the UN Secretary-General (Apr. 5, 2011)).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *See* Gao & Jia, *supra* note 54, at 107.

<sup>70</sup> Discussion on the Philippines' Arbitration Case, *supra* note 1.

<sup>71</sup> *Id.*



Philippines has spent many years in negotiations with China, mainly bilateral and some multilateral, but at no point was any progress made.<sup>72</sup> Furthermore, given the escalating conflicts at the Scarborough Shoal in April 2012 and the Ayungin Reef in Spring 2013, China has indicated that it would not soften its position.<sup>73</sup> In a *note verbale* dated February 19, 2013, China asserted that by initiating arbitration proceedings, the Philippines was acting in contravention of the 2002 DOC, in which all ASEAN states agreed to resolve their territorial and jurisdictional disputes through friendly negotiations.<sup>74</sup> The Philippines, however, cannot viably confront China militarily and does not have the economic power to affect China's decision-making, and thus, the only option for the Philippines is the law.<sup>75</sup> By bringing its complaints to arbitration, the Philippines is using the only leverage it has—bringing international attention to the issue.<sup>76</sup>

## II. DISCUSSION

### A. *The 1982 United Nations Convention on the Law of the Sea*

#### 1. The Content of UNCLOS

UNCLOS establishes the legal framework for evaluating all legal disputes in the oceans.<sup>77</sup> The Convention provides legal order to facilitate international communication and promotes the peaceful, equitable, and efficient use of the oceans.<sup>78</sup> UNCLOS defines offshore features and sets out the maritime zones determined by offshore features.<sup>79</sup>

Each state is entitled to certain maritime zones under UNCLOS.<sup>80</sup> A coastal state may establish a territorial sea up to 12 nm from its land territory and may exercise complete sovereignty over that water, seabed, and subsoil.<sup>81</sup> In addition, a coastal state may also exercise sovereign rights on the Continental Shelf, for the purpose of exploring and exploiting the natural resources of the seabed and subsoil of the submarine areas, for up to 200 nm from its land territory.<sup>82</sup> A state is also entitled to an Exclusive Economic Zone (EEZ), where it has sovereign

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Note Verbale No. (13) PG-039 from the Embassy of the People's Republic of China in the Republic of the Philippines to the Department of Foreign Affairs of the Republic of the Philippines (Feb. 19, 2013), available at [http://www.globalcompetitionreview.com/cdn/files/gar/china\\_note\\_verbale.pdf](http://www.globalcompetitionreview.com/cdn/files/gar/china_note_verbale.pdf), archived at <http://perma.cc/WMB2-DDPF>.

<sup>75</sup> Discussion on the Philippines' Arbitration Case, *supra* note 1.

<sup>76</sup> Himmelman, *supra* note 2, at 43.

<sup>77</sup> See UNCLOS, *supra* note 5, at pmbl.

<sup>78</sup> *Id.*

<sup>79</sup> See *id.* arts. 121(1)–(2).

<sup>80</sup> See *id.* arts. 2, 57.

<sup>81</sup> *Id.* arts. 2, 3.

<sup>82</sup> *Id.* arts. 76, 77.

rights for the purpose of exploring and exploiting living and non-living resources of the waters for up to 200 nm from its land territory.<sup>83</sup> The coastal state's rights include the jurisdiction to establish and use artificial islands, installations, and structures.<sup>84</sup>

Offshore features are also entitled to maritime zones, although these zones differ depending on UNCLOS's classification of the feature as an island, rock, low tide elevation, or artificial island.<sup>85</sup> An island is a naturally formed area of land that remains above water at high tide.<sup>86</sup> An island is entitled to the same maritime zones as land territory, including a 12 nm territorial sea and a 200 nm EEZ and Continental Shelf.<sup>87</sup> Rocks are a sub-category of islands, and also remain above water at high tide.<sup>88</sup> Rocks are distinguishable from islands, however, because they cannot sustain human habitation or economic life of their own; rocks are therefore only entitled to a 12 nm territorial sea.<sup>89</sup> A low tide elevation is a naturally formed area of land that is above water at low tide but submerged at high tide.<sup>90</sup> A low tide elevation located within a coastal state's territorial sea may be utilized as a baseline for measuring the state's territorial sea.<sup>91</sup> If it is situated beyond 12 nm from a coastal state, however, it does not have a territorial sea of its own.<sup>92</sup> Similarly, an artificial island is not entitled to any maritime zones, except for a 500 meter safety zone.<sup>93</sup> Although the Convention provides the definitions to classify offshore features, it does not contain any provisions regarding how to decide competing sovereignty claims.<sup>94</sup>

## 2. Dispute Settlement Under UNCLOS

Although UNCLOS contains no guidance to assist states in resolving competing claims to sovereignty, the Convention does contain a complex system for settling disputes between parties over the interpretation or application of its provisions.<sup>95</sup> The default rule is that if there is a dispute between two states concerning the interpretation or application of any provision in the Con-

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<sup>83</sup> *Id.* arts. 56(1), 57.

<sup>84</sup> *Id.* art. 56(1).

<sup>85</sup> *Id.* art. 121(1).

<sup>86</sup> *Id.* arts. 121(2)–(3).

<sup>87</sup> *Id.* arts. 3, 77, 121(2).

<sup>88</sup> *See id.* arts. 121(1), 121(3).

<sup>89</sup> *See id.* art. 121(3).

<sup>90</sup> *Id.* art. 13(1).

<sup>91</sup> *Id.* arts. 13(1)–(2).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* arts. 60(5), 60(8).

<sup>94</sup> POLING, *supra* note 7, at IX.

<sup>95</sup> Beckman, *supra* note 8, at 142.

vention, they are subject to compulsory binding dispute settlement.<sup>96</sup> States are first obligated to try to settle the dispute through peaceful means through the process outlined in Section 1 of Part XV.<sup>97</sup> Under Article 282, if the parties to the dispute have agreed through a general, regional, or bilateral agreement that the dispute be submitted to a procedure resulting in a binding decision, that procedure will be utilized in lieu of the UNCLOS procedure.<sup>98</sup> The parties are obligated to exchange views expeditiously to negotiate a settlement.<sup>99</sup>

If no settlement is reached through the process in Section 1, either party may submit the dispute to a court or tribunal with jurisdiction, as outlined in Section 2 of Part XV.<sup>100</sup> The court or tribunal with jurisdiction to hear a dispute depends on whether the parties selected a procedure for resolving disputes.<sup>101</sup> Upon signing, ratifying, or acceding to UNCLOS, under Article 287 a state is free to choose one or more of four possible procedures for settling disputes concerning the interpretation or application of the Convention.<sup>102</sup> A state may elect to: (1) adjudicate before the International Tribunal for the Law of the Sea (ITLOS); (2) adjudicate before the International Court of Justice (ICJ); (3) arbitrate before an Annex VII tribunal; or (4) arbitrate before a special tribunal under Annex VIII.<sup>103</sup>

If the parties to a dispute have accepted the same procedure for settlement, the dispute may only be submitted to that procedure, unless the parties agree otherwise.<sup>104</sup> If the parties did not accept the same procedure, or if a party did not select a choice of one of the four procedures, the dispute may only be submitted to Annex VII arbitration, unless the parties agree otherwise.<sup>105</sup> Any decision rendered by an Annex VII tribunal is final and binding on all the parties to the dispute.<sup>106</sup>

## B. Adjudication Under UNCLOS

### 1. Structure and Function of Adjudication

Under Article 287, a state may select or agree to adjudicate a dispute before ITLOS or the ICJ.<sup>107</sup> Each compulsory dispute resolution body has juris-

<sup>96</sup> UNCLOS, *supra* note 5, art. 286.

<sup>97</sup> *Id.* art. 279.

<sup>98</sup> *Id.* art. 282.

<sup>99</sup> *Id.* art. 283(1).

<sup>100</sup> *Id.* art. 286.

<sup>101</sup> *See id.* art. 287.

<sup>102</sup> *Id.* art. 287(1).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* art. 287(4).

<sup>105</sup> *Id.* arts. 287(3), 287(5).

<sup>106</sup> *Id.* art. 296(1).

<sup>107</sup> *Id.* art. 287(1).

diction over any dispute concerning the interpretation or application of the Convention.<sup>108</sup> While both tribunals have been granted potentially extensive jurisdiction, the claims brought before ITLOS have been limited in number and scope.<sup>109</sup> Under UNCLOS, compulsory jurisdiction has been granted to ITLOS to hear “prompt release” cases and cases seeking provisional measures but for which an arbitral tribunal has not yet been formed.<sup>110</sup> Thus, ITLOS gained the reputation as a court of first instance for deciding questions of an urgent matter that require prompt resolution, but not a tribunal for final determination.<sup>111</sup> As a result, the ICJ has become the adjudicatory arm of the United Nations and issues final binding decisions on conflicts arising under the Convention.<sup>112</sup>

## 2. Criteria for Classifying Offshore Features and Determining Sovereignty

In the landmark decision *Nicaragua v. Honduras*, the ICJ outlined the criteria for classifying offshore features and the four principles for evaluating sovereignty disputes.<sup>113</sup> In that case, Nicaragua filed an application requesting that the court determine the maritime boundary between Nicaragua and Honduras in the Caribbean Sea.<sup>114</sup> During the proceedings, Nicaragua also requested that the court decide the question of sovereignty over the islands and other features within the area in dispute.<sup>115</sup>

As a result of the vagueness of Nicaragua’s request, the court could only make determinations regarding the legal characterization and sovereignty of the four features named by Honduras.<sup>116</sup> The court found that the four main cays in dispute remained above water at high tide and thus, fell within the definition of islands under Article 121 of UNCLOS.<sup>117</sup> With the exception of these four islands, the court determined there was an insufficiency of information to classify the other offshore features in the disputed area.<sup>118</sup> The court, however, noted that it was not “aware of a uniform and widespread State practice which might have given rise to a customary rule which unequivocally permits or ex-

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<sup>108</sup> *Id.* art. 288(1).

<sup>109</sup> Jillaine Seymour, *The International Tribunal for the Law of the Sea: A Great Mistake?*, 13 IND. J. GLOBAL LEGAL STUD. 1, 8 (2006).

<sup>110</sup> *Id.* at 15.

<sup>111</sup> *Id.* at 16, 20.

<sup>112</sup> See C. Leah Granger, *The Role of International Tribunals in Natural Resource Disputes in Latin America*, 34 ECOLOGY L. Q. 1297, 1313 (2007).

<sup>113</sup> Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (*Nicar. v. Hond.*), 2007 I.C.J. 659, ¶¶ 146, 168, 209, 220 (Oct. 8).

<sup>114</sup> *Id.* ¶ 17.

<sup>115</sup> *Id.* ¶ 19.

<sup>116</sup> See *id.* ¶¶ 139, 140.

<sup>117</sup> *Id.* ¶ 137.

<sup>118</sup> *Id.* ¶ 138.

cludes appropriation of low tide elevations.”<sup>119</sup> The court reasoned that the existing rules did not establish that low tide elevations could be fully assimilated with islands and thus, it could not make a determinative finding on their sovereignty.<sup>120</sup>

In determining the sovereignty of the four identified islands, the court considered four principles: the principle of *uti possidetis juris*, post-colonial *effectivités*, the evidentiary value of maps, and recognition by third states.<sup>121</sup> The court found the principle of *uti possidetis juris* could apply to offshore possessions and maritime spaces, as a key aspect of *uti possidetis juris* is to deny the possibility of *terra nullius*.<sup>122</sup> While the court assumed that these islands were under the rule of the Spanish crown, in order to claim sovereignty under this principle, it must be shown that the predecessor state allocated the islands to one of its successor states.<sup>123</sup> The court held that neither Nicaragua nor Honduras produced documentary evidence from the pre-independence era that explicitly refers to the islands and determined that proximity alone to the islands did not establish legal title.<sup>124</sup> Thus, the question of sovereignty over the islands could not be determined under the principle of *uti possidetis juris*.<sup>125</sup>

The court found that evidence of post-colonial *effectivités* facilitated the determination of the sovereignty of the islands.<sup>126</sup> A sovereign title may be inferred from the effective exercise of authority over a territory.<sup>127</sup> The court even decided that sovereignty over maritime features, such as these islands, could be established by only a relatively modest display of state power.<sup>128</sup> Evidence of acts of legislative and administrative control, the application and enforcement of civil and criminal law, the regulation of immigration, fishing ac-

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<sup>119</sup> *Id.* ¶ 141 (quoting Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), 2001 I.C.J. 102, ¶ 205 (Mar. 16)).

<sup>120</sup> *Id.* ¶¶ 141, 144.

<sup>121</sup> Coalter G. Lathrop, *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, 102 AM. J. INT’L L. 113, 115 (2008). See generally Frontier Dispute (Burk. Faso v. Mali), 1986 I.C.J. 554, ¶¶ 24, 63 (Dec. 22) (explaining *uti possidetis juris* is the principle that the internal administrative boundaries of the pre-independence sovereign form the international boundaries of the several successor states and *effectivités* are acts that demonstrate the exercise of authority over an area).

<sup>122</sup> *Nicaragua*, 2007 I.C.J. 659, ¶¶ 156–157. See generally BLACK’S LAW DICTIONARY 1701 (10th ed. 2014) (defining *terra nullius* as the term for territory not belonging to any particular country).

<sup>123</sup> *Nicaragua*, 2007 I.C.J. 659, ¶ 158.

<sup>124</sup> *Id.* ¶ 161.

<sup>125</sup> *Id.* ¶¶ 161, 165.

<sup>126</sup> *Id.* ¶ 168.

<sup>127</sup> *Id.* ¶ 172.

<sup>128</sup> *Id.* ¶ 174.

tivities, naval patrols, an oil concession practice, and public works could demonstrate the existence of such *effectivités*.<sup>129</sup>

The court also considered the evidentiary value of maps in confirming sovereignty over the disputed islands.<sup>130</sup> For a map to be considered in deciding a question of sovereignty, it must be geographically accurate.<sup>131</sup> The court determined, however, that evidence of sovereignty solely from maps could not constitute a territorial title; thus, the submission of cartographic material only serves to support claims and confirm arguments.<sup>132</sup>

The court also reviewed whether recognition by third states and bilateral treaties contributed to a finding of sovereignty.<sup>133</sup> If the evidence of recognition is neither consistent nor consecutive, it does not signify an explicit acknowledgment of sovereignty.<sup>134</sup> The court also found that bilateral treaties were irrelevant in showing title over the disputed islands.<sup>135</sup>

### C. Arbitrations Under Annex VII of UNCLOS

#### 1. Efficiency of Arbitration

Under Article 287, a state may select or agree to arbitrate a dispute before an Annex VII arbitral tribunal or an Annex VIII special tribunal.<sup>136</sup> The Annex VIII special tribunal, however, is a forum of limited jurisdiction.<sup>137</sup> Thus, if a state does not select or agree to the same resolution mechanism, the dispute will be submitted for arbitration under Annex VII of UNCLOS, as that forum has general jurisdiction to hear all disputes arising under the interpretation and application of the Convention.<sup>138</sup> As compared to adjudication, the Annex VII arbitration process has issued fair and binding decisions without prolonging the litigation process.<sup>139</sup> Given the expediency of the arbitration process, the expertise to hear a wide range of complex issues, and the absence of declarations made under

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<sup>129</sup> *Id.* ¶ 170.

<sup>130</sup> *Id.* ¶ 213.

<sup>131</sup> *Id.* ¶ 214.

<sup>132</sup> *Id.* ¶¶ 215, 217.

<sup>133</sup> *Id.* ¶ 220.

<sup>134</sup> *Id.* ¶ 224.

<sup>135</sup> *Id.* ¶ 225.

<sup>136</sup> UNCLOS, *supra* note 5, art. 287(1).

<sup>137</sup> *See generally id.* at Annex VIII, art. 1 (Annex VIII special arbitration only settles disputes involving scientific or technical matters).

<sup>138</sup> *Id.* arts. 287(3)–(5), 288.

<sup>139</sup> *Compare Nicaragua*, 2007 I.C.J. 659, at Title page, ¶ 1 with *Barbados v. Trinidad and Tobago*, 45 I.L.M. 800 (UN Law of the Sea Annex VII Arb. Trib. 2006), ¶¶ 1, 385 (comparing adjudication in the ICJ that took eight years to resolve with arbitration before the Annex VII arbitral tribunal that took only two years).

Article 287 regarding choice of procedure, the Annex VII arbitral tribunals have become an increasingly popular forum to settle disputes.<sup>140</sup>

The Annex VII arbitral tribunal consists of five members.<sup>141</sup> Each party to the proceeding may appoint one member of the tribunal and the remaining three are appointed by agreement.<sup>142</sup> If the parties cannot agree on the members to be appointed by agreement, the president of ITLOS appoints the remaining tribunal members.<sup>143</sup> If one of the parties to the dispute fails to appear before the tribunal, the other party may request that the tribunal continue the proceedings and issue its award.<sup>144</sup> The arbitral tribunal's award is final and may not be appealed.<sup>145</sup>

## 2. Jurisdiction

Early decisions under this process established the jurisdiction of the Annex VII arbitral tribunals.<sup>146</sup> The Barbados/Trinidad and Tobago dispute was the first Annex VII arbitration to render an award on the merits; prior to its seminal decision, however, the tribunal had to determine whether it had the jurisdiction to issue an award.<sup>147</sup>

The Barbados/Trinidad and Tobago dispute emerged after nine rounds of failed negotiations concerning delimitation of the maritime boundary.<sup>148</sup> The tribunal determined that it had jurisdiction as the parties satisfied Section 1 of Part XV, UNCLOS's dispute settlement procedures.<sup>149</sup> Furthermore, the tribunal reasoned that Article 281, which extends the dispute resolution procedures after peaceful attempts have been made, was intended to cover circumstances where the parties had come to an ad hoc agreement as to how to settle a particular dispute.<sup>150</sup> When the chosen method of peaceful settlement failed to result

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<sup>140</sup> See Stephen Fietta, *Guyana/Suriname Award*, 102 AM. J. INT'L L. 119, 120 (2008); see also Seymour, *supra* note 109, at 10 n.53 (stating that of the 149 states that are parties to UNCLOS, only 35 of those made Article 287 declarations). See generally *Guyana v. Suriname*, ¶¶ 1, 488 (Perm. Ct. Arb. 2007), <http://www.pca-cpa.org/upload/files/Guyana-Suriname%20Award.pdf>, archived at <http://perma.cc/YT9U-UL4J> (an Annex VII arbitral tribunal resolved another maritime dispute in three years).

<sup>141</sup> UNCLOS, *supra* note 5, Annex VII art. 3(a).

<sup>142</sup> *Id.* at Annex VII, arts. 3(b)–(d).

<sup>143</sup> *Id.* at Annex VII, art. 3(e).

<sup>144</sup> *Id.* at Annex VII, art. 9.

<sup>145</sup> *Id.* at Annex VII, art. 11.

<sup>146</sup> See Barbara Kwiatkowska, *The Landmark 2006 UNCLOS Annex VII Barbados/Trinidad and Tobago Maritime Delimitation (Jurisdiction & Merits) Award*, 39 GEO. WASH. INT'L L. REV. 573, 585 (2007).

<sup>147</sup> See *id.* at 576, 579.

<sup>148</sup> *Id.* at 578.

<sup>149</sup> See UNCLOS, *supra* note 5, art. 279. See generally *Barbados*, 45 I.L.M. 800, ¶¶ 194–195 (parties engaged in negotiations both formally and informally but reached no agreement within a reasonable period of time).

<sup>150</sup> UNCLOS, *supra* note 5, art. 281; Kwiatkowska, *supra* note 146, at 588.

in settlement, the tribunal found that, under Article 281(1), submission to an Annex VII arbitral tribunal was then appropriate.<sup>151</sup>

Furthermore, the tribunal also determined that instituting arbitration proceedings unilaterally against a state is an inherent part of the UNCLOS dispute settlement.<sup>152</sup> The tribunal found that invoking the arbitration procedure is not an abuse of right contrary to UNCLOS or to international law generally.<sup>153</sup> It is a straightforward exercise conferred by the treaty, even if done unilaterally and without discussion or agreement with the other party.<sup>154</sup>

### 3. Scope of Authority

The Barbados/Trinidad and Tobago decisions also established the scope of authority of the Annex VII arbitral tribunals.<sup>155</sup> In order to decide the merits of the case, the Barbados/Trinidad and Tobago Maritime Delimitation Arbitral Tribunal first clarified the scope of its power.<sup>156</sup> It found that because the dispute concerned legal rules, the resulting boundary line must be drawn on the basis of UNCLOS, the predominant authority on maritime law.<sup>157</sup> Thus, in order to render a judgment, the tribunal applied Articles 74(1) and 83(1), which contain the law applicable to the delimitation of the EEZ and the Continental Shelf.<sup>158</sup> The tribunal, however, also determined that it had the right and the duty to exercise judicial discretion in order to achieve an equitable result.<sup>159</sup> In order to achieve an equitable solution, the tribunal deliberated over whether the boundary might be adjusted in consideration of geography, proportionality, or other special circumstances.<sup>160</sup>

The Guyana/Suriname dispute was the second Annex VII arbitration to resolve a maritime boundary dispute under UNCLOS and was another landmark decision on the scope of authority of the tribunals.<sup>161</sup> The Guyana/Suriname dispute arose after an oil-rig-and-drill ship, operating under a Guyanese concession, was ordered to leave the contested area by two Surinamese naval vessels.<sup>162</sup> After three years of failed negotiations regarding the

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<sup>151</sup> Kwiatkowska, *supra* note 146, at 588.

<sup>152</sup> *Barbados*, 45 I.L.M. 800, ¶ 204.

<sup>153</sup> *Id.* ¶ 208.

<sup>154</sup> *Id.*

<sup>155</sup> See Kwiatkowska, *supra* note 146, at 585, 586; see also Fietta, *supra* note 140, at 120.

<sup>156</sup> See Kwiatkowska, *supra* note 146, at 585, 586.

<sup>157</sup> *Id.* at 585.

<sup>158</sup> *Barbados*, 45 I.L.M. ¶ 221.

<sup>159</sup> *Id.* ¶ 244.

<sup>160</sup> Kwiatkowska, *supra* note 146, at 603.

<sup>161</sup> Fietta, *supra* note 140, at 119–20.

<sup>162</sup> *Id.* at 120.



maritime boundary after this incident, Guyana initiated arbitration proceedings under Part XV, Section 2 (Annex VII arbitration).<sup>163</sup>

The tribunal expanded the decision-making power of the Annex VII arbitration process by considering and ruling on allegations that a state engaged in the unlawful use or threat of force under UNCLOS, the UN Charter, and customary international law.<sup>164</sup> In determining whether the state's conduct amounted to an explicit threat of force, the tribunal considered the statements of the main participants.<sup>165</sup> It also decided whether the use of force itself would have been illegal, because then the threat to use such force would likewise be illegal.<sup>166</sup> The tribunal reviewed whether the measures were unavoidable, reasonable, and necessary, as that may justify the use of force as law enforcement activities under customary international law.<sup>167</sup> It ultimately found that Suriname acted unlawfully, but determined that an additional order precluding Suriname from resorting to further threats of force was unnecessary.<sup>168</sup>

#### D. Negotiations

Under UNCLOS, parties can agree to settle a dispute concerning the interpretation or application of the Convention through any peaceful means of their choice.<sup>169</sup> A state may exercise this choice for peaceful measures by bilaterally negotiating a settlement.<sup>170</sup>

In deciding how to resolve the SCS in the most equitable and peaceful way possible, the foreign ministers of the ASEAN states agreed to resolve their territorial and jurisdictional disputes by peaceful means.<sup>171</sup> Vietnam and China committed to this approach to resolve their disagreement in the SCS and provide an example of the outcomes of negotiations in this dispute.<sup>172</sup> This strategy is shaped by Vietnam's history, economy, and geographical proximity to China, as Vietnam is highly engaged in trade and investments with China.<sup>173</sup>

The negotiations have resulted in both wins and losses for Vietnam.<sup>174</sup> In 1974, Vietnam lost territorial claims in the Paracels as well as part of the Sprat-

<sup>163</sup> *Id.*

<sup>164</sup> See *Guy. v. Surin.*, ¶ 439 (Perm. Ct. Arb. 2007).

<sup>165</sup> *Id.* ¶ 432.

<sup>166</sup> *Id.* ¶ 439.

<sup>167</sup> *Id.* ¶ 445.

<sup>168</sup> *Id.* ¶ 450.

<sup>169</sup> UNCLOS, *supra* note 5, art. 280.

<sup>170</sup> See *DOC*, *supra* note 40, ¶ 4 (exemplifying the decision by the ASEAN states to engage in negotiations).

<sup>171</sup> *Id.*

<sup>172</sup> See Lucio Blanco Pitlo III & Amruta Karambelkar, *Philippines and Vietnam in the South China Sea*, *DIPLOMAT* (Oct. 21, 2013), <http://thediplomat.com/2013/10/philippines-and-vietnam-in-the-south-china-sea-2/>, archived at <http://perma.cc/E5TA-EGMS>.

<sup>173</sup> *Id.*

<sup>174</sup> See *id.*

lys Islands in 1988.<sup>175</sup> Both countries contested each other's offshore blocks awarded to foreign energy companies and engaged in accusations over arrests and harassment of fisherman.<sup>176</sup> The commitment to peaceful settlement, however, also resulted in many positive milestones between the two states.<sup>177</sup> Through negotiations, Vietnam and China demarcated their common land boundary, established a joint fishing zone in the Tonkin Gulf, and created a fishery hotline to mitigate incidents at sea arising from overlapping fishing grounds.<sup>178</sup> Furthermore, the countries signed twelve agreements to enhance bilateral cooperation in trade, infrastructure, energy, and maritime affairs and set up a working group to review joint exploration options in the SCS.<sup>179</sup> Thus, despite Vietnam's expression of dissatisfaction with China in ASEAN forums, the two states leveraged the approach under the 2002 *Declaration* and maintained strong bilateral relations despite the territorial and maritime disputes in the SCS.<sup>180</sup>

#### *E. Overview of the Philippines' Claims Submitted for Arbitration*

Neither the Philippines nor China have made a selection under Article 287.<sup>181</sup> As a result of this abstention, when the Philippines invoked the compulsory binding dispute settlement procedure under Section 2 of Part XV, the dispute automatically went to arbitration under Annex VII of UNCLOS.<sup>182</sup> The parties could agree, however, to submit the dispute to another method of resolution, including adjudication or bilateral negotiations.<sup>183</sup>

The Philippines' position is that under UNCLOS, to which both China and the Philippines are parties, and customary international law, a coastal state's entitlements are prescribed to a 12 nm territorial sea and a 200 nm EEZ and Continental Shelf.<sup>184</sup> Within the 200 nm zone, a state has the exclusive entitlement to its resources, both living and non-living in the sea and under the

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> Pitlo & Karambelkar, *supra* note 172.

<sup>179</sup> *Id.*

<sup>180</sup> *See id.*

<sup>181</sup> *See Settlement of Disputes Mechanism*, U.N. DIV. FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, [http://www.un.org/Depts/los/settlement\\_of\\_disputes/choice\\_procedure.htm](http://www.un.org/Depts/los/settlement_of_disputes/choice_procedure.htm) (last updated Apr. 10, 2013), archived at <http://perma.cc/TC9F-S526> (illustrating that on the UN's up-to date list of official declarations, China made no choice under Article 287 and the Philippines is not on the list, therefore by default has made no selection under Article 287).

<sup>182</sup> *See* UNCLOS, *supra* note 5, arts. 287(3), 287(5).

<sup>183</sup> *See id.* art. 287(5).

<sup>184</sup> Discussion on the Philippines' Arbitration Case, *supra* note 1.

seabed.<sup>185</sup> The Philippines has articulated four major claims that it seeks to raise against China at the arbitration, which began in March 2014.<sup>186</sup>

The Philippines' first claim is regarding China's sovereignty claims under the Nine-Dash Line.<sup>187</sup> By claiming sovereign rights over land and resources more than 800 nm from its mainland coast, China is extending its sovereignty far beyond the entitlements under UNCLOS.<sup>188</sup> The Philippines will argue that China's claims of sovereignty under the Nine-Dash Line are inconsistent with UNCLOS.<sup>189</sup> Thus, China's prevention of the Philippines from exploiting natural resources from the Continental Shelf and exercising fishing rights throughout the EEZ are unlawful and constitute a trespass of the Philippines' rights.<sup>190</sup>

The other three issues that will be raised by the Philippines concern the status of offshore features in the SCS.<sup>191</sup> The second major claim is regarding six features that protrude above the water at high tide in the Scarborough Shoal.<sup>192</sup> The Philippines will ask the tribunal for a decision of whether these features are true islands under Article 121, or whether these features are rocks that cannot sustain human habitation or economic life on their own.<sup>193</sup> The third major claim is regarding seven features in the Spratly Islands.<sup>194</sup> Three of these features are above water at high tide, thus the Philippines will seek a determination of whether these features are islands or rocks.<sup>195</sup> The remaining four features are underwater at all times; thus the Philippines will seek a determination that these features are neither islands nor rocks, and are instead a part of the Continental Shelf.<sup>196</sup> Finally, the fourth major claim is regarding Mischief Reef.<sup>197</sup> The Philippines will request that the tribunal determine whether a state can transform an underwater feature into an island by building a structure over it.<sup>198</sup>

The Philippines seeks a declaration by the arbitral tribunal that all of the rights and entitlements in the SCS, including the rights to resources, are governed by UNCLOS and thus, the Nine-Dash Line is inconsistent and unlawful.<sup>199</sup> Furthermore, the Philippines seeks a finding that it is entitled to the full

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*; Press Release, Permanent Court of Arbitration, Arbitration between the Republic of the Philippines and the People's Republic of China: Arbitral Tribunal Establishes Rules of Procedure and Initial Timetable, PCA 101203 (Aug. 27, 2013).

<sup>187</sup> Discussion on the Philippines' Arbitration Case, *supra* note 1.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

enjoyment of its 200 nm EEZ and Continental Shelf and the resources located therein, and is free to exploit those resources without interference by China.<sup>200</sup>

### III. ANALYSIS

As outlined above, the Philippines is not necessarily limited in its options for dispute resolution.<sup>201</sup> Though the proceedings may default to arbitration, if both parties agree, they could elect to either submit the dispute to adjudication before the ICJ or engage in further negotiations.<sup>202</sup> This section analyzes the relative merits of these three approaches and argues that arbitration would ultimately be the most effective and favorable course of action for the Philippines.<sup>203</sup>

#### *A. Arbitration: The Most Efficient and Successful Solution for the Philippines*

##### 1. Efficiency

The Annex VII arbitration process will be the most efficient procedure for determining a solution to this dispute.<sup>204</sup> The arbitral tribunals have become a valuable forum for resolving complex issues in an authoritative and comprehensive manner within a shorter amount of time than adjudication or negotiation.<sup>205</sup> In this case, each state had been asked by the arbitral tribunal to submit its position by the end of March 2014.<sup>206</sup> The Philippines filed its Memorial on March 30, 2014.<sup>207</sup> In a procedural order, the arbitral tribunal fixed December 15, 2014 as the date by which China must submit a Counter-Memorial responding to the Philippines.<sup>208</sup> While the Philippines anticipated the case to take three to four years, a decision may be issued as early as March 2015.<sup>209</sup>

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<sup>200</sup> *Id.*

<sup>201</sup> See UNCLOS, *supra* note 5, arts. 279, 287(1).

<sup>202</sup> See *id.* arts. 279, 287(1), 287(5).

<sup>203</sup> See Discussion on the Philippines' Arbitration Case, *supra* note 1 (arguing that a small state like the Philippines, which is weaker militarily, commercially, and economically, has the best opportunity to compete on more equal terms before an arbitral tribunal).

<sup>204</sup> See Fietta, *supra* note 140, at 126.

<sup>205</sup> See *Nicar. v. Hond.*, 2007 I.C.J. 659, at Title page, ¶ 1 (illustrating that adjudication took seven years); see also Fietta, *supra* note 140, at 126 (arguing that the Tribunal succeeding in resolving a case involving not only a maritime delimitation dispute but also allegations of violations of UNCLOS, the UN Charter, and customary international law in only three and a half years); see also Pitlo & Karambelkar, *supra* note 172 (stating that the Vietnam-China territorial conflict in the SCS dates back to at least 1974 and despite bilateral negotiations, Vietnam continues to express its dissatisfaction with China in ASEAN forums).

<sup>206</sup> Torode, *supra* note 1.

<sup>207</sup> Press Release, PCA 121063, *supra* note 4.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*; Himmelman, *supra* note 2, at 43.

Furthermore, the arbitration process has continued despite China's refusal to participate, a unique attribute of the Annex VII arbitration process that could not occur under any other dispute resolution mechanism.<sup>210</sup> China made it clear to the other claimant states that it believes the Philippines has no legal grounds and expressed anger that the Philippines raised this dispute to the United Nations.<sup>211</sup> The arbitral tribunal, however, does not seem deterred by the politics and likely recognizes the importance of the decision to the entire region.<sup>212</sup> Fair decision-making and efficiency in the Philippines/China case could provide the right incentive for China to resolve all associated sovereignty disputes, as China may be vulnerable to additional claims being raised to the Annex VII arbitral tribunal if the Philippines is successful.<sup>213</sup> If China decides to settle as a result of the arbitration, it could prompt peaceful resolution between all of the claimant states of their disputes in this strategically important region and thereby, create stability in the South China Sea.<sup>214</sup>

## 2. Jurisdiction

The arbitral tribunal will also be the forum where the Philippines will achieve the most favorable result.<sup>215</sup> The jurisdiction of the Annex VII arbitral tribunals was significantly broadened from judgments in the Barbados/Trinidad and Tobago dispute and the Guyana/Suriname dispute.<sup>216</sup> Given this expansion and the near universal respect for the United Nations and the rule of law, the Philippines will likely receive a judgment in its favor that China will feel obligated to obey.<sup>217</sup>

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<sup>210</sup> See Lewis, *supra* note 2, at 1. See generally UNCLOS, *supra* note 5, art. 279, Annex VII, art. 9 (stating that the Philippines can continue with the proceedings despite China's refusal to participate in the process and the arbitral tribunal is required to issue a ruling).

<sup>211</sup> See Torode, *supra* note 1.

<sup>212</sup> See *id.* (arguing that a favorable ruling would give the Philippines confidence to develop oil and gas reserves in the disputed areas, and foreign companies would feel more comfortable about investing in these areas).

<sup>213</sup> See Pitlo & Karambelkar, *supra* note 172 (arguing that Vietnam will be watching closely the outcome of the Philippines' arbitration and may subsequently reshape its strategies).

<sup>214</sup> See Kwiatkowska, *supra* note 146, at 618–19 (applying the conclusion from the Barbados/Trinidad and Tobago case to the Philippine/China case).

<sup>215</sup> See Discussion on the Philippines' Arbitration Case, *supra* note 1 (arguing that before an arbitral tribunal, a small state that is weak militarily, commercially, and economically has the opportunity to compete on more equal terms).

<sup>216</sup> See Kwiatkowska, *supra* note 146, at 587; see also Fietta, *supra* note 140, at 126.

<sup>217</sup> See Kwiatkowska, *supra* note 146, at 587; see also Discussion on the Philippines' Arbitration Case, *supra* note 1 (arguing that in more than 95% of cases decided by arbitral tribunals, the states that lose comply out of concern for not wanting to be branded as an international outlaw that doesn't respect international law).

The arbitral tribunal will be able to make a key finding in the Philippines' favor regarding the appropriateness of the decision to submit to arbitration.<sup>218</sup> China could raise the argument that under Article 281, the Philippines may not pursue arbitration, as the DOC requires peaceful settlement through negotiations to resolve this dispute.<sup>219</sup> The arbitral tribunal will likely find that the DOC was an ad hoc agreement, in which the parties had agreed to seek to settle their disputes through negotiations.<sup>220</sup> The de facto agreement, however, did not exclude any further procedure; therefore, because their chosen peaceful settlement procedure failed to result in a settlement, the Philippines may lawfully apply the procedures under Part XV of UNCLOS.<sup>221</sup>

### 3. Scope of Authority

The arbitral tribunal will also likely issue an award in the Philippines' favor because it derives its scope of authority from UNCLOS.<sup>222</sup> The Philippines believes that UNCLOS contains important rules and principles that govern the validity of claims in the South China Sea and seeks a decision that finds China's claims under the Nine-Dash Line invalid.<sup>223</sup> As the arbitral tribunal functions in accordance with UNCLOS, it will likely agree with the Philippines and apply Article 121 and Article 13 of the Convention to determine the legal characterization of the offshore features.<sup>224</sup> Under Article 121, the Philippines can provide sufficient evidence that, although above water at high tide, the six features in the Scarborough Shoal cannot sustain human habitation or economic life on their own.<sup>225</sup> Thus, the tribunal will conclude that the features are rocks and are only entitled to a territorial sea.<sup>226</sup> The Philippines can also show that four of the seven features in the Spratly Islands are underwater at all times and therefore, the tribunal will find that these features are part of the Continental Shelf.<sup>227</sup> The tribunal will also determine that UNCLOS defines the three other identified features in the Spratly Islands that are only above water at low tide

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<sup>218</sup> See *Barbados*, 45 I.L.M. 800, ¶¶ 194–195 (UN Law of the Sea Annex VII Arb. Trib. 2006) (comparing the tribunal's decision in the Barbados/Trinidad and Tobago arbitration regarding the appropriateness to submit to arbitration after many rounds of formal negotiation to the Philippine/China case).

<sup>219</sup> See UNCLOS, *supra* note 5, art. 281(1); see also Note Verbale No. (13) PG-039, *supra* note 74.

<sup>220</sup> See Kwiatkowska, *supra* note 146, at 588.

<sup>221</sup> See *id.*; DOC, *supra* note 40, ¶ 4 (illustrating that other dispute resolution mechanisms are not precluded except the threat or use of force).

<sup>222</sup> See Kwiatkowska, *supra* note 146, at 585.

<sup>223</sup> See Beckman, *supra* note 8, at 163.

<sup>224</sup> See UNCLOS, *supra* note 5, Annex VII, art. 4; see also Kwiatkowska, *supra* note 146, at 585.

<sup>225</sup> See UNCLOS, *supra* note 5, arts. 121(1), 121(3).

<sup>226</sup> See *id.* art. 121(3).

<sup>227</sup> See POLING, *supra* note 7, at 18–19.

as low tide elevations.<sup>228</sup> Finally, Mischief Reef is another completely underwater feature identified by the Philippines and the tribunal will also likely characterize it as part of the Continental Shelf, as it is never above water.<sup>229</sup>

The arbitral tribunal will also likely hold in the Philippines' favor because the tribunal has both the right and the duty to exercise judicial discretion in order to achieve an equitable result.<sup>230</sup> Thus, in determining the classification of the features, the tribunal can consider the inequity of the Nine-Dash Line, as it encompasses 75 percent of the SCS, and in some parts, comes within 30 nm of the Philippines.<sup>231</sup> A decision by the tribunal provides not only a stable legal outcome, but also serves as a message to all of the SCS claimants that China's assertion of sovereignty so far from its mainland is inequitable.<sup>232</sup> If all parties abide by the provisions in UNCLOS, the resolution in the SCS will be universally satisfactory and will provide more certainty in the region.<sup>233</sup>

The Philippines could also assert an additional claim against China for the unlawful use of force in violation of UNCLOS, the UN Charter, and customary international law.<sup>234</sup> Although China's maritime presence in Scarborough Shoal and the Spratlys Islands are civilian forces and thus are theoretically unarmed, the ships have been aggressive towards the Philippines.<sup>235</sup> China has been clear that it does not want to start a war.<sup>236</sup> As the director of the Center on Asian and Globalization Huang Jing put it, "[W]hat China is doing is putting both hands behind its back and using its big belly to push [the Philippines] out, to dare [the Philippines] to hit first."<sup>237</sup> Although the arbitral tribunal will likely find that China's increasingly aggressive actions constitute an unlawful threat of force, it will probably refrain from granting an additional order precluding China from resorting to further threats.<sup>238</sup> The clarification provided by the legal characterization of the features will sufficiently decrease the tension in the SCS caused by the ambiguity of the claims and will be the crucial first step towards joint development of the resources.<sup>239</sup>

<sup>228</sup> See UNCLOS, *supra* note 5, art. 13(1).

<sup>229</sup> See POLING, *supra* note 7, at 18–19.

<sup>230</sup> See Kwiatkowska, *supra* note 146, at 601.

<sup>231</sup> See *id.* at 601–02; see also Discussion on the Philippines' Arbitration Case, *supra* note 1.

<sup>232</sup> See Kwiatkowska, *supra* note 146, at 601–02.

<sup>233</sup> See *id.* at 602; see also Beckman, *supra* note 8, at 163 (arguing that if the claimant states bring their maritime claims into conformity with UNCLOS, this will set the stage for negotiations and cooperation).

<sup>234</sup> See *Guy. v. Surin.*, ¶ 439 (Perm. Ct. Arb. 2007); see also Fietta, *supra* note 140, at 120.

<sup>235</sup> See Himmelman, *supra* note 2, at 26 (reporting that Chinese Coast Guard cutters were stationed at either side of the Ayungin Reef in the Spratlys, restricting the Filipino Navy from accessing the reef and patrol boats tail any boat that comes near the reef).

<sup>236</sup> *Id.* at 43.

<sup>237</sup> *Id.*

<sup>238</sup> See *Guy. v. Surin.*, ¶ 450 (Perm. Ct. Arb. 2007).

<sup>239</sup> See POLING, *supra* note 7, at IX, X.

#### 4. Implementation Issues

The Annex VII tribunals have a reputation for exercising common sense and restraint when evaluating cases, and that type of authority is desperately needed in this particularly complex dispute.<sup>240</sup> The Annex VII decision will be respected by all parties because the holding will advance the purpose of the Convention's compulsory dispute settlement system—it will balance the rights of coastal states with the freedoms enjoyed by all states.<sup>241</sup> This purpose is clearly recognized and respected, evident from the record of compliance with these dispute settlement decisions.<sup>242</sup> Furthermore, a decision from the arbitral tribunal is particularly important due to the fact that the dispute is hindering economic development in the SCS.<sup>243</sup> This decision will serve all parties involved in the SCS by releasing the tension between claimant states.<sup>244</sup> It will narrow the areas in dispute, provide a clear source of legal authority, and thereby, enable joint development opportunities.<sup>245</sup>

Although the decision by the arbitral tribunal is final and binding, there is no enforcement mechanism that can ensure China obeys the order.<sup>246</sup> In over 95 percent of cases decided by an arbitral tribunal, however, the state that “loses” did comply.<sup>247</sup> While China may feel entitled to reject the application of UNCLOS in this dispute as well as the findings of the arbitral tribunal, this would likely be extremely damaging to China's larger interests.<sup>248</sup> There is a heavy price to pay for defying an international court order that is recognized as legitimate, fair, and appropriate, and China would risk being branded an “international outlaw.”<sup>249</sup> It is unclear, however, how much of an effect that will

<sup>240</sup> See Bernard H. Oxman, *A Tribute to Louis Sohn—Is the Dispute Settlement System Under the Law of the Sea Convention Working?*, 39 GEO. WASH. INT'L L. REV. 655, 661 (2007).

<sup>241</sup> See *id.* at 659.

<sup>242</sup> *Id.* at 660.

<sup>243</sup> See Doodnauth Singh, *Comment on the Guyana-Suriname Boundary Dispute*, 32 GA. J. INT'L & COMP. L. 657, 659 (2004) (arguing that the inability to reach any compromise led to discouraged foreign investment and limited discovery of natural resources); see also POLING, *supra* note 7, at 5 (arguing that joint development of oil and gas resources is off the table in the SCS at the moment because China will only pursue those activities in areas not under dispute).

<sup>244</sup> See POLING, *supra* note 7, at IX.

<sup>245</sup> See *id.* at 24 (arguing that by clarifying the dispute and determining exactly what areas are undisputed under UNCLOS, states may access the resources in their jurisdiction that they are wholly entitled to without pressure from neighboring states, and may subsequently begin peaceful negotiations over joint development in the disputed areas).

<sup>246</sup> See Himmelman, *supra* note 2, at 43.

<sup>247</sup> Discussion on the Philippines' Arbitration Case, *supra* note 1.

<sup>248</sup> See POLING, *supra* note 7, at 4; see also Himmelman, *supra* note 2, at 43 (arguing that China has recognized that the United States blatantly violates international law whenever it is in their interest and thus believes this is a right that first-class powers are entitled to exercise).

<sup>249</sup> See Discussion on the Philippines' Arbitration Case, *supra* note 1 (arguing that soft power influences states in the international system and that is derived from the universal respect for international law).



have on China, as it has to provide for nearly 1.4 billion people, all eager for growing displays of Chinese nationalism.<sup>250</sup>

*B. Adjudication: Deciding Sovereignty Based on China's Objectionable Expansion into the South China Sea*

If this dispute were instead brought before the ICJ, assuming adjudication is an available dispute resolution mechanism, it would likely result in the same outcome regarding the legal characterization of the disputed features as arbitration, however, ownership over the features may be come out differently.<sup>251</sup> The Philippines has explicitly named the islands and offshore features that it seeks to be legally characterized, and thus, the court will likely find no issue in making determinations about the six features of the Scarborough Shoal, the seven features within the Spratly Islands, and Mischief Reef.<sup>252</sup> In *Nicaragua v. Honduras*, the court applied UNCLOS when the parties identified the offshore features they sought to characterize, and therefore, the court will likely apply the provisions of the Convention to the offshore features named by the Philippines and make the same findings as the arbitral tribunal.<sup>253</sup>

Unlike the Annex VII arbitral tribunal, if the court determined any of the features to be islands, the court could decide the question of sovereignty, but it would likely not find in the Philippines' favor.<sup>254</sup> The ICJ could find Chinese sovereignty over the features under the principle of *uti possidetis juris* because China's claims in the SCS, particularly over the Spratlys Islands, derive from Japan's surrender of the islands in World War II.<sup>255</sup> The Philippines, however, has a strong argument that China cannot show that a predecessor state allocat-

<sup>250</sup> See Himmelman, *supra* note 2, at 49.

<sup>251</sup> See *Nicaragua*, 2007 I.C.J. 659, ¶ 137 (illustrating how the ICJ used UNCLOS to characterize the four features as islands under Article 121). See generally UNCLOS, *supra* note 5, arts. 287(3), 287(5) (neither China nor the Philippines have declared a choice of procedure under Article 287 and thus their dispute would default to the Annex VII arbitration procedure, unless otherwise agreed upon); *Settlement of Disputes Mechanism*, *supra* note 181 (illustrating that on the UN's up-to date list of official declarations, China made no choice under Article 287 and the Philippines is not on the list, therefore by default has made no selection under Article 287).

<sup>252</sup> Cf. *Nicaragua*, 2007 I.C.J. 659, ¶ 138 (with the exception of the four named islands, the ICJ lacked sufficient information to classify the other features within the disputed area because neither Nicaragua nor Honduras described these features in enough detail for the court to determine which were under dispute).

<sup>253</sup> See *id.* ¶ 137.

<sup>254</sup> Compare *Nicaragua*, 2007 I.C.J. 659, ¶ 114 (stating that the ICJ could determine sovereignty because it was an issue that was implicit in and arises directly out of the maritime delimitation) with POLING, *supra* note 7, at IX (arguing that there is nothing in UNCLOS to resolve sovereignty disputes).

<sup>255</sup> Cf. *Nicaragua*, 2007 I.C.J. 659, ¶ 154 (stating that the *uti possidetis juris* principle applies because both Nicaragua and Honduras are successor states derived from the Spanish colonial provinces); see also Gao & Jia, *supra* note 54, at 103.

ed the offshore features to China as the successor state, and therefore, sovereignty cannot be justified under *uti possidetis juris*.<sup>256</sup>

To strengthen its sovereignty claim, China could also present evidence of *effectivités* over the disputed features.<sup>257</sup> In Scarborough Shoal, China exercises fishing activities and naval patrols and has surrounded the area with fisherman, fishing administration ships, marine-surveillance ships, and navy warships.<sup>258</sup> In the Spratlys Islands, the Chinese are extending their effective exercise of authority by instituting a similar “cabbage strategy.”<sup>259</sup> China exercises administrative and military control in Mischief Reef, where it has constructed a military outpost, which successfully serves as the harbor for the Chinese ships that patrol the Scarborough Shoal and the Spratlys Islands.<sup>260</sup> Although predominately a civilian maritime force, the ICJ will likely find that China’s actions evidence a sufficient display of *effectivités* to support its sovereignty claim.<sup>261</sup> Furthermore, the Philippines has little evidence of *effectivités* to counter China’s claim as it has done very little to develop the islands it holds.<sup>262</sup> Although the Philippines stationed troops in the Spratlys Islands to assert administrative control, the settlements are little more than crude, stilted structures over shallow water and sandbars, or in the case of Ayungin Reef, a grounded naval ship.<sup>263</sup>

The ICJ would also likely consider China’s map containing the Nine-Dash Line as evidence confirming China’s sovereignty over the disputed islands.<sup>264</sup> Although a map, by itself, cannot constitute a territorial title, it would provide support to China’s already strong claim of sovereignty in the disputed areas.<sup>265</sup> The Philippines’ strongest counterargument would be to highlight the lack of recognition by third states and absence of bilateral treaties that support China’s claim to sovereignty.<sup>266</sup> The SCS, however, is the site of one of the most contentious and most complicated disputes with multiple overlapping claims between six claimant states.<sup>267</sup> While the ICJ might determine that this

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<sup>256</sup> See *Nicaragua*, 2007 I.C.J. 659, ¶ 158 (arguing that being a successor state is not enough to claim sovereignty under *uti possidetis juris*, but rather, it must be shown that the predecessor state allocated the feature to the successor state).

<sup>257</sup> See *id.* ¶ 168.

<sup>258</sup> See *id.* ¶ 170; see also Himmelman, *supra* note 2, at 29.

<sup>259</sup> Himmelman, *supra* note 2, at 29.

<sup>260</sup> *Id.* at 33.

<sup>261</sup> See *Nicaragua*, 2007 I.C.J. 659, ¶ 172 (arguing that a claim to sovereignty requires two elements to be shown: the intention and will to act as sovereign, and some actual exercise or display of authority); see also Himmelman, *supra* note 2, at 43.

<sup>262</sup> See Himmelman, *supra* note 2, at 32.

<sup>263</sup> See *id.* at 26, 32.

<sup>264</sup> See *Nicaragua*, 2007 I.C.J. 659, ¶ 213; see Gao & Jia, *supra* note 54.

<sup>265</sup> See *Nicaragua*, 2007 I.C.J. 659, ¶¶ 215, 217.

<sup>266</sup> See *id.* ¶ 220; see also POLING, *supra* note 7, at XI (arguing that China’s claims of sovereignty in the SCS has led to several disputes, thus indicating a lack of recognition of China’s claims).

<sup>267</sup> See POLING, *supra* note 7, at IX.

is an explicit acknowledgement that China does not have sovereignty, it would not be sufficient to show that the Philippines is the rightful sovereign.<sup>268</sup> It would likely not be enough to undermine China's position.<sup>269</sup>

Considering the four principles in totality, the ICJ would likely determine that China could produce sufficient evidence to sustain its sovereignty claim over the disputed islands, particularly due to its ability to show *effectivités* in the Scarborough Shoal, Spratly Islands, and Mischief Reef.<sup>270</sup> Furthermore, in coming to this unfavorable decision towards the Philippines, the ICJ would be forced to consider objectionable assertions by China into the SCS as evidence of sovereign control, most of which are being challenged by the Philippines in raising this claim for international review.<sup>271</sup> Adjudication would be a more favorable path for the Philippines than arbitration only if the ICJ does not classify the offshore features as islands entitling China to a 200 nm EEZ and Continental Shelf.<sup>272</sup> As discussed above, the ICJ would likely grant sovereignty of these features to China, thus greatly increasing China's sphere of influence in the SCS.<sup>273</sup> Adjudication would be favorable to the Philippines only if the offshore features were not classified as islands.<sup>274</sup> If considered rocks, the features would be limited to a 12 nm territorial sea; if considered underwater features, they will be under the control of the Philippines (and not subject to an independent claim of sovereignty) because they are located on the Philippines' continental shelf.<sup>275</sup> Therefore, the Philippines should not submit this case to adjudication before the ICJ because the decision would likely not fall in the Philippines' favor, it would legitimize China's actions and greatly increase China's access to the resources in the South China Sea.<sup>276</sup>

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<sup>268</sup> See *Nicaragua*, 2007 I.C.J. 659, ¶ 224 (arguing in the alternative that if recognition were consistent and consecutive, it could be an explicit acknowledgement of sovereignty, thus lack of recognition and consistent contestation of sovereignty could be an explicit acknowledgment that sovereignty does not exist).

<sup>269</sup> See *id.*

<sup>270</sup> See Lathrop, *supra* note 121, at 115; see also Himmelman, *supra* note 2, at 26, 29, 33 (illustrating examples of China's authority and control in each of the disputed areas with the Philippines).

<sup>271</sup> See Discussion on the Philippines' Arbitration Case, *supra* note 1 (arguing that China has been preventing the Philippines from the full enjoyment of its rights and entitlements within the EEZ and Continental Shelf where China has no corresponding entitlement); see also Himmelman, *supra* note 2, at 33, 43 (arguing that China is engaged in "salami slicing," the slow accumulation by unlawful actions, none of which are incident enough to cause war, but are amounting to China's complete takeover of the SCS).

<sup>272</sup> See UNCLOS, *supra* note 5, arts. 77, 121; see also Discussion on the Philippines' Arbitration Case, *supra* note 1.

<sup>273</sup> See *Nicaragua*, 2007 I.C.J. 659, ¶ 227.

<sup>274</sup> See UNCLOS, *supra* note 5, art. 121; see also POLING, *supra* note 7, at 18–19.

<sup>275</sup> See UNCLOS, *supra* note 5, art. 121.

<sup>276</sup> See *Nicaragua*, 2007 I.C.J. 659, ¶ 227; see also Himmelman, *supra* note 2, at 33, 43; see also POLING, *supra* note 7, at 21 (arguing that in the center of the SCS, between the Paracel Islands and Scarborough Shoal, the potential EEZs do not overlap thus the sovereign State of those islands would be given their full 200 nm EEZ and Continental Shelf claims).

### C. Negotiations: Insufficient Authority to Deter China

Negotiations are an inadequate approach to resolving this dispute because the Philippines requires a binding decision-making authority to stop China from continuing to bully the Philippines and other states bordering the South China Sea.<sup>277</sup> The ambiguity of China's claims over the "islands and adjacent waters" has resulted in confusion among the ASEAN states as to what is genuinely in dispute and what is not.<sup>278</sup> The ASEAN parties had been operating under the assumption that the Spratlys Islands and other key features were not legally islands, but merely rocks and therefore, entitled only to a 12 nm territorial sea.<sup>279</sup> This notable difference in positions highlights the need for the Philippines, as the first ASEAN state to raise this conflict to an international tribunal, to have these assumptions regarding the SCS codified into law by an arbitral tribunal.<sup>280</sup> A judgment by the arbitral tribunal in the Philippines' favor would strengthen the legal basis of all of the ASEAN states' maritime claims.<sup>281</sup> It would also enable them to present a united front to China in support of the position that the only acceptable basis for maritime claims in the SCS must be under UNCLOS.<sup>282</sup>

The Philippines may be required to engage in negotiations if the arbitral tribunal finds that the DOC is a standing, formal agreement that binds the signing parties to negotiations as the sole means of dispute resolution.<sup>283</sup> The DOC, however, does not include any self-contained clauses that exclude any further procedure; therefore, it is likely that the Philippines will not be solely restricted to negotiations to settle this dispute.<sup>284</sup> Consequently, the tribunal will likely find that the Philippines may lawfully exercise their right to submit the dispute to the procedures under Part XV Section 2.<sup>285</sup> Furthermore, as the Philippines

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<sup>277</sup> See Himmelman, *supra* note 2, at 32 (arguing that the Philippines' best hope for resisting China is the arbitration case, which can invalidate China's nine-dash line claims and establish that territorial rights be governed by UNCLOS).

<sup>278</sup> See POLING, *supra* note 7, at 2, 3 (arguing that there is confusion because China's ambiguous position of only claiming "the islands and adjacent waters" has not matched its actions of objecting to the activities of the Philippines and the other ASEAN states far outside the possible "adjacent waters").

<sup>279</sup> *Id.* at 3.

<sup>280</sup> *See id.*

<sup>281</sup> *See id.* at 4.

<sup>282</sup> *See id.*

<sup>283</sup> See Kwiatkowska, *supra* note 146, at 588, 590 (arguing that the ability under Article 281 of UNCLOS to continue with Part XV Section 2 procedures after a chosen peaceful settlement procedure has failed is only available if the chosen peaceful settlement was established through an ad hoc agreement).

<sup>284</sup> See DOC, *supra* note 40, ¶ 4 (stating that the parties agree to resolve their territorial disputes by peaceful means, in accordance with the 1982 UN Convention on the Law of the Sea, and only precludes resorting to the threat or use of force); see also Kwiatkowska, *supra* note 146, at 288 (arguing that in order to bring the dispute to Part XV Section 2 procedures, Article 281 requires that the agreement not exclude any further procedure).

<sup>285</sup> See UNCLOS, *supra* note 5, art. 281(1).

and China have already engaged in several years of negotiations without resolution, China cannot claim that the Philippines must participate in further negotiations.<sup>286</sup>

Invoking the Annex VII arbitration process is a key aspect to the Philippines' strategy in the SCS and its only option given its power asymmetry with China.<sup>287</sup> While the Philippines has been bolstering its defense and maritime law enforcement with the help of the United States, warming Sino-U.S. relations put limits on what Manila can expect from its ally.<sup>288</sup> At the East Asia Summit in 2013, Secretary of State John Kerry expressed the United States' desire for a binding code of conduct in the SCS and welcomed the legal processes offered under UNCLOS.<sup>289</sup> Although this signified to the Philippines tacit approval by the United States of its decision, the United States has also been clear that it would not take sides in the dispute over sovereignty.<sup>290</sup> Ultimately, the arbitration process levels the playing field between the Philippines and China and ensures the fairest outcome the Philippines can achieve on its own.<sup>291</sup>

#### CONCLUSION

The Annex VII approach would be the most effective resolution method and would lead to the most favorable outcome for the Philippines. The Philippines will likely not pursue adjudication in ICJ because the court would likely grant sovereignty over any islands to China. Furthermore, in coming to this unfavorable decision towards the Philippines, the ICJ would legitimize China's actions in the SCS as evidence of China's sovereignty. These actions are exactly what the Philippines is challenging in raising this dispute to the international arena. Allowing the ICJ to validate these actions, therefore, does not further the Philippines' purposes. Finally, continued negotiations are also not a viable option for the Philippines because any agreement would be inadequate to deter China from future actions in the SCS. The Philippines needs a judgment from a binding authority in order to strengthen the legal basis of all of the ASEAN states' claims.

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<sup>286</sup> See Kwiatkowska, *supra* note 146, at 592–93.

<sup>287</sup> See Pitlo & Karambelkar, *supra* note 172 (arguing that the Philippines' strategy is motivated by a perceived Chinese westward expansion at its expense); see also Himmelman, *supra* note 2, at 43 (arguing that by bringing the dispute to arbitration, the Philippines has used its only leverage).

<sup>288</sup> See Pitlo & Karambelkar, *supra* note 172.

<sup>289</sup> Himmelman, *supra* note 2, at 48.

<sup>290</sup> *Id.* at 43 (illustrating that approval can be derived from the fact that the United States has stepped up its joint operations with the Philippines, including a recent mock amphibious landing not far from the Scarborough Shoal).

<sup>291</sup> See Discussion on the Philippines' Arbitration Case, *supra* note 1.

Given that the SCS is central to the Southeast Asian economies due to its abundance of natural resources, ensuring access to these resources is an important consideration for the Philippines. A holding in the Philippines' favor would enable the ASEAN states to present a united front to China that the only acceptable basis for maritime claims in the SCS must be under UNCLOS. Furthermore, a decision by the tribunal establishing UNCLOS as the predominant authority governing the SCS disputes will benefit all parties by narrowing the areas in dispute and opening the door for joint development. Overall, not only will arbitration lead to the most efficient and favorable outcome for the Philippines, it will also lay the groundwork for future stability among all claimant states in the SCS.

