



***The Belt and Road Initiative:
The China-Philippines relation in the South China Sea
beyond the Arbitration***

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***The Belt and Road Initiative and
Common Development of the Greater South China Sea Region***

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Outline

- I. The South China Sea (SCS)
- II. The Belt and Road Initiative (BRI)
- III. The China-Philippines relation in the SCS:
 - a) The arbitration
 - b) Recent developments
- IV. Legal alternatives after the arbitration and consistent with BRI
- V. Conclusions and outlook

I. The South China Sea

The South China Sea

- Semi-enclosed sea with 7 coastal States: China*, Vietnam*, Malaysia*, Singapore, Indonesia, Brunei*, the Philippines*
- 5 States with overlapping claims (*)
- All States are parties to UNCLOS and several examples of regional and bilateral cooperation
- Joint development in the South China Sea and greater Asia-Pacific region
- China/Philippines: Dispute and cooperation, never engaged in negotiation regarding the settlement or delimitation
- 2005, Pres. Arroyo comment on Pres. Hu Jintao's visit: the China-Philippines relations had entered a golden age

II. The Belt and Road Initiative

The Belt and Road Initiative

- What is the BRI?
- How does it apply to BRI- and other States?
- Relevance beyond national jurisdiction?
- What is the relation with UNCLOS and how to frame the goals set out in the BRI?
 - a) freedom of navigation and protection and preservation of the marine environment
 - b) The rule of law at sea as a key element for the successful implementation of maritime cooperation and BRI
 - c) BRI an auspicious momentum towards achieving a sustainable and functional ocean governance

The Belt and Road Initiative

- **Preamble of UNCLOS:**

- a) Recognition that all issues relating to the law of the sea should be settled in a spirit of **mutual understanding and cooperation**
- b) Establishing a **legal order for the seas and oceans** to facilitate **international communication** and promote the **peaceful uses of the seas and oceans** and the **protection and preservation of the marine environment**
- c) Achievement of goals contribute to the realization of a **just and equitable international economic order**, taking into account the interests and needs of mankind as a whole

= UNCLOS the basis for maritime cooperation and development of BRI

III. The China-Philippines relation in the South China Sea

Pursuing Arbitration

- **Article 286 of UNCLOS:**

“(...) dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached (...), be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.”

- **Article 287(3) of UNCLOS:**

“A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.”

- **Article 1 Annex VII of UNCLOS:**

“(...) any party to a dispute may submit the dispute to the arbitral procedure provided for in this Annex by written notification addressed to the other party or parties to the dispute (...)”

China's Declaration

(25 August 2006)

- **Exception to the compulsory dispute settlement:**

“[China] does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all categories of disputes referred to in Paragraph 1(a)-(c) of Article 298 (...).”
- **Article 298(1)(a):**

“(...) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations”
- **Article 309:**

“No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention”

Jurisdiction & Admissibility

(Award 29 October 2015)

- Proceedings initiated on 22 January 2013 (Art 287 and Art 1)
- The Philippines' Memorial 30 March 2014 identifies 15 specific submissions, on 3 interrelated matters:
 - a) Legality of historic rights within 9-dash line
 - b) Legal status and projections of certain features
 - c) China's compliance with the Convention
 - [d) Actions during proceedings]
- Dispute concerning the source of maritime entitlements, not territorial sovereignty or boundary delimitation: two distinct matters
- Observes: Malaysia, Vietnam, Indonesia, Japan, Thailand, Australia

Jurisdiction & Admissibility

(Award 29 October 2015)

- PRC ‘nine-dash line’ interfered with EEZ/CS of PHI
- PRC claim and occupation within ‘nine-dash line’ of submerged banks, reefs, low tide elevations hinders PHI rights over features
- PRC claim of maritime zones greater than 12nm surrounding features (PHI considers rocks Art 121(3)), results encroachment of these zones on the PHI EEZ
- PHI main obstacle: China’s 2006 Declaration excluded the applicability of compulsory dispute settlement – *“none of the submissions was excluded by China’s 2006 Declaration”*; *“dispute concerns source of entitlements and lawfulness of Chinese activities in the South China Sea”*; *“entitlement, not delimitation”*

China's Position Paper

(7 December 2014)

- China does not ignore the proceedings, but does not accept or participate, based on international law
- The issue of territorial sovereignty over the maritime features is ancillary to the Philippines' submissions
- Territorial disputes are outside the scope of UNCLOS
- Disputes are an integral part of maritime delimitation, precluded by Declaration 2006
- Recalls DoC 2002 and maintains historic rights theory

Non-participation/acceptance

- Determine rules of procedure, appointing judges, submitting evidence, experts, presenting its case (art. 3-5)
- Not addressing the issue of bifurcation (the Philippines opposed)
- Not an obstacle to proceedings: Tribunal must satisfy itself of jurisdiction and that claim is well founded (art. 9)
- Award is final and without appeal, unless parties agreed in advance to an appellate procedure (art. 11)
- Finality and binding force of decisions (art. 296)
- The Tribunal considered that the Position Paper was *de facto* constituting preliminary objections

Bifurcation of Proceedings

- **Procedural Order No. 4:**

“The Arbitral Tribunal considers that, in light of the circumstances and its duty to “assure to each Party a full opportunity to be heard and to present its case,” it is appropriate to bifurcate the proceedings and to convene a hearing to consider the matter of the Arbitral Tribunal’s jurisdiction and, as necessary, the admissibility of the Philippines’ submissions (“Hearing on Jurisdiction”).”

Jurisdiction & Admissibility

(Award 29 October 2015)

- DoC 2002 is not legally binding and...
 - Treaty of Amity and Cooperation in the Southeast Asia 1976 is legally binding but...
 - CBD 1992 dispute settlement provisions...
 - Obligation to negotiate under Art 283 (exchange views) (*Chagos Marine Protected Area Arbitration*)
- = does not prevent **Tribunal's jurisdiction under Art 281(1)**
- objective approach to the interpretation of Art 281 (PHI)
 - subjective approach to the interpretation of Art 281 (PRC) necessary intent to exclude further procedures under the LOSC, not necessary express exclusion (*Southern Bluefin Tuna Arbitration*)

The Tribunal's view

- China refused to settle dispute through negotiations
- Tribunal attempted to safeguard China's procedural rights
- Position Paper are *de facto* preliminary objections
- Article 281 of UNCLOS is not applicable because there is no agreement to settle through negotiations or that time limits have expired, therefore Part XV applies
- The “ancillary test” in mixed disputes (Art 288(1)), *Mauritius/UK Arbitration*)

Award on Merits

- Conclusion 1: the nine dash line has no basis in law
- Conclusion 2: no islands in the disputed area (art 123)
- Conclusion 3: China interfered in the Philippines' EEZ
- Conclusion 4: China aggravated the dispute
- Conclusion 5: construction of artificial islands (Part XII)
- Conclusion 6: China violated the duty to act in good faith

Article 121(3) of UNCLOS

- “rocks”: not in geological sense
- “cannot”: objective capacity
- “sustain”: time and qualitative elements...
- ... “human habitation”
- “or”: means “or”
- ... “economic life of their own”

= natural capacity, non-transient character of inhabitation
(and) being able to sustain economic life (case-by-case basis)

Recent Developments

- Since 12 July 2016
- Visit President Rodrigo Duterte to China (October 2016)
- Possibility of side-tracking the outcome of the Arbitration and pursue legal cooperation?
- The case of PRC allowing fishing by PHI in the waters of Scarborough Shoal (Huangyan Dao/Panatag Shoal or Bajo de Masinloc)
- Signing of 13 arrangements, including *Memorandum of Understanding between the China Coast Guard and the Philippine Coast Guard on the Establishment of a Joint Coast Guard Committee on Maritime Cooperation**
- 2017 PHI Chairmanship ASEAN and visit President Xi Jinping to the Philippines

IV. Legal alternatives after the arbitration and consistent with BRI

Legal Alternatives

- Non-compliance?
- Further aggravate the deadlock situation?
- Agree-to-disagree and maintain *status quo*?
- Adopt (additional) rules of engagement?
- Settle by agreement on sovereignty and boundaries?
- Implement provisional measures under arts. 74(3)/83(3)?
 - Falkland Islands (Malvinas)
 - Timor Sea Treaty
 - Libya/Tunisia
 - North Sea Continental Shelf cases
 - Senegal – Guinea-Bissau

Provisional Arrangements of a Practical Nature

- Articles 74(3) and 83(3) of UNCLOS

Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.

- a) Conflicting titles: (5 claims? where to place the JDA?)
- b) Obligation to make every effort and of mutual-restraint
- c) Final delimitation of maritime boundaries

'Package Deal'

- **Three questions:**
 - a) The criteria to be applied for the delimitation of economic zones or continental shelves adjacent or opposite to each other
 - b) Interim measures to be applied pending final delimitation
 - c) Settlement of delimitation disputes
- Overall concern for **economic activities in disputed maritime areas** (cfr. *Guyana v. Suriname 2007*)

'Package Deal' (cont.)

- Consensus that delimitation should be effected by agreement and based on international law
- No adoption of any of the criteria put forward: equidistance rule or the delimitation in accordance with equitable principles
- Interim measures could influence negotiation of maritime delimitation
- Measures dependent on final delimitation

Joint development of non-living marine natural resources

- Relevance of political will of the relevant States
- Management of disputed maritime areas
- ‘Sustainable development’ of non-living resources (protection and preservation of the marine environment)
- Importance of marine spatial planning with competing activities (fishing)
- Safety and security of activities and offshore installations

V. Conclusions and Outlook

Conclusions and Outlook

- Bilateral and regional implications of decreasing tensions and rapprochement
- BRI: important initiative and auspicious momentum towards achieving a sustainable and functional ocean governance
- Safeguarding the rule of law at sea: freedom of navigation and States obligations in disputed maritime areas (protection and the preservation of the marine environment)
- Prospects for JD in the SCS and in the PRC/PHI relation? (ex: joint explorations for oil and gas in contested waters, September 2004; Joint Marine Seismic Undertaking, March 2005, with Vietnam)
- Refrain from the threat or use of force and the peaceful settlement of disputes.
- Time for a renewed golden age?

谢谢

Obrigado!