The Framework Code of Conduct, One Year After the Arbitration

(Remarks delivered at the ADR Institute on 12 July 2017 on the 1st Anniversary of the Arbitral Ruling)

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I. Introduction

The historic arbitral ruling issued one year ago on 12 July 2016 was decided overwhelmingly in favor of the Philippines and against China. The ruling was jubilantly received in Hanoi, which would benefit immensely from the ruling invalidating China's nine-dashed lines. But in Manila, the stunning victory became strangely orphaned. The Duterte Administration refused to celebrate the ruling, even though the ruling legally secured for the Philippines a vast maritime zone **larger** than the total land area of the Philippines.

Six months later in December 2016, President Rodrigo Duterte announced he was "**setting aside**" the ruling in favor of better economic relations with China. I was aghast at the President's use of the phrase "setting aside." In law, to "set aside" a ruling means to nullify, void or abandon the ruling. I had to sound the alarm for the Department of Foreign Affairs (DFA) to immediately clarify the President's statement. If accepted by China, the President's statement would legally bind the Philippines under the well-recognized doctrine in international law on unilateral declarations by heads of state.

Thankfully, the DFA promptly issued a clarification that there was no abandonment of the ruling. The clarification was issued just a few hours before China warmly accepted the President's statement. This prevented the President's statement from becoming legally binding on the Philippines. We escaped a self-inflicted national disaster by the skin of our teeth.

This incident explains vividly Philippine foreign policy on the South China Sea (SCS) dispute **after** the arbitral ruling - a policy without discernable direction, coherence or vision, a policy that relies more on improvisation than on long-term strategy. I do not at all blame the DFA for this because the Chief Architect of our foreign policy is not the DFA but the President.

I am happy that the ADR Institute has organized this forum to provide some clarity to our foreign policy on the South China Sea after the arbitral ruling.

II. Framework of the Code of Conduct (COC)

The Framework is simply a list of topics to be included in the draft COC that will be negotiated into a final COC. The Framework is just the **skeleton** of an agreement. From this skeleton, a draft agreement will be fleshed out, and from this draft agreement a final agreement – the COC - will be hammered out by the parties.

Each topic in the Framework indicates the intent of a provision; e.g., under the heading "**Basic Undertakings**," the first item is "Duty to Cooperate," the second item is "Promotion of Practical Maritime Confidence," the third item is "Prevention of Incidents." Under this item on "Prevention of Incidents," there are two sub-items: "Confidence Building Measures" and "Hotlines," and the fourth item is "Management of Incidents," with the sub-item of "Hotlines."

Lawyers drafting an agreement would call the Framework "**Heads of Agreement**," while laymen would call the Framework **bullet points**. The Framework is not the COC, not even the draft COC.

The Framework, as of May 2017, is simply a one-page set of bullet points. The Framework came about 15 years after the ASEAN-China DOC was signed in 2002, which called for the negotiation of a COC. So, this one-page Framework is 15 years in the making, and it is still a skeleton of a draft agreement.

China has repeatedly stated it will sign a COC "**at the appropriate time**," or "**when the time is ripe**." In my assessment, that time is when China has completed its island-building activities in the SCS to create the air and naval bases China needs to control the SCS for economic and military purposes. That means a strategic triangle of air and naval bases on Woody Island, in the Spratlys and in Scarborough Shoal. China already has air and naval bases on Woody Island and in the Spratlys. Thus, only one air and naval base is missing – in Scarborough Shoal - to complete China's radar and anti-aircraft missile coverage of the entire SCS.

Of course, a Chinese air and naval base in Scarborough Shoal will also protect the Bashi Channel as the outlet to the Pacific for China's nuclear-armed submarines that are based in Hainan Island. The missiles of these Chinese submarines, if launched in the South China Sea, cannot reach the continental U.S.A. The submarines must transit the Bashi Channel and launch their missiles in the mid-Pacific. Securing the Bashi Channel is critical to China's nuclear deterrent strategy.

The Framework, and its eventual transformation and signing as a COC, is a case of good news and bad news. When China says it is ready to sign the COC, it is of course good news. But at the same time, it is also bad news because it means China will soon reclaim Scarborough Shoal since China will sign the COC only after it completes its radar and anti-aircraft missile coverage of the entire SCS. Once the COC is signed, China will then demand a freeze by all disputant states on all island-building, reclamation and militarization in the SCS.

III. COC and the Arbitral Ruling

The purpose of the COC is to regulate the **conduct** of the parties so there will be no skirmishes or shooting war in the SCS. The

COC is not intended to settle the merits of the SCS dispute. The SCS dispute involves territorial and maritime disputes. There is already a dispute settlement mechanism for the merits of the maritime dispute, and that is found in the UN Convention on the Law of the Sea (UNCLOS) to which all disputant states in the SCS are parties. There is no dispute settlement mechanism for the territorial dispute, unlike in South America where there is the Pact of Bogota.

The Framework itself states that the COC is "not an instrument to settle territorial or maritime delimitation issues." The phrase "maritime delimitation issues" should be changed to "maritime issues" only, excluding the word "delimitation." There are issues under UNCLOS other than maritime delimitation, like the status of geologic features, whether such features are low-tide elevations or high-tide elevations, and these issues are not delimitation issues. As worded in the Framework, the Philippine may be impliedly barred from bringing to an UNCLOS tribunal the status of geologic features in the Spratlys because only delimitation issues are excluded from the Framework. We do not want such a provision.

China's *Position Paper* in the Philippine-China arbitration claimed that the 2002 Asean-China Declaration of Conduct (DOC), which provides for negotiations as a mode to settle disputes, is legally binding and barred the Philippines from filing the arbitration case and from invoking the UNCLOS dispute settlement mechanism. The Philippines argued that the 2002 Asean-China DOC is not legally binding but merely aspirational, and does not provide for negotiations as the exclusive mode of settling disputes. The Tribunal upheld the Philippines position. With this experience, we must ensure that the COC is clear **– it does not supplant the UNCLOS dispute settlement mechanism on maritime disputes** because China might again later claim that the COC bars other states from resort to the UNCLOS dispute settlement mechanism.

In the *Southern Bluefin Tuna* case, Australia and New Zealand were stuck in the dispute settlement mechanism prescribed in the Convention for the Conservation of the Southern Bluefin Tuna. Australia and New Zealand could not invoke the UNCLOS dispute settlement mechanism because the Southern Bluefin Tuna Convention had a dispute settlement mechanism which required the consent of all parties to any settlement. There was a permanent deadlock when Japan refused to agree to any settlement. If the COC is legally binding and supplants the UNCLOS dispute settlement mechanism, we will be stuck in a similar deadlock. **If negotiations will be the only mode of settlement**, **China can create a deadlock by refusing to agree to any settlement.** China can also simply delay the negotiations while it completes its air and naval bases in the SCS and extracts for itself all the resources within the nine-dashed lines.

The merits of the dispute should continue to be governed **primarily** by the UNCLOS dispute settlement mechanism. Thus, the COC regulates the conduct of parties to the dispute, while UNCLOS settles the merits of the dispute among the parties. Although related, these are essentially two different issues.

We should not re-invent the wheel – there is already the existing UNCLOS dispute settlement mechanism which guarantees a level playing field for all states – whether superpowers or small states. The UNCLOS dispute settlement mechanism guarantees that the dispute will be resolved solely in accordance with international law. Warships, warplanes, cruise missiles and nuclear bombs do not count before an UNCLOS tribunal. That is why the Philippines won in the arbitration case against China. Asean disputant states should not give up this advantage and should not fall into the trap of the *Southern Bluefin Tuna* case where consent of all the disputant states to any settlement is required to resolve the dispute.

Of course, in an apparent rebuke of the *Southern Bluefin Tuna* decision, the arbitral tribunal in the Philippine-China arbitration stated that to be binding any derogation from the UNCLOS

dispute settlement mechanism must be express and categorical. But the fact that China took the stand in its *Position Paper* that the 2002 Asean-China DOC is legally binding, despite China's previous statements that it was not, forewarns us to be very precise in the language of the COC. **I have to stress this - the COC must be clear that it does not supplant the UNCLOS dispute settlement mechanism**.

China wants the COC to apply only to the Spratlys and to exclude the Paracels and Scarborough Shoal. The Philippines should insist on the inclusion of Scarborough Shoal in the COC to prevent China from claiming that if Scarborough Shoal is not covered by the COC, it is also not covered by the 2002 Asean-China DOC which barred the parties from "inhabiting previously uninhabited shoals." Scarborough Shoal remains uninhabited to this day.

IV. Enforcement of the Arbitral Ruling

There is no world policeman or sheriff to enforce the arbitral ruling. However, states that ratified UNCLOS expressly bound themselves to comply in good faith with decisions of arbitral tribunals created under UNCLOS. China is reneging on this treaty obligation.

The option for the Philippines is not to either "**talk with China or go to war with China**." This is a **false option**, and shows a dismal lack of understanding of international law and international relations.

First, the Philippine Constitution prohibits war as instrument of national policy. Second, the UN Charter has outlawed war as a means of settling disputes between states. **In resolving the SCS dispute, war is not an option, and has never been an option**. That is precisely why the Philippines filed the arbitration case against China, because war was never an option.

If the Philippines starts a war against China, the Philippines would surely lose, and lose badly. If the Philippines is the aggressor, that will violate the Constitution and the UN Charter. The Philippines cannot even invoke the Philippine-U.S. Mutual Defense Treaty because the treaty is only for defense, not for aggression. President Duterte's oft-repeated question – whether the U.S. will support and join the Philippines if we got to war against China – is a misguided question because the U.S. is not bound by the Philippine-U.S. Mutual Defense Treaty to support any act of aggression by the Philippines. If the U.S. joins the Philippines in a war of aggression, the U.S. will also be in breach of the UN Charter.

China itself does not want to start a war because war will give the U.S. an excuse to intervene in the SCS dispute, since **to defend itself** the Philippines will certainly invoke the Philippine-U.S. Mutual Defense Treaty. China's strategy is to control the SCS without firing a single shot. Those who raise the issue of war with China either do not understand the Three Warfares Strategy of China, or are simply scaring the Filipino people to make them submit to China's designs in the SCS.

The real and practical option for the Philippines is to "**talk with China while taking measures to fortify the arbitral ruling**." We should talk with China on the COC, on the Code for Unplanned Encounters at Sea (CUES) for naval and coast guard vessels, on conservation of fish stocks, on preservation of the maritime environment, and on how our fishermen can fish in Scarborough Shoal. There are many other things to talk with China on the South China Sea dispute even if China refuses to discuss the arbitral ruling.

As we talk with China, we can fortify the arbitral ruling in many ways:

1. The Philippines can enter into a sea boundary agreement with Vietnam on our overlapping ECSs in the Spratlys, based on the ruling of the tribunal that no geologic feature in

the Spratlys generates an EEZ. **Such an agreement implements part of the arbitral ruling by state practice**.

2. The Philippines can enter into a sea boundary agreement with Malaysia on our overlapping EEZ and ECS in the Spratlys, again based on the ruling of the tribunal that no geologic feature in the Spratlys generates an EEZ. **Such an agreement also implements part of the arbitral ruling by state practice**.

3. The Philippines can file an extended continental shelf (ECS) claim beyond our 200 NM EEZ in the West Philippine Sea off the coast of Luzon. If China does not oppose our ECS claim, the United Nations Commission on the Limits of the Continental Shelf (UNCLCS) will award the ECS to the Philippines, similar to our ECS claim in Benham Rise where there was no opposition. If China opposes our ECS claim, China will have a **dilemma** on what ground to invoke. If China invokes the nine-dashed lines again, the UNCLCS will reject the opposition because the UNCLCS is bound by the ruling of the arbitral tribunal which, just like the UNCLC, was created under UNCLOS. If China claims an overlapping ECS, then China will be admitting that the Philippines has a 200 NM EEZ from Luzon that negates the nine-dashed lines.

4. The arbitral tribunal has ruled that no geologic feature in the Spratlys generates an EEZ. The Philippines can initiate an agreement among all Asean disputant states – Vietnam, Malaysia, Brunei, Indonesia and Philippines – declaring that no geologic feature in the Spratlys generate an EEZ that could overlap with their respective EEZs. Even if only the Philippines, Vietnam and Malaysia will agree to this declaration, it will clearly remove any maritime delimitation dispute among them, leaving only the territorial disputes. This will isolate China as the only state claiming an EEZ from geologic features in the Spratlys.

5. The Philippines can claim damages before an UNCLOS tribunal for the "severe, permanent harm" to the marine environment, as ruled by the arbitral tribunal, that China caused within Philippine EEZ in the Spratlys because of China's dredging activities and its failure to stop Chinese fishermen from harvesting endangered species.

6. In case China shows signs of reclaiming Scarborough Shoal, the Philippines can file a new case before an UNCLOS arbitral tribunal to stop the reclamation because any reclamation in Scarborough Shoal will destroy the traditional fishing ground common to fishermen from the Philippines, Vietnam and China as ruled by the arbitral tribunal.

The arbitral ruling involves only **maritime issues, not territorial issues**. Enforcing the arbitral ruling does not mean forcibly evicting China from the islands and high-tide elevations that China occupies in the SCS, as occupation of these geologic features is a **territorial issue**. There are still many commentators in media who fail to distinguish between territorial and maritime disputes, and thus wrongly conclude that enforcing the ruling means going to war with China on the territorial dispute.

V. Acts that Weaken the Arbitral Ruling and Frustrate Enforcement of the Ruling

The following statements and acts of President Duterte weakened the arbitral ruling that the Philippines won in the arbitration case, and even frustrate the enforcement of the ruling:

1. President Duterte stated: "**I just want to patrol our territorial waters**. We do not go into patrol or join any [foreign] army because I do not want trouble. **Territory is limited to the 12-mile limit. That is ours.** ***Hanggang diyan lang tayo***."

(Inquirer.net, 13 September 2016, http://globalnation.inquirer.net/144805/duterte-rejects-joint-patrols)

Any refusal to patrol Philippine EEZ in the West Philippine Sea violates the command of the Constitution that the "**State shall protect the nation's marine wealth xxx in its exclusive economic zone**." If the Philippines announces to the world that it will not patrol its EEZ in the West Philippine Sea despite the arbitral ruling affirming that these waters form part of Philippine EEZ, then that is a signal to China that there will be no opposition from the Philippines to China's expansion in the West Philippine Sea. **China will interpret this as a green light to grab Philippine EEZ in the West Philippine Sea**.

2. "President Duterte said he would not stop China from building on a disputed shoal near the Philippine west coast because it was too powerful.

   Mr. Duterte made the statement in reaction to reports that China would set up an environmental monitoring station on **Panatag Shoal** (international name: Scarborough Shoal) off the coast of Zambales province."

   "**We cannot stop China from doing those things**. Even the Americans could not stop them," President Duterte said during a press conference shortly before flying for his state visit to Myanmar. (Inquirer.net, 20 March 2017, http://globalnation.inquirer.net/153556/duterte-cant-stop-china-panatag)

   Just because the Philippines cannot physically stop China from building on Scarborough Shoal does not mean that the Philippines should simply do nothing. Publicly announcing that the Philippines cannot stop China is a signal to China that the Philippines will not put up any obstacle to the construction of any Chinese structure on Scarborough Shoal. **China will interpret this as a green light to construct on Scarborough Shoal**.

At the very least, **the Philippines should vigorously protest any planned or actual construction because Scarborough Shoal, under Philippines law, is part of Philippine territory**. The President cannot simply do nothing to the seizure of Philippine territory by a foreign state. As Commander-in-Chief of the Armed Forces, the President has the constitutional duty to preserve and defend the territorial integrity of the Philippines. If the country does not have the militarily capability to defend its territory, the President must at least take legal and diplomatic measures to preserve Philippine sovereignty over the seized territory.

In fact, the Philippines should now prepare to file another arbitration case before an UNCLOS tribunal on the ground that any reclamation of Scarborough Shoal will destroy the shoal as a traditional fishing ground of Filipino fishermen as ruled by the arbitral tribunal.

3. The 2016 Asean Chair's Statement released by the Lao Prime Minister included wording that some Asean leaders had expressed their "**serious concerns" over "reclamation and militarization** (of disputed geologic features) that may complicate the situation**"** in the South China Sea. In sharp contrast, **President Duterte, as 2017 Asean Chair, deleted this wording in the 2017 Asean Chair's Statement**. (http://www.reuters.com/article/us-asean-summit-idUSKBN17W02Ehttp://www.sunstar.com.ph/manila/local-news/2017/05/20/palace-tells-carpio-chinas-reclamation-activities-ongoing-years-already)

   President Duterte's **deletion** in the Statement of "serious concern on reclamation and militarization" implies that Asean leaders are no longer concerned with the reclamation and militarization of disputed geologic features in the SCS. **China will again interpret this as a green light to proceed with its reclamation and militarization activities in the SCS**.

VI. What the Philippines Should Do from Here On

The Philippines should start seriously protecting its sovereign rights and jurisdiction in the West Philippine Sea by patrolling its EEZ, including holding joint patrols with the U.S. Navy; by entering into sea boundary agreements with Vietnam and Malaysia; by filing an ECS claim beyond its EEZ off the coast of Luzon, and by implementing other measures discussed above.

Otherwise, the Philippines will lose by default its EEZ in the West Philippine Sea to China. The ramifications will be far-reaching. The nine-dashed lines will be the common border between China and the Philippines, running 1,700 kilometers very close to the territorial sea of the Philippines, just some 64 kilometers off the coast of Balabac Island in Palawan, the southernmost island in Palawan, 70 kilometers off the coast of Bolinao in Pangasinan, and 44 kilometers off the coast of Y'ami Island in Batanes, the northernmost island in Batanes.

This is what Chinese Foreign Minister Wang Yi stated in February 2016 in Washington DC, that China and the Philippines are very close neighbors separated by just a "**narrow body of water**" – referring to the sliver of territorial sea and EEZ between the Philippine coastline and the nine-dashed lines. Chinese fighter jets from Scarborough Shoal can reach Manila in less than 20 minutes. Likewise, Chinese fighter jets from Mischief Reef can reach Puerto Princesa in less than 20 minutes.

The Philippines will lose 80 percent of its EEZ in the West Philippine Sea, a maritime space as large as the total land area of the Philippines. **This is the gravest external threat to the Philippines since World War II**. The Philippines will lose to China all the oil, gas, fishery, methane hydrates or combustible ice, and other mineral resources within this huge maritime space, including the gas-rich Reed Bank. The Reed Bank is supposed to replace the Malampaya gas field when it runs out of gas in less than 10 years. Malampaya supplies 40 percent of the energy requirement of Luzon.

Without a replacement for Malampaya, Luzon will have 10 to 12 hours of brownouts every day less than 10 years from now. Factories will close and workers will be out of jobs. This will

devastate the Philippine economy. Unless there is assurance of a replacement for Malampaya, no serious investor will put up a new factory in Luzon during the Duterte administration.

The stakes are high for present and future generations of Filipinos. All Filipinos should now unite to defend and protect the West Philippine Sea.

Thank you and a good day to everyone.

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