

- **Excerpts from South China Seas Rules of Procedure (with map)**
- **Excerpts from UN Convention on the Law of the Sea**

Readings for MIAS Membership Meeting

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at White & Case  
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Featuring Prof. Bernard H. Oxman  
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"The Recalcitrant Party in International Arbitration: Recent Cases Involving a Party's Refusal to Participate in the Proceedings"

## **The South China Sea Arbitration (Philippines v. China)**

### **Rules of Procedure**

*(selected provisions)*

#### **Preliminary Objections**

##### *Article 20*

1. The Arbitral Tribunal shall have the power to rule on objections to its jurisdiction or to the admissibility of any claim made in the proceedings.
2. A plea that the Arbitral Tribunal does not have jurisdiction shall be raised no later than in the Counter-Memorial.
3. The Arbitral Tribunal shall rule on any plea concerning its jurisdiction as a preliminary question, unless the Arbitral Tribunal determines, after seeking the views of the Parties, that the objection to its jurisdiction does not possess an exclusively preliminary character, in which case it shall rule on such a plea in conjunction with the merits.

#### **Evidence**

##### *Article 22*

1. Each Party shall have the burden of proving the facts relied on to support its claim or defence.
2. The Arbitral Tribunal may take all appropriate measures in order to establish the facts ....

#### **Experts Appointed by the Arbitral Tribunal**

##### *Article 24*

1. After seeking the views of the Parties, the Arbitral Tribunal may appoint one or more independent experts. That expert may be called upon to report on specific issues and in the manner to be determined by the Arbitral Tribunal. A copy of the expert's terms of reference, established by the Arbitral Tribunal, shall be communicated to the Parties.

#### **Failure to Appear or to Make Submissions**

##### *Article 25*

1. *[Repeats text of Article 9 of Annex VII to the Convention.]*
2. In the event that a Party does not appear before the Arbitral Tribunal or fails to defend its case, the Arbitral Tribunal shall invite written arguments from the appearing Party on, or pose questions regarding, specific issues which the Arbitral Tribunal considers have not been canvassed, or have been inadequately canvassed, in the pleadings submitted by the appearing Party. The appearing Party shall make a supplemental written submission in relation to the matters identified by the Arbitral Tribunal within three months of the Arbitral Tribunal's invitation. The supplemental submission of the appearing Party shall be communicated to the

non-appearing Party for its comments which shall be submitted within three months of the communication of the supplemental submission. The Arbitral Tribunal may take whatever other steps it may consider necessary, within the scope of its powers under the Convention, its Annex VII, and these Rules, to afford to each of the Parties a full opportunity to present its case.

## **Expenses**

### *Article 31*

1. Pursuant to Article 7 of Annex VII to the Convention, unless the Arbitral Tribunal decides otherwise because of the particular circumstances of the case, the expenses of the Arbitral Tribunal, including the remuneration of its members, shall be borne by the Parties in equal shares.

## **Deposit for Expenses**

### *Article 33*

1. The Registry may request each Party to deposit an equal amount as an advance for the expenses referred to in Article 31.

2. During the course of the proceedings, the Registry or the Arbitral Tribunal may request supplementary deposits from the Parties in respect of the expenses referred to in Article 31.

3. If the requested deposits are not paid in full within 45 days after the receipt of the request, the Arbitral Tribunal shall so inform the Parties in order that one of them may make the required payment. If such payment is not made, the Arbitral Tribunal may order the suspension or termination of the proceedings.

## **EXCERPTS FROM PROCEDURAL ORDERS OF THE TRIBUNAL**

### **Procedural Order No. 1**

2.1.1 The Philippines shall submit a Memorial by **30 March 2014**. In its Memorial, the Philippines shall fully address all issues including matters relating to jurisdiction, admissibility, and the merits of the dispute.

### **Procedural Order No. 2**

1.1 The People's Republic of China shall submit a Counter-Memorial responding to the Memorial of the Republic of the Philippines by **15 December 2014**.

### **Procedural Order No. 3**

**WHEREAS** on 8 December 2014, the Embassy of the People's Republic of China in the Kingdom of the Netherlands deposited with the PCA a Note Verbale to inform the PCA that "[o]n 7 December 2014, the Ministry of Foreign Affairs of the People's Republic of China was authorized to release the Position Paper of the Government of the People's Republic of China on

the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines.” In the Note Verbale, the People’s Republic of China also requested the PCA to forward the Position Paper and its English translation to the individual members of the Arbitral Tribunal. The Note Verbale further included the statement that: “The Chinese Government reiterates that it will neither accept nor participate in the arbitration unilaterally initiated by the Philippines. The Chinese Government hereby makes clear that the forwarding of the aforementioned Position Paper shall not be regarded as China’s acceptance of or its participation in the arbitration”;

**WHEREAS** although to date the People’s Republic of China has “reiterated its position that it does not accept the arbitration initiated by the Philippines,” it nonetheless remains open to the People’s Republic of China to participate in these proceedings at any stage;

1.1 Pursuant to Article 25(2) of the Rules of Procedure, the Arbitral Tribunal invites further written argument from the Philippines on specific issues which the Arbitral Tribunal considers have not been canvassed, or have been inadequately canvassed, in the Memorial, as set out in the attached document entitled “Requests for Further Written Argument by the Philippines Pursuant to Article 25(2) of the Rules of Procedure.”

1.2 The Philippines shall make a supplemental written submission in relation to the matters identified by the Arbitral Tribunal by **16 March 2015** and shall communicate the supplemental written submissions to the People’s Republic of China, the Registry and the Arbitral Tribunal.

1.3 The People’s Republic of China shall have until **16 June 2015** to provide any comments it may wish to make on the supplemental written submission.

#### **Procedural Order No. 4**

**WHEREAS** in accordance with Procedural Order No. 3, on 16 March 2015, the Philippines filed a Supplemental Written Submission responding to the Arbitral Tribunal’s Request for Further Argument Pursuant to Article 25 of the Rules of Procedure. The Philippines noted that the Chinese Ambassador’s Letter had described China’s Position Paper as having comprehensively addressed jurisdictional objections, and the Philippines thus concluded ... that “the Tribunal need not look beyond the views stated in China’s Paper for the purposes of determining whether it has jurisdiction.” ;

**WHEREAS** China did not submit a Counter-Memorial before 15 December 2014, the date set by the Arbitral Tribunal’s Procedural Order No. 2;

**WHEREAS** the Philippines also stated that “China’s Position Paper is notable for what it does *not* argue as for what it does;

1.1 The Arbitral Tribunal considers that the communications by China, including notably its Position Paper of 7 December 2015 and the Letter of 6 February 2015 from the Ambassador of the People’s Republic of China to the Netherlands, effectively constitute a plea concerning this Arbitral Tribunal’s jurisdiction for the purposes of Article 20 of the Rules of Procedure and will be treated as such for the purposes of this arbitration.

1.3 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 ....

1.4 Notwithstanding its decision that China's communications effectively constitute a plea concerning the jurisdiction of the Arbitral Tribunal, the Arbitral Tribunal considers that it continues to have a duty pursuant to Article 9 of Annex VII to the Convention to satisfy itself that it has jurisdiction over the dispute. Accordingly, the Arbitral Tribunal shall not be prevented from considering other possible issues of jurisdiction and admissibility not addressed in China's Position Paper, and the Hearing on Jurisdiction will not be limited to the questions raised in China's Position Paper.

2.1 Conscious of its duty to conduct proceedings "to avoid unnecessary delay and expense and to provide a fair and efficient process," and the Philippines' expressed concerns about delay and disruption, the Arbitral Tribunal will endeavour to issue its decision on such preliminary objections that it determines appropriate as soon as possible after the Hearing.



# UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

*(selected provisions)*

## PART XV SETTLEMENT OF DISPUTES

### SECTION 2. COMPULSORY PROCEDURES ENTAILING BINDING DECISIONS

#### Article 286

##### *Application of procedures under this section*

Subject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

#### Article 287

##### *Choice of procedure*

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:

- (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;
- (b) the International Court of Justice;
- (c) an arbitral tribunal constituted in accordance with Annex VII;
- (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

3. 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 288

##### *Jurisdiction*

4. In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.

#### Article 293

##### *Applicable law*

1. A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.

## ANNEX VII. ARBITRATION

#### Article 3

##### *Constitution of arbitral tribunal*

For the purpose of proceedings under this Annex, the arbitral tribunal shall, unless the parties otherwise agree, be constituted as follows:

- (a) . . . the arbitral tribunal shall consist of five members.
- (b) The party instituting the proceedings shall appoint one member . . . .
- (c) The other party to the dispute shall, within 30 days . . . appoint one member . . . . If the appointment is not made within that period, the party instituting the proceedings may, within two weeks . . . request that the appointment be made in accordance with subparagraph (e).
- (d) The other three members shall be appointed by agreement between the parties. . . . If, within 60 days . . . the parties are unable to reach agreement on the appointment of one or more of the members of the tribunal to be appointed by agreement, or on the appointment of the President, the remaining appointment or appointments shall be made in accordance with subparagraph (e), at the request of a party to the dispute. Such request shall be made within two weeks of the expiration of the aforementioned 60-day period.
- (e) Unless the parties agree that any appointment under subparagraphs (c) and (d) be made by a person or a third State chosen by the parties, the President of the International Tribunal for the Law of the Sea shall make the necessary appointments.

Article 5  
*Procedure*

Unless the parties to the dispute otherwise agree, the arbitral tribunal shall determine its own procedure, assuring to each party a full opportunity to be heard and to present its case.

Article 6  
*Duties of parties to a dispute*

The parties to the dispute shall facilitate the work of the arbitral tribunal and, in particular, in accordance with their law and using all means at their disposal, shall:

- (a) provide it with all relevant documents, facilities and information; and
- (b) enable it when necessary to call witnesses or experts and receive their evidence and to visit the localities to which the case relates.

Article 9  
*Default of appearance*

If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to make its award. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.

Article 11  
*Finality of award*

The award shall be final and without appeal, unless the parties to the dispute have agreed in advance to an appellate procedure. It shall be complied with by the parties to the dispute.