

PCA Case N° 2013-19

IN THE MATTER OF AN ARBITRATION

- before -

**AN ARBITRAL TRIBUNAL CONSTITUTED UNDER ANNEX VII TO THE
1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (“CONVENTION”)**

- between -

THE REPUBLIC OF THE PHILIPPINES

- and -

THE PEOPLE’S REPUBLIC OF CHINA

PROCEDURAL ORDER N° 4

ARBITRAL TRIBUNAL:

**Judge Thomas Mensah (Presiding Arbitrator)
Judge Jean-Pierre Cot
Judge Stanislaw Pawlak
Professor Alfred Soons
Judge Rüdiger Wolfrum**

REGISTRY:

Permanent Court of Arbitration

21 April 2015

WHEREAS Article 288(4) of the Convention provides that “[i]n 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”;

WHEREAS Article 5 of Annex VII to the Convention provides that “[u]nless 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”;

WHEREAS Article 9 of Annex VII to the Convention provides, under the heading “Default of appearance”, that “[b]efore 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”;

WHEREAS Article 10 of the Rules of Procedure in the present case provides the following general rule:

1. Subject to Annex VII to the Convention and these Rules, the Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the Parties are treated with equality and that at any stage of the proceedings each Party is given a full opportunity to be heard and to present its case. The Arbitral Tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the Parties’ dispute.

WHEREAS Article 20 of the Rules of Procedure in the present case provides as follows under the heading “Preliminary Objections”:

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. A Party is not precluded from raising such a plea by the fact that it has appointed, or participated in the appointment of, an arbitrator. A plea that the Arbitral Tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The Arbitral Tribunal may, in either case, admit a later plea if it considers the delay justified.
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.
4. Prior to ruling on any matters relating to jurisdiction or admissibility, a hearing shall be held if the Arbitral Tribunal determines that such a hearing is necessary or useful, after seeking the views of the Parties.

WHEREAS in Procedural Order No. 1, dated 27 August 2013, the Arbitral Tribunal ordered the Philippines to submit a Memorial that “shall fully address all issues including matters relating to jurisdiction, admissibility, and the merits of the dispute”;

WHEREAS in accordance with Procedural Order No. 1, the Philippines submitted its Memorial on 30 March 2014, Chapter 7 of which addressed “The Tribunal’s Jurisdiction over the Claims of the Philippines.” It acknowledged (at para 7.6) that “China’s non-appearance does impose on the Tribunal a duty to assess the issue of jurisdiction *proprio motu*”;

WHEREAS in its Memorial, the Philippines argued (at para 7.157) that the Arbitral Tribunal has jurisdiction in regard to all of the claims raised by the Philippines’ Amended Statement of Claim because:

1. All aspects of the disputes raised in the Philippines' Amended Statement of Claim concern the interpretation and application of UNCLOS;
2. China's decision not to appear has no effect on the Tribunal's jurisdiction;
3. The 2002 ASEAN Declaration on the Conduct of the Parties in the South China Sea does not bar the exercise of jurisdiction by this Tribunal;
4. The Philippines fulfilled the requirement to engage in an exchange of views with China;
5. The limitations to jurisdiction provided in Article 297 are inapplicable to the claims of the Philippines in this case; and
6. The optional exceptions to jurisdiction provided in Article 298 also do not apply to the claims of the Philippines;

WHEREAS by Procedural Order No. 2 of 2 June 2014, the Arbitral Tribunal set 15 December 2014 as the date by which China could submit a Counter-Memorial;

WHEREAS throughout the proceedings China has repeatedly sent Notes Verbales to the PCA reiterating "its position that it does not accept the arbitration initiated by the Philippines" and insisting that such Notes Verbales "shall not be regarded as China's acceptance of or participation in the arbitration procedure";

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 on 7 December 2014, the Ministry of Foreign Affairs published a "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" ("**China's Position Paper**"). As the PCA informed the Parties on 11 December 2014, the Chinese Embassy to the Kingdom of the Netherlands requested the PCA "to forward the Position Paper and its English translation to Judge Thomas A. Mensah, Judge Jean-Pierre Cot, Judge Stanislaw Pawlak, Professor Alfred H.A. Soons and Judge Rüdiger Wolfrum";

WHEREAS China's Position Paper was "intended to demonstrate that the arbitral tribunal established at the request of the Philippines for the present arbitration does not have jurisdiction over this case" and stated that "[i]t does not express any position on the substantive issues related to the subject-matter of the arbitration initiated by the Philippines," elaborating the following positions, summarized at paragraph 3:

- The essence of the subject-matter of the arbitration is the territorial sovereignty over several maritime features in the South China Sea, which is beyond the scope of the Convention and does not concern the interpretation or application of the Convention;
- China and the Philippines have agreed, through bilateral instruments and the Declaration on the Conduct of Parties in the South China Sea, to settle their relevant disputes through negotiations. By unilaterally initiating the present arbitration, the Philippines has breached its obligation under international law;
- Even assuming, *arguendo*, that the subject-matter of the arbitration were concerned with the interpretation or application of the Convention, that subject-matter would constitute an integral part of maritime delimitation between the two countries, thus falling within the scope of the declaration filed by China in 2006 in accordance with the Convention, which excludes, *inter alia*, disputes concerning maritime delimitation from compulsory arbitration and other compulsory dispute settlement procedures;

WHEREAS on 16 December 2014, the PCA on behalf of the Arbitral Tribunal invited the Parties to comment on, among other things, “a possible bifurcation of the proceedings, with a view to addressing some or all issues of the Tribunal’s jurisdiction as a preliminary matter” and the Parties’ “availability for, and the appropriate scope of, a hearing in The Hague during the period between 7 and 18 July 2015”;

WHEREAS by letter dated 26 January 2015, the Philippines expressed its view that such bifurcation would be “neither appropriate or desirable.” Citing the decisions on bifurcation by the tribunals in *Guyana v. Suriname* and *Mauritius v. United Kingdom*, the Philippines argued that it is apparent from the Memorial and China’s Position Paper that:

[T]he jurisdictional issues in the case between the Philippines and China are plainly interwoven with the merits. The issues raised by the jurisdictional objections identified by China in its Position Paper depend ‘in significant measure [on] the same facts and arguments on which the merits of the case depend.’ They therefore do not possess an exclusively preliminary character, making bifurcation inappropriate.

WHEREAS the Philippines also noted that bifurcation would “needlessly prolong, and increase the costs of, these proceedings when they are already at an advanced stage,” and submitted that:

[T]he interests of the sound administration of justice would best be served by timely action by the Tribunal and the avoidance of unnecessary delays. The Philippines has previously made known China’s increasingly assertive and expansive actions in the South China Sea, including its impeding the resupply of Philippine personnel at Second Thomas Shoal and its undertaking large-scale land reclamation activities with several environmental consequences. A prompt ruling by the Tribunal would allow future actions and dialogue in the region to take place against the backdrop of an authoritative determination of entitlements and constraints.

WHEREAS the Philippines made certain procedural suggestions with respect to the conduct of a hearing in July, including that (1) “the hearings proceed in two rounds, a first round to take place over three days between 7 and 9 July, and a second round to take place on 14 and 15 July”; (2) “[a]pproximately a month before the beginning of the first round, the Tribunal could indicate any points or issues which it would like the Philippines specially to address, or on which it considers that there has been insufficient argument”; and (3) “following the completion of the first round, the Tribunal could then consider whether it wishes to present the Philippines with a final set of questions/topics on which it would like further submissions [at the conclusion of the] second round”;

WHEREAS on 6 February 2015, a letter from the Chinese Ambassador to the Netherlands was delivered, stating “the Chinese Government’s position on issues relating to the South China Sea arbitration initiated by the Philippines” (“**Chinese Ambassador’s Letter**”);

WHEREAS the Chinese Ambassador’s Letter described China’s Position Paper as having “comprehensively explain[ed] why the Arbitral Tribunal ... manifestly has no jurisdiction over the case” and stated that the Chinese Government’s position of not accepting or participating in the arbitration “will not change”;

WHEREAS the Chinese Ambassador’s Letter clarified that China’s non-participation and non-response to any issue raised by the Arbitral Tribunal “shall not be understood or interpreted by anyone in any sense as China’s acquiescence in or non-objection to any and all procedural or substantive matters already or might be raised by the Arbitral Tribunal,” and while it expressed China’s “firm opposition” to some of the procedural items raised in the PCA’s letter of 16 December 2014, it did not directly address the issue of bifurcation;

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 (at para 26.2) that "the Tribunal need not look beyond the views stated in China's Paper for the purposes of determining whether it has jurisdiction." The Philippines referred to the Award on Jurisdiction of 26 November 2014 in the *Arctic Sunrise Arbitration (The Netherlands v. The Russian Federation)*;

WHEREAS the Philippines also stated that "China's Position Paper is notable for what it does *not* argue as for what it does. Among the points that China does not deny are the following":

- That there is a dispute between the Parties over China's claim to "historic rights" beyond the limits of its potential entitlements under UNCLOS in all areas located within the nine-dash line;
- That China is not claiming "historic title" over any maritime areas in the South China Sea, as distinguished from "historic rights";
- That the optional "historic bays or titles" exception does not apply to any aspect of the Philippines' claims;
- That there is a dispute between the Parties over the extent of the potential entitlements that the insular features in the South China Sea generate;
- That the Tribunal has jurisdiction over the Philippines' claims concerning China's violations of its obligations to protect and preserve the marine environment;
- That the law enforcement activities exception does not apply to any aspect of the Philippines' claims; and
- That the military activities exception likewise does not apply to any aspect of the Philippines' claims.

WHEREAS the Arbitral Tribunal considers that it has sufficiently sought the views of the Parties and given them a full opportunity to be heard on the question of bifurcation of proceedings; and

WHEREAS the Tribunal is cognizant of the practice of international courts and tribunals in interstate disputes of (i) taking note of public statements or informal communications made by non-appearing Parties, (ii) treating such statements and communications as equivalent to or as constituting preliminary objections, and (iii) bifurcating proceedings to address some or all of such objections as preliminary questions.¹

¹ See, for example, *Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation)*, Provisional Measures, Order of 22 November 2013, ITLOS reports 2013, para. 54 [Annex LA-45]; *Arctic Sunrise Arbitration (Kingdom of the Netherlands v. Russian Federation)*, Procedural Order No. 4, 21 November 2004, (as cited at para. 44 of Award on Jurisdiction, 26 November 2014 (Annex LA-184)); and decisions of the International Court of Justice including, *Fisheries Jurisdiction Cases* [Annex LA-8]; *Nuclear Tests cases* [Annex LA-7]; *Aegean Sea Continental Shelf (Greece v. Turkey)* [Annex LA-9].

THE ARBITRAL TRIBUNAL HEREBY ISSUES THE FOLLOWING PROCEDURAL ORDER:

1. Scope and Dates of July Hearing

- 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.
- 1.2 As provided for in Article 20(3) of the Rules of Procedure, 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."
- 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 ("**Hearing on Jurisdiction**").
- 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.
- 1.5 The Hearing on Jurisdiction will commence on 7 July 2015 and will close on 13 July 2015, in accordance with a detailed schedule to be finalised in consultation with the Parties.
- 1.6 Noting that pursuant to Procedural Order No. 3 China has until 16 June 2015 to submit comments on the Philippines' Supplemental Written Submission and the Philippines' suggestions in its letter of 26 January 2015, the Arbitral Tribunal will aim to circulate, on or before 22 June 2015, any questions it may have relating to issues of jurisdiction and admissibility which it wants the Parties to address during the Hearing on Jurisdiction. The Parties will, however, not be limited during the Hearing on Jurisdiction to addressing those questions and this procedure will not rule out the possibility of individual members of the Arbitral Tribunal raising questions during the course of the hearing.

2. Decision on Jurisdiction and Admissibility

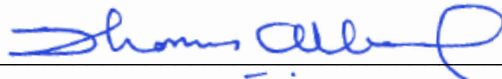
- 2.1 Conscious of its duty to conduct proceedings "to avoid unnecessary delay and expense and to provide a fair and efficient process," and the Philippines' expressed concerns about delay and disruption, the Arbitral Tribunal will endeavour to issue its decision on such preliminary objections that it determines appropriate as soon as possible after the Hearing.
- 2.2 If the Arbitral Tribunal determines after the Hearing on Jurisdiction that there are jurisdictional objections that do not possess an exclusively preliminary character, then, in accordance with Article 20(3) of the Rules of Procedure, such matters will be reserved for consideration and decision at a later stage of the proceedings.

3. Leave to Apply

- 3.1 Any Party has leave to apply to the Arbitral Tribunal for a variation of this Order, giving particulars of the variation sought and the reason for it.
- 3.2 Any Party may, at any point in these proceedings, request that the Arbitral Tribunal convene a conference with the Parties to address any procedural aspect of these proceedings. The Arbitral Tribunal will arrange to confer with the Parties in person or by teleconference, according to the circumstances.

Dated: 21 April 2015

ON BEHALF OF THE ARBITRAL TRIBUNAL



**Judge Thomas Mensah
President**