Kluwer Arbitration Blog

Philippines-China UNCLOS arbitration moving forward without Chinese participation

Luke Eric Peterson (Investment Arbitration Reporter) · Wednesday, August 28th, 2013

The Permanent Court of Arbitration has just updated its website so as to offer information about the pending arbitration initiated by the Philippines against China pursuant to Annex VII of the UN Convention on the Law of the Sea (UNCLOS).

Readers may recall that the Philippines requested arbitration in January of this year, citing a long-running dispute with China over "the maritime jurisdiction of the Philippines in the West Philippine Sea." (For background see this post on the EJIL Talk blog, as well as this one from Opinio Juris.).

China disputes that arbitrators have authority to adjudicate the Philippines' claims, and the Chinese government has thus far declined to cooperate with the arbitration. The PCA website describes China's response to the arbitration in the following terms:

"On 19 February 2013, China presented a Note Verbale to the Philippines in which it described 'the Position of China on the South China Sea issues,' and rejected and returned the Philippines' Notification."

Appointing Authority picked four of five arbitrators

In light of this Chinese stance, it fell to the President of the International Tribunal of the Law of the Sea (ITLOS) to act as appointing authority in the case, and to appoint four of the five tribunal members. (The Philippines appointed German lawyer Rudiger Wolfrum as its party-appointed arbitrator).

The five member tribunal hearing the case consists of four European lawyers and one Ghanaian:

Judge Thomas A. Mensah (President; Ghana)
Judge Jean-Pierre Cot (France)
Judge Stanislaw Pawlak (Poland)
Professor Alfred H. Soons (Netherlands)
Judge Rüdiger Wolfrum (Germany)

Mr. Mensah is the second President of the young tribunal. An earlier nominee, Sri Lankan attorney M.C.W. (Chris) Pinto resigned his seat in May of this year.

Rules of procedure finalized, and Philippines given deadline of March 2014 to file memorial

The PCA website contains an August 27 press release announcing that the tribunal met in July of this year and established rules of procedure and an initial timetable for the case. The tribunal has set a deadline of March 30 2014 for the Philippines to file a memorial that fully addresses "all issues", including the admissibility of the Philippines' claim, the tribunal's jurisdiction, and the merits of the dispute.

It was not clear, initially, whether that memorial will be public. The tribunal's procedural order has not been published on the PCA website, which may point to the possibility that arbitration-related documents will remain confidential. (I've emailed lawyers involved in the case to seek clarification on this point, and I'll update this post if I receive more information.)

In light of China's ongoing refusal to participate in the arbitration, the tribunal has set no further procedural deadlines, planning instead to decide at a latter date on "the need for and scheduling of any other written submissions and hearings, at an appropriate later stage, after seeking the views of the Parties."

The recent press release confirms that the tribunal consulted the parties for comments on its draft rules of procedure prior to their being finalized. In response, China addressed a Note Verbale dated August 1, 2013 to the Permanent Court of Arbitration in which it reiterated its position that "it does not accept the arbitration initiated by the Philippines" and its plan to not participate in the proceedings.

Is the arbitration futile due to China's non-participation?

China's decision not to cooperate with the arbitral proceeding has generated debate as to whether the arbitral process becomes "futile" or doomed to failure. Julian Ku, writing on the Opinio Juris blog has pointed out that the arbitration is capable of moving forward even in the face of a recalcitrant party. (Enforcement of any final award is another matter, and Prof. Ku rightly notes that enforcement is never a foregone conclusion *even* when the two parties are cooperating and engaged in the arbitration process.)

Support for Prof. Ku's views can be taken from the sphere of investor-state arbitration, where I've covered several recent arbitrations – including claims against Moldova, Tajikistan and Belize – where the respondent state has refused to participate in the arbitration. Those arbitrations have managed to proceed to final resolution nonetheless, sometimes with the arbitrators expressing a heightened need to consider the interests and positions of the non-cooperating state.

Indeed, in the aftermath of the Moldovan case, reporting work by *IAReporter* found that a final arbitral award against Moldova was indeed paid by the government despite that country's non-participation in the relevant arbitration.

It may be a *much* further stretch to assume that China will accept the final arbitral verdict in this highly-sensitive dispute, but based on recent events there is less concern that the arbitration process itself is in jeopardy due to the non-participation of a party.

Luke Eric Peterson is the Editor of InvestmentArbitrationReporter.com an online news and analysis service focused on investor-state arbitration and policy. He has been a contributor to Kluwer's Arbitration Blog since its launch.

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