Non-participation in Arbitral Proceedings Under Annex VII United Nations Convention on the Law of the Sea: *Arctic Sunrise* and *South China Sea* Compared

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Abstract This paper analyzes the legal consequences of non-participation in arbitral proceedings under Annex VII to the United Nations Law of the Sea Convention (LOSC). Two recent examples of non-participation are analyzed and compared with each other: first, the case of the Arctic Sunrise, and second, the South China Sea case. The first case was instituted by the Netherlands against Russia. The second case was instituted by the Philippines against China. In both cases, the respondent State did not take part in any way in the arbitral proceedings. There are some striking similarities between the two cases. For example, in both cases, the respondent State made extensive reservations to jurisdiction, but the applicant State formulated its submissions in such a way that these reservations turned out not to be a bar to the exercise of jurisdiction by the tribunal. There are also some differences between the two cases: unlike Russia, China developed a quite sophisticated and relatively consistent legal argumentation, but it did so outside the arbitral process, in the media, at conferences, and in scholarly articles.

1 Introduction

This article is about two disputes relating to the law of the sea. The first dispute is between the Netherlands and Russia, and regards the legality of the detention, by the Russians, of the Arctic Sunrise and its crew. The Arctic Sunrise is a ship operated by Greenpeace, and with Amsterdam (Netherlands) as its port of registry. The second dispute is between the Philippines and China, and relates to the legality of all kinds of claims and activities, mostly held and undertaken by China, in the South China Sea.

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A. Del Vecchio, R. Virzo (eds.), *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals*,
https://doi.org/10.1007/978-3-030-10773-4_11

One similarity between the two disputes is that one party made an effort to settle the dispute through international adjudication, whilst the other refused to participate in such proceedings. In other words, the Russians and Chinese have consistently maintained a strategy of non-participation in international arbitration. A strategy of non-participation is relatively unique in international law. The only important example from the past is the non-participation of the United States of America in its dispute with Nicaragua, before the International Court of Justice in the 1980s. It is therefore interesting to take a good look at the practical and legal consequences of non-participation. First, an overview of the applicable legal framework is provided (Sect. 2), followed by an analysis of the two procedures, starting with the one between the Netherlands and Russia (Sect. 3), and then the one between the Philippines and China (Sect. 4). By way of a conclusion, the two disputes will be compared, in an attempt to draw therefrom some general lessons for the future (Sect. 5).[1]

2 Law on Non-participation

What does the applicable law say about non-participation in international dispute settlement of controversies relating to the application and interpretation of the UN Law of the Sea Convention (LOSC or the Convention)?[2] In principle, the LOSC provides for compulsory dispute settlement. However, according to Art. 298 LOSC, "when signing, ratifying or acceding to this Convention or at any time thereafter, a State may […] declare in writing that it does not accept anyone or more of the [dispute settlement] procedures […] with respect to [certain] categories of disputes". In other words, the Convention allows exceptions.

At the drafting stages, it became clear that certain States "consider[ed] certain matters to be so sensitive that they should not be subject to the far-reaching dispute settlement procedures being envisaged for inclusion in the Convention".[3] This was the reason to include Art. 298. This idea, that exceptions to compulsory dispute settlement should be tolerated, was not disputed during the drafting process; the controversies focused more on what exactly could be excluded.

The starting point was that any "State may exclude [certain] categories of disputes from adjudication", but if a "declaration excluding a category of disputes is made when a proceeding has already commenced before a court or tribunal, it has no retroactive effect on the proceeding".[4] States should thus think hard about what they considered sensitive issues, and exclude those from dispute settlement at the time they become party to the Convention, and not at the time such a dispute actually arises in practice.

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[1] This is not the first article to make a comparison between these two cases. See e.g., Zhang and Chang (2015), Chang (2016), and Zhao and Li (2016).

[2] United Nations Convention on the Law of the Sea of 10 December 1982, 1833 UNTS 3.

[3] Nordquist et al. (2017), Commentary to Art. 298.

[4] *Ibidem*, para. 298.12.

Paragraph 4 of Art. 288 LOSC adds that "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". From this, it can be concluded that these declarations excluding certain categories of disputes from compulsory jurisdiction "are not self-judging, and their applicability in a particular case cannot be determined by their invocation by the State party against which a complaint is brought".[5] Instead, pursuant to the customary rule of international law that "any international court or tribunal has jurisdiction to determine the scope of its jurisdiction", the following applies: "if a party should dispute the jurisdiction of a court or tribunal functioning under the Law of the Sea Convention, that dispute will be settled by that court or tribunal".[6]

Unilateral filing of a dispute is possible. This follows from Art. 1 Annex VII of the LOSC, which states that each party to a dispute can submit the dispute to the arbitration procedure, by means of a written notification to the other party to the dispute. If the other party does not respond, Art. 9 of Annex VII applies. This is the most important article, which I quote in its entirety:

> 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.

In the remainder of this article, the legal framework set out above will be applied to two disputes in which the respondent State did not show up.[7] The section immediately below (Sect. 3) analyzes the Arctic Sunrise arbitration, followed by an examination of the arbitration concerning the South China Sea (Sect. 4).

3 Arctic Sunrise

The Arctic Sunrise arbitration relates to a controversy between the Netherlands and Russia, about the arrest and detention of the Arctic Sunrise and its crew. The Arctic Sunrise is a Greenpeace operated vessel registered in the Netherlands. The vessel was boarded by the Russian authorities, when Greenpeace attempted to stage a protest on and near an oil platform operated by Russia.[8] The merits of the case do not concern us here; we will focus instead on the procedural issue of non-participation.

Upon signature of the LOSC, the Russian Federation declared that "it does not accept the compulsory procedures entailing binding decisions for the consideration of disputes relating to sea boundary delimitations, disputes concerning military

[5] *Ibidem*, para. 298.43.

[6] *Ibidem*, para. 288.5.

[7] See also Cembrano-Mallan (2014), and Gates (2017).

[8] Caddell (2014), Oude Elferink (2014, 2016a), Harrison (2016), and Mossop (2016).

activities, or disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations".[9] And upon ratification, Russia declared that "it does not accept the procedures […] entailing binding decisions with respect to […]" and then followed an even more detailed and expansive list of disputes.[10]

In view of the Netherlands, this very extensive list of categories of disputes that were excluded from dispute settlement was not a bar to litigating the present dispute. And so, it started legal proceedings against Russia. The Netherlands first requested provisional measures from the International Tribunal for the Law of the Sea (ITLOS, or Tribunal),[11] and thus the dispute settlement proceedings began there, before they moved to Annex VII LOSC arbitration.[12]

Art. 28 of the Statute of the International Tribunal for the Law of the Sea (ITLOS Statute) contains a rule on default of appearance, which says that:

> When one of the parties does not appear before the Tribunal or fails to defend its case, the other party may request the Tribunal to continue the proceedings and make its decision. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings. Before making its decision, the 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.

Art. 28 ITLOS Statute is quite similar to Art. 9 Annex VII LOSC, quoted above. In a letter of 22 October 2013 to ITLOS, the Russian Federation invoked its declaration, and explained to the Tribunal that, "acting on this basis, the Russian Side has accordingly notified the Kingdom of the Netherlands by *note verbale* that it does not accept the arbitration procedure under Annex VII to the Convention initiated by the Netherlands in regard to the case concerning the vessel "Arctic Sunrise" and that it does not intend to participate in the proceedings of [ITLOS]". It is important to note that Russia merely informed ITLOS of the letter *directed to the Netherlands*. In other words, Russia did not want or expect a reply from ITLOS.

In response, the Netherlands sent a letter to ITLOS on 24 October 2013, in which it "requests the Tribunal to continue the proceedings and make its decision […] even if, regrettably, these proceedings would be in default of appearance by the Russian Federation".

In its order of 25 October 2013, ITLOS fixed the date for the opening of the hearing. It did so, whilst "having regard to the *note verbale* of [Russia] by which it informed the Tribunal that the Russian Federation does not intend to participate in the proceedings before the Tribunal".

During the hearing, in which Russia was indeed absent, the representation of the Netherlands discussed the issue of non-participation extensively. Let us look at some of these remarks.

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[9] Reservation available at https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec.

[10] *Ibidem*.

[11] See Art. 290(5) LOSC.

[12] See also Guilfoyle and Miles (2014), and Peiris (2015).

In view of the Netherlands, "if a State considers that an international court or tribunal does not have jurisdiction, as the Russian Federation seems to indicate in its communication to the Tribunal on 22 October, the regular practice of States is to appear and challenge that jurisdiction".[13] The Netherlands then referred to Russia's own practice, which had always been in line with this regular practice. And thus, "if the Russian Federation believes that the arbitral tribunal that is being constituted does not have jurisdiction, it would have been in keeping with its own practice to argue so in these proceedings as well [but] instead, it has refused to participate [and] thus, the Tribunal will have to address the consequences of this non-appearance".[14]

The Netherlands understood Art. 28 ITLOS Statute—quoted above—to require the Tribunal to apply a "three-pronged" test. First, "the Tribunal must satisfy itself that it has jurisdiction"; second, "the claim is well founded in fact"; and third, "the claim is well-founded in law".[15] Since the International Court of Justice (ICJ) has a similar provision in its Statute—Art. 53[16]—the Netherlands extensively analyzed the practice before that court. From this analysis, it concluded that "the non-appearance of the Russian Federation cannot by itself constitute an obstacle to the prescription of provisional measures by the Tribunal [and that] the Tribunal must, on its own accord, examine the question of jurisdiction [and that] the Tribunal needs to ensure that the factual and legal requirements for prescribing the provisional measures are met [and that] the Russian Federation, which has chosen not to appear, remains a party to the case and is bound by the decision of the Tribunal".[17] In essence, it comes down to this: "the Russian Federation stated that it does not accept the arbitration procedure and that it [does] not intend to participate in the proceedings before this Tribunal [but] ultimately it is for the arbitral tribunal to decide whether it has jurisdiction [and not Russia], *compétence de la compétence*".[18]

The ITLOS was convinced by the reasoning of the Netherlands, and followed it. It first "consider[ed] that the absence of a party or failure of a party to defend its case does not constitute a bar to the proceedings and does not preclude the Tribunal from prescribing provisional measures, provided that the parties have been given an opportunity of presenting their observations on the subject".[19] The Tribunal further emphasized that a "non-appearing State is nevertheless a party to the proceedings".[20]

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[13] Public sitting held on Wednesday, 6 November 2013, at 10 a.m., at ITLOS, Hamburg, in the *Arctic Sunrise Case* (*Netherlands* v. *Russia*), ITLOS/PV13/C22/1/Rev.1, p. 5.

[14] *Ibidem*.

[15] *Ibidem*, p. 6.

[16] Art. 53 of the ICJ Statute provides that "[w]henever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim. The Court must, before doing so, satisfy itself, not only that it has jurisdiction […] but also that the claim is well founded in fact and law."

[17] Public sitting held on Wednesday, 6 November 2013, pp. 8–9.

[18] *Ibidem*, p. 12.

[19] ITLOS, *Arctic Sunrise Case* (*Netherlands* v. *Russia*), Order, 22 November 2013, para. 48.

[20] *Ibidem*, para. 51.

It then quoted a paragraph from the ICJ's judgment in the *Nicaragua* case—where the USA failed to appear: "[a] State which decides not to appear must accept the consequences of its decision, the first of which is that the case will continue without its participation [and the second is that] the State which has chosen not to appear remains a party to the case, and is bound by the eventual judgment […]".[21] The Tribunal immediately added that it must always "ensure full implementation of the principle of equality of the parties in a situation where the absence of a party may hinder the regular conduct of the proceedings and affect the good administration of justice".[22] It regretted that "the Russian Federation could have facilitated the task of the Tribunal by furnishing it with fuller information on questions of fact and of law",[23] and it expressed the belief that "the Netherlands should not be put at a disadvantage because of the non-appearance of the Russian Federation in the proceedings",[24] and this meant "the Tribunal must […] identify and assess the respective rights of the Parties involved on the best available evidence".[25] The ITLOS then continued to discuss jurisdiction and the merits. Interestingly, in examining whether it had jurisdiction, the Tribunal referred extensively to the *note verbale* of Russia dated 22 October 2013, treating it as a plea to contest the Tribunal's jurisdiction. This is not how Russia meant it to be interpreted (it is basically only one page long!): it was to be regarded as a mere explanation why Russia decided not to participate.

What is striking about the order, is that the Tribunal based its reasoning with regard to default of appearance entirely on the ICJ case law. It did not refer at all to Art. 28 ITLOS Statute, the provision in the Tribunal's own Statute dealing exactly with this issue. ITLOS judge Paik also pointed out this remarkable fact in his separate opinion. He suggested it might be because it was unclear to his fellow judges whether Art. 28 was applicable also in provisional measures proceedings, but his view—which is convincing—is that it does.

The dispute then moved to Annex VII LOSC arbitration. On 3 March 2014, the Russian Federation sent a letter to the Permanent Court of Arbitration—which facilitated the Annex VII arbitration—informing it of a letter sent to the Netherlands with the message that "the Russian Federation does not accept the arbitration procedure under Annex VII […] proposed by the Kingdom of the Netherlands in relation to the case of "Arctic Sunrise" [and that] the Russian side confirms its refusal to take part in this arbitration and abstains from providing comments both on the substance of the case and procedural matters". The use of language is interesting. It suggested that the Netherlands was *proposing* to settle the dispute by means of arbitration, and that Russia politely declined this proposal. In response, the Netherlands referred to Art. 9 of Annex VII—identical to Art. 28 ITLOS Statute—and requested the Arbitral

[21] *Ibidem*, para. 52. The quote is from ICJ, *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States*), Judgment, 27 June 1986, para. 28.

[22] ITLOS, *Arctic Sunrise Case*, para. 53.

[23] *Ibidem*, para. 54.

[24] *Ibidem*, para. 56.

[25] *Ibidem*, para. 57.

Tribunal to continue the proceedings. The Netherlands thus adopted the same strategy as it had done successfully before the ITLOS.

In an order of 17 March 2014, the Arbitral Tribunal *inter alia* adopted its Rules of Procedure.[26] These rules contained a very detailed rule on default of appearance (Rule 25), which builds on Art. 9 Annex VII LOSC. The first paragraph is basically identical to Art. 9, and then follows the following second paragraph:

> 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 45 days of the Arbitral Tribunal's invitation. The supplemental submission of the appearing Party shall be communicated to the non-appearing Party and the non-appearing Party shall indicate within 15 days of the communication of the supplemental submission whether it intends to submit any comments thereon. If the non-appearing Party indicates that it intends to submit comments on the supplemental submission, it shall do so within 30 days of its indication of intent. 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.

It is not clear how exactly this more detailed rule relates to Art. 9 Annex VII. All the Rules of Procedure say about this relationship is that "the Arbitral Tribunal shall function in accordance with these Rules, the relevant provisions of the Convention, and Annex VII to the Convention".[27]

Following its own rules of procedure, the Arbitral Tribunal decided to continue with the proceedings. It noted that "it remains open to Russia to participate in these proceedings at any stage, in the manner that the Arbitral Tribunal deems appropriate to preserve the integrity and fairness of the proceedings",[28] and that "Russia shall continue to receive a copy of all written communications between the Parties and the Tribunal in these proceedings".[29]

In its memorial of 31 August 2014, the Netherlands once again "regrets the refusal of the Russian Federation to participate in the present arbitral proceedings".[30] In view of the Netherlands, "its non-participation has a negative impact on the sound administration of justice [and it] adversely affects the integrity of the compulsory dispute settlement system under the LOSC".[31] It is even considered a failure by Russia to act in good faith.[32] The Netherlands developed its argumentation in considerable detail, once again referring to the case law of the ICJ. It also referred again to the three-pronged test.[33] It once again explained that a refusal to accept an arbitra-

[26] PCA, *Arctic Sunrise Arbitration* (*Netherlands* v. *Russia*), Procedural order no. 2, 17 March 2014.

[27] Art. 1 Rules of Procedure, annexed to procedural order no. 2.

[28] PCA, *Arctic Sunrise Arbitration*, Procedural order no. 2, para. 3.2.

[29] *Ibidem*, para. 3.3.

[30] *Arctic Sunrise Arbitration*, Memorial of the Kingdom of the Netherlands, 31 August 2014, available at https://pcacases.com/web/sendAttach/1406, para. 36.

[31] *Ibidem*, para. 36.

[32] *Ibidem*, para. 36.

[33] *Ibidem*, paras. 34–59. For the three-pronged test, see para. 50.

tion procedure should be interpreted as identical to a plea contesting the jurisdiction of the arbitral tribunal.[34] In such case, "the regular practice of States […] is to appear before the court of tribunal and challenge its jurisdiction".[35] The Netherlands referred extensively to Art. 9 Annex VII LOSC, but not a single time to the lengthy Rule 25, quoted above. It is not clear why this was done. The Netherlands concluded in its memorial that the Arbitral Tribunal must hold that "the non-appearance of the Russian Federation cannot by itself constitute an obstacle to the Tribunal entertaining the Netherlands' claim [and that] the Tribunal must, on its own accord, examine the question of jurisdiction and make a decision thereon [and that] the Tribunal needs to ensure that the factual and legal requirements of the Netherlands' claim are met [and that] the Russian Federation, which has chosen not to appear, remains a party to the case and is bound by the decision of the Tribunal".[36]

At the end of the memorial, the Netherlands suggested to the Arbitral Tribunal that it should consider the Russian Federation's diplomatic notes in which it explained its non-acceptance and non-participation "as a plea concerning its jurisdiction".[37] In a separate procedural order, the Arbitral Tribunal followed this suggestion and ruled that "the statement by Russia in its *note verbale* dated 22 October 2013, relying on the declaration it made upon ratification of the Convention, that it "does not accept" this arbitration, constituted a plea concerning this Arbitral Tribunal's jurisdiction".[38]

On 26 November 2014, the Arbitral Tribunal issued its award on jurisdiction.[39] Unsurprisingly, in the award on jurisdiction it referred to Russia's *notes verbales* of 22 October 2013 and of 27 February 2014 as "Plea Concerning Jurisdiction". This is most obvious in the Glossary of Defined Terms.[40] The Tribunal basically agreed with the Netherlands that Russia could not rely on its declaration to exclude the present dispute from the Tribunal's jurisdiction. Of note is that Russia refused to pay its share of the costs of the arbitration, which was considerable (150,000 euros).[41]

We then move from the jurisdiction to the merits stage of the arbitration. At the start of the hearings on the merits, the President of the Arbitral Tribunal explained the practical consequences of Russia's non-appearance, as follows:

> In light of the fact that the Russian Federation is not participating in the Tribunal proceedings today and tomorrow, of course at this hearing the Tribunal must seek as much clarification as possible from the Netherlands, and I hope that this is understood by the Netherlands. The Tribunal or any of its members may also have questions for the witnesses presented by the Netherlands at this hearing.[42]

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[34] *Ibidem*, para. 46.

[35] *Ibidem*.

[36] *Ibidem*, para. 58.

[37] *Ibidem*, para. 59.

[38] PCA, *Arctic Sunrise Arbitration*, Procedural order no. 4 (Bifurcation), 21 November 2014.

[39] PCA, *Arctic Sunrise Arbitration*, Award on Jurisdiction, 26 November 2014.

[40] *Ibidem*, p. iv. See also paras. 5–6, 18, 41, 48, 48, 59, and 65–78.

[41] *Ibidem*, paras. 31–32.

[42] PCA, *Arctic Sunrise Arbitration*, Hearing, Day 1, Tuesday, 10 February 2015, transcripts, p. 2.

At the second day of the hearings, the Netherlands delegation expressed its frustrations, as follows:

> I would like to start out with the continuing and regretful situation of the absence of our counterparts; we have been looking at an empty table the past few days. As I mentioned before, and I wish to reiterate, we continue to regret the non-participation of the Russian Federation. Also, I think this complicates the task of the Tribunal in establishing whether the claim that the Netherlands is making is well-founded in fact and in law.[43]

The Netherlands then made a very interesting reference to a judgment of the International Court of Justice, delivered only a few days before the hearing before the Arbitral Tribunal. In this judgment, the ICJ noted that "whilst the burden of proof rests in principle on the party which alleges a fact, this does not relieve the other party of its duty to co-operate in the provision of such evidence as may be in its possession that could assist the Court in resolving the dispute submitted to it".[44] After quoting this paragraph of the ICJ's judgment to the Tribunal, the Netherlands delegation continued as follows:

> This is exactly the difficulty with the current case, in which our opponents have chosen not to appear, in spite of their duty to co-operate such as formulated by the International Court of Justice. Thus, evidence that may be of assistance to this Tribunal is not fully available to you; and the difficulty in establishing facts in a case directly influences determination and application of the relevant law.[45]

In its award on the merits of 14 August 2015, the Arbitral Tribunal again explained how it had dealt with the non-appearing Russians. It continued the proceedings, whilst at the same time taking all sorts of measures to "safeguard Russia's procedural rights".[46] The list of measures taken was long. The Tribunal had:

- Ensured that all communications and materials submitted in this arbitration have been promptly delivered, both electronically and physically, to the Russian Ministry of Foreign Affairs in Moscow and to the Ambassador of Russia to the Netherlands in The Hague;
- Granted Russia adequate time to submit responses to the written pleadings submitted by the Netherlands;
- Provided Russia adequate notice of procedural meetings and the hearing in the case;
- Promptly provided Russia with copies of recordings and/or transcripts of procedural meetings and the hearing; and
- Reiterated the right of Russia to participate in the proceedings at any stage.[47]

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[43] PCA, *Arctic Sunrise Arbitration*, Hearing, Day 2, Wednesday, 11 February 2015, transcripts, p. 19.

[44] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia* v. *Serbia*), Judgment, 3 February 2015, para. 173.

[45] PCA, *Arctic Sunrise Arbitration*, Hearing, Day 2, transcripts, p. 20.

[46] PCA, *Arctic Sunrise Arbitration*, Award on the Merits, 14 August 2015, para. 9.

[47] *Ibidem*, para. 9.

At the same time, the Tribunal concluded that, "despite its non-participation in the proceedings, Russia is bound under international law by any awards rendered by the Tribunal".[48]

The Tribunal echoed the complaints of the Netherlands. It noted that "Russia's non-participation in the proceedings has made the Tribunal's task more challenging than usual [and that] in particular, it has deprived the Tribunal of the benefit of Russia's views on the factual issues before it and on the legal arguments advanced by the Netherlands".[49] The Tribunal relied heavily on the information provided by the Netherlands. All the witnesses were presented by the Netherlands.[50] Most of the documents were also provided by the Netherlands; the Tribunal only "circulated to the Parties certified English translations of certain Russian laws and regulations that it had considered useful to procure in the course of its deliberations".[51] It did not spend all that much time and energy looking for facts and legal arguments that might support Russia's point of view. As a kind of understatement, the Tribunal "appreciates that the evidence before it may not include all of the evidence that would have been put before it had both Parties participated in the proceedings".[52]

At a very late stage, Russia sent a letter to the Arbitral Tribunal in which it stated its position on the merits.[53] In this paper, Russia emphasized that it "did not participate in the ITLOS proceedings initiated by the Kingdom of the Netherlands […] nor does it participate in the arbitration […]". And then it continued as follows:

> Nevertheless, taking into account that the case highlights issues that are essential for the responsible lawful uses of the EEZ and of the continental shelf, for the legal regime of these maritime areas and for the preservation of the proper balance of coastal and flag States' rights and obligations therein, the Ministry finds it important to address some of those issues.[54]

The Tribunal clearly lost its patience at this stage. It did not take this Russian position paper into account, as it "was brought to the Tribunal's attention at a very late stage of this phase of the proceedings following Russia's consistent failure to participate in this arbitration; and according to Russia, the Position Paper does not constitute a formal submission in this proceeding [and] the Tribunal is satisfied that the relevant issues are fully addressed in this Award".[55]

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[48] *Ibidem*, para. 10.

[49] *Ibidem*, para. 19.

[50] *Ibidem*, para. 58.

[51] *Ibidem*, para. 66.

[52] *Ibidem*, para. 73.

[53] *Ibidem*, para. 68.

[54] The Ministry of Foreign Affairs of the Russian Federation, Certain legal issues highlighted by the action of the Arctic Sunrise against Prirazlomnaya platform, published on the website of the Ministry, at http://www.mid.ru/documents/10180/1641061/Arctic+Sunrise.pdf/bc7b321e-e692-46eb-bef2-12589a86b8a6.

[55] PCA, *Arctic Sunrise Arbitration*, Award on the Merits, para. 68.

4 South China Sea

The second example of arbitration proceedings concerning the application of the Law of the Sea Convention, in which the respondent State did not take part, is the procedure between the Philippines and China.[56] In this section, this procedure is examined in a similar way as the Arctic Sunrise proceedings were examined in the section above. Here, too, we will not dwell extensively on the substantive side of the dispute. So much has been written on the merits of this dispute that an entire library can been filled with scholarly books and articles, especially written by Chinese scientists. The dispute between the Philippines and China relates to historical rights in the South China Sea claimed by China, the legal status of certain maritime features in the South China Sea, and the legality of certain actions of China in the South China Sea, such as the construction of artificial islands and fisheries, which damage the marine environment.[57] This article will focus on the procedural issue of non-participation.

The story is in many ways similar to the Arctic Sunrise story. When ratifying the LOSC, China made a declaration stating that "the Government of the People's Republic of China does not accept any of the procedures […] with respect to all the categories of disputes [which can be excluded from compulsory dispute settlement]".[58] In other words, China did not bother to make a comprehensive list of excluded categories of disputes, as Russia had done; it simply excluded everything from compulsory dispute settlement that it was allowed to exclude.

Unlike the Arctic Sunrise controversy, the dispute between the Philippines and China did not include a provisional measures phase before ITLOS, and thus the litigation immediately went to the Annex VII LOSC arbitration stage. In its memorial submitted 30 March 2014, the Philippines addressed the legal consequences of the non-participating respondent. It reminded the Tribunal that "China's consent to be bound by the LOSC, including the dispute settlement provisions of Part XV, is not in any way vitiated by its decision not to participate in these proceedings".[59] Referring to Art. 9 Annex VII and Rule 25 of the Arbitral Tribunal's Rules of Procedure, the Philippines, "for the avoidance of any doubt […] requests that these proceedings continue" despite China's non-participation.[60] The Netherlands made a similar, formal request. The Philippines then referred to the quote from the ICJ's *Nicaragua* case, which was reaffirmed by ITLOS in the *Arctic Sunrise* case.[61]

The Philippines noted, in its memorial, that "China's non-appearance […] does not mean that the Tribunal has no basis on which to form a view as to China's posi-

[56] See Franckx and Benatar (2017).

[57] See e.g., Gao and Jia (2013), and Zimmermann and Bäumler (2013).

[58] The reservation is available at https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#EndDec.

[59] *South China Sea Arbitration*, The Philippines' Memorial, Vol. I, 30 March 2014, available at https://files.pca-cpa.org/pcadocs/Memorial%20of%20the%20Philippines%20Volume%20I.pdf, para. 1.21.

[60] *Ibidem*. See also para. 7.39.

[61] *Ibidem*, para. 1.22.

tions on the matters before it".[62] Indeed, both before, during, and after the arbitration, various Chinese authorities continuously commented on the proceedings, and the legal and political issues relating to the South China Sea. Remarkable also was the continuous interest from Chinese academics in the issue. An endless flow of academic publications, all of which—without a single exception!—defended the formal Chinese position, were published. In its memorial, the Philippines already directed the Tribunal to the "academic literature that includes the views of individuals closely associated with the Chinese authorities".[63] However, the Tribunal did not consider these articles as representing the views of the Chinese government. This is for good reason, because formally academics function independently of the government. In practice, this might be different, of course.[64] The Philippines did appear to encourage the Chinese authorities and its scholars to continue issuing these statements and to keep publishing these scholarly articles and books, to assist the Arbitral Tribunal in settling the dispute. The Philippines reminded the Tribunal, and indirectly also China, that "nothing prevents China from informally presenting information pertaining to relevant questions of fact or law".[65] Such statements could, at least to some extent, avoid that "the Philippines is in the position of having to guess what China's arguments might be and formulate arguments for both States".[66]

In its memorial, the Philippines already predicted that the Arbitral Tribunal could expect a constant flow of statements from the Chinese government from which the Chinese legal position could without much effort be derived. And this prediction turned out to be correct. "Nevertheless", continued the memorial,

> The Philippines recognizes that China's non-appearance does impose a special burden on the Tribunal, which 'must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law' [and for this reason] the Philippines wishes to assist the Tribunal as far as possible, and to that end has formulated its arguments in the Memorial with this in mind, seeking to take into account the arguments that China might have raised if it had elected to appear.[67]

This Philippines' strategy to humbly offer the Tribunal its services as its fact-finder, law clerk, assistant, etc., proved to be a very effective one.

The most important statement issued by China was its position paper.[68] The Position Paper was formally "intended to demonstrate that the arbitral tribunal established at the request of the Philippines […] does not have jurisdiction over this case". This is an important difference with the Russian *notes verbales*, which were

[62] *Ibidem*, para. 1.23.

[63] *Ibidem*, para. 1.23.

[64] See in particular Yee (2015).

[65] Memorial of the Philippines, Vol. 1, para. 7.41.

[66] *Ibidem*, para. 7.42.

[67] *Ibidem*, para. 1.24.

[68] 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, 7 December 2014, published on the website of the Ministry, at http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml.

not presented as a plea on jurisdiction, but rather as an explanation why Russia decided not to accept the arbitration instituted against it. At the same time, China made it clear that "this Position Paper [shall not] be regarded as China's acceptance of or participation in this arbitration". Because the Tribunal, in China's view, "manifestly has no jurisdiction over the present arbitration […] China's rejection of and non-participation in the present arbitration stand on solid ground in international law". China's thus gave the impression that it was up to China—and not the Tribunal—to decide on the issue of jurisdiction, and when China believed the Tribunal would have no jurisdiction, it was China's right, as a sovereign State, not to accept and participate in the arbitration.

At the hearings on jurisdiction, China obviously was not present. The Philippines sent a big delegation of lawyers, and they did bring up the issue of China's non-participation. They began by stressing the uniqueness of the situation. "What is novel about the present case - or, sadly, what was novel", said the Philippines delegation, "is that China is the first respondent to refuse to participate in proceedings instituted under the United Nations Convention on the Law of the Sea".[69] Shortly before, Russia had done the same in the Arctic Sunrise arbitration, and thus China was, strictly speaking, not the first to do so. "China has nevertheless set forth its jurisdictional objections in detail in its Position Paper which it has communicated to the members of this Tribunal", continued the Philippines delegation, and thus they had something to argue against.[70] The Philippines delegation then addressed these Chinese objections.

At the end of the jurisdiction hearing, the Philippines concluded by flattering the arbitrators, as follows:

> Despite the challenges that China's non-appearance has posed, you have demonstrated your evident determination to 'satisfy [yourselves] … that [you] ha[ve] jurisdiction over the dispute' we have brought before you. Your astute questions, raised both before and during these hearings, have made quite clear that the Tribunal has left no stone unturned. We hope that we have properly and sufficiently addressed all the points that you have raised, and demonstrated why there is manifestly no bar to the Tribunal exercising jurisdiction in this case.[71]

The Arbitral Tribunal confirmed in an award, delivered 29 October 2015, that it had jurisdiction to settle the dispute.[72] The Arbitral Tribunal first summarized, in one sentence, what non-participation amounted to in practice:

> [China] did not participate in the constitution of the Tribunal, it did not submit a Counter-Memorial in response to the Philippines' Memorial, it did not attend the Hearing on Jurisdiction in July 2015, and it has not advanced any of the funds requested by the Tribunal toward the costs of arbitration. Throughout the proceedings, China has rejected and returned

[69] PCA, *South China Sea Arbitration* (*Philippines* v. *China*), Final Transcript Day 2, Jurisdiction Hearing, 8 July 2015, pp. 38–39.

[70] *South China Sea Arbitration*, Final Transcript Day 2, *Ibidem*, p. 39.

[71] PCA, *South China Sea Arbitration*, Final Transcript Day 3, Jurisdiction Hearing, 13 July 2015, p. 79.

[72] PCA, *South China Sea Arbitration*, Award on Jurisdiction and Admissibility, 29 October 2015. Paras. 112–123 relate to the legal and practical consequences of China's non-participation.

> correspondence from the Tribunal sent by the Registry, explaining on each occasion 'its position that it does not accept the arbitration initiated by the Philippines'.[73]

On the advice of the Philippines, the Arbitral Tribunal regarded the Chinese Position Paper as a challenge to its jurisdiction.[74] It referred to the "academic literature by individuals closely associated with Chinese authorities", but did not explicitly affirm that this could be regarded as reflective of the official Chinese position.[75] The Arbitral Tribunal rejected all arguments developed in that paper. It concluded that Art. 9 Annex VII LOSC sought "to balance the risks of prejudice that could be suffered by either party":

> First, it protects participating parties by ensuring that the proceedings will not be frustrated by the decision of the other party not to participate. Second, it protects the rights of non-participating parties by ensuring that a tribunal will not simply accept the claim of the participating party by default. Instead, the Tribunal must satisfy itself that it has jurisdiction and that the claim is well founded in fact and law.[76]

The Tribunal then explained in some detail what it had done to safeguard the procedural rights of both China and of the Philippines.[77] In the end, the Tribunal accepted it had jurisdiction to adjudicate the submissions put before it by the Philippines. This predictably led to a huge amount of publications by Chinese scholars; these publications were without exception critical of the award.[78]

Some of this criticism might be justified. But is China itself not partly to blame? Is it not unfair that China, by being vague as to the exact qualification of some of its arguments, basically left it to the Arbitral Tribunal to make China's claims as strong and legally persuasive as possible? At various times in its pleadings, the Philippines protested about such favorable consequences non-appearance might have. This might motivate States in the future to choose a litigation strategy of non-participation, because you can just let the arbitrators do the work for you, instead of having to pay dearly for expensive legal counsel to develop your arguments. These complaints could also be heard during the hearings on the merits. For example, the delegation of the Philippines reminded the Tribunal that "it is normally up to the Respondent State to assert any applicable jurisdictional exclusions under Articles 297 or 298 as affirmative defenses [and that] China cannot be excused from this burden by virtue of its refusal to formally or physically appear".[79]

On 12 July 2016, the Arbitral Tribunal published its Award on the Merits.[80] This was followed by a response from the Chinese government the next day, and a lot of

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[73] *Ibidem*, para. 112.

[74] *Ibidem*, para. 122.

[75] *Ibidem*, para. 119.

[76] *Ibidem*, para. 115. The Arbitral Tribunal also referred to Rule 25 RoP (para. 119).

[77] *Ibidem*, paras. 117 and 118, respectively.

[78] See e.g., Pemmaraju (2016), Pinto (2016), Talmon (2016), Tanaka (2016), Tiantian (2016), Yee (2016), Sheng-ti Gau (2017), and Yu and Xie (2017) and so on. The list is endless.

[79] PCA, *South China Sea Arbitration*, Final Transcript Day 1, Merits Hearing, 24 November 2015, p. 45.

[80] PCA, *South China Sea Arbitration*, Award on the Merits, 12 July 2016.

critical scientific articles, mainly—but certainly not exclusively—in Chinese scientific journals.[81] The list of scholarly articles supporting the position of the Chinese authorities is endless, and continues to expand to this day, more than 2 years after the award was issued. Of particular note is a Critical Study, published by the Chinese Society of International Law.[82] In this very lengthy study, the Society claims to demonstrate, once and for all, that the Arbitral Tribunal committed so many errors, that its Awards on Jurisdiction and Merits are both invalid and even threaten to undermine the international rule of law.

In the Award, the legal consequences of non-participation were discussed once again. A lengthy chapter was specially devoted to addressing this issue.[83] The Arbitral Tribunal once again started by describing, in a single paragraph, what non-participation came down to in practice.[84]

Turning to the law, the Tribunal first noted that Art. 9 of Annex VII LOSC "expressly acknowledges the possibility of non-participation by one of the parties to a dispute and confirms that such non-participation does not constitute a bar to the proceedings".[85] It is thus a regrettable, but not a prohibited litigation strategy. The Arbitral Tribunal had to allow China's non-participation, at the same time emphasizing that "despite its non-appearance, China remains a party to the arbitration, with the ensuing rights and obligations, including that it will be bound under international law by any decision of the Tribunal".[86]

Similar to what it had done already in the award on jurisdiction, the Tribunal explained in some detail what it had done to ensure a balance of the rights of both parties, as Art. 9 Annex VII prescribed.[87] As disadvantages of non-participation, the Tribunal referred to (1) unnecessary delays and expenses[88]; (2) lack of an opportunity for the Philippines to provide further evidence or argumentation to strengthen its arguments when particularly challenged[89]; and (3) the fact that the Philippines had to guess what arguments China might have put forward if it had decided to take part.[90] The Arbitral Tribunal often requested the Philippines to provide further evidence or clarification in an attempt to mitigate the second disadvantage. And it referred to the Chinese Position Paper, and the many statements made by Chinese authorities over the course of the proceedings, which were used both by the Philippines and the Arbitral Tribunal itself as reflective of the Chinese position, as way to mitigate the third disadvantage.

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[81] See e.g., Oude Elferink (2016b), Sofaer (2016), Whomersley (2016), and Talmon (2017).

[82] Chinese Society of International Law (2018).

[83] PCA, *South China Sea Arbitration*, Award on the Merits, paras. 116–144.

[84] *Ibidem*, para. 116.

[85] *Ibidem*, para. 117.

[86] *Ibidem*, para. 118.

[87] *Ibidem*, paras. 121 (China), and 122–128 (Philippines).

[88] *Ibidem*, para. 123.

[89] *Ibidem*, paras. 124–125.

[90] *Ibidem*, paras. 126–128.

Three arguments developed in the Chinese Position Paper are of particular interest. First, China claimed that "not accepting or participating in arbitral proceedings is a right enjoyed by a sovereign State".[91] It is clear that the Arbitral Tribunal interpreted this as saying that China considered non-participation in the arbitration to be "its lawful right under the Convention".[92] From a letter written by the Chinese Ambassador in The Hague, the Tribunal equally concluded that China believed to have a "legitimate right" under the LOSC not to "accept any imposed solution or any unilateral resorting to a third-party settlement," a right that the Philippines had supposedly breached by initiating the arbitration.[93] Is there really a *right* not to participate, and if so, what does that right entail exactly? Second, initiation of the proceedings by the Philippines was regarded as an "abuse" of the compulsory arbitration procedures.[94] And third, China seemed to distinguish between (1) contesting the jurisdiction of the Tribunal, (2) non-acceptance of the arbitration and the award issued as a result of it, and (3) non-participation in the arbitration.[95] The Tribunal did not really address the first and third of these arguments in great depth. Instead, it simply applied Art. 9 Annex VII LOSC to the present dispute.

The Tribunal emphasized that Art. 9 Annex VII makes clear that "there is no system of default judgment under the Convention" and thus "the Tribunal does not simply adopt the Philippines' arguments or accept its assertions untested".[96] At the same time, Art. 9 of Annex VII LOSC "does not operate to change the burden of proof or to raise or lower the standard of proof normally expected of a party to make out its claims or defenses".[97] In other words, the non-participation of China should not have as consequence that the Arbitral Tribunal takes over all submissions put forward by the Philippines. But it should also not have the consequence that the Philippines now have to provide much more evidence and clarifications, because their arguments are now contested by the Tribunal itself, as opposed to respondent State China. However, as the Arbitral Tribunal seemed to acknowledge, in a way this is exactly what happened. The Tribunal constantly asked the Philippines to produce more evidence, to provide more witnesses, to give more elaborate argumentation, etc.[98] The Tribunal even appointed additional experts and undertook additional archival research itself![99] This does give the impression that non-participation pays off: you can simply let the applicant State, together with the Arbitral Tribunal, do all the work for you! Of course, that is not entirely true. The applicant might, at the request of the Tribunal, uncover lots of additional facts and

[91] *Ibidem*, para. 127.
[92] *Ibidem*, para. 11.
[93] *Ibidem*, para. 51.
[94] *Ibidem*, para. 127.
[95] *Ibidem*, para. 61. See also para. 54.
[96] *Ibidem*, para. 129.
[97] *Ibidem*, para. 131.
[98] *Ibidem*, paras. 131–142.
[99] *Ibidem*.

evidence, but you cannot expect it to produce evidence that clearly refutes its own argumentation. The Tribunal never asked it to do so.

To summarize, this is what had happened:

> In line with its duties under Annex VII to the Convention, in the circumstances of China's non-participation, the Tribunal has taken steps to ensure procedural fairness to both Parties without compromising the efficiency of the proceedings. The Tribunal has also taken steps to ascertain China's position on the issues for decision, based on statements made by Chinese officials publicly and in communications to the members of the Tribunal. In addition to its thorough review of the materials placed before it by the Philippines, the Tribunal has also taken steps to satisfy itself of its jurisdiction and the legal and factual foundations of the Philippines' claims through obtaining independent expert input, reviewing other materials in the public domain, and inviting further comments from the Parties on those sources.[100]

This led the Arbitral Tribunal to basically agree with all submissions put forward by the Philippines. China lost on all counts. This should, of course, be taken into consideration when States consider using the litigation strategy of non-participation in the future. So far—looking at the Arctic Sunrise and South China Sea arbitrations—it has only led to a complete defeat by the non-appearing State.

5 Comparing the Two Cases

The basic rule is that the participating State cannot be disadvantaged by the non-participation of its opponent. This means that the dispute settlement mechanism must do its utmost to avoid unnecessary costs and delays in the procedure. The participating State must also be given the opportunity to respond to arguments that the non-participating State could have put forward. This is a difficult task, because one can only guess what the legal argumentation could be of a non-participating State. The dispute settlement mechanism must ensure fair litigation. Pursuant to this goal, the Arbitral Tribunal therefore sent all procedural documents to the non-participating State on an ongoing basis. The non-appearing State was kept constantly informed of all developments in the procedure, and was invited again and again to take part in the procedure. The dispute resolution mechanism must also resist the temptation to simply take over the arguments of the participating state. It must constantly realize that it lacks a proper treatment of the non-participating State's argumentation, and that it must therefore actively seek out facts and legal arguments that can support the position of the non-participating State. That the participating State indicates its willingness to assist the Tribunal in this formidable task is of course sympathetic, but one can wonder how earnest the efforts will be of the lawyers of the participating State to undermine their own argumentation. The dispute settlement mechanism can, of course, call in experts of its own, and subject the experts of the participating party to a critical cross-examination. It can also look for

[100] *Ibidem*, para. 144.

historical documents and other evidence that works in favor of the non-participating State. This happened in the dispute concerning the South China Sea. But the non-participating State is much better able to gather such evidence. What is also unfortunate is that the non-participating State refuses to pay its contribution to the costs of the arbitration, and arbitration is not free. The question remains whether non-participation is only an annoying practice, or whether it can also be qualified as in violation of the principle of good faith. It is to be hoped that Russia and China have not created a trend of non-participation. If the Arbitral Tribunal had been a bit tougher on the non-participating State, for instance by concluding that non-participation is indeed contrary to the principle of good faith, or by going a bit more in the direction of pronouncing a kind of default judgment, in which the plaintiff's claim is more or less fully adopted, unless this is obviously contrary to the law, then in the future States would think twice before choosing a litigation strategy of non-participation.

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