

The South China Sea Arbitration

A Chinese Perspective

Edited by

Stefan Talmon
and
Bing Bing Jia



• H A R T •
PUBLISHING

OXFORD AND PORTLAND, OREGON

2014

Published in the United Kingdom by Hart Publishing Ltd
16C Worcester Place, Oxford, OX1 2JW
Telephone: +44 (0)1865 517530
Fax: +44 (0)1865 510710
E-mail: mail@hartpub.co.uk
Website: <http://www.hartpub.co.uk>

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786
USA
Tel: +1 503 287 3093 or toll-free: (1) 800 944 6190
Fax: +1 503 280 8832
E-mail: orders@isbs.com
Website: <http://www.isbs.com>

© The editors and contributors severally 2014

The editors and contributors have asserted their right under the Copyright, Designs and Patents Act 1988, to be identified as the authors of this work.

Hart Publishing is an Imprint of Bloomsbury Publishing plc.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, without the prior permission of Hart Publishing, or as expressly permitted by law or under the terms agreed with the appropriate reprographic rights organisation. Enquiries concerning reproduction which may not be covered by the above should be addressed to Hart Publishing Ltd at the address above.

British Library Cataloguing in Publication Data
Data Available

ISBN: 978-1-84946-547-2

Typeset by Criteria International Ltd
Printed and bound in Great Britain by
TJ International Ltd, Padstow, Cornwall

Preface

Books on important international law cases are normally written only after the parties have submitted their memorials and presented their oral arguments, and the court or tribunal has finally rendered its judgment. The *South China Sea Arbitration* will, in our view, be one of the landmark cases in international law because of the parties involved, the legal questions to be decided and the absence of one of the parties. In a situation not dissimilar to the famous *Nicaragua* case before the International Court of Justice in the 1980s, China, one of the world's major powers and a permanent member of the United Nations Security Council, has decided not to participate in arbitral proceedings instituted by the Philippines under the United Nations Convention on the Law of the Sea (UNCLOS) with regard to the disputes between the two countries in the South China Sea.

China has made it clear from the outset that it will not have any part in the arbitral proceedings because it considers the Tribunal seized with the case to be evidently without jurisdiction and the claims made to be clearly inadmissible and manifestly unfounded. The Arbitral Tribunal will thus receive written memorials and hear oral submissions from the Philippines only. It seems unlikely that China will follow the example of the United States in the *Nicaragua* case and set out its position in an official publication that will be submitted to the Tribunal in an informal manner 'to be made available to anyone at the [Tribunal] interested in the subject',¹ or that it will set out its legal position in letters or other informal communications to the Tribunal. The Chinese position will thus most likely go unheard. China's default of appearance will make the task of the Arbitral Tribunal more than difficult as the factual and legal situation in the South China Sea is 'highly complex'.² However, the Arbitral Tribunal is under an obligation, before making its award, to satisfy itself not only that it has jurisdiction over the dispute, but also that the claims brought by the Philippines are well founded in fact and law.³

The book aims to offer a specifically Chinese perspective on some of the legal issues before the Arbitral Tribunal, to present the Tribunal with a fuller picture of the facts underlying the Philippines' claims, and thus to assist the Tribunal in meeting its obligations under UNCLOS. The

¹ See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, 44 [73].

² United Nations General Assembly, Law of the Sea: Report of the Secretary-General, UN Doc A/47/623 (24 November 1992) 14 [33].

³ UNCLOS Annex VII, art 9.

book does not, however, deal with the merits of the disputes between the Philippines and China, but focuses on the questions of jurisdiction, admissibility and other objections, which the Arbitral Tribunal will have to decide as a preliminary matter. The book hopes to show that there are considerable obstacles to the Tribunal deciding the case on the merits and that it would be well advised to refer the disputes back to the parties in order for them to reach a negotiated settlement.

The book does not intend to set out or represent in any way the official position of the Chinese Government but endeavours to serve as a kind of *amicus curiae* brief of interested academics acting in their capacity as independent experts of international law. As pointed out by Salmon LJ, 'the role of an *amicus curiae* [is] to help the court by expounding the law impartially, or if one of the parties [is] unrepresented, by advancing the legal arguments on his behalf'.⁴ By advancing possible legal arguments on behalf of the absent respondent, the book hopes to serve the administration of justice and to strengthen the rule of law.

The editors would like to express their gratitude for editorial assistance to Holly Wesener JD and Steven Reinhold MJur who were ably assisted by Franca Maurer, Kathrin Wiesche, Katja Breucker and David Bieger, student assistants at the Institute for Public International Law at the University of Bonn.

Stefan Talmon
Institute for Public International Law
University of Bonn

Bing Bing Jia
School of Law
Tsinghua University, Beijing

⁴ *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229, 266.

Contents

<i>Preface</i>	v
<i>Abbreviations</i>	xi
<i>Contributors</i>	xiii
<i>Table of Cases</i>	xv
<i>Table of Treaties</i>	xxi
<i>Table of National Instruments</i>	xxiii
1. Introduction	1
<i>Bing Bing Jia and Stefan Talmon</i>	
I. The Disputes between the Philippines and China in the South China Sea	1
II. The South China Sea Arbitration	8
2. The South China Sea Arbitration: Is There a Case to Answer?	15
<i>Stefan Talmon</i>	
I. Introduction	15
II. Default of Appearance in Historical Perspective	18
III. The Consequences of Default of Appearance	19
IV. Possible Preliminary Objections to the Philippines' Claims	25
1. Lack of Jurisdiction of the Arbitral Tribunal	25
a. Limited Subject-Matter Jurisdiction	26
(1) Lack of Dispute between the Parties	27
(2) Subject-Matter outside the Jurisdiction of the Tribunal	30
(a) Sovereignty and other Rights over Land Territory	31
(b) Historic Titles and Historic Rights	48
b. Ipso Jure Limitations on Jurisdiction	54
c. Optional Exceptions to Jurisdiction	56
2. Inadmissibility of the Claims	59
a. Obligation to Exchange Views	59
b. Commitment to Other Means of Dispute Settlement	63
3. Other Objections of a Preliminary Character	66
a. Indispensable Third Parties	66
b. Abuse of Legal Process	70
V. The Politics of Arbitration	71
VI. Conclusion	75

3. Issues of Jurisdiction in Cases of Default of Appearance	81
<i>Michael Sheng-ti Gau</i>	
I. Introduction	81
II. Default of Appearance and Ensuing Duties of the Tribunal	83
III. The Requirement of a Dispute between the Parties	86
1. Determination of the Disputes	86
a. The First Group of Claims Concerning China's Maritime Areas in the South China Sea	87
b. The Second Group of Claims Concerning Sovereignty of Certain Reefs	91
c. The Third Group of Claims Concerning the 'Rock'-Status of Certain Reefs	94
d. The Fourth Group of Claims Concerning the Philippines' Claim to Maritime Zones and Corresponding Rights in the South China Sea	95
e. The Fifth Group of Claims Concerning the Right to Navigation	96
f. Conclusion	97
2. The Real Disputes between the Parties	98
3. Identity of Disputes under Section 1 and Section 2 of the Convention	101
IV. The Requirement that the Disputes Concern the Interpretation or Application of the Convention	102
V. Disputes Removed from Compulsory Jurisdiction under Article 298 UNCLOS	103
VI. Conclusion	105
4. The Issue of Admissibility in Inter-State Arbitration	107
<i>Bing Bing Jia</i>	
I. Introduction	107
II. Primary Obligation to Negotiate: Article 281(1) UNCLOS	110
1. Agreement to Seek Settlement by Negotiations	111
a. Agreement as Evidenced in the 2002 Declaration and Other Official Documents Issued Jointly by China and the Philippines	111
b. Agreement in the Form of the Treaty of Amity and Cooperation of 1976, as Amended	115
c. Conclusion	116
2. No Relevant and Conclusive Proof as to the Failure of Negotiations	116
a. Negotiations Undertaken under the 2002 Declaration and Other Related Official Documents	116
b. Negotiations under the Treaty of Amity and Cooperation in Southeast Asia	121
c. Conclusion	121

3. Exclusion of Further Procedures	122
a. Exclusion under the 2002 Declaration	122
b. Exclusion under the Treaty of Amity and Cooperation in Southeast Asia	123
c. Conclusion	124
4. Summary	124
III. Defects of Certain Claims	125
1. Mootness of Claims	125
2. Vagueness of Claims	127
IV. Abuse of Rights/Procedure	128
V. Estoppel	131
VI. Conclusion	135
5. Jurisprudential Tenability of the Philippines v China Arbitration on South China Sea Disputes?	137
<i>Haiwen Zhang and Chenxi Mi</i>	
I. Introduction	137
II. What Are the Philippines' Claims against China?	138
III. China's Reasons for Refusing the Philippines' Arbitration Request	141
1. Failure to Fulfil in Good Faith Legal Obligations under UNCLOS	141
2. Serious Legal Flaws in the Notification and Statement of Claim	146
3. Breach of Numerous Declarations and Bilateral Agreements	148
IV. Chinese Policy toward Resolution of the South China Sea Disputes	149
1. The Essence of the South China Sea Disputes	149
2. Integrity of the Dispute Settlement System under UNCLOS	151
3. Peaceful Settlement of the Disputes through Negotiations	152
V. Future of the Arbitration	153
1. Possibility of the Philippines Revising Its Claims or Introducing New Ones	153
2. Attitude of Vietnam toward the Case	154
3. Attitude of Taiwan Authorities toward the Case	155
VI. Conclusion	156
6. Annexes	
I. Selected Documents Relevant to the South China Sea Arbitration	159
II. Select Bibliography on the South China Sea Dispute	219
III. Glossary of Place Names	229
<i>Bibliography</i>	233
<i>Index</i>	241