The South China Sea 
Arbitration 

A Chinese Perspective

Edited by

Stefan Talmon
and
Bing Bing Jia

OXFORD AND PORTLAND, OREGON
2014
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].
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

Preface v
Abbreviations xi
Contributors xiii
Table of Cases xv
Table of Treaties xxii
Table of National Instruments xxiii

1. Introduction 1
Bing Bing Jia and Stefan Talmon
   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
Stefan Talmon
   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

Michael Sheng-ti Gau

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

Bing Bing Jia

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  
   a. Exclusion under the 2002 Declaration  
   b. Exclusion under the Treaty of Amity and Cooperation in Southeast Asia  
   c. Conclusion  
4. Summary  
III. Defects of Certain Claims  
   1. Mootness of Claims  
   2. Vagueness of Claims  
IV. Abuse of Rights/Procedure  
V. Estoppel  
VI. Conclusion  

5. Jurisprudential Tenability of the Philippines v China Arbitration on South China Sea Disputes?  

Haiwen Zhang and Chenxi Mi  
I. Introduction  
II. What Are the Philippines’ Claims against China?  
   III. China’s Reasons for Refusing the Philippines’ Arbitration Request  
   1. Failure to Fulfil in Good Faith Legal Obligations under UNCLOS  
   2. Serious Legal Flaws in the Notification and Statement of Claim  
   3. Breach of Numerous Declarations and Bilateral Agreements  
IV. Chinese Policy toward Resolution of the South China Sea Disputes  
   1. The Essence of the South China Sea Disputes  
   2. Integrity of the Dispute Settlement System under UNCLOS  
   3. Peaceful Settlement of the Disputes through Negotiations  
V. Future of the Arbitration  
   1. Possibility of the Philippines Revising Its Claims or Introducing New Ones  
   2. Attitude of Vietnam toward the Case  
   3. Attitude of Taiwan Authorities toward the Case  
VI. Conclusion  

6. Annexes  
   I. Selected Documents Relevant to the South China Sea Arbitration  
   II. Select Bibliography on the South China Sea Dispute  
   III. Glossary of Place Names  

Bibliography  
Index