The South China Sea Arbitration: A Chinese Perspective


Taisaku IKESHIMA

The South China Sea Arbitration (the arbitral proceedings unilaterally instituted by the Philippines against China in January 2013 under the United Nations Convention on the Law of the Sea (UNCLOS)), has proven to be a particularly high-profile event due to the tense situation in and around South East Asia. The deadlocked negotiation between these two countries after the minor maritime incidents over the territorial sovereignty of the islands and shoals in the South China Sea may well have motivated the Philippine government with various support offered by some interested states to settle the dispute by way of a third-party mechanism of dispute settlement available under international law. China, nowadays a rising super power alongside the United States and one of the five permanent members of the United Nations Security Council (UNSC), has already clarified its intention not to take part in the proceedings and to resolve the territorial and maritime issue through direct talks with the parties concerned, including the Philippines.\(^1\) China’s rebuff was disappointing, particularly for the international lawyers who were looking forward to the possible outcome of a small powerless country beating a super-power by way of legal justice. It is little wonder, however, that those who cast a doubtful eye on the proceedings from the beginning may have taken this outcome for granted in the light of past precedents such as the Nicaragua case brought before the International Court of Justice (ICJ), regardless of the future results of the proceedings.
It is timely and welcome that a book on the ongoing South China Sea Arbitration has been published because it ‘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 curie brief of interested academics acting in their capacity as independent experts of international law’ with a hope of serving ‘the administration of justice’ and of strengthening ‘the rule of law’ (p. vi).

The book consists of six chapters. In the first half of Chapter 1, Bing Bing Jia and Stephan Talmon, the editors, explain the geographical and historical background of the dispute; they particularly stress a regional approach to settling disputes through friendly consultation and negotiation between the States directly concerned. The second half of the chapter is an outline of how the arbitral proceedings started, from the Philippines’ unilateral Notification and Statement of Claim (NSC) in 2013 to the Arbitral Tribunal’s issuance of its first Procedural Order regarding the deadline for the submission of the Philippines’ Memorial.

Chapter 2, ‘The South China Sea Arbitration: Is There a Case to Answer?’, by Talmon, is an in-depth examination of China’s non-appearance before the Tribunal from historical, juridical, and political perspectives, implying that to ‘challenge the jurisdiction of the tribunal’ ‘seems to be the reason for China’s non-appearance’ (p. 16). Talmon summarises the precedents regarding a party refusing to appear before the Permanent Court of International Justice (PCIJ) or the ICJ, and analyses the consequences of non-appearance under Article 9 of UNCLOS’s Annex VII (‘Default of appearance’), which Talmon interprets as being designed ‘to protect both parties: the appearing party against any attempts at frustrating the arbitral proceedings and the non-appearing party against any unjustified and frivolous claims’ (p. 19). Talmon then addresses China’s preliminary objections to the Philippines’ claims on three grounds: the Arbitral Tribunal’s lack of jurisdiction, the inadmissibility of the claims, and the other objections of a preliminary character. Because the Philippines’ claims include the question of sovereignty over the reefs and any other insular land territory in the disputed maritime area, as Talmon states, the Tribunal has no jurisdiction. The same can be said of China’s position with respect to historic titles and rights, the dispute over which is outside the jurisdiction of the Tribunal. Moreover, the Philippines’ claims have been blocked from the beginning by China’s Declaration under Article 298 of UNCLOS.
(‘Optional exception to applicability of section 2’ of Part XV of UNCLOS).

As regards the requirement that the claims be admissible, in Talmon’s view, the Philippines has not fulfilled the obligation to exchange views under Article 283 of UNCLOS, and is also obliged, under Article 281(1) to refrain from submitting a dispute to a compulsory settlement of disputes mechanism, in accordance with the Declaration of the Conduct of Parties in the South China Sea (DOC). Talmon also presumes that the reason the Philippines adopted ‘such a confrontational approach’ is ‘to publicise its case against China to the world’, as ‘the proceedings appear to be an end in themselves’ (p. 72). In conclusion, Talmon is of the opinion that none of the thirteen points of the ‘Relief Sought’ by the Philippines can legitimately include any dispute over the interpretation and application of UNCLOS, nor is the conflict that falls within the Tribunal’s jurisdiction.

Chapter 3, entitled ‘Issues of Jurisdiction in Cases of Default of Appearance’ (by Michael Sheng-Ti Gau), discusses several major defects in the Philippines’ claims which demonstrate that the case does not fall within the Tribunal’s jurisdiction. For Gau, there is neither a legitimate dispute between the two parties nor jurisdiction for the Tribunal to hear a case; he asserts that the question of the parties’ maritime zones in the South China Sea cannot be decided without also determining the question of territorial sovereignty over the disputed islands (i.e. the Nansha [Spratly] and Zhongsha [Macclesfield Bank, including Scarborough Shoal] Archipelagos) as well as their maritime features (i.e. reefs and rocks therein). He denies the Philippines’ assumption that China’s claims to the maritime zones in the South China Sea are based on the so-called “nine-dash line”, and refutes its ‘misconception’ that China is not a coastal State in the South China Sea as there can only be the Philippines exclusive economic zone (EEZ) or high seas in the region. He repeatedly stresses that the real disputes between the two parties are over territorial and maritime boundaries in the South China Sea, and rightly points out that these disputes ‘cannot be separated from the disputes artificially cut out of these disputes and presented to the Tribunal’ (p. 103). Gau concludes that China’s 2006 declaration under Article 298 of UNCLOS, which precludes a territorial dispute and maritime delimitation from the jurisdiction of the compulsory procedures of dispute settlement under UNCLOS, removes the current case from the Tribunal’s jurisdiction.
Chapter 4, ‘The Issue of Admissibility in Inter-State Arbitration’, is by co-editor Bing Bing Jia. He maintains that the Philippines’ claims, outlined in the NSC, are inadmissible on the following four grounds: first, Article 281 (1) of UNCLOS (a procedure where no settlement has been reached by the parties and the agreement between the parties does not exclude any further procedure); second, defects in certain claims in the Notification, in the form of the mootness or vagueness of those claims; third, Article 300 of UNCLOS (‘Good faith and abuse of rights’); and lastly, contamination of arbitral jurisdiction due to the consequences of estoppel. In the light of the application and interpretation of Article 281(1) of UNCLOS, Jia argues that there are at least two agreements (i.e. the DOC and the 1976 Treaty of Amity and Cooperation in Southeast Asia (TAC)) between the two parties to seek settlement of the South China Sea dispute by negotiation. His position is that one of the requirements of Article 281(1) - that all the possibilities of negotiating a settlement be explored and exhausted - has not been met. Moreover, the two agreements mentioned above are purported to exclude all means other than negotiation between the two parties. Without China’s clarification on certain essential points, particularly a precise account of the extent and nature of the waters within the nine-dash line, the claims made by the Philippines are moot and vague. He is also of the view that, under Article 300 of UNCLOS, the Philippines’ unilateral institution of arbitral proceedings despite a prior commitment to resolve the dispute by negotiation ‘is likely to constitute an act of bad faith’ (p. 128) and an abuse of its rights and procedures under UNCLOS. Therefore, ‘as a corollary’ (p. 131), these last two points give rise to the possibility of estoppel.

Chapter 5, ‘Jurisprudential Tenability of the Philippines v China Arbitration on South China Sea Disputes?’ by Haiwen Zhang and Chenxi Mi, deals with China’s reasons for refusing the Philippines’ arbitration request. Zhang and Mi point out that ‘there are deliberate cover-ups and distortions of important facts’ (p. 142) in the NSC, and that the true nature of the dispute between the two countries in the South China Sea is ‘one over territorial sovereignty and sea boundary delimitations’ (p. 146). Zhang and Mi severely criticise the Philippines, stating that ‘[t]he essence of the Philippines’ strategy is to submit issues based on fabricated facts, concealment and misrepresentations to compulsory arbitration under Annex VII
of UNCLOS, put pressure on China, internationalise the South China Sea disputes and try to gain support for its position from the international community’ (p. 152). Reiterating the official position of the Chinese government that the disputes should be resolved ‘through direct negotiations between the parties directly concerned in accordance with international law and historical facts’ (p. 152), Zhang and Mi conclude that the Philippines should ‘recognise that bilateral negotiations in good faith with China are the only path toward achieving a peaceful and definitive settlement of the disputes’ (p. 158).

The final chapter of the book is a set of Appendices. Annex I comprises sixty detailed pages covering ‘Selected Documents Relevant to the South China Sea Arbitration’; Annex II is a useful ten-page ‘Select Bibliography on the South China Sea Disputes’; and Annex III is a helpful ‘Glossary of Place Names’ in both Chinese Pin-yin and English.

This book, as ‘a kind of amicus curiae brief’, is an informative and helpful aid to understanding the Chinese government’s semi-official position on the issue of the South China Sea disputes as well as the famous nine-dash line. Most of the contributors to this book, as experts on this issue, have already expressed their positions with respect to the disputes elsewhere. The reviewer of this book largely shares the overall opinion presented by these authors that the arbitral procedures in question will turn out to be unsuccessful and fruitless. The essence of the arguments laid out here is that because the South China Sea disputes are over territorial sovereignty and other geographical features of the islands, as well as maritime delimitation in the region, the Philippines’ claims in the NSC fall outside the jurisdiction of the Arbitral Tribunal established under Annex VII of UNCLOS.

The multifaceted and thorough survey of the arbitral procedural aspects presented in this book is persuasive, although the overlapping arguments on procedural points and the reiteration of China’s standpoint, which have been previously detailed by different writers in different works, may be redundant for some readers. In addition, even taking into account the nature of this book, a collection of essays written by five writers, the organization of the chapters could have been better. No matter how motivated the Philippine government may have been in instituting an Arbitral Tribunal, the international supporters of this small country against the major power in Southeast Asia will certainly
look forward to a result in favour of the applicant. This is because, regardless of the possible legal reasons covered in this book, their support may be driven by impatience for a revival of the former dream they saw manifested in the *Nicaragua* case brought before the ICJ, where Nicaragua won against the United States.

Finally, though this point is of course beyond the scope of the book under review, it may also be of interest to consider the consequences of an unfavourable result of the arbitral procedures for China and to consider in advance possible consequences of China’s refusal to pay out any award money deemed necessary by the Tribunal. This is because the *Palestine Wall* Advisory Opinion of the ICJ, too, may be a good lesson not only for lawyers interested in the case but for those who sought the endorsement of the ICJ regarding the illegality of Israel’s construction of the walls. In world politics, international law is not all-powerful in resolving an inter-state conflict with so long a history. After reading this book, it is hoped that readers will be able to grasp the role and limits of international law in settling territorial and maritime disputes between states, with a special reference to China’s position concerning its own territory and its statehood. (30 September 2014)

---
