

BOOK REVIEW

**Stefan Talmon and Bing Bing Jia (eds), *The South China Sea Arbitration: A Chinese Perspective*. Hart Publishing, Portland (2014). 274 pp.
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The South China Sea is a highly contested and complex geographical area, semi enclosed by seven nations (Brunei, Indonesia, Malaysia, China, the Philippines, Taiwan and Vietnam), and scattered with an array of islands and other features including reefs, shoals, cays and rocks, many of which are claimed by multiple States.

China claims and occupies a number of islands and other smaller landforms in the region, and is creating new islets with ports, military barracks and airstrips by pumping millions of tonnes of sand onto reefs, including on the appropriately named Mischief and Fiery Cross Reefs in the Spratlys. These works are building what the US Commander of the US Pacific Command, Admiral Harris, has called China's 'great wall of sand'.¹ Other States in the region are also undertaking similar works, although not on the same scale.

In addition to claims to particular features, China also makes a deliberately unspecific claim to an arc of influence marked out by a series of dashes on its map of the region. This is the so-called nine dash line that has appeared on Chinese maps since the 1940s, and which encircles virtually the entire South China Sea.

There are two interconnected bodies of international law of relevance to the ambitions and activities of China and other States in the South China Sea.² The first is the law concerning sovereignty over territory. The second is the law of the sea as set out in the 1982 *United Nations Convention on the Law of the Sea* (UNCLOS),³ to which all States in the region are parties.

The law of the sea borrows the Roman law notion *dominium maris* and so most maritime zone issues flow from the prior question of which State has sovereignty over contested territory. Nonetheless, there are some law of the sea issues separable from sovereignty disputes, including the legal status of the hundreds of islands, rocks, low-tide elevations and reefs. How these are categorised under UNCLOS has major implications for what maritime zones can emanate from them, regardless of who actually owns them. For instance, artificial islands can possess no territorial sea, and uninhabitable rocks cannot have an exclusive economic zone or continental shelf.⁴

Given that South China Sea States are parties to UNCLOS the possibility of turning to UNCLOS's sophisticated dispute settlement system has always seemed a possibility. There was considerable anticipation, therefore, when in January 2013 the Philippines initiated arbitral proceedings against China under UNCLOS.

The Philippines argues that China cannot claim the waters within the nine dash line, as there is clearly no basis for such a claim under UNCLOS, and the area is far and beyond any claim that China would legitimately have even were it sovereign over all the territories it claims. The Philippines also contends that China is unlawfully asserting maritime entitlements from rocks, submerged banks, reefs and low tide elevations that do not qualify as islands under UNCLOS.

China has objected to the case from the outset and taken no part in the proceedings. But outside the courtroom China has given several reasons for rejecting the arbitration, including that the dispute really relates to territorial sovereignty and also concerns maritime boundaries, a matter that China has lawfully excluded from UNCLOS

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¹ Clive Schofield, 'Why the World is Wary of China's "Great Wall of Sand" in the Sea', *The Conversation*, 8 May 2015, <<https://theconversation.com/why-the-world-is-wary-of-chinas-great-wall-of-sand-in-the-sea-40070>>.

² See Chris Ward SC, 'The South China Sea: An Introduction to the Disputes and the Role of International Law' (2014 Justice Richard Cooper Memorial Lecture, Sydney, 17 November 2014).

³ 1833 UNTS 3.

⁴ UNCLOS, art 121(3). For discussion see Robert C Beckman and Clive H Schofield, 'Defining EEZ Claims from Islands: A Potential South China Sea Change' (2014) 29 *International Journal of Marine and Coastal Law* 193. See generally Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (Hart Publishing/Bloomsbury, 2nd ed, 2016).

dispute settlement. While refusing to enter the international courtroom, China nonetheless went to significant lengths to explain aspects of its position in legal terms in a detailed position paper released in late 2014.⁵

The South China Sea dispute has given rise to a large volume of literature that has examined various dimensions of the controversy. And, very prominent among this body of work is *South China Sea Arbitration: A Chinese Perspective*, edited by Stefan Talmon and Bing Bing Jia. The editors of the volume are well known and regarded international law scholars, and they have assembled an impressive list of co-contributors, most of whom are from mainland China. Nonetheless this book is very unusual, for several reasons.

There are relatively few books devoted to a single case in an international court or tribunal.⁶ And there are none, to my knowledge, written in advance of the actual proceedings. As the editors themselves note in the Preface, '[b]ooks 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.'⁷

The book is rendered even more curious by the approach that it takes to the subject matter. It does not seek to offer an independent assessment of the *South China Sea Arbitration*, as most scholarly contributions would normally aspire to. Instead it is designed 'to offer a specifically Chinese perspective on some of the legal issues before the Arbitral Tribunal.'⁸ And it deliberately steers clear of the merits of the case and focuses on the questions of jurisdiction, admissibility and other objections, which the Arbitral Tribunal will have to decide as a preliminary matter.⁹ As such, the authors state that it is designed to be something akin to an *amicus curiae* brief,¹⁰ but one which presents an avowedly Chinese view on the case in the absence of China's participation in the proceedings.

While this book offers an exceptionally detailed and rigorous analysis of the jurisdictional issues, it might legitimately be asked what purpose it serves. China is more than capable of safeguarding its international legal interests. China's calculated non-appearance in the proceedings, coupled with its detailed position paper in late 2014, illustrate that China has ample capacity to advance its position without the type of gratuitous assistance that this book seeks to provide. In any event the book does not appear to have influenced the tribunal's deliberations, nor its award on jurisdiction and admissibility. The work was not cited in the award issued in October 2015, nor in oral argument before the tribunal.

And, most critically, the arbitral tribunal took opposite conclusions to the book on all of the main issues of jurisdiction, concluding that Philippines has presented a case worthy of consideration on its merits.¹¹ Crucially, the tribunal noted that the Philippines had not asked the tribunal to determine contested issues of sovereignty, but rather only to address discrete law of the sea questions that are justiciable, or which may well be so on closer inspection at the merits stage.¹²

While the tribunal accepted it cannot rule on sovereignty, it insisted that it can rule on the law of the sea implications of sovereignty. It can rule on whether an outcrop of land in the South China Sea is an island, rock, low-tide elevation, or submerged feature, from which then flow legal consequences for maritime entitlements. And it can also rule on whether China's land reclamation activities are unlawful because they are damaging the marine environment.

And, so the scene is set for the possible (perhaps now likely) conclusion by the tribunal that there are minimal or no maritime entitlements extending from the reefs and shoals claimed by China. As James Kraska has observed, this would inevitably undermine China's position on the nine dash line, leaving it with perhaps nothing more than small patches of territorial sea.¹³

⁵ Ministry of Foreign Affairs of the People's Republic of China, *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) <http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml>.

⁶ See, for instance, Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge University Press, 1999).

⁷ Stefan Talmon and Bing Bing Jia (eds), *The South China Sea Arbitration: A Chinese Perspective* (Hart Publishing, 2014) v.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.* vi.

¹¹ *Republic of the Philippines v People's Republic of China (Award on Jurisdiction and Admissibility)*, (Permanent Court of Arbitration, 29 October 2015).

¹² *Ibid.*, [153].

¹³ J Kraska, 'A Legal Analysis of the Philippine-China Arbitration', *The Diplomat*, 2 November 2015 <<http://thediplomat.com/2015/11/a-legal-analysis-of-the-philippine-china-arbitration-ruling/>>.

Given that the arbitral tribunal did find that it could proceed to the merits, the *South China Sea Arbitration: A Chinese Perspective* has to a large extent outlived its usefulness as it was aimed specifically at anticipating jurisdictional and admissibility issues. However, the book does have a number of features of enduring value that merit acknowledgment.

The introduction by Bing Bing Jia and Stefan Talmon provides helpful background to the dispute by explaining the geographical context and the timeline for the proceedings (albeit in terms sympathetic to the Chinese view as to its claims in the region). Stefan Talmon's chapter on jurisdiction and the consequences of default of appearance is exceptionally closely argued, and draws upon a wide array of practice, case law and scholarship. Notwithstanding the tribunal's decision there are aspects of this chapter which will continue to have importance for understanding the operation of the UNCLOS dispute settlement system.

The contributions that follow, by Michael Sheng-ti Gau, Bing Bing Jia and Haiwen Zhang and Chenxi Mi do involve a certain degree of repetition of points advanced by Talmon, although there are some additional details added to the mix, particularly in relation to specific areas and maritime features at issue in the arbitration. This analysis, mainly found in the chapter by Michael Sheng-ti Gau will continue to be useful as the parties enter the merits stage. Finally, the book contains three Annexes which reproduce select documents of relevance in the case, including in Annex I the Philippines Notification and Statement of Claim. Annex II contains a select bibliography on the dispute, and Annex III a glossary of place names for all of the islands, islets, rocks and other features to which references is made throughout the book.

In sum, this book provides a thought-provoking contribution to a highly contested dispute that has importance not only for the States in the South China Sea region but for all governments with an interest in the law of the sea and the integrity of the UNCLOS dispute settlement system.