Judicial fact-finding and the South China Sea arbitration

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Heading

The July 2016 Award of the Tribunal in the *South China Sea Arbitration (The Republic of the Philippines v The Peoples' Republic of China)* has been the subject of extensive interest and comment for its findings on rights and maritime entitlements, and the obligations of States under the United Nations Convention on the Law of the Sea ("UNCLOS"). However, the Award is also of interest to arbitration practitioners because of the approach the Tribunal took to judicial fact-finding.

Main findings of the Award

As is well-known, the arbitration was commenced by the Philippines against China on 22 January 2013, alleging various breaches of UNCLOS linked to China's claims to the "nine-dash line". China refused to appear in the proceedings, but set out its objections to the Tribunal's jurisdiction in a December 2014 Position Paper. Under Article 9 of Annex VII to UNCLOS, China's non-participation did not constitute a bar to the proceedings and the arbitration progressed. In its 29 October 2015 Award on Jurisdiction and Admissibility and in the final Award, the Tribunal found that the dispute was within its jurisdiction under UNCLOS. On the merits, the Tribunal found in favour of the Philippines on the main points in issue. Amongst other things, the Tribunal made a number of important statements on the interaction between UNCLOS and claimed historic rights, the nature and features of "low tide elevations", "rocks" and "islands", and the obligations of States in relation to the protection of the marine environment.

Fact-finding by the Tribunal

Aside from the main findings, the Award is of interest to practitioners because of the approach the Tribunal took to judicial fact-finding, in relation to both expert evidence and documentary evidence.

Expert evidence

After seeking the views of the parties in December 2014, and following the conclusion of the hearing on jurisdiction and admissibility in July 2015, the Tribunal appointed an expert hydrographer in August 2015, prior to the merits hearing in November 2015. The Tribunal then proceeded to appoint two further independent experts in February 2016, after deciding, upon a review of the evidentiary record and pursuing its deliberations, that it would benefit from further evidence and clarifications, and from the views of independent experts. The Tribunal appointed an expert to provide an independent

opinion on the environmental impact of Chinese construction on coral reef systems, appointing a further two additional experts to help prepare the report in April 2016 (the "Ferse Report"). It also appointed an expert to provide an independent opinion on Philippines' evidence on navigational safety issues (the "Singhota Report"). The Philippines had produced expert reports in relation to both of these issues.

Documentary evidence

In support of its submissions on the status of features in the South China Sea, the Philippines submitted, amongst other documentary evidence, nautical charts, surveys and sailing directions. However, the Philippines had not provided the original charts of surveys conducted on the features in the Spratly Islands, upon which the Philippines' evidence was based. In April and May 2016, the Tribunal independently obtained historic survey records undertaken by France, the Royal Navy and the Japanese Imperial Navy from the 1860s and 1930s, and provided these to the Parties for comment.

What is interesting is the extent to which the Tribunal relied upon its own fact-finding to support its conclusions (this was clearly motivated by a desire to satisfy itself that the Philippines' claim was well founded, in the absence of participation by China). The Tribunal referred to and relied upon the Ferse and Singhota Expert Reports extensively, in order to support its findings that China violated its obligations under UNCLOS to protect the marine environment and to ensure safety at sea (see for example paragraphs 978-983 and 1084-1108 of the Award). With regard to documentary evidence, as the Tribunal noted in paragraph 331 its Award, many of its conclusions in relation to the status of features in the South China Sea were drawn from the British and Japanese survey information, documentary evidence which it had obtained independently of the Parties.

Powers of courts and tribunals to engage in fact-finding

There is a broad recognition in international arbitration and judicial proceedings of a proactive, inquisitorial approach to adjudication. A wide variety of arbitral rules and laws allow an arbitral tribunal to take a proactive, inquisitorial approach to procedure.

International courts and tribunals such as the International Court of Justice ("ICJ"), International Tribunal for the Law of the Sea ("ITLOS") and ICSID tribunals are all empowered to appoint independent experts, to request the parties to produce documents and evidence and to visit any place connected with the dispute.

Similarly, the rules of the major arbitration institutions also confer a broad power on arbitral tribunals to appoint independent experts and request the parties to produce documents and evidence. Consistent with the inquisitorial approach to adjudication seen in many civil law countries, the ICC Rules provide that the tribunal shall "*establish the facts of the case by all appropriate means*". The LCIA Rules also allow the tribunal to "*conduct such enquiries as may appear … necessary or expedient*" including whether the tribunal should itself take the initiative in ascertaining relevant facts.

The national arbitration laws of many countries – particularly civil law countries – allow a tribunal to proactively investigate the facts. Even the arbitration laws of common law countries such as England and Hong Kong make allowance for the inquisitorial tradition found in international arbitration, allowing the tribunal to decide all procedural and evidential matters, subject to contrary agreement of the parties, including "*whether and to what extent the tribunal should itself take the initiative in ascertaining the facts and the law*" (Section 34 of the Arbitration Act 1996 and Section 56 of the Hong Kong Arbitration Ordinance).

Despite the broad recognition of the inquisitorial powers of a tribunal, the powers of an international arbitration tribunal to engage in an independent fact-finding investigation is generally recognised as being limited to appointing independent experts, examining witnesses and requesting the Parties to produce additional documents and evidence. As noted by the ILA in its 2008 Final Report on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration, "*[b]oth common and civil law acknowledge that arbitrators do not have independent fact-finding powers*" (though Article 3.10 of the IBA Guidelines on the Taking of Evidence in International Arbitration 2010 does foresee a tribunal taking "*any step that it considers appropriate to obtain Documents from any person or organisation*").

Even in cases involving allegations of bribery and corruption – where it is recognised that tribunals in both international commercial arbitration and investment treaty arbitration tribunals have a duty to investigate such allegations – tribunals have limited themselves to requesting evidence and, in certain cases, drawing adverse inferences (see for example *Metal-Tech Ltd v Uzbekistan* (ICSID Case No. ARB/10/3). Of course, the nature of allegations of bribery and corruption is that it will generally be difficult if not impossible for a tribunal to procure evidence without the cooperation of the parties).

The approach of the Tribunal

The proactive approach to fact-finding by the Tribunal in the *South China Sea Arbitration* may be explained in large part by the facts and circumstances of that case. Article 9 of Annex VII of UNCLOS provides that if one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case "*… [b]efore 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*". This obligation was expressly invoked by the Tribunal when explaining its decision to appoint independent experts (both before and after the merits hearing) and to obtain historical evidence regarding the status of maritime features independently of the parties, as well as its decision to request further written submissions from the Philippines, and putting questions to the Philippines prior to and during both hearings (paragraphs 129 to 142 of the Award).

Article 5 of Annex VII of UNCLOS confers a wide discretion upon the Tribunal to determine its own procedure, unless agreed otherwise by the Parties. The Rules of Procedure established by the Tribunal reflected this wide power to fulfil its mandate. Article 24 of the Rules of Procedure allowed the Tribunal to appoint independent experts after seeking the views of the Parties. Article 22 of the Rules of Procedure empowered the Tribunal to require the Parties to produce documents, exhibits or other evidence, but also to "*take all appropriate measures in order to establish the facts including, when necessary, the conduct of a visit to the localities to which the case relates*".

The obligation on a court or tribunal, in the absence of a party, to "*satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law*" is found in nearly identical terms in the rules of international courts and tribunals, most notably in the Statute of the ICJ (Article 53) and the Statute of the ITLOS (Article 28). The obligation is also found in Rule 42(4) of the ICSID Arbitration Rules, which goes on to state that "*[t]o this end, it may, at any stage of the proceeding, call on the party appearing to file observations, produce evidence or submit oral explanations*".

These provisions reflect a strong imperative upon an arbitral tribunal in a State-State arbitration or an investor-State arbitration to take a pro-active approach to fact-finding when one party refuses to participate on the proceedings, because of the public law nature of the dispute. Such disputes entail the review of sovereign acts, and sensitive issues of public policy and international responsibility, which distinguish those proceedings from the private law disputes generally found in international commercial arbitration (this point has previously been made by commentators – see for example de

Brabandere, *Investment Treaty Arbitration as Public International Law* (CUP, 2016)).

Comment

Tribunals in State-State arbitrations have, in rare cases, taken similarly proactive steps in relation to fact-finding. For example, the tribunal in the *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v India)* requested a site visit and appointed an expert hydrographer, and the tribunal in the *Indus Waters Kishenganga Arbitration (Pakistan v India)* conducted site visits at the request of the parties. However, the Award in the *South China Sea Arbitration* is notable for the broad exercise of these powers by the Tribunal in seeking "external" evidence, whether by appointing a number of independent experts to review the evidence submitted by the Philippines, or, in particular, independently obtaining additional documentary evidence from publically available sources.

While the approach of the Tribunal in the *South China Sea Arbitration* may be explained by the Tribunal's duty to satisfy itself in the absence of China's participation that it not only had jurisdiction over the Philippines' claims but also that those claims were well-founded, the Award raises the broader question of whether international courts and tribunals should adopt a more active approach to evidence-gathering, more generally. Broad evidence-gathering powers exist in the rules of international courts and investment treaty arbitration tribunals, but they have not generally been exercised in such an active manner as they were in the *South China Sea Arbitration*. This traditionally conservative approach might be explained, not only by the small number of comparable situations of non-participation by one party, but also by a desire on the part of tribunals to ensure that the burden of proof remains firmly with the parties.

Taking the example of investment treaty arbitration, the author is not aware of an Award where the tribunal has obtained factual evidence independently of the parties and then relied upon that evidence in reaching its conclusions (whether in cases where one party failed to participate or where all parties participated). With regard to expert evidence, investment treaty tribunals have more often appointed independent experts to assist them in calculation of damages, rather than to assist with the evaluation of technical or expert evidence submitted by the parties. This conservative approach to fact-finding is not limited to international arbitration tribunals, and the ICJ has been criticised for not appointing independent experts to assist it in technical cases, or appointing internal "*experts fantômes*", whose conclusions are not made available to the parties (e.g. Joint Dissenting Opinion of Judges Al- Khasawneh and Simma in the *Case Concerning Pulp Mills on the River Uruguay*). Similarly, there are a limited number of cases where the ICJ has requested parties to provide factual evidence (e.g. the *Corfu Channel Case* and the *Hostages Case*), but it has never made an express adverse inference where a party has not provided such evidence.

The Tribunal in the *South China Sea Arbitration* was, in the author's view, notably active in its approach to judicial fact-finding. Given the high-profile nature of the case, it will be interesting to see whether the Award inspires international courts and tribunals to exercise their fact-finding powers more broadly, whether or not both parties appear.