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Forecasting the Aftermath of a Ruling on China's Nine-Dash Line

A tribunal is likely to rule on China's hazy claims to South China Sea sovereignty. How Beijing and others react isn't set in stone.

- By [Jerome A. Cohen](#)
- April 20, 2016



The arbitration tribunal of five impartial experts that has been considering the Philippines suit against China under the UN Convention on the Law of the Sea (UNCLOS) will soon hand down its final decision. Although the tribunal will not decide territorial sovereignty questions or set maritime boundaries, it may well determine, among many other issues, whether there is a legal basis for China's notorious "Nine-Dash Line" that ambiguously claims over 85 percent of the South China Sea and whether any of the islands in dispute are entitled to a 200-nautical mile exclusive economic zone.

If, as it promises, Beijing rejects the outcome, it will harm the UNCLOS system that Beijing, which has ratified the agreement, played a significant role in negotiating. It will also hurt Beijing's own interests by reinforcing the image of lawlessness that it has acquired by its expansive territorial claims and assertive maritime actions — including a relentless drive to convert disputed submerged features, low-tide elevations, and rocks into islands, airfields, and ports. There is still hope that Beijing might eventually change course, but it will require a re-commitment to UNCLOS principles from affected Asian nations, and from the United States. It will also require other major countries increasing pressure on China, such as the G-7's surprisingly strong April 11 [statement](#) of support for the arbitration.

In January 2013, the Philippines' stunning [initiation](#) of UNCLOS arbitration against China brought the system of third-party dispute resolution into the world of Beijing's maritime disputes. China insisted then that the UNCLOS tribunal lacked jurisdiction, but refused to submit its jurisdictional objections for the tribunal's impartial decision. In October 2015, the tribunal ruled that it did have jurisdiction over certain issues, and postponed determination of its jurisdiction over other issues until it issued its decision on the merits of the Philippines' claims. That decision is now imminent.

But this is preeminently about politics, not only law. Beijing's opposition reflects the current primacy of highly nationalistic elements within China's military and political leadership over those Chinese international law experts, both within and outside government, who believe that China should test its challenges to the tribunal's jurisdiction and to the Philippine claims before the tribunal itself — regardless of whether or not it's legally obligated to do so. Under the fear-inspiring command of President Xi Jinping, it requires an act of courage for any international law or foreign relations specialist within the government to contradict prevailing policy, although academic debate continues to be allowed.

What will Beijing do in response to the tribunal's impending final award? Ignoring it in silence does not appear to be a feasible option. Some have speculated that a largely adverse decision might lead China to dramatize its protest by withdrawing from the UNCLOS system, as permitted upon one year's notice. Yet denunciation of the treaty could not occur in time to relieve China of its obligation to comply with the arbitration award, and such an extreme reaction to a judgment of the world community would cause China even more long-lasting damage to its reputation than failure to comply. China would also be surrendering its future opportunities to influence the development of UNCLOS as it relates to many other issues important to Beijing.

It seems more likely that Beijing will continue to disparage the decision through official and unofficial statements, contesting its validity on both jurisdiction and the merits. Also, although Beijing chose not to participate in organizing the proceedings, it has already sought to discredit the process by which the tribunal was constituted, even attacking the independence and impartiality of the arbitrators. Its Foreign Ministry recently condemned the arbitration as “a political provocation in the guise of law.” Such attempts, of course, only further harm China's quest for so-called soft power.

Yet the situation is not hopeless. Experience has shown that China's foreign policies and legal positions are not written in stone. An increasingly vigorous effort by those nations that have their own maritime disputes with China to promote their settlement through diplomacy that includes resort to international legal institutions may ultimately prove effective. If all affected nations in the East China Sea and the South China Sea “bombard the headquarters” in Beijing by taking their international law disputes with China to international legal institutions — rather than relying exclusively on endless, fruitless, and unequal bilateral negotiations or American military gestures — there is hope for a turnabout.

Surprisingly, India's Prime Minister Narendra Modi, usually regarded as a nationalistic leader, provided an encouraging example of how a big power should

respond to a disappointing result in UNCLOS arbitration with a weaker neighbor. Despite the fact that India's claims against Bangladesh over jurisdiction in the Bay of Bengal were generally not vindicated, Modi calmly [accepted](#) the July 2014 decision rather than inciting xenophobic popular protests against alleged foreign unfairness. Modi emphasized that the arbitration, by putting hoary divisive issues behind the parties, had established the basis for future cooperation.

Other players in the South China Sea should follow the Philippine example and bring UNCLOS dispute resolution proceedings, not only against China but also against each other, as necessary, in order to stimulate and inform successful negotiations. After threatening to pursue China on several occasions, Vietnam decided that awaiting the outcome of the Philippine case was the safer political course, although it did make its support of the Philippines known to the tribunal. Recent events suggest that perhaps Malaysia and even Indonesia may be tempted by UNCLOS dispute resolution if reported Chinese provocations persist.

Japan's choice is the most interesting to contemplate. If the Philippines arbitration does not invalidate China's "nine dash line," which contains its claims to the South China Sea, then Japan, as an UNCLOS member that supports freedom of navigation, may be able to craft a claim that justifies its own compulsory dispute resolution proceedings against China regarding the South China Sea. (This is true even though Japan is not a South China Sea littoral state.) Yet, like other affected states, Japan has been cautiously awaiting the outcome of the Philippine case. However, Prime Minister Abe's Liberal Democratic Party recently stated that if Tokyo's negotiations with China over maritime issues in the East China Sea continue to flounder, Japan would consider resort to third-party determination.

The Philippine arbitration also highlights an international law challenge for the United States. More than three decades since the completion of the UNCLOS treaty, Washington has yet to ratify it, although in practice the U.S. complies with most of the treaty provisions as customary international law. Despite strong support for ratification from previous American presidents, the Joint Chiefs of Staff, cabinet officers, and leading diplomats and experts from both major political parties, U.S. President Obama decided not to launch a vigorous campaign to obtain a very hostile U.S. Senate's consent to ratification.

Yet American national security increasingly involves law of the sea issues, and the U.S. endorses resort to arbitration against China by other states. Sadly, failure to ratify leaves Washington in the pathetic position of "do as I say, not as I do." American refusal to ratify denies the United States the opportunity to avail itself of UNCLOS dispute resolution possibilities, both as they relate to China, and to other countries that do not accept U.S. maritime claims. This creates the false impression that, in the South China Sea, potentially risky military posturing, which may be necessary but is not sufficient to meet the crisis, is the sole American option for responding to China's law of the sea challenges.

Taiwan, a self-governing island of 23 million, is in the most delicate situation, given that mainland China claims Taiwan as its own, while Taiwan itself purports on occasion to speak for all of China. On the one hand, despite its mistrust of the mainland, the new administration of President-elect Tsai Ing-wen, slated to take office

May 20, is unlikely to abandon the claims that Taiwan has made to the South China Sea under the banner of “China.” On the other hand, Taiwan, eager to eliminate the barriers to its formal participation in the diplomatic world that stem from its status as a quasi-state, is increasingly careful to portray itself as a loyal supporter of the UNCLOS system from which it is currently barred. How Taiwan copes with this dilemma may depend on the substance of the tribunal’s decision. If the tribunal decides that Taiping Island, occupied by Taiwan and the largest of the Spratly island group, is entitled to a 200-nautical mile exclusive economic zone, then Taiwan may gracefully acquiesce in and even explicitly rely on the tribunal’s views.

There are, to be sure, many possibilities for sensible compromises to emerge from sincere negotiations based on authoritative interpretations of UNCLOS rather than overbearing unilateral power. The impressive 2013 fisheries [agreement](#) between Japan and Taiwan, as well as Vietnam’s 2000 Gulf of Tonkin [agreement](#) with China, illustrate the virtues of compromise. Persistent and imaginative horse-trading, informed by relevant international law decisions, can settle territorial disputes, delimit maritime boundaries, provide for the sharing of economic resources, and even convert to exclusively peaceful uses the artificial islands on which Beijing and other powers have constructed potential military facilities. Skilled negotiators can spare China the loss of face it might suffer if explicit reference were made to the arbitration that stimulated any settlement with the Philippines and other countries.

China has been touting its peaceful rise for over a decade, and it has been trying to persuade the international community that it is a responsible great power adhering to the rule of law. In these circumstances, it would be statesmanlike and conducive to Asian peace if Beijing were to accept the arbitration’s outcome and adopt the decision as a platform for negotiations that seek a sensible compromise. In the meantime, the more that other interested states engage with international law of the sea, the better. This might stimulate both China and the United States to reconsider their current postures and act in their different ways to strengthen — not weaken — the UNCLOS system. Given the sensitivity of the seas around China, world peace may depend upon it.

This article is based on an April 14 speech in Taipei at Soochow University. It has been edited for style and length