

Beijing's Defiance in the South China Sea

China refuses to abide by the laws of the sea, even though it ratified the convention.

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Chinese soldiers patrol the Spratly Islands, known in China as the Nansha islands. The sign reads: 'Nansha is our national land, sacred and inviolable.' Photo: Reuters

The Law of the Sea tribunal will issue a much-anticipated verdict on Tuesday on the South China Sea case brought by the Philippines. While that should help to resolve some of the prickly issues surrounding the dispute, the most important aspect may be how China reacts.

China's response will be an important test of whether it can accept a rules-based order. Since Manila brought the case three and a half years ago, the Chinese government has steadfastly refused to participate in the proceedings. It asserts that the tribunal lacks jurisdiction and that it won't comply with its verdict.

China has maintained this stance despite the tribunal's carefully reasoned judgment, rendered in October, that it has jurisdiction to hear at least seven of the Philippines' 15 submissions, and

reserving its judgment on whether it had jurisdiction to hear another seven until the merits phase. The tribunal requested the Philippines to clarify its 15th submission.

In the run-up to the final award, Beijing has embarked on a public-relations blitz to challenge the legitimacy of the tribunal's proceedings. Apart from articles in state media, its salvos have included commentaries by its ambassadors and advertisements in foreign newspapers.

Beijing is wrong to reject the tribunal's jurisdiction. The United Nations Convention on the Law of the Sea makes clear that a party's absence in no way bars proceedings. When China ratified the convention in 1996, it agreed to be bound by its provisions, including those on compulsory dispute resolution. A party can raise jurisdictional objections, but the ultimate determination of jurisdiction falls to the tribunal.

In the current case, the tribunal carefully considered jurisdiction. It addressed objections set out in a position paper posted on the Chinese Foreign Ministry website in December 2014, even though the paper wasn't formally submitted as a pleading in the case. The tribunal also decided to bifurcate proceedings to decide the issue of jurisdiction before hearing the merits of the case.

On matters of substance, the tribunal took great care to only confirm jurisdiction over matters "concerning the interpretation or application of [the] Convention." Matters outside of the scope of the convention, such as ascertaining sovereignty over land features, aren't being considered.

China takes the position that the "essence" of the arbitration is territorial sovereignty, even though the Philippines hasn't asked for a ruling on who owns the land features in the South China Sea. Rather, Manila has asked the tribunal to rule on the status of features (that is, whether a feature is an "island," a "rock," or something short of these) and their maritime entitlements. Beijing's insistence that the arbitration is about sovereignty stems from its erroneous view that this must be resolved before a feature's maritime entitlements can be ascertained.

The tribunal has ruled that the status and maritime entitlement of a feature is determined independently of the question of who owns it. The convention says that an island is entitled to a 200-mile exclusive economic zone (EEZ) and a 12-mile territorial sea, a rock is entitled only to a 12-mile territorial sea, and a low-tide elevation is entitled to no maritime zones of its own.

The Convention defines an "island" as a naturally formed area of land, surrounded by water, and above water at high tide. If it "cannot sustain human habitation or economic life of [its] own," it is a rock. Whether a thing is a fish or a fowl doesn't depend on its master.

China also argues that the subject matter of the arbitration falls within categories of disputes validly excluded from compulsory dispute resolution by its 2006 declaration. The excluded categories are "delimitation" of maritime entitlements, "historic bays or titles," military activities, and law-enforcement activities.

The tribunal reserved judgment on its jurisdiction to rule on submissions relating to whether certain Chinese activities in the South China Sea violate the convention, where a ruling might first require it to delimit the boundary between overlapping maritime entitlements to determine whether these activities took place within the Philippines or Chinese EEZ.

The tribunal also reserved judgment on whether it had jurisdiction to hear submissions relating to China's claim to the South China Sea based on maps showing a dashed line around 90% of its area. That concerns whether the convention is the sole source of maritime entitlements, and whether the dashed line is contrary to the convention.

China hasn't made clear the meaning of the dashed line. It could be a claim to "historic title" over the waters, a lesser claim to "historic rights" or merely a claim to land features contained within the line and maritime zones generated from them in accordance with the convention.

The tribunal first wanted to hear evidence on the nature of China's claims. If it finds that the dashed line is a claim to "historic title," the issue might fall outside its purview given China's 2006 declaration. If the tribunal finds that evidence on the dashed line is inconclusive, a decisive ruling cannot be made. The tribunal might nonetheless declare that insofar as the dashed line is a claim to "historic rights," it is incompatible with the convention.

The tribunal's jurisdiction in the *Philippines v China* case is unassailable. Once its judgment is rendered, it is final and binding on both parties. While noncompliance with the decision might serve China's narrow aim of advancing its claims in the South China Sea, it would undermine its ultimate goal of being recognized as a responsible great power. No country that disrespects international law can truly be a great power in the 21st century.

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