

U.S.-Asia Law Institute NEWS & BULLETIN



Is there a way for Beijing to save face after the South China Sea arbitration ruling?

Jerome A. Cohen says China should look to restart negotiations with the Philippines after the upcoming ruling on the UN Law of the Sea dispute, given its impact on regional peace and its own foreign policy

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International tensions are rising rapidly as D-Day approaches in the Philippines arbitration case against China. Increasingly anxious, Beijing is resorting to a full-court press in the propaganda realm, seeking to justify its refusal to participate in the proceedings, and it has rejected in advance the forthcoming decision of the distinguished arbitration panel of five independent maritime experts. Both the Chinese Society of International Law and the All China Lawyers Association have just issued dutiful supporting arguments.

Rumour even has it that the People's Republic, by enticing many landlocked autocracies and other smaller states with no apparent interest in the South China Sea to endorse its position, may seek to delegitimise the arbitration decision through a majority vote in the UN General Assembly or some other international forum.

The Philippines, by contrast, has done relatively little to publicly lobby its case with the world community, even while doing an excellent job in presenting its legal claims to the tribunal it convened in accordance with the UN Convention on the Law of the Sea. The controversial election of its new president, Rodrigo Duterte, who will take office on July 1, [has created uncertainty](#) about how his government might build upon the platform that the arbitration decision may give him for a better bargaining position in any renewal of previously unsuccessful maritime negotiations with China. There are even recent indications that Duterte might soften his country's maritime position in exchange for massive Chinese economic assistance.

Taiwan finds itself in a third distinctive position. The recently departed administration of president Ma Ying-jeou, himself an international law specialist, went all out to persuade both the world and the tribunal that Taiping Island (Itu Aba), the largest of the disputed Spratly chain and the only one that Taiwan occupies, deserves a 200-nautical-mile "exclusive economic zone". Taipei and Beijing, because they both claim to represent China, take similar positions regarding many of the issues at stake in the arbitration. Yet Taipei, it should be emphasised, unlike Beijing, does not seek to discredit either the tribunal's proceedings or the arbitrators.

Taiwan does not challenge the legitimacy of the tribunal's anticipated application of the Law of the Sea. Quite the contrary, it bemoans the fact that it has been denied the opportunity to take part in the proceedings because of its exclusion from representation in the UN. Nevertheless, it has sought to influence the tribunal's decision about the merits of the issue through submission of an uninvited but skillful "friend of the court" brief prepared by its Chinese (Taiwan) Society of International Law.

To what extent Taiwan's newly elected government, led by the able law scholar Tsai Ing-wen, will alter the legal stands taken by the Ma government concerning the South China Sea remains to be seen. On a related question, apparently in order not to offend Japan, it has made a milder response than Ma to Tokyo's spurious claim that the spit of land it calls Okinotori Island to the east of Taiwan is entitled to an exclusive economic zone.

Moreover, Tsai's defence minister has just announced that their new government would [refuse to recognise any "air defence identification zone"](#) that China might declare after the arbitration decision, in complete disregard of the concerns of its neighbours, a line similar to Washington's.

The United States, increasingly aware of the significance of the forthcoming decision, has not been a passive witness to these disturbing developments. The Obama administration has emphatically addressed the issues through both unusually publicised naval manoeuvres and vigorous diplomatic actions. It has mobilised ever greater direct and indirect pressure upon Beijing to reconsider its refusal to honour its obligation, as a member of the UN convention, to obey the arbitration decision.

The G7, for example, under American influence, [has twice recently issued strong statements](#) to this effect. President Barack Obama has also belatedly asked the US Senate to again consider granting consent to American ratification of the UN convention, which it has shamefully withheld for over three decades, leaving the US in the embarrassing position of supporting the convention from the sidelines.

Moreover, many American non-governmental experts in international law and politics have emphasised the arbitration's importance for China's foreign policy, peace in Southeast Asia and a rules-based world community. The American Society of International Law discussed the issues in April at its annual meeting and included two Chinese experts, who found themselves in rough waters. The Council on Foreign Relations, the Centre for Strategic and International Studies and other prominent think tanks as well as universities have had a number of similar programmes, and quite a few relevant editorials, op-eds and longer articles have been published in major American newspapers and magazines.

China, now evidently worried that it will be condemned by the world community, has been forced to seek support from Mozambique, Slovenia, Burundi and many other weak and distant states. This is ironic, of course, since Beijing has until now argued that powerful states like the US, Japan and India that oppose China on this matter have no right to address it, because they do not border the South China Sea.

Russia, having recently been diminished by its refusal to accept the jurisdiction of another Law of the Sea arbitration panel, has announced its neutrality on South China Sea questions. After losing its dispute with the Netherlands over seizure of a Dutch-flagged Greenpeace ship and crew, Russia found a face-saving way to comply with most of the tribunal's decision without recognising its jurisdiction. Moscow claimed it released the ship and crew in accordance with its national law!

In losing its Law of the Sea dispute with Bangladesh over the Bay of Bengal in 2014, India showed how great powers should accept the decision of an expert panel of independent arbitrators and renew negotiations on that basis.

China and the Philippines, after the arbitration decision, can renew their negotiations and settle the issues by taking account of the decision without formally mentioning it. "Face" is crucial, of course. But with every Beijing propaganda blast, it will become harder to save.

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