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OPINION

Beijing's Defiance in the South China Sea

By Lynn Kuok

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

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

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.

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

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.

Ms. Kuok is a fellow at the Brooking Institution and a visiting fellow at Harvard Law School.

Why Britain Belongs in a New Nafta

By Robert B. Zoellick

At critical moments over the past century, the United States has acted boldly and creatively to secure Europe's peace and prosperity. After the fighting of two devastating wars across Europe, America's Marshall Plan spent $120 billion (in current dollars) over four years to spark Western Europe's economic recovery and political integration. In 1949 the U.S., Canada, and Western European states invented NATO as a transatlantic shield. In 1989 President George H.W. Bush moved rapidly yet deftly to unify Germany within NATO and the European Community, setting the cornerstones of a Europe "whole and free."

Britain's vote to exit the EU now launches an uncertain and dramatic course of negotiations and public debates that will shape the future of the British Isles, the EU, transatlantic ties and global growth. The U.S. must have a plan. As during historical pivot points of the past, America must shape events, not wince and dismiss the turmoil in Britain and Europe.

The Brexiters include a group that wants Britain to become an Atlantic Singapore, but also a faction that wants protection against immigration, globalization and change. If the contest for Britain's future is waged principally through the poisoned debate over future relations with the EU, Little Englanders are likely to cramp Britain's future roles and influence.

The U.S. should support Britain's internationalists by offering to negotiate, in concert with Canada and Mexico, a modern trade and investment accord. The three North American nations have fostered economic integration while respecting one another's national independence, in contrast with the EU's model for "shared sovereignty." A new agreement with Britain should move beyond the North American Free Trade Agreement to an agenda that facilitates economic vitality in the 21st century.

The North American offer to Britain must not be presented as an alternative to close British-EU ties. Britain needs both. Equally important, the U.S. negotiations with the EU to create a Transatlantic Trade and Investment Partnership are now even more consequential because they can support EU economic reforms and create a healthy combination of linkages among the U.S., EU and Britain. The three parallel negotiations should prod all parties to lower barriers and invent new rules for cutting-edge economic developments. The best defense against political paralysis, retreat and protectionism is an active offense.

New transatlantic and EU-British economic deals might offer the Scots an alternative to their possible exit from the U.K., too. As a supportive actor in the negotiations in Northern Ireland, the U.S. should also be prepared to help steady the hard-won peace there.

After Brexit, the U.S. must help prevent Europe from slipping into nativism and protectionism.

In addition, the U.S. should help redirect the North Atlantic Treaty Organization security agenda after Brexit. NATO can be another pillar of Britain's internationalism and the basis for future ties with Germany, France and the other European states. NATO leaders need to focus on deterring Russian aggression, organizing an integrated effort against Islamic terrorists and helping to secure the EU's borders.

European publics are likely to turn to nativist policies if the EU cannot secure its borders. The EU is expanding its frontier police, but EU forces and plans are woefully inadequate. The U.S. needs to urge the EU toward accomplishments, not just talk, while assisting through NATO.

In 1989-90, U.S. support for Germany's unification was motivated in part by recognition that a strong U.S.-German partnership would be essential for future transatlantic relations. After the financial crisis and now the Brexit vote, Germany is even more dominant in Europe, although it doesn't want to be seen as dominating. Adroit U.S. diplomacy can help Germany and the EU, too, by strengthening U.S. ties with Germany while reassuring other Europeans. U.S. initiatives should be coordinated with Berlin.

German Chancellor Angela Merkel has led the EU's firm response to Russia's attacks on Ukraine. But some Germans and Southern Europeans want to forgive and forget Russia's aggression. Working through NATO, Washington can reassure Eastern Europeans while demonstrating that the U.S. will pursue diplomacy with Russia as well.

The elections in France early next year may well lead to a government that is willing to pursue structural economic reforms. If so, the U.S. should encourage Germany and France to combine pro-competition reforms with the European Central Bank's monetary stimulation. Monetary policy buys time, but as ECB President Mario Draghi has explained, national governments need to open more pathways for entrepreneurs, small businesses and job creation.

France takes security seriously. U.S. leaders should ask Paris how America might assist France to strengthen military ties with both Britain and Germany, further bolstering transatlantic security.

America's European diplomacy has also benefited from listening to the insights and concerns of Italy, Poland, Spain and smaller countries that appreciate the critical role of European integration in securing democracies and healthy economies while understanding imperfections and frustrations.

From the Marshall Plan through German unification, U.S. diplomacy in Europe has been most effective when Americans recognize that Europeans must decide to help themselves. The U.S. can be a catalyst, organizer, source of ideas and provider of critical assistance in their decisions. U.S. activism inevitably sparks criticism.

But Washington cannot afford strategic detachment from Britain and Europe. The next U.S. president will be as important for Europe's future as were Harry Truman, Ronald Reagan and George H.W. Bush.

Mr. Zoellick is a former World Bank president, U.S. trade representative and deputy secretary of state.

When Startups Put the Fab in Fabricate

By Andy Kessler

The stormy Theranos saga took another turn last week when the company announced that federal regulators were banning founder Elizabeth Holmes for two years from operating a blood-testing laboratory. The Centers for Medicare and Medicaid Services also pulled approval of the company's California laboratory.

Theranos had already voided two years of results from its Edison blood-testing device. It is increasingly unclear whether the secretive company's microfluidics technology, which required only a finger prick instead of a needle jab, ever actually worked.

I'm in no way surprised. After 25 years of tracking and investing in startups, I've learned that entrepreneurs will do anything to make their company successful: persuade, cajole and even put the fab in fabricate.

Entrepreneurs, it seems, all want to emulate the late Steve Jobs—even his fashion, given Ms. Holmes's penchant for black mock turtlenecks. At Apple and Next and Pixar, Jobs emanated what became known as a "reality distortion field." His overpowering charisma would convince workers, developers and investors to come around to his view of where the world was going.

There was only one Steve Jobs, but other entrepreneurs try their own Jedi mind tricks, attempting to use The Force to influence the weak. (In Silicon Valley, "Star Wars" is regarded as a documentary.) Sadly, the journey from charisma to coercion to lying is quick and often complete.

I've been lied to plenty. As an analyst, I once visited a still-prominent Silicon Valley CEO. His stock had just taken a beating, but I liked the firm's prospects and had come to evaluate the opportunity. He looked me in the eyes and said, as I recall, "I don't know why anyone would recommend our stock right now." Then he unloaded all the things that were about to go wrong. Within two months, on better revenue, the stock had almost doubled. It turned out that when I had visited, the company was pricing options for the CEO and other executives. Had I recommended the stock, the exercise price might have been higher, eating into their take.

During the dot-com frenzy, I recall sitting through an initial public offering presentation for eToys.com. A chart of projected e-commerce spending overall showed quarter-by-quarter growth. But the graph with revenue for eToys itself inexplicably switched to six-month numbers. I passed on the deal; they were hiding something. No matter, the public got duped and in May 1999 the stock quadrupled on the first day of trading to a $7.8 billion valuation. The company would file for bankruptcy 22 months later.

It's almost a rite of passage to be pitched an investment with a dodgy PowerPoint deck. There is some ambitious goal, a product road map and then overly precise revenue forecasts: $1 million after one year, $5 million after two, then $20 million. Uh huh. Sure.

Shading the truth in Silicon Valley comes with the territory.

After I figured out the game, I learned a few tricks of my own. At meetings with CEOs or CFOs, I started to notice whether they closed their office door. That might be a sign they didn't want to be overheard stretching the truth. Healthy skepticism is also advisable. This year I was pitched to invest in a Korean company. A billion in sales, multibillion valuation, they said. Can I see audited numbers? No. Can I talk to existing investors? No. Can I meet the CEO? No. Did I invest? Heck no.

If you talk to people who short stocks, the cause célèbre is Tesla. The firm's Model S is imperfect—no cupholders or armrest in the back seat?—but still a nice vehicle. Short sellers note, however, that the company's founder, Elon Musk, has his own battery-powered reality-distortion field. Two years ago, Tesla suggested that it might ship 100,000 vehicles in 2016. Now it has missed the numbers for both first and second quarter, and even 80,000 seems like a stretch.

Yet every time investors get nervous, Mr. Musk makes another outlandish announcement. In May he audaciously suggested that Tesla might have the capacity to ship 500,000 cars by 2018 and a million by 2020. Will he do it? Who knows? But as Morgan Stanley analyst Adam Jonas wrote in May: "Our delivery estimates are largely unchanged. By 2018, we forecast ~108k units, well below the updated target." Add the funky-smelling plan to merge Tesla and SolarCity, another of Mr. Musk's babies, and it might be enough to remind investors that hype is what entrepreneurs do best.

Theranos raised some $700 million and once sported a $9 billion valuation. Backed by a world-class board of investors and prominent politicians, it promised to completely transform a $50 billion market. I was rooting for it. Turned out we don't know if the machine works. When Ms. Holmes said that all was well, she was probably trying to buy time until she could get the technology right. But she wasn't selling toys online: People's health was involved.

Theranos has probably set back the tremendously promising field of microfluidics by a decade. That's a shame—speaking as more than an investor.

Mr. Kessler, a former hedge-fund manager, is the author of "Eat People" (Portfolio, 2011).

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