

The South China Sea Arbitration and Taiwan's Claim: Legal and Political Implications

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Abstract In early 2013, the Philippines initiated the compulsory arbitral procedure under Article 287 and Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS) against China, with regard to their disputes in the South China Sea. Three years later, the ad hoc Arbitral Tribunal rendered its award that declared China's historic rights claim within the U-shaped line unlawful and that none of the Spratly Islands including Itu Aba (Taiping Island) are "islands" entitled to an EEZ. Although the ROC/Taiwan was not the Philippines' intended party in the case, it was brought into the proceedings and became a de facto party. This paper will illustrate how Taiwan became relevant to the South China Sea arbitration and analyze possible legal and political implications for Taiwan. It is suggested that the Philippines-initiated arbitration may have more serious political implications for Taiwan's future claim and position in the South China Sea dispute. In particular, Taiwan should carefully manage the One-China/South China Sea/cross-straits policy triangle after the South China Sea arbitration.

Keywords South China Sea dispute · Philippines v. China · Taiwan · U-shaped line · Itu Aba · "One China" principle

Introduction

The South China Sea is a semi-enclosed sea that spans approximately 3.5 million square kilometers of the earth's water surface, and consists of more than 200 mid-ocean geographical features, which are generally divided into four island groups: The Pratas Islands, the Paracel Islands, the Macclesfield Bank, and the Spratly Islands. The sea is

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surrounded by China, Taiwan, the Philippines, Malaysia, Singapore, Indonesia, Brunei and Vietnam. It is regarded as a crucial international shipping lane and a rich ground of fishing, biodiversity and other natural resources including oil and gas. Since the early twentieth century, the South China Sea has been a ground for contests over territorial sovereignty and maritime rights and interests. The situation became even more complicated after 2009 [1].

On January 22, 2013, the Philippines instigated the compulsory arbitration procedure against the People's Republic of China (China) under Article 287 and Annex VII to the United Nations Convention on the Law of the Sea (UNCLOS), with respect to their dispute over the maritime jurisdiction in the South China Sea (South China Sea Arbitration) [2]. Notwithstanding China's objection and refusal to participate in the Philippine-initiated procedure, the ad hoc Arbitral Tribunal was constituted accordingly with the Permanent Court of Arbitration (PCA) in the Hague, the Netherlands as its Registry. The Arbitral Tribunal went on to first establish its jurisdiction over the case in October 2015. (Jurisdiction/Admissibility Award) [3], then delivered its final decisions on the remaining jurisdictional issues and merits on 12 July 2016 (Merits Award) [4]. Throughout the entire process, China persistently upheld its policy of objection and non-participation, and refused to accept the rulings.

Taiwan (officially the Republic of China, or ROC), though it was not the Philippines' intended counterpart in the arbitration, became involved in the case, as Taiwan's positions with regard to the so-called "U-shaped line" and the Spratly Islands particularly, Itu Aba (Taiping Island or Taiping Dao in Chinese), became directly relevant to the Philippines' arguments and the Tribunal's deliberation. In the end, the Tribunal ruled that Itu Aba—the only island effectively controlled by Taiwan in the Spratly Islands—was legally a "rock" that did not enjoy a 200-nautical-mile EEZ. Taiwan, which also suffered some status and procedural prejudices during the arbitral process, rejected the Tribunal's rulings at both Jurisdiction/Admissibility and Merits stages. The South China Sea arbitration has been one of the most anticipated and controversial cases in recent years. The jurisprudence and conclusions of the ad hoc Tribunal may have far-reaching implications for the South China Sea dispute and for all claims including ROC/Taiwan. This paper will discuss Taiwan's role in the South China Sea arbitration process, and analyze possible implications of the arbitration for Taiwan.

Summary of Key Issues and Outcome of the South China Sea Arbitration

In the proceedings against China, the Philippines formally made a total of fifteen submissions to the Arbitral Tribunal [5:271–272; 4: para. 112]. Taken together, these submissions were concerned with four sets of inter-related matters, upon which the Philippines asked the Tribunal to adjudge and declare.

First, the respective rights and obligations of the Philippines and China with regard to the waters, seabed, and maritime features in the South China Sea are governed by UNCLOS, as both are Contracting Parties. China's maritime claims in South China Sea based on the "nine-dash" U-shaped line and the "historic rights" claim are inconsistent with the UNCLOS and invalid.

Second, none of the nine features occupied and controlled by China in the northern and southern sectors of the South China Sea qualify as full "islands," which can claim a

200-nautical-mile Exclusive Economic Zone (EEZ) and continental shelf under Article 121 of the UNCLOS. Some (Scarborough Shoal, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef) are “rocks” that are entitled to no more than 12 nautical miles territorial sea,¹ while others like Mischief Reef, McKennan Reef (including Hughes Reef), Gaven Reef, Second Thomas Shoal, and Subi Reef are merely “low-tide elevations”—lands surrounded by and above water at low tide and submerged at high tide—which cannot be appropriated by States, nor by themselves serve as a basis for claiming maritime entitlement.² China's claims of maritime rights beyond 12 nautical miles with regard to those “rocks” are therefore unlawful. Its occupation of, and land reclamation activities on, those features are illegal.

Third, China has breached the UNCLOS by interfering with the Philippines' sovereign rights, jurisdiction, and navigational rights within the Philippines' claimed EEZs.

Fourth, China has violated the UNCLOS and caused irreversible damages to the marine environment in the South China Sea, including areas in the Philippines' claimed EEZs, by its destruction of coral reefs, its destructive and hazardous fishing practices, and its harvesting of endangered species [6].

Fully aware of the procedural preconditions and substantive limitations of the compulsory dispute settlement mechanisms under Part XV of the UNCLOS [7], the Philippines carefully selected and framed its claims and arguments with a view to ensure that the Arbitral Tribunal would not be prevented from exercising jurisdiction. For example, according to Article 288 of the UNCLOS, the Arbitral Tribunal has jurisdiction over those disputes “concerning the interpretation or application” of the Convention which have not been excluded from its scope of jurisdiction by virtue of Article 298 of the UNCLOS. China had made a declaration after ratifying the Convention in 2006 under Article 298 to opt out of several disputes otherwise subject to the compulsory dispute settlement procedure under the UNCLOS—namely, disputes relating to maritime boundary delimitation, involving historic bays or titles under the Convention, necessarily involving the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory, concerning military activities or certain types of law enforcement, or concerning matters seized by the United Nations Security Council [8]. Bearing these in mind, the Philippines stressed from the outset that it did not seek the Tribunal's ruling on territorial sovereignty or maritime delimitation [3: para. 8]. Rather, the Philippines invited the Tribunal to determine the sources of rights to maritime areas to help clarify China's and its own respective “maritime entitlements.”

The Philippines' legal strategy proved successful. On October 29, 2015, the Arbitral Tribunal ruled that it had jurisdiction on the case and confirmed its jurisdiction on seven out of fifteen submissions by the Philippines, while reserving the remaining jurisdictional issues to the next (merits) stage. On July 12, 2016, the Tribunal rendered the Merits Award. On the substantive issues raised by the Philippines, the Tribunal found that it has jurisdiction on all except the dispute involving military activities. Significantly, after finding that it had jurisdiction to consider the Parties' dispute

¹ According to Article 121 (3) of UNCLOS, “Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.”

² Cf. Article 13 of UNCLOS.

concerning historic rights and the source of maritime entitlements in the South China Sea, the Tribunal concluded that, with regard to the disputes between the Philippines and China, the UNCLOS is the only basis for defining the scope of each Party's maritime entitlement in the South China Sea. China's historic right claims encompassed by the "nine-dash" line, to the extent that they exceed the relevant maritime rights provided by the UNCLOS, are without legal basis or legal effect.

On the issue of the legal status of certain maritime features listed in the Philippines' submissions, the Tribunal declared that Scarborough Shoal, as well as Johnson Reef, Cuarteron Reef, Fiery Cross Reef, Gaven Reef (North), and McKennan Reef in the Spratly waters are "rocks," while Mischief Reef, Second Thomas Shoal, Subi Reef, and Gaven Reef (South) are "low-tide elevations." The Tribunal further held that none of the Spratly features, including Itu Aba, can generate an EEZ or continental shelf. It also rejected that the Spratly Islands can apply archipelagic straight baselines and generate maritime zones collectively as a single unit. The Tribunal finally concluded that certain disputed areas are within the exclusive economic zone of the Philippines, and China had violated the Philippines' sovereign rights within such area by (a) interfering with Philippine fishing and petroleum exploration, (b) constructing artificial islands and (c) failing to prevent Chinese fishermen from fishing in that zone. The Tribunal also held that the Philippine fishermen enjoyed the same traditional fishing rights at the Scarborough Shoal as the Chinese, and China had interfered with these rights in restricting the Philippines' access. Moreover, Chinese law enforcement vessels had unlawfully created a serious risk of collision when they physically obstructed Philippine vessels in the vicinity of the Scarborough Shoal. With regard to the protection and preservation of marine environment in the South China Sea, the Tribunal held that China's large-scale land reclamation and construction of artificial islands at seven features in the Spratly Islands, and destructive fishing activities in the South China Sea, had caused severe, irreparable harm to the coral reef ecosystem, in violation of various obligations under the UNCLOS. The Tribunal also concluded that China has breached its obligations under the UNCLOS, as well as general international law, not to aggravate or extend the dispute, while the compulsory dispute resolution proceedings were ongoing.

China refused to accept or recognize the Arbitral Tribunal's rulings. Immediately after the Arbitral Tribunal rendered the Merits Award on 12 July 2016, China's Foreign Ministry responded with two statements. The first statement declared the award "null and void" and "has no binding force", and "China neither accepts nor recognizes it". It detailed how the Philippines' initiation of the arbitration proceedings had been unilateral and out of bad faith. It also enumerated the many "errors" the Arbitral Tribunal had made, which in China's view rendered the Tribunal's conduct and its decisions "unlawful and unjust." The statement followed that China's territorial sovereignty and maritime rights and interests in the South China Sea shall not be affected, and that China will never accept any claim or action based on those awards [9]. The second statement reiterated China's territorial sovereignty and maritime rights and interests in the South China Sea. In defiance of the Merits Award's pronouncements in relation to the Spratly Islands as a unit, as well as China's historic rights claims, the statement reaffirms China's sovereignty over all the islands in the South China Sea (NanhaiZhudao, 南海諸島) including the Spratly, or Nansha, Islands as NanshaQundao (群島, archipelagos), that China has exclusive economic zone and continental shelf based on NanhaiZhudao, and that it has historic rights in the South China Sea [10].

According to Article 296 and Article 11 of Annex VII of the UNCLOS, the Arbitral Tribunal's decisions in the Merits Award will be final, legally binding and without appeal on both the Philippines and China. The ruling, which was reached unanimously by all five judges constituting the Arbitral Tribunal, might also carry some legal weight. At the same time, the Award does not have an automatic *erga omnes* binding effect on other countries.³ Those countries may adopt the jurisprudence or decisions of the Arbitral Tribunal if they choose to do so. An example may be Vietnam, which is one of the claimants in the South China Sea and has supported the Arbitral Tribunal's jurisdiction on the Philippine-initiated process [3: para. 183, 4: para. 157].⁴ Due to China's outright rejection and Philippine President Rodrigo Duterte's more reconciliatory policy toward China [12], the practical effect of the Arbitral rulings seem to have become somewhat ambiguous.

Taiwan's Role in the South China Sea Arbitration and its Responses

When the Philippines first initiated the compulsory proceedings in January 2013, it tactfully chose to challenge only two aspects concerning the legal bases of China's rights in the South China Sea. The first focused on the legality of China's maritime claim based on a nine-dash U-shaped line, which China presented officially to the international community in the form of a map attached to a letter dated 7 May 2009 to the United Nations Secretary-General with regard to the Malaysia/Vietnam Joint Submission and the Vietnam Submission on Extended Continental Shelf submitted to the Commission on the Limits of Continental Shelf [13]. The second challenge focused on the legal status of maritime features occupied by China at the time of the initiation of the arbitral process, including Scarborough Shoal and several maritime features of the Spratly Islands. However, during the arbitral process, both challenges inevitably involved the consideration of Taiwan's positions on some of the relevant issues.

Concerning the status of maritime features, the Philippines' first Memorial, submitted to the Arbitral Tribunal on 30 March 2014, further claimed that in fact none of the high tide features in the Spratlys should qualify as "islands" capable of generating entitlement to an EEZ or a continental shelf under Article 121 of the UNCLOS [5: 140–150]. Such features include Itu Aba (occupied by Taiwan), Thitu, (known in the Philippines as Pagasa and in China as Zhongye Dao and occupied by the Philippines), and West York (known in the Philippines as Likas and in China as Xiyue Dao, occupied by the Philippines). According to the Philippines, these features were not mentioned in its statement of claims against China because "they are not occupied or controlled by the PRC". [5: Section C, 5.96] In demonstrating how Itu Aba fell short of the criteria for an "island," the Philippines referred to the control and activities of "the authorities in Taiwan" since 1946 [5: Section C, 5.97].

On 7 December 2014, China issued a Position Paper that provided the first comprehensive legal arguments against the Philippines' initiation and the jurisdiction of the Arbitral Tribunal [14]. In that paper, China criticized the Philippines' decision to select

³ UNCLOS Article 296(2) clearly provides: "Any such decision shall have no binding force except between the parties and in respect of that particular dispute."

⁴ Some Vietnamese legal experts also seem to support the Tribunal's decisions, e.g. [11].

“only a few features and requests the Arbitral Tribunal to decide on their maritime entitlements. This is in essence an attempt at denying China's sovereignty over the Nansha Islands as a whole.” According to China, the state “has always enjoyed sovereignty over the Nansha Islands in its entirety, not just over some features thereof.” This was evidenced by the Map of Islands in the South China Sea published by the Chinese Government's Commission for the Review of Maps of Land and Waters in 1935, and the Map of the Location of the South China Sea Islands in 1948, as well the Declaration of the Government of the People's Republic of China on the Territorial Sea of 1958, and the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone of 1992.

Furthermore, China made an intriguing argument that the Philippines' selective approach had violated the “One-China Principle” and China's territorial integrity, which in turn confirmed the dispute between the two countries was in fact related to territorial sovereignty, on which the Arbitral Tribunal lacked jurisdiction. The text of China's relevant argument is as follows:

The Philippines, by requesting the Arbitral Tribunal to determine the maritime entitlements of only what it describes as the maritime features "occupied or controlled by China", has in effect dissected the Nansha Islands. It deliberately makes no mention of the rest of the Nansha Islands, including those illegally seized or claimed by the Philippines. Its real intention is to gainsay China's sovereignty over the whole of the Nansha Islands, deny the fact of its illegal seizure of or claim on several maritime features of the Nansha Islands, and distort the nature and scope of the China-Philippines disputes in the South China Sea. In addition, the Philippines has deliberately excluded from the category of the maritime features "occupied or controlled by China" the largest island in the Nansha Islands, Taiping Dao, which is currently controlled by the Taiwan authorities of China. This is a grave violation of the One-China Principle and an infringement of China's sovereignty and territorial integrity. This further shows that the second category of claims brought by the Philippines essentially pertains to the territorial sovereignty dispute between the two countries [14: para. 22].

Since China insisted on not participating in the proceedings, the Tribunal had a duty, in the case of China's non-appearance before the Tribunal, to ensure that “it not only has jurisdiction over the dispute but also that the claim is well founded in fact and law.”⁵ The Arbitral Tribunal decided to treat China's relevant statements and communications, including contentions raised in the Position Paper, as constituting preliminary objections to its jurisdiction [15].

China's positions drew significant attention to the Arbitral Tribunal. In particular, it prompted the Tribunal to not limit its deliberations on the legal status of Spratly maritime features to only those “occupied or controlled” by China, but also to include all those “claimed” by China. This was demonstrated in the subsequent approach adopted by the Tribunal. On 16 December 2014, the Tribunal posed 26 questions to the Philippines. Question 22 asked whether or not any maritime features claimed by China could give rise to EEZ or continental shelf reaching all those nine features

⁵ Article 9, Annex VII of UNCLOS.

identified in the Philippine Memorial. In the Jurisdiction/Admissibility ruling, the Tribunal indicated that if any maritime feature claimed by China within 200 nautical miles of certain features identified by the Philippines was found capable of generating an entitlement to an EEZ and continental shelf—for example, Mischief Reef or Second Thomas Shoal in relation to Submission No. 5—it would result in an overlap of the claims of maritime rights between China and the Philippines and a dispute of boundary delimitation, excluding the Tribunal's jurisdiction under Article 298 of UNCLOS [3: para. 402]. In this context, whether or not Itu Aba—the largest Spratly feature—was legally an “island” or a “rock” became a highly pertinent issue for the Tribunal at the Merits stage. Taiwan, which has exercised effective control since the mid-1950s, was compelled to come forward to defend Itu Aba's legal status. This will be discussed in more detail in the next section.

In regard to problems concerning the U-shaped line, Taiwan's relevance appeared in the Philippines' Memorial of 2014 to the extent that China's “nine-dash” U-shaped line originated from the “eleven-dash” U-shaped line contained in the “Map of Location of the Islands in the South China Sea” issued by the Nationalist Government of the ROC in December 1947 and first officially published in 1948 [5: 76–77]. As the ROC government was also recognized by China as the first author of the Chinese U-shaped line, how Taiwan explains the intention and legal meaning of the line might be relevant to understanding China's position. Taiwan thus faced considerable international pressures to help clarify the meaning and nature of such a line during the process of the South China Sea arbitration [16–18]. The Philippines then used some of Taiwan's efforts to provide further clarification, like former President Ma Ying-jeou's remarks at the opening ceremony of the “Exhibition of Historical Archives on the Southern Territories of the Republic of China” held on September 1 2014, to reinforce its arguments against China's “historic rights” claims [19: 83–87].

Despite the fact that ROC/Taiwan's positions on Itu Aba and the U-shaped line became deeply entwined with the Philippines' and China's arguments, and Taiwan's interests in the South China Sea could be directly affected by the outcome of the Arbitration, Taiwan's status and identity was ambiguous, and thus undermined during the process. For example, Taiwan complained that it was not invited by the Tribunal to any of the hearings as “observers” or “witness,” nor consulted especially where the issues concerning the status of Itu Aba were discussed [20]. Moreover, no consideration was given to Taiwan as an “indispensable third party” throughout the proceedings. It is well established in the practice of international courts and tribunals that when the rights of third party states would not only be affected by a decision in a case, but would form the very subject matter of the decision, those states become indispensable third parties whose absence constitute a bar to the court's or tribunal's jurisdiction.⁶ Notably, throughout the arbitration, Taiwan was repeatedly referred to as “Taiwan Authority of China” by the Philippines and the Tribunal. During the Merits Hearings in November 2015, one of the arbitrators, Judge Rüdiger Wolfrum, noticed that much of the Philippines' analyses against China's early territorial and maritime claims to the South China Sea relied on historic records published by Taiwan, and that Taiwan was particularly active in the Spratlys, while China (referred to by the Philippines as PRC) was hardly involved. He thus raised a “touchy” question—could the Philippines really

⁶ The Tribunal considered this aspect in relation to Vietnam, [3: paras. 179–188].

distinguish between the PRC and Taiwan? Wasn't Taiwan acting on behalf of China too [21:98]? The Philippines gave the following reply:

The Philippines considers that there is only one China, and that it is the People's Republic of China. Since 1949, only the People's Republic of China has been able to speak for or on behalf of China. The actions of predecessor governments prior to 1949, including the Republic of China, which is now based in Taiwan, are, of course, attributable to China as well. The actions of the Taiwanese authorities since 1949 are not per se attributable to the PRC. In fact, there are many issues on which the authorities in Beijing and Taipei [differ? *sic.*], including in regard to entitlements of features or sovereign rights over the waters of the South China Sea. For example, the PRC has never contended that any individual feature in the Spratlys is capable of sustaining human habitation or economic life, as... will discuss later. Accordingly, in the Philippines' view, it cannot be assumed that the actions or views of the Taiwanese authorities are on behalf of, or attributable to, China [22: 6].

The Philippines' enunciation of the "One-China" policy and its differential approach toward the legal effects of Taiwan's conducts before and after 1949 left Taiwan some grounds to consider itself not bound by the Arbitral rulings. On 31 October 2015, two days after the Tribunal rendered its decisions on jurisdiction/admissibility, Taiwan's Nationalist (Kuomintang or KMT) government, under then President Ma Ying-jeou, issued a statement expressing its positions on the arbitration. The seventh and last point of the statement argues, "The Philippines has not invited the ROC to participate in its arbitration with mainland China, and the arbitral tribunal has not solicited the ROC's views. Therefore, the arbitration does not affect the ROC in any way, and the ROC neither recognizes nor accepts related awards." [23]. As soon as the Arbitral Tribunal rendered the Merits Award on 12 July 2016, Ma's successor, Tsai Ing-wen of the Democratic Progressive Party (DPP), who was inaugurated as new President on 20 May 2016, issued a statement that made three assertions. First, the ROC has sovereignty over the South China Sea islands and is entitled to all rights over those islands and their relevant waters in accordance with international law and the law of the sea. Second, because the Arbitral Tribunal did not invite the ROC to participate in the proceedings or solicit its views, its decisions which impinge on ROC's interests and undermine its rights, especially those regarding the status of Itu Aba, are not legally binding on the ROC. Third, the ROC urges the South China Sea disputes to be settled through multilateral negotiations and that it will work with all states concerned on the basis of equality [24]. Another statement issued on the same day by Taiwan's Ministry of Foreign Affairs criticized the Arbitral Tribunal for undermining ROC's sovereign status by inappropriately referring to it as the "Taiwan Authority of China," and repeated the government's rejection to the Merits Award's binding effect on Taiwan [25].

Legal Implications of Tribunal's Ruling for Taiwan's South China Sea Claim

Although Taiwan is not a party to the Philippines-initiated arbitration, several aspects of the Tribunal's legal deliberations on the case have important bearing on ROC/Taiwan's

South China Sea claims which warrant attention. This section will focus on possible impacts of the Merits Award on Taiwan's "eleven-dash" U-shaped line and the extent of Taiwan's maritime entitlement in the South China Sea.

U-Shaped Line

The Philippines' challenge to China's U-shaped line constituted the first and second issues of its pleadings submitted to the Tribunal:

- (1) China's maritime entitlements in the South China Sea, like those of the Philippines, may not extend beyond those expressly permitted by the United Nations Convention on the Law of the Sea ("UNCLOS or the "Convention");
- (2) China's claims to sovereign rights jurisdiction, and to "historic rights" with respect to the maritime areas of the South China Sea encompassed by the so-called "nine-dash line" are contrary to the Convention and without lawful effect to the extent that they exceed the geographic and substantive limits of China's maritime entitlements expressly by UNCLOS.

One of the Philippines' contentions in regard to the above submissions was that since officially presenting the "nine-dash" line map in May 2009, China has been making "historic rights" claims in the maritime areas within the "nine-dash" line which are not consistent with UNCLOS. Because China had never officially expressly clarified the nature and scope of its claimed historic rights, nor clarified its understanding of the meaning of the "nine-dash line," the Tribunal undertook to examine China's relevant conduct to ascertain the nature of the claim. The Tribunal observed that China claims historic rights to the living and non-living resources in the waters of the South China Sea within the "nine-dash" line, but does not consider those waters as forming part of its territorial sea or internal waters (other than the territorial sea generated by islands) [4: para. 232]. In other words, China "does not claim historic title to the waters of the South China Sea, but rather a constellation of historic rights short of title." [4: para. 229].

Based on this understanding, the Tribunal reached the following findings. First, as between China and the Philippines, which became Parties to UNCLOS in 1996 and 1984 respectively, the Convention is the only basis that defines the scope of maritime entitlements in the South China Sea. UNCLOS provides and defines limits within a comprehensive system of maritime zones that is capable of encompassing any area of sea or seabed, and leaves no room for an assertion of historic rights to the waters and resources beyond the limits of maritime zones provided therein [4: para. 231]. Accession by a state to the Convention reflects a commitment of that state to bring incompatible claims into alignment with its provisions [4: para. 263]. Secondly, the Convention supersedes any historic rights or other sovereign rights or jurisdiction in excess of limits imposed therein [4: paras. 278; 1203B(2)]. Thirdly, while theoretically China may still acquire rights and jurisdiction over living and non-living resources in the waters of the South China Sea independent of and at variance with the UNCLOS, three requirements with respect to "historic rights" under customary international law must be met before such rights can be established: The assertion by a State of a right at variance with the Convention, acquiescence by other State Parties, and the passage of

sufficient time to establish beyond doubt the existence of both the right and a general acquiescence. In the Tribunal's opinion, there was no acquiescence by other States in China's claim of "historic rights" since 2009 [4: para. 275]. Thus, relevant to the dispute between the Philippines and China, China's claims to those rights with respect to the maritime areas of the South China Sea within the "nine-dash" line, to the extent that they exceed the geographic and substantive limits of China's maritime entitlements under the UNCLOS, are contrary to the Convention and without lawful effect. It should be added that the Tribunal repeatedly emphasized that its ruling in no way concerns China's or either Party's historic claims to or use of islands in the South China Sea [4: paras. 266–267; 272].

Notably, the arbitral proceedings conspicuously left out ROC/Taiwan's actions with regard to the U-shaped line during the 1990s. It may be recalled that the ROC/Taiwan first made a "historic waters" claim to the U-shaped line in the Policy Guidelines for the South China Sea adopted in 1993, of which the preamble stated the following:

On the basis of history, geography, international law and facts, the Nansha Islands [Spratly Islands], Shisha Islands [Paracel Islands], Chungsha Islands [Macclesfield Islands], Tungsha Islands [Pratas Islands] have always been a part of the inherent territory of the Republic of China. The sovereignty of the Republic of China over them is beyond doubt.

The South China Sea area within the historic waters limit is the maritime area under the jurisdiction of the Republic of China, where the Republic of China possesses all rights and interests [26: 408].

According to one commentator, the "historic waters" within the U-shaped line was explained by some government officials at that time as analogous to "archipelagic waters" under UNCLOS, and did not have the status of internal waters. In other words, within the U-shaped line, the ROC has sovereignty over the islands as well as preferential rights in the maritime sphere [26: 403]. Although such line of interpretation did not become the official policy of the ROC/Taiwan government, the meaning of the line became a subject of query by the international community. The legal basis, validity and feasibility of the "historic waters" claim also generated debate among prominent Taiwanese international law of the sea experts during the 1990s.

In practice, no references to the "historic waters" claims or the U-shaped line have appeared in any governmental actions after late-1990s [27]. On 15 December 2005, Taiwan's Ministry of the Interior terminated the 1993 South China Sea Guidelines by an internal note [13:58], and it has not been reinstated since. It may be suggested that the Taiwanese government has dropped its dubious "historic waters" claim described above [13: 58; 60, cf. 28: 13–14]. That said, the same may not be said about Taiwan's U-shaped line. For example, the reference to the U-shaped line continues to remain in the "First Batch of the Republic of China Territorial Sea Baselines surrounding the Taiwan Island and Nearby Sea Area," announced by the Executive Yuan in 1999 and revised in 2009, in relation to the Spratly Islands. Although the baselines for the Spratly Islands were not promulgated, it was noted "the Spratly archipelagos within the traditional U-shaped line belong to our country." [29: 89].

If the Arbitral Tribunal's views on the interactions of "historic rights" with UNCLOS and customary international law are deemed as authoritative, there would be no legal ground for Taiwan to claim or maintain maritime rights and jurisdiction similar to those related to archipelagic waters within the U-shaped line. However, it would be entitled to continue to claim territorial sovereignty over the maritime geographic features in the South China Sea, maritime rights, and jurisdiction based on the "land dominates the sea" doctrine as provided under UNCLOS and general international law. Apart from that, there might still be room for Taiwan to claim traditional fishing rights within the U-shaped line [e.g. 4: para. 804].

Status of Itu Aba

Before the South China Sea arbitration, the legal status of Itu Aba had hardly been an issue. At 0.5 km² and 5 m above sea level at high tide, Itu Aba is the largest feature of the Spratly Islands and was generally perceived as an "island" entitled to full maritime zones (territorial sea, contiguous zone, EEZ and CS) under UNCLOS [30: 210–211]. However, as mentioned earlier, the issue became a key point of contention in the arbitration, as the Philippines began to challenge China's claim to 200-nautical-mile entitlements for the Spratly features, and argue that Itu Aba is a "rock," not a fully entitled "island" under Article 121 of UNCLOS, as a litigation tactic to substantially reduce possible areas of overlapping maritime claims between China and itself.⁷ The problem necessitated the Tribunal to interpret Article 121(3), which constitutes the exception to a fully entitled island under Article 121(1). According to Article 121(3), "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." If Itu Aba was determined to be a "rock," the maritime entitlement it can have would be limited to a twelve-nautical-mile territorial sea. This would then seriously undermine the extent of maritime rights and jurisdiction of Taiwan in the Spratly area [32]. Most of the evidence the Philippines brought forward against Itu Aba was directly concerned with Taiwan, and the Philippines had relied on several existing Taiwanese sources for its advantage. As a result, Taiwan began to put on an active defense against the Philippines' challenges. Between July 2015 and July 2016, Taiwan issued official statements and provided new materials and facts to refute the Philippines' assertions that Itu Aba could only be a "rock" because it is not capable of "sustaining human habitation" and "economic life on its own." Taiwan even invited the Tribunal and the Philippines to conduct fact-finding on Itu Aba [33].

The Tribunal did take note of, and invited the Philippines and China to comment on, the new documents produced by Taiwan, which included, inter alia, a press release from the Ministry of Foreign Affairs in January 2016 [34], the Position Paper on ROC South China Sea Policy of March 21, 2016 [35], an *amicus curiae* submission by the Chinese (Taiwan) Society of International Law [36], and former President Ma Ying-jeou's press remarks on Itu Aba and the Spratly Islands in January and March 2016, as well as two recent publications—*A Frontier in the South China Sea: Biodiversity of*

⁷ For example, Philippines argued: "if the largest Spratly feature is incapable of generating an EEZ and continental shelf entitlement, then it is most unlikely that any of the other 750 features will be able to do so", [31: 89].

Taiiping Island, Nansha Islands (December 2014) and *Compilation of Historical Archives on the Southern Territories of the Republic of China* (July 2015). At the Tribunal's requests for comment on some of Taiwan's more recent public declarations and publication of videos of conditions on Itu Aba through the internet, the Philippines argued that Taiwan's activities were aimed at rebutting the Philippines' case against Itu Aba's "island" status and effectively constituted a legal pleading. The Philippines urged the Tribunal to treat the claims made by Taiwan with great caution, because they were not supported by actual evidence, created specifically for the purpose of litigation, and based on statements by officials with an interest in the outcome of the proceedings. The Philippines further contended that "it makes no difference that Taiwan is not a party to this case. It has the same interest as the People's Republic of China in maximizing Itu Aba's potential maritime entitlements." [4: para. 434, 37: 17–21].

The Tribunal finally adopted a very strict interpretation of Article 121(3), and decided to examine Itu Aba as well as the other Spratly high-tide features in question based on historical evidence of the relevant features' respective natural conditions before any significant or substantial human modification [4: paras. 539–551], or the advent of EEZ as a concept [4: para. 578]. According to the Tribunal, the most reliable evidence of the capacity of a feature to sustain human habitation or economic life would be the "historical use to which it has been put." [4: para. 549]. Based on this approach, the Tribunal did not accept Taiwan's invitation to visit Itu Aba [4: para. 142]. The Tribunal found that contrary to the Philippines' assertions, Itu Aba and certain other main high-tide Spratly features did have fresh water, vegetation and soil capable of enabling the survival of small groups of people, hence they are not barren rocks or sand cays. That said, such capacity based on the features' physical characteristics appeared to be "distinctly limited." [4: paras. 615–616]. Moreover, the Tribunal saw no historic evidence which indicated any stable human community had ever formed on the Spratly Islands. Rather, the islands had been a temporary refuge and base of operations for fishermen and a transient residence for laborers engaged in mining and fishing. There was no evidence to suggest that the historical absence of human habitation on the Spratly Islands was the product of intervening forces (like war, pollution, or environmental harm), or otherwise did not reflect the limited capacity of the features themselves [4: paras. 549; 621–622]. The history of extractive economic activity in the Spratly Islands did not constitute evidence of an economic life of their own [4: para. 624]. Accordingly, the Tribunal concluded that none of the high-tide features in the Spratly Islands, Itu Aba included, are capable of sustaining human habitation or an economic life of their own, and hence they are "rocks" under Article 121(3) of UNCLOS.

Until this arbitration, Itu Aba's "island" status had never been contested, although as a small mid-ocean feature, the effect it should have on delimitation vis-à-vis a coastal state with much longer coastlines was debatable [30: 210–211]. This was the first time an international tribunal comprehensively reviewed and tried to clarify the ambiguities existing in the wording of UNCLOS Article 121 concerning the Regime of Islands, particularly Article 121(3). How well this interpretation will be adopted remains to be seen.⁸ It may be argued that since the Philippines itself asserted that Taiwan was not a

⁸ One expert describes the Tribunal's interpretation of Article 121(3) as "missionary", and said "It will be future tribunals, courts, and state practice that will determine whether this "missionary" aspect of the Award finds favour." [38].

party to its case against China, and Taiwan was not consulted or given access to the arbitral proceedings earlier as a directly affected party on the question of Itu Aba, Taiwan has reasons to consider itself not bound by the Tribunal's relevant ruling. After the Merits Award of July 2016, the Taiwan government reiterated that the ROC has sovereignty over the South China Sea islands and entitlement to all rights over those islands and their relevant waters under international law and the law of the sea. It is unlikely that Taiwan will concede Itu Aba's status as a fully entitled island. At the same time, it is likely Taiwan will not formally proclaim a 200-mile EEZ around Itu Aba, either, as doing so will undoubtedly be deemed by its Southeast Asian rival countries and others including the US and Japan as "excessive."⁹

Political Implications for Taiwan's South China Sea Claim

In this section, it will be argued that following the Philippines-initiated arbitration, Taiwan's policy options for its South China Sea claim may become further constrained by the "One-China" principle.

During the second (Merits) phase of the South China Sea arbitration, Taiwan also entered into a period of presidential election. Tsai Ing-wen, the presidential contender for the DPP, held different approaches toward Taiwan's relationship with China and the South China Sea from those of the then incumbent President Ma Ying-jeou of the KMT. Briefly speaking, Ma embraced the so-called "1992 Consensus" as the basis for cross-straits relations, which is a short hand for the informal understanding reached by mainland China and Taiwan in 1992 that the two sides across the Taiwan Straits maintain that there is only one China, to which both Chinese mainland and Taiwan belong, although their interpretations of "one China" differ: for China it means the PRC, and for Taiwan the ROC [40]. On that basis, Ma re-invigorated cross-straits institutional relations after he came to office in May 2008. With regard to the South China Sea, Ma had fervently defended the ROC's territorial sovereignty and maritime rights from the perspectives of history, geography and international law. Cooperation between China and Taiwan in the functional domain also expanded, at least during Ma's first term (2008–2012). On the other hand, the Ma government declined repeated calls from China to defend the Chinese sovereignty and interests together. Ma's insistence on upholding the "1992 consensus" and "One-China" principle led China to welcome Ma's effort to defend and clarify the ROC's claims in the South China Sea, including the meaning of the 1948 U-shaped map, and support Taiwan's activism in defending Itu Aba's "island" status during the arbitration. China also tolerated Ma's South China Sea Initiative introduced in May 2015 [41], and its Roadmap for implementation in January 2016 [42] that contained proposals for multilateral negotiation and regional cooperation.

By contrast, the previous DPP government (2000–2008) had rejected the "1992 consensus," terminated the 1993 South China Sea Guidelines in 2005, and abolished the 1991 "Guidelines for National Unification" adopted by the Taiwan Executive Yuan (Cabinet) [43]—one of the bases of the South China Sea Guidelines in 2008 [13: 58].

⁹ President Tsai had remarked that the government would not assert excessive claims, although it would also not give up any rights, either. [39].

These moves were seen by Beijing as Taiwan's attempts to pursue independence or separatism, and caused serious tensions in the cross-straits relationship. Not long before the presidential election in 2016, there were resurgent speculations that if Tsai won the election in January 2016, her government would resume the DPP's Taiwan independence agenda, and consider significantly revising Taiwan's South China Sea claim. It was feared that Tsai might confine Taiwan's claim to the Spratly Islands to only Itu Aba, or abandon the eleven-dash U-shaped line and Itu Aba all together. Since President Tsai came to office on 20 May 2016, she has not yet fully and unequivocally recognized the "1992 consensus," or the underlying notion of "One China" demanded by China as the precondition for continued cross-straits institutional interactions. This has led Beijing to suspend government-to-government communications with Taiwan and curtail Taiwan's access to international organizations.

As regards the South China Sea, the Tsai government's responses mentioned earlier show that it continues to maintain the ROC's claim to territorial sovereignty over the four groups of islands in the South China Sea, as well as maritime rights in their "relevant waters." Subsequent actions taken by the government also suggest Tsai's intention to maintain Taiwan's sovereignty and interests in relations to Itu Aba. Nonetheless, so far official statements have made no reference to a common Chinese history or the U-shaped line, as former President Ma had done. In particular, the omission of the U-shaped line may be seen as either a way to bring Taiwan's claim more in line with relevant international law [17], or a tactic to distinguish Taiwan's claim and position from China's, so as to avoid the impression that the two sides are taking a unified stance [44]. Some policy experts in China have certainly suspected the possible intention behind those caveats in the Tsai government's responses to the Tribunal's final ruling. For example, Wu Shicun, President of the National Institute for South China Sea Studies has warned that Tsai has never recognized the U-shaped line. Her future South China Sea policy may lead Taiwan to "separate itself from the Chinese mainland, follow the suit of the US and Japan, curry favor with the ASEAN, and seek Taiwan's independence." [45]. As indicated earlier in this paper, since after the South China Sea arbitration was initiated in early 2013, an inextricable linkage among Taiwan, China's territorial and maritime interests in the South China Sea, and the "One China" principle has been established and reinforced. Taiwan's South China Sea claim and policy, especially in relation to the U-shaped line and Itu Aba, will be considered as a litmus test for its policy toward China. Thus, unless China itself decided to abandon the U-shaped line first, it will see Taiwan's attempt to do so as provocative, and will ensure that Taiwan does not take such an initiative. Also, as long as the cross-straits relationship continues to be deadlocked over "One China," it will be highly difficult, and thus unlikely, for Taiwan to participate in any major multilateral or regional mechanisms for managing the South China Sea dispute [C.f. 46: 478]. Finally, it is worth noting that Itu Aba may now be encircled within a new "strategic triangle" created by China's land reclamation and construction on Fiery Cross, Subi Reef and Mischief Reef. All of them now have dual-use concrete air runways, and weapon systems have reportedly been installed on Fiery Cross and Johnson Reef [47]. This encirclement effectively allows China to easily take over Itu Aba in case of an abandonment by Taiwan. It may also eliminate any possibility to make Itu Aba a contingency base for the US, and could increase the difficulty for the US to intervene in case of a serious deterioration in cross-straits relations.

Conclusion

This paper has illustrated how the ROC/Taiwan was brought into the South China Sea arbitration through a carefully crafted legal strategy designed by the Philippines against China, and how it became a “de facto party” in the case. The ad hoc Arbitral Tribunal’s final ruling has been hailed as a “game changer,” [48] in the sense that the Merits Award has helped clarify in several ways how UNCLOS applies to the complex disputes in the South China Sea, but it may have “the potential to radically reshape the South China Sea dispute.” [49: 346] For Taiwan, the arbitration may have certain legal and political implications for its claim to the South China Sea.

First, from a legal perspective, the arbitration might have compounded Taiwan’s chronic international status problem, and further undermined its position as a party in the South China Sea dispute. Taiwan was referred to as “Taiwan Authority of China,” or even “non-state entity” in the arbitral documents and proceedings.¹⁰ This cognizance was reflected in the lack of a due process for Taiwan. Even though the status of Itu Aba became a key issue in the arbitral proceedings, Taiwan was not treated as a relevant party or actor, nor given an equal procedural opportunity to intervene in a direct and timely manner. While Taiwan might well reject the Tribunal’s ruling, it would become more difficult to negotiate on the basis of a more expansive claim with Southeast Asian claimants on the South China Sea dispute, especially in relation to the Spratly Islands. Moreover, in the Merits Award, the Tribunal clarified what legal principles are applicable to a claim within China’s U-shaped line. Those guidelines show how China could still legally claim its territorial sovereignty and maritime rights in accordance with international law, and seem also to suggest that such a claim might be made without the U-shaped line. The same conclusion should also hold true for Taiwan.

From the political perspective, Taiwan’s South China Sea policy options after the recent arbitration have arguably become more constrained by the “One-China” principle. This could make Taiwan’s relevant policy considerations more complicated. Under the current stalemate between Beijing and the DPP government in Taiwan, whether or not Taiwan should formally abandon the U-shaped line claim or sovereignty over Itu Aba is more of a political than legal policy choice. However, a hasty decision to abandon either, or internationalize Itu Aba, may not only incur undesirable consequences on cross-straits relations, but may also increase Taiwan’s security risk. Consequently, Taiwan should more carefully manage the One-China/South China Sea/cross-straits policy triangle after the South China Sea Arbitration.

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¹⁰ See the Philippines’ legal counsel Paul Reichler’s statement in [50: 38].

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