

Taiwan and the Arbitral Tribunal's Ruling: Responses and Future Challenges

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The Arbitral Tribunal's award of 12 July 2016 was overwhelmingly in favour of the Philippines and denounced by China. Although the Republic of China (ROC, or Taiwan) was not a party to the arbitration, it was dragged into the proceedings, as the issue of the status and entitlements of Itu Aba — the largest geographical feature in the Spratly Islands, occupied by Taiwan and also known as Taiping Island — gained prominence in the course of the Tribunal's deliberations.

The Tribunal's award declared that Itu Aba is a “rock” and not an “island” as defined by Article 121 of the United Nations Convention on the Law of the Sea (UNCLOS).¹ The ROC government — headed by Taiwan's new President and Chair of the Democratic Progressive Party (DPP), Tsai Ing-wen — immediately objected to the ruling and declared that it had no legally binding force on the ROC. The government's response echoed that of China's, with whom relations have run into problems since President Tsai took office in May 2016. This article makes two propositions: first, that the immediate response from Taiwan was aimed at three audiences; and second, that the ruling has created challenges for Tsai's policy on the South China Sea.

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Taiwan's Kaleidoscopic Responses to the Arbitral Ruling

On the same day that the award was issued, Taiwan released two official statements rejecting it. One of the statements came from President Tsai's office, and made three assertions: first, that the ROC has sovereignty over the South China Sea islands and is entitled to all rights over those islands and their relevant waters under international law and the law of the sea; second, that 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, particularly those regarding the status of Itu Aba, are not legally binding on the ROC; third, that 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.²

The other statement, issued by the Ministry of Foreign Affairs, gave more specific reasons for Taiwan's rejection of the award.³ First, that the Tribunal had inappropriately referred to the ROC as the "Taiwan Authority of China" and that the government considered this designation "inappropriate" and "demeaning to the ROC as a sovereign state". The second concerned how the Tribunal had dealt with the legal status of Itu Aba. According to the statement, this issue was not part of the Philippines' original submission in January 2013, and that the Tribunal "took it upon itself to expand its authority". In disregard of Taiwan's sovereignty and actual control of Itu Aba, and without inviting the ROC to participate in the arbitral proceedings or solicit its views, the Tribunal had denied Itu Aba's "island" status and the maritime entitlements provided by UNCLOS. The statement also reiterated President Tsai office's call to resolve the South China Sea dispute peacefully through multilateral negotiations, as well as "in the spirit of setting aside differences and promoting joint development".⁴

The two statements were simultaneously aimed at three audiences. The first and most important audience was China. Beijing is deeply suspicious about the new DPP government's cross-straits and South China Sea policies, and has been watching warily how Tsai would address these issues since she was elected in January 2016. In recent years, the South China Sea and Taiwan issues have become two inter-related "core interests" for China. On the one hand, Beijing's insistence on Taiwan as an integral part of China, and its firm opposition to so-called "Taiwan independence", are longstanding. On the other hand, Beijing, which claims to have

succeeded the ROC Nationalist (KMT) government as the sole legal government of China since 1 October 1949, adopted the ROC's eleven-dash "U-shaped line" published in 1947 to represent its claims in the South China Sea, albeit with subsequent modifications.⁵ Beijing also regards the ROC's administration of Itu Aba since 1956 as proof of China's territorial sovereignty of the Spratly Islands. Thus, China has repeatedly called for Taiwan to cooperate in defending the territorial sovereignty and the overall interests of the Chinese nation.

China welcomed efforts by Tsai's predecessor, Ma Ying-jeou, to defend and clarify the ROC's claims in the South China Sea, especially after the commencement of the arbitral proceedings in 2013. These efforts included holding an "Exhibition on the ROC's Historic Archives on the Southern Territories" in Taipei in September 2014, and supporting Itu Aba's "island" status.⁶ Even though the Ma government declined Beijing's call to help it defend Chinese sovereignty and interests in the South China Sea, China was prepared to tolerate his South China Sea Peace Initiative proposed in May 2015,⁷ and the associated Roadmap announced in January 2016⁸ that contains proposals for multilateral negotiations and regional cooperation. China tolerated Ma's activities because he had upheld the so-called "1992 Consensus", a short hand for the notion that the two sides across the Taiwan Straits maintain that there is only one China, to which both the Chinese mainland and Taiwan belong, although their interpretations of "one China" differ: for China it means the People's Republic of China and for Taiwan the Republic of China.⁹

So far, President Tsai has yet to fully and unequivocally recognize the "1992 Consensus" and the underlying notion of "one China", which Beijing has demanded as the basis for positive cross-strait interactions to continue. Tsai's reluctance to do so has led Beijing to suspend government-to-government communications with Taipei, and curtail Taiwan's participation in international organizations. With regard to the South China Sea, the DPP government has reiterated the ROC's sovereignty and maritime jurisdictional claims over the four groups of islands — Tungsha (Pratas), Chungsha (Macclesfield Bank), Shisha (Paracel) and Nansha (Spratly) — and rejected the Tribunal's ruling because it undermines Taipei's rights and interests.

That said, the aforementioned statements made no reference to a common Chinese history or the U-shaped line as former President Ma had done. Thus, on the surface at least, the Tsai

government's response to the ruling appears in line with China's, and hence Beijing's initial response to Taiwan's rejection of the award was moderate in tone. According to China's Ministry of Foreign Affairs spokesperson Lu Kang: "Chinese people across the Strait are duty-bound and obliged to jointly preserve the ancestral land of the Chinese nation."¹⁰ However, some policy experts in China pointed to the caveats in Taiwan's statements. For example, Wu Shicun, President of National Institute for South China Sea Studies, noted that Tsai has never recognized the U-shaped line, and warned that Tsai's future South China Sea policy may "separate itself from the Chinese mainland, follow the suit of the US and Japan, curry favor with the ASEAN, and seek Taiwan's independence", which, in turn, could adversely impact cross-strait cooperation.¹¹

The second audience was the domestic population. According to one poll conducted following the ruling, almost 70 per cent of Taiwanese felt that Taiwan had fallen victim to Sino-US competition in the South China Sea.¹² In particular, the United States was blamed for supporting the arbitral proceedings which had resulted in Itu Aba being downgraded from an island to a rock.¹³ In an attempt to make good on her inauguration pledge to "safeguard the sovereignty and territory of the Republic of China",¹⁴ a day after the ruling, Tsai dispatched a frigate to conduct patrols in the South China Sea, including a stop at Itu Aba. In a speech delivered on board the warship before it departed, Tsai stated that the Tribunal's ruling had created a new situation in the South China Sea and that it was necessary for Taiwan to demonstrate its determination to protect its national interests.¹⁵ However, thus far, Tsai has refrained from visiting Itu Aba herself, despite popular support to do so. Instead, Minister of the Interior Yeh Jiunn-rong paid a low-profile visit to Itu Aba in August 2016 during which he talked about environmental issues.¹⁶ His visit drew criticism from the KMT for not defending the country's sovereignty strongly enough in the South China Sea.

The third audience was the international community. The two statements registered Taiwan's grievances at the Tribunal's prejudice against the country's sovereign identity as well as its treatment of Taiwan during the proceedings. Although the legal status of Itu Aba directly concerns Taiwan's rights and interests in the South China Sea, the Tribunal rejected a request from Taipei for observer status. Moreover, although the Tribunal did take note of materials provided by Taiwan — including a 400-page *Amicus Curiae*

submission from the Chinese (Taiwan) Society of International Law — it did not give Taiwan an equal procedural opportunity to argue its case against the Philippines. The Tribunal's attitude towards Taiwan may have been due to the fact that it is not a state party to UNCLOS or because of China's non-participation in the proceedings. Nevertheless, Taiwan feels justified in rejecting the Tribunal's decision on Itu Aba because it was derived without due process.

Potential Challenges for Taiwan after the Arbitration

Legally speaking, the Tribunal's ruling is only binding on the Philippines and China, although other countries may choose to accept it. In Taiwan's case, while the Tsai government does not accept the binding effect of the Tribunal's interpretation concerning the status of Itu Aba, it is committed to maintaining territorial and maritime claims in accordance with international law and UNCLOS, and thus will not make excessive claims.¹⁷ This suggests that while Taiwan still claims sovereignty over all the atolls in the South China Sea and their relevant waters, the government will likely continue to enforce only a 4,000-metre prohibition sea zone and 6,000-metre restricted zone around Itu Aba, which was proclaimed in 1994 and has been implemented since then.

Technically, Taiwan is not obliged to take any action regarding the U-shaped line, since the Tribunal reached its conclusions by focusing mainly on China's interpretation and practices, and has indicated that its ruling applies only to the Philippines and China. Nonetheless, the ruling could still impact Taiwan's rights and interests. For example, following the ruling, a new round of debate and consultation may take place about the location of "overlapping" or "disputed" areas in the South China Sea. This may generate new tensions, particularly between the Philippines and China, or China and Vietnam, and any unilateral measures adopted by these countries could adversely affect the interests of Taiwanese fishing boats operating in the South China Sea. Attempts by the rival claimants to assert sovereignty or jurisdictional rights, or the increased militarization of the Spratlys, could also affect the rights or put at risk the safety of ROC ships and aircraft that sail or fly to Itu Aba on a regular basis. These will require the governments concerned to communicate and consult with one another to avoid potentially dangerous incidents at sea.

Moreover, as a country that borders the semi-enclosed South China Sea, and which controls Itu Aba and the non-disputed Pratas Islands in the northeast, Taiwan is a direct party to the dispute. Thus, Taiwan should be included in all relevant conflict management and cooperation processes, for example cooperation based on Article 123 of UNCLOS for states bordering enclosed or semi-enclosed seas, the implementation of the 2002 ASEAN–China Declaration on the Conduct of Parties in the South China Sea (DoC) and negotiations for a binding Code of Conduct (CoC). President Tsai's predecessors consistently objected to Taiwan's exclusion from cooperative arrangements, such as the DoC and the Trilateral (China–Philippines–Vietnam) Joint Marine Seismic Undertaking (2004–08) which allegedly covered areas around Itu Aba without consulting Taiwan. Similar situations should best be avoided in the future. Admittedly, for Taiwan to participate in those multilateral processes, political will and effective communication among the governments concerned will be necessary.

NOTES

- ¹ "PCA Case No. 2013-9 in the Matter of the South China Sea Arbitration", 12 July 2016, pp. 253–54, available at <<https://pca-cpa.org/wp-content/uploads/sites/175/2016/07/PH-CN-20160712-Award.pdf>>. Hereafter "Award".
- ² "ROC Government Position on the South China Sea Arbitration", ROC (Taiwan) Office of President Press Release, 12 July 2016, available at <<http://english.president.gov.tw/Default.aspx?tabid=491&itemid=37703&rmid=2355>>.
- ³ "ROC Position on the South China Sea Arbitration", ROC Ministry of Foreign Affairs, 12 July 2016, available at <http://www.mofa.gov.tw/en/News_Content.aspx?n=1EADDCFD4C6EC567&s=5B5A9134709EB875>.
- ⁴ Ibid.
- ⁵ See "Limits in the Sea No. 143 China Maritime Claims in the South China Sea", US Department of State, 5 December 2014, available at <<http://www.state.gov/documents/organization/234936.pdf>>.
- ⁶ Ma Ying-jeou, "A Flawed Verdict in the South China Sea", *Wall Street Journal*, 26 July 2016.
- ⁷ "South China Sea Peace Initiative", 26 May 2015, available at <http://www.mofa.gov.tw/News_Content.aspx?n=604CBAA3DB3DDA11&sms=69594088D2AB9C50&s=4589151C339E71C5>.
- ⁸ "Remarks by President Ma on Taiping Island", 28 January 2016, available at <<http://english.president.gov.tw/Default.aspx?tabid=491&itemid=36616&rmid=2355>>.
- ⁹ Ma Ying-jeou, "Consolidating Peace in the Taiwan Strait", *USA Today*, 22 November 2015.

- ¹⁰ "Foreign Ministry Spokesperson Lu Kang's Remarks on Taiwan's Response to South China Sea Arbitration Ruling", 12 July 2016, available at <http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1380255.shtml>.
- ¹¹ "14th Cross-Strait Forum on the South China Sea Issue held in Haikou", National Institute for South China Sea Studies, 26 August 2016, available at <<http://en.nanhai.org.cn/index.php/Index/Info/content/cid/20/id/2905.html>>.
- ¹² I-Chia Lee, "New Party Publishes South China Sea Poll Results", 27 July 2016, available at <<http://www.taipeitimes.com/News/taiwan/archives/2016/07/27/2003651882>>.
- ¹³ "Trouble in Taiwan: Hague Ruling on Taiping Island gives Tsai her Biggest Headache", *South China Morning Post*, 30 July 2016, available at <<http://www.scmp.com/news/china/diplomacy-defence/article/1994841/trouble-taiwan-hague-ruling-tai-ting-island-gives-tsai>>.
- ¹⁴ "Inaugural Speech of ROC 14th-term President Tsai Ing-wen", 20 May 2016, ROC (Taiwan) Office of President, available at <<http://english.president.gov.tw/Default.aspx?tabid=491&itemid=37416&rmid=2355>>.
- ¹⁵ "President Tsai Addresses Troops at Naval Fleet Command", 13 July 2016, available at <<http://english.president.gov.tw/Default.aspx?tabid=491&itemid=37728&rmid=2355>>.
- ¹⁶ Stacy Hsu, "Interior Minister Pays a Visit to Itu Aba", *Taipei Times*, 17 August 2016.
- ¹⁷ "Tsai Holds 1st NSC Meeting, Unveils South China Sea Approach", *Taiwan Today*, 20 July 2016, available at <<http://taiwantoday.tw/ct.asp?xItem=246353&ctNode=2175>>.

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