



Post-Arbitration South China Sea:

Taiwan's Legal Policy Options and Future Prospects

Chen-Ju Chen

Abstract

Through an analysis of official statements and government actions, this chapter looks into the Republic of China (ROC) in Taiwan's positions on the South China Sea disputes before and after the change in ruling political party from the Kuomintang (KMT) to the Democratic Progressive Party (DPP) in May 2016. Differences exist between these two parties in terms of their views on the ROC's international legal status, cross-strait relations, the "Taiwan Authority of China" term used in the Award of July 12, 2016, and the historical and inherency concepts used in the ROC's territorial claims in the South China Sea. Nevertheless, the ROC's legal policy approach has been mostly maintained, and includes reiteration of its territorial claims, emphasis on Itu Aba (Taiping) Island's legal status as an island, support for freedom of navigation and overflight, proposals for the peaceful settlement of the disputes, and its position of non-acceptance of the Award, which is determined to have no legally-binding effect on the ROC. The legal implications of the Award for the ROC relate to its U-shaped line claim and the legal status of Itu Aba, both of which were implicitly targeted in the content of the Award. In light of these implications, the ROC's legal policy options relate to potential clarification of its U-shaped line claim and the governance of Itu Aba (Taiping) Island in the post-arbitration context.

Introduction

Since the Republic of the Philippines initiated arbitral proceedings against the People's Republic of China (PRC) on February 19, 2013, in regards to the South China Sea maritime territorial disputes, the Republic of China (ROC) in Taiwan¹ has paid close attention to the procedures and developments in the arbitra-

1 In practice, the terms ROC and Taiwan, are often used interchangeably. Given that the government's official statements on South China Sea issues have used "the ROC," this chapter mostly conforms to that usage.

The two administrations seem to have different policies for managing the South China Sea disputes, and some doubts have been raised about the ROC's shifting South China Sea policy approach since the DPP took office.

tion case. The Philippines' submissions and the contents of the Award of July 12, 2016, have two major legal implications for the ROC's interests in the South China Sea. These relate to the ROC's eleven-dash (or U-shaped) line claim and its occupied features, particularly Itu Aba (Taiping) Island, which is the largest naturally formed feature in the Spratly Islands and has had a permanent ROC presence since the 1950s. At different stages during and after the arbitral proceedings, the ROC has officially reiterated its positions on the South China Sea disputes and taken actions to support its claims and safeguard its interests. Towards the end of the arbitral proceedings, democratic elections in January 2016 led to a transfer of power between ruling political parties with President Tsai Ing-wen being inaugurated in May 2016. The previous administration led by former President Ma Ying-jeou of the Kuomintang (KMT) and the current administration led by the Democratic Progressive Party (DPP) hold different views on the ROC's international legal status and cross-strait relations. Moreover, the two administrations seem to have different policies for managing the South China Sea disputes, and some doubts have been raised about the ROC's shifting South China Sea policy approach since the DPP took office.

On July 12, 2016, the Tribunal in the South China Sea arbitration case issued its Award, making legal conclusions related to the interpretation and application of the United Nations Convention on the Law of the Sea (UNCLOS).² In the Award, the arbitrators concluded that the PRC's "claims to historic rights, or other sovereign rights or jurisdiction, with respect to the maritime areas of the South China Sea encompassed by the relevant part of the 'nine-dash line' are contrary to the Convention and without lawful effect..."³ Therefore, the PRC had no legal basis to claim historic rights to resources within the sea areas falling within the 'nine-dash line.'⁴ Although directed at the PRC's claims, the Award also implicitly made legal conclusions affecting the

2 United Nations Convention on the Law of the Sea, United Nations, December 10, 1982, <http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf>.

3 Award, PCA Case No. 2013-19, Permanent Court of Arbitration, July 12, 2016, para. 278, <<http://www.pcacases.com/web/sendAttach/2086>>.

4 "The Tribunal Renders Its Award," Press Release, Permanent Court of Arbitration, July 12, 2016, <<http://www.pcacases.com/web/sendAttach/1801>>.

ROC's eleven-dash line claim from which the PRC's nine-dash line is derived. In addition, the arbitrators concluded that none of the Spratly Islands were islands as defined by UNCLOS and were thus not capable of generating exclusive economic zones (EEZs).⁵ These conclusions in particular have been detrimental to the ROC's territorial claims and rights in the South China Sea. When the ROC forms policies on and exercises its rights in the South China Sea, it must consider the challenges resulting from the Award and issues of compliance with differing interpretations of international law and the law of the sea.

This chapter analyzes the ROC's official statements and relevant actions from a legal perspective and makes comparisons between the ROC's pre- and post-inauguration positions on the South China Sea. It further investigates the Award's legal implications for the ROC and its legal policy options in the wake of the arbitration case. Based on the ROC's current approach and the major issues faced, it then concludes with a discussion of the future prospects for the ROC's legal position and role in the South China Sea disputes.

Policy Approach

The ROC's policy approach can be analyzed based on observations of the ROC's statements before and after the Award. Under the KMT administration, the arbitration case already garnered global attention. In that context, the ROC's Ministry of Foreign Affairs (MOFA) made clear its position on the South China Seas disputes in its "Statement on the South China Sea" released on July 7, 2015,⁶ well before the Tribunal issued its Award on Jurisdiction and Admissibility on October 29, 2015. Following that first award, the government reiterated its position in another statement released on October 31, 2016.⁷ After the DPP took office, even more attention has been paid to the ROC's South China Sea policies, the arbitral proceedings, and the DPP administration's reactions to the Award. Following the Award of July 12, 2016, in which the

MOFA made clear its position on the South China Seas disputes well before the Tribunal issued its Award on Jurisdiction and Admissibility on October 29, 2015.

5 Award, para. 646.

6 "Statement on the South China Sea," Ministry of Foreign Affairs, Republic of China, July 7, 2015, <http://www.mofa.gov.tw/en/News_Content.aspx?n=0E7B91A8FBEC4A94&sms=220E98D761D34A9A&s=EDEBCA08C7F51C98>.

7 "ROC government reiterates its position on South China Sea issues," Ministry of Foreign Affairs, Republic of China, October 31, 2015, <http://www.mofa.gov.tw/en/News_Content.aspx?n=1EADDCFD4C6EC567&s=F5170FE043DADE98>.

arbitrators overwhelmingly concluded in favor of the Philippines' and against the arguments and interests of the PRC and ROC, the ROC's MOFA immediately reiterated its position on the South China Sea disputes with regards to its claims, rights, and the content of the Award.⁸ Through these statements, the key aspects of the ROC's legal policy approach can be understood to include reiteration of its territorial claims, emphasis on Itu Aba (Taiping) Island's legal status as an island, support for freedom of navigation and overflight, proposals for the peaceful settlement

any claims to sovereignty over, or occupation of, these areas by other countries, irrespective of the reasons put forward or methods used for such claim or occupation.⁹

This built upon its statement of July 7, 2015, which emphasized the historical basis for its claims, explaining:

the ROC maintains that the South China Sea Islands were recorded long ago in ancient Chinese historical records and local chronicles, even since the Han dynasty. During World War

The ROC's legal policy approach includes reiteration of its territorial claims, emphasis on Itu Aba (Taiping) Island's legal status as an island, support for freedom of navigation and overflight, proposals for the peaceful settlement of the disputes, and its position of non-acceptance of the Award, which is determined to have no legally-binding effect on the ROC.

of the disputes, and its position of non-acceptance of the Award, which is determined to have no legally-binding effect on the ROC.

Reiteration of Territorial Claims

In its statement on October 31, 2015, the ROC reiterated its territorial claims, stating:

[w]hether from the perspective of history, geography, or international law, the Nansha (Spratly) Islands, Shisha (Paracel) Islands, Chungsha Islands (Macclesfield Bank), and Tungsha (Pratas) Islands (together known as the South China Sea Islands), as well as their surrounding waters, are an inherent part of ROC territory and waters. As the ROC enjoys all rights to these islands and their surrounding waters in accordance with international law, the ROC government does not recognize

II, the South China Seas Islands were occupied by Japanese forces. Called "Shinnan Gunto" and placed under the Kaohsiung Prefecture's jurisdiction in 1939, these islands were administered by Taiwan's 'Governor-General' office. By World War II's end, Japan withdrew from the South China Sea Islands. In 1946, the ROC reclaimed these islands and set up outposts on the Tungsha (Pratas Islands), Shisha (Paracel Islands), and Nansha Islands (Spratly Islands). Since then, to support its sovereignty, the ROC has conducted various administrative measures. Such measures include the publication of a cross-reference table for the South China Sea Islands' new and old names and the publication of the Location Map of the South China Sea Islands in 1947 that delineates the scope of ROC territory and waters in the region.¹⁰

8 "ROC position on the South China Sea Arbitration," Ministry of Foreign Affairs, Republic of China, July 12, 2016, <http://www.mofa.gov.tw/en/News_Content.aspx?n=1EADDCCFD4C6EC567&s=5B5A9134709EB875>.

9 "ROC government reiterates its position on South China Sea issues," Ministry of Foreign Affairs, Republic of China, October 31, 2015, point 1.

10 "Statement on the South China Sea," Ministry of Foreign Affairs, Republic of China, July 7, 2015, point 2.

As for this claim's legal basis, according to Article 2 of the 1952 Treaty of Peace between the ROC and Japan, which is pursuant to Article 2 of the 1951 San Francisco Peace Treaty, Japan renounced all rights, titles, and claims to the Nan-sha Islands (Spratly Islands) and Shisha Islands (Paracel Islands). From the ROC's perspective, by then, the ROC had formally restored the ter-

territory and waters" concept as it implied ties with Chinese history, geography, and views on international law, the statement of July 12, 2016, merely restated the ROC's "entitlement to the sovereignties over the South China Sea Islands, which form part of its territory"¹³ without mentioning the historical and inherency concepts. Thus, these differences suggest that the ROC

The ROC government's attitude has changed slightly with the DPP taking office, and it has shifted its approach to advocating territorial sovereignty over the islands and waters of the South China Sea.

ritories that Japan had taken from the Chinese during World War II. As the ROC further stressed in its statement of October 31, 2015:

[t]he South China Sea Islands were first discovered, named, and used, as well as incorporated into national territory, by the Chinese. Furthermore, the San Francisco Peace Treaty, which entered into effect on April 28, 1952, as well as the Treaty of Peace between the ROC and Japan, which was signed that same day, together with other international legal instruments, reconfirmed that the islands and reefs in the South China Sea occupied by Japan should be returned to the ROC.¹¹

Over these areas, the ROC does not recognize other States' claims to occupation or sovereignty.¹²

In these official statements, a key issue that should be noted is that, although the 2015 statements elaborated "an inherent part of ROC

government's attitude has changed slightly with the DPP taking office, and it has shifted its approach to advocating territorial sovereignty over the islands and waters of the South China Sea.

Emphasis on Itu Aba (Taiping) Island's Legal Status as an Island

The ROC's statements emphasized not only its effective control (a basis for sovereignty claims under international law) of Itu Aba (Taiping) Island but also the island's legal status. Along with the documents released in 2015¹⁴ that provided evidence of the ROC's control of and sovereignty over Itu Aba (Taiping) Island, the ROC's statements further discussed the island's legal status under international law. In the statement of October 31, 2015, it argued that, from legal, economic, and geographic perspectives, Itu Aba (Taiping) Island indisputably qualified as an island. This argument was supported by the requirements set forth in Article 121 of UNCLOS. Itu Aba (Taiping) Island is an "island" because it can sustain human habitation and economic life of its own,

11 "ROC government reiterates its position on South China Sea issues," Ministry of Foreign Affairs, Republic of China, October 31, 2015, point 2.

12 Chen-Ju Chen, "Philippines v. China Arbitration Case: Taiwan's Legal Perspectives on the Arbitral Proceedings," in Fu-Kuo Liu and Jonathan Spangler (eds.), *South China Sea Lawfare: Legal Perspectives and International Responses to the Philippines v. China Arbitration Case*, Taipei: South China Sea Think Tank / Taiwan Center for Security Studies, January 29, 2016, pp. 58-59, <<http://scstt.org/reports/2016/525/>>.

13 "ROC position on the South China Sea Arbitration," Ministry of Foreign Affairs, Republic of China, July 12, 2016.

14 Dustin K. H. Wang (eds.), *Compilation of Historical Archives on the Southern Territories of the Republic of China*, Taipei: Ministry of the Interior, 2015, pp. 128 and 161.

and under the same article, it is categorically not a “rock”. To firmly defend this position, MOFA, along with its statement of July 7, 2015, released a document that detailed the island’s environment, natural resources, life, and development.¹⁵ From the ROC’s perspective, Itu Aba (Taiping) Island’s fresh water supplies and other conditions enable it to meet the criteria required by Article 121(3) of UNCLOS for an island to be entitled to an EEZ. As such, the ROC maintains that Itu Aba (Taiping) Island’s legal status cannot be subject to discussion or reinterpretation by other claimants.¹⁶

To further raise awareness of the evidence demonstrating Itu Aba (Taiping) Island’s “island” status, the ROC has sent many high-ranking government officials to visit Itu Aba since late 2015.

Itu Aba (Taiping) Island’s fresh water supplies and other conditions enable it to meet the criteria required by Article 121(3) of UNCLOS for an island to be entitled to an EEZ.

These visits are viewed as actions taken against the Philippines’ attempt at “legally downgrading” the island through its arbitration case.¹⁷ In January 2016, then-ROC President Ma Ying-jeou visited Itu Aba to promote his South China Sea

Peace Initiative.¹⁸ These visits, combined with the Chinese (Taiwan) Society of International Law’s *Amicus Curiae* submission on March 23, 2016,¹⁹ have drawn global attention to the ROC’s long-standing occupation and administration of Itu Aba (Taiping) Island as well as its status as a fully entitled island under international maritime law.

With the Award falling in the Philippines’ favor, the MOFA’s statement of July 12, 2016, reiterated the ROC’s territorial claims over and views on the status of Itu Aba (Taiping) Island. The Ministry of the Interior (MOI) further supported the ROC’s stance on the issue. In a press conference, Minister of the Interior Yeh Jiunn-rong drew further attention to the “Location Map of the South China Sea Islands” published by the MOI in 1947. This publication specified that the Tungsha (Pratas), Shisha (Paracel), Chungsha (Macclesfield Bank), and Nansha (Spratly) islands and their surrounding waters were part of the ROC territory.²⁰ These official statements can be considered significant actions taken by the Tsai administration. Such actions contrast the previous “U-Shaped line” term’s absence in the ROC’s diplomatic responses under the Ma administration due to concerns over diplomatic pressure by other countries, particularly the United States. Such actions also contrast earlier doubts about whether the Tsai administration would abandon or simply not mention the U-shaped line claim.

On August 16, 2016, Yeh went to Itu Aba (Taiping) Island as the DPP’s first high-ranking government official to visit since Tsai’s inauguration

15 “Our Island: The Atlas of Taiping Island of the Republic of China (Taiwan), Vol. 1,” Ministry of Foreign Affairs, Republic of China, July 7, 2015, <<http://www.mofa.gov.tw/Upload/RelFile/1125/150640/848fe97d-1e7c-4ad1-95f4-86b922f9fceb.pdf>>.

16 Chen-Ju Chen, “Philippines v. China Arbitration Case: Taiwan’s Legal Perspectives on the Arbitral Proceedings,” pp. 59-60.

17 “Minister leads group at opening rites for Itu Aba facilities,” *Taipei Times*, December 13, 2015, <<http://www.taipetimes.com/News/front/archives/2015/12/13/2003634679>>.

18 Yuan-Ming Chiao, “Ma visits Taiping, asserts nation’s claim,” *The China Post*, January 29, 2016, <<http://www.chinapost.com.tw/taiwan/national/national-news/2016/01/29/457279/p2/Ma-visits.htm>>.

19 “Amicus Curiae Submission by the Chinese (Taiwan) Society of International Law,” Chinese (Taiwan) Society of International Law, March 23, 2016, <<http://csil.org.tw/home/wp-content/uploads/2016/03/SCSTF-Amicus-Curiae-Brief-final.pdf>>.

20 “ROC gives strong response over South China Sea award,” *Taiwan Today*, July 13, 2016, <<http://taiwantoday.tw/ct.asp?xItem=246203&ctNode=2175>>.

in May 2016 and took the opportunity to reaffirm the ROC's territorial sovereignty claims.²¹ On his visit, Yeh restated that the ROC maintained all rights over the South China Sea islands and their surrounding waters in accordance with international law and UNCLOS. Yeh further stated that "while we will not assert excessive claims, we will also not give up any rights."²² He also announced an important policy to transform Itu Aba into a scientific hub for research on climate change and

China Sea."²⁴ With such statements and a history of actions to support them, the international community has been assured by the ROC of its enduring support for freedoms of navigation and overflight in relevant South China Sea areas. These assurances comply with the UN Charter and other relevant international norms. In terms of implementation, by not interfering with other countries' legal activities, the ROC has, in practice, acted to ensure that all countries can exer-

The international community has been assured by the ROC of its enduring support for freedoms of navigation and overflight in relevant South China Sea areas. These assurances comply with the UN Charter and other relevant international norms.

marine ecology.²³ This suggests that the current government's policy to govern this island has moved from a more traditional military-based approach to a more non-traditional and environmentally friendly one.

Support for Freedom of Navigation and Overflight

The ROC government has also emphasized its commitment to international law by abiding by and advocating the freedoms of navigation and overflight that are guaranteed to countries under international law. It has stressed that it "has consistently adhered to ... freedom of navigation and over-flight as stipulated in the UN Charter and other relevant international law and regulations ... [and has not] interfered with other nations' freedom of navigation or overflight in the South

cise their rights to unimpeded navigation and overflight through ROC-claimed territory where it is guaranteed to them under international law."²⁵

Peaceful Settlement of Disputes

As part of its legal policy approach, the ROC has also insisted that the territorial disputes be managed and resolved through peaceful means. The statement of October 31, 2015, stressed that the ROC "has consistently adhered to the principles of peaceful settlement of international disputes ... as stipulated in the UN Charter and other relevant international law and regulations. In fact, the ROC has defended Taiping Island and other islands without ever getting into military conflict with other nations."²⁶

As for the means of dispute settlement, the ROC urged in its statement of July 12, 2016, that

21 Stacy Hsu, "Interior Minister pays a visit to Itu Aba," *Taipei Times*, August 17, 2016, <<http://www.taipeitimes.com/News/front/archives/2016/08/17/2003653278>>.

22 "Interior minister visits Taiping, reasserts ROC sovereignty," *Taiwan Today*, August 17, 2016, <<http://taiwantoday.tw/ct.asp?xItem=247058&ctNode=2175>>.

23 "Interior minister visits Taiping, reasserts ROC sovereignty," *Taiwan Today*, August 17, 2016, <<http://taiwantoday.tw/ct.asp?xItem=247058&ctNode=2175>>.

24 "ROC government reiterates its position on South China Sea issues," Ministry of Foreign Affairs, Republic of China, October 31, 2015, point 4.

25 Chen-Ju Chen, "Philippines v. China Arbitration Case: Taiwan's Legal Perspectives on the Arbitral Proceedings," pp. 60-61.

26 "ROC government reiterates its position on South China Sea issues," Ministry of Foreign Affairs, Republic of China, October 31, 2015, point 4.

the South China Sea disputes, in the spirit of setting aside differences and promoting joint development, be settled peacefully through multilateral negotiations. To advance South China Sea peace and stability, the ROC maintains that negotiations must be conducted on the basis of equality and has expressed its willingness to work with all concerned parties.²⁷

Aside from these statements, Taiwan has complemented its legal and diplomatic rhetoric with concrete actions, particularly through the development of Itu Aba (Taiping) Island, which has focused on not only on defense but also emergency, humanitarian, scientific, environmental, and other uses that solidify its role as a regional peacemaker. These

Taiwan has complemented its legal and diplomatic rhetoric with concrete actions, particularly through the development of Itu Aba (Taiping) Island, which has focused on not only on defense but also emergency, humanitarian, scientific, environmental, and other uses that solidify its role as a regional peacemaker.

goals are in contrast to the offensive military power expansion and lawfare approaches of rival claimants, which risk destabilizing the region. To build Itu Aba into a location that contributes to regional peace, is ecologically sustainable, has low carbon emissions, and can support humanitarian aid operations, the ROC has set up solar photovoltaic systems, improved navigation facilities, and developed its regional maritime rescue capabilities. To facilitate

normal and emergency communications for global humanitarian rescue operations, a communications network was completed in December 2013. In order to reduce regional tensions and maintain regional peace, the government has “call[ed] on the coastal states of the South China Sea to respect the provisions and spirit of the UN Charter and UNCLOS, and to exercise restraint, safeguard peace and stability in the South China Sea, uphold the freedom of navigation and overflight through the South China Sea, refrain from taking any action that might escalate tensions, and resolve disputes peacefully.”²⁸

Non-Acceptance and Non-Legally-Binding Force of the Award

Immediately following the Award, the ROC’s statement of July 12, 2016, stressed that the Award was completely unacceptable and without legally binding force on the ROC because: (1) the arbitrators exceeded

27 “ROC position on the South China Sea Arbitration,” Ministry of Foreign Affairs, Republic of China, July 12, 2016.

28 “ROC government reiterates its position on South China Sea issues,” Ministry of Foreign Affairs, Republic of China, October 31, 2015, point 5.

the scope of their jurisdiction by concluding on issues not directly related to the South China Sea disputes, including Taiwan's international legal status by addressing Taiwan with the inappropriate and demeaning nomenclature "Taiwan Authority of China";²⁹ (2) the Tribunal severely jeopardized the South China Sea islands' legal statuses by expanding its authority and declaring all Spratly Islands to be rocks that do not generate extended maritime zones including EEZs, even though some of these islands, including Itu Aba, do not fall within the scope of the Philippines' submissions; (3) the ROC's sovereignty and entitlement claims in the South China Sea are based on international law and the law of the sea; and (4) the ROC, from a procedural view, was not invited to participate in the proceedings, nor were its views solicited or taken into consideration by the Tribunal. Thus, the ROC has insisted the Award

has no legally binding force on the ROC and expressed its resolute attitude towards safeguarding its national territory and relevant maritime rights.³⁰

The arbitrators exceeded the scope of their jurisdiction by concluding on issues not directly related to the South China Sea disputes, including Taiwan's international legal status by addressing Taiwan with the inappropriate and demeaning nomenclature "Taiwan Authority of China".

Legal Implications of the Award

The Award's legal implications for the ROC relate to two major issues: the U-shaped line claim and Itu Aba's legal status. In terms of the ROC's U-shaped line claim, the arbitrators determined that the PRC's nine-dash line, which was derived

from the ROC's earlier claims, was not in accordance with UNCLOS. This has raised doubts about the legality of the ROC's claims that served as the foundation for those of the PRC. In terms of Itu Aba's legal status, the Award interpreted Article 121(3) of UNCLOS in an exceptionally narrow manner, concluding that none of the features in the Spratly Islands, including Itu Aba, were capable of sustaining human habitation or an economic life of their own.

29 It should be noted that the term "Taiwan Authority of China" had been previously used by the Philippines in its supplemental written submission submitted on March 16, 2015. However, in all of the ROC's statements responding to the South China Sea arbitration case, the statement of July 12, 2016, was the first time that it had raised the issue. Only under the Tsai administration and following the Award did the government respond officially to highlight the error. See "Supplemental Written Submission of the Philippines," Arbitration under Annex VII of the United Nations Convention on the Law of the Sea, Permanent Court of Arbitration, March 16, 2015, <<http://www.pcacases.com/pcadocs/Supplemental%20Written%20Submission%20Volume%20I.pdf>>.

30 "ROC position on the South China Sea Arbitration," Ministry of Foreign Affairs, Republic of China, July 12, 2016.

Territorial Claims

On the ROC's U-shaped line and the PRC's nine-dash line, the Tribunal concluded that the PRC had no legal basis to claim historical resource rights within the sea areas falling within the nine-dash line. As the PRC rejected the Tribunal's jurisdiction and did not participate in the proceedings, the Tribunal proceeded on the basis of the PRC's official statements from 2009, 2013, and subsequent statements that suggested that its South China Sea claims were historically based³¹ and looked into the nature of the PRC's claimed South China Sea rights.³² The Tribunal then concluded, without considering that those waters form part of its territorial sea or internal waters, that the PRC's historical rights claim to the living and non-living resources within the nine-dash

clarified.³⁵ The ROC's 1993 South China Sea Policy Guidelines claimed that "the South China Sea area within the historic water limit is the maritime area under the jurisdiction of the Republic of China, in which the Republic of China possesses all rights and interests,"³⁶ the aftermath and development of which have been examined by several Taiwanese scholars.³⁷ In December 2005, these Policy Guidelines were suspended by the DPP administration in office at the time.³⁸

Legal Status of Itu Aba (Taiping) Island

As for the legal status of islands and rocks, the Award is the first international adjudication to formally interpret Article 121(3) of UNCLOS. It investigated the text of Article 121(3) in a rig-

As for the legal status of islands and rocks, the Award is the first international adjudication to formally interpret Article 121(3) of UNCLOS.

line were incompatible with UNCLOS.³³

In the ROC's case, the U-shaped line first appeared in its 1947 "Location Map of the South China Sea Islands". However, the "U-shaped line" term has never been formally used in official documents or laws with the exception of the publication of the baselines plus limits of the territorial sea and contiguous zone of both the Tungsha and Chungsha (Huangyan) Islands promulgated by the ROC's Executive Yuan on February 10, 1999, in which the ROC claimed that "all islands and rocks of Spratly Islands within the traditional U-Shaped line of the ROC all belong to its territory."³⁴ This was the only instance in which the ROC officially used the "U-shaped line" term. To date, the U-shaped line's contents have not been

orous manner by detailing its six elements: (a) "rocks", (b) "cannot", (c) "sustain", (d) "human habitation", (e) "or", (f) "economic life of their own."³⁹ Also examined in detail were the objective and purpose of UNCLOS and Article 121(3)'s *travaux préparatoires*.⁴⁰ With the Philippines' rele-

31 Award, paras. 182, 185, and 817.

32 Award, paras. 207–214.

33 Award, para. 232.

34 Dustin K. H. Wang (eds.), *Compilation of Historical Archives on the Southern Territories of the Republic of China*, pp. 196–197.

35 Chun-I Chen, "Legal Aspects of the ROC's Position on the U-Shaped Line," *Prospect Journal*, April 15, 2016, pp. 20–21, <http://nccur.lib.nccu.edu.tw/bitstream/140.119/97954/1/01_Legal_Aspects.pdf>.

36 South China Sea Policy Guidelines, republished in Kuan-Ming Sun, "Policy of the Republic of China towards the South China Sea: Recent Developments," *Marine Policy*, 19, 1995, p. 408.

37 Kuan-Hsiung Wang, "The ROC's Maritime Claims and Practices with Special Reference to the South China Sea," in Nien-Tsu Alfred Hu and Ted L. McDorman (eds.), *South China Sea: Troubled Waters or a Sea of Opportunity*, Oxon: Routledge, 2013, pp. 62–63.

38 Yann-Huei Song, "Possibility of US Accession to the LOS Convention and its Potential Impact on State Practices and Maritime Claims in the South China Sea," in Yann-Huei Song and Keyuan Zou (eds.), *Major Law and Policy Issues in the South China Sea*, Oxon: Routledge, 2016, p. 116.

39 Award, paras. 478–506.

40 Award, paras. 507–538.

vant submissions requesting that the Tribunal consider whether or not certain features under the PRC's control (Scarborough Shoal, Johnson Reef, Cuarteron Reef, and Fiery Cross Reef) generated extended maritime zone entitlements as well as claiming Mischief Reef and Second Thomas Shoal were part of the Philippines' EEZ and continental shelf,⁴¹ the Tribunal also decided to go beyond what was requested of it and investigated other insular features located within 200 nautical miles of Mischief Reef and Second Thomas Shoal, including Itu Aba. In doing so, it concluded that "none of the high-tide features in the Spratly Islands

Although Itu Aba was only raised during the merits hearings, not in the Philippines' initial submissions, the Tribunal nevertheless made conclusions regarding its legal status.

are capable of sustaining human habitation or an economic life of their own within the meaning of those terms in Article 121(3) of the Convention."⁴² Although Itu Aba was only raised during the merits hearings, not in the Philippines' initial submissions, the Tribunal nevertheless made conclusions regarding Itu Aba's legal status in its discussions of the application of Article 121(3) when

determining the legal statuses of Mischief Reef and Second Thomas Shoal. The decision, which legal scholars and policy makers have argued was based on incomplete evidence and beyond the scope of the Tribunal's jurisdiction, that Itu Aba is incapable of generating a 200-nm EEZ or continental shelf has been seriously detrimental to the ROC's interests and its capacity to safeguard its territorial claims in the region.

Legal Policy Options

Given the Award's content, there are two broad policy issues related to these two legal implications that merit consideration: the maintenance and ambiguity of the U-shaped line claim and the governance of Itu Aba (Taiping) Island in light of the Award's potential effects on its legal status.

U-Shaped Line Claim

Given the U-shaped line's historical development and the Award's conclusions on the matter, the ROC has been presented with major several options: abandon its U-shaped line claim, clarify its U-shaped line claim to be in accordance with the Tribunal's interpretation of UNCLOS, or maintain its policy of ambiguity over its U-shaped line claim. Furthermore, if it opted to clarify its claims, it would have to consider the var-

41 Award, para. 385.

42 Award, para. 646.

ious ways of doing so. These legal policy options for the ROC's U-shaped line have also long been a concern for the United States, which has urged the ROC to clarify the contents of the U-shaped line claim.⁴³ The ROC's claims about the Spratly Islands in the 1999 publication of the baselines plus limits of the territorial sea and contiguous zone of the Tungsha and Chungsha (Huangyan) Islands, implied that the U-shaped line refers to its island territories. Nonetheless, the ROC has never fully clarified the U-shaped line's contents and continues to maintain a certain level of ambiguity on the issue. Although clarifying its U-shaped line claims could avoid accusations of incompatibility with or breaching of UNCLOS, the Tsai administration's attitude toward these options seem to suggest that it will continue to maintain ambiguity for several reasons. First, the administration has not explicitly abandoned the U-shaped line but just avoided using the term in response to the Award.⁴⁴ Second, because clarification would have to be compliant with international law and the law of the sea, it could trigger negative reactions from either the PRC or US depending on the way in which it was clarified and introduce contradictions regarding the ROC's role in US-ROC-PRC triangular relations. Thus, it may be the best choice for the ROC in the near-term to maintain the "status quo" of cautious ambiguity regarding its claims.

Governance of Itu Aba (Taiping) Island

As for Itu Aba's legal status, which, in the view of Taiwanese lawmakers, the arbitrators sought to "legally downgrade" in their Award, the Tsai administration's responses, including its official statements and Yeh's visit, seem to continuously advocate maintaining effective control over the

feature, which mirrors the general public's feelings on the issue. However, questions still remain about whether the ROC should consider Itu Aba a rock or an island, how to govern the feature in light of the arbitrators' conclusions, whether or not – and, if so, how – more evidence about its legal, historical, geographic, and geological nature should be provided and disseminated, and whether other legal procedures to further assess its legal status should be considered.

As for whether the ROC should consider Itu Aba a rock or an island, the ROC has not published the baselines of the Itu Aba or the Spratly Islands, so the claims to Itu Aba's EEZ and continental shelf entitlements have not been completed yet. Although the ROC's official statements insisted on its status as an island, in practice, it is still difficult to deduce the government's real

The administration has not explicitly abandoned the U-shaped line but just avoided using the term in response to the Award.

intentions because of the lack of official maritime delimitation submissions. This question, in turn, also links to other issues such as whether or to publish the baselines of Itu Aba (Taiping) Island or the Spratly Islands and, if the government were to do so, how to draw these baselines as doing so would involve explicitly recognizing the legal status of other features within 200 nm of the feature.

As for how to govern Itu Aba in light of the arbitrators' conclusions, its governance must comply with international law and the law of the sea. The ROC's current policy plan to turn Itu Aba (Taiping) Island into a hub for scientific research and humanitarian aid operations seems not to go too far in terms of a concrete, long-term plan for administration of the feature.

In terms of whether or not to research and disseminate more evidence about Itu Aba's legal, historical, geographic, and geological nature, the ROC government – through its official statements, visits, and invitations – and the Chinese

43 Lynn Kuok, *Tides of Change: Taiwan's evolving position in the South China Sea*, Washington D.C., Brookings Institution, May 2015, pp. 15–16, <<https://www.brookings.edu/wp-content/uploads/2016/06/taiwan-south-china-sea-kuok-paper.pdf>>

44 Li-hua Chung, "Tsai to avoid 'U-shaped line': source," *Taipei Times*, July 15, 2016, <<http://www.taipeitimes.com/News/front/archives/2016/07/15/2003651053>>.

(Taiwan) Society of International Law – through its *Amicus Curiae* submission – tried hard before the Award was issued to demonstrate to the Tribunal and the international community that Itu Aba qualified as a fully entitled island under the provisions of UNCLOS. Providing more evidence may or may not change the result or the perspectives of other relevant actors on the matter.

This leads the final important aspect of the ROC’s legal policy options regarding Itu Aba’s governance: whether or not other legal procedures to further assess its legal status should be

and related entitlements, the arbitrators’ conclusions, which overwhelmingly supported the Philippines’ arguments, still have important legal implications for the ROC and are, on the whole, detrimental to its interests in the South China Sea. In particular, these legal implications relate to the ROC’s U-shaped line claim and the legal status of Itu Aba (Taiping) Island, both of which were targeted in the Award. The ROC’s corresponding legal policy options, which relate to the possibility of clarifying its claims and the governance of Itu Aba, are complex, and the government will have

Influential Taiwanese politicians have called publicly for the government to file the case with the International Tribunal for the Law of the Sea.

considered. In answering this question, several challenging legal issues will need to be considered. These relate to whether or not decisions on side issues in the arbitration case are legally binding, whether or not non-parties to the arbitration are legally bound by the Award, how different State practices might impede the force of this arbitral award as it is only “a subsidiary means for the determination of rules of law” according to Article 38(1)(d) of the Statute of the International Court of Justice, and whether or not it would be possible for the ROC to initiate further international arbitral proceedings to determine the legal status of Itu Aba (Taiping) Island. Each of these complex issues deserves further analysis in the coming years, and such analyses must take into account that influential Taiwanese politicians have already called publicly for the government to file the case with the International Tribunal for the Law of the Sea.⁴⁵

to proceed cautiously while continuing to analyze the potential effects of its actions with regards to these policy options over the coming years.

Chen-Ju Chen is currently an Associate Professor at the Department of Law, National Chengchi University, Taiwan. She obtained her LL.B. at National Taiwan University, LL.M. at National Taiwan Ocean University, LL.M. in International Legal Studies at Georgetown University Law Center, United States, along with Dr. iuris at the Faculty of Law, University of Hamburg, Germany with the Max Planck Society’s scholarship. In 2010, her doctoral dissertation *Fisheries Subsidies under International Law* was published by Springer. Upon returning to Taiwan, she has participated in several government-funded research projects regarding the marine environment, underwater cultural heritage protection, the Taiwan-Japan Fisheries Agreement, and South China Sea issues. Following events involving Taiwan’s maritime affairs, such as the various cases of marine pollution, bullet trajectory of Guangdaxing in 2013, along with the South China Sea Arbitration, she has focused on researching relevant law of the sea issues and published several papers in both Chinese and English.

Conclusion and Future Prospects

Although the ROC was not a party to the arbitration case and has insisted that the Award has no legally binding effect on its territorial claims



45 Stacy Hsu, “Lu calls for action on Itu Aba ruling,” *Taipei Times*, July 22, 2016, <<http://www.taipetimes.com/News/taiwan/archives/2016/07/22/2003651544>>.

