



Post-Arbitration South China Sea:
**Taiwan's Security Policy Options and
Future Prospects**

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Abstract

In the South China Sea arbitration case initiated by the Philippines against China, Taiwan was not allowed to participate in the proceedings due to its unique political status with regards to the mainland. Nevertheless, the Award issued by the Arbitral Tribunal on July 12, 2016, which fell overwhelmingly in favor of the Philippines, has major political and security implications for Taiwan. This chapter first outlines Taiwan's response to the Award and its political and security policy approach regarding the South China Sea disputes. It then assesses the political and security implications of the Award for Taiwan, which include aggravating regional tensions, emboldening rival claimants, weakening international law, limiting the scope of and options for negotiations, stoking nationalism, aligning cross-strait interests, encouraging domestic political interest and opposition, and complicating the disputes. Following this, the chapter highlights some of the major political and security policy options that Taiwan's government must consider, which relate to national and regional security, Taiwan-US relations, and domestic politics and cross-strait relations.

Introduction

The Award issued on July 12, 2016, in the South China Sea arbitration case ruled overwhelmingly in favor of the Philippines. It was an unusual result that surprised many, and many policy makers and analyst believe that it reflects a strong political influence in the arbitration process. Although the Tribunal attempted to avoid making explicit legal conclusions on sovereignty and delimitation, issues that the arbitrators were aware was beyond their jurisdiction, the Award walks a fine line in this regard, with its content implicitly deciding the rights to the ownership and status of land features, rocks, reefs, and low-tide elevations in the Spratly Islands. Taiwanese lawmakers maintain that this clearly exceeds the scope of the Tribunal's jurisdiction under the Unit-

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ed Nations Convention on the Law of the Sea (UNCLOS) by ruling on national sovereignty issues and that was confined to issuing an award related to the interpretation of international law as relevant to the disputes in question and parties involved. The function of an arbitral tribunal's award should be to provide parties concerned with legal guidelines that contribute to achieving a final resolution to the dispute. It would then depend on those parties involved to engage in diplomatic negotiations within the framework of the terms decided by the Tribunal to reach an agreement.

The Tribunal emphasized that the two awards were legally binding, no matter what position was taken by the other party – in this case, China. Realistically, after the final award was given, the most critical step would be to urge China and the Philippines to go through the diplomatic negotiation process for dispute settlement. As China has firmly rejected the arbitration, it is not feasible for the two parties to reach an agreement concerning the terms of implementation, so the Award can only be considered a superfluous legal exercise. By toning down the Philippine government's criticism of China, President Rodrigo Duterte has taken a pragmatic approach by circumventing direct confrontation with China. In reality, the situation on the ground has not changed much at all following the Award. A big question that remains is whether or not this arbitration case will have any meaningful legal impacts and be referred to any future cases.

The Arbitral Tribunal's controversial conclusions in the Award have given rise to new challenges for the international legal system and regional politics and security. Taiwan and other countries view the Award as not conducive to peaceful settlement of the maritime disputes. Rather, it has served to disrupt the existing legal, diplomatic, and security structure of the South China Sea, which has existed for centuries. Although the arbitral proceedings were supposedly relevant only to Chinese and Philippine claims and conduct in the South China Sea, Taiwanese claims were also directly referred to in and affected by the Award. For Taiwan, there are clear political and security implications resulting from the Award and the entire arbitration process. The following sections discuss Taiwan's political and security policy approach, the political and security implications of the Award, and Taiwan's policy options related to national security and the po-

litical challenges for Taiwan’s current government that have arisen as a result of the Award.

Political and Security Policy Approach

Immediately after the Award was announced, the DPP government released a strong statement rejecting it. The statement emphasized that Taiwan does not accept the Award and that it does not have any legally binding effect on Taiwan. The main reasons Taiwan was given no option but to issue such a strong statement against the Arbitral Tribunal’s conclusions are based on at least three key political considerations.¹ First, throughout the arbitration process, the Tribunal did not consult or make any attempt whatsoever to engage with Taiwan. Second, the Tribunal referred to Taiwan as “Taiwan authority of China”, which clearly defined Taiwan as a part of China. From legal standpoint, the arbitrators’ unexpected decision to denigrate Taiwan by using this term – one that is not even used by foreign countries or international organizations – made it absolutely impossible for Taiwan’s government to stand on the side of Arbitral Tribunal. Third, the Tribunal misguidedly determined that Itu Aba (Taiping) Island was defined as a “rock” instead of an “island” under the provisions set forth in UNCLOS. Accordingly, under the Tribunal’s interpretation of international maritime law, Taiping Island does not generate an entitlement to an exclusive economic zone (EEZ) or continental shelf. If the government were to accept it, the Award is seriously detrimental to Taiwan’s national interests.

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With its strong statement in response to the Award, the Democratic Progressive Party (DPP) government won a surprisingly high degree of popular support both from Taiwanese society and across the Taiwan Strait, even though being forced to do so happened to be against its original wishes. There are several profound implications of this outcome scenario. First, it has given President Tsai no option but to follow the traditional course of protecting sovereignty based on Taiwan’s eleven-dash line claim that has been official government policy for seventy years. By insisting on basing Taiwan’s claims on this traditional line of sovereignty, she may not be regarded as drifting away from the

1 “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=1EADDCFD4C6EC567&s=5B5A9134709EB875>.

constitution of the Republic of China.

Secondly, from an international perspective, it may seem that Taiwan is echoing China's stance on South China Sea issues and agreeing to take the same policy line as China as far as sovereignty claims are concerned. Quite surprisingly, President Tsai was applauded by the public in main-

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land China as well. In fact, President Tsai wanted neither to align Taiwan with the Chinese policy in the South China Sea nor accept international legal conclusions so detrimental to Taiwan's national interests. For a few weeks afterwards, the rejection of the Award seemed to send out a hopeful political signal to Beijing as a possible political opportunity to link Taiwan with China without the latter directly affirming the "1992 consensus".

Nevertheless, later on, a review from within the DPP suggested that Taiwan's policy stance should not be in line with that of China.² According to an open survey, mismanagement of the response to the Award, the arbitral proceedings, and South China Sea issues overall was one of the main factors causing the decline in President Tsai's approval rating.³ As the popularity of the Tsai administration continuously and dramatically drops, the hardliners inside the ruling party

have tried to shift away from a hopeful course for cross-strait relations and differentiate Taiwan's policy stance from the Chinese one. On her first National Day address, President Tsai affirmed that she would not provoke China. However, she only elaborated on relations with China by referring to the historic fact that a meeting took place in 1992 without using the term "1992 consensus" that had previously served as the basis for cross-strait dialogue. Politically, it has diminished Taiwan's flexibility for engaging with China and weakened China's expectations that direct dialogue would continue. In terms of security, the tendency to drift away from rapprochement with China increases diplomatic uncertainty and security risks in the Taiwan Strait. This has come to be a critical issue for the administration as it continues to cope with the potential for tougher responses from

Beijing and the lack of common understanding between the two governments.

Political and Security Implications of the Award

The Award's surprising and controversial conclusions that were detrimental to Chinese and Taiwanese interests on almost every key issue has aroused debate throughout the regional and international legal and political communities. The Arbitral Tribunal claimed that it was independent, offered objective legal perspectives, and considered only on legal issues that would affect the parties concerned. However, the whole arbitration process was seriously influenced by political factors, the arbitrators took it upon themselves to not simply offer legal arguments on the issues submitted by the Philippines but to make legal conclusions beyond what was requested of it and on issues that implicitly affect territorial sovereignty. Because of the resulting political and security implications, the arbitral proceedings did not serve to make progress towards the ultimate goal of peaceful dispute settlement. Instead, the Award was counterproductive to regional peace

2 "Taiwan Thinktank July Public Survey Press Conference," Taiwan Thinktank, July 30, 2016, <<http://www.taiwanthinktank.org/chinese/page/5/61/3149/0>>.

3 "Blue Survey: Tsai Ing-wen has been Too Moderate on South China Sea," Apple Daily / Radio France Internationale, September 7, 2016, <<http://www.appledaily.com.tw/realtimenews/article/new/20160907/944356/>>.

and stability and has since increased tensions among the related parties. For Taiwan, the Award has major political and security implications, which include aggravating regional tensions, emboldening rival claimants, weakening international law, limiting the scope of and options for negotiations, stoking nationalism, aligning cross-strait interests, encouraging domestic political interest and opposition, and complicating the disputes.

Aggravating Regional Tensions

Throughout the arbitration process, diplomatic battles between the Philippines and China and between the US and China have been further aggravated. With the arbitral proceedings ongoing, the bilateral relationship between the Philippines and China reached its lowest point in recent his-

Emboldening Rival Claimants

As the Award denied the legality of Chinese historical entitlements within its nine-dash line claims in the South China Sea and ruled on the status of land features, suggesting that many features in the Spratly Islands only receive the legal entitlements of rocks and low-tide or fully submerged features under UNCLOS, the surprising outcome of the arbitration case may have shifted the fundamental power structure of the South China Sea. It gives other claimants the legal basis to challenge Chinese claims by declaring them as not in accordance with international law and preventing features in the Spratly Islands from receiving the legal entitlements of an “island” under international law. In effect, it may have paved a way for further struggle among claimants and non-claimants rather than offer-

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tory. Most regional tensions are derived from the bilateral antagonism on the ground. Policy makers from Taiwan, China, and elsewhere are concerned that, as a result of the Philippines legal accusations, the whole region has been brought to the brink of confrontation. Moreover, as a result of the arbitration, most regional countries were pushed by the US into supporting the Philippines’ arbitration case and were thus forced to either take sides regarding its lawfare approach or cautiously navigate a fine line in an attempt to find a middle ground for their South China Sea policies. The US has taken advantage of the arbitration case against China and placed further emphasis on its Asia-Pacific rebalancing strategy that has increased its involvement in regional security affairs.

ing any clear guidelines for long-term peaceful settlement of the disputes. In terms of the goal of seeking regional peace, the Award has been counterproductive.

Furthermore, as the Award challenged the legality of China’s nine-dash line claims and therefore sought to implicitly invalidate Taiwan’s eleven-dash line claims that were the foundation for these, it may have unfortunately sent a wrong message to the region by encouraging other claimants and non-claimants to challenge the long-standing sovereignty claims of China and Taiwan in the South China Sea. This may even encourage other rival claimants to initiate more legal proceedings against China in the future. Following the Award, some voices in Japan and Indonesia have expressed their strong desire for presenting new arbitration cases against China. If this became a trend, it could have even grav-

er security consequences for Taiwan as it would continue to be sidelined while third parties make legal decisions that directly affect its rights.

Weakening International Law

In part because of the Philippines' unilateral initiation of the arbitral proceedings, China's resulting decision to not participate, and the prohibition of Taiwan from participating, the legal conclusions set forth in the Award are primarily based on the provisions of UNCLOS and partial

The arbitrators' unusually narrow interpretation of international law regarding the status of features, their tendency to make legal conclusions beyond what was requested of them, their unnecessary denigration of Taiwan, and their eagerness to make legal decisions based on incomplete evidence has led many observers in Taiwan, China, and elsewhere to lose faith in the potentially beneficial international arbitration process.

information supplied by the Philippines. It did not accept the Chinese position on historic entitlements in the South China Sea but did accept that the Philippines had certain historic rights. Where the Tribunal did accept China's position on key issues, it used it in a way that was detrimental to Chinese interests. This was the case with the arbitrators' acceptance of China's argument that its infrastructural developments were for civilian purposes, which it then took to mean that, because they were not military installations, they could not be excluded from jurisdiction. Moreover, the Tribunal did not consider Taiwan's submission of a careful scientific survey of Itu Aba

(Taiping) Island that provided ample evidence that the feature qualifies as an island under UNCLOS, nor did it accept formal invitations by the Taiwanese government to visit the island or send relevant experts on its behalf. The arbitrators' unusually narrow interpretation of international law regarding the status of features, their tendency to make legal conclusions beyond what was requested of them, their unnecessary denigration of Taiwan, and their eagerness to make legal decisions based on incomplete evidence has led many observers in Taiwan, China, and elsewhere to lose faith in the potentially beneficial international arbitration process.

Limiting the Scope of and Options for Negotiations

Now, the big question is how to implement the Award. If China rejects negotiations with the Philippines that are based on the Award, nobody will be able to force the parties concerned to negotiate. In terms of bilateral dialogue, China has emphasized that any possibility of negotiations with the Philippines would have to start from ground zero and could not make use of the content of the Award, while the Philippines faces external and internal political pressure to abide by the Award. In addition, the international community lacks a credible mechanism to help implement the Award issued by the Arbitral Tribunal. These factors have effectively limited the scope of and options for negotiations. If the Philippines does not make concessions, it will be difficult for the two parties to move forward with negotiations on dispute management and eventual dispute settlement.

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Stoking Nationalism

Another security implication for Taiwan stems from the unfortunate reality that the arbitrators' decisions were overwhelmingly in favor of the Philippines and detrimental to Taiwanese and

Chinese national interests. The negative outcome of the Award has stirred up strong nationalism and absolutism in domestic politics in China and confusion in Taiwan. Acutely aware that accepting the Tribunal's conclusions would damage their national interests, China and Taiwan were clear in their respective rejections of the Award, and the public on both sides of the Taiwan Strait has been largely in support of their governments' decisions. Interestingly, nationalism in the Philippines has also been on the rise in the wake of the country's historic 'victory' in the unilaterally initiated arbitration case. In the future, these trends may have the unintended consequence of constraining the degree of policy flexibility that national decision makers have in negotiating with

alignment of these interests. Whether or not this partial policy alignment could pave the way for the two sides to consider South China Sea issues as new grounds for reconciliation is something that will be worth watching in the future.

Encouraging Domestic Political Interest and Opposition

In light of the arbitrators' denial of Taiwan's participation in the arbitration process and surprising decision to refer to the sovereign state as "Taiwan authority of China" throughout the Award, Taiwan's government under President Tsai responded that Taiwan would not accept

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each other. In this regard, there is a marked difference between the pre-arbitration and post-arbitration South China Sea political environments.

Aligning Cross-Strait Interests

Since ambiguity about Taiwan's political relations with China remains and Taiwan's original claims serve as the basis for those of China, the Award has implicitly denied Taiwan's claims of historical entitlements based on its eleven-dash line, the source of China's nine-dash line claims. The negative impacts of the Award have alerted policy makers in Taipei and Beijing to the unfortunate reality that international legal mechanisms may not be as impartial as they had hoped and that they have the potential to threaten their national security interests. In the midst of the ongoing rivalry in the Taiwan Strait, both sides have nevertheless recognized that there may be common interests at stake on the South China Sea issues, and the Award may have led to an increasing

the Award and that it would not have any legally binding effect on Taiwan.⁴ Taiwan's position that it rejects the Award has been clear and consistent. This led to a very interesting situation that Taiwan, by defending its national interests, has the appearance of siding with China in its response to the Award. This has catalyzed domestic political interest in and opposition to the Award and given rise to complicated feelings for the independence-oriented government at home and abroad.

Taiwan's new DPP government has made a surprisingly strong turn in responding to the Award. Traditionally, given its complicated political nature and lower priority relative to other more pressing policy issues, the South China Sea disputes were not high on the DPP agenda. When the Award seriously undercut Taiwan's national

4 "ROC rejects South China Sea arbitration award," *Taiwan Today*, July 12, 2016, <<http://taiwantoday.tw/ct.asp?xItem=246168&ctNode=2175>>.

interests by referring to the Republic of China government on Taiwan as “Taiwan authority of China” and stripping Itu Aba (Taiping) Island of the potential legal entitlements accorded to it as an island, Taiwan’s government was forced to express its strong opposition to and rejection of the Award. To some extent, the government was surprised by the negative outcomes of the Award and was forced to change the original course of its policy, which has unintentionally given the impression that it is leaning toward China in the disputes. However, political concerns have increased as to whether or not Taiwan’s government may seek to provide further clarification of its South China Sea policy and claims in order to distance itself from those of Beijing.

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Complicating the Disputes

Finally, even though the Award has presented legal conclusions on certain aspects of disputes, offered legal bases for some sovereignty claims, and provided justifications for certain actions, the situation in the South China Sea has

become an increasingly complicated aspect of the policy agendas of rival claimants and other major stakeholders. As a result, their national policies for the South China Sea may become further constrained by international and internal factors.

Political and Security Policy Options

As a result of the Award, security issues in the post-arbitration context have become increasingly difficult to manage for Taiwan and the region. The Award may have profound effects on China and Taiwan’s policy approaches when dealing with other claimants in the future. Such a scenario will definitely increase security risks for Taiwan, as neighboring countries will naturally quote the awards vis-à-vis Taiwan as justification for their own actions and whenever touching upon the maritime territorial disputes. Furthermore, the arbitrators’ references to Taiwan as the “Taiwan authority of China” have reinvigorated domestic political sentiment opposed to becoming closer to China. Should the Tsai administration drift further away from China, political tensions and security concerns will rise as a result. There remain questions as how much Taiwan can do to articulate its rejection of the Award and convey its message to the region and international community. Despite not being bound by the Award, Taiwan will still have to push to engage in some practical actions to strengthen its position and effectively deny

the detrimental legal impacts of the Award. Consequently, there are three important dimensions of its security policy options that must be considered.

Regional Security and Marginalization

Regional security and stability are critical to Taiwan's national security interests. With the security environment in the South China Sea changing in the wake of the Award, other claimants and major stakeholders prepared to act according to the conclusions outlined in the Award. Although immediately after release of the Award there was no significant change to individual claims on the ground, there would be a tendency that regional countries would follow what the direction of the verdict gives. Taiwan is not the immediate party of the arbitration. However, based on the U-shaped line, its position and policy on territorial claims has the same base as China's. Regardless of the controversy surrounding

the Award, Taiwan has to make a hard decision regarding how to engage in practical actions to show that it remains a key claimant and should be involved in any potential multilateral negotiations. Otherwise, Taiwan will be further marginalized to the extent of irrelevance in the South China Sea disputes. When regional order is going through a period of readjustment after the arbitral

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proceedings, it would serve Taiwan's national security interests to respond more actively by increasing military presence and strengthening its defense capabilities.

Taiwan-US Relations

The US has been a significant factor influencing the direction of Taiwan's South China Sea policy. Under former President Ma Ying-jeou, Taiwan would have liked to boost its strength in the South China Sea. However, because of US concerns that Taiwan's efforts could bolster China's position in the arbitration and disrupt its own South China Sea strategy, it attempted to dissuade Taiwan from becoming more actively engaged. Throughout the period of arbitration, Taiwan was constrained by US policy interests in the region and unbalanced domestic political preferences, so it could not freely pursue its own national interests.

In the wake of the arbitration case, Taiwan has been left with few legal and diplomatic policy options but to remain firm in its stance that the Award has no legal effect on Taiwan's claims in the South China

Sea. At the same time, Taipei must carefully calibrate its relations with Washington, particularly with US lawmakers calling upon China to accept and abide by the content of the Award. Although the Philippines' decreasing emphasis on the arbitration case and improving ties with China under President Rodrigo Duterte may alleviate US diplomatic pressure on all parties to abide by the Award, there will nevertheless remain some underlying incompatibility between Taiwan and US perspectives on the South China Sea. Nevertheless, Taiwan and the US have long maintained strong, albeit informal, diplomatic and security relations. The US remains a guarantor of Taiwanese security – although this would unlikely extend to its South China Sea claims – and a key supplier of defense technology and equipment. In the future, Taiwan will have to continue to demonstrate to US policymakers that supporting it is also in US

wan's South China Sea policy options have become increasingly constrained. As a result, the DPP government has taken a more indistinct position than its predecessor. By implicitly advocating Taiwan independence, the DPP government has reduced the possibility of working with China and actually undercut its own opportunities for engagement on relevant issues.

As previously discussed, the Tribunal's decisions in the arbitration case were overwhelmingly in favor of the Philippines and detrimental to China and Taiwan's interests, and this resulted in what has the appearance of legal policy alignment between Beijing and Taipei, even under the DPP administration. In terms of security, however, Taiwan is in a unique situation in that it must confront both the security challenges of cross-strait relations as well as those of the South China Sea. The government's reluctance to take

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Domestic Politics and Cross-Strait Relations

Internally, for two decades, Taiwan has been bogged down by domestic political struggle that has centered on different views of statehood, and these debates, in turn, affect its future as well as sovereignty claims in the South China Sea. Because the former KMT government was given greater leeway by Beijing in addressing international policy issues, it was active in asserting Taiwan's sovereignty claims in the South China Sea with its handicapped status in the international community being less of an obstacle. However, as cross-strait relations have soured due to the DPP government's rejection of the 1992 consensus, the common political basis for negotiations between the KMT government and Beijing, Tai-

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more drastic actions to protect national sovereignty in the South China Sea is the result of the cross-strait dilemma, which presents a greater existential threat to its security than do its lesser maritime claims. The political dilemma is that increased efforts to protect its sovereignty claims could mean accepting the legitimacy of the "One China" concept, which the DPP is unable to swallow. In cross-strait relations, the DPP government now faces a tough choice in terms of its security policy. As it takes both internal and external pressures into consideration, its policy options are limited, and some fear that its actions are causing it to drift away from its national interests.

Conclusion and Future Prospects

The Award presents a great deal of security challenges for the incumbent government in Taipei, and many believe that President Tsai has not been doing enough to protect Taiwan's national

interests. After rejecting the Award, the government has taken few actions in line with the tone of its legal stance and has seemingly backed down from its tough position. From a domestic political perspective, the government was not ready to take on the Award. While the cross-strait relations today are not stable and pathway for negotiations is unclear, any responses to South China Sea issues by Taipei could further complicate cross-strait relations depending on mainland China's interpretations of such actions. Although the strong rejection of the Award from a legal perspective may have been the right course of action, it does not seem to go along with the DPP's original desire to comply with the Award. Moreover, when the government destabilizes cross-strait relations and fails to back up its legal position with clear actions

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to protect its sovereignty, Taiwan may be further marginalized in future South China Sea negotiations. The great risk generated by the Award and Taipei's subsequent responses are that they may deepen Beijing's mistrust of the DPP government. When President Rodrigo Duterte of the Philippines visited China in October 2016, it implied that a fundamental change in the South China Sea power struggle was taking place. By its reluctance to take action, Taiwan puts its national security interests at risk on two fronts: it loses its edge in the South China Sea, and it causes a deterioration in cross-strait relations. To show its determination, it is important for Taiwan to further strengthen its South China Sea claims while, at the same time, engage in bilateral dialogue with rival claimants including China.

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