



## Taiping Island's Legal Status: Questions Remain in the Aftermath of the Award

By Serafettin Yilmaz and Tsung-Han Tai / *Issue Briefings* 16 / 2016

**Far from making progress towards a South China Sea dispute settlement, the Award in the Philippines v. China arbitration case has all but ensured that debate will continue. In particular, the Tribunal's controversial conclusions regarding Itu Aba (Taiping) Island's legal status may have already reduced the effectiveness and perceived validity of the Award.**

In a recent article titled “Analysis of the Legal Impact on the South China Arbitration: Perspective on the Legal Status of Taiping island,” which appeared in *Chinese Review of International Law*,<sup>1</sup> the authors questioned the impact of Itu Aba (Taiping) Island's legal status on the Philippines' fifteen Submissions under the One-China Policy and argued that 9 of the 15 Submissions (Submission No. 4, 5, 6, 7, 8, 9, 11, 12, and 14) would potentially be damaged if Taiping Island were established as having entitlement to an exclusive economic zone (EEZ) and continental shelf (CS).

The Arbitral Tribunal, through the Permanent Court of Arbitration (PCA) as its registry, released its Award in the Philippines v. China arbitration case on July 12, 2016, concluding that, among other issues, Taiping Island and several

other features are incapable “of sustaining human habitation or an economic life of their own, [and] the effect of Article 121(3) is that such features shall have no exclusive economic zone or continental shelf.”<sup>2</sup> However, we view this decision as being inconclusive and suggest that it leaves the question of the legal status of Taiping Island far from solved. On the contrary, the decision will further intensify the debate over Taiping Island's status with larger implications for international practice and the law of the sea with respect to Article 121 of UNCLOS as it relates to small sea features around the world.

### Taiping Island's Status

During the arbitral proceedings, after a certain internal debate, the Philippine side chose to exclude Taiping Island from the fifteen

<sup>1</sup> Tsung-Han Tai and Serafettin Yilmaz, “Analysis of the Legal Impact on the South China Arbitration: Perspective on the Legal Status of Taiping island,” *Chinese Review of International Law*, 2016, Vol. 4 (July 2016), pp. 3- 12. For the text of the article (in Chinese) visit, <http://www.guojifayanjiu.org/Magazine/Show?id=13201>. The research results are sponsored by China/Shandong University International Postdoctoral Exchange Program. The field work is supported by the following projects: “The Study of the

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<sup>2</sup> Award, Permanent Court of Arbitration, 12 July 2016, p. 254. For the full text of the Award, <http://www.pcacases.com/pcadocs/PH-CN%20-%2020160712%20-%20Award.pdf>



Submissions that it requested the Tribunal consider in issuing an Award but nevertheless included arguments regarding Taiping Island's legal status in its Memorial and oral arguments. In its Position Paper published on December 7, 2014, China criticized the absence of the island in the Submissions, stating that "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."<sup>3</sup> It must be noted here that the Position Paper did not raise the issue of Taiping Island to argue for a 200-nm EEZ entitlement. Rather, Beijing criticized the Philippines for "a grave violation of the One-China Principle and an infringement of China's sovereignty and territorial integrity" for not adding Taiping Island into its Submissions which included all the rest of the nine China-occupied Spratly features.

During the hearing, the Philippines not only clarified its position on the One-China Principle but also presented in detail its argument in regards to the legal status of Taiping Island. The Philippines explicitly reiterated its position, indicating that "there is only one China, and that it is the People's Republic of China"<sup>4</sup> and called Taiwan "a non-state entity."<sup>5</sup> On Taiping Island's

legal status, the Philippines held that, "because Itu Aba is not capable of sustaining human habitation or economic life of its own ... it is a 'rock' under Article 121(3), based on the plain meaning of the text, even without recourse to its object and purpose."<sup>6</sup> Significant amount of time was dedicated to substantiate the arguments regarding Taiping Island's legal status during the arbitral proceedings, in which the Philippines often selectively referred to data to attempt to demonstrate that Taiping Island was in fact a rock not entitled to a 200-nm EEZ.

In our article, however, we argued that factual evidence suggested otherwise as far as the sustainability of human habitation and economic activities are concerned. On the question of human habitation on Taiping Island, we referred to various official statements, including one by the ROC's Ministry of Foreign Affairs which held that "Taiping Island (Itu Aba) has groundwater wells, [and] natural vegetation."<sup>7</sup> Fresh water on Taiping Island has been available since 1992 when "a water catchment, reservoirs and other facilities were constructed."<sup>8</sup>

We also cited a recent study released by Taiwan's Council of Agriculture which organized a trip to Taiping Island in an effort to provide additional first-hand accounts of evidence supporting Taiping Island's status as an island

<sup>3</sup> China's Position Paper, Article 2, para. 22.

<sup>4</sup> PCA Case No. 2013-19, Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility, November 25, 2015, p. 6, <<http://www.pcacases.com/web/sendAttach/1548>>

<sup>5</sup> *Ibid.*, p. 38.

<sup>6</sup> PCA Case No. 2013-19, Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility, 30th November 2015," p. 12, <<http://www.pcacases.com/web/sendAttach/1548>>

<sup>7</sup> Statement on the South China Sea, Ministry of Foreign Affairs, Taiwan, July 7, 2015.

<[http://www.mofa.gov.tw/en/News\\_Content.aspx?n=1EADDCFD4C6EC567&s=EDEBCA08C7F51C98](http://www.mofa.gov.tw/en/News_Content.aspx?n=1EADDCFD4C6EC567&s=EDEBCA08C7F51C98)>

<sup>8</sup> Yann-huei Song, "Taiping island: An island or a Rock under UNCLOS?" Asian Maritime Transparency Initiative, May 7, 2015, <<http://amti.csis.org/taiping-island-an-island-or-a-rock-under-unclos/>>



under international law. Joined by experts from scientific and legal community, the two-day investigation revealed further details and photographic evidence that appeared to effectively invalidate the Philippines' arguments to the Tribunal about Taiping Island. On the question of water quality, the on-site analysis showed that "the water on Taiping Island is freshwater that can be used as drinking water, and is of higher quality than the groundwater found on Penghu island."<sup>9</sup> The analysis further demonstrated that "soil on the island is naturally formed and supports indigenous vegetation as well as agricultural crops," which demonstrates that Taiping Island is able to "sustain human habitation and economic life of its own."<sup>10</sup>

We also held that the conditions outlined in Article 121 (3), which states that "rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf," suggested that, if one of the conditions were met, there would be no need for the other condition to be present. Therefore, lack of human habitation, if continuous official occupation since 1956 were ignored, did not change Taiping Island's status so long as it was well-established that it could potentially support it.

## Fundamental Impact

It has been obvious from the start of the arbitration case that the question of Taiping Island would have a fundamental impact on the arguments laid out by the Philippines. For that reason, the Philippine side avoided including it in the original Submissions and instead included it extensively in its Memorial and oral arguments. By doing so, Manila hoped to create a legal narrative in which Taiping Island was considered to be a rock without endangering its own core arguments. In our paper, we listed the potential impact of Taiping Island's legal status on the Philippines' Submissions around three major issue areas:

1. The potential EEZ generated by Taiping Island would encompass eight of the nine features (with the exception of Scarborough Shoal) brought up by Manila in its Submissions.<sup>11</sup> Thus, Manila's argument about their status as rocks or low-tide elevations (LTEs) would be moot because they are covered by the Taiping Island EEZ.
2. Since China's build-up activities on the eight features mentioned by the Philippines take place within the EEZ and CS that could be generated by Taiping Island, as per the One-China Principle, they are within the law, as China has the exclusive rights to construct

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<sup>9</sup> Taiping island is an island, not a rock, and the ROC possesses full rights associated with an exclusive economic zone and continental shelf in accordance with UNCLOS, Public Diplomacy Coordination Council, Taiwan, January 23, 2016 <[http://www.mofa.gov.tw/en/News\\_Content.aspx?n=1EADDCFD4C6EC567&s=542A8C89D51D8739](http://www.mofa.gov.tw/en/News_Content.aspx?n=1EADDCFD4C6EC567&s=542A8C89D51D8739)>

<sup>10</sup> Taiping island is an island, not a rock, and the ROC possesses full rights associated with an exclusive economic zone and

continental shelf in accordance with UNCLOS, Public Diplomacy Coordination Council, Taiwan, January 23, 2016 <[http://www.mofa.gov.tw/en/News\\_Content.aspx?n=1EADDCFD4C6EC567&s=542A8C89D51D8739](http://www.mofa.gov.tw/en/News_Content.aspx?n=1EADDCFD4C6EC567&s=542A8C89D51D8739)>

<sup>11</sup> The Philippine side considered Mischief Reef, Second Thomas Shoal, McKennan Reef, Gaven Reef, and Subi Reef to be low-tide elevations (LTEs) and Johnson Reef, Quarteron Reef, and Fiery Cross Reef to be rocks.



- artificial islands, installations and structures on the sea features in their own EEZ and CS under Article 60 and 80 of UNCLOS.<sup>12</sup>
3. China's maritime law enforcement activities, too, occur within 200 nm of Taiping Island, which means that China has the rights, jurisdiction, and duties in the area afforded to it under Article 56 of UNCLOS.<sup>13</sup> Furthermore, although Scarborough Shoal falls outside the EEZ generated by Taiping island, it still generates 12-nm territorial waters; thus, the argument that China has invaded the Philippines' EEZ or CS would be made invalid.

## Conclusion

It is obvious that the question of Taiping Island will occupy a greater space and weight in arguing against the Tribunal's conclusions in its Award in the post-arbitration regional context, and this can already be seen in various official statements released by Beijing which now frequently refer to Taiping Island.<sup>14</sup> Thus, the Tribunal's conclusions on the issue of Taiping Island's legal status seem to have further complicated the situation rather than providing answers or solutions because of the island's potential implications for the arguments laid out by the Philippines and endorsed by the Tribunal in the strongest terms.

First and foremost, the counterarguments brought in the 500-page Award against the Taiping Island are not convincing. They are not convincing not the least because of the fact that Beijing was not present during the hearings because it held that the Tribunal did not have jurisdiction over matters related to sovereignty (and Taipei, for its part, was not invited by the Tribunal to share its views). Thus, the Tribunal lacked legitimate opposing views and expert opinions from the parties directly affected by the case. None of the experts on the Philippine side had the chance to personally observe the conditions on Taiping Island and therefore they all had to rely on secondary resources, which should actually have convinced the Tribunal of Taiping Island's status as a full-fledged island.

Conflicting expert opinions also shed negative light on the Award. One of the experts on the Philippines' legal team, Professor Clive Schofield of the University of Wollongong, Australia, observed in a 2014 article co-authored with Robert C. Beckman that "it can be argued in good faith that the islands we have identified are not 'rocks which cannot sustain human habitation or economic life of their own' within the meaning of Article 121(3). As a result, they would, in principle, be entitled to a territorial sea, EEZ and continental shelf of their own," thereby identifying Taiping Island as "the largest island

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<sup>12</sup> UNCLOS full text available at [http://www.un.org/Depts/los/convention\\_agreements/texts/unclos/UNCLOS-TOC.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/UNCLOS-TOC.htm)

<sup>13</sup> Article 56 of the UNCLOS deals with the issue of *Rights, jurisdiction and duties of the coastal State in the exclusive economic zone*.

<sup>14</sup> Facts show Taiping Dao is island, not rock, says FM, Xinhua, 2016-06-03, [http://news.xinhuanet.com/english/2016-06/03/c\\_135409893.htm](http://news.xinhuanet.com/english/2016-06/03/c_135409893.htm).



and the only one reported to have a source of fresh water.”<sup>15</sup> However, during his testimony, Schofield backed down on his earlier conviction, arguing that Taiping Island was a rock with no entitlement other than 12-nm territorial waters.

Furthermore, the Tribunal’s conclusions related to Taiping Island have put the legal status of smaller sea features such as Japan’s Okinotorishima or the United States’ Kingman Reef in jeopardy since both countries claim territorial waters and EEZs for these LTEs. This brings up the most vital issue of enforcement. The historical fact is that international legal rulings have been ignored by countries such as Russia, Japan, the US, and the UK in the past. For example, in the Arctic Sunrise case, although the Moscow was ordered to pay damages to the Netherlands, Russia, which did not take part in the hearings, ignored the ruling.<sup>16</sup> In another case, *The Republic of Nicaragua v. The United States of America*, the International Court of Justice (ICJ) demanded the US government pay reparations for its support of the Contras against the Nicaraguan government. The US rejected participation in the case and declined to pay reparations as ordered by the court. Hence, considering China’s non-participation and non-recognition of the Tribunal as well as the Tribunal’s questionable conclusions regarding

Taiping Island, there is little reason to think that the result of the arbitration case will be different this time.

It is partly for these reasons that regional and global reactions to the Award have been relatively muted so far. The EU, for instance, was slow to release a statement on the issue despite pressure from the US.<sup>17</sup> In the meantime, the ICJ, a UN institution, released a statement stressing that it had no connection to the Arbitral Tribunal constituted under UNCLOS with the PCA as registry. The ICJ statement read that “the Award in the South China Sea Arbitration was issued by an Arbitral Tribunal acting with the secretarial assistance of the PCA. The ICJ, which is a totally distinct institution, has had no involvement in the above mentioned case.”<sup>18</sup> Finally, ASEAN abstained from releasing a joint statement on the Award and instead expressed concern about recent developments without naming any country.<sup>19</sup>

Moving forward, questions regarding Taiping Island’s legal status will persist and debate will intensify following the Award. The Tribunal’s decisions will create further complications for states such as Japan and the US in administering sea features smaller than Taiping Island as far as Article 121 of UNCLOS is concerned. It now appears that the Tribunal’s conclusions regarding

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<sup>15</sup> Robert C. Beckman and Clive H. Schofield, “Defining EEZ Claims from islands: A Potential South China Sea Change,” *The International Journal of Marine and Coastal Law*, 29, (2014), pp. 220-221.

<sup>16</sup> Arctic Sunrise case: Russia to boycott intl maritime tribunal over Greenpeace arrests, *Russia Today*, 23 Oct, 2013, <https://www.rt.com/news/greenpeace-arctic-sunrise-court-617/>

<sup>17</sup> EU’s Silence on South China Sea Ruling Highlights Inner Discord, *Reuters*, Jul 14, 2016,

<http://www.reuters.com/article/southchinasea-ruling-eu-idUSL8N1A01TV>

<sup>18</sup> UN Court Reaffirms Unrelated to South China Sea Arbitral Tribunal, *People’s Daily*, July 16, 2016, <http://en.people.cn/n3/2016/0716/c90000-9086845.html>

<sup>19</sup> Diplomatic Win for China as ASEAN Drops Reference to Maritime Court Ruling, *Mon Jul 25, 2016, Reuters*.



Taiping Island's legal status as a rock under UNCLOS have reduced the effectiveness and perceived validity of the Award. In this sense, the Award will not make progress towards a

resolution of the disputes but instead solidify the parties' respective positions regarding their South China Sea claims.

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