

Rival Partners? Cross-Strait Relations After the Permanent Court of Arbitration Ruling Over the South China Sea Disputes

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Structured Abstract

Article Type: Research Paper

Purpose—While many recent studies on the territorial and maritime disputes in the South China Sea focused on the interactions between China on the one hand and Vietnam, the Philippines, and the United States on the other, limited analysis has looked into the implications of the 2016 Permanent Court of Arbitration (PCA) ruling over the South China Sea Arbitration (the Republic of the Philippines v. the People’s Republic of China) on the two claimants—the People’s Republic of China (PRC) and the Republic of China (ROC) on Taiwan—with almost identical claims and their bilateral relations. This paper seeks to fill this gap by examining how recent development, especially the PCA ruling, has affected the PRC’s and ROC’s approaches to the South China Sea disputes and Cross-Strait relations.

Design, Methodology, and Approach—Based on a historical analysis of the PRC’s and ROC’s territorial and maritime claims in the South China Sea and a qualitative investigation of primary and secondary sources relevant to the PCA ruling and reactions from both sides of the Taiwan Strait, this paper attempts to shed light on the rival partnership and the dilemma facing both sides over their South China Sea claims and identify options and prospects for them to move forward. The study

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begins with an overview of the territorial and maritime disputes in the South China Sea. It further examines the PRC's and ROC's overlapping claims based on historic rights. Then the study compares and analyzes the approaches adopted by the PRC and ROC before and after the PCA ruling. Finally, the study identifies policy options for both sides to move forward on the South China Sea disputes.

Findings—This study has several findings. First, the PCA ruling seemed to have a striking effect of pulling the PRC and ROC, the two rival claimants in the South China Sea, closer in their uncoordinated, uneasy “partnership” of defiance against the ruling. Second, the detrimental impact of the PCA ruling and the rival partnership across the Strait further accentuate the dilemma Beijing and Taipei both face in the South China Sea disputes. Third, contrary to conventional wisdom, the study argues that this could be a window of opportunity to enhance the political cooperation across the Taiwan Strait. The paper suggests that the PRC and ROC can and should enhance dialogues and strengthen cooperation through Track II channels to defend their common claims and interests in the South China Sea.

Practical Implications—This study presents a unique and interesting perspective on the relations between the PRC and ROC and how they may move forward on the territorial and maritime disputes in the South China Sea after the 2016 PCA ruling.

Originality/Value—Although much has been written about the territorial and maritime disputes in the South China Sea, few studies have focused on the intersection of the South China Sea disputes and Cross-Strait relations between two of the claimants, the PRC and the ROC on Taiwan.

Key Words: Cross-Strait Relations, PCA Ruling,
People's Republic of China, Republic of China (Taiwan),
South China Sea, sovereign territory and maritime disputes

Introduction

With the vast body of water of approximate 648,000 square nautical miles (3.5 million square kilometers), the South China Sea contains one of the world's most strategic choke points and crucial sea-lanes connecting the Indian Ocean, the Pacific, and the littoral countries in Asia. For thousands of years, it was a vast and remote test ground for courage and persistence for sailors, merchants, and explorers. Nowadays, it carries over half of the world's annual merchant fleet tonnage and a third of all maritime traffic worldwide.¹ Its shipping lanes are indispensable to transport two thirds of South Korea's energy supplies, nearly 60 percent of Japan's and Taiwan's energy supplies, and four fifths of China's crude oil supplies. It also includes hundreds of islands, reefs, and shoals that are claimed by six parties in littoral Asia.

In 2011, geopolitical thinker Robert D. Kaplan declared in his special report in *Foreign Policy*: “The South China Sea is the future of conflict.”² Since then, escalation of tensions over disputed territory and adjacent waters in the region seems to have confirmed the trajectory of conflict, both legally and militarily. On January 22, 2013, the Philippines initiated compulsory arbitration proceedings at the Permanent Court

of Arbitration (PCA) against the People's Republic of China (PRC) under Article 287 and Annex VII to the United Nations Convention on the Law of the Sea (UNCLOS). On July 12, 2016, the PCA ruled in favor of the Philippines while rejecting or opting out of consideration of the positions of the PRC, which vehemently opposed the ruling and refused to comply.

More importantly, in spite of their official neutrality, non-claimants with enormous strategic interests in the region, i.e., the United States, Japan, Australia, and India,³ have increasingly involved and even supported some of the claimants such as Vietnam and the Philippines through diplomatic rhetoric, legal and military assistances. The U.S. led the regional campaign to openly and verbally challenge China's "excessive claims" in the South China Sea. In 2010, the then-Secretary of State Hillary R. Clinton declared at the Association of Southeast Asian Nations (ASEAN) Regional Forum (ARF) meeting in Hanoi that peaceful resolution of the South China Sea disputes is a "U.S. national interest" and that the U.S. opposes the use or threat of force by any claimant. This declaration emboldened ASEAN member states to openly raise their concerns about China's territorial claims. Beijing sharply criticized the U.S. meddling in what China perceives as bilateral territorial disputes.

The most serious "in-your-face" challenge to China came from the U.S. Navy's six freedom of navigation operations (FONOPs) between 2013 and 2016 in or around its claimed territorial waters. These coercive operations have brought the U.S. and PRC navies and air forces ever closer to armed conflict. With China's dramatic economic rise and perceived growing military activism in East Asia and the gradual but evident decline of the U.S. power, the South China Sea suddenly poised to become a high-stake battle ground for armed conflict among the most powerful players in the contemporary time.

The rapidly growing body of research and studies about the contested South China Sea in recent years largely focuses on three main areas: (1) the complex nature of the claims in sovereignty and maritime rights in the South China Sea, involving six parties from the littoral entities⁴; (2) legal issues surrounding the definitions of an island, islet, reef, rock, shoal, etc., in the UNCLOS⁵; and (3) the potential for a high-stake battle ground in the armed conflict between the U.S. and China.⁶

With a few important exceptions,⁷ however, little research has centered on the intersection of the South China Sea disputes and the relations between two of the claimants, the PRC and the ROC on Taiwan. Both have almost identical territorial and maritime claims and both have occupied and fortified different islands and reefs in the South China Sea. However, the disputed status of Taiwan vis-à-vis China and the more contentious relations between the Xi Jinping and Tsai Ing-wen administrations have further complicated the delicate positions of Beijing and Taipei over the South China Sea in the post-arbitration ruling context. Without a better understanding of this complicated dynamic, it would be difficult to move the dialogues and negotiations about the South China Sea disputes forward. Therefore, this paper seeks to examine the PRC's and the ROC's approaches to the South China Sea disputes and how the Cross-Strait relations have affected their positions on their sovereign and territorial claims in the South China Sea.

The paper begins with a brief overview of the territorial and maritime disputes in the South China Sea. After comparing the approaches of the PRC and ROC on these disputes, it further analyzes the implications of the PCA ruling, the policy options for both sides, and the prospects for Cross-Strait relations. The paper argues that the South China Sea disputes could become a window of opportunity to enhance political and strategic cooperation across the Taiwan Strait and that Taiwan should be invited to participate in the shaping process of a multilateral framework towards the eventual resolution of the territorial and maritime disputes in the South China Sea.

Territorial and Maritime Disputes in the South China Sea

Since the late 20th century, the hundreds of islets, reefs, shoals, and rocks spread across the South China Sea have been increasingly contested among seven littoral states—the PRC, ROC, Vietnam, the Philippines, Malaysia, Indonesia, and Brunei—for sovereignty and maritime rights over part or nearly all of the South China Sea. For each party, the territorial and maritime claims are rooted in the historic rights, legal rights under the 1982 UNCLOS, or a combination of both.⁸

Beyond multiple claimants of various overlapping areas, numerous legal issues derived from international law, including UNCLOS, are still hotly debated and contested. One of the key issues is how to define a geographical feature of an island. Paragraph I of Article 121 in UNCLOS states, “An island is a naturally formed area of land, surrounded by water, which is above water at high tide.” Paragraph III stipulates, “Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.” It is worth noting that UNCLOS does not specify any operationalized criteria to define and distinguish rocks, islets, isles, and islands. In addition, it is unclear how to interpret the meaning of “cannot sustain human habitation or economic life of their own.”⁹

Another key issue is the delimitation of Exclusive Economic Zones (EEZs) and Continental Shelves (CS). Per UNCLOS, ownership of an island would entitle the state up to 200 nautical miles of surrounding waters as its EEZ while ownership of a rock or an islet would only entitle the claimant state up to 12 miles of surrounding territorial water. However, operationally there is no accurate and “current data on whether features are above or below water at different tide levels.”¹⁰

The disputes in the South China Sea are multi-layered and complicated in nature. Disputes over sovereignty and territorial integrity, even over tiny and remote territories in the oceans, will be the most intractable to resolve, because the symbolic value and indivisible nature, rather than strategic and economic values, make them far more difficult to settle. Leaders tend to face extremely high political risks and would have to pay a much higher price domestically when they make compromises that often will be perceived to be a sellout of the state’s fundamental national interest. When sovereignty and territorial disputes are framed as inexcusable loss and leaders

cornered into the domain of loss, according to the Prospect Theory, leaders tend to take greater risks with irrational behavior to avoid hefty political price at home.¹¹ Among the six claimants in the South China Sea disputes, all claim part or all of the Spratly Islands and all but Brunei have accelerated grabbing islets and shoals and building military structures and lighthouses on those features to bolster their respective claims.¹²

In comparison, economic rights and resource-related rights (e.g., fishing rights and rights to develop gas fields) in the disputed territory are *relatively* easier to settle because these rights are considered divisible and shareable. Therefore, when leaders wish to maintain peace and avoid armed conflict, they tend to propose to shelve the disputes over sovereignty while seeking to cooperate with competing claimants to develop the resources in the disputed area together. Chinese leader Deng Xiaoping's proposal and Taiwan's former president Ma Ying-jeou's South China Sea Initiatives are two cases in point. In this spirit, in 2002, after prolonged negotiations, China and ASEAN signed the DOC in the South China Sea to reduce tension and build confidence for all parties (except Taiwan) to manage the overlapping disputes.

In spite of this, economic rights and other rights to use the disputed territory are intricately linked with disputes over sovereignty and territorial integrity. The linkage makes practical cooperation for economic development and environmental protection significantly conditioned on the political and strategic bargaining over sovereign rights. Therefore, as demonstrated in the incidents among the claimants near the disputed islands and overlapping EEZs in the South and East China Seas in recent years, contentious disputes related to fishing rights tended to become flash-points that often escalate tensions and trigger diplomatic altercations and nationalistic protests among the claimant states.

The PRC and the ROC on Taiwan: Parallel Rival Claims in the South China Sea

With a shared and contentious history in the early 20th century, the PRC and the ROC have almost identical claims over the legal status of the land features in the South China Sea.¹³ Both governments share the consensus that China has the historic rights to the above-mentioned islands and the adjacent waters in the East and South China Seas¹⁴ although they disagree on which government is the legitimate representative of China.

In the 2016 Taiwan Yearbook issued by the ROC Executive Yuan, Taiwan's territory includes:

About 12 kilometers off the southwest coast of Taiwan, Xiaoliuqiu 小琉球 covers an area of 6.80 square kilometers. Other islands in the South China Sea claimed by the ROC include the Dongsha (Pratas) Islands 東沙群島, the Nansha (Spratly) Islands 南沙群島, the Xisha (Paracel) Islands 西沙群島 and the Zhongsha Islands (Macclesfield Bank) 中沙群島. Further, lying about 170 kilometers northeast of Taiwan is the Diaoyutai Islands 釣魚臺列嶼, a small island group

that includes Diaoyutai Island 釣魚臺, Huangwei Isle 黃尾嶼 and Chiwei Isle 赤尾嶼.¹⁵

Similarly, the ROC Ministry of Foreign Affairs states in its 2016 Yearbook: “The Diaoyutai Islands, which lie northeast of Taiwan, and a number of islands in the South China Sea, including those in the Tungsha (Pratas), Nansha (Spratly), Shisha (Paracel) and Chungsha (Macclesfield Bank) islands, are also part of the territory of the ROC.”¹⁶

The PRC’s claims are analogous to the ROC’s. Article 2 of the Law of the People’s Republic of China on the Territorial Sea and the Contiguous Zone states,

The territorial sea of the People’s Republic of China is the sea belt adjacent to the land territory and internal waters of the People’s Republic of China.

The land territory of the People’s Republic of China includes the mainland of the People’s Republic of China and its coastal islands; Taiwan and all islands appertaining thereto including the Diaoyu Islands (釣魚島), the Penghu Islands (澎湖列島); the Dongsha Islands (東沙群島); the Xisha Islands (西沙群島); the Zhongsha Islands (中沙群島) and the Nansha Islands (南沙群島); as well as all the other islands belonging to the People’s Republic of China.¹⁷

Similarly, according to China’s Ocean Development Report (2011, p. 24),

The Xisha Islands (西沙群島) comprise 32 islands and islets, each possessing a surface area larger than five hundred square meters; the Zhongsha Islands (中沙群島) are composed of rocks, sandbanks, and reefs, among which, by virtue of two rocks, only Huan Yan Island (黃岩島 or Scarborough Shoal) rises above sea level at high tide; the Nansha Islands (南沙群島) consist of over 230 islands, islets, rocks, banks, and shoals, among which 25 are islands.¹⁸

On May 7 and 8, 2009, the PRC government submitted two Notes Verbales to the then United Nations Secretary-General Ban Ki-Moon, declaring:

China has indisputable sovereignty over the islands in the South China Sea and the adjacent waters, and enjoys sovereign rights and jurisdiction over the relevant waters as well as the seabed and subsolid thereof.... The above position is consistently held by the Chinese Government, and is widely known by the international community.

The continental shelf beyond 200 nautical miles as contained in the Joint Submission by Malaysia and the Socialist Republic of Vietnam has seriously infringed China’s sovereignty, sovereign rights and jurisdiction in the South China Sea.¹⁹

Similar to the ROC’s position, the PRC’s territorial claims are based on the “Nine-Dash Line,” also known as the “U-Shaped Line,” which was modified from the “Eleven-Dash Line” map of 1946 issued by the ROC’s Department of the Territories and Boundaries of the Ministry of the Interior.²⁰ Based on their common understanding of historic rights, both parties draw on the same historical evidence, including historical documents kept by fishermen living in Hainan Island.²¹ An important piece of such documents is *Geng Lu Bu* (更路簿 or *The Manual of Sea Routes*), a 600-year-old handwritten manual for fishermen in Hainan Island that

details the locations of land features, navigation routes, fishing grounds, and ocean conditions of the South China Sea. In addition, both governments emphasize specific provisions in the Cairo Declaration and Potsdam Proclamation as the legal basis for Japan to return the islands in the South and East China Seas after its unconditional surrender in the Second World War. Last, but not least, both governments declare that their positions on historic rights are consistent with international law and practice, including UNCLOS.²²

However, the PRC and ROC disagree on which government should claim sovereignty and maritime rights over the disputed islands and adjacent waters. From Beijing's perspective, the historic rights are rooted in the understanding that the PRC is the legitimate successor of the ROC after defeating the ROC's KMT government in the Chinese Civil War in 1949, which symbolized the decease of the ROC. On the contrary, from Taipei's perspective, the ROC has never ceded its existence; it only moved its government from the mainland to the island of Taiwan. After nearly seven decades of diplomatic battle and coercive diplomacy, the PRC has managed to break international isolation in the 1970s and isolated the ROC's diplomatic space to the minimum. In the context of the South China Sea disputes, the ROC is not recognized as a state claimant and thus not allowed to join diplomatic negotiations or international legal proceedings.

The PRC and the ROC on Taiwan: Rival Partners on the South China Sea Disputes?

Under various domestic and international pressures, the PRC and the ROC, have pursued diverging approaches to the territorial and maritime disputes in the South China Sea, which resulted in different scope of *de facto* control over the claimed islands and adjacent waters. However, with the detrimental impact on both sides of the Taiwan Strait, the PCA ruling has had a striking effect of pulling the two rival claimants closer in their uncoordinated reactions. This may be an opportunity for the PRC and ROC to work together in pursuing solutions to the territorial and maritime disputes.

The PRC's Approach Before the PCA Ruling

With a few exceptions of armed clashes, China's approach to seizing and solidifying control over the maritime features in the South China Sea can be characterized as firm, persistent, yet incremental and measured, with self-restraint. Among the disputed islands, reefs, and atolls in the South China Sea, China currently has *de facto* control over seven reefs in the Spratly Islands and the entire Xisha/Paracel Islands, including the largest Yongxing (永兴岛/Woody/Phu Lam) Island, on which it built a military airfield in 1990. In 1974 and 1988, China had two armed clashes with Vietnam over Xisha/Paracel Islands and Johnson South Reef in Nansha/Spratly, respectively.

In the flare-ups in the South China Sea since 2010, China has regarded itself as a latecomer playing catch-up in “land grabbing” and infrastructure-building activities as other claimants have been unduly doing so quietly for years. As Chan points out:

[C]ontrary to conventional renditions that cast Beijing in the role of a challenger, China has often been engaging in its own deterrence against attempts by rival claimants perceived by it to be altering the status quo unilaterally. In undertaking this policy, Beijing has usually been the defender, and has been generally disposed to put aside these disputes in conducting its relations with the other claimant states rather than seeking confrontations with them.²³

As a result, China has become more assertive in defending and strengthening the maritime features it currently controls. Since 2010, Chinese Maritime Law Enforcement Forces (MLEFs) and the People’s Liberation Army (PLA) have had a dozen incidents with several claimants, most notably Vietnam and the Philippines, across the Nansha/Spratly Islands.

Playing catch-up through administrative re-organization, on July 24, 2012, the PRC officially put Yongxing under the administration of the newly established Sansha City (三沙市) in Hainan Province. Since then, the PRC has launched a blizzard of nationalist and public relations campaigns to bolster its administrative control over Yongxing. History, poetry, arts, music, and tourism are all prominently featured in the Chinese media to promote patriotism and solidify China’s sovereignty over Xisha/Paracel Islands, including Yongxing.

By advancing its economic interests, in 2014, the PRC moved *Haiyang Shiyou* 981, an oil rig of the state-owned China National Offshore Oil Corporation, near the disputed Paracel Islands in the South China Sea and caused an intense standoff between the PRC and Vietnam, involving confrontations of multiple ships from both sides, diplomatic protests, and numerous anti-China demonstrations and riots across Vietnam.

Immediately after the Philippines initiated the PCA arbitral proceedings, the PRC has adopted the “non-acceptance and non-participation” position and denounced the Philippines’ unfriendly move and the PCA’s lack of jurisdiction over the case. On January 23, 2013, the day after the Philippines filed the proceedings, the PRC Ministry of Foreign Affairs Spokesperson Hong Lei reiterated that China has “indisputable sovereignty over the South China Sea islands and adjacent waters, which has abundant historical and legal grounds.”²⁴ Beijing’s position was further elaborated in the official Position Paper issued by the PRC Ministry of Foreign Affairs on December 7, 2014.²⁵

More significantly, according to the Island Tracker of the Asia Maritime Transparency Initiative, since 2014, China has done extensive and fast land reclamation for 3,000 acres on Cuarteron, Fiery Cross, Gaven, Hughes, Johnson South, Mischief, and Subi, the seven reefs it currently occupies in Nansha/Spratly, making artificial islands and building airstrips, ports, radar facilities, solar arrays, lighthouses, and other supporting facilities on them.²⁶ Widely seen as backed by the country’s economic rise, growing external influence, and an assertive leadership in Beijing, these

actions were loudly criticized outside of China as unilateral, aggressive changes of the status quo against international law and as the source of growing tensions disrupting regional stability. With the exception of the ROC, the other claimants in the South China Sea disputes criticized China's unilateral moves as a violation of the 2002 Declaration on the Conduct of Parties in the South China Sea (DOC).

From Beijing's perspective, however, such biased criticisms come from an over-emphasis on China's growing military capabilities and presumed aggressive intentions and from one-sided silence on the other claimants' earlier, similar "land grabs" in their occupied reefs in Xisha/Paracel and Nansha/Spratly, particularly Vietnam's and the Philippine's. While U.S. satellite images have shown military development on these newly expanded islands, Beijing has denied such allegations and insisted that construction on these reefs is intended to build up capabilities to support civilian activities, including fishing safety, disaster relief, and navigation safety. Chinese media report that China has built four lighthouses on Huayang 华阳礁/Guarteron, Chigua 赤瓜礁/Johnson South, Zhubi 渚碧礁/Subi, and Yongshu 永暑礁/Fiery Cross Reefs and is building a fifth one on Meiji 美济礁/Mischief Reef to enhance navigation safety for fishing and other commercial vessels. Furthermore, unlike leaders of some of the other parties in territorial disputes, Chinese leaders have not talked about or planned for paying a visit to any of the disputed islands, which no doubt would further escalate the conflict.

It is crucial to consider the PRC's South China Sea claims in the broader context of its overall approach to territorial disputes, including land border disputes. The PRC has never resorted to the international legal institutions, including the International Court of Justice (ICJ) and other international tribunals, to settle its territorial disputes.²⁷ Instead, it has always preferred bilateral consultation and negotiation. The eminent scholar on the PRC's territorial disputes M. Taylor Fravel has characterized China's overall strategy for handling land territorial disputes with its neighbors as "reactive assertiveness."²⁸ With India as the main exception, the PRC has demonstrated more conciliatory flexibility to settling land border disputes with its neighbors. Between 1945 and 2012, the PRC was a party to more than half of the 34 territorial dispute settlements in Asia among 27 pairs of states.²⁹ Equally significant, Beijing offered significant concessions over the territory being contest in 15 of the 17 settlements of its territorial disputes.³⁰ In the context of the PRC's rising power and influence, the South China Sea disputes will be a litmus test as to the extent to which Beijing might change its approach to maritime border disputes from its traditional approach to land border disputes. However, this is beyond the scope of this study and will need to be further examined in future research.

The ROC's Approach Before the PCA Ruling

The ROC's strategy towards the South China Sea disputes has been more assertive, persistent, firm, and actual enforcement through continuous administration. The ROC was the first claimant to have militarized the territorial and maritime disputes in the South China Sea. On December 12, 1946, two ROC Navy ships, the

Taiping and *Zhongye* (the former *USS Decker* and *USS LST 1056* respectively), landed on Taiping/Itu Aba.³¹ In January 1947, just days earlier than the French forces from Vietnam, Chiang Kai-shek first ordered his KMT forces to land on and occupy Yongxing/Woody Island, the largest of Xisha/Paracel Islands. The ROC government subsequently announced the “Eleven-dash Line”³² to claim the South China Sea as its sovereign territory.

In July 1956, the ROC navy occupied Taiping/Itu Aba Island, the biggest and the only land feature in Nansha/Spratly Islands with its own fresh water supply. Since then, the ROC on Taiwan has maintained a continuous presence on Taiping/Itu Aba and officially administered it under Qijin District, Kaohsiung City. At its peak, the ROC was estimated to have stationed about 500 troops on Taiping/Ita Aba. Since 2000, in an effort to reduce regional tension, Taipei has replaced the Marine Corps with Coast Guards to station on Taiping/Itu Aba.³³ In addition, the ROC also regularly patrols the nearby Zhongzhou Reef and controls Dongsha/Pratas, the largest island cluster in the South China Sea.

During the Chen Shui-bian administration (2000–2008), the ROC backed its assertive claims over the South China Sea with concrete actions. In 2007, it built an airfield on Taiping/Ita Aba that is capable of landing large military aircrafts such as C-130 Hercules. In the last year in his office, as a show of strength, Chen became the first ROC president to pay a high-profile visit to Taiping/Itu Aba accompanied by half of the ROC’s main naval warships and a couple of submarines.³⁴ It was clear that Chen’s pro-independence stance did not weaken but strengthened Taiwan’s sovereign and territorial claims in the South China Sea.

During the Ma Ying-jeou administration (2008–2016), the ROC remained seized of the matter and spent more than U.S.\$100 million to make several major infrastructure upgrades on Taiping/Itu Aba, including building an antenna tower, extending the airstrip, and building a 3,000-tonnage port facility.³⁵ As tension over the disputed waters intensified, on May 26, 2015, Ma formally announced his South China Sea Peace Initiative: “[W]e emphasize that while sovereignty cannot be divided, resources can be shared, thereby replacing sovereignty disputes with resource sharing.”³⁶ This was modeled after his East China Sea Initiative proposed in August 2012. These initiatives were meant to demonstrate the ROC’s firm claims on territorial sovereignty as well as its desire for more diplomatic space to peacefully resolve the disputes. However, given Taiwan’s special non-state status and hence the limited role it can play in negotiations with other state claimants, the real impact of these initiatives will be quite limited as well. As shown in the trilateral territorial and maritime disputes over Diaoyu/Senkaku Islands, both Japan and the PRC ignored the East China Sea Initiative.³⁷ Although the ROC has participated in numerous informal bilateral and multilateral Track II workshops and conferences regarding the South China Sea disputes, the realistic chance for Taiwan to be formally accepted as a claimant party is very slim if cross-strait status quo remains.

On January 28, 2016, just a few months before his presidency would expire, Ma also led government officials and scholars to pay a high-profile visit to Taiping/Itu Aba despite mounting pressure and criticism from the U.S. and the other claimants,

especially the Philippines and Vietnam. In his speech delivered on Taiping/Itu Aba, Ma explained his South China Sea Peace Initiative by first reaffirming the ROC's historic rights to the disputed waters:

In response to the decades of dispute regarding sovereignty over the South China Sea Islands and maritime rights, we must state clearly that these islands were first discovered, named, and used by the Chinese in the Western Han dynasty (in the first century BCE). They were incorporated into the maritime defense system no later than 1721, in the Kangxi period of the Qing dynasty, with patrols and other management measures. After the ROC was founded in 1912, the government published maps of the South China Sea Islands in 1935 and 1947, reaffirming to the international community ROC sovereignty over the islands and their surrounding waters.

Whether from the perspective of history, geography, or international law, the Nansha (Spratly) Islands, Shisha (Paracel) Islands, Chungsha (Macclesfield Bank) Islands, and Tungsha (Pratas) Islands, as well as their surrounding waters, are an inherent part of ROC territory and waters, and the ROC enjoys all rights over these islands and their surrounding waters in accordance with international law. This is indisputable. To resolve disputes in the South China Sea, the ROC government will work to safeguard sovereignty, shelve disputes, pursue peace and reciprocity, and promote joint development.³⁸

Two months after his visit, an ROC air force C-130 transport flew two dozens of journalists from international media to Taiping/Itu Aba to witness how the island supports human habitation with its own fresh water supply and natural habitat and how the ROC has developed the island with peaceful and eco-friendly ways.³⁹ This was intended to refute any legal challenge that Taiping/Itu Aba is not an island with its EEZ.

Before the PCA ruling, the South China Sea policy of the current ROC President Tsai Ing-wen was not yet clear. As President-Elect, on the evening of her victory day, Tsai elaborated her position on the South China Sea during an international press conference: 1) her administration will reaffirm its sovereignty over the South China Sea; 2) it will call on all parties to abide by international law; 3) it will support freedom of navigation and overflight in disputed areas; 4) it will oppose provocative actions that increase regional tensions; and 5) it will continue to express hope for a peaceful resolution to the maritime territorial disputes.⁴⁰ It is notable that Tsai Ing-wen avoided mentioning two of the main points in Ma Ying-jeou's South China Sea Initiative, i.e., shelving the sovereignty disputes and joint development of resources. On the other hand, Tsai highlighted the importance of abiding by international law and supporting freedom of navigation although the ROC is not a party to UNCLOS due to its non-state status. This may signal Tsai's desire to distance Taiwan from its overlapping claims with the PRC and to move closer to the position of the U.S. and other non-claimant stakeholders on the South China Sea disputes.

However, domestic pressures for defending the ROC's maritime sovereignty and interests may force the Tsai Ing-wen administration to change its less assertive stance. Since taking office, Tsai has been called by many, including Ma Ying-jeou, to pay a presidential visit to Taiping/Itu Aba as a show of resolve to defend the

ROC's sovereignty and territorial integrity. In August 2016, a month after the arbitration ruling, Tsai sent her Interior Minister Yeh Jiunn-rong and a group of officials and researchers to visit Taiping/Itu Aba.⁴¹ From March 27 to 29, 2017, the ROC Coast Guard on Taiping/Itu Aba conducted the first live-fire exercise under her administration, which subsequently drew sharp criticism from Vietnam.⁴²

Rival Partners? Cross-Strait Reactions to the PCA Arbitration Ruling

While neither the PRC or the ROC accepts it or considers it legitimate, the legal implications of the arbitration ruling are direct and far reaching. It was a detrimental blow to the PRC's sovereign and maritime rights and entitlements in the South China Sea.⁴³ First, the PCA ruled that the PRC's claims based on historic rights and the Nine-dash Line are contrary to UNCLOS because they exceed the geographic and substantive limits of its maritime entitlements under UNCLOS. Second, in the PCA ruling, none of the high-tide natural features⁴⁴ in Nansha/Spratly or Scarborough Shoal is defined as an "island" under Article 121 of UNCLOS and thus none is entitled to a 200-nautical-mile EEZ or continental shelf. Most notably, Taiping/Itu Aba, the largest natural land feature in the Spratly Islands, is defined as merely an "uninhabitable rock" that does not generate an EEZ or continental shelf. Third, the PCA defines Mischief Reef as merely a low-tide elevation that cannot be deemed sovereign territory. Moreover, the PCA ruled that the PRC has no sovereign rights or jurisdiction over Mischief Reef because it sits on the continent shelf of the Philippines. Fourth, although land reclamation and artificial island-building on "rocks" are deemed legal, the PCA criticized these activities by the PRC for their harmful impact on the marine ecology.⁴⁵ As will be shown below, such damaging impact is evident from Beijing's strong objections and defiance immediately before and after the ruling was announced. It may weaken Beijing's leverage at the negotiation table with the other claimants.

With advance notice, the growing assertiveness and converging positions from both sides of the Taiwan Strait became especially pronounced immediately before and after July 12, 2016, when the PCA ruled in favor of the Philippine's charges against the PRC.⁴⁶ On the day before and after the ruling, the PRC Ministry of Foreign Affairs Spokesperson Lu Kang lodged strong protests and declared the PCA ruling "null and void, with no binding force,"⁴⁷ as Beijing had done since the Philippines' unilateral initiation of the arbitration proceedings in 2013. As a show of defiance, on July 13, 2016, two PRC passenger airliners landed respectively on the newly built airfields in Meiji 美济礁/Mischief Reef and Zhubi 渚碧礁/Subi Reef. With the airfield on Yongshu 永暑礁/Fiery Cross Reef, China now has three functioning airfields in the South China Sea. On July 16, 2017, the PRC Vice Foreign Minister Zhang Yesui reiterates Beijing's objection and "non-acceptance" position: "China opposes and will not accept any proposition and action based on the award and will never negotiate with any other country over the South China Sea based on the illegal award."⁴⁸

Due to Taipei's analogous claims to Beijing's, the arbitration ruling had a similar detrimental effect on the ROC even though it was not a party in the arbitration case. The first three points of the PCA ruling summed up above are crucial to the ROC's claims and interests, especially with regards to the legal status of Taiping/Itu Aba and the maritime rights it extends. As a result, the ROC reacted to the PCA ruling as swiftly and furiously as the PRC. On the same day when the ruling was formally announced, the ROC Presidential Office, Ministry of Foreign Affairs, Ministry of Internal Affairs, Ministry of Defense, and Mainland Affairs Council, along with some members of the Legislative Yuan, all issued their own statements rejecting the ruling as "absolutely unacceptable." The ROC Ministry of Foreign Affairs called the ruling "completely unacceptable" and has "no legal binding force on the ROC." In reference to the legal status of Taiping/Itu Aba, the ROC Ministry of Foreign Affairs strongly criticized the illegitimate expansion of the PCA's authority beyond the case involving the disputes between the Philippines and the PRC: "The decision severely jeopardizes the legal status of the South China Sea Islands, over which the ROC exercises sovereignty and their relevant maritime rights."⁴⁹

Beyond verbal rejections of the arbitration ruling, the Tsai Ing-wen administration stepped up with more forceful show of resolve. On the day before the PCA ruling announcement, it had dispatched a Coast Guard vessel the *Wei Hsing* to Taiping/Itu Aba for a resupply and patrol mission. Two days after the ruling, the ROC dispatched a naval vessel, the *Lafayette*-class frigate, for a patrol mission in the South China Sea. In August 2017, the ROC Coast Guard conducted another round of live-fire drills on Taiping/Itu Aba, leading to new verbal spat between the ROC and Vietnam.⁵⁰

Post-Arbitration Dilemmas

Contrary to conventional wisdom, both Beijing and Taipei chose similarly high-profile reactions against the PCA ruling. The two rival claimants have found each other in an uncoordinated, uneasy "partnership" of defiance. The detrimental impact of the PCA ruling and the rival partnership across the Strait further accentuate the dilemma Beijing and Taipei both face in the South China Sea disputes.

On the one hand, the PRC does not recognize the ROC as a legitimate state party in the South China Sea disputes, and with its growing economic and diplomatic clout, has left almost no diplomatic space for the ROC to negotiate with the other claimants. Moreover, the pro-independence, de-Sinification inclinations of Tsai Ing-wen and the Democratic Progressive Party (DPP) she leads cannot be further from the anti-independence, anti-secession position of Xi Jinping and the Chinese Communist Party he leads. Without Tsai's explicit acknowledgment of the 1992 Consensus, Beijing has sharply criticized the Tsai administration and taken several measures to cool down Cross-Strait relations since Tsai came to power. For example, cross-strait tourism has significantly slowed down since Tsai took office. Beijing has practically ended the "diplomatic truce"⁵¹ with Taiwan by restarting its efforts to snatch away Taiwan's diplomatic allies. Since Tsai took office, São Tomé and Príncipe and

Panama have severed diplomatic relations with the ROC, further reducing Taiwan's diplomatic allies to only 20.

On the other hand, the PRC's territorial and sovereign claims significantly hinges on the ROC's assertion and enforcement of those claims since the 1930 and 1940s before Chiang Kai-shek's KMT government lost the Chinese Civil War. Regardless which political party holds power in Taipei, the fact that the ROC exercises *de facto* sovereign control of some islands and reefs in the South China Sea reinforces the ROC's own *de facto* sovereignty. In spite of this, Beijing still prefers Taipei to keep a firm hand on the territories over which the latter has *de facto* control. Under the DPP rule, any sign of Taipei's weakened defense of Taiping/Ita Aba could be interpreted as Taiwan's de-Sinification move towards building its own identity and possibly towards its own *de jure* independence. For instance, Taiwan's former President Chen Shui-bian's scrapping of the 1993 "Policy Guidelines for the South China Sea" raised fear in Beijing that Chen was leading Taiwan to abandon the claims in the South China Sea and move towards independence.⁵²

Moreover, without diplomatic recognition from the other claimants, the ROC has to rely on the PRC to use the latter's political, economic, and diplomatic clout to defend their commonly shared territorial and maritime claims and seek potential resolution through consultation and negotiation. During the PCA hearings, the ROC was not allowed to participate as a *de jure* independent state, and not even as an observer to the PCA hearings,⁵³ while the direct legal challenge to the legitimacy of its claims came from the Philippine's legal case against the PRC.

With regard to territorial and maritime disputes in the South China Sea, the ROC are stuck between a rock and a hard place. If the ROC refuses to cooperate with the PRC on the sovereignty and maritime claims in the South China Sea, many people in Taiwan, especially from the Pan-Blue coalitions will strongly oppose it. If the ROC cooperates with PRC, Beijing will continue to gain the upper hand if the ROC holds onto the claims for China while remains isolated without statehood.

Prospects for Cross-Strait Relations: Policy Options and Recommendations

Moving forward, the status of Taiwan remains the biggest conundrum for both Beijing and Taipei. Which is the rightful claimant of the South China Sea, the PRC or the ROC? The answer has direct impact on the territorial and maritime disputes. More importantly, it is the crux of the matter in Cross-Strait relations. Resolving the central issue of sovereignty concerning Taiwan would resolve Cross-Strait rival claims over the South China Sea. Ideally, peaceful reunification of Taiwan with China in some shape or form, through bilateral negotiations or international tribunals, would significantly strengthen the leverage of the reunified China vis-à-vis the other claimants on the South China Sea disputes.

Given the preference for maintaining the status quo within Taiwan, especially with the recent de-Sinification movement and the creation of a unique Taiwanese

identity that is separate from the dominant Chinese identity on the mainland, peaceful reunification with the mainland seems unlikely in the short run.⁵⁴ Short of reunification, the 1992 Consensus remains a most viable solution to the dilemma, both politically and diplomatically. Especially in the post-arbitration context, explicit mutual acceptance of the 1992 Consensus may make it easier for both sides to tacitly manage their respective claims over the South China Sea and coordinate policies through Track II mechanisms. Meanwhile, the legal implications on the status of Taiping/Itu Aba and other reefs may not serve as sufficient incentive to pull the Tsai administration closer to Beijing. As shown in the growing assertiveness of both KMT and DPP leaders from the past, partisan politics in the ROC may significantly shift its approach to the claims in the South China Sea.

Beijing and Taipei can and should develop a more pragmatic and flexible approach to maximizing cooperation and defending their parallel South China Sea claims. Putting aside Taiwan's non-state status and the non-acceptance position from Beijing and Taipei, Track II discussions have proven to be more candid and open-minded among scholars from both sides of the Taiwan Strait. In August 2016, for instance, at a Cross-Strait Track II conference hosted by the PRC's National Institute of the South China Sea Studies, scholars and experts from both sides openly discussed and debated the implications of the PCA ruling and how to forge further cooperation as a response. The consensus from the meeting openly acknowledged the negative long-term effect of the PCA ruling on the respective claims of both parties. In the meantime, many participants regarded the ruling as a window of opportunity for Beijing and Taipei to further cooperate to strengthen the common defense of the historic rights and the island status of Taiping and other islands/reefs in Nansha/Spratly and Scarborough Shoal. Furthermore, both parties can and should make joint initiatives for deeper cooperation in marine biology and environmental research and encourage joint development of tourism in the region.

In response to the legal challenge from the PCA ruling, Beijing and Taipei share the same interest in focusing on Japan's claim over Okinotorishima atoll, a ring-shaped reef and chain of rocks made of coral, with a current total area of less than 10 square meters (33 square feet), located 1,000 nautical miles to the south of Tokyo.⁵⁵ Following the legal implications of the PCA ruling, under Article 121 of UNCLOS, Okinotorishima may also be defined merely as an uninhabitable "rock," rather than an "island," and thus does not generate an EEZ around it for Japan. The potential legal challenge to Japan highly resembles those facing the PRC (and ROC as a non-party) in the PCA ruling. While neither Beijing nor Taipei disputes Tokyo's sovereignty over the Okinotorishima, highlighting Japan's claim of maritime rights to its EEZ centering on the Okinotorishima could potentially help them counter the legal implications of the PCA ruling and strengthen the defense of their EEZs in the South China Sea. Equally noteworthy, to bolster its territorial and maritime claims, Japan's artificial island building is similar in nature to what the PRC and ROC have done on their reefs and atolls in the South China Sea. Since 1987, Japan has built a three-story observatory on Okinotorishima and spent over \$600 million to prevent the atoll from further erosion by building an 82-foot concrete wall to encase the remaining

rock outcroppings and covering the smaller of the two atolls with a net of titanium.⁵⁶ In February 2016, Japan announced its plan to spend 13 billion yen (roughly U.S.\$114.1 million) to rebuild the observatory on Okinotorishima. Both parties can share legal expertise and monitor the development of this important case.

More importantly, as shown in the aftermath of the PCA ruling, the most viable short-term solution to the South China Sea disputes will not come from an international tribunal; instead, it may come from enhanced political dialogues and diplomatic negotiations for a Code of Conduct (COC) in the South China Sea between the PRC and ASEAN and the Code for Unplanned Encounters at Sea (CUES).⁵⁷ The arbitration ruling and growing militarized tensions in the region may have stoked a higher sense of urgency for the PRC and ASEAN to make a commitment for these goals. Without a seat at the table, the ROC should have more incentives to work with the PRC through Track II channels to coordinate positions and specific terms in the Code of Conduct.

Conclusion

This paper has examined the rival partnership between the PRC and ROC on their parallel but rival sovereign and maritime claims in the South China Sea in the post-arbitration ruling context. While the parallel in their claims is based on commonly shared historic rights and international law, the rivalry in their claims is rooted in the 70-decade conundrum of Taiwan's status and thus the different *de facto* exercise of sovereignty in the South China Sea.

The 2016 PCA ruling over the South China Sea disputes (the Philippines v. the PRC) has further boxed the PRC and ROC in this involuntary partnership in pursuit of their claims and interests. This was abundantly clear in their uncoordinated but common reactions opposing and defying the PCA ruling. While neither Beijing nor Taipei is willing to relinquish their territorial and maritime claims, neither side wants to undermine the other's, especially facing growing political, legal, and military challenges by the other claimants and outside pressures from the U.S. and Japan. Therefore, managing the rival partnership in the context of territorial and maritime disputes requires a delicate balancing act and a pragmatic and flexible approach.

With the implications of the PCA ruling, Beijing and Taiping need to enhance dialogues and strengthen cooperation through Track II channels to defend their parallel territorial and maritime claims in the South China Sea. This could help the two sides inch back closer to the 1992 Consensus. By accepting the existence of one China with different interpretations, the two sides could return to political dialogues about issues of common interests. The South China Sea issue is an existing area of common interests. Cooperation in the shared maritime and territorial claims in the South China Sea could lead to a functional spillover⁵⁸ to other areas of cooperation during a time of cooling relations between Taipei and Beijing. However, doing so would require putting aside the political conundrum across the Taiwan Strait.

Considering the limited possibility for the ROC to fully and equally participate

in Track I negotiations regarding the South China Sea disputes, the PRC and ROC should allow more frequent, pragmatic, and in-depth Track II collaborations to share legal expertise on the issues raised in the PCA ruling, explore more ways to enhance bilateral cooperation on issues such as scientific research, management of resources, and protection of marine ecosystems. More importantly, both sides should focus on maintaining regional peace and stability through diplomatic negotiations and seeking resolution to the territorial and maritime disputes. It would also be important to keep on monitoring this issue as the U.S. supremacy in the region continues to decline and China is poised to play a more important and assertive role in the region.

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