

Yu-Jie Chen\*, Jerome A. Cohen, Dec. 2018, “China-Taiwan Relations Re-examined: The ‘1992 Consensus’ and Cross-strait Agreements”, *University of Pennsylvania Asian Law Review*, 14(1), 1-40.

## CHINA-TAIWAN RELATIONS RE-EXAMINED: THE “1992 CONSENSUS” AND CROSS-STRAIT AGREEMENTS

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### ABSTRACT

*This Article is a legal-political examination of two of the most consequential elements in contemporary relations between the People’s Republic of China (PRC) and the Republic of China on Taiwan (ROC)—the controversial “1992 Consensus” and the remarkable cross-strait agreements that the ROC and the PRC have concluded, especially the 23 made between 2008 and 2015 when then President Ma Ying-jeou’s Nationalist Party (KMT) governed Taiwan. Political developments have inextricably interlinked these two elements, leading to the present crisis in cross-strait relations that developed when the ROC’s current president, Tsai Ing-wen, led her Democratic Progressive Party (DPP) to electoral victory over the KMT in 2016. Tsai has refused to endorse the so-called “1992 Consensus”, a strategic political formula that implied that Taiwan is part of China. The PRC’s response has been to suspend all official contacts with the new ROC government, to cease or limit implementation of many of the cross-strait agreements and increasingly to mobilize a range of other pressures designed to coerce the new ROC government to adopt the “1992 Consensus”.*

*By briefly referring to the domestic legal systems of the parties as well as international law, we seek to clarify the nature of the parties’ momentous dispute and to evaluate their respective positions. We question whether there ever was a genuine “1992 Consensus” and whether it should be regarded as a binding legal commitment. The fiction of “consensus” was in fact a political strategy constructed after the fact to allow the KMT and the Chinese Communist Party governments to shelve their differing positions*

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Both authors contributed equally to this work. We are grateful to our colleagues Jacques deLisle, Keith Hand and Dalton Kuen-da Lin for their helpful comments on earlier drafts of this Article. This research has been funded by the Smith Richardson Foundation.

*concerning which government is the legitimate, exclusive representative of “China”, so that they could negotiate the more immediate challenges of concluding binding agreements on various practical subjects.*

*The cross-strait agreements concluded by the parties imaginatively resorted to supposedly “unofficial” proxies to make cooperation on an equal footing possible between two governments that refuse to recognize each other. Although for political reasons neither the PRC nor the ROC considers cross-strait agreements to fall within the province of international law, since the domestic laws and legal systems of the parties cannot provide impartial resolution of their dispute, we find it appropriate to assess their agreements by applying international legal principles, either directly or by analogy. In accordance with international legal principles and practice, we argue that all the cross-strait agreements that have been formally authorized by each side should be deemed to be legally binding. We further recommend some modest steps that can be undertaken by the ROC toward diminishing the crisis and promoting a rule-based, sustainable order across the Taiwan Strait.*

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## INTRODUCTION<sup>1</sup>

When the former president of the Republic of China on Taiwan (ROC or Taiwan) Ma Ying-jeou was in office from 2008 to 2016, Taiwan and the People's Republic of China (PRC or China) initiated a groundbreaking series of measures fostering political reconciliation. Taipei and Beijing, through their respective proxies—Taiwan's Straits Exchange Foundation (SEF) and China's Association for Relations Across the Taiwan Straits (ARATS)—signed no fewer than 23 cross-strait agreements designed to facilitate cooperation in multiple areas, including transportation, tourism, judicial assistance, trade, investment and safety.<sup>2</sup>

Yet Taiwanese dissatisfaction with the policy of Ma's Kuomintang (KMT) government to minimize domestic popular and legislative participation in cross-strait agreements, combined with a

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<sup>1</sup> This Article was completed in December 2018. The speeches of Xi Jinping and Tsai Ing-wen for the New Year of 2019 concerning China-Taiwan relations vindicate our analysis about the divergent views of the "1992 Consensus." These speeches, together with the response from the Kuomintang (KMT) rejecting Xi's proposal of "One Country, Two Systems," make it ever clearer that there was no genuine "consensus" about sovereignty issues disputed by the PRC and ROC governments. Notably, Xi Jinping's remarks, linking "One Country, Two Systems" with the "1992 Consensus," depart from China's previous implicit practice not to publicly challenge the KMT's position of "One China, Respective Interpretations." See Xi Jinping, Wei Shixian Minzu Weida Fuxing Tuijin Zuguo Heping Tongyi er Gongtong Fendou--Zai "Gao Taiwan Tongbao Shu" Fabiao Sishi Zhounian Jinian Hui Shang de Jianghua (為實現民族偉大復興推進祖國和平統一而共同奮鬥——在《告台灣同胞書》發表40週年紀念會上的講話) [Jointly Strive to Fulfill Great Rejuvenation of the Chinese Nation and Promote Peaceful Unification of the Motherland--Speech at the 40th Anniversary of "Message to Compatriots in Taiwan"], Jan. 2, 2019, Xinhua, [www.xinhuanet.com/politics/2019-01/02/c\\_1123937757.htm](http://www.xinhuanet.com/politics/2019-01/02/c_1123937757.htm) [<https://perma.cc/ZB6M-HJCK>]; President Tsai Issues Statement on China's President Xi's "Message to Compatriots in Taiwan", Office of the President Republic of China (Taiwan), Jan. 2, 2019, <https://english.president.gov.tw/News/5621>; Zhongguo Guomindang Shengming (中國國民黨聲明) [Statement of the KMT], Kuomintang, Jan. 3, 2019, [www.kmt.org.tw/2019/01/blog-post\\_3.html](http://www.kmt.org.tw/2019/01/blog-post_3.html) [<https://perma.cc/D3Q7-AHNM>]. For our evaluation of the "1992 Consensus," see *infra* Section I.

<sup>2</sup> For a list of the cross-strait agreements, see the website of the ROC Mainland Affairs Council, Liang'an Xieyi (兩岸協議), MAINLAND AFF. COUNCIL OF THE EXECUTIVE YUAN ROC (TAIWAN) [hereinafter Cross-strait Agreements], <https://www.mac.gov.tw/cp.aspx?n=1494D59CE74DF095> [<https://perma.cc/QD3J-ACNG>] (last visited Aug. 14, 2018) (in Chinese language); Liang'an Xiangguan Xieyi (兩岸相關協議), TAIWAN AFF. OFFICE OF THE STATE COUNCIL PRC [hereinafter Relevant Cross-strait Agreements], [www.gwytb.gov.cn/lhjl/laxy/](http://www.gwytb.gov.cn/lhjl/laxy/) [<https://perma.cc/7TTN-DDBP>] (last visited Aug. 14, 2018) (in Chinese language).

growing Taiwan identity and generally increasing anxiety over ties with Beijing, eventually resulted in Taiwan's Sunflower Movement in March 2014.<sup>3</sup> The trigger point for this protest was the KMT's effort to push the Cross-Strait Services Trade Agreement through the legislature after the opposition party, the Democratic Progressive Party (DPP), had filibustered it for nearly a year. Angry with this KMT maneuver, student activists stormed into and occupied the legislative chamber for 24 days. More than half a million Taiwanese protestors took to the streets to support the students' demands to put more effective legislative checks on cross-strait cooperation, particularly the signing and implementation of cross-strait agreements.

After the end of the Sunflower Movement, Beijing-Taipei relations gradually cooled. Even an unprecedented meeting between the General Secretary of the Chinese Communist Party (CCP), Xi Jinping, and Ma Ying-jeou in Singapore in 2015,<sup>4</sup> the first between the political leaders of China and Taiwan since the Chinese civil war ended on the Mainland over six decades earlier, was unable to revive the declining interaction. In addition, the KMT suffered major electoral setbacks, losing to the DPP the local elections in November 2014 and the island-wide legislative and presidential elections in 2016.<sup>5</sup>

The new DPP President, Tsai Ing-wen, has advocated a moderate stand on cross-strait relations.<sup>6</sup> Unlike the first DPP leader

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<sup>3</sup> See generally Ian Rowen, *Inside Taiwan's Sunflower Movement: Twenty-Four Days in a Student-Occupied Parliament, and the Future of the Region*, 74 J. OF ASIAN STUD. 1, 5 (Feb. 2015); MICHAEL COLE, BLACK ISLAND: TWO YEARS OF ACTIVISM IN TAIWAN (2015); LAW AND POLITICS OF THE TAIWAN SUNFLOWER AND HONG KONG UMBRELLA MOVEMENTS (Brian Christopher Jones ed., 2017).

<sup>4</sup> *One-minute Handshake Marks Historic Meeting between Xi Jinping and Ma Ying-jeou*, THE STRAIT TIMES (Jan. 19, 2016, 3:51 PM), <https://www.straitstimes.com/singapore/one-minute-handshake-marks-historic-meeting-between-xi-jinping-and-ma-ying-jeou> [https://perma.cc/33HW-B9BK].

<sup>5</sup> Min-Hua Huang, *Taiwan's Changing Political Landscape: The KMT's Landslide Defeat in the Nine-in-One Elections*, BROOKINGS (Dec. 8, 2014), <https://www.brookings.edu/opinions/taiwans-changing-political-landscape-the-kmts-landslide-defeat-in-the-nine-in-one-elections/> [https://perma.cc/8BZN-PVKE]; Aube Rey Lescure, *Taiwan's 2016 Election in Review*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Jan. 26, 2016), <https://carnegieendowment.org/2016/01/26/taiwan-s-2016-election-in-review-pub-62586> [https://perma.cc/UKN3-4XHN].

<sup>6</sup> Douglas Paal, *China, the U.S. and the Coming Taiwan Transition*, THE DIPLOMAT (Dec. 29, 2015), <https://thediplomat.com/2015/12/china-the-u-s-and-the-coming-taiwan-transition/> [https://perma.cc/3YPM-RU9M];

ected to the presidency, Chen Shui-bian, who served from 2000 to 2008 and who became increasingly controversial because of his apparent interest in declaring Taiwan's de jure independence,<sup>7</sup> Tsai claims to be maintaining the status quo and has called on Beijing to continue cooperation with Taipei.<sup>8</sup>

Beijing, however, has rejected Tsai's conciliatory policy. It has used various non-cooperative and even coercive political, economic and military tactics, including minimizing the implementation of the existing cross-strait agreements, to pressure Tsai Ing-wen to recognize the so-called "1992 Consensus," which Ma's KMT government had embraced.<sup>9</sup> Beijing considers Tsai's explicit endorsement of the "1992 Consensus" to be the essential prerequisite to the PRC's continuing implementation of cross-strait agreements.<sup>10</sup>

Cross-strait relations are crucial to the stability of the Asian region as well as the U.S. relationships with China and Taiwan. This Article focuses on the two most important, interlinked aspects of current cross-strait relations—the controversial "1992 Consensus" and the impressive cross-strait agreements. A precise understanding and assessment of China's and Taiwan's positions on cross-strait relations requires analysis of the legal as well as political meaning of these two distinctive and crucial aspects.

We proceed as follows: Part I investigates the basis and legal-political significance of the "1992 Consensus." Part II discusses the innovative achievements and legal nature of the cross-strait agreements. It introduces the recent dispute over the "1992 Consensus" that has adversely affected the full implementation of the cross-strait agreements and explores the role of law in attempts to

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Fang-long Shih, *Not Vague, But Moderate: the Political Philosophy in President Tsai Ing-wen's Inaugural Address*, LSE TAIWAN RESEARCH PROGRAMME (May 26, 2016), [www.lse.ac.uk/researchAndExpertise/units/TaiwanProgramme/Statements/Not-Vague-But-Moderate.aspx](http://www.lse.ac.uk/researchAndExpertise/units/TaiwanProgramme/Statements/Not-Vague-But-Moderate.aspx) [<https://perma.cc/NK7K-VTJD>]; *A Year in Office, Taiwan's Tsai Ing-wen Faces Surge in Anti-China Sentiment*, THE STRAIT TIMES (May 19, 2017), <https://www.straitstimes.com/asia/east-asia/a-year-in-office-taiwans-tsai-ing-wen-faces-surge-in-anti-china-sentiment> [<https://perma.cc/8UZ3-K2XM>].

<sup>7</sup> Chien-Min Chao, *One Step Forward, One Step Backward: Chen Shuibian's Mainland Policy*, 12 J. OF CONTEMP. CHINA 125 (2003).

<sup>8</sup> *Tsai Calls for Cooperation to Ensure Peace, Stability in Asia-Pacific*, TAIWAN TODAY (Jan. 10, 2018), <https://taiwantoday.tw/news.php?unit=2,6,10,15,18&post=127784> [<https://perma.cc/DEH5-P5TS>].

<sup>9</sup> See discussion *infra* Sections II and III.

<sup>10</sup> See discussion *infra* Section II.

resolve the dispute. Part III discusses the broader political approaches of the two sides toward cooperation, including China's non-compliance with cross-strait agreements and recent tactics to mount pressure on Tsai Ing-wen's government. Part IV's Conclusion reflects our evaluation of not only the claims and actions of the parties regarding the "1992 Consensus" and the cross-strait agreements, but also the implications of their current stalemate. Finally, we offer our comments about the role that law might play in enhancing prospects for a more peaceful and sustainable cross-strait future.

## I. THE "1992 CONSENSUS"

### A. *The significance of the "Consensus"*

The "1992 Consensus" is a formula that supposedly encapsulated an agreement allegedly reached by the proxies of the ROC and PRC governments in 1992.<sup>11</sup> Beijing considers the "Consensus" crucial to its "One China Principle," which it interprets to mean that there is only one China in the world, that Taiwan is part of China and that the PRC is the only legitimate government that represents the whole of China.<sup>12</sup> It insists that Tsai Ing-wen explicitly endorse the "Consensus," which implicitly excludes the possibility of Taiwan's independence from China.

This is why the "Consensus" is frequently stressed in Beijing's political narrative. At the 19th Congress of the CCP in October 2017, Xi Jinping stated: "(T)he 1992 Consensus embodies the One-China principle and defines the fundamental nature of cross-strait relations."<sup>13</sup> Subsequently, the new head of the PRC State

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<sup>11</sup> "YIGE ZHONGGUO GEZI BIAOSHU" GONGSHI DE SHISHI (「一個中國，各自表述」共識的史實) ["ONE CHINA, WITH RESPECTIVE INTERPRETATIONS"—A HISTORICAL ACCOUNT OF THE CONSENSUS OF 1992] I-VIII (Chi Su & An-kuo Cheng eds., 2002) [hereinafter A HISTORICAL ACCOUNT OF THE CONSENSUS OF 1992]; CHI SU, TAIWAN'S RELATIONS WITH MAINLAND CHINA: A TAIL WAGGING TWO DOGS 12-15 (2009).

<sup>12</sup> Yige Zhongguo de Yuanze yu Taiwan Wenti Baipishu (一個中國的原則與台灣問題白皮書) [White Paper—the One China Principle and the Taiwan Issue], PRC GOVERNMENT, (Jan. 21, 2000), <http://www.scio.gov.cn/zfbps/ndhf/2000/Document/307945/307945.htm>.<http://www.scio.gov.cn/zfbps/ndhf/2000/Document/307945/307945.htm> [https://perma.cc/C5VV-9MKH].

<sup>13</sup> Opening Ceremony of the 19th Chinese Communist Party National Congress (Oct. 17, 2017), [live.china.org.cn/2017/10/17/opening-ceremony-of-the-19th-cpc-national-congress/](http://live.china.org.cn/2017/10/17/opening-ceremony-of-the-19th-cpc-national-congress/) [https://perma.cc/GE8D-XCFQ].



Council's Taiwan Affairs Office, Liu Jieyi, in meeting with a KMT—not DPP—delegation in March 2018 for the first time, reiterated that the “1992 Consensus” embodies the “One China Principle” and “opposes Taiwanese independence schemes in any form.”<sup>14</sup> In Beijing's view, the “One China Principle” is non-negotiable<sup>15</sup> and is the basis for all countries to develop diplomatic ties with China; “no country can be an exception to this rule.”<sup>16</sup>

Unlike her predecessor Ma Ying-jeou, Tsai Ing-wen has not recognized the existence of the “1992 Consensus.”<sup>17</sup> Yet, she has tried to reach a middle ground between Beijing's stance and that of her own party, the DPP. In her inaugural speech, she carefully worded her position, acknowledging the first meeting between SEF and ARATS in 1992 as “historical fact.”<sup>18</sup> She stated that the meeting had “arrived at various joint acknowledgments and understandings” and was conducted “in a spirit of mutual understanding and a political attitude of seeking common ground while setting aside differences,”<sup>19</sup> a phrase often used by Beijing. She added that, “it is based on such existing realities and political foundations that the stable and peaceful development of the cross-strait relationship must be continuously promoted.”<sup>20</sup> In other words, while Tsai did not accept the “1992 Consensus,” she acknowledged that the 1992 meeting took place in a positive spirit that should lay the groundwork for sustaining cross-strait peace.

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<sup>14</sup> Lai Hsiao-tung, Chung Li-hua & Sherry Hsiao, *Chu Meets New Boss of China's TAO*, TAIPEI TIMES (Mar. 27, 2018), [www.taipetimes.com/News/front/archives/2018/03/27/2003690114](http://www.taipetimes.com/News/front/archives/2018/03/27/2003690114) [<https://perma.cc/AZ38-JLBP>].

<sup>15</sup> Willy Worley, *One China Principle is Not Negotiable, Foreign Ministry Says in Response to Donald Trump Comments*, INDEPENDENT (Jan. 15, 2017, 9:34 AM), <https://www.independent.co.uk/news/world/asia/one-china-principle-non-negotiable-donald-trump-comments-taiwan-tsai-ing-wen-a7527761.html> [<https://perma.cc/A8QL-XPYK>].

<sup>16</sup> *China Says No Country Can Be Exception to 'One China' Principle*, REUTERS (Dec. 15, 2016, 8:18 PM), <https://www.reuters.com/article/us-usa-trump-china-taiwan/china-says-no-country-can-be-exception-to-one-china-principle-idUSKBN145053> [<https://perma.cc/D6BV-NJL3>].

<sup>17</sup> Eleanor Albert, *China-Taiwan Relations*, COUNCIL ON FOREIGN REL. (June 15, 2018), <https://www.cfr.org/backgrounder/china-taiwan-relations> [<https://perma.cc/3UQN-FJUG>].

<sup>18</sup> President Tsai Ing-wen, *Inaugural Presidential Address*, FOCUS TAIWAN (May 20, 2016, 11:49 AM), [focustaiwan.tw/news/aip/201605200008.aspx](http://focustaiwan.tw/news/aip/201605200008.aspx) [<https://perma.cc/7ZAD-CTMD>].

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

B. *Fiction or reality? Consensus or dissensus?*

Why are there different views with regard to the “1992 Consensus”?<sup>21</sup> Was there ever a “consensus” reached in 1992? After all, the term “1992 Consensus” was only coined in 2000 by Su Chi—the KMT’s then Chairman of the ROC Executive Yuan’s Mainland Affairs Council (MAC).<sup>22</sup> Su claimed this consensus could be found in the 1992 exchanges between SEF and ARATS.<sup>23</sup> SEF and ARATS had been set up in November 1990 and December 1991, respectively, as “non-governmental,” “white-glove” organizations in order to enable them to negotiate and sign cross-strait agreements, because their respective governments were unwilling to have “official” contact with each other.<sup>24</sup>

In March 1992, the representatives of SEF and ARATS met in Beijing to discuss technical matters including document authentication, tracing of registered mail, and compensation for lost mail.<sup>25</sup> ARATS insisted that SEF make a statement on “One China”, while SEF held that the technical matters under negotiation should not involve political discussion.<sup>26</sup>

The two organizations met again in Hong Kong from October 28 to October 30, 1992. During lengthy discussions, neither organization could agree to the various formulas proposed by the other side to describe the cross-strait political situation.<sup>27</sup> Before the representatives parted, SEF suggested that each organization orally

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<sup>21</sup> See generally SU, *supra* note 11; Tong Zhenyuan (童振源) [Tung Cheng-yuan] & Chen Shuoting (陳碩廷) [Chen Shuo-ting], *Jiuer Gongshi de Xingcheng, Shijian yu Wajie* (九二共識的形成、實踐與瓦解) [The Formation, Implementation and Dissolution of the 1992 Consensus], 2 ZHANWANG YU TANSUO (展望與探索) [Prospect and Exploration] 33; Alan D. Romberg, *The “1992 Consensus”—Adapting to the Future?*, 49 CHINA LEADERSHIP MONITOR (2016), <https://www.hoover.org/research/1992-consensus-adapting-future> [<https://perma.cc/3TW2-3E3S>].

<sup>22</sup> Tung & Chen, *supra* note 21, at 34.

<sup>23</sup> SU, *supra* note 11.

<sup>24</sup> In exercising the public authority entrusted by the Taiwan government, SEF is supervised by the MAC, a full-fledged, official cabinet-level administrative agency in charge of the planning and implementation of policies toward Mainland China, Hong Kong and Macau. ARATS is authorized to cooperate with SEF by the Taiwan Work Office of the Central Committee of the Chinese Communist Party and the Taiwan Affairs Office of the State Council of the PRC Government.

<sup>25</sup> Tung & Chen, *supra* note 21, at 36.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 37.

state its own position regarding “One China”, but no conclusion was reached.<sup>28</sup>

SEF sought to end the stalemate a few days later by issuing a press release and sending ARATS a letter on November 3, 1992, stating that “it is acceptable if the two sides orally state their own positions separately.”<sup>29</sup> SEF added that its own position is in accordance with the National Unification Guidelines and the resolution made on August 1, 1992 by the ROC’s National Unification Council. This referred to a resolution that defined the Taiwanese government’s position on “One China.”<sup>30</sup> The resolution stated that “both sides of the Strait insist on the principle of ‘One China,’ but the two sides have different views regarding its meaning.” It went on to explain the difference, stating that, from the viewpoint of the Communist authorities, “One China” refers to the PRC, but from the viewpoint of the ROC, “One China” refers to the ROC.<sup>31</sup>

ARATS reportedly responded the same day with a telephone call, informing SEF that it “fully respected and accepted” SEF’s suggestion.<sup>32</sup> On November 16 the same year, ARATS sent a formal letter to SEF, again stating that ARATS “fully respects and accepts your Foundation’s suggestion.”<sup>33</sup> It added that the oral statement that ARATS would make would note that, “both sides of the Taiwan Strait insist on the principle of one China, seeking the unification of the nation; but the functional negotiations of cross-strait matters do not involve the political meaning of one China.”<sup>34</sup>

These fragmentary exchanges were later relied upon by those who claimed the existence of the “1992 Consensus.”<sup>35</sup> When the KMT’s Su Chi coined the term, what he reportedly had in mind was

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<sup>28</sup> *Id.*

<sup>29</sup> A HISTORICAL ACCOUNT OF THE CONSENSUS OF 1992, *supra* note 11, at 25-28; SU, *supra* note 11, at 1.

<sup>30</sup> A HISTORICAL ACCOUNT OF THE CONSENSUS OF 1992, *supra* note 11, at 32; SU, *supra* note 11, at 13; Tung & Chen, *supra* note 21, at 37.

<sup>31</sup> A HISTORICAL ACCOUNT OF THE CONSENSUS OF 1992, *supra* note 11, at 32.

<sup>32</sup> SU, *supra* note 11, at 13-14; Tung & Chen, *supra* note 21, at 37-38.

<sup>33</sup> A HISTORICAL ACCOUNT OF THE CONSENSUS OF 1992, *supra* note 11, at 42-46; SU, *supra* note 11, at 14; Tung & Chen, *supra* note 21, at 38.

<sup>34</sup> *Id.*

<sup>35</sup> SU, *supra* note 11, at 14; *see also* President Ma Ying-jeou, *Remarks in Meeting with Mainland Chinese Leader Xi Jinping*, MAINLAND AFF. COUNCIL OF THE EXECUTIVE YUAN ROC (TAIWAN) (Nov. 9, 2015), [https://www.mac.gov.tw/en/News\\_Content.aspx?n=2BA0753CBE348412&sms=E828F60C4AFBAF90&s=4F225A4BA95218E4](https://www.mac.gov.tw/en/News_Content.aspx?n=2BA0753CBE348412&sms=E828F60C4AFBAF90&s=4F225A4BA95218E4) [<https://perma.cc/6EWM-RH22>].

the formula of “One China, Respective Interpretations” (Yige Zhongguo Gezi Biaoshu 一個中國，各自表述, OCRI).<sup>36</sup> In Su’s formulation, the “Consensus” at best can be understood as a formula to implicitly agree that there is only “one China” and that Taiwan is part of that “China” but to disagree about which government is the legitimate, exclusive representative of that “China.”<sup>37</sup> In the interpretation of the KMT’s ROC Government, “one China” means the ROC, not the PRC.

By contrast, in Beijing’s current narrative, the “1992 Consensus” embodies its own “One China Principle,” which emphasizes the PRC as the only legitimate government that represents the whole of China, including Taiwan,<sup>38</sup> without acknowledging that the Taiwan side may have a different interpretation. In the PRC’s view, the phrase “respective interpretations” in the OCRI formula should not exist. Indeed, from 1995 to 1998, when cross-strait relations were at a low point, the PRC denied there was ever a consensus about OCRI.<sup>39</sup>

Despite this difference, SEF and ARATS, after the November 1992 exchanges, proceeded to negotiate cooperation. In April 1993, the SEF chairman, Koo Chen-fu, and the ARATS chairman, Wang Daohan, held groundbreaking talks in Singapore and formally signed four agreements—the Agreement on Document Authentication, the Agreement on Tracing of and Compensation for Lost Registered Mail, the Agreement on the Establishment of Systematic Liaison and Communication Channels between the SEF and ARATS, and the Koo-Wang Talks Joint Agreement.<sup>40</sup> These instruments paved the way for later regular negotiations and cooperation between SEF and ARATS.

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<sup>36</sup> Su, *supra* note 11, at 14.

<sup>37</sup> *Id.*

<sup>38</sup> *Mainland Stresses One-China Principle in Relations with Taiwan*, XINHUA NEWS (Tian Shaohui ed. July 17, 2016), [www.xinhuanet.com/english/2016-07/17/c\\_135519622.htm](http://www.xinhuanet.com/english/2016-07/17/c_135519622.htm) [<https://perma.cc/45XC-HEVT>].

<sup>39</sup> Tung & Chen, *supra* note 21, at 43.

<sup>40</sup> *Relations Across the Taiwan Straits*, MAINLAND AFF. COUNCIL OF THE EXECUTIVE YUAN ROC (TAIWAN) (July 29, 1994), [https://www.mac.gov.tw/en/News\\_Content.aspx?n=8A319E37A32E01EA&sms=2413CFE1BCE87E0E&s=D6A36C53F3FB9CC1](https://www.mac.gov.tw/en/News_Content.aspx?n=8A319E37A32E01EA&sms=2413CFE1BCE87E0E&s=D6A36C53F3FB9CC1) [<https://perma.cc/774S-A38L>].

C. *Legal-political evaluation of the 1992 SEF-ARATS exchanges*

How should we evaluate the November 1992 SEF-ARATS exchanges from a legal perspective? First of all, neither Beijing nor Taipei has officially characterized its relations with the other side in terms of international law. Indeed, they have both denied its direct applicability. Yet, as we will note again in Part II, their respective domestic laws have little to offer regarding settlement of disputes relating to cross-strait agreements. Taipei, taking advantage of the fact that the world community has not yet vindicated Beijing's claim that Taiwan is part of China,<sup>41</sup> may ultimately alter its position and formally invoke international law in this context. Even if it does not, this should not prevent foreign governments and international organizations, as well as scholars and other observers, from assessing the legal nature of cross-strait relations and related controversies with the helpful lens of international law. Indeed, some experts on both sides of the Strait have already done so.

Under international law, the 1992 SEF-ARATS exchanges would not amount to a legally binding agreement on the meaning of "One China" and other sovereignty questions. While SEF and ARATS apparently possessed the capacity to represent their own governments in concluding agreements on cross-strait cooperation, the intention<sup>42</sup> of each organization was to sign legal instruments

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<sup>41</sup> FRANK CHIANG, *THE ONE-CHINA POLICY: STATE, SOVEREIGNTY, AND TAIWAN'S INTERNATIONAL LEGAL STATUS* 282 (2017) ("The United Nations has no official policy that maintains that China has the title to the island of Taiwan or China has sovereignty over the inhabitants of Taiwan."); LUNG-CHU CHEN, *THE U.S.-TAIWAN-CHINA RELATIONSHIP IN INTERNATIONAL LAW AND POLICY* 79 (2016) ("General Assembly Resolution 2758, which recognized the PRC as the only legal government of China, did not go so far as to recognize that Taiwan was an integral part of China."). Additionally, observers have long noted that the One-China policy of the United States is not the same as the PRC's One-China principle. See Richard C. Bush, *A One-China Policy Primer*, 10 EAST ASIA POL'Y PAPER 1, 3 (Mar. 2017),

<https://www.brookings.edu/wp-content/uploads/2017/03/one-china-policy-primer.pdf> [<https://perma.cc/E2Y6-USFF>] ("The One-China policy contains more elements, such as the U.S. interest in a peaceful process of cross-Strait dispute resolution, and its differing interpretation of Taiwan's legal status as compared to Beijing's interpretation."); Pasha L. Hsieh, *The Taiwan Question and the One-China Policy: Legal Challenges with Renewed Momentum*, 84 J. OF INT'L PEACE & ORG. 59, 71 (2009) ("The key difference between the stances of the PRC and the US is that the latter has never recognized the PRC's sovereignty over Taiwan.").

<sup>42</sup> See VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 41 (Oliver Dörr & Kirsten Schmalenbach eds., 2018) (noting that whether there is intention can be decided

recording their agreement on the specific matters under negotiation, such as document authentication and registered mail. The parties never evinced an intention to conclude an agreement on sovereignty matters involving the notion of “One China” precisely because they could not reach agreement on the thorny issues involved. Instead, they bypassed the “One China” issues and went on to conclude formal written agreements on technical matters.

In other words, the element of intent to create legal obligations on sovereignty questions did not exist.<sup>43</sup> This is evident from the caution of SEF—it carefully avoided committing itself to a written agreement with regard to the all-important political issue and suggested that each side orally state its differing position separately. This poses a contrast with the formal agreements later concluded by the two organizations on various economic and technical matters.<sup>44</sup> None of these cross-strait agreements touched upon the “One China” issue, and all were concluded without regard to it.

Without the necessary element of consensus ad idem to effect any binding obligation, these exchanges in 1992 between SEF and ARATS would not constitute a “treaty” under the Vienna Convention on the Law of Treaties (VCLT)<sup>45</sup> nor any other type of legally binding obligation under customary international law. There was never a meeting of the minds regarding the “One China” notion.

Su Chi claimed that these exchanges were an “exchange of notes,”<sup>46</sup> which, he maintained, represents the views expressed regarding certain issues and is “politically binding to a certain degree.”<sup>47</sup> Yet it is unclear what “politically binding to a certain degree” means in this context, and it certainly is not equivalent to “legally binding.”<sup>48</sup> After all, political policies are, at most, policies that can be changed, while a treaty or other international agreement

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with view to the drafting history, the language of the agreement and the circumstances of its conclusion as well as the subsequent practice).

<sup>43</sup> See *id.* (noting that “if the intent of the parties to be legally bound under international law cannot be determined on the basis of objective criteria, it has to be assumed that no legal relations have been established.”).

<sup>44</sup> See sources cited *supra* note 2.

<sup>45</sup> Vienna Convention on the Law of Treaties, Jan. 27, 1980, 1155 U.N.T.S. 331, 8 I.L.M. 679.

<sup>46</sup> SU, *supra* note 11, at 14.

<sup>47</sup> *Id.*

<sup>48</sup> Certainly, an “exchange of notes” is capable of generating binding legal obligations on states, but, as discussed above, evidence does not support the existence of the intent as such and there was no “consensus” in terms of both acceding to a certain position.

creates obligations that should be fulfilled under international law in the absence of valid legal justification or resort to termination or amendment procedures.

The “1992 Consensus” must be understood as a formula strategically constructed after the fact to allow the KMT and the CCP governments to shelve their differing positions concerning which government is the legitimate, exclusive representative of “China”, so that they could proceed to cooperation. The formula is thus not a consensus in any meaningful sense.

The KMT and the CCP disagreed on the crucial political questions before them, but neither wished to publicly confront the other, thus enabling them to move on to negotiation of more immediate issues. This delicate strategy later allowed SEF and ARATS to again steer away from political discussion and sign 23 cross-strait agreements from 2008 to 2015. Their resort to the fiction of the “1992 Consensus” is a remarkable demonstration of what Holmes Welch, a shrewd observer of the Chinese scene, fifty years ago termed “the Chinese art of make believe.”<sup>49</sup> This fiction was designed to conceal what was in reality a dissensus!

By contrast, the new DPP government does not accept the existence of a “1992 Consensus.”<sup>50</sup> Nor does it approve either the KMT’s formula of OCRI, or Beijing’s “One China Principle.”<sup>51</sup> Yet Beijing insists that Taiwan’s DPP government must recognize the “1992 Consensus” before any further cooperation can be discussed and even before some of the important cross-strait agreements can continue to be implemented.<sup>52</sup>

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<sup>49</sup> Holmes Welch, *The Chinese Art of Make-Believe*, ENCOUNTER 8 (May 1968).

<sup>50</sup> E.g., William Kazer, *Taiwan’s Tsai Ing-wen Skirts ‘One China’ Consensus in Inaugural Address*, WALL ST. J. (May 20, 2016), <https://www.wsj.com/articles/taiwans-new-president-skirts-one-china-consensus-in-inaugural-address-1463723943>

[<https://perma.cc/9DG7-K9WH>];

*Beijing ‘Unshakeable’ on ‘One China’ Principle as Taiwan’s Tsai Ing-wen Refuses to Bow to Pressure*, SOUTH CHINA MORNING POST (Oct. 6, 2016),

<https://www.scmp.com/news/china/policies-politics/article/2025722/beijing-unshakeable-one-china-principle-taiwan> [<https://perma.cc/VPH6-F5CL>]; Wangshu Luo, *One-China Principle Reiterated After Speech*, CHINA DAILY (Oct. 27, 2017),

[www.chinadaily.com.cn/china/2017-10/27/content\\_33759481.htm](http://www.chinadaily.com.cn/china/2017-10/27/content_33759481.htm)

[<https://perma.cc/Z3MR-8AEC>].

<sup>51</sup> *Id.*

<sup>52</sup> *Guotaiban: Ru Fouding Jiu Er Gongshi Zhengzhi Jichu Shibi Daozhi Liang’an Guanxi Xianzhuang Gaibian* (國台辦：如否定「九二共識」政治基礎勢必導致兩岸關係現狀改變) [Taiwan Affairs Office: The Denial of the Political Foundation of the “1992

DPP acquiescence to this demand would be tantamount to its implicit concession, as a matter of policy, that Taiwan is part of “China”. This would presumably foreclose, at least for the foreseeable future, the option of the island’s formal independence, even though many countries have yet to accede to Beijing’s position on the territorial status of Taiwan.<sup>53</sup>

## II. CROSS-STRAIT AGREEMENTS

### A. *An impressive accomplishment gone sour?*

After SEF and ARATS chairmen Koo Chen-fu and Wang Daohan signed the first four SEF-ARATS agreements on April 29, 1993,<sup>54</sup> the two organizations continued routine talks until cross-strait relations deteriorated in 1995, when the United States Government granted Taiwan’s then president, Lee Teng-hui, permission to enter the U.S. to visit his alma mater, Cornell University. There he gave a famous speech about Taiwan’s democratization.<sup>55</sup> Beijing responded with personal attacks on Lee and a threatening series of missile tests in the waters surrounding Taiwan in 1995-96.<sup>56</sup> In October 1998, when cross-strait agitation had relented, Koo Chen-fu visited Wang Daohan in Shanghai, with the hope of resuming the interrupted SEF-ARATS talks.<sup>57</sup> But cross-strait tension returned in 1999 when President Lee Teng-hui characterized Taiwan-China relations as a “special state-to-state relationship,” which implied that Taiwan enjoyed independent international status.<sup>58</sup> This eliminated the

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Consensus” Must Lead to the Change of the Status Quo in Cross-strait Relations], XINHUA WANG (新華網) [Xinhua Net] (Apr. 27, 2016) [hereinafter *Guotaiban*], [www.xinhuanet.com/2016-04/27/c\\_1118752398.htm](http://www.xinhuanet.com/2016-04/27/c_1118752398.htm) [<https://perma.cc/59Z7-2ESL>].

<sup>53</sup> See *supra* note 41.

<sup>54</sup> *Relations Across the Taiwan Straits*, *supra* note 40.

<sup>55</sup> *President Lee Tenghui Cornell Commencement Address*, EAST ASIAN PEACE & SEC. INITIATIVE (1995), [https://www.eapasi.com/uploads/5/5/8/6/55860615/appendix\\_80\\_--\\_president\\_lee\\_tenghui\\_cornell\\_commencement\\_address.pdf](https://www.eapasi.com/uploads/5/5/8/6/55860615/appendix_80_--_president_lee_tenghui_cornell_commencement_address.pdf) [<https://perma.cc/R4PE-6BU4>].

<sup>56</sup> Bruce Jacobs & I-hao Ben Liu, *Lee Teng-Hui and the Idea of “Taiwan”*, 190 CHINA Q. 375, 385 (2007).

<sup>57</sup> *Remarks Made by SEF Chairman Koo Chen-fu Upon Arrival at Shanghai Hongqiao Airport*, MAINLAND AFF. COUNCIL OF THE EXECUTIVE YUAN ROC (TAIWAN) (Oct. 14, 1998), [https://www.mac.gov.tw/en/News\\_Content.aspx?n=45276FBF58204DDE&sms=232A20FF37090599&s=39FB754FF34BE816](https://www.mac.gov.tw/en/News_Content.aspx?n=45276FBF58204DDE&sms=232A20FF37090599&s=39FB754FF34BE816) [<https://perma.cc/W6ZS-DHDG>].

<sup>58</sup> Jacobs & Liu, *supra* note 56, at 388-89.



possibility of cooperative cross-strait talks in the absence of more positive developments.

From 2000 to 2008, the first DPP president of Taiwan, Chen Shui-bian, refused to recognize any familiar formulation relating to “One China,” including the KMT’s OCRI and Beijing’s One China Principle. Although Chen would not concede that there was ever a “1992 Consensus,” he did acknowledge a “1992 Spirit,” which he termed a spirit of “dialogue, exchanges and shelving disputes.”<sup>59</sup> Yet the gap between Chen’s position and Beijing’s remained, and no cross-strait negotiation was initiated during this period.<sup>60</sup>

When Ma Ying-jeou took office in 2008, he embraced the KMT version of the “1992 Consensus”—i.e., the KMT’s OCRI formula.<sup>61</sup> Beijing, while still holding onto its One China Principle, was willing to cooperate with Ma. As Beijing hoped that Taiwan’s increasing economic integration would lead to political integration,<sup>62</sup> Ma adopted the policy of “addressing economic matters before political ones.”<sup>63</sup> The shared priority on economics placed by the two sides led to a renewed series of SEF-ARATS negotiations, which produced many significant agreements. Their efforts culminated in an Economic Cooperation Framework Agreement (ECFA) in June 2010 and a Cross-Strait Services Trade Agreement (CSSTA) in June 2013.<sup>64</sup> China’s Xi Jinping, after taking over Mainland leadership from Hu Jintao in late 2012, wished to begin political discussions

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<sup>59</sup> Luweihui: *You Jiu Er Jingsheng Wu Jiu Er Gongshi* (陸委會：有九二精神 無九二共識) [Mainland Affairs Council: There is “1992 Spirit” and No “1992 Consensus”], ZHIYOU SHIBAO (自由時報) [Liberty Times] (Nov. 1, 2001), old.ltn.com.tw/2001/new/nov/1/today-t2.htm [https://perma.cc/K48Q-DBPA].

<sup>60</sup> *Chen’s Speech a Grave Provocation to Peace*, CHINA DAILY (Oct. 13, 2004), www.chinadaily.com.cn/english/doc/2004-10/13/content\_381992.htm [https://perma.cc/5BFG-734S]; Jane Rickards, *SEF Seeks Talks for Second Time with China Over Official’s Visit*, CHINA POST (Nov. 18, 2005), https://chinapost.nownews.com/20051118-148799 [https://perma.cc/DU49-6MAW].

<sup>61</sup> *President Ma’s Inaugural Address*, OFFICE OF THE PRESIDENT, REPUBLIC OF CHINA (TAIWAN) (May 20, 2008), https://english.president.gov.tw/NEWS/45 [https://perma.cc/8GNV-E3CR].

<sup>62</sup> Dennis V. Hickey, *Beijing’s Evolving Policy toward Taipei: Engagement or Entrapment*, 45 ISSUES & STUD. 31, 38-39 (2009).

<sup>63</sup> *President Ma’s Inaugural Address*, OFFICE OF THE PRESIDENT, REPUBLIC OF CHINA (TAIWAN) (May 20, 2012), https://english.president.gov.tw/NEWS/3887 [https://perma.cc/H5G4-CJ4D].

<sup>64</sup> See sources cited *supra* note 2.

with Taiwan soon,<sup>65</sup> but the Ma government made it clear that in its view the time was not yet ripe for political talks.<sup>66</sup>

Ma Ying-jeou was well aware of the potential opposition in Taiwan to closer ties with Beijing, even within his own political party, the KMT. Thus, although KMT legislators constituted a majority in the Legislative Yuan throughout Ma's presidency, he sought to minimize the opportunity for legislative review of the new cross-strait agreements, despite the DPP's objection. The Ma administration insisted that, for most cross-strait agreements, no substantive legislative review was required by Taiwan's 1992 Law Governing Relations between Peoples of the Taiwan Area and the Mainland Area (the Law Governing Cross-strait Relations).<sup>67</sup> Under that law, a cross-strait agreement must be sent to Taiwan's legislature for a substantive review in circumstances where "the content of the agreement requires any amendment to laws or creation of any new legislation."<sup>68</sup> In cases where no legislative amendment or new legislation is required, the agreement need only be filed with the Legislative Yuan for the record.<sup>69</sup> Regardless of the controversies created by its position, the Ma government successfully filed 19 agreements (out of 23 agreements concluded during Ma's presidency) with the Legislative Yuan merely "for the record," instead of going through a substantive legislative review that might have held up approval.<sup>70</sup>

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<sup>65</sup> Ben Blanchard, *China's Xi Says Political Solution for Taiwan Can't Wait Forever*, REUTERS (Oct. 6, 2013, 5:32 AM), <http://www.reuters.com/article/2013/10/06/us-asia-apec-china-taiwan-idUSBRE99503Q20131006> [<https://perma.cc/SV5Q-ZB22>].

<sup>66</sup> Shih Hsiu-chuan, *Ma Says Time not Right for Cross-strait Peace Pact*, TAIPEI TIMES (Nov. 10, 2012), <http://www.taipetimes.com/News/taiwan/archives/2012/11/10/2003547334> [<https://perma.cc/9AEE-T3PQ>].

<sup>67</sup> Taiwan Diqū yu Dalu Diqū Renmen Guanxi Tiaoli (臺灣地區與大陸地區人民關係條例) [The Law Governing Relations between the People of the Taiwan Area and the Mainland Area] (promulgated by the Legislative Yuan, July 31, 1992, effective Sept. 18, 1992, last amended June 17, 2015).

<sup>68</sup> *Id.* art. 5, ¶ 2.

<sup>69</sup> *Id.*

<sup>70</sup> The four exceptions were the ECFA, the Cross-Strait Agreement on Intellectual Property Rights Protection and Cooperation, the CSSTA and the Cross-Strait Agreement on Avoidance of Double Taxation and Enhancement of Tax Cooperation. The first two of these agreements passed substantive review in August 2010. The third and the fourth, however, were not able to pass substantive review before the end of Ma's administration due to the political sentiment adverse to cross-strait cooperation after the Sunflower Movement, and therefore have never been approved and have not yet gone into effect.

Although generally underappreciated, it was an impressive achievement for Taipei and Beijing to conclude and implement such a large number of important cross-strait agreements on an equal footing by establishing the supposedly “unofficial” agencies SEF and ARATS. This was done despite the fact that Beijing has always maintained that Taiwan is merely a province of the PRC, and that the Mainland’s Central Government would never deal with Taiwan on an equal footing.

To avoid the implications of the failure to agree on the sensitive political issues involving sovereignty, the cross-strait agreements cleverly steered away from wording such as “China”, “Taiwan”, “government” and other phrases that may be associated with international relations and international law such as “extradition”.<sup>71</sup> Instead, innocuous terms such as “parties” and “both sides of the Strait” (haixia liang’an 海峽兩岸) were used. When alluding to officials in charge of implementation, they used “personnel from the relevant responsible authorities”. The imaginative accomplishment is a further demonstration of their willingness to resort to “the Chinese art of make-believe”<sup>72</sup> in order to meet the practical needs of cooperation. And, of course, even while both sides continue to declare that their relationship is not “international,” to the rest of the world the agreements that this fiction has enabled look suspiciously similar to agreements between sovereign governments.

### *B. Resolving relevant disputes under cross-strait agreements*

How should cross-strait agreements be regarded by the international legal order? Is international law relevant—either directly or by analogy—to the resolution of disputes that arise under cross-strait agreements? We do not purport to discuss the perennial and hugely important international questions concerning Taiwan’s diplomatic and territorial status that the parties decided to avoid in

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<sup>71</sup> For example, in the Cross-Strait Agreement on Joint Crime-Fighting and Judicial Mutual Assistance, the procedure of returning criminals requested by the other side is formally termed “repatriation” (*qiansong* 遣送), rather than “extradition” (*yindu* 引渡), despite the fact that it is in many ways similar to the practice of extradition in conventional bilateral relations.

<sup>72</sup> Welch, *supra* note 49.

achieving their supposed “Consensus.”<sup>73</sup> We are only concerned with the immediate, practical question of whether international law might offer Taipei relief from Beijing’s refusal to carry out its obligations under some of the agreements.

Neither the cross-strait agreements themselves nor the domestic laws and institutions of the parties hold significant promise for a party that feels itself the victim of the other party’s violations. The minimal dispute resolution provisions in the cross-strait agreements—which generally amount to little more than admonitions that both parties should negotiate to resolve as soon as possible any disputes arising from the application of the agreement—are of no value if one of the parties simply boycotts negotiations, which in itself is another violation of the agreement.

Although Taiwan law carefully authorizes SEF to make agreements with ARATS, it fails to provide effective remedies for violations of the agreements. In Taiwan’s legal system, “cross-strait agreements” appears to be a *sui generis* legal category, distinct from both conventional domestic agreements and international agreements. Nor does the PRC legal system offer opportunities for Taiwan to obtain relief from even blatant violations of cross-strait agreements.

The problem can be illustrated by reference to the example of the 2009 Cross-Strait Agreement on Joint Crime-Fighting and Judicial Mutual Assistance (Judicial Assistance Agreement or JAA),<sup>74</sup> which operated relatively smoothly during the years of the Ma administration. Once it became clear that the Tsai administration would not endorse the “1992 Consensus”, Beijing ceased significant cooperation under the agreement, and has failed to respond to efforts to improve the situation, including resort to the agreement’s modest dispute resolution provision.<sup>75</sup>

Can international law and institutions be helpful to the party that deems itself to have been wronged under this agreement? The JAA appears to have been properly concluded in accordance with

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<sup>73</sup> Many able scholars have closely examined the issue relating to the international status of the ROC and Taiwan. *E.g.*, Hungdah Chiu, *The International Legal Status of the Republic of China*, 5 OCCASIONAL PAPERS / REPRINT SERIES IN CONTEMP. ASIAN STU. 1 (1992); CHIANG, *supra* note 41.

<sup>74</sup> See discussions *infra* Section III C.

<sup>75</sup> Cross-Strait Agreement on Joint Crime-Fighting and Judicial Mutual Assistance, Taiwan-China art. 22, May 22, 2009, MAINLAND AFF. COUNCIL OF THE EXECUTIVE YUAN ROC (TAIWAN) [hereinafter JAA] (stating that “any disputes arising from the application of this Agreement shall be resolved by prompt negotiation between the Parties.”).

international contractual principles. Like many other cross-strait agreements, it provides that both sides should comply with the agreement and that any changes to the agreement, including its termination provisions, require the negotiation and consent of both parties.<sup>76</sup> Evidently, there existed an intention from both parties to create binding obligations. Even though the territorial status of Taiwan remains an unsettled question and the ROC government only maintains diplomatic relations with a minority of states, the ROC conducts *de facto* relations, including the conclusion of international agreements, with virtually all important states and is fully capable of entering into such agreements either directly or via an authorized entity such as SEF. There is no doubt that SEF was properly authorized to enter into the JAA, as was ARATS, and there was evidently a meeting of the minds resulting in what should be regarded by any domestic or international legal system as a binding set of commitments.

In the international legal order, such cross-strait agreements should be treated as legally binding—regardless of what they are called in each party's domestic law. The principle *pacta sunt servanda* should be applied. The parties should not be allowed to unilaterally revise or withdraw from the agreements in the absence of valid justification or compliance with termination or amendment procedures.<sup>77</sup>

International legal principles can be helpful in assessing the merit of controversies arising under the cross-strait agreements. But where can a wronged party find a forum to plead its case if the other party refuses to apply the relevant principles and take part in a dispute resolution negotiation? SEF itself surely has no access to the International Court of Justice, and the ROC, having lost its representation in the United Nations, is very unlikely to do better. In any event the PRC, which shuns third party adjudication, arbitration

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<sup>76</sup> *Id.* art. 21.

<sup>77</sup> While the PRC acceded to the VCLT in 1997, the ROC failed to ratify the Convention, which it signed in 1970, before being ousted from the UN in 1971. Since the ROC is not a party, the VCLT cannot apply to cross-strait agreements, but this should not affect their legal force under international law. *See* Vienna Convention on the Law of Treaties art. 3(a), May 23, 1969, 1155 U.N.T.S. 331.

or even mediation in disputes that it perceives involve sovereignty,<sup>78</sup> would never consent to such dispute resolution.

Nevertheless, we believe that SEF should propose that ARATS accept ad hoc arbitration by an independent tribunal, if only to embarrass Beijing and enhance respect for Taipei in the court of world opinion. In all likelihood world opinion will be its only available forum, as so often occurs in international disputes.

The ROC should therefore make public not only its arbitration proposal, but also its arguments on the merits of the JAA dispute, in conventional international law language that should be introduced as either directly applicable to the dispute or applicable by analogy. This might at least stimulate Beijing, which is still subject to widespread criticism over its refusal to recognize the major arbitration award rendered against it concerning the South China Sea, in a proceeding brought by the Philippines under the United Nations Convention on the Law of the Sea, to try to mount a legal defense of its cessation of implementation under the agreement. Presumably, Beijing might claim that President Tsai's refusal to adopt the "1992 Consensus" had undermined the tacit, never consensually articulated, basis of the agreement<sup>79</sup> and thereby released ARATS from any obligations under it, an argument more likely to appeal to political scientists than lawyers.

If the two parties ever resume negotiations regarding the agreement, Taipei should, of course, raise its concerns about Beijing's non-compliance and seek to include in any future agreement, and in amendments to the existing one, robust mechanisms to resolve relevant disputes, including the possibility of submitting the dispute to an impartial tribunal.

### III. BROADER POLITICAL APPROACHES AND PROSPECTS

#### A. *Tsai Ing-wen's approach*

In Tsai Ing-wen's inaugural address, she stated that cross-strait relations will be promoted based on four "political foundations": (1) the "historical fact" of the key 1992 SEF-ARATS meeting and the

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<sup>78</sup> Jerome A. Cohen, *Law and Power in China's International Relations*, DI LIU JIE MA HANBAO JIANGZUO LUNWEN HUIBIAN (第六屆馬漢寶講座論文彙編) [SIXTH HERBERT HAN-PAO MA DISTINGUISHED LECTURESHIP] 275, 283-295 (2017).

<sup>79</sup> *Guotaiban*, *supra* note 52.

shared understanding of seeking common ground while shelving differences, (2) the ROC's current Constitutional regime, (3) the achievements resulting from the negotiations and interaction of the two sides of the Strait over more than two decades, and (4) Taiwan's democratic principles and popular will.<sup>80</sup> Her China policy is considered moderate by the United States and other Western governments.<sup>81</sup>

Tsai's inaugural address suggested that she was prepared to cooperate under the existing cross-strait agreements. Indeed, while the DPP generally voiced objection to cross-strait agreements and the lack of adequate legislative supervision when the KMT was in office from 2008-2016,<sup>82</sup> Tsai's administration has consistently stated that Taiwan is willing to continue to cooperate with Mainland China regarding the implementation of the agreements and properly address any problems.<sup>83</sup>

On the other hand, Tsai's administration also emphasizes that cross-strait agreements must be scrutinized more vigorously by Taiwan's democratic institutions. Since the Sunflower Movement, the DPP has maintained that new legislation—namely a Cross-Strait Agreement Supervisory Act—is needed to effectively monitor the negotiation, signing and implementation of Taiwan's agreements with China.<sup>84</sup> Currently, there are six different versions of this proposed legislation on the agenda of Taiwan's legislature.<sup>85</sup> Each version has a different level of scrutiny for the agreements, and, more controversially, is different in terms of how to define the nature of cross-strait relations. One bill, for example, explicitly describes

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<sup>80</sup> President Tsai Ing-wen, *supra* note 18.

<sup>81</sup> Paal, *supra* note 6.

<sup>82</sup> Flora Wang & Vincent Y. Chao, *DPP Walks Out of ECFA Review*, *TAIPEI TIMES* (July 10, 2010), <http://www.taipetimes.com/News/front/archives/2010/07/10/2003477587> [<https://perma.cc/R98E-77N9>].

<sup>83</sup> *Taiwan's President Tsai Urges Mainland China to Work with Her to Break Deadlock*, *SOUTH CHINA MORNING POST* (Aug. 9, 2017), <https://www.scmp.com/news/china/policies-politics/article/2106081/taiwans-president-tsai-urges-china-work-her-break> [<https://perma.cc/MW2B-PKV6>].

<sup>84</sup> Joy Lee, *DPP Tells US It Doesn't Fully Oppose Pact*, *CHINA POST* (Apr. 6, 2014), <https://chinapost.nownews.com/20140406-73408> [<https://perma.cc/F7LZ-7P27>].

<sup>85</sup> All drafts are available on the website of the ROC Mainland Affairs Council. Liang'an Xieyi Jiandu Tiaoli (兩岸協議監督條例) [Supervisory Act on Cross-strait Agreements], MAINLAND AFF. COUNCIL OF THE EXECUTIVE YUAN ROC (TAIWAN) <https://www.mac.gov.tw/CSASR/News.aspx?n=31D80F602BE78F77&sms=77196D4469ABAD63> [<https://perma.cc/G9YR-NFH6>].

China-Taiwan relations as interstate relations, instead of “cross-strait relations,” as they are normally termed in Taiwan’s legislation.<sup>86</sup>

Obviously, trying to pass a law that can spark many controversies, including those relating to Taiwan’s sovereignty, is not what Tsai Ing-wen needs at this point, when her popularity has declined due to other domestic reform issues.<sup>87</sup> The DPP caucus also appears to be dragging its feet on the proposed “supervisory” legislation.<sup>88</sup> Yet, without this legislation, Tsai’s government is unlikely to sign any new agreement with Beijing even if the two sides resume talks, and there is no indication that any talks will be resumed soon.

### B. *Xi Jinping’s approach*

After Tsai made her conciliatory tone clear in her inaugural address, China could have seized this opportunity to initiate communication with the DPP government. Instead, the PRC’s Taiwan Affairs Office, noting that Tsai did not clearly recognize the so-called “1992 Consensus,” described Tsai’s inaugural speech as an “incomplete test answer.”<sup>89</sup> Beijing has since cut any official contact with the DPP administration.<sup>90</sup> There are no longer SEF-ARATS meetings to negotiate new agreements or to communicate about the implementation of the existing agreements. Beijing has selectively

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<sup>86</sup> *NPP Caucus Tables Bill on Monitoring Cross-strait Pacts*, TAIPEI TIMES (Mar. 2, 2016), <http://www.taipeitimes.com/News/taiwan/archives/,/03/02/2003640630> [https://perma.cc/U2UV-NXUK].

<sup>87</sup> Wei-han Chen, *Tsai Still Low, But Lai Rebounds in Poll*, TAIPEI TIMES (Mar. 20, 2018), <http://www.taipeitimes.com/News/taiwan/archives/,/03/20/2003689652> [https://perma.cc/ZCU2-PGLV] (reporting a drop in President Tsai’s approval rating concurrently with the implementation of pension policies and alterations to employment laws).

<sup>88</sup> Ke Yu’an (柯昱安), *Ke Jianming: Liang’an Jiandu Tiaoli Xian Jieduan Bushi Zui Zhongyao* (柯建銘：兩岸監督條例現階段不是最重要) [Ko Chien-ming: Cross-strait Supervisory Act Is Not the Most Important Task in the Current Stage], XIN TOU KE (新頭殼) [Newtalk] (Mar. 22, 2017), <https://newtalk.tw/news/view/2017-03-22/83302> [https://perma.cc/U7LP-MJC9].

<sup>89</sup> *Tsai’s Speech on Cross-Straits Ties Offers “An Incomplete Test Answer:” Mainland Official*, XINHUA NET (May 20, 2016), [http://www.xinhuanet.com/english/2016-05/20/c\\_135375684.htm](http://www.xinhuanet.com/english/2016-05/20/c_135375684.htm) [https://perma.cc/82D3-SCV9].

<sup>90</sup> Jean-Pierre Cabestan, *Beijing’s Policy towards President Tsai Ying-wen and the Future of Cross-strait Relations*, 18 WHITEHEAD J. DIPL. & INT’L REL. 55 (2017).



continued to implement the existing cross-strait agreements as it strives to mount increasing pressures on Tsai's government.

From Beijing's perspective, only the "1992 Consensus" can serve as a "common political foundation" for any future ARATS-SEF talks or more official dialogues, not to mention further cross-strait agreements.<sup>91</sup> Without the "Consensus", adverse "changes in cross-strait relations would be inevitable."<sup>92</sup> This narrative implies Beijing's self-justification for unilaterally limiting or ceasing the implementation of the cross-strait agreements.

In our view, this non-cooperative approach is rigid, unnecessary and self-restrictive. By contrast, Beijing was willing to cooperate with the KMT government even though Beijing's interpretation of the "1992 Consensus" was different from that of the KMT's. It was flexible enough to not publicly challenge the KMT's position on the "1992 Consensus," enabling the two sides to proceed to discuss other matters. Yet Beijing would not adopt a similarly adaptable approach with the DPP government, which it does not trust.

Beijing is suspicious that Tsai Ing-wen, while not declaring *de jure* Taiwan independence, will promote "soft independence," "cultural independence" and other de-sinicization policies that foster an already strong Taiwan national identity independent of China.<sup>93</sup> Xi Jinping has proclaimed the "Chinese Dream of national rejuvenation" as a priority and made the return of Taiwan to Mainland China's rule an indispensable part of the rise of the Chinese nation.<sup>94</sup> This represents a dramatic shift in the political atmosphere from the post-2008 Ma Ying-jeou "honeymoon" period for China-Taiwan relations. The current time is often described as an

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<sup>91</sup> *Guotaiban*, *supra* note 52.

<sup>92</sup> *Id.*

<sup>93</sup> *Taiwan Covert Move Fails*, CHINA DAILY (Sept. 13, 2017, 7:24 AM), [http://www.chinadaily.com.cn/opinion/2017-09/13/content\\_31926925.htm](http://www.chinadaily.com.cn/opinion/2017-09/13/content_31926925.htm) [<https://perma.cc/5M3A-K4RZ>]; J. Michael Cole, *Chinese Warns of 'Soft' and 'Insidious' Taiwan Independence Forces*, THE NEWS LENS (July 27, 2016), <https://international.thenewslens.com/article/45216> [<https://perma.cc/W83F-U7YB>].

<sup>94</sup> *Xi Calls for Persistently Pursing Chinese Dream of National Rejuvenation*, XINHUA NET (Sept. 25, 2017), [http://www.xinhuanet.com/english/2017-09/25/c\\_136637577.html](http://www.xinhuanet.com/english/2017-09/25/c_136637577.html) [<https://perma.cc/G69J-MWZ9>]; Li Zhenguang, *Taiwan Integral to National Rejuvenation*, CHINA DAILY (Oct. 20, 2017), [http://www.chinadaily.com.cn/newsrepublic/2017-10/20/content\\_33509757.htm](http://www.chinadaily.com.cn/newsrepublic/2017-10/20/content_33509757.htm) [<https://perma.cc/U2JQ-E5JD>].

era of “cold peace.”<sup>95</sup> Some commentators predict an even more problematic period of “hot confrontation.”<sup>96</sup>

Although China now rejects implementation of certain cross-strait agreements, it has not gone so far as to formally renounce any of them. It has mostly minimized, if not ceased, the implementation of some of them. Sometimes it deliberately ignores their existence when doing so would be politically advantageous for pressing the Tsai government. Yet, where the practical consequences of suspending implementation would obviously be harmful to the major interests of both sides of the Strait, as in the case of an interruption or reduction of air and sea transportation, Beijing has allowed the relevant agreements to continue largely unaffected.

In other words, Beijing is not ready to entirely discard the agreements. It is probably also concerned that, if it repudiates any cross-strait agreements, the “1992 Consensus”—which in Beijing’s version means the “One China Principle”—will begin to lose its most visible manifestations. The logic here understandably seems to be “don’t throw the baby out with the bathwater.”

This is Beijing’s self-imposed dilemma. On the one hand, it cannot afford to abandon the agreements. On the other hand, it does not wish to cooperate with Tsai Ing-wen’s government unless she agrees with China’s political position. Accordingly, we see a Beijing that continues to tolerate effective implementation of certain cross-strait agreements still deemed to be essential, while trying to limit, marginalize, or ignore others. The following notable examples illustrate the situation.

### C. *Examples of China’s non-compliance with cross-strait agreements*

One of Beijing’s earliest post-Ma efforts to put economic pressure on Taiwan was its reduction of the number of Mainland

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<sup>95</sup> Paul Lin, ‘Cold Peace’ A Likely Stable Future, *TAIPEI TIMES* (May 28, 2016), <http://www.taipetimes.com/News/editorials/archives/2016/05/28/2003647286> [<https://perma.cc/3S4J-3F59>].

<sup>96</sup> *Cross-Strait Crisis Management during Cold Confrontation* (Translation), NAT’L POL’Y FOUND. (China Times Editorial trans. June 6, 2016), <http://www.taiwannpfnews.org.tw/english/page.aspx?type=article&mnum=113&anum=17690> [<https://perma.cc/Q4K5-TVF3>].

Chinese tourists allowed to visit the island.<sup>97</sup> The 2008 Cross-Strait Agreement on Mainland Tourists Traveling to Taiwan (the Tourism Agreement)<sup>98</sup> allowed Mainland Chinese tourists to go to Taiwan for the first time. The number of Chinese visitors per year increased rapidly from more than 300,000 in 2008 to more than four million in 2015.<sup>99</sup>

The year of Tsai's ascendancy, 2016, began to see the first decline, and in 2017 Taiwan hosted only around 2.7 million Chinese tourists.<sup>100</sup> Thus, the influx of Chinese tourists has not stopped but has dropped quickly. Beijing has not torn up the Tourism Agreement but has reportedly used tactics to discourage or disapprove tourists from visiting Taiwan in order to cut the island's tourism profits. Yet, the initial decrease of tourists from China was offset largely due to the increase in number of tourists to Taiwan from South East Asia, Japan, Macao, Hong Kong and South Korea.<sup>101</sup>

Beijing has also made some cross-strait institutions suspend their operation, even affecting one of the most important agreements, the ECFA, a major economic agreement that cuts tariffs on more than 500 Taiwanese exports to China and more than 250 Chinese exports to Taiwan.<sup>102</sup> Under the ECFA, the two parties jointly established the "Cross-Straits Economic Cooperation Committee," which according to the agreement is in charge of monitoring and evaluating the agreement, settling any dispute over its interpretation, and

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<sup>97</sup> Chris Horton, *China's Attempt to Punish Taiwan by Throttling Tourism Has Seriously Backfired*, QUARTZ (Feb. 10, 2017), <https://qz.com/907429/chinas-attempt-to-punish-taiwan-by-throttling-tourism-has-seriously-backfired> [<https://perma.cc/7ZGB-N582>].

<sup>98</sup> Haixia Liang'an Guanyu Dalu Jumin Fu Taiwan Lüyou Xieyi (海峽兩岸關於大陸居民赴臺灣旅遊協議) [Cross-Strait Agreement concerning Mainland Tourists Traveling to Taiwan], China-Taiwan, June 13, 2008, translated on Mainland Affairs Council website, <http://ws.mac.gov.tw/001/Upload/OldFile/public/Data/011216194071.pdf> [<https://perma.cc/ZD74-4XB6>] (last visited Nov. 13, 2018).

<sup>99</sup> Sarah Mishkin, *Chinese Tourists Boost Taiwan Economy*, FIN. TIMES (Aug. 30, 2012), <https://www.ft.com/content/b231cf10-f248-11e1-8973-00144feabdc0> [<https://perma.cc/KU49-3W4N>].

<sup>100</sup> Russell Hsiao, *China's Intensifying Pressure Campaign against Taiwan*, 18 CHINA BRIEF (2018), <https://jamestown.org/wp-content/uploads/2018/06/Read-the-6-19-2018-CB-Issue-in-PDF.pdf> [<https://perma.cc/2RBT-6T4K>].

<sup>101</sup> *Id.*

<sup>102</sup> *Historic Taiwan-China Trade Deal Takes Effect*, BBC NEWS (Sept. 12, 2010), <https://www.bbc.com/news/world-asia-pacific-11275274> [<https://perma.cc/HP3U-FRGF>].

negotiating and implementing new agreements related to ECFA.<sup>103</sup> The Committee used to meet regularly, but it has not held any meetings since 2015.<sup>104</sup> As a result, when tariff-free treatments expire, there is no channel to make new arrangements, and the relevant industries (especially Taiwanese industries that had benefited from ECFA) are now adversely impacted.<sup>105</sup>

Beijing has also suspended the operation of other dispute resolution procedures authorized by certain agreements. In January 2018, for example, despite Taiwan's protests, China launched new northbound air flights on the M503 route, which is only kilometers away from the middle line of the Taiwan Strait and close to a buffer zone designed to protect Taiwan against Chinese military intrusions.<sup>106</sup> China also expanded other routes that are close to Taiwan's air-defense identification zone.<sup>107</sup> Taiwan claimed these routes to be a great danger to the island's aviation safety.<sup>108</sup> In fact, this is not the first time Beijing and Taipei have had aviation disputes. In March 2015, the two encountered similar issues over the M503 route but were able to reach a compromise in accordance with the communication clause in the 2009 Supplementary Agreement on Cross-Strait Air Transportation.<sup>109</sup> This time, however, Beijing

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<sup>103</sup> Haixia Liang'an Jingji Hezuo Jiagou Xieyi (海峽兩岸經濟合作架構協議) [The Economic Cooperation Framework Agreement], China-Taiwan, art. 11, June 29, 2010; see also sources cited *supra* note 2.

<sup>104</sup> Chou Pei-feng (仇佩芬), *Liang'an Jinghehui Tingbai Yu 2 Nian ECFA Wuyiwei* (兩岸經合會停擺逾 2 年 ECFA 無以為繼) [ECFA Committee Has Been Discontinued for Over Two Years, Leading to Suspension of ECFA], UP MEDIA (Feb. 2, 2017, 9:50 PM), [www.upmedia.mg/news\\_info.php?SerialNo=11582](http://www.upmedia.mg/news_info.php?SerialNo=11582) [<https://perma.cc/D9G5-KJL9>].

<sup>105</sup> *Id.*

<sup>106</sup> *The Skinny on the China vs Taiwan M503 Air Route Saga*, THE NEWS LENS (Mar. 16, 2018), <https://international.thenewslens.com/article/91669> [<https://perma.cc/W8TG-9RGY>].

<sup>107</sup> Chiu Bihui, *China vs. Taiwan—Controversy Over Flight Route M503*, DEUTSCHE WELLE (Feb. 2, 2018), <https://www.dw.com/en/china-vs-taiwan-controversy-over-flight-route-m503/a-42430594> [<https://perma.cc/9V26-PPPA>].

<sup>108</sup> C.L. Chen & Flor Wang, *176 Lunar New Year Flights Put on Hold Due to M503 Dispute*, FOCUS TAIWAN (Jan. 18, 2018), <http://focustaiwan.tw/news/acs/201801180023.aspx> [<https://perma.cc/N6XV-FRYA>].

<sup>109</sup> See Haixia Liang'an Kongyun Buchong Xieyi (海峽兩岸空運補充協議) [Supplementary Agreement on Cross-Strait Air Transportation], China-Taiwan, art. 12, May 22, 2009, translated on Mainland Affairs Council website, <https://www.mac.gov.tw/en/cp.aspx?n=FD37619195CF6DA5&s=B8F2335E74E0748C> [<https://perma.cc/DL4H-2FKE>] (last visited Aug. 15, 2018) (stating that “the Parties agree that the aviation regulators on the two sides of the Strait shall establish a liaison mechanism, to conduct communication and exchange of views on matters related to cross-strait air transport at any time according to need.”).

refused to communicate with Taipei under the agreement, claiming that its new move did not concern Taiwan.<sup>110</sup> In response, Taipei canceled 176 charter flights across the Strait ahead of the 2018 Lunar New Year.<sup>111</sup>

China has also pressed hard to change the existing practice under some of the other agreements. It has, since April 2016, persuaded several countries that do not have official diplomatic relations with Taiwan (including Kenya, Malaysia, Cambodia and Armenia) to send Taiwanese nationals they have detained for telecommunications fraud to China rather than Taiwan for prosecution.<sup>112</sup> This is a sharp departure from China's practice since 2011 of collaborating with Taiwanese law enforcement under the Judicial Assistance Agreement. During the 2011-16 period, in accordance with the JAA, Chinese police worked jointly with Taiwanese police in third countries, not only exchanging information but also helping local law enforcement arrest Chinese and Taiwanese suspected of colluding in telecom fraud schemes that prey on both Mainland Chinese and Taiwanese.<sup>113</sup> In a friendly exercise of discretion, during that period, Chinese police joined in sending Taiwanese suspects in third countries directly to Taiwan while returning the PRC nationals to Mainland China, thus avoiding any political controversy.<sup>114</sup>

To be sure, China has always claimed criminal jurisdiction over such Taiwanese suspects whenever the alleged fraud has victimized PRC citizens. By now resuming the exercise of that jurisdiction, Beijing can punish Taiwanese offenders more severely than they have generally been punished if returned to Taiwan. Moreover, the cooperation of third countries in deporting Taiwanese to the Mainland reminds the world of Beijing's long-standing position that Taiwan is part of China, which is considered helpful at

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<sup>110</sup> *Opening New Air Routes No Threat to Taiwan*, GLOBAL TIMES (Jan. 5, 2018, 10:08 PM), <http://www.globaltimes.cn/content/1083562.shtml> [<https://perma.cc/4R4Y-SPTN>].

<sup>111</sup> Chen & Wang, *supra* note 108.

<sup>112</sup> *Taiwan Lodges Protest as Armenia Deports Fraud Suspects to China*, REUTERS (Sept. 8, 2016, 9:28 AM), <https://uk.reuters.com/article/uk-taiwan-china-armenia-idUKKCN11E04T> [<https://perma.cc/HU39-C7Y9>].

<sup>113</sup> Yu-Jie Chen & Jerome A. Cohen, *Beijing and Taipei Should End Their Tug of War Over Repatriation of Criminal Suspects*, SOUTH CHINA MORNING POST (Sept. 28, 2016, 6:12 PM), <https://www.scmp.com/comment/insight-opinion/article/2023276/beijing-and-taipei-should-end-their-tug-war-over> [<https://perma.cc/P53Z-YXKK>].

<sup>114</sup> *Id.*

a time when Beijing is building pressure on Tsai's government to adopt the same position.<sup>115</sup>

An extreme example of China's current tactics of simply ignoring certain cross-strait agreements is the infamous prosecution of Mr. Lee Ming-che, a Taiwanese NGO activist currently serving a five-year sentence in China for "subverting state power" by his peaceful criticism of the Chinese government.<sup>116</sup> Lee disappeared in China on March 19, 2017. Ten days later, Beijing, having ignored the Taiwan government's appeals for information through prescribed channels under the Judicial Assistance Agreement, finally admitted—without following the prescribed procedures under the JAA—that Lee had been placed in official custody.<sup>117</sup> Lee's eventual trial was webcast, so that he could be seen confessing to participating in a "criminal organization" that allegedly incited web users to spread articles that "vilified and defamed China's socialist system."<sup>118</sup> He is the first Taiwanese to be convicted of human rights activity in China.<sup>119</sup>

During this high-profile case that added much tension to the already strained cross-strait relations, Beijing showed no regard for the JAA. Its belated acknowledgement of Lee's detention—not in response to SEF's requests, but at a routine press conference—was itself a violation of the Agreement, which obligates each party to "promptly" notify the other side when it has restricted the liberty of one of the other side's people.<sup>120</sup> Notification in this case was not "prompt," nor was it communicated through formal channels.

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<sup>115</sup> *Id.*

<sup>116</sup> Jerome A. Cohen & Yu-Jie Chen, *A Taiwanese Man's Detention in Guangdong Threatens a Key Pillar of Cross-Straits Relations*, CHINA FILE (Apr. 20, 2017), [www.chinafile.com/reporting-opinion/viewpoint/taiwanese-mans-detention-guangdong-threatens-key-pillar-of-cross-straits](http://www.chinafile.com/reporting-opinion/viewpoint/taiwanese-mans-detention-guangdong-threatens-key-pillar-of-cross-straits) [<https://perma.cc/8632-5YYU>].

<sup>117</sup> *Id.*

<sup>118</sup> Jerome A. Cohen & Yu-Jie Chen, *How China's Trial of Lee Ming-Che Is a Warning to Taiwanese Activists Inspired By Freedoms and Democracy*, SOUTH CHINA MORNING POST (Oct. 2, 2017), <https://www.scmp.com/comment/insight-opinion/article/2113665/how-chinas-trial-lee-ming-che-warning-taiwanese-activists> [<https://perma.cc/5QLC-U8BW>].

<sup>119</sup> *Id.*

<sup>120</sup> See Haixia Liang'an Gongtong Daji Fanzui ji Sifa Huzhu Xieyi (海峽兩岸共同打擊犯罪及司法互助協議) [Cross-Strait Joint Crime-Fighting and Judicial Mutual Assistance Agreement], China-Taiwan, art. 12, May 22, 2009, translated on Mainland Affairs Council website, <https://www.mac.gov.tw/en/cp.aspx?n=FD37619195CF6DA5&s=CED288DC9B1EC576> [<https://perma.cc/LR5B-ZVML>] (last visited Aug. 15, 2018) ("The Parties agree to promptly

Beijing also violated the JAA provision that requires the facilitation of family visits to the detainee<sup>121</sup>; it revoked the entry permit of Lee Ming-che's wife, Ms. Lee Ching-yu, right before she boarded a plane from Taiwan to China.<sup>122</sup> Throughout this case, the Chinese government did not mention a word about its obligations under the JAA. Ms. Lee, after making numerous requests to the Chinese government to visit Mr. Lee in prison, finally was allowed to do so in March 2018. More recently, however, her request to see her husband was again denied.<sup>123</sup> Mr. Lee is now serving a five-year sentence for his peaceful rights advocacy, a violation by China of the freedom of speech guaranteed under international law and the PRC Constitution.

These major incidents illustrate how Beijing seeks to exert pressures on Tsai's government by non-cooperation, non-compliance measures, despite the commitments it has made under the cross-strait agreements. Beijing has not disclaimed the agreements altogether, but has adopted a minimalist, selective approach towards their implementation.

#### D. *Beijing's carrots and sticks*

While Beijing has severed communication with Tsai Ing-wen's government, it seeks to appeal to multiple groups of Taiwanese through attractive measures that mostly offer economic, educational and employment benefits. The Chinese government now emphasizes "integration and development"<sup>124</sup> as a main policy to promote economic and social integration with the island. It also creates new

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inform the other side of persons having their personal liberty restricted, suffering non-natural death or suspected non-natural death, and other such major incidents, and to provide facilitation for visits by family members in accordance with each Party's own rules and regulations.").

<sup>121</sup> *Id.*

<sup>122</sup> Abraham Gerber, *Beijing Blocks Advocate's Wife*, *TAIPEI TIMES* (Apr. 11, 2017), [www.taipeitimes.com/News/front/archives//04/11/2003668483](http://www.taipeitimes.com/News/front/archives//04/11/2003668483) [<https://perma.cc/RN6Y-64XW>].

<sup>123</sup> *Wife of Jailed Taiwan Activist Denied Visits; Health Concerns Raised*, *FOCUS TAIWAN* (Nov. 10, 2018, 3:18 PM), [focustaiwan.tw/news/aip/201811100007.aspx](http://focustaiwan.tw/news/aip/201811100007.aspx) [<https://perma.cc/3RVQ-D4T3>].

<sup>124</sup> "Wenhua Taidu" *Dang Bu Zhu Liang'an Jingji Shehui Ronghe Fazhan de Dachao* (「文化台獨」擋不住兩岸經濟社會融合發展的大潮) ["Cultural Taiwan Independence" Cannot Block the Tidal Wave of Cross-strait Economic and Social Integration and Development], *HUANQIU WANG* (環球網) [*Global Daily*] (Oct. 13, 2017), <http://taiwan.huanqiu.com/article/2017-10/11324881.html> [<https://perma.cc/Q9RU-V9K8>].

mechanisms, such as a new service center in China for Taiwan, Hong Kong and Macau businesses (run by the China Council for the Promotion of International Trade), that enable direct interaction with Taiwan business and civic groups, thereby marginalizing the role of the DPP government.<sup>125</sup>

In fact, after the 2014 Sunflower Movement that frustrated Taiwan's formal legislative approval of the CSSTA, Beijing learned that it needed to change its policy to one that would cultivate and lure groups of Taiwanese that it had previously overlooked, especially those that were deemed to disapprove of economic ties with China. Beijing referred to these groups as *Sanzhongyiqing* (三中一青), meaning small and medium businesses, people with middle or low income, people in Central and Southern Taiwan and young generations.<sup>126</sup> The idea is to offer economic benefits to these targeted populations so there will be a broader support base in Taiwan for unification with China. This *Sanzhongyiqing* policy has now been more politely rephrased as *Yidaiyixian* (一代一線) to broadly include young generations and grassroots communities.

Most recently, China released a package of “31 measures” that are said to give Taiwanese companies and residents “equal status” to Mainland Chinese counterparts, showering them with business, social and employment opportunities in China.<sup>127</sup> These include, for example, allowing Taiwanese companies doing business on the Mainland to bid for China's infrastructure projects and to claim tax benefits and permitting Taiwanese professionals to take exams for a range of 134 professional qualifications.<sup>128</sup> Taiwanese students in

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<sup>125</sup> Chou Pei-feng (仇佩芬), *Liang'an "Xinmoshi" Mei "Jiu'er Guanjianzi" Zhongfang Pinkai Minjian Duihua Shichuang* (兩岸「新模試」沒「九二關鍵字」中方頻開民間對話視窗) [Cross-Strait “New Model” Without the “1992 Keyword”—the Chinese Side Seeks to Open Windows of Civil Society Dialogue], UP MEDIA (Feb. 3, 2017), [https://www.upmedia.mg/news\\_info.php?SerialNo=11595](https://www.upmedia.mg/news_info.php?SerialNo=11595) [<https://perma.cc/VWH3-QLLR>].

<sup>126</sup> *Dalu dui Tai Xin Zhengci Yidai Yixian Qudai Sanzhong Yiqing* (大陸對台新政策 一代一線取代三中一青) [The Mainland's New Policy toward Taiwan: “Yidaiyixian” Replaces “Sanzhongyiqing”], ZHONGGUO SHIBAO (中國時報) [China Times] (May 24, 2017), <https://www.chinatimes.com/cn/newspapers/20170524000115-260203> [<https://perma.cc/JZ5C-7UXP>].

<sup>127</sup> Kristin Huang, *Taiwanese Given 'Equal Status' on China's Mainland, But Is Beijing Just Trying to Buy Their Support?*, SOUTH CHINA MORNING POST (Mar. 11, 2018, 11:25 PM), <https://www.scmp.com/news/china/policies-politics/article/2135291/taiwanese-given-equal-status-chinas-mainland-beijing> [<https://perma.cc/55QV-UFF9>].

<sup>128</sup> *Id.*



China are also encouraged to find jobs in China after graduation, including, for instance, internships at state-owned banks.<sup>129</sup>

The Taiwan government criticizes China's policy as using money to buy political influence, and says it will heighten the awareness of the island's youth about the risks of living under China's undemocratic rule.<sup>130</sup> It has also underlined the difference between China and Taiwan in values, emphasizing that only with a China that fulfills universal values of democracy, the rule of law and human rights can peaceful cross-strait relations be achieved.<sup>131</sup>

China has always adopted a "mercantilist" approach towards Taiwan, especially during the Ma era when the two sides made deals that were plainly designed to "offer economic benefits to Taiwan" (Rangli 讓利). Beijing is now intensifying this approach and trying to reach broader groups while circumventing official Taipei channels.

In addition to these economic "carrots," Beijing also resorts to military "sticks" to reinforce the message about its power in relation to Taiwan. The newly-reconstituted Chinese aircraft carrier, Liaoning, has sailed through the Taiwan Strait a number of times in recent months.<sup>132</sup> While Beijing claims these passages are routine drills and the carrier has stayed on the west side of the median line of the Taiwan Strait,<sup>133</sup> it is obvious that Beijing's move is an intentional

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<sup>129</sup> Lin Jing-jie (林勁傑), *Zhongguo Yinhang Hui Tai Shou Zhao Zai Lu Taisheng* (中國銀行惠台首招在陸台生) [Chinese Banks Offer Benefits for Taiwan, Recruiting Taiwanese Students in the Mainland for the First Time], *ZHONGGUO SHIBAO* (中國時報) [China Times] (Mar. 31, 2018, 4:10 AM), <http://www.chinatimes.com/newspapers/20180331000500-260108> [<https://perma.cc/2NSN-9KAAQ>].

<sup>130</sup> *Taiwan Says Should Educate Its Youth on Dangers of China*, REUTERS (Mar. 23, 2018), <https://www.reuters.com/article/us-taiwan-china/taiwan-says-should-educate-its-youth-on-dangers-of-china-idUSKBN1GZ1AN> [<https://perma.cc/BW4S-9HZF>].

<sup>131</sup> Chai Sze-chia & Evelyn Kao, *MAC Calls on China to Improve Human Rights Protection*, FOCUS TAIWAN (July 12, 2018), <http://focustaiwan.tw/news/aall/201807120019.aspx> [<https://perma.cc/RC5W-CFG4>].

<sup>132</sup> *Taiwan Shadows China Carrier Group After Xi Warning*, CHANNEL NEWS ASIA (Mar. 21, 2018, 12:15 PM), <https://www.channelnewsasia.com/news/asia/china-sends-carrier-through-taiwan-strait-after-xi-warning-10062490> [<https://perma.cc/9W3C-HCVD>].

<sup>133</sup> Ben Blanchard, *China Says South China Sea Drills Routine, No Word on Carrier*, REUTERS (Mar. 29, 2018, 6:30 AM), <https://www.reuters.com/article/us-china-southchinasea/china-says-south-china-sea-drills-routine-no-word-on-carrier-idUSKBN1H51BT> [<https://perma.cc/FV8G-N64L>]; Matthew Strong, *Chinese Aircraft Carrier Liaoning Passes through Taiwan Strait*, TAIWAN NEWS (Jan. 5, 2018, 7:58 PM), <https://www.taiwannews.com.tw/en/news/3334978> [<https://perma.cc/8ATU-URRF>].

effort to intimidate the island's population. Alarmed by this new tactic, Taipei dispatched fighter jets and ships to monitor these crossings carefully.<sup>134</sup> In March 2018, days after President Donald Trump signed the Taiwan Travel Act, which encourages high-level official visits between Taiwan and the U.S., the Liaoning cruised through the Taiwan Strait again.<sup>135</sup>

Another recent move that heightens Taipei's unease is Beijing's new northbound flights on the route M503, as noted earlier. Taiwan claims that China's new flights are intended as military and political provocations of the island.<sup>136</sup> This will require the Taiwan government to incur greater military costs to enhance its monitoring of the flights. There are recently even more provocative actions by Beijing to increase military tensions and opportunities for confrontations. The most dangerous have been China's "live-fire" naval exercises near the island, which immediately elicited Taipei's own "live-fire" exercises in response.<sup>137</sup>

#### *E. Beijing's recent international tactics*

At least as early as 2003, Beijing began to designate its long-standing demand for the return of Taiwan to the Motherland as one of its "core interests,"<sup>138</sup> signifying an uncompromising, "non-negotiable" stance.<sup>139</sup> During Ma Ying-jeou's presidency from 2008

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<sup>134</sup> Eva Dou, *Taiwan Military Tails Chinese Aircraft Carrier*, WALL ST. J. (Mar. 21, 2018), <https://www.wsj.com/articles/taiwan-military-tails-chinese-aircraft-carrier-1521625526> [https://perma.cc/T2D9-56JD].

<sup>135</sup> *Id.*

<sup>136</sup> *ROC Protests Unilateral Launch of Mainland China Flight Routes in Taiwan Strait, Urges Consultation*, ROC MINISTRY OF FOREIGN AFF. (Jan. 8, 2018), [https://www.mofa.gov.tw/en/News\\_Content.aspx?n=8157691CA2AA32F8&sms=4F8ED5441E33EA7B&s=F66994C5329CCB5A](https://www.mofa.gov.tw/en/News_Content.aspx?n=8157691CA2AA32F8&sms=4F8ED5441E33EA7B&s=F66994C5329CCB5A) [https://perma.cc/F95F-4N8H].

<sup>137</sup> Minnie Chan & Liu Zhen, *Beijing 'Takes Aim at Taipei' with 'Last-minute' Live-fire Drills in the Taiwan Strait*, SOUTH CHINA MORNING POST (Apr. 13, 2018), <https://www.scmp.com/news/china/diplomacy-defence/article/2141690/beijing-takes-aim-taipei-last-minute-live-fire-drills> [https://perma.cc/ZU96-76JZ].

<sup>138</sup> Michael D. Swaine, *China's Assertive Behavior Part One: On "Core Interests"*, 34 CHINA LEADERSHIP MONITOR 3 (Feb. 22, 2011), <https://www.hoover.org/sites/default/files/uploads/documents/CLM34MS.pdf> [https://perma.cc/PK9R-LVHP].

<sup>139</sup> *Id.* at 8.

to 2016, Beijing relaxed some measures that had been used to block Taiwan's international participation.<sup>140</sup>

Since Tsai Ing-wen's presidential election, Beijing has resumed a tougher position.<sup>141</sup> Its diplomatic tactics have recently included establishing diplomatic ties with Gambia, luring São Tomé and Príncipe, Panama, the Dominican Republic, Burkina Faso and El Salvador to switch diplomatic recognition from Taiwan to China,<sup>142</sup> and excluding Taiwan from meetings of the World Health Assembly,<sup>143</sup> the International Civil Aviation Organization,<sup>144</sup> and the International Criminal Police Organization (Interpol).<sup>145</sup> Beijing's tactics include some that are as pathetic as preventing ordinary Taiwanese from even visiting the UN as tourists, unless they show a Mainland Travel Permit for Taiwan Residents issued by the PRC government, which implies Chinese nationality.<sup>146</sup>

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<sup>140</sup> Zhe Sun, *Ma Ying-jeou's Second Term and Taiwan's International Participation*, BROOKINGS (May 8, 2012), <https://www.brookings.edu/opinions/ma-ying-jeous-second-term-and-taiwans-international-participation/> [<https://perma.cc/TK3J-QBWY>].

<sup>141</sup> See generally Jacques deLisle, *Taiwan's Quest for International Space*, Paper presented at the third World Congress of Taiwan Studies, Taiwan in the Globalized World: The Relevance of Taiwan Studies to the Social Sciences and Humanities, Academia Sinica, Taiwan, Sept. 6-8, 2018, available at [https://wcts.sinica.edu.tw/05\\_03\\_en.php](https://wcts.sinica.edu.tw/05_03_en.php) [<https://perma.cc/WP3F-ZWCK>].

<sup>142</sup> Xuan Loc Doan, *Taiwan Resilient in Face of Beijing's Coercive Tactics*, ASIA TIMES (July 8, 2018), <http://www.atimes.com/taiwan-resilient-in-face-of-beijings-coercive-tactics> [<https://perma.cc/J4FJ-XDA2>]; Chris Horton, *El Salvador Recognizes China in Blow to Taiwan*, N.Y. TIMES (Aug. 21, 2018), <https://www.nytimes.com/2018/08/21/world/asia/taiwan-el-salvador-diplomatic-ties.html> [<https://perma.cc/KA3S-24FA>].

<sup>143</sup> *Taiwan to Continue Efforts to Secure World Health Assembly Invite*, FOCUS TAIWAN (Mar. 21, 2018), <http://focustaiwan.tw/news/aip/201803210020.aspx>. [<https://perma.cc/8VBY-TFDF>].

<sup>144</sup> Lin Feng, *Taiwan Snubbed by ICAO, Under Pressure from China*, VOICE OF AM. (Sept. 23, 2016, 6:07 PM), <https://www.voanews.com/a/taiwan-snubbed-icao-pressure-china/3522841.html> [<https://perma.cc/4CRK-UX9S>].

<sup>145</sup> *Taiwan Barred from Interpol Assembly*, TAIPEI TIMES (Nov. 6, 2016), <http://www.taipeitimes.com/News/front/archives/2016/11/06/2003658663> [<https://perma.cc/6VYE-KSH7>].

<sup>146</sup> *Taiwan to Call On U.N. to End Discrimination against Taiwanese*, FOCUS TAIWAN (Sept. 11, 2017), <http://focustaiwan.tw/news/aip/201709110024.aspx> [<https://perma.cc/LW99-2M3Y>]; Elson Tong, *Not Just Officials: Taiwan Students Blocked from Visiting UN Public Gallery in Geneva*, HONG KONG FREE PRESS (June 15, 2017, 5:49 PM), <https://www.hongkongfp.com/2017/06/15/not-just-officials-taiwan-students-blocked-visiting-un-public-gallery-geneva/> [<https://perma.cc/ZXS2-ACR7>].

These past few years have also seen Beijing escalating tactics to put pressures on various international businesses to agree to China's position that Taiwan is part of China. Beijing has pushed the U.S. hotel chain Marriott to apologize for listing Taiwan as a country on its website.<sup>147</sup> Under China's pressures, major German companies such as Lufthansa, Mercedes-Benz and Bosch have also listed Taiwan as part of China on their websites.<sup>148</sup> In May 2018, Beijing issued an order to dozens of foreign air carriers, demanding that they stop referring to Taiwan as an independent nation on their "websites or in other material" and that they rename it as "Taiwan, China" or "Chinese Taipei."<sup>149</sup> Airlines that fail to comply will suffer sanctions and be deemed "untrustworthy" in "China's social credit system", which will undoubtedly have an adverse impact on their business.<sup>150</sup> All airlines on the list have followed China's instructions, including the U.S. airlines.<sup>151</sup> The White House has criticized China's order as "Orwellian nonsense".<sup>152</sup> A U.K. foreign affairs official remarked that, "U.K. companies should not be placed under political pressure to make changes on its designation of Taiwan."<sup>153</sup>

China's increasingly assertive behavior on the international stage—not just on the question of Taiwan but more generally on other

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<sup>147</sup> Tara F. Chan, 'Economic Blackmail': Zara, Qantas, Marriott and Delta Air Lines Reverse Position on Taiwan for Fear of Angering China, BUSINESS INSIDER (Jan. 17, 2018, 1:23 AM), <https://www.businessinsider.com/zara-marriott-qantas-apologized-to-china-listing-taiwan-as-country-2018-1> [<https://perma.cc/TM4M-36UE>].

<sup>148</sup> Keoni Everington, *German Companies Lufthansa, Mercedes-Benz and Bosch Kowtow to Beijing*, TAIWAN NEWS (Mar. 8, 2018, 12:59 PM), <https://www.taiwannews.com.tw/en/news/3379415> [<https://perma.cc/5XR2-QLHU>].

<sup>149</sup> David Shepardson, *U.S. Condemns China for 'Orwellian Nonsense' over Airline Websites*, REUTERS (May 6, 2018, 12:47 PM), <https://www.reuters.com/article/us-usa-airlines-china-exclusive/u-s-condemns-china-for-orwellian-nonsense-over-airline-websites-idUSKBN1I60NL> [<https://perma.cc/C9TA-4N2G>].

<sup>150</sup> Jeremy Daum, *Credible Threat? Taiwan, Websites, and Social Credit*, CHINA L. TRANSLATE (July 3, 2018), <https://www.chinalawtranslate.com/credible-threat-taiwan-websites-and-social-credit> [<https://perma.cc/28TH-GH8V>].

<sup>151</sup> Sui-Lee Wee, *Giving In to China, U.S. Airlines Drop Taiwan (in Name at Least)*, N.Y. TIMES (July 25, 2018), <https://www.nytimes.com/2018/07/25/business/taiwan-american-airlines-china.html> [<https://perma.cc/RG4J-ADZR>]; *Three Biggest US Airlines Bow to China Taiwan Demand as Deadline Passes*, BBC NEWS (July 25, 2018), <https://www.bbc.com/news/world-asia-china-44948599> [<https://perma.cc/A6J8-475F>].

<sup>152</sup> Shepardson, *supra* note 149147.

<sup>153</sup> Tai Ya-chen & Joseph Yeh, *U.K. Insists on Its Terminology for Taiwan Amid Chinese Threat*, FOCUS TAIWAN (July 12, 2018, 11:20 AM), <http://focustaiwan.tw/news/afav/201807120006.aspx> [<https://perma.cc/2HWY-V2CU>].

controversial issues, such as the PRC's military land reclamation efforts in the South China Sea and its "united front" attempts to influence developments in various democracies, including the EU, Australia and New Zealand—has heightened the concerns of many countries.<sup>154</sup>

The U.S. is particularly alarmed. Facing a China that is widely perceived to be ever more aggressive, as previously mentioned, the U.S. Congress passed the Taiwan Travel Act in March 2018.<sup>155</sup> On a voice vote, the Act won the unanimous support of both Republicans and Democrats in the Senate as well as the House of Representatives, which is unusual in America's current polarized political climate. The Act, which President Trump gladly signed, encourages "officials at all levels of the U.S. Government, including Cabinet-level national security officials, general officers, and other executive branch officials," to travel to Taiwan and high-level officials of Taiwan to enter the U.S.<sup>156</sup> While the Act is generally considered symbolic, it is still a remarkable achievement for Taiwan's diplomatic efforts.

Beijing, of course, was vexed by this development, since until recently it had generally succeeded in preventing high level official contacts between Washington and Taipei. When the U.S. Congress was debating the draft Taiwan Travel Act, China's official media issued a warning, threatening serious retaliatory action if the Act was adopted.<sup>157</sup> Days after passage of the Act, Xi Jinping responded with a harsh statement that "[a]ny actions and tricks to split China are doomed to failure and will meet with the people's condemnation and

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<sup>154</sup> Thorsten Benner et al., *Authoritarian Advance: Responding to China's Growing Political Influence in Europe*, GLOBAL PUB. POL'Y INST. (Feb. 2018), [www.gppi.net/fileadmin/user\\_upload/media/pub/2018/Benner\\_MERICS\\_2018\\_Authoritarian\\_Advance.pdf](http://www.gppi.net/fileadmin/user_upload/media/pub/2018/Benner_MERICS_2018_Authoritarian_Advance.pdf) [<https://perma.cc/H2LF-U2HF>]; Joshua Kurlantzick, *Australia, New Zealand Face China's Influence*, COUNCIL ON FOREIGN REL. (Dec. 13, 2017), <https://www.cfr.org/expert-brief/australia-new-zealand-face-chinas-influence> [<https://perma.cc/U4XX-N6LR>].

<sup>155</sup> Taiwan Travel Act, H.R. 535, Pub.L. 115-135, <https://www.congress.gov/115/bills/hr535/BILLS-115hr535enr.pdf> [<https://perma.cc/5KW4-XEPQ>].

<sup>156</sup> *Id.* § 3.

<sup>157</sup> *Sheping: Meizhongyuan "Taiwan Lüxing Fa" shi "Cuihui Taiwan Fa" (社評：美眾院「台灣旅行法」是「摧毀台灣法」)* [Editorial: the "Taiwan Travel Act" of the U.S. House of Representatives is the "Act to Destroy Taiwan"], HUANQIU SHIBAO (環球時報) [Global Daily] (Jan. 10, 2018), <http://opinion.huanqiu.com/editorial/2018-01/11512000.html> [<https://perma.cc/7FNQ-Z586>].

punishment of history.”<sup>158</sup> Following the Act’s promulgation, U.S. Deputy Assistant Secretary of State, Alex Wong, traveled to Taiwan. Wong remarked during the visit that “Taiwan can no longer be excluded unjustly from international fora.”<sup>159</sup> Since President Trump later shed doubt upon the wisdom of Wong’s visit,<sup>160</sup> however, the extent to which Washington intends to implement the Act is unclear.

In this uncertain but largely negative political climate, in the eyes of many in the world community Xi Jinping’s hope to achieve the Chinese Dream of national rejuvenation by reunifying Taiwan with Mainland China is likely to be seen as unduly nationalist and expansionist. How much harder Beijing may push and how much of a backlash that might inspire, remains to be seen.

#### IV. CONCLUSION

In principle, China views the reunification of Taiwan with the Mainland as the most important issue on its agenda. Yet, Taiwan’s continuous growth as one of Asia’s most robust liberal democracies as well as its developing Taiwanese national identity are enlarging the political and psychological gaps between Taiwan and China. As the former tension across the strait is renewing, this Article seeks to contribute to relevant scholarship and policy discussion by offering a critical evaluation of the most contentious aspects of current China-Taiwan relations—the controversial “1992 Consensus” and the remarkable cross-strait agreements that Taipei and Beijing have concluded.

We note that the “1992 Consensus” would not be deemed to be legally binding under international law; nor was it even a genuine

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<sup>158</sup> Philip Wen & Ben Blanchard, *Xi Warns Taiwan Will Face ‘Punishment of History’ for Separatism*, REUTERS (Mar. 19, 2018, 10:11 PM), <https://www.reuters.com/article/us-china-parliament-taiwan/xi-warns-taiwan-will-face-punishment-of-history-for-separatism-idUSKBN1GW07X> [<https://perma.cc/4P8A-C5Q6>].

<sup>159</sup> Twinnie Siu & Fabian Hamacher, *U.S. Official Says Support of Taiwan Has Never Been Stronger*, REUTERS (Mar. 20, 2018, 11:01 PM), <https://www.reuters.com/article/us-taiwan-usa/u-s-official-says-support-of-taiwan-has-never-been-stronger-idUSKBN1GX08U?platform=hootsuite> [<https://perma.cc/Q5R6-DUJL>].

<sup>160</sup> Jackson Diehl, *Taiwan Seems to Be Benefiting from Trump’s Presidency. So Why Is No One Celebrating?*, WASHINGTON POST (Apr. 29, 2018), [https://www.washingtonpost.com/opinions/global-opinions/taiwan-seems-to-be-benefiting-from-trumps-presidency-so-why-is-no-one-celebrating/2018/04/29/f5d38166-4966-11e8-827e-190efaf1f1ee\\_story.html?noredirect=on&utm\\_term=.2c8fb3fb4fdd](https://www.washingtonpost.com/opinions/global-opinions/taiwan-seems-to-be-benefiting-from-trumps-presidency-so-why-is-no-one-celebrating/2018/04/29/f5d38166-4966-11e8-827e-190efaf1f1ee_story.html?noredirect=on&utm_term=.2c8fb3fb4fdd) [<https://perma.cc/6FV9-KST9>].

consensus. The term has been employed by the KMT and CCP as a placeholder phrase to refer to their differing positions about China. The KMT has used the “1992 Consensus” to refer to the formula of OCRI while the CCP has used it to refer to Beijing’s “One China Principle.” That is, the two sides differ on not only what “One China” means but also what the “1992 Consensus” means. The term must be understood simply as a formula strategically constructed after the fact to allow the KMT and the CCP governments to shelve their differing positions concerning which government is the legitimate, exclusive representative of “China” and to proceed to cooperation. It is not analogous to an international agreement and should not be considered to have binding legal effect on Taipei or Beijing.

With regard to cross-strait agreements, by contrast, while neither Beijing nor Taipei considers them to be “international agreements” per se, they would be deemed to be legally binding in the eyes of the international legal order, and therefore both China and Taipei should be obliged to comply with them in good faith. However, their dispute resolution and enforcement mechanisms are understandably weak and not capable of dealing with the unanticipated issue of whether President Tsai’s refusal to endorse the “1992 Consensus” entitles Beijing to cease or diminish implementation of any of the agreements.

In these circumstances, we believe that the ROC should try once again to negotiate with the PRC through their proxies in accordance with the dispute resolution provisions of each of the agreements that has gone into effect. If this renewed effort proves fruitless, the ROC should seek to obtain PRC consent to third party conciliation or mediation and, if need be, an ad hoc arbitration. Although, at present, the chances are nil that the PRC might accept any formal third-party role in settling this dispute, the ROC’s effort to invoke international third-party participation as well as relevant international norms for evaluating the merits of the dispute should boost foreign respect for the ROC for prompting the PRC to comply with the norms and institutions of the rule-based world order.

Publicly emphasizing the PRC’s non-compliance with the agreements may not only embarrass Beijing and elevate Taipei’s status in the court of world opinion, but also stimulate Beijing’s willingness to resume negotiations. If the two parties decide to resume negotiations, Taipei, in raising its concerns about Beijing’s non-compliance, should seek to include in future agreements, as well

as in the amendment of existing ones, more robust procedures for resolving disputes, including the possibility of submitting any legal issues to an independent tribunal.

This Article highlights Beijing's self-imposed dilemma. In Beijing's view, these cross-strait agreements are difficult to abandon and yet equally difficult to fully implement as long as the DPP administration does not recognize the "1992 Consensus." Accordingly, Beijing has thus far adopted a highly selective, politically expedient approach toward the continuing fulfillment of its legal commitments, while making other moves —'carrots and sticks'—that bypass and increase pressures upon the DPP government. It is ironic that Beijing insists on Taipei's literal acceptance of the "1992 Consensus", as though it were a legally binding agreement. Yet, it shows little regard for cross-strait agreements that should plainly be deemed legally binding! As the Chinese slogan puts it, "Politics takes command."

In our view, political actors on both sides of the Taiwan Strait have generally undervalued the potential of a rule-based order to facilitate institutional cooperation and sustainable peace in cross-strait relations. The CCP is willing to thumb its nose at cross-strait agreements for short-term political gains. The KMT, zealous to make progress in cross-strait relations, tried to ram cross-strait agreements through the legislature, underestimating the value of popular scrutiny in a democracy and accordingly losing the wide-based support required for sustainable cross-strait cooperation. Even though it now dominates Taiwan's legislature, the DPP, given the current strained relations with China, has not begun to seriously promote the draft Cross-Strait Agreement Supervisory Act that is required to lay the groundwork for Taiwan's future approval of cross-strait cooperation. These short-sighted approaches of the main political actors are likely to contribute to a vicious cycle in which law fails to play any significant role in restoring cooperation and reducing tension.

We recognize the realistic challenges of promoting the rule of law in cross-strait relations. Yet Beijing frequently urges other states to adopt a long-term perspective, and both Beijing and Taipei have continuing incentives to cultivate greater respect for their cross-strait agreements in order to facilitate their lasting cooperation. Unjustifiable non-compliance with these agreements undermines their credibility. If these agreements can no longer be trusted, Beijing will lose a valuable tool to exert its influence, enable cooperation with



Taiwan and foster peaceful development in the region. Also, although Beijing does not regard cross-strait agreements to be within the ambit of international law, its persistent non-compliance will be interpreted by others as further evidence of its disdain for the international rules of the game. This cannot be in Beijing's long-term interest.

Taiwan, and countries that support its democratic progress, should not miss this opportunity to encourage the PRC to respect, and make use of, some of the most important and enduring rules and institutions of the world community.