

TAIWAN RELATIONS ACT AT 35:
ENDURING FRAMEWORK OR SINGULAR TRIUMPH?

Vincent Wei-cheng Wang
University of Richmond

Paper presented at the 56th annual meeting of the American Association for Chinese Studies and George Washington University Sigur Center of Asian Studies joint conference on Taiwan, Washington, DC, 10 October 2014

This year commemorates the 35th anniversary of the Taiwan Relations Act (TRA). Although debates over the reasons for its success, its continued relevance, and its future viability have never completely settled, it is fair to say that TRA has outlasted what its original “framers” had expected. This paper examines the political resilience of a unique feature and important factor that has helped uphold United States-Taiwan relations and U.S. staying power in the Western Pacific since 1979 – the TRA.

More than thirty years ago, on 15 December 1978, American President Jimmy Carter announced that the U.S. government would terminate diplomatic relations with the Republic of China (ROC) on Taiwan and recognize the People's Republic of China (PRC) on the mainland. The news unsettled my carefree days as a freshman at National Taiwan University. The mood on campus was gloomy and pessimism permeated the society. Many people felt betrayed, and the future looked bleak. While its "economic miracle" had taken off by then, Taiwan's democratic transition was just in its infancy. Per capita GNP was US\$1,958 (in current prices).

Three and half decades later, Taiwan has evolved into a full-fledged democracy (one of the freest in Asia and the sole democracy in all ethnic Chinese societies), with a per capita GDP of US\$20,900 (or US\$39,600 in purchasing power parity) in 2013. The hardworking people of Taiwan and sound politico-economic management deserve much of the credit.

However, these accomplishments also benefited from the peace and security arguably engendered by an extraordinary framework -- the TRA. Enacted in 1979 by the United States Congress dissatisfied with the way President Jimmy Carter handled the normalization issue, the TRA has guided U.S.-Taiwan relations for over three and half decades -- a feat few could have anticipated. Many would argue that the TRA has also contributed to peace and stability in the Western Pacific and gradual improvement of relations across the Taiwan Strait. But the TRA's future cannot be taken for granted. The thirty-fifth anniversary of the TRA thus calls for reflection on the past and a surmising of the future.

This paper is divided into four sections. Section one discusses the unique political aspects of the TRA that contribute to its resilience. Section two evaluates the successes and shortcomings of the TRA. Section three speculates about the future of the TRA. While the TRA's implications for the people on Taiwan are clear, section four discusses some of the implications of the TRA for the Chinese people on the mainland and cross-Strait relations.

A Unique Legislation

To analyze the roles played by the TRA, it is useful to consider the diplomatic and political quandary faced by the U.S. in 1979. Jacob K. Javits, U.S. Senator from New York from 1957 to 1981, might have spoken for many Americans: "We could no longer operate under the fiction that the government in Taipei was the government of all China, but neither could we ignore the fact that the people of Taiwan had been our friends and allies for decades and that we had assisted in protecting them from domination by the communist regime on the mainland."¹ The TRA, as Stephen Solarz, the former Chairman of the Subcommittee on Asian and Pacific Affairs of the House of Representatives, put it, was thus enacted "to solve an unprecedented diplomatic problem: How to continue U.S. substantive relations with the people on Taiwan even though the U.S. government terminated diplomatic relations with the government in Taipei, as a precondition for normalization of relations with Beijing."²

Under conventional international law, an unrecognized state is severely handicapped. Typically it cannot have access to the courts of the state refusing recognition. But the TRA created an important exception to this rule. Section 4 states that "Whenever the laws of the United States refer or relate to foreign countries, nations, states, governments, or similar entities,

¹ Jacob K. Javits, "Congress and Foreign Relations: The Taiwan Relations Act," *Foreign Affairs*, No. 60 (1981-82) p. 56.

² U.S. Congress, House of Representatives, Subcommittees on Human Rights and International Organizations and on Asian and Pacific Affairs, *Implementation of the Taiwan Relations Act, Hearing and Markup*, May 7, June 25, and August 1, 1986 (Washington, DC: Government Printing Office, 1987) p. 1.

such terms shall include and such laws shall apply with respect to Taiwan."³ Prominent legal scholar Gerhard von Glahn argued that the TRA caused the U.S. to treat Taiwan as a state and its governing authorities as a government, despite the formal derecognition of both by the U.S.⁴

Indeed, as Columbia University Law professor Lori Fisler Damrosch, who served in the State Department Legal Advisor's Office and participated in the preparation of the TRA, pointed out, despite the U.S. government's *acknowledgement* of the Chinese position that Taiwan was a part of China, the U.S. continued granting Taiwan such trade benefits as MFN (most-favored-nation) and GSP (Generalized System of Preferences), while China, with a socialist economy at that time, received neither. U.S. courts consistently applied the Foreign Sovereign Immunities Act (FSIA) to Taiwan. The law says a foreign state is immune from suits in the U.S. for acts undertaken in official capacity.⁵ Similarly, the nominally "unofficial" American Institute in Taiwan is accorded with sovereign immunity.⁶

The TRA defines U.S. policy toward the ROC so extensively -- in the fields of trade, cultural, defense, and other relations and preserves the legal status of the ROC under U.S. laws and in U.S. federal and state courts -- that J. Terry Emerson, former legal counsel to Senator Barry Goldwater, concluded, "All that was missing from this legislation...was a provision for formal diplomatic relations."⁷

The TRA is thus a unique legislation. Its *pragmatic* arrangements of relations between the U.S. and Taiwan after 1979 fill a lacuna in traditional international law. However, America's concern for a former ally's fate cannot fully explain this innovation. Real U.S. *interests* were

³ U.S. Public Law 96-8, 96th Congress, April 10, 1979.

⁴ Gerhard von Glahn, *Law Among Nations: An Introduction to Public International Law*, 7th Ed. (Boston: Allyn and Bacon, 1996) p. 85.

⁵ Lori Fisler Damrosch, "The Taiwan Relations Act: After Ten Years," *Journal of Chinese Law*, No. 3 (1989) pp. 157-183.

⁶ "Sovereign Immunity Accorded to American Institute in Taiwan," *The American Journal of International Law*, Vol. 95 (2001) pp. 629-630.

⁷ J. Terry Emerson, "What Determines U.S. Relations with China: The Taiwan Relations Act or the August 17 Communique with Beijing?" *Asian Studies Center Background* (Heritage Foundation, 1987) p. 1. Emerson cited a case: "A U.S. District Court has found that the range of ties established by the TRA is so extensive that 'quasi-governmental relations' are provided by the Act." *Chang v. Northwestern Memorial Hospital* 506 F. Supp. 975, 978 [note 3][N.D.II1. 1980], quoted in *ibid.*, p. 2.

involved. The U.S. was Taiwan's largest trading partner (accounting for 32.3% of Taiwan's foreign trade in the first half of 1978); and Taiwan was the eighth largest trading partner of the U.S.⁸ A secure Taiwan was key to the peace and stability in the Western Pacific -- a region vital to U.S. interests. The U.S.'s reputation among its allies in the region was also on the line. So the TRA blends realism and idealism, and this is a reason for the wide bipartisan support it has received.

The TRA was a unique legislation in a second way. Politically, the TRA resulted from a rare kind of *equilibrium* (with intrinsic ambiguities and tensions arising from the American political system of separation of powers and checks and balances) between the Congress whose unusual coalition wanted to "do something" for Taiwan and against the executive, reasserting itself in the aftermath of the Vietnam War, and the executive branch, which typically enjoyed an upper hand on foreign policy.⁹ To the extent the TRA mandates executive-legislative joint responsibility for Taiwan's security,¹⁰ Congress has shown a keen interest in Taiwan that is rare with other countries. Senator Jacob Javits commended the TRA as an important example of the "unique" and "independent congressional role" in U.S. foreign policy.¹¹ Taiwan was thus able to somewhat compensate its disadvantage in gaining executive access due to derecognition with its work tapping into the Congress's goodwill toward it.

Third, the TRA was unique in that it was designed conceptually as a *transitory* legislation: a pragmatic but exceptional arrangement for Taiwan during a period of diplomatic limbo caused by U.S. derecognition in 1979. Theoretically, if Taiwan declares *de jure* independence and establishes an independent, sovereign Taiwan state, the TRA would become

⁸ Damrosch, "The Taiwan Relations Act," p. 159.

⁹ For a discussion about the politics of the TRA, see Steven M. Goldstein and Randall Schriver, "An Uncertain Relationship: The United States, Taiwan, and the Taiwan Relations Act," *The China Quarterly*, No. 165 (2001) pp. 147-172.

¹⁰ For example, Section 3 mandates that the President *and* the Congress shall determine the nature and quantity of weapons Taiwan needs for its defense and requires the President to inform the Congress promptly of any threat to the security of Taiwan. Some scholars, such as Goldstein and Schriver, question whether these provisions are not already provided by the U.S. Constitution and relevant laws. But others argue that Congress makes laws (e.g., the TRA), and the President's job is to faithfully implement the laws made by Congress. Emerson, "What Determines."

¹¹ Javits, "Congress and Foreign Relations," p. 54.

unnecessary, because the President of the U.S. has ample authority to recognize such a state and establish diplomatic relations with it.¹² On the contrary, if Taiwan should decide to peacefully join the mainland when the latter becomes freer and more prosperous, the TRA would also become obsolete. The TRA was thus enacted in tandem with a "*status quo*" constructed by the U.S. -- essentially no unification for China and no recognition for Taiwan.¹³

The TRA is studiously silent (or neutral) on the resolution of Taiwan's ultimate status, as long as it is achieved through *peaceful* means. In other words, it insists on a *process*, but does not privilege a particular outcome. It neither endorses nor precludes eventual unification of Taiwan with China, nor their separation.¹⁴

Despite its pragmatic origin, ambiguous nature, and transitory design, the TRA has guided U.S.-Taiwan relations for over thirty-five years - longer than many had anticipated. Does this mean that the TRA is a "durable agreement or a fraying framework"?¹⁵ While it is implausible that Taiwan's progress or U.S.-Taiwan relations could have been better *without* the TRA, it is equally far-fetched to attribute all the credit to the TRA. It is thus necessary to analyze the successes and failures of TRA.

Successes and Failures

The TRA's resilience stems from its protection of Taiwan's three core interests: economy, security, and democracy and from the alignment of U.S. interests with Taiwan's in

¹² Damrosch, p. 182.

¹³For vivid evidence that the "status quo" is a construct, rather than a reality, see former Assistant Secretary of State for East Asian and Pacific Affairs James A. Kelly, "Overview of U.S. Policy Toward Taiwan," testimony at the U.S. House International Relations Committee, April 21, 2004, <http://www.state.gov/p/eap/rls/rm/2004/31649pf.htm>. When pressed to explain "status quo," Kelly could only say "The U.S. does not support unilateral moves that would change the status quo as we define it. For Beijing, this means no use of force or threat to use force against Taiwan. For Taipei, it means exercising prudence in managing all aspects of cross-strait relations. For both sides, it means no statements or actions that would unilaterally alter Taiwan's status."

¹⁴ Damrosch, p. 181.

¹⁵ Avery Goldstein, "E-Notes: The Taiwan Relations Act: Durable Agreement or Fraying Framework? A Conference Report," Foreign Policy Research Institute, 8 September 1999, <http://fpri.org/enotes/19990908.goldstein.taiwanreladonsact.html>.

these areas.

Commercial Relations

Taiwan's economic development strategy has been described as export-led growth (ELG), which requires maintaining an outward-oriented economy. Historically, the U.S. was crucial to Taiwan's ELG strategy as a large market for finished manufactured goods and as an important source for technological know-how and capital. Taiwan's information technology (IT) industry, a mainstay of its exports, exemplifies this close relationship. From 1981 to 2007, two-way trade between the U.S. and Taiwan increased five-fold from \$12.1 billion to \$65 billion (accounting for 12.6% of Taiwan's exports and 12% of its imports). The U.S. remained Taiwan's largest trading partner until 2004, when it was surpassed by China. Taiwan is currently the United States' ninth-largest trading partner. On average, each person in Taiwan imported \$1,243 from the U.S. in 2007.¹⁶ Thus, Taiwan and the U.S. are quite important to each other.

From 1980 to 2012, Taiwan's GNP increased 11.6 times (from \$42.3 billion to \$489.5 billion, in current prices), while its GNP per capita rose 8.5 times (from \$2,385 to \$20,386, in current prices).¹⁷ Rapid growth based on ELG enabled Taiwan to quickly transform from a former recipient of U.S. aid to a creditor. For example, in 1979, Taiwan had \$2 billion in foreign exchange reserves. As of July 2008, it had the world's fifth largest foreign exchange reserves at \$291 billion.¹⁸

Could these impressive results have happened naturally, or *without* the TRA? Conceivably, they could have. However, considering that the TRA provided a legal framework

¹⁶ U.S. International Trade Commission, *Operations of the Trade Agreements Program* (annual reports prepared in conformity with Section 163(b) of the Trade Act of 1974); U.S. Department of State, "Background Note: Taiwan," <http://www.state.gov/r/pa/ei/bgn/35855.html>, accessed 29 December 2008.

¹⁷ Council on Economic Planning and Development, *Taiwan Statistical Databook, 2008* (Taipei: CEPD, 2008) p. 17.

¹⁸ Department of State, "Background Note: Taiwan."

that allowed commercial relations between the U.S. and Taiwan to develop normally without the adverse effects from the derecognition of Taiwan, the TRA most likely contributed to the growth in U.S.-Taiwan commercial ties, Taiwan's foreign trade, and Taiwan's prosperity stemming from ELG. Because the TRA treats Taiwan as a state different from the PRC, Taiwan enjoys more ready access to U.S. high technology than China.

Security Commitment

To consummate normalization with the PRC, Jimmy Carter abrogated the 1954 USA-ROC Mutual Defense Treaty without providing a clear commitment to Taiwan's security. Nor was he able to extract from the PRC a renunciation of the use of force against Taiwan. Congress was particularly concerned about Taiwan's security after the switchover and went to work to significantly enhance the U.S.'s commitment to Taiwan's security after recognition. The TRA affirms a concern for Taiwan's security in no uncertain terms. Of the six policy statements contained in section 2(b), four stress the interest of the U.S. in the peace, stability, and security in the Western Pacific and in ensuring that Taiwan's future is determined by peaceful means. The TRA also declares that the U.S. will "make available to Taiwan such defense articles and defense services in such quantity as may be necessary to enable Taiwan to maintain a sufficient self-defense capability" and the U.S. will maintain "the capacity to resist any resort to force that would jeopardize the security, or the social or economic system, of the people on Taiwan."

Scholars have debated about the essence of these security provisions. Some say that since the "strategic ambiguity" inherent in the TRA is intended to deter both Beijing's use of force and Taipei's provocation, thus as long as this "dual deterrence" works, the TRA is nothing more than a piece of paper. The U.S. is not obligated to come to Taiwan's defense, but can choose to do so.

Others contend that the TRA can be implemented like (perhaps more than) a defense treaty. For example, the typical defense treaty only covers "armed attack" on partners' soil; the TRA covers more. Thus, former Senate Foreign Relations Committee Chairman Frank Church, an Idaho Democrat, portrayed the TRA's security provisions as "very broad indeed, broader than the objective of the mutual defense treaty, which had to do with an attack and only an attack," whereas the TRA has considered "not only the security, but also the social and economic system of the people on Taiwan," and "not only the resort to force, but other forms of coercion."¹⁹

At any rate, the TRA's objective -- a secure Taiwan capable of self-defense -- complements the U.S. alliance structure in the Western Pacific. Although the TRA mandates that the U.S. bases its arms sales to Taiwan only Taiwan's defensive needs, such decisions are often carefully calibrated in light of the other diplomatic considerations of the U.S. Nonetheless, the U.S. has remained Taiwan's main weapons supplier. This has been critical for Taiwan's self-defense and confidence, because few other major powers are willing to supply Taiwan with weapons needed for its own defense.

According to the Stockholm International Peace Research Institute (SIPRI) data, between 1977 and 2006, Taiwan imported US\$28.4 billion worth of arms (mostly from the U.S.), making it the seventh largest importer of arms in the world.²⁰ In addition, U.S. military actions, such as dispatching carrier groups in 1996 to deter China's saber-rattling and revising the U.S.-Japan alliance, were also consistent with the TRA.

Human Rights and Democracy

In 1979, Taiwan was still a "soft authoritarian" polity. The TRA also sought to impress

¹⁹ Hearings on S. 245, Taiwan Relations Act, U.S. Senate, Committee on Foreign Relations, 96th Congress, 1st Session, February 1979, p. 779. In the House, Congressman Lester Wolff agreed: "We have gone far beyond the mutual defense treaty..." 124 Cong. Res. 4514. Quoted in Emerson, p. 10.

²⁰ SIPRI Arms Transfer Database. Available at http://www.sipri.org/contents/armstrad/output_types TIV.html.

the then ruling party (the KMT) that such benefits as commercial ties and security commitment were to be bestowed with an expectation for greater freedom. Section 2(c) affirms "the preservation and enhancement of the human rights of all the people on Taiwan" as an objective of the U.S. In other words, a freer Taiwan respecting human rights can make a stronger case for continued and greater U.S. support. This gave the incumbent government at that time some incentive to liberalize the political system and to better protect human rights.

Thus, a diplomatic setback ironically provided a catalyst for Taiwan's rapid democratization that ensued, although the primary impetuses were internal. Thirty-five years later, Taiwan has evolved into a vibrant democracy where all viewpoints about possible future choices, including independence, are protected.

An increasing number of Americans, including former U.S. Congressman Henry Hyde, who was chairman of the House International Relations Committee, consider Taiwan's democracy of great political and strategic importance to the U.S., because it is a beacon for China, and only when China becomes free will the Taiwan issue be resolved and can the U.S. and China have truly friendly relations.²¹

Shortcomings

While the TRA contributed to Taiwan's security, prosperity, and freedom, it did not increase Taiwan's *dignity*.²² Section 4(d) of the TRA took a passive approach to Taiwan's international space: "Nothing in this Act may be construed as a basis for supporting the exclusion or expulsion of Taiwan from continued membership in any international financial institution or any international organization."

²¹ See the speech given by Henry Hyde, the late Chairman of the U.S. House of Representatives Committee on International Relations, in Taipei on August 24, 2001, "Rep. Hyde Suggests Taiwan May Hold Key to China's Destiny," e-mail update sent by the U.S. Department of State's "USINFO East Asia" iipgeap@PD.STATE.GOV.

²² It should be noted that this assessment pertains to the *overall* U.S. policy toward Taiwan (particularly the acts - omission or commission - by the executive branch), rather than the TRA *per se*.

However, the results have been quite different. In 1979, the ROC still retained membership in the International Monetary Fund and the World Bank. But since then the ROC has been expelled from all UN-affiliated organizations following its expulsion from the UN in 1971. It lost its membership in the IMF and the World Bank in 1980. In his Three Noes statement in 1998, former U.S. President Bill Clinton said the U.S. does not support Taiwan's membership in international organizations requiring statehood. Clinton's statement (issued at the persistent request of PRC officials), though not logically inconsistent with the protocol of America's "one China" policy, diminished the room for maneuver for the United States regarding shoring up (or at least not further eroding) Taiwan's *international space*. As the world's seventeenth largest economy, sixteenth largest trader, and fifth largest foreign exchange earner located at international crossroads for commerce and epidemics, the ROC's exclusion from IGOs due to *non-recognition* of its statehood (rather than its intrinsic lack thereof) is unfortunate and damaging. The U.S. could have done more. Neither the TRA nor U.S. executive actions have prevented the erosion of Taiwan's international legal personality. Indeed, the issue of Taiwan's international space has become a salient and contentious issue.

Another shortcoming pertains to the outdated self-imposed restrictions by the U.S. government to conduct "unofficial relations" with Taiwan (protocol). High-ranking officials from Taiwan are still barred from visiting the U.S., but the AIT Taipei Office Director can easily see Taiwan's president (this was especially true during the DPP's Chen Administration, 2000-2008). The lack of direct high-level communication channels between Taiwan and the U.S. undermines the *quality* of communication between the two sides. Within the TRA's "unofficiality" model, room still exists to improve the quantity and quality of governmental exchanges.

Whither?

As the implementation of the TRA enters its fourth decade, one may ponder about its future. Will it be changed? Will it become obsolete or less relevant, as conditions on the ground, including the evolving cross-Strait relations, outpace a law enacted more than thirty-five years ago?

Looking into the future, the TRA is unlikely to be fundamentally changed for three reasons. The first is *resilience* or *inertia*. To mitigate the impact of the August 17, 1982 Communique, former U.S. President Ronald Reagan gave Taiwan "Six Assurances," including that the U.S. would not alter the terms of the TRA.²³ Over the years, attempts to shift the TRA toward a more or less pro-Taiwan direction have not succeeded.²⁴ The unusual legislative-executive *equilibrium* achieved at the TRA's onset, as discussed before, made it hard to deviate. Today's congressional-executive relationship is also quite different from 1979. Congress had largely returned to its historical norm of deferring to the executive branch over foreign policy. In that regard, the congressional activism seen in the making of the TRA was more an exception than the rule. While implementation by the executive is important, Congress does monitor executive implementation and ensure a baseline. The two check and balance each other, making a radical departure difficult and unlikely.

The second is *personnel* and *continuity*. Those individuals who have occupy key positions in the Obama Administration dealing with Taiwan -- such as former Deputy Secretary of State James Steinberg, Assistant Secretary of State for East Asian and Pacific Affairs Kurt Campbell, National Security Council Senior Director for Asian Affairs Jeff Bader, and

²³ For the text of the August 17 Communique and the Six Assurance, see Kerry Dumbaugh, "Taiwan: Text of the Taiwan Relations Act, the United States-China Communiques, and the 'Six Assurances,'" *CRS Report for Congress* (received through the CRS Web, updated 21 May 1998).

²⁴ One such example was the Taiwan Security Enhancement Act of 2000, passed overwhelmingly in the House of Representatives but eventually tabled in the Senate. The text can be found at http://usinfo.org/sino/taiwan_enhance.htm. Currently some members of Congress are asking the State Department to conduct a Taiwan policy review, arguing that this first review since 1994 is needed to update the evolving U.S.-Taiwan relations and demonstrate U.S. support.

Principal Deputy Assistant Secretary of Defense for Asian and Pacific Security Affairs Derek Mitchell -- are all former officials familiar with the continuity and nuance of U.S. policy toward China and Taiwan. The current team – Assistant Secretary of State for East Asian and Pacific Affairs Danny Russell, and National Security Council Senior Director on Asia Evan Medeiros, and Assistant Secretary of Defense for Asian and Pacific Security Affairs David Shear – is equally seasoned and knowledgeable.

The third is *policy priority*. Revitalizing the economy is the Obama administration's top priority. He may handle foreign policy challenges, such as North Korea, Iran, and the Middle East in a reactive mode, which means policy innovation regarding the Taiwan Strait is doubtful. There is no urgency, although the Obama administration may be under some pressure to, before he leaves office, announce another arms sales to Taiwan – first since 2011 – that is needed to help Taiwan offset some of the growing military imbalance across the Taiwan Strait. Although this may cause the PRC to again suspend the military-to-military dialogue between the U.S. and the PRC, analysts argue that the need is clearly there and the time is right.²⁵

Meanwhile, the U.S. will cautiously observe the cross-strait *detente* pursued by Taiwan's Ma Ying-jeou administration and calibrate its policy toward Taiwan and China.²⁶ Officially, various officials of the Obama administration have expressed satisfaction with improved cross-Strait relations, which also means that there is no incentive to alter the basic legal and policy framework.

Although the case for the continued validity of the TRA seems plausible, three longer-term opposite forces could present a challenge. The first is that an increasingly powerful and nationalistic China may eventually force unification. As a result of China's rapid military modernization (double-digit growth in published annual defense expenditures and substantial

²⁵ Denny Roy, "Taiwan: A Status Upgrade Is Now Affordable," *The Diplomat* (October 3, 2014), <http://thediplomat.com/2014/10/taiwan-a-status-upgrade-is-now-affordable/>

²⁶ Wendell Minnick, "U.S. NSC Reviewing Taiwan Issues", *Defense News*, September 21, 2009.

progress in military capabilities ranging from the Taiwan contingencies to scenarios "beyond Taiwan"),²⁷ this prospect has become increasingly likely (or at least increasingly less unlikely). It could put the clauses in Section 2 of the TRA to test.

The second challenge is that a democratic Taiwan may aspire to upgrade its *de facto* independence to *de jure* independence. In other words, it may challenge the U.S.-constructed "status quo" which has frozen Taiwan in a diplomatic limbo. The Chen Shui-bian administration of Taiwan (2000-2008) was perceived as particularly energetic in pushing for Taiwan's independence and consequently experienced the limits of U.S. support when the George Bush administration leaned harder on Taipei than on Beijing.

A third challenge, not as serious as the previous two, is the "*creeping unification*" between Taiwan and the mainland. Former Georgetown University history professor Nancy Bernkopf Tucker posited a provocative but important question in 2002, "If Taiwan chooses to peacefully join the mainland, should the United States care?"²⁸ This question, unthinkable during the Chen administration (2000-2008), gained relevance after Ma Ying-jeou, the KMT candidate, came to power after Taiwan's 2008 presidential election. In contrast to his predecessor, Chen Shui-bian, Ma made it a top priority to improve cross-Strait relations and reduce tensions with both Beijing Washington. Subscribing to its own "one China" formula ("one China, each side has its own interpretations", or as "the 1992 Consensus," a term coined by Chi Su, Ma's national security advisor),²⁹ the Ma administration appears to have squarely returned to the "status quo" *ante* (pre-2000). Consequently, cross-Strait relations have improved rapidly, compared to the DPP era, as "low-hanging fruits" (e.g., direct air links, tourists, and other commercial relations, culminating in the landmark Economic Cooperation

²⁷ See Office of the Secretary of Defense, *Annual Report to Congress, Military Power of the People's Republic of China, 2009*, available online at http://www.defenseUrik.mil/pubs/pdfs/China_Military_Power_Report_2009.pdf.

²⁸ Nancy Bemkopf Tucker, "If Taiwan Chooses Unification, Should the United States Care?" *The Washington Quarterly*, Vol. 25,3 (2002) pp. 15-28.

²⁹ See Chi Su, *Relations Across the Taiwan Straits* (London: Routledge, 2008).

Framework Agreement signed on 29 June 2010³⁰) have been quickly reaped, but the more difficult issues (e.g., international space, confidence-building measures, and a peace agreement) remain unresolved.³¹ Although the Ma administration's moderate approach toward China has been welcomed by official Washington and Beijing,³² it has also caused some unease in Taiwan (the Pan-Green supporters who fear that Ma's policies will compromise Taiwan's sovereignty or at least take away the independence option) and in the U.S. (those who are concerned if the *rapprochement* between Taiwan and China proceeds much faster than U.S. policy can adjust and may harm U.S. interests or pose complications for the policy of "Pivot" to Asia).³³

Ironically, improvement in cross-Strait relations might perversely 'weaken the TRA, as a veteran Taiwanese journalist contends.³⁴ No sooner was the ECFA inked then did Chinese scholars and analysts push for military confidence-building measures (CBMs).³⁵ The real purpose was to remove Taiwan's defense, especially to stop U.S. arms sales to Taiwan. The logic was that CBMs with China would remove threats to Taiwan; consequently, Taiwan would have no need for purchasing arms.³⁶ The Chinese are particularly interested in wooing

³⁰ A copy of the signed Chinese text of ECFA is available at http://ekm92.trade.gov.tw/BOFT/OpenFileService?file_id=e26110a384b0c83824a20141e6d4e397&context=83ee4cf785ad25a257533dlac7c3b82f. The English text can be found at http://www.moea.gov.tw/Mns/populace/news/News.aspx?kind=1&menu_id=40&news_id=19723.

³¹ Alan D. Romberg, "Cross-Strait Relations: First the Easy, Now the Hard," *China Leadership Monitor*, No. 28 (2009). See also Philip C. Saunders and Scott Kastner, "Bridge Over Troubled Water? Envisioning a China-Taiwan Peace Agreement," *International Security*, Vol. 33, 4 (2009) pp. 87-114.

³² See Yun-han Chu and Andrew I. Nathan, "Seizing the Opportunity for Change in the Taiwan Strait," *The Washington Quarterly*, Vol 31,1 (2007-08) pp. 77-91.

³³ Cf. Vincent Wei-cheng Wang, "Cross-Strait relations after the Sunflower movement," China Policy Institute Blog (University of Nottingham, U.K.)(26 September 2014), <http://blogs.nottingham.ac.uk/chinapolicyinstitute/2014/09/26/cross-strait-relations-after-the-sunflower-movement/> and 4. "The U.S. 'Pivot' to Asia and Evolving China-Taiwan Relations," paper delivered at the 2014 Annual Meeting of the American Political Science Association, Washington, DC, August 28-31, 2014.

³⁴ Ching-hung Wang, "Weekly Commentary: Washington's Other Suspicion About Ma Ying-jeou" (in Chinese), *The Liberty Times*, September, 12, 2010.

³⁵ For an excellent preliminary analysis of cross-Strait CBMs and their impact on the U.S., see Bonnie S. Glaser and Ralph Cossa, *Building Trust Across the Taiwan Strait: A Role for Confidence-Building Measures* (January 12, 2010), http://csis.org/files/publication/100107_Glaser_BuildingTrust_Web.pdf.

³⁶ It should be pointed out that the Chinese concept of CBMs with respect to Taiwan is broader and more encompassing than purely military aspects. It includes the arrangement of political relationships between the two sides of the Taiwan Strait. So, peace accord and unification (under "one country, two systems") all fit into this broadly defined CBMs, and the presumption is that China will *only* renounce the use of force or the threat of use of force against Taiwan when China and Taiwan have established a political relationship satisfactory to Beijing (or Beijing can feel confident about).

Taiwan's retired generals in groups (typically with close ties to the KMT) to discuss and promote CBMs. Although the Ma administration denied ever authorizing such groups to discuss CBMs with their Chinese counterparts, the U.S. government has reportedly already voiced its concerns to Taiwan, fearing that such talks between Taipei and Beijing, bypassing Washington, would complicate U.S. policy and adversely affect U.S. interests,³⁷ because the security provisions in the TRA, particularly U.S. arms sales to Taiwan, are based on the following premises:

- The U.S. has not accepted the PRC's position on Taiwan (i.e., the various renditions of the syllogism: there is only one China; Taiwan is a part of China; Beijing is the legal government of all China);³⁸
- Taiwan's security is important to peace and stability in the Western Pacific and is in the interests of the U.S.;
- The PRC has not renounced force or the threat of use of force against Taiwan; and
- U.S. arms sales have deterred China's occasional military adventurism, bolstered Taiwan's self-confidence, and helped contribute to peace and stability in the region.

³⁷ Chao-lung Lu and Pei-fen Chou, "Retired Generals Frequently Visit the Mainland; the U.S. Closely Watches. In the Past Two Years, the Levels of Such Groups Become Increasingly Higher. American Think Tanks Worry that the Two Sides of the Taiwan Strait Seek to Develop CBMS by Bypassing Washington. [Our Government] Reassures the U.S. that Such Exchanges Have Never Received Government Authorization" (in Chinese), *The China Times*, August 30, 2010, p. A1.

³⁸ In the 1972 Shanghai Communiqué, the United States "*acknowledges* that all Chinese on either side of the Taiwan Strait maintain there is but one China and Taiwan is a part of China." It is important to note that this means that the U.S. simply takes notice that this is the Chinese position, but it is not necessarily the U.S. position. Indeed, the U.S. essentially repeated the same position in the two other later joint communiqués with the PRC: "The Government of the United States of America *acknowledges* the *Chinese* position that there is but one China and Taiwan is part of China" (the January 1, 1979 Communiqué' on the establishment of diplomatic relations) and "the United States of America... *acknowledged* the *Chinese* position that there is but one China and Taiwan is part of China" (the August 17, 1982 Communiqué on U.S. arms sales to Taiwan). Emphases added. The text of the three joint communiqués can be found at Harry Harding, *A Fragile Relationship: The United States and China since 1972* (Washington, DC: Brookings, 1992), pp. 373-390. The last time the U.S. government arguably issued *its own* position on the status of Taiwan was in 1950. In ordering the Seventh Fleet to prevent any attack on Taiwan (then called Formosa) after North Korea had invaded the South, President Harry Truman declared: "The occupation of Formosa by Communist forces would be a direct threat to the security of the Pacific area and to United States forces" in that area. Truman further declared: "The determination of the future status of Formosa must await the restoration of security in the Pacific, a peace settlement with Japan, or consideration by the United Nations." *Department of State Bulletin* (July 3, 1950) p. 5.

Consequently, this journalist asks if the Ma administration readily accepts the one China principle (although Ma's formula is "one China, each side has its own interpretation," the Chinese side has insisted the "one China" principle and has never explicitly endorsed the "respective interpretations" part) and excessively touts the reduction of tensions in the Taiwan Strait, would this not weaken the rationales for U.S. arms sales to Taiwan?³⁹

A further concern is that if the relationships (particularly military relationship) between Taiwan and China become too cozy, China might gain access to the technologies and secrets embodied in the U.S. arms sales to Taiwan (both hardware and software). This could cause further pause in U.S. decisions to sell weapons to Taiwan, weakening the TRA still further.

While the above arguments do not seem hitherto supported by evidence (after all, the Ma administration continues stressing the importance of a robust defense and appears to lobby the U.S. for arms sales energetically), logically they cannot be easily dismissed.

At any rate, skeptics of this stripe fear that if Taiwan decides to bandwagon on China (willingly or unwillingly absorbed into China's orbit economically, politically, and strategically), the TRA or other foundations of U.S. policy toward Taiwan or cross-Strait relations would lose their relevance.

This "status quo-changing by stealth" has not received the same amount of attention as either type of explicit status quo-changing, but it is worth considering.

Some people close to the U.S. government thus advocate a review of U.S. policy toward Taiwan in light of the new situation. Although it is premature to draw any definitive conclusions, it is fair to note that the U.S. seems, at this point, to take a cautious approach overall: while commending on the reduction of tensions between China and Taiwan and improvement of cross-Strait relations, it is also carefully assessing the net impact of such developments on U.S. policy and strategic and economic interests.⁴⁰ Regardless, it seems

³⁹ Wang, "Washington's Other Suspicion."

⁴⁰ See Deputy Assistant Secretary of State for East Asian and Pacific Affairs David B. Shear's remarks at the

doubtful that even if there is such a review, it will abandon the core principles of the TRA.⁴¹

In light of these long-term trends that point toward different directions, can the TRA, enacted in tandem with a U.S.-constructed "status quo" and agnostic about Taiwan's ultimate status, continue its practical usefulness? Thirty-five years later, the answer is still not entirely clear. However, the TRA seems to have done remarkably well. But what about the next five, ten, or fifteen years?

The TRA's Implications for China

This paper will end with a brief reflection on the TRA's implications for China and the Chinese people on the mainland. This is an aspect that the prevailing discourse on the TRA (for or against) has overlooked but nonetheless entails implications for cross-Strait relations, China's future, U.S. policy, and the future of the TRA.

The "conventional wisdom" or "hegemonic discourse" on the TRA in the PRC is predictably negative. The Chinese government always reminds the U.S. government (especially with each new administration) of America's obligations under the three communiqués (1972, 1978, and 1982) and almost never recognizes the TRA also as a pillar of U.S. policy. Chinese officials have steadfastly opposed U.S. arms sales to Taiwan (as mandated by the TRA); and on rare occasions when they must address the TRA, they contend that the three communiqués, which the Chinese view as treaties between states, take precedence over a so-called U.S. domestic law. At any rate, the official version of Chinese reaction to the TRA is that it is invalid and it impedes U.S.-China relations.

The dominant voices in the Chinese society also tend to echo the official line, as can be gleaned from media reports or commentaries (all state-controlled) or internet chatrooms. Certain American academics who have taught relevant courses in China have also reported that few if any of

"Cross-Strait Relations in a New Era of Negotiation," Conference at the Brookings Institution, July 7, 2010, <http://www.state.gov/p/eap/rls/rm/2010/07/144363.htm>.

⁴¹ The last time the U.S. government formally implemented a review of its Taiwan policy was in 1994 during the Clinton Administration.

their Chinese students, despite their strong (negative) opinions about the TRA, had actually read the text of the TRA (English or Chinese) itself (because it could not be found in any textbooks or websites in China), until the resourceful American professors managed to secure a copy of the text for their students.⁴²

However, there is a tiny minority, mainly in the intellectual circles, who takes a more enlightened view. Although they are Chinese nationalists, they appreciate that the U.S. policy in general (and the goals enunciated in the TRA in particular) have contributed greatly to the peace and stability of the Western Pacific for the past thirty years. This benign international environment engendered by the U.S. policy can be seen as a "public good" of which China is also a (if not the biggest) beneficiary. But more importantly, China's post-1979 grand strategy -- pursuing national wealth and power through economic development -- has fortuitously relied on this benign international environment. China has wisely taken advantage of the "strategic opportunity" -- the thirty-five years since 1979 -- to transform itself from a poor and insular nation to a world power. The TRA deserves at least their grudging gratitude.

Furthermore, as the effects of the TRA on Taiwan's democratization make clear, the TRA's concern for democracy and human rights may also provide the enabling environment for transforming a (capable) one-party dictatorship into a democracy built upon and consistent with China's own culture and history. Admittedly, China is a much larger and more complex nation; and its authoritarian legacy is much more entrenched than was Taiwan's. However, there is also no other example that is culturally more "Chinese" than Taiwan.

If one day the TRA should succeed in facilitating China's transformation into a democratic polity with greater respect for human rights, as it did with Taiwan, then the quality and substance of U.S.-China relations will surely change for the better (more affinity and trust than suspicion and hedging). The intersubjective identities of China and Taiwan will also

⁴² Lecture by one American professor and personal communication with another -- both have taught American Foreign Policy in China.

change for the better, making cross-Strait reconciliation (or even union) more likely (as stated earlier, in that scenario, the TRA would become unnecessary). If that should happen, although the TRA was enacted to protect Taiwan's interests and to regulate U.S.-Taiwan relations, this flexible U.S. domestic law with international implications would have achieved a larger unintended consequence.

Although the "framers" of the TRA may or may not have anticipated the durability of this supposedly transitory legal framework or the relative success of this pragmatic policy tool, the TRA, by blending realism and liberalism, has arguably done as well as any other similar U.S. laws or domestic laws of any other country. It is fair to say that for over thirty-five years, this unique U.S. domestic law has helped to *shape* the international environment of the Asia-Pacific region in a positive way. For the coming decade, it remains to be seen whether faster developments on the ground will render the TRA obsolescent.