

## **The Taiwan Relations Act—Legal Foundations of Political Entrenchment**

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### ***Context I—Retrospect***

The Taiwan Relations Act was created in a moment of great peril for Taiwan, yet it has been an especially durable and fundamental pillar of Taiwan's security for more than one-third of a century. There are many reasons that this has been so. But the TRA's legal aspects are a significant if somewhat esoteric part of the explanation for its remarkable success and utility for Taiwan.

The TRA was adopted in a context that bode very ill for the prospects of a functionally independent and relatively secure Taiwan. The US's termination of the mutual defense treaty with the Republic of China undercut the principal external guarantee of Taiwan's security. The U.S.'s severing of diplomatic relations with the ROC was one in a series of blows to the ROC's status in the international system. It came less than a decade after Taipei had lost the Chinese seat at the United Nations to Beijing and amid many governments' moves to switch recognition from the ROC to the PRC. Although formal and arguably mostly symbolic (given that many states continued to maintain robust informal, functional ties), these shifts were potentially dangerous for Taiwan. Recognition and diplomatic relations are indicia of the capacity to engage in relations with states, which in turn is a key criterion for statehood or state-status under international law and, more importantly, in the order of international politics which international law, in this respect, largely tracks and reinforces. The moves were all the more significant for Taiwan because the recognition and diplomatic ties that the ROC lost shifted to the PRC, which claimed to be (and sought recognition and ties on the basis of other states' accepting or at least

acknowledging that the PRC asserted that it was) the sole legitimate government (and sole legitimate international representative) of a single state of China that included Taiwan. The significance of the realignment of recognition and diplomatic relations for Taiwan was greater still because of the ROC's stridently held official position at the time that it, rather than the PRC, had that same status and because (as a corollary of that position) Taiwan did not claim—and realistically could not seek—recognition as a separate state.

Beyond these legal niceties (albeit ones fraught with political and security implications), the broader politics of US-ROC relations were famously grim for Taiwan as well. The US administration under Richard Nixon and Henry Kissinger that had set in motion the forces that led to the ROC's loss of treaty-based security guarantees from and diplomatic relations with the US had done so under the expectation that Taiwan would be eventually absorbed by the PRC and thus that there was not much need for, or point to, efforts to find alternative means to protect Taiwan's security and autonomy in the long run. Doing so could risk setbacks in pursuit of the higher-priority goal of closer ties with Beijing in the context of the Cold War rivalry with Moscow.<sup>1</sup> Significantly for the legal issues noted above, the Shanghai Communiqué that marked the first formal step in that process was based in part on the US's acknowledgement of the view on both sides of the Strait that there was but one China that included Taiwan. The principle was reaffirmed explicitly in the 1979 second Communiqué that, near the end of the Carter administration, normalized US-PRC relations, which prompted the TRA. Partly a product of the Chiang Kai-shek regime's own position about the nature of the ROC-PRC relationship and Taiwan's status, this built into US policy (and PRC expectations about US policy) an element

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<sup>1</sup> See, for example, Nancy Bernkopf Tucker, "Taiwan Expendable? Nixon and Kissinger Go to China," *Journal of American History*, vol. 92, no. 1 (June 2005), pp. 109-135, at 124-125; "See How Those Pieces Could be Moved to Our Advantage," *The Kissinger Transcripts*, chap. 1 (William Burr ed.).

adverse to robust state-like status for Taiwan and an implication that each shift among the community of states' governments from Taipei to Beijing as the appropriate partner government for dealing with "China" further eroded a legal component of Taiwan's stature and, in turn, security.

In this bleak environment, some in the US who sought to limit the damage to Taiwan turned to legal means. Some of the ROC's supporters in Congress brought suit to challenge President Carter's termination of the mutual defense treaty without the Senate's consent. This legal challenge ultimately failed. In part it rested on a weak argument: that the requirement that the Senate consent to the US entering a "treaty" meant that the US could only withdraw from such a Senate-consented treaty if the Senate consented to the withdraw—even though the Constitution's provision mandating Senate advice and consent for the US to enter into those international agreements cast as treaties contained no language about withdrawing from or abrogating treaties. In part, the courts were reluctant to wade into a dispute between the president and Congress about a major foreign and security policy issue—the type of concern that underlies the "political question" doctrine that courts employ to refuse to decide such questions. In the end, a fractured Supreme Court let stand lower court decisions that rejected the Senators' challenges and permitted the President to terminate the treaty.<sup>2</sup>

The TRA was the other, more successful legal move undertaken to limit the impact on Taiwan of the US moves to end the security treaty and formal relations. Amid congressional concern and alarm about these issues, a hastily drafted TRA moved quickly through the process of congressional passage and presidential signature.

### ***Content***

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<sup>2</sup> *Goldwater v. Carter*, 617 F.2d 697 (1979), 444 U.S. 996 (1979).

The TRA's key substantive features are well-known, but some of their broader or more thematic features warrant attention here. First, the arms sales provisions, obligating the US to sell "arms of a defensive character" (based solely on judgments about Taiwan's needs) and to maintain its own capacity to resist force or coercion that would jeopardize the security of the people on Taiwan, was a second-best alternative to the terminated mutual defense pact. And this was bolstered somewhat by some of the TRA's wider policy language—including the declaration that peace and stability in the area are interests of the United States and that the US expectation that the future of Taiwan would be decided by peaceful means was a condition of establishing relations with the PRC.<sup>3</sup>

Second, the TRA is a domestic law mechanism directing the US government to treat Taiwan and the ROC more or less "as if" they were, respectively, a sovereign state and a recognized government that maintains diplomatic relations with the United States. Those are the effects—and a good part of the significance for Taiwan's security and stature—of many of the TRA's core provisions.<sup>4</sup> The provision mandating that the ROC continue to be treated like the government of a recognized state under US laws that confer benefits or impose burdens on such entities is a broad "as if" provision, allowing Taiwan / the ROC to maintain the functional state-like and government-like stature under US law that the loss of formal status as the US-accepted government of a recognized state (China) otherwise would have imperiled. Particularly potent and concrete "as if" provisions include: the mandate for the continuation of the immunity that foreign sovereign states enjoy under US law; the directive for the US to support the ROC's continued participation in international organizations; and the provision that the ROC can a party

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<sup>3</sup> 22 USC §§ 3301(b), 3302.

<sup>4</sup> See 22 USC § 3303.

to agreements with the United States. All of these recognize and affirm as a matter of US law that the ROC/Taiwan would continue to enjoy in practice many of the attributes of a state and its government. The arms sales provision has significant resonance here as well, given that it is perfectly permissible under international law to sell weapons to the government of another state but not, under most circumstances, to an ousted government or a secessionist province. Similarly, the creation of the American Institute in Taiwan and the seconding of Department of State personnel to staff it were fallbacks to an informal alternative to lost formal diplomatic relations.<sup>5</sup>

These legal features of the TRA have had tangible effects that have indirectly enhanced Taiwan's security. Absent the enjoyment of the state-like powers, privileges or responsibilities that the TRA confers, Taiwan and Taiwanese entities and individuals would have found it much more difficult or impossible to undertake the level and range of economic engagement with the United States that has occurred. For example, absent coverage under the Foreign Sovereign Immunities Act, ROC government organs and state-owned enterprises would have faced serious impediments to operating in the United States because counterparties would not have been willing to enter into contracts with them. Without the TRA's commitment to US support for the ROC being a party to bilateral and multilateral economic accords—including, in recent years, the WTO and a still-prospective TIFA accord or a future TPP—Taiwan might have faced and still faced much more serious obstacles to the international economic integration that has been vital to its economic success.

Third, “values”-related provisions in the TRA also evoked principles that mattered or, more important, later came to matter in US views on the stature to be accorded or supported for

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<sup>5</sup> 22 USC § 3305-3310.

various state or state-like entities. Thus, the TRA refers to the people on Taiwan in ways that have come to resonate more strongly with notions of the self-determination of peoples and, in turn, claims to significant autonomy and even statehood.<sup>6</sup> Such norms of self-determination have deep roots in US foreign policy and understandings of international law, dating in relatively robust form to Woodrow Wilson and, with greater impact, to the era of Postwar decolonization and, with renewed vigor, amid the post-Cold War disintegration of the former Soviet Bloc. Adopted when the US had no reason to challenge the common assertion by the ROC and the PRC that people on both sides of the Strait were all part of a Chinese people in a single Taiwan-including Chinese state, the self-determination-evoking language in TRA began to look more like an element (albeit an oblique one) of US legal support for Taiwan's autonomy and stature when later ROC administrations—primarily under Lee Teng-hui and then Chen Shui-bian—began to emphasize and cultivate ideas of the distinctiveness and separateness of Taiwanese people and a quest for separate or separately sovereign status for Taiwan.

So too, the TRA expressed a US commitment to the human rights of the people in Taiwan.<sup>7</sup> In the context of the TRA's enactment, this was unhelpful for the ROC's cause of maintaining as much of the US's former support as it could. Echoing a significant component of President Carter's foreign policy that has persisted in the years since and the was reinvigorated and integrated more closely with international legal issues in the context of decisions to recognize post-Soviet states in Central and Eastern Europe, the provision problematically (for the

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<sup>6</sup> 22 USC § 3301(a),(b).

<sup>7</sup> 22 USC § 3301(c).

ROC at the time) if only loosely linked US support to an area where the ROC's then-current record was quite weak.<sup>8</sup>

### ***Entrenchment***

The substantive commitments set forth in the TRA thus did promise the ROC / Taiwan some limits to its losses in the aftermath of the US's cancellation of the mutual defense treaty and termination of diplomatic relations in favor of ties with the PRC. But the content was relatively thin gruel compared to what the ROC had previously enjoyed. Much of the remarkable success of the TRA in helping Taiwan attain a measure of security—and, more narrowly, even the legal dimension of the help the TRA has provided—lies in not just in its fairly modest content but also in the high degree of “entrenchment” that it demonstrated or promoted. There are several elements in this entrenchment, all or almost all of them partly legal and some of them distinctively legal.

The simplest and most obvious indicator of entrenchment of the TRA generally and its most Taiwan security and status-enhancing provisions more specifically is its remarkable endurance over thirty-five years with no fundamental changes and with little change of any sort. Despite periodic eruptions of arguments that the US should abandon Taiwan or acquiesce in its Finlandization and so on, the TRA has not faced near death experiences or even major surgery.<sup>9</sup> The fixity here has been symmetrical: attempts to adopt legislation to strengthen the US's legal commitments to Taiwan—the Taiwan Security Enhancement Act, for example—have

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<sup>8</sup> See generally, Jacques deLisle, “The Chinese Puzzle of Taiwan's Status,” *Orbis* vol. 44, no. 1 (Winter 2000) pp. 35-62.

<sup>9</sup> See Bruce Gilley, “Not So Dire Straits: How the Finlandization of Taiwan Benefits U.S. Security,” *Foreign Affairs*, vol. 89 no. 1 (Jan-Feb 2010), pp. 44-60); Charles Glaser, “Will China's Rise Lead to War?: Why Realism Does Not Mean Pessimism,” *Foreign Affairs* (Mar-Apr 2011).

consistently failed to become law.<sup>10</sup> Unlike many laws, it has not been gutted through executive branch interpretation or willful neglect. Despite some ups and downs, it has not become a dead letter or a hollow shell.

Today, the TRA seems especially safe from amendment or repeal. Calls from academics and policy intellectuals to rethink fundamentally the US's relationship with Taiwan in recent years have failed markedly to gain much traction in policymaking circles.<sup>11</sup> Further weakening any pressures to revisit the premises underlying the TRA and revise its content are the significant and in some respects mounting tensions in US-China relations and the Obama administration's pledge to "rebalance" to Asia in response, at least in significant part, to the US's and regional states' shared concern about a more powerful and assertive PRC. At the same time, polarized politics, partisan gridlock, legislative paralysis—or however one chooses to characterize the recent and likely near future state of affairs in Congress—imply an additional hurdle to any consideration of revising the TRA.

The TRA has been a uniquely entrenched element in US policy toward Taiwan issues, in part (although not entirely) because of its legal status and features. As a duly enacted law, it occupies a higher place in the hierarchy of "bindingness" among policy-embodied government actions. The other three most sacred texts of US policy toward Taiwan and cross-Strait issues—the Three Communiqués—are merely policy statements. They are not law or documents with distinctly legal significance. Notably, the PRC takes a very different view, regarding the Communiqués as treaty or treaty-like agreements that bind the US as a matter of international

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<sup>10</sup> Taiwan Security Enhancement Act, HR 1838, S. 693 (106<sup>th</sup> Cong. 2d. Sess. 1999).

<sup>11</sup> They have encountered a formidable counter-offensive even within the world of academics and policy intellectuals. See, for example, Nancy Bernkopf Tucker and Bonnie Glaser, "Should the United States Abandon Taiwan?" *Washington Quarterly*, vp:// 34 no. 4 (2011), pp. 23-37 Shelley Rigger, *Why Taiwan Matters: Small Island, Global Powerhouse* (2011).



law and dismissing the TRA as mere domestic legislation that cannot supersede or negate international legal obligations.

In practice, on the occasions when a US president or senior administration official has strayed—intentionally or accidentally—from the catechism on Taiwan and cross-Strait policies that are embodied in the TRA and the Three Communiqués, they have almost invariably retreated quickly to the sturdy shelter of those texts as the authoritative statement of fundamentally unchanged and unchanging US policy. This has been the pattern with seeming or perceived retreats from US commitments by Secretary of State Powell or President Obama, or seeming or perceived increases in commitments early in the second Bush administration.<sup>12</sup>

To be sure, some of this retreat can be and has been accomplished by policy statements and pointed assurances that nothing that was said constituted or signaled a change in US policy. But much of the work is done by invoking the four key texts, which are singularly effective because of their longstanding and unchanging content and US officials' repeated—and entrenchment-promoting—assertions of their fixed and foundational character. Among the four, the TRA's unmatched status as US law gives it special force from the US perspective.

The controversies and difficulties surrounding the 1982 Third Communiqué in part (although only in part) reflect this face of the TRA's entrenchment effect. To be sure, President Reagan's initially secret "six assurances" were a key element in blunting the force of the communiqués language concerning the reduction or elimination of arms sales to Taiwan, some of the work was accomplished by the TRA by virtue of its special status. To the extent that the

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<sup>12</sup> Joseph Kahn, "Warnings by Powell to Taiwan Provoke a Diplomatic Dispute," *New York Times*, Oct. 28, 2004; "US Still Abiding by One-China Policy, Says Powell," *People's Daily*, Mar. 24, 2004; U.S.-China Joint Statement, Beijing, Nov. 17, 2009, <http://www.whitehouse.gov/the-press-office/us-china-joint-statement>; Shih Hsiu-chuan, "Opinions Differ on US-China Statement," *Taipei Times*, Jan. 22, 2011, p.3; "Shaheen Causes Controversy," *The China Post*, Sept. 20, 2003.

Third Communiqué was or could be construed as inconsistent with the arms sales provisions in the TRA, the Communiqué was, in law-influenced US political discourse and thinking, was the weaker of the two or was to be interpreted in light of the enduring and more binding TRA provisions.

Relatedly the TRA has become particularly entrenched due to features of US constitutional law, specifically the law governing the separation of powers. Policy proclamations from the executive branch, joint communiqués or statements issued with officials of the US and other governments and the like are actions by one branch of government—albeit the dominant one in foreign affairs. And they can be altered or reversed by the unilateral action of that same, single branch. As the litigation arising from President Carter’s termination of the mutual defense treaty with the ROC helped make clear, even international agreements with legal force can be changed by the President alone without the consent of the legislative branch or—given doctrines of judicial restraint when faced with political questions or foreign relations questions—the judicial branch.

The TRA is qualitatively different. As legislation passed by Congress and signed by the President, it is binding until subsequent legislation changes it. (A determination by the courts that the TRA is unconstitutional would have the same effect, but such an outcome is unimaginable, given the ways that US courts approach challenges to actions by the political branches in the foreign affairs area and given that the TRA has survived for 35 years without facing a plausible charge of constitutional invalidity).

Beyond and behind such TRA-preserving features of US law lie the realities of separation of powers-related politics. Simply, the TRA gains additional entrenchment and greater invulnerability because executive branch efforts to undermine it—even, or especially, without

formal amendment—would face congressional opposition that is rooted not just in views that Members of Congress might hold on the merits of the policy or the implications for partisan political gain. Precisely because the TRA is a congressional creation, issues of institutional power and prerogative are at stake.

Given the relative dominance of the executive in foreign affairs matters, Congress has additional incentives to defend those areas where it has staked a claim or, at least, to avoid acquiescence in executive actions that could threaten to set a precedent of further erosion. This is especially so when the issue arises in a context where Congress does not have counter-incentives to shirk responsibility by leaving the President to take the risk of a policy's failure while Congress foregoes taking a clear stand. To be sure, Taiwan-related issues can have this quality, as moments of crisis in cross-Strait relations sometimes have illustrated. But, much of the time, US policy to Taiwan does not give Congress strong reasons to engage in such “ducking.” The relatively robust textual provisions in the TRA concerning presidential reporting, congressional review and congressional oversight reflect at least an intention by the TRA's framers to bind and monitor to the President on Taiwan security issues.<sup>13</sup>

The TRA thus constrains—and in that sense weakens—the President in making policy with respect to Taiwan. But that weakness at home is a form of strength abroad. In a world that understands (or can be made to comprehend) the structure of government that is characteristic of the US's constitutional regime, the President is empowered (and constrained) to play a two-level game on Taiwan-related issues. Because he cannot as a matter of intertwined constitutional law and inter-branch politics at home, the executive branch can, does, or must be less compromising

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<sup>13</sup> 22 USC §§ 3302(b),(c), 3313.

on such issues in negotiation with Beijing or others on matters that implicate the TRA-embodied US commitments about Taiwan.<sup>14</sup>

Notably, Beijing has gained considerably in its comprehension of US separation of powers since the TRA was adopted. In the context of a noted case that was unfolded roughly contemporaneous with the TRA, official and orthodox PRC commentary expressed near disbelief that the US President could not simply order US courts to grant the PRC sovereign immunity from plaintiffs seeking to recover from the PRC for Chinese state-issued bonds dating to the Qing dynasty.<sup>15</sup> In the early years of the TRA, PRC sources were similarly disdainful or ostensibly disbelieving of the idea that the President could be and was constrained by the TRA to (in Beijing's view) violate the binding international commitments made in the Communiqués (and, before them, the Cairo and Potsdam Declarations). Although Beijing has become no friendlier to the TRA, it has gained a much richer appreciation of the contours and power of the separation of powers in American governance. Thus, the PRC and its instrumentalities now routinely appear in US litigation to make conventional, US separation of powers law-consistent arguments about sovereign immunity. And, especially in recent years, critical commentators have developed a quite sharp eye for the ways in which the separation of powers stymies government activity and activism in the US in ways that it does not in China.<sup>16</sup>

There is another related, also judicial component to the separation of powers-linked dimension of the TRA's "entrenchment" dynamic. As noted above, the US system's famously high level of judicial independence can give the courts a significant independent voice on foreign

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<sup>14</sup> The international relations literature on two-level games is vast. Much of it flows from the seminal work by Robert Putnam. See for example, Robert Putnam, "Diplomacy and Domestic Politics: The Logic of Two-Level Games," *International Organization*, vol. 42 (1988), pp. 427-460.

<sup>15</sup> See *Russell Jackson et al. v. People's Republic of China*, 194 F.2d 1490 (1986).

<sup>16</sup> See, for example, "China Lectures US on 'Responsibility' Over Debt Default," *Telegraph*, Oct. 7, 2013.

affairs-related matters, including those related to Taiwan. The TRA specifically directs courts to give the ROC many of the rights and privileges of the government of a sovereign state and to treat Taiwan as having many of the legal attributes of a sovereign state (that is, the “as if” features of the TRA discussed above). These two features have combined to yield a series of judicial decisions in US federal courts that show one of the co-equal branches of the US national government in most (although not quite all) cases treating the ROC government like the government of a sovereign state and Taiwan like a sovereign state—and often doing so because, the courts say, Congress and the executive want the courts to do so (as reflected in the TRA and other legislative or executive acts).<sup>17</sup>

To be sure, if one parses the law carefully, these cases do not imply (and do formally eschew) a position on sovereignty over Taiwan and Taiwan’s international legal status. But to reach that conclusion requires some relatively close lawyerly analysis and some determination to move past language that seems to imply “pro-Taiwan” positions on these issues. Tellingly, Taiwanese authorities and at times the government in Beijing have paid close attention to these cases and have pushed hard for results or language that favors their positions and, especially on the Taiwan side, become greatly concerned when the courts’ analyses have been at odds with Taiwan’s pursuit of indicia of robust state-like or state-equivalent status.

Yet another US legal structure-based “entrenching” quality of the TRA stems from the sharp distinction—and, indeed, barrier—that US law draws between domestic law and international law. This feature (noted above in a different but related context) insulates the TRA and its commitment to foster or protect Taiwan’s security from the vagaries of shifts in foreign

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<sup>17</sup> See, for example, *Liu v. Republic of China*, 189 F.2d 1419 (9<sup>th</sup> Cir. 1989); *New York Chinese TV Programs v. UE Enterprises*, 954 F.2d 847 (2d Cir. 1992); *Atlantic Mutual Insurance Co. v. Northwest Airlines*, 796 F.Supp. 1188 (E.D. Wisc. 1992); *Mingtai Fire & Marine Insurance Co. v. United Parcel Service*, 177 F.3d 1142 (9<sup>th</sup> Cir. 1999).

policy and from the pressure Beijing might be able to assert at the international level. Principles of US law here create a sharp “acoustical separation” that can benefit Taiwan, especially in difficult or perilous times.<sup>18</sup> Whatever the US might say or do about Taiwan as a matter of foreign policy or even as a matter of interpreting international law, the impact on the TRA and its promises is minimal because, simply, the TRA is a domestic law and is in part about domestic law issues (for example, how US courts should handle cases involving Taiwan). Because it is domestic law, it is not changed by international policy or even international law. Because it is partly about domestic law questions it is, to that extent, a law which is irrelevant to and thus not affected by what happens in international law and politics.

Finally, an accidental or incidental policy effect of the TRA structure has enhanced its role in entrenching US policy commitments to Taiwan’s security. This has occurred through the simple mechanism of having created routine deadlines and anniversaries. Every decade or half-decade anniversary of the TRA’s adoption brings discussion and—from official Taipei and official Washington—statements of appreciation or support for the TRA and the relationship it helps to define. Also, for much of the TRA’s life, it has been the trigger for regular reviews of Taiwan’s defense needs and offers of arms sales. The offers have sometimes disappointed Taiwan and, in recent years, the failure of Taiwan to follow through on purchases has frustrated the US. But the arms sales consistently irritate and sometimes have infuriated Beijing. And they always provide a tangible and visible, TRA-as-law-driven occasion for reaffirming regularly, and thereby further entrenching, a US commitment to support Taiwan’s security.<sup>19</sup>

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<sup>18</sup> On “acoustical” or “acoustic” separation, see generally Meir Dan-Cohen, “Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law,” *Harvard Law Review*, vol. 97 no. 3 (Jan 1984), pp. 625-677.

<sup>19</sup> See, for example, Andrew Jacobs, “Arms Sale Draws Angry, but Familiar, Reaction,” *New York Times*, Sept. 22, 2011; “China Urges U.S. to Stop Taiwan Arms Sales,” Apr. 9, 2014; US Taiwan Business Council, “Chinese Reactions to Taiwan Arms Sales (Mar. 2012); “Taipei’s Arms Procurement Dilemma,” *Asia-Pacific Security Studies*, vol. 3, no. 4 (Apr 2004).

(Here the TRA is somewhat analogous to the former statutorily mandated human rights-based review of the PRC's most-favored-nation trading privileges with the United States. By accident coinciding with the anniversary of the June 4, 1989, military suppression of the Tiananmen demonstrations, this annual ritual kept the human rights issue more securely in the mix in the US's China policymaking. After China's entry into the WTO, this yearly ritual had to end—under WTO rules—and the effect was to remove one impetus to making human rights matter in US China policy.)

### *Context II and III—China and Recent Developments*

The TRA's efficacy in supporting Taiwan's security is reflected in Chinese actions and reactions that, in effect, pay back-handed compliments to the TRA. First, Chinese sources and commentaries portray the TRA as an especially unacceptable component of US policy on Taiwan issues.<sup>20</sup> The arms sales that it calls for are the most extreme or most obvious evidence, in Beijing's view, of the US's improper interference in China's domestic affairs. Among the four key texts, the TRA is the least consistent with the PRC's favored positions. And it is, for reasons discussed above, the one that would be most legally and politically constraining for any US administration inclined to be more accommodating toward the PRC's position. The TRA is the *bête noire* in the PRC account of what is wrong and unacceptable about US policy on Taiwan issues.

Second, amid the especially troubled cross-Strait relations of the later Chen Shui-bian years, when Beijing was particularly focused on the prospect that Taiwan might make a bid for

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<sup>20</sup> See, for example, "US Should Abolish 'Taiwan Relations Act,'" *People's Daily*, Sept. 26, 2011; State Council Information Office, PRC, "White Paper—The Taiwan Question and the Reunification of China," § II (Aug. 1993); Taiwan Affairs Office and State Council Information Office, "White Paper—The One-China Principle and the Taiwan Issue" § V (Feb. 21, 2000).

full formal independence, the PRC implicitly but strikingly acknowledged the power of the TRA. Beijing adopted an Anti-Secession Law that reflected a range of motivations and concerns. But it was in key respects a mirror image of the perennially Beijing-vexing TRA. Where the TRA was a domestic law concerning Taiwan as a matter of foreign affairs, the ASL was a domestic law that asserted in an especially formal way the PRC's position that Taiwan was a domestic affair. Where the TRA pledged arms sales to prevent coercive changes to the status quo of Taiwan's autonomy in practice (at least arguably its de facto independence), the ASL threatened the use of force in response to any changes to what Beijing claimed was the status quo of de jure unseceded and thus still unified Taiwan. Some reports on Beijing's thinking in adopting the ASL suggested that the TRA was very much in the minds of the ASL's framers, in part as a template as well as a target.<sup>21</sup>

Finally, some recent developments suggest the TRA's ongoing and possibly evolving utility for Taiwan's security. First, the US pivot to Asia not only reflects shifts in US and others states' perception that China is a growing threat or at least potential threat to their interests and regional security—something which, at least in the relatively near term, shifts the balance in favor of supporting Taiwan's security. Beyond that, the rebalance or pivot is making US security policies toward the region more variegated or graduated. As the US seeks and welcomes closer cooperation with states ranging from Japan to Korea to Vietnam to the Philippines to Singapore to India, the relationships range from venerable formal security alliance to ad hoc, tentative or wary cooperation. In this context, the somewhat odd character of the TRA-framed relationship with the ROC appears less anomalous and thus, all other things being

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<sup>21</sup> On these issues, see generally Jacques deLisle, "Legislating the Cross-Strait Status Quo? China's Anti-Secession Law, Taiwan's Constitutional Reform and Referenda, and the United States' Taiwan Relations Act," in Peter C.Y. Chow, ed. *Economic Integration, Democratization and National Security in East Asia* (2007), p.. 101-138.



equal, possibly less vulnerable. It is just one more among many, nearly sui generis security relationships that the US has with regional entities.

Second, the ongoing and recently dramatic controversy over democratization and the political order in Hong Kong may serve to underscore the value of features that the TRA has helped to support in US relations with Taiwan. To be sure, the circumstances of Hong Kong and Taiwan are profoundly different for reasons having nothing to do with the TRA. Hong Kong is formally under Chinese rule, has never had an independent state-like status, and has no prospects for or serious constituency favoring independence. But Beijing's relative success in attacking what it denounces as the illegitimate attempts to "internationalize" the Hong Kong question—despite the internationalization sought by the British side in the Joint Declaration and pursued by the US in the very palely TRA-like US Hong Kong Policy Act—are perhaps also a cautionary tale about the vulnerability that attends the absence of the type of commitment that the TRA reflects and has helped to entrench for Taiwan.