

International Law In Absentia: Legal Constraints and Clarity in a China-Taiwan Scenario

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## **Abstract**

The United States has solely engaged in informal relations with Taiwan for roughly the past forty years, though it has also stated its support of an independent, democratic Taiwan since that time. For the past seventy years, China has maintained that Taiwan is rightfully part of China, and in the past two years, China has repeatedly increased military pressure on the island. The informal international legal landscape surrounding Taiwan and the increasingly strong domestic law of China and the United States have created an unclear and precarious landscape in which the United States will have to operate in the event of a China-Taiwan scenario. This landscape, combined with intelligence considerations about the expectations and understandings of China, Taiwan, the Taiwanese people, and international observers create a series of problems the United States should keep in mind in preparation for and execution of a China-Taiwan scenario. It also prompts a potential reconsideration of our legal approach to Taiwan overall.

## Introduction

In the event of aggression by China against Taiwan (also known as a China-Taiwan scenario), the United States will be expected to support Taiwan. However, the relationship between the United States and Taiwan is largely shaped by the legal instruments (or lack thereof) covering interaction among the United States, China, and Taiwan. This legal landscape combined with present intelligence, surveillance, and reconnaissance considerations presents certain barriers to successful United States support of Taiwan in the event of a China-Taiwan scenario. Given the long-cemented nature of the relevant legal instruments and norms relating to Taiwan, changing the law would be challenging, but knowing the problems the law creates will allow the United States to successfully assist Taiwan.

## History & Recent Escalations

The modern era of China-Taiwan legal history began in 1949 with the retreat of the Republic of China (ROC) government to the island of Taiwan after the Chinese Civil War with the People's Republic of China (PRC) government.<sup>1</sup> In 1979, the United States recognized the PRC as the official government of China and ceased all official diplomatic ties with Taiwan.<sup>2</sup> Despite no official legal agreements or ties, the United States maintains informal relations with Taiwan and includes assistance to Taiwan in its domestic law. Though it initially asserted it was the true government of China, since its democratization in the 1990s, Taiwan asserts only that it is a separate state from China. China has maintained that Taiwan is part of its territory, and its pressure upon Taiwan to rejoin has become ever greater.<sup>3</sup>

During much of 2020 and 2021, activity between China and Taiwan has centered around Taiwan's Air Defense Identification Zone (ADIZ). An ADIZ is an area of airspace surrounding the

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<sup>1</sup> Odd Arne Westad, *Decisive Encounters: The Chinese Civil War, 1946-1950* (Stanford: Stanford University Press, 2003), 286-90.

<sup>2</sup> "December 15, 1978: Speech on Establishing Diplomatic Relations with China," University of Virginia, accessed May 7, 2021, <https://millercenter.org/the-presidency/presidential-speeches/december-15-1978-speech-establishing-diplomatic-relations>.

<sup>3</sup> Kwang Kyu Nam, "U.S. Strategy and Role in Cross-Strait Relations: Focusing on U.S.-Taiwan Relations," *The Journal of East Asian Studies* 33, no. 1 (2020): 155-176.

borders of a country that is used to detect and control foreign aircraft entering the space.<sup>4</sup> Taiwan's ADIZ covers most of the Taiwan Strait and part of the East China Sea and adjacent airspace.<sup>5</sup> In the past two years, China has increasingly encroached upon Taiwan's ADIZ, flying close to the demarcation line, and, in early 2021, crossing that demarcation line. In late April 2021, Taiwan reported that twenty-five Chinese aircraft entered Taiwan's ADIZ on the southwestern side, the largest such incursion since Taiwan began reporting them in 2020. Notably, this incursion occurred three days after the United States had issued guidelines to enable United States officials to meet more freely with Taiwanese officials.<sup>6</sup>

The combination of the unique legal situation surrounding Taiwan, the United States, and China and intelligence and historical indicators of how Taiwan, China, and other countries may react in the event of a China-Taiwan scenario has created several potential roadblocks and complications.

### **Potential Legal Issues**

1) **Unofficial Relations with Taiwan:** The United States has not engaged in official diplomatic relations or bilateral agreements with Taiwan since 1979; however, the American Institute in Taiwan conducts unofficial relations.<sup>7</sup> The lack of official relations complicates United States' efforts to assist Taiwan with any military, diplomatic, or economic preparations in the event of a China-Taiwan scenario. It is difficult to set up the logistical and personnel infrastructure that would be necessary to support Taiwan in the event of an attack or invasion from China if such preparations cannot be officially planned and memorialized, so all parties agree and understand. Both the United States and Taiwan must rely on verbal assurances rather than written agreements, and because of this, the United States is hindered in providing pre-emptive support to Taiwan because any support provided must be informal and somewhat

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<sup>4</sup> Ruwantissa Abeyratne, "In Search of Theoretical Justification for Air Defence Identification Zones," *Journal of Transportation Security* 5, no. 1 (2011): 87-94, <https://doi.org/10.1007/s12198-011-0083-2>.

<sup>5</sup> U.S. Library of Congress, Congressional Research Service. *China's Air Defense Identification Zone (ADIZ)*, by Ian E. Rinehart and Bart Elias, R43894 (2015), 8.

<sup>6</sup> Reuters, "Taiwan Reports Largest Incursion Yet by Chinese Air Force," *Reuters*, April 12, 2021, <https://www.reuters.com/world/china/taiwan-reports-largest-incursion-yet-by-chinese-air-force-2021-04-12/>.

<sup>7</sup> "December 15, 1978: Speech on Establishing Diplomatic Relations with China."

scaled back in nature. In addition, the United States does not have a written, signed agreement from Taiwan outlining both Taiwan's expectations for the degree of United States support in a China-Taiwan scenario and the degree of assistance Taiwan will provide in its own defense. This lack of clarity means that the United States and Taiwanese officials (and potentially the Taiwanese people) may hold differing views on what assistance in a China-Taiwan scenario would look like.

2) **Unofficial Relations with Taiwan in a Wider Context:** The informal nature of the United States-Taiwan relationship places the United States in a precarious position regarding the views of other nations should a China-Taiwan scenario arise. On one hand, Taiwan views itself as a democracy, and the United States has stated its interest in focusing on and starting a coalition of democracies.<sup>8</sup> Not providing support to democratic Taiwan would look like a repudiation of democratic values and of the previously stated intentions of focusing on democracy. This would undermine the relationship between the United States and democracies worldwide. In addition, other Taiwan allies are unlikely to come to its aid unless the United States assists Taiwan first.<sup>9</sup> However, United States action in a China-Taiwan scenario could also upset the many nations that do not recognize an independent Taiwan.<sup>10</sup> Thus, the lack of clear international recognition and legal agreements surrounding Taiwan places the United States in an extremely precarious position in a China-Taiwan Scenario. It may be difficult if not impossible for the United States to maintain the quality of its relations with its international partners no matter what action is taken.

3) **Taiwan's Defense of Itself:** The lack of official agreements between the United States and Taiwan left Taiwanese citizens without a clear idea of the United States' expectation of Taiwanese participation in its own defense. Given the number of military sales and support being provided to

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<sup>8</sup> Shannon Tiezzi, "What to Expect from US-Taiwan Relations in 2021 (and Beyond)," *The Diplomat*, February 11, 2021, <https://thediplomat.com/2021/02/what-to-expect-from-us-taiwan-relations-in-2021-and-beyond/>.

<sup>9</sup> Bonny Lin, *U.S. Allied and Partner Support for Taiwan: Responses to a Chinese Attack on Taiwan and Potential U.S. Taiwan Policy Changes* (Santa Monica: Rand Corporation, 2021), 2-6.

<sup>10</sup> Greg Torode and Jess Macy Yu, "Taiwan Courts Security Ties with Bigger Friends as Beijing Snatches Allies," *Reuters*, September 13, 2018, <https://www.reuters.com/article/us-taiwan-diplomacy-analysis/taiwan-courts-security-ties-with-bigger-friends-as-beijing-snatches-allies-idUSKCN1LU00G>.

Taiwan, United States policymakers understandably expect Taiwan to help in its own defense. However, The Taiwanese populace may not agree with that expectation. In August 2020, a poll commissioned by the Chinese Association for Public Research found that 20 percent of Taiwanese citizens polled believed a military confrontation with China would happen. Less than half of those polled indicated they would be willing to fight if such a confrontation did occur.<sup>11</sup> Admittedly, the reliability of the data in this poll is undoubtedly skewed by the collection source, particularly because respondents may feel pressured to answer a certain way. However, Taiwan also no longer requires two years of mandatory military service of all citizens, meaning it may not be able to provide a robust, experienced military force with which to aid American military support.<sup>12</sup> In short, the United States may not be able to count on the support of the Taiwanese populace in the event of a China-Taiwan scenario, and there are no legal instruments to clarify these expectations.

4) **The Ratchet Effect in Domestic Law:** The Ratchet Effect is a concept used to explain a process that moves more easily in one direction than another. For example, a price may raise repeatedly but will never lower again after being raised. United States domestic law and Chinese domestic law in relation to Taiwan appear to be undergoing the Ratchet Effect. Both the United States and China increased the intensity with which they support or threaten Taiwan in recent months. The United States passed a revision of the National Defense Authorization Act in January 2021 reaffirming the six assurances provided by the United States to Taiwan in 1982. This law also includes provisions for assistance through military sales, conducting practical military training and exercises, and responses to requests for help from Taiwan. Notably, the revised law now also contains a provision requiring Department of Defense officials to report to Congress what actions are being taken to fulfill the provisions.<sup>13</sup> In March 2021, China passed an updated version of its National Defense Law that included not only provisions for use of

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<sup>11</sup> Michael A. Hunzeker and Dennis L. Weng, "The Painful, But Necessary, Next Steps in the U.S.-Taiwanese Relationship," *War on the Rocks*, September 24, 2020, <https://warontherocks.com/2020/09/the-painful-but-necessary-next-steps-in-the-u-s-taiwanese-relationship/>.

<sup>12</sup> *Ibid.*

<sup>13</sup> *National Defense Authorization Act for Fiscal Year 2021*, Public Law 116-283, accessed May 5, 2021, <https://www.congress.gov/bill/116th-congress/house-bill/6395?s=6&r=61>.

military action in self-defense but provisions to use military action to achieve “development interests” as well.<sup>14</sup> Chinese media has specifically stated that increasing military presence around Taiwan is part of Chinese development interests.<sup>15</sup> Together, the increased proposed support from the United States and increased pressure on Taiwan from China has ratcheted up the likelihood of conflict in the area with no apparent way under domestic law to release that pressure in the event of conflict. Having written such strongly worded domestic laws, it seems unlikely there will be room for nuance in how either country reacts in a China-Taiwan scenario.

### **Conclusions**

The lack of bilateral agreements and other international law recognizing Taiwan as an independent state combined with the domestic law of China and the United States has created a problematic legal landscape in the event of a China-Taiwan scenario. These legal issues have created the landscape through which any China-Taiwan scenario must be navigated in the future. While the likelihood of the United States officially recognizing Taiwan is slim given the potential implications with China and its allies, one avenue for gaining the benefits of an official legal relationship could be working with a country that does officially recognize Taiwan. Most of these countries are either relatively small or geographically separated from Taiwan, but the United States might be able to utilize its official relationship with one of those countries to tap into the legal avenue of the relationship of that country with Taiwan. This might not resolve every legal barrier present in a China-Taiwan scenario, but it could be useful particularly with preparation for such a scenario and fulfilling the requirements of United States domestic law.

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<sup>14</sup> Ben Lowson, “China’s Updated National Defense Law: Going for Broke,” *The Jamestown Foundation*, February 26, 2021, <https://jamestown.org/program/chinas-updated-national-defense-law-going-for-broke/>.

<sup>15</sup> Song Zhongping, “New National Defense Law to Protect China’s Development Interests,” *Global Times*, December 28, 2020, <https://www.globaltimes.cn/page/202012/1211278.shtml>.

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