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The New York Convention and Taiwan: It's Time to Be Sensible

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The Republic of China, also known as “Taiwan,” is among the world’s leading economies. In 2021, Taiwan had a gross domestic product of US\$ 670 billion, predicted to increase by 6.45% in 2022; by 2026, Taiwan is projected to be the world’s twentieth largest economy. Taiwan was the United States’ eleventh largest trading partner in 2021, and it has similar commercial relations with other leading economies, including Japan, Korea, the EU, the People’s Republic of China, and Singapore. Likewise, foreign direct investment in Taiwan totaled US\$ 116 billion in 2021, and outbound foreign direct investment from Taiwan totaled US\$ 411 billion.

The commercial activities of Taiwanese companies and entrepreneurs inevitably give rise to cross-border commercial disputes between Taiwanese businesses and their foreign counterparts – as well as the need to resolve those disputes effectively and efficiently. Unfortunately, the ability of Taiwanese and foreign companies to resolve these international commercial disputes is significantly impeded because Taiwan is currently unable to accede to the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention” or “Convention”) or to effectively participate in the Convention’s mechanisms for international dispute resolution. Taiwan’s exclusion from the New York Convention and its framework for international arbitration is anomalous and damaging to increasingly important international trade and investment flows.

The New York Convention, with 171 Contracting States, plays an essential role in the resolution of cross-border commercial disputes: it provides uniform, international rules requiring the recognition and enforcement of international commercial arbitration agreements and arbitral awards. The Convention’s vital role as the global constitution governing resolution of international commercial disputes, and facilitating cross-border trade and investment, is universally acknowledged. In the classic assessment of the Convention by Stephen Schwebel, formerly President of the International Court of Justice, “It works.”

Despite the New York Convention’s essential role in contemporary international commerce, and the importance of Taiwan to contemporary international trade and investment between virtually all nations, Taiwan is not a Contracting State to the Convention. Article VIII of the Convention provides only for accession to the Convention by states which are members of a U.N. specialized agency or the Statute of the International Court of Justice, or which have been invited to accede to the Convention by the U.N. General Assembly:

any State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

Of course, most nations, including EU member states and the United States, do not formally recognize Taiwan as a state. Despite this policy of non-recognition, most nations have both robust trade relations and significant governmental dealings with Taiwan, including, as discussed below, numerous international agreements and other forms of inter-governmental cooperation, particularly in commercial matters. A natural element of such relations would, one would think, include Taiwan's inclusion in the New York Convention.

Nonetheless, the People's Republic of China has blocked Taiwan's accession to the Convention through any of the avenues provided by Article VIII, much as it has objected to Taiwan's ratification of the Vienna Convention on the Law of Treaties. Regrettably, China's attitude appears likely to continue in the future.

Taiwan's resulting exclusion from the New York Convention is irrational and damaging to both Taiwan and its principal trading partners, including the United States, the EU, Japan, Korea and, ironically, China. In particular, Taiwan is not bound by the Convention's obligations to recognize international arbitration agreements (in Article II) or arbitral awards (in Articles III, IV and V); conversely, the 80 or so Contracting States to the Convention that have adopted reciprocity reservations (under Article I of the Convention) are not obligated to recognize Taiwanese arbitral awards (or, arguably, associated arbitration agreements).

Taiwan's resulting exclusion from the New York Convention inhibits international commerce, by making trade and investment with a major, and growing, economy less predictable and more risky; it also makes that commerce less efficient and fair. More fundamentally, Taiwan's exclusion from the Convention also reduces the efficacy of an otherwise global instrument which plays a vital role in advancing the rule of law in international commercial matters and permitting peaceful international dispute resolution. Russia's aggression and other crimes in Ukraine underscore the vital importance of international law, and Taiwan's exclusion from the Convention inhibits its ability to advance the rule of law.

It makes neither good economic policy nor good international law to continue Taiwan's exclusion from a major aspect of the world's economic and legal order. It is of vital importance to both Taiwan and its trading partners to facilitate the efficient and effective resolution of cross-border commercial disputes – as the New York Convention does. It is likewise of vital importance, particularly today, to enhance the rule of international law and to facilitate the peaceful resolution of international disputes – again, as the Convention does. Excluding Taiwan from the Convention serves no legitimate purpose.

The fact that most nations do not formally recognize Taiwan as a state provides no legitimate reason to exclude it from the Convention. Notwithstanding the lack of formal diplomatic recognition, Taiwan is party to numerous international economic organizations, including the World Trade Organization (“WTO”), the Asian Development Bank and the Asia Pacific Economic Cooperation, as well as the treaties establishing these institutions. Among other things, Taiwan participates actively in the WTO dispute resolution mechanisms (resolving interstate disputes over

cross-border trade and investment). Similarly, Taiwan is party to nearly 40 bilateral investment or investment protection treaties and to a number of free trade agreements; virtually all of these international agreements have been concluded principally by states that do not formally recognize Taiwan as a state or maintain formal diplomatic relations with Taiwan; again, all of these treaties provide for the participation of Taiwan and Taiwanese companies in international dispute resolution, similar in most essential respects to dispute resolution under the New York Convention.

Given Taiwan's economic importance, and its role in the WTO and other international trade and investment agreements, it makes no sense to exclude it from the New York Convention. That exclusion undermines the objectives of both the Convention and international law more generally – by inhibiting international trade and investment and undermining the rule of law in international affairs.

Excluding Taiwan from the Convention is also anomalous. Put simply, how does it make sense, in today's world, for states like Afghanistan, Syria, Venezuela, Iran and Belarus to be parties to the Convention, and part of the international legal framework for commercial arbitration, but Taiwan not to be? Why does it make sense for Sao Tome, Andorra, and Cape Verde to be parties to the Convention, but Taiwan not to be? How is it that North Korea, Yemen, Chad and Somaliland would be able to accede to the Convention, as treaty partners with the United States, the EU and Japan, but Taiwan cannot? The simple answer is that it makes no sense to exclude Taiwan from the Convention, while doing so injures not only Taiwanese businesses, but also companies in the United States, the EU, Japan, Korea and elsewhere.

There are ready means for remedying the current status (or lack of status) of Taiwan in the international legal regime for resolving cross-border commercial disputes. These remedies are capable of easy, uncomplicated implementation and should raise no legitimate political concerns – either in the United States, Europe or elsewhere, including China.

Three remedies should be considered on the international level: (a) an amendment to the New York Convention, (b) the adoption of a new treaty – with a reach aspiring to that of the Convention's 171 current jurisdictions – that would provide for reciprocal recognition and enforcement of international arbitration agreements and arbitral awards involving Taiwan and (c) a series of smaller-scale bilateral and multilateral trade agreements to the same effect. Each of these types of international agreement is fully compatible with international law (and not dissimilar from either Taiwan's participation in the WTO or its 40 or so investment protection agreements with countries around the world); each of these types of international agreement would also remedy the current, irrational exclusion of Taiwan from the Convention.

Remedies for Taiwan's exclusion from the Convention are also possible, if less desirable, on a domestic level. Those legislative remedies would vary among states, depending on existing national statutory instruments. In the United States, for example, Congress could amend Chapter 2 of the Federal Arbitration Act, the domestic U.S. legislation implementing the Convention, allowing for arbitration agreements and awards involving Taiwan and Taiwanese parties to be enforced in the United States on the same terms as the Convention. Alternatively, the United States could conclude a congressional executive agreement (like the North American Free Trade Agreement or the United States-Mexico-Canada Agreement), which would similarly provide for mutual recognition and enforcement of international arbitration agreements and awards on terms paralleling the Convention. Each of these options would complement existing Taiwanese legislation by effectively ensuring that Taiwanese awards and agreements are recognized and

enforced in the United States. Comparable legislation or bilateral agreements could be adopted in other states.

All of the foregoing proposals would largely or entirely remedy Taiwan's exclusion from the New York Convention. The most effective means of remedying that exclusion would be simply to amend the Convention – thereby extending the Convention's uniform, global rules for dispute resolution to cross-border trade and investment involving Taiwan. Nonetheless, political inertia and reservations regarding China's potential reactions may make a series of bilateral (or regional) treaties incorporating the Convention's substance less controversial. In either case, international agreements would be preferable to domestic legislative solutions.

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