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# Rethinking non-recognition: The EU's Investment Agreement with Taiwan under the One-China Policy

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## Abstract

This article re-examines the theories of recognition and non-recognition in the context of the evolving framework of the European Union (EU)'s trade and investment relations with Taiwan from legal and international relations perspectives. Notwithstanding its one-China policy, the EU has developed a pragmatic approach to engaging Taiwan under bilateral consultations and World Trade Organization negotiations that have built the foundation for the bilateral investment agreement (BIA). The article argues that since the 1980s, the EU has accorded diverse forms of recognition to Taiwan and the BIA will buttress the process. To substantiate the contention, the article systemically explores the political and trade policies of European states and EU institutions in line with their strategies toward cross-strait relations. By deciphering the new momentum that has galvanized the European Commission's strategy towards the EU-Taiwan BIA, the research sheds light on the implications of European Parliament resolutions and the EU's investment talks with China. The structure and impact of the BIA are also analysed in light of EU investment protection agreements with Singapore and Vietnam. Hence, the findings contribute to the interdisciplinary study of international law and international relations and enhance the understanding of the EU's Asia-Pacific trade and investment agreements.

Keywords: China; EU; FTA; recognition theory; Taiwan

## 1. Introduction

The evolution of the EU's economic relations with Taiwan constitutes a unique case study in international law and international relations (IR). Taiwan is currently the EU's sixth largest trading partner in Asia and bilateral trade in goods amounts to €51.9 billion.<sup>1</sup> As the largest investor in Taiwan, the EU accounts for 30 per cent of Taiwan's foreign investment stock.<sup>2</sup> Despite vibrant trade ties, the EU and its member states follow their respective one-China policies that recognize the People's Republic of China (PRC) as the sole legitimate government of China and maintain non-diplomatic relations with Taiwan.

EU-Taiwan interactions illustrate the IR notion of recognition as a gradual process, which is different from the legal perspective that demarcates recognition and non-recognition of

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<sup>1</sup> European Economic and Trade Office [EETO], *EU-Taiwan Relations* (2019), at 5–6.

<sup>2</sup> *Ibid.*

statehood.<sup>3</sup> The EU has explicitly recognized Taiwan as ‘a separate customs territory’ and as ‘an economic and commercial entity’.<sup>4</sup> As of 2020, Taiwan has not entered into a free trade agreement (FTA) or bilateral investment agreement (BIA) with any EU country. Yet, it has signed double taxation agreements with 13 EU states and concluded investment facilitation agreements and memoranda of understanding (MoU) with eight EU countries at national and regional levels.<sup>5</sup>

As the Beijing factor would hinder FTA negotiations, Taiwan has advocated for a BIA with the EU since 2014.<sup>6</sup> Albeit as a ‘Plan B’, a BIA could address priority investment issues and serve as a building block for a full-fledged FTA. In 2015, for the first time, the EU Commission included the objective to ‘explore launching negotiations on investment’ with Taiwan in the ‘Trade for All’ trade and investment policy paper.<sup>7</sup> This article provides the most up-to-date, comprehensive account of Brussels’ evolving approach to engaging Taipei under the one-China policy and new EU economic agreements with Asian countries in the post-Lisbon era. In particular, it argues that the EU has established diverse forms of recognizing Taiwan in economic and political arenas in light of a policy of non-recognition, and that the BIA will buttress the process. Contrary to the conventional understanding, these modes of recognition create legal consequences at domestic and international levels and reinforce the IR concept of recognition premised on identity and status.<sup>8</sup>

To facilitate the interdisciplinary understanding of the EU-Taiwan BIA in the context of international law and IR, the article proceeds as follows. Section 2 sheds light on the theories of recognition, and legal and IR concepts that underline states’ ‘struggles for recognition’.<sup>9</sup> It explains the tensions and compatibility between the EU’s non-recognition policy and trade agreements with unrecognized entities. Moreover, it deciphers the convergence of one-China policies of major European states such as France, Germany, and the UK and their pragmatic ‘re-engagement’ with the Republic of China (ROC) on Taiwan.

Section 3 examines the competence of the EU institutions, including the European Commission, the Council of the EU, and the European Parliament. It explores the approaches of EU institutions to bilateral consultations with Taiwan, its participation in the World Trade Organization (WTO) and ongoing BIA dialogues. Section 4 discusses the new momentum since 2015 and the legal structure of the EU-Taiwan BIA. It offers insight into the EU’s investment protection agreements with Singapore and Vietnam, as well as Taiwan’s updated investment pacts. Finally, Section 5 highlights political and legal implications of the EU-Taiwan BIA in tandem with the EU’s trade strategy towards the Asia-Pacific.

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<sup>3</sup> A. Geis et al., ‘Gradual Processes, Ambiguous Consequences: Rethinking Recognition in International Relations’, in C. Dasse et al. (eds.), *Recognition in International Relations: Rethinking a Political Concept in a Global Context* (2015), 3, at 15–17.

<sup>4</sup> S. C. Tang, ‘The EU’s Policy Towards China and the Arms Embargo’, (2005) 3 *Asia Europe Journal* 313, at 316; EETO in Taiwan, Taiwan and the EU, 17 May 2016, available at [eeas.europa.eu/delegations/taiwan\\_en/2000/Taiwan%20and%20the%20EU](https://eeas.europa.eu/delegations/taiwan_en/2000/Taiwan%20and%20the%20EU).

<sup>5</sup> Taiwan Today, ‘Taiwan–Czech Republic Ink Double Taxation Avoidance Pact’, Taiwan News, 15 December 2017, available at [www.taiwannews.com.tw/en/news/3321064](http://www.taiwannews.com.tw/en/news/3321064); List of ROC Double Taxation Agreements, available at [www.mof.gov.tw/singlehtml/191?cntId=63930](http://www.mof.gov.tw/singlehtml/191?cntId=63930); List of ROC Cooperation and Facilitation Investment Agreements, available at [investtaiwan.nat.gov.tw/showBusinessPagechtG\\_Agreement03?lang=cht&search=G\\_Agreement03&menuNum=92](http://investtaiwan.nat.gov.tw/showBusinessPagechtG_Agreement03?lang=cht&search=G_Agreement03&menuNum=92) (in Chinese).

<sup>6</sup> R. C. Lee, ‘EU-Taiwan: New Partners in International Trade Negotiations’, in M. Bungenberg et al. (eds.), *European Year Book of International Economic Law* (2017), 513, at 529.

<sup>7</sup> European Commission, *Trade for All: Towards a More Responsible Trade and Investment Policy* (2015), at 31.

<sup>8</sup> T. Lindemann, ‘Concluding Remarks on the Empirical Study of International Recognition’, in T. Lindemann and E. Ringmar (eds.), *The International Politics of Recognition* (2012), 209, at 210–13.

<sup>9</sup> R. Wolf, ‘Respect and Disrespect in International Politics: The Significance of Status Recognition’, (2011) 3(1) *International Theory* 105, at 106–9; C. Duncombe, ‘Representation, Recognition and Foreign Policy in the Iran-US Relationship’, (2015) 22(3) *European Journal of International Relations* 622, at 625–6; J. Friedrich, ‘An Intercultural Theory of International Relations: How Self-Worth Underlies Politics Among Nations’, (2016) 8(1) *International Theory* 63, at 65–6.

## 2. The EU's economic frameworks under the non-recognition policy

The article assesses the political and legal issues that underpin the EU's economic relations and agreements with Taiwan. The findings fill a gap in the international law and IR literature because they demonstrate that substantive trade relations and instruments galvanize diverse forms of recognition, which goes beyond doctrinal recognition limited to statehood. Furthermore, based on the understanding of EU-Taiwan relations and the prospective structure of the BIA, the research provides insight into the EU's new Asia trade policy. These issues will continue to hold significance for the new von der Leyen Commission and Taipei and Beijing governments following Taiwan's 2020 presidential election.

### 2.1 Theoretical concepts and the EU's diplomatic strategies

In 1949, Kuomintang (KMT) lost mainland China to its rival, the Chinese Communist Party that established the PRC. The ROC government led by the KMT relocated to Taiwan, an island over which the ROC resumed sovereignty following the Japanese surrender at the end of the Second World War.<sup>10</sup> In 1950, the UK and the Netherlands were among the first Western European allies to sever diplomatic ties with Taipei and switch recognition to Beijing.<sup>11</sup> France and the Federal Republic of Germany similarly recognized the PRC in 1964 and 1972, respectively.<sup>12</sup> Moreover, the 1971 UN General Assembly Resolution 2758 replaced Taipei with Beijing as the government that represents China.<sup>13</sup> Since 1974, the ROC has only been recognized by the Holy See in Europe.<sup>14</sup> To understand how the EU and Taiwan have 'normalized' their trade relations and the corresponding legal frameworks without diplomatic recognition, it is critical to understand the theoretical concepts of recognition and non-recognition and their impact on EU diplomacy.

G. W. F. Hegel's recognition theory provides the basis for the notion of recognition in political theory.<sup>15</sup> His master-slave dialectic explains that human behaviour is motivated by seeking recognition peers, and thus, establishing self-consciousness.<sup>16</sup> Similarly, in interstate relations, Hegel also asserted that the sovereignty and legitimacy of a state are influenced by recognition by foreign states.<sup>17</sup> In the post-Second World War era, political theorists explored the Hegelian idea of struggles for recognition in domestic politics and reinvigorated social equality movements.<sup>18</sup> Since the 2000s, the emerging IR literature on recognition has applied the recognition theory to decipher international affairs.<sup>19</sup> Commentators averred that the Hegelian analysis of states' desire

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<sup>10</sup> P. L. Hsieh, 'The Taiwan Question and the One-China Policy: Legal Challenges with Renewed Momentum', (2009) 84(3) *Die Friedens-Warte: Journal of International Peace and Organization* 59, at 59–62.

<sup>11</sup> F. Mengin, 'A Functional Relationship: Political Extensions to Europe-Taiwan Economic Ties', (2002) 169 *China Quarterly* 136, at 137.

<sup>12</sup> *Ibid.*, at 138–9; S. Hu, 'Structural Constraints on the EU's Role in Cross-Taiwan Strait Relations', (2011) 10(1) *European Journal of East Asian Studies* 37, at 43–4.

<sup>13</sup> Resolution on Restoration of the lawful rights of the People's Republic of China in the United Nations, UN Doc. A/RES/2758(XXVI) (1971).

<sup>14</sup> F. Mengin, 'Rethinking the Europe-Taiwan Relationship', (1991) 4(1) *The Pacific Review* 25, at 26.

<sup>15</sup> G. W. F. Hegel, *Phenomenology of Spirit* (1977), 110–17.

<sup>16</sup> A. Blunden, 'Subjectivity, Redistribution and Recognition', in J. Connolly et al. (eds.), *Recognition in Politics: Theory, Policy and Practice* (2007), 84, at 90–6; E. Ringmar, 'The Relevance of International Law: A Hegelian Interpretation of a Peculiar Seventeenth-Century Preoccupation', (1995) 21(1) *Review of International Studies* 87, at 94–6.

<sup>17</sup> G. W. F. Hegel, *Elements of the Philosophy of Right* (1991), 366–7.

<sup>18</sup> Blunden, *supra* note 16, at 90–6; C. McBride, *Recognition* (2013), 2–4.

<sup>19</sup> For example, E. Erman, 'The Cognitive Practices of Declaring and Constituting Statehood', (2013) 5(1) *International Theory* 129, at 130–3; C. Fehl, 'Understanding the Puzzle of Unequal Recognition: The Case of the Nuclear Non-Proliferation Treaty', in Dasse et al., *supra* note 3, at 104, at 108–10; Friedrich, *supra* note 9, at 65–6.

for recognition could complement the neorealist assumption that states struggle predominantly for security in anarchy.<sup>20</sup>

IR academics have attempted to crystallize the new IR concept of recognition.<sup>21</sup> They first utilized a psychological approach to interpret state behaviour. This approach was transplanted from ‘identity politics’, which elaborates individuals’ search for recognition of their identities in an intersubjective social process.<sup>22</sup> Distinguishable from the neorealist angle centred on the pursuit of material power, IR scholars argued that states’ actions are inherently promoted by their psychological desire for having their identity recognized on par with their self-image.<sup>23</sup> This identity-driven pursuit of recognition is essentially the ‘struggle for prestige’.<sup>24</sup> Moreover, IR scholars sought to offer a more balanced examination by stressing ‘the status dimensions of recognition’ based on Fraser’s justice-oriented ‘principle of participatory parity’.<sup>25</sup> Distinct from identity construction, a status claim focuses on the ‘struggle for dignity’.<sup>26</sup> In state practice, state actions motivated by the desire for pursuing the identity and status dimensions are often intertwined.

The notions of recognition in IR have developed in parallel with international law. As Hersch Lauterpacht well observed, ‘there is probably no other subject in the field of international relations in which law and politics appear to be more closely interwoven’.<sup>27</sup> Recognition can be defined as ‘an authoritative statement’ that signals a foreign state’s willingness ‘to treat with a new state or government or to accept that consequences . . . flow from a new situation’.<sup>28</sup> As for the consequences, recognition can also be seen as ‘an act on the international plane, affecting the mutual rights and obligations of states, and their status or legal capacity in general’.<sup>29</sup>

Central to the EU’s approach to Taiwan, recognition of states and governments are legally different. While recognition of states concerns the international existence (i.e., whether an entity exists as a state), recognition of governments relates to the international representation (i.e., which government represents the state).<sup>30</sup> Some international law textbooks discuss Taiwan in the category of recognition of governments on the grounds that ‘China’ remains the recognized state, and that the issue is whether Taipei or Beijing represents the state.<sup>31</sup> Yet, in contemporary interstate affairs and judicial practice, the status of Taiwan often falls within the ambit of recognition of statehood.

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<sup>20</sup> A. Wendt, ‘Why a World State is Inevitable?’, (2003) 9(4) *European Journal of International Relations* 491, at 510–12; B. Greenhill, ‘Recognition and Collective Identity Formation in International Politics’, (2008) 14(2) *European Journal of International Relations* 343, at 348–9.

<sup>21</sup> Lindemann, *supra* note 8, at 209–19; Erman, *supra* note 19, at 133–4; S. Fikencher, ‘Seeking Status Recognition through Military Symbols: German and Indian Armament Policies between Strategic Rationalization and Prestige Motives’, in Dasse et al., *supra* note 3, at 86–90.

<sup>22</sup> N. Fraser, ‘Rethinking Recognition: Overcoming Displacement and Reification in Cultural Politics’, in B. Hobson (ed.), *Recognition Struggles and Social Movements: Contested Identities, Agency and Power* (2003), at 21–8.

<sup>23</sup> Geis et al., *supra* note 3, at 4–5; Wendt, *supra* note 20, at 510–11.

<sup>24</sup> Lindemann, *supra* note 8, at 210.

<sup>25</sup> Fraser, *supra* note 22, at 101; Wolf, *supra* note 9, at 107.

<sup>26</sup> Wolf, *ibid.*, at 106; K. Gustafsson, ‘Recognizing Recognition through Thick and Thin: Insights from Sino-Japanese Relations’, (2016) 51(3) *Cooperation and Conflict* 255, at 257.

<sup>27</sup> H. Lauterpacht, *Recognition in International Law* (1947), v.

<sup>28</sup> T. D. Grant, *The Recognition of States: Law and Practice in Debate and Evolution* (1999), xviii.

<sup>29</sup> R. Jennings and A. Watts, *Oppenheim’s International Law* (1996), 128.

<sup>30</sup> The third type of recognition involves recognition of belligerency (i.e., in armed conflicts, how rebels and the parent governments are entitled to belligerent rights and are bound by belligerent obligations). *Ibid.*, at 130–67; J. A. Frowein, ‘Recognition’, *Oxford Public International Law*, December 2010, available at [opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1086?prd=EPIL](http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1086?prd=EPIL).

<sup>31</sup> For example, L. F. Damrosch and S. D. Murphy, *International Law: Cases and Materials* (2014), 325.

Notably, discussions on IR's turn to the recognition theory represent the latest academic attempt to bridge the 'missing link' between IR and international law.<sup>32</sup> It is widely accepted that the granting 'of recognition by a state is a unilateral act' and there is no duty for states to accord recognition.<sup>33</sup> The great debate that IR and legal academics have commonly discussed lies in the issue of whether statehood hinges on recognition.<sup>34</sup> There are two main legal theories of recognition. Relying on Hegel's concept, the constitutive theory holds that recognition completes statehood and is essential to the legal personality of a state.<sup>35</sup> Consequently, the existence of statehood depends on recognition by foreign states.

In contrast, the declaratory theory contends that recognition only functions as a formal acknowledgement of statehood.<sup>36</sup> In other words, the existence of a state is a fact, and recognition does not amount to a criterion of statehood. International law practice demonstrates that the declaratory theory prevails over the constitutive theory.<sup>37</sup> The 1933 Montevideo Convention manifests this position by omitting recognition from the criteria of statehood and indicating that '[t]he political existence of the state is independent of recognition by other states'.<sup>38</sup> Nevertheless, IR academics argue for a constitutive analysis of recognition.<sup>39</sup> According to them, states' identity construction and status claim cannot be ignored in construing state behaviour in practice.<sup>40</sup>

Non-recognition is often seen as the negative side of recognition. As the EU case illustrates, the tensions and compatibility between a non-recognition policy and the permissible scope of recognition that allows for engagement such as economic pacts often give rise to political dilemma. Non-recognition, which implies a negation of identity and status of states, gives rise to different treatment.<sup>41</sup> From the view of unrecognized entities, non-recognition can be perceived as an act of misrecognition premised on injustice and disrespect.<sup>42</sup> Both IR and legal academics understand the legal principle of non-recognition in a similar way. Rooted in earlier treaties such as the Covenant of the League of Nations, the legal principle can be applied in the form of collective non-recognition that aims to sanction entities that are created because of serious violations of international law.<sup>43</sup> The international community's non-recognition of Manchukuo and South African homelands represents this approach.<sup>44</sup>

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<sup>32</sup> H. Agné, 'The Politics of International Recognition: Symposium Introduction', (2013) 5(1) *International Theory* 94, at 94–176; Geis et al., *supra* note 3, at 4–5.

<sup>33</sup> Jennings and Watts, *supra* note 29, at 130; J. Crawford, *Brownlie's Principles of Public International Law* (2012), 147–8.

<sup>34</sup> J. Crawford, *The Creation of States in International Law* (2006), 61; Crawford, *ibid.*, at 154–6.

<sup>35</sup> H. Lauterpacht, 'Recognition of States in International Law', (1944) 53(3) *Yale Law Journal* 385, at 419–20; L. Oppenheim, *International Law: A Treatise* (1955), 125.

<sup>36</sup> Crawford, *supra* note 33, at 145–6.

<sup>37</sup> I. Brownlie, 'Recognition in Theory and Practice', (1983) 53(1) *British Year Book of International Law* 197, at 205; S. Talmon, 'The Constitutive Versus the Declaratory Theory of Recognition: *Tertium Non Datur?*', (2005) 75(1) *British Year Book of International Law* 101, at 106–7.

<sup>38</sup> Montevideo Convention on the Rights and Duties of States (1933), Arts. 1 and 3.

<sup>39</sup> Erman, *supra* note 19, at 132–3; Agné, *supra* note 32, at 98–102; J. Bartelson, 'Three Concepts of Recognition', (2013) 5(1) *International Theory* 107, at 117.

<sup>40</sup> S. Oeter, '(Non-)Recognition Policies in Secession Conflicts and the Shadow of the Right of Self-Determination', in Dasse et al., *supra* note 3, at 125–6.

<sup>41</sup> S. Brincat, 'Recognition, Conflict, and the Problem of Ethical Community', (2014) 4(4) *Global Discourse* 397, at 403; T. Lindemann, 'Interest, Passion, (Non)Recognition, and Wars: A Conceptual Essay', (2014) 4(4) *Global Discourse* 483, at 490–1.

<sup>42</sup> Geis et al., *supra* note 3, at 7–9.

<sup>43</sup> Covenant of the League of Nations (1919), Art. X.

<sup>44</sup> J. Ker-Lindsay, *The Foreign Policy of Counter Secession: Preventing the Recognition of Contested States* (2012), 13–15; Frowein, *supra* note 30.

Nevertheless, the legal principle is not absolute. Based on the EU practice, ‘the space of nonrecognition’ may enable some flexibility and latitude for engaging unrecognized entities.<sup>45</sup> Various forms of engagement are galvanized by geopolitical considerations to buttress regional stability. The IR view for the space of non-recognition is also supported by international lawyers. Evidenced by the EU’s position on Taiwan under the one-China policy, a policy of non-recognition does not necessarily denote the illegality of unrecognized entities or mean non-discourse.<sup>46</sup> While international law imposes no duty to recognize foreign states, an unrecognized entity should not ‘be treated as a nullity’ and can be recognized ‘as something else’.<sup>47</sup> Consequently, systemic engagement may lead to legal instruments that accord gradual forms of recognition to the identity and status of an unrecognized entity. These instruments, including trade and investment agreements, also result in binding effects in international and domestic laws.

## 2.2 The European models for trade agreements with unrecognized entities

In considering the EU-Taiwan BIA, the European models for economic agreements with other unrecognized entities are critical. The space of non-recognition permits diverse forms of engagement and may in turn result in additional degrees of legal recognition, which does not amount to recognition of statehood in international law. The EU’s strategies for interacting with unrecognized entities demonstrate the unique policy that balances non-recognition and engagement.<sup>48</sup> The EU’s relations with Taiwan under the one-China policy can be understood as an example. Although none of the 28 EU member states recognize Taiwan, the EU indicates that both sides ‘share the same values of democracy, and respect for human rights and the rule of law, and are seeking closer cooperation where their interests and values converge’.<sup>49</sup>

Devised by Peter Semneby, the EU Special Representative for the South Caucasus, the EU adopted the ‘Non-recognition and Engagement Policy’ (NREP) for Abkhazia and South Ossetia in 2009.<sup>50</sup> The NREP aimed to prevent counterproductive effects of isolation while holding the premise that ‘engagement without a firm line on non-recognition is a potential slippery slope’.<sup>51</sup> Significantly, while the NREP implies the illegality of the unrecognized entities, other policy options may represent a neutral stance. The EU’s approach to Kosovo and Palestine evidences the

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<sup>45</sup> R. Richards and R. Smith, ‘Statebuilding and the Politics of Non-Recognition’, in Dasse et al., *supra* note 3, at 162–73; Oeter, *supra* note 40, at 134; E. Newman and G. Visoka, ‘The European Union’s Practice of State Recognition: Between Norms and Interests’, (2018) 44(4) *Review of International Studies* 760, at 772–80.

<sup>46</sup> I. A. Shearer, *Starke’s International Law* (1994), 129.

<sup>47</sup> S. Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (1998), 31; Talmon, *supra* note 37, at 147.

<sup>48</sup> A. Cooley and L. A. Mitchell, ‘Engagement Without Recognition: A New Strategy Towards Abkhazia and Eurasia’s Unrecognized States’, (2010) 33(4) *The Washington Quarterly* 59, at 66–8; J. Ker-Lindsay, ‘Engagement Without Recognition: The Limits of Diplomatic Interaction with Contested States’, (2015) 91(2) *International Affairs* 267, at 276–81; Newman and Visoka, *supra* note 45, at 773–5.

<sup>49</sup> European External Action Service (EEAS), ‘Taiwan and the European Union Hold 2<sup>nd</sup> Human Rights Consultations’, 14 May 2019, available at [eeas.europa.eu/headquarters/headquarters-homepage/62602/taiwan-and-european-union-hold-2ndhuman-rights-consultations\\_en](https://eeas.europa.eu/headquarters/headquarters-homepage/62602/taiwan-and-european-union-hold-2ndhuman-rights-consultations_en).

<sup>50</sup> S. Fischer, *The EU’s Non-recognition and Engagement Policy towards Abkhazia and South Ossetia*, EU Institute for Security Studies Seminar Reports (2010), 1–3; T. de Waal, *Uncertain Ground: Engaging with Europe’s De Facto States and Breakaway Territories* (2018), 15.

<sup>51</sup> P. Semneby, Statement by the EUSR for the South Caucasus Peter Semneby, OSCE Permanent Council, PC.DEL/126/11 (2011), at 5.

‘engagement without recognition’ policy, which is conceptually different from the NREP.<sup>52</sup> Here, the EU policy represents a *modus vivendi*, in which the legality of an entity is not judged.<sup>53</sup>

In contrast to the Abkhazia and South Ossetia case, where all of 28 EU members hold almost identical non-recognition policies, EU states presently diverge in recognizing Kosovo and Palestine. As of 2019, five EU member states have yet to recognize Kosovo and only nine member states have recognized the State of Palestine.<sup>54</sup> To co-ordinate the different positions among its constituencies, the EU as a supranational institution maintains a status-neutral stance that simply reflects an abstention of recognition.

The level of the EU’s engagement with Kosovo and Palestine is evidenced by the conclusion of economic agreements that ‘normal’ states have concluded. The EU and Kosovo signed the Stabilization and Association Agreement (SAA), which liberalizes trade in goods, trade in services and investment and will ‘gradually develop a free trade area between’ the two sides.<sup>55</sup> Although Kosovo is not a WTO member, the SAA commits to WTO principles on regional integration.<sup>56</sup> With a narrower scope, the European Community also previously inked an Interim Association Agreement on Trade and Cooperation with Palestine to liberalize trade with the West Bank and Gaza Strip.<sup>57</sup> Furthermore, the EU, Kosovo, and Palestine are contracting parties to a regional convention that facilitates intra-regional trade by enabling regional cumulation of origin.<sup>58</sup>

Commentators may contend that these trade agreements can be construed as implied recognition in international law. Yet, this argument does not stand because ‘recognition is a matter of intention’.<sup>59</sup> An intention is often subject to recognizing states’ interpretations. Absent a clear intention to recognize entities as sovereign states, the intention of recognizing statehood cannot be easily inferred from the conclusion of agreements that may not be interpreted as formal treaties.<sup>60</sup> Hence, this legal analysis and the precedents of EU agreements with Kosovo and Palestine provide a formula for the BIA with Taiwan.

### 2.3 Pragmatic ‘re-engagement’ of European states with Taiwan

The EU’s approach to Taiwan is based on the common denominator of EU member states’ one-China policies. While EU members hold a common position that recognizes the PRC as the sole *de jure* government of China, they have diverged in the level of engagement with Taiwan. From an IR perspective, while non-recognition may be perceived as disrespectful and result in

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<sup>52</sup> B. Coppeters, ‘“Statehood”, “De Facto Authorities” and “Occupation”: Contested Concepts and the EU’s Engagement in its European Neighbourhood’, (2018) 17(4) *Ethnopolitics* 343, at 348. Although commentators have used the Non-recognition and Engagement Policy to refer to the EU’s approach to all unrecognized entities, the policy is arguably different from the ‘engagement without recognition’.

<sup>53</sup> Lindemann, *supra* note 41, at 490; Newman and Visoka, *supra* note 45, at 773.

<sup>54</sup> The five EU member states that do not recognize Kosovo are Cyprus, Greece, Romania, Slovakia, and Spain. The nine EU states that recognize Palestine include Bulgaria, Cyprus, Czech Republic, Hungary, Malta, Poland, Romania, Slovakia, and Sweden. J. Solana, ‘The EU must Recognize the Palestinian, Association of Accredited Public Policy Advocates to the European Union’, AALEP, 15 May 2018, available at [www.aalep.eu/eu-must-recognize-palestinian-state](http://www.aalep.eu/eu-must-recognize-palestinian-state); V. Xhambazi, ‘A Blueprint Solution for Kosovo: What is at Stake?’, *New Eastern Europe*, 28 January 2019, available at [neweastern.europe.eu/2019/01/28/a-blueprint-solution-for-kosovo-what-is-at-stake/](http://neweastern.europe.eu/2019/01/28/a-blueprint-solution-for-kosovo-what-is-at-stake/). 55 EU-Kosovo Stabilization and Association Agreement (2015), Arts. 1 and 8.

<sup>55</sup> EU-Kosovo Stabilization and Association Agreement (2015), Arts. 1 and 8.

<sup>56</sup> *Ibid.*, Art. 10.

<sup>57</sup> EU-Palestine Interim Association Agreement on Trade and Cooperation on Trade and Cooperation (1997), Titles I and II.

<sup>58</sup> European Commission, ‘The Pan-Euro-Mediterranean Cumulation and the PEM Convention’, available at [ec.europa.eu/taxation\\_customs/business/calculation-customs-duties/rules-origin/general-aspects-preferential-origin/arrangements-list/paneuromediterranean-cumulation-pem-convention\\_en](http://ec.europa.eu/taxation_customs/business/calculation-customs-duties/rules-origin/general-aspects-preferential-origin/arrangements-list/paneuromediterranean-cumulation-pem-convention_en).

<sup>59</sup> S. Talmon, ‘Recognition of Governments: An Analysis of the New British Policy and Practice’, (1993) 63(1) *British Year Book of International Law* 231, at 256.

<sup>60</sup> Crawford, *supra* note 33, at 149.



conflicts, what EU member states have attempted to achieve is to facilitate pragmatic co-operation. Within the space of non-recognition, the EU's attempts have accorded various forms of recognition to Taiwan's identity separate from the PRC and a status akin to other sovereign states. Among European states, the practices of the UK, Germany and France are most representative because of their influence over EU institutions and long-standing engagement with China and Taiwan.

Comparable to the US-PRC Shanghai Communiqué, the UK's 1972 communiqué with Beijing merely 'acknowledges' Beijing's position that Taiwan is part of China.<sup>61</sup> The carefully chosen word 'acknowledgement' differs from 'recognition' that represents a binding effect, thus leaving the scope of relations with Taiwan undetermined. Similarly, the Netherlands only 'respects' and Italy and Belgium 'take note of' Beijing's position on Taiwan.<sup>62</sup> However, the German case is different. When the Federal Republic of Germany (West Germany) established official ties with Beijing, the Chinese side did not insist on including a Taiwan-related clause in their 1972 communiqué.<sup>63</sup> Arguably, a critical reason is that West Germany could have also included a 'one-Germany clause' that would antagonize East Germany, which was Beijing's communist ally.<sup>64</sup>

France and the PRC concluded two communiqués that are of significance to French-Taiwan relations. President Charles de Gaulle's 'national independence' policy prompted a departure from America's pro-Taipei stance by establishing diplomatic ties with Beijing in 1964, but Paris managed to omit the Taiwan issue in the communiqué.<sup>65</sup> To some extent, the post-Tiananmen Massacre sanctions against Beijing led by France triggered the contact with Taipei in 1989 when Taiwanese Foreign Minister Lien Chan was invited to commentate the bicentennial anniversary of the French Revolution.<sup>66</sup>

In the early 1990s, China responded robustly to France's arms sale, including six frigates and 60 'Mirage 2000' fighters, to Taiwan by closing France's consulate and cancelling large-scale contracts.<sup>67</sup> To remedy commercial and political ties, France in the 1994 communiqué with the PRC altered its previous position by recognizing Taiwan to be part of China and committing not to authorize additional arms sales.<sup>68</sup> These cases demonstrate that while the space of non-recognition permits flexibility and latitude, the degrees of according recognition to unrecognized entities may fluctuate and depend on broader geopolitical changes and commercial interests. It is therefore incorrect to assume that EU-Taiwan relations have been static since de-recognition.

In line with EU members' shifting positions, Taiwan's ties with the EU changed significantly in 1975 when Christopher Soames, Vice President of the European Commission in charge of external relations, visited China.<sup>69</sup> Although Soames stressed that recognition is not within the capacity of the European Community, he confirmed that Community members recognized the PRC as China's sole legal government and did 'not entertain any official relations or enter any

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<sup>61</sup> House of Commons Library, UK Relations with Taiwan, CDP 2017-0190 (2017), 13.

<sup>62</sup> 王萬里 [W. Wang], 歐盟台灣中國三邊關係剖析 [EU-Taiwan China: An Analysis of the Trilateral Relations] (2008), 193–5.

<sup>63</sup> Mengin, *supra* note 11, at 139; J. Cabestan, 'The Taiwan Issue in China-Europe Relations: An Irritant More than Leverage', in D. Shambaugh et al. (eds.), *China-Europe Relations: Perceptions, Policies and Prospects* (2008), 84, at 85.

<sup>64</sup> Mengin, *supra* note 11, at 139; Cabestan, *ibid.*, at 85.

<sup>65</sup> *Ibid.*

<sup>66</sup> J. Cabestan, *France's Taiwan's Policy: A Case of Shopkeeper Diplomacy* (2001), 10; S. Hu, 'Structural Constraints on the EU's Role in Cross-Taiwan Strait Relations', (2011) 10(1) *European Journal of East Asian Studies* 37, at 43.

<sup>67</sup> Mengin, *supra* note 14, at 32–3; C. Tubilewicz, 'Europe in Taiwan's Post-Cold War Foreign Relations', (2007) 18(2) *Diplomacy and Statecraft* 415, at 434.

<sup>68</sup> Mengin, *supra* note 11, at 151; Cabestan, *supra* note 63, at 94.

<sup>69</sup> P. Lim and S. Winkler, 'The European Union's Relations with the Republic of China (Taiwan)', in J. Damn and P. Lim (eds.), *European Perspectives on Taiwan* (2012), 170, at 172–5.

agreements with Taiwan'.<sup>70</sup> This position led to the subsequent establishment of diplomatic relations with China in the same year.

The normalization of EU-China relations was premised on elements of the one-China principle demanded by PRC Foreign Minister, Chiao Kuan-Hua (Qiao Guanhua). His requests included recognition of the PRC, to which Taiwan belongs, and commitments not to develop 'official relations with Taiwan'.<sup>71</sup> Undeniably, non-recognition has jeopardized Taiwan's participation in economic relations. A seminal instance is Taipei's quest to accede to the European Community's Generalized System of Preferences, which would provide preferential tariff treatment to developing nations, including Taiwan's key export competitors. The request was denied in 1975 because of the view that due to non-recognition, Taiwan 'did not exist for' the Community.<sup>72</sup> In other words, the EU perceived non-recognition of the ROC as its non-existence in law.

For several reasons, the situations have changed since the 1980s. First, Taiwan's rapid economic growth made itself one of the four 'Asian tigers' and dramatically expanded trade with major European nations. For instance, from 1970 to 1990, Taiwan's trade with Germany and France ascended by 45 and 238 times, respectively.<sup>73</sup> The creation of the EU and its enlargements since the 1993 Maastricht Treaty have further bolstered bilateral trade. In contrast, the PRC's trade with the EU at the inception of Deng Xiaoping's economic form was rather limited.

Second, the European Parliament has strengthened its support for Taiwan over the decades. Based on core values of democracy and human rights, the Parliament's pro-Taiwan stance has also resulted in the 'spillover effect' on the implementation of one-China policy by the Council of the EU and the European Commission.<sup>74</sup> Lastly, Taiwan's accession to the WTO as the 'Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu' in 2002 has institutionalized interactions with the EU under a multilateral framework.<sup>75</sup> It also led to Brussels' policy change to recognize 'Taiwan as a separate customs territory'.<sup>76</sup> This form of non-statehood recognition is a critical step from the previous view of 'non-recognition, no existence' in the 1970s. The stance, hence, extended the WTO formula to overall foreign policy on Taiwan and enabled a larger scope of engagement.

In 2001, Taiwan also expanded the operations of its Brussels-based mission and re-designated it as the 'Taipei Representative Office in the EU and Belgium' as a central contact point for EU institutions.<sup>77</sup> To accommodate the policy shift, the EU established the European Economic and Trade Office (EETO) in Taipei in 2003.<sup>78</sup> The EETO is claimed to be informal and non-political, but it performs official functions similar to an EU delegation. The creation of the EETO was in line with the EU members' evolving relations with Taipei. Due to Taiwan's trade significance, Spain, the UK, Belgium, France and Germany have set up their de facto embassies in Taiwan since 1974.<sup>79</sup> Currently, Taiwan has 23 offices in 27 EU states, and 16 EU countries have Taipei-based

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<sup>70</sup> See H. Kapur, *China and the European Economic Community: The New Connection* (1986), 37 (citing Soames' statement).

<sup>71</sup> See Lim and Winkler, *supra* note 69, at 175 (referring to the 1975 record of meeting between Soames and Chiao).

<sup>72</sup> Mengin, *supra* note 11, at 140; Lim and Winkler, *ibid.*, at 177.

<sup>73</sup> Wang, *supra* note 62, at 38–50.

<sup>74</sup> Y. Lan, 'The European Parliament and the China-Taiwan Issue: An Empirical Approach', (2004) 9(1) *European Foreign Affairs Review* 115, at 117–131; B. Lang, *Taiwanese Lobbying in European Union: 'Workable Diplomacy' and its Limitations*, *EU Diplomacy Papers* 08/2015 (2015), at 14–16.

<sup>75</sup> P. L. Hsieh, 'Facing China: Taiwan's Status as a Separate Customs Territory in the World Trade Organization', (2005) 39(6) *Journal of World Trade* 1195, at 1196–200.

<sup>76</sup> Tang, *supra* note 4, at 316.

<sup>77</sup> Taipei Representative Office in the EU and Belgium, 'Introduction', 8 July 2017, available at [www.roc-taiwan.org/be\\_en/post/13.html](http://www.roc-taiwan.org/be_en/post/13.html).

<sup>78</sup> EETO in Taiwan, *supra* note 4.

<sup>79</sup> H. Su, 'The EU's Taiwan Policy in a New Context', (2010) 46(1) *Issues & Studies* 1, at 6.

offices that operate closely with the EETO.<sup>80</sup> With some exceptions, most of Taiwan's missions and diplomats in the EU are entitled to various degrees of diplomatic privileges.<sup>81</sup>

The re-engagement of the EU and its member states with Taiwan has positively impacted the bilateral economic frameworks. In the 2000s, the EU further adjusted its diplomatic discourse by recognizing 'Taiwan as an economic and commercial entity'.<sup>82</sup> The EU's recognition of Taiwan as an 'entity', which resembles the legal concept of entities *sui generis*, implies a broader ambit of recognition than as recognition of a trade-specific 'separate customs territory'.<sup>83</sup> Since the 1970s, the EU's views on Taiwan changed from 'non-existence' to a 'separate customs territory' and an 'economic and commercial entity'. These policy changes evidence the gradual forms of recognition in IR within the space of non-recognition. They also reiterate the legal view that unrecognized entities can be recognized 'as something else' and recognition of the governmental capacity, in turn, builds the foundation for the BIA.

Recent developments further demonstrate the divergence between EU members' one-China policies and Beijing's one-China principle, as well as the political premise that recognizes Taiwan's separate identity from the PRC and independent legal status. In response to the Trump administration's pro-Taiwan stance, Beijing has exerted additional pressure on EU states to reinforce the legitimacy of Chinese sovereign claims over Taiwan. While major European states have reiterated their positions to follow their one-China policies, they stressed their support for peaceful development of cross-strait ties and declined to succumb to Beijing's extra demands.<sup>84</sup>

To illustrate, Paris issued a statement that congratulated the elected candidates of Taiwan's 'presidential and legislative elections' in 2016.<sup>85</sup> The specific acknowledgement of Taiwan's central government-level elections defeats China's argument that Taiwan is merely its province. In the same year, London concluded an arrangement with Taiwan on the transfer of sentenced persons. The arrangement, which equally refers to the governments of both sides as 'authorities', recognizes its legal consequences and defines the territorial application.<sup>86</sup> In the context of non-recognition, these provisions particularly reinforce Taiwan's participatory parity in bilateral relations.

In 2018, China demanded that foreign airlines, including British Airways, alter the designation of Taiwan to 'Taiwan, China' on their websites.<sup>87</sup> The UK expressed concerns about the request and emphasized that its terminology for Taiwan would remain simply 'Taiwan'.<sup>88</sup> Beijing's assertive stance also incurred opposition from local governments. The newly-elected Prague

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<sup>80</sup> EETO, *supra* note 1, at 68; Taipei Representative Office in the EU and Belgium: Missions and Countries, 29 July 2019, available at [www.roc-taiwan.org/be/post/19.html](http://www.roc-taiwan.org/be/post/19.html) (in Chinese).

<sup>81</sup> For example, the diplomatic status of Taiwan's missions in Greece, Poland and Spain, see 國史館 [Academia Historica], 中華民國史外交志 (初稿) [Diplomatic History of the Republic of China] (2002), 822; International Law Association, Washington Conference: Recognition/Non-recognition in International Law (2014), at 10–11.

<sup>82</sup> EETO in Taiwan, *supra* note 4; Tang, *supra* note 4, at 316.

<sup>83</sup> Details on entities *sui generis*, see Crawford, *supra* note 33, at 124–5.

<sup>84</sup> For example, J. Nasr and M. Martin, 'Merkel Says Germany to Stick to "One China" Policy', Reuters, 12 December 2016, available at [www.reuters.com/article/usa-trump-china-germany-idINKBN1411GM](http://www.reuters.com/article/usa-trump-china-germany-idINKBN1411GM); House of Commons Library, *supra* note 61, at 13.

<sup>85</sup> 'Taiwan – Élections Présidentielle et Législatives [Taiwan – Presidential and Legislative Elections]', France Diplomatie, 16 January 2016, available at [www.diplomatie.gouv.fr/fr/dossiers-pays/asie-oceanie/evenements/article/taiwan-elections-presidentielle-et-legislatives-16-01-16](http://www.diplomatie.gouv.fr/fr/dossiers-pays/asie-oceanie/evenements/article/taiwan-elections-presidentielle-et-legislatives-16-01-16).

<sup>86</sup> For example, Arrangement between the Justice Authorities of Taiwan and the Authorities of the United Kingdom of Great Britain and Northern Ireland on the Transfer of Sentenced Persons (2016), Arts. 1, 2, 6, and 14.

<sup>87</sup> N. Connor, 'British Airways Comes Under Attack in China for Listing China and Hong Kong as Countries', Telegraph, 14 March 2018, available at [www.telegraph.co.uk/news/2018/03/14/british-airways-comes-attack-china-listing-taiwan-hongkong/](http://www.telegraph.co.uk/news/2018/03/14/british-airways-comes-attack-china-listing-taiwan-hongkong/).

<sup>88</sup> Foreign and Commonwealth Office, 'Taiwan: China: Written question – HL9452', 19 July 2018, available at [www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2018-07-11/HL9452/](http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2018-07-11/HL9452/).

mayor decided to remove Article 3 of the city's partnership agreement with Beijing in which the former mayor agreed to include a one-China policy clause in exchange for a panda.<sup>89</sup>

### 3. The EU's bilateral and multilateral approach to Taiwan

EU-Taiwan BIA negotiations are inevitably premised on the policy convergence of EU states and EU institutions. Within the space of non-recognition, their approaches have collectively responded to Taiwan's struggles for recognition and demonstrate gradual forms of recognizing Taiwan's identity and status in bilateral ties. Comparable to European countries' individual reengagement with Taiwan, the EU as a supranational institution commenced its informal contact with Taiwan in the 1980s. The contact was reinvigorated by bilateral consultations and negotiations for Taiwan's accession to the WTO. Notably, the impact of the Treaty of Lisbon is also of critical significance to the EU's BIA with Taiwan under the one-China policy. As the constitutional basis of the EU, the Treaty of Lisbon that consolidated and amended the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) came into effect in 2009.<sup>90</sup>

The new Article 207 of the TFEU entitles the EU to gain exclusive competence of 'foreign direct investment' as part of the EU's common commercial policy.<sup>91</sup> Negotiations and implementation of BIAs thus fall within the ambit of the EU rather than of member states. Moreover, the overall strategy to carry out the one-China policy should also refer to the EU's 'competence in matters of common foreign and security policy (CFSP)' under the TEU.<sup>92</sup> Although EU members ought to implement CFSP 'actively and unreservedly', EU external actions have to take into account the 'degree of convergence of' all members' actions.<sup>93</sup> EU states' practices of engaging Taiwan thus remain relevant to EU institutions. Furthermore, as distinct compositions and functions of key EU institutions contribute to their nuanced policy divergence, the EU's trade policy on Taiwan is based on the convergence of their positions.

#### 3.1 Competences and policies of EU institutions in the post-Lisbon era

Composed of heads of states, the European Council has less direct impact on the Taiwan issue because of its role in setting political directions and agenda without performing legislative function.<sup>94</sup> Similarly as an intergovernmental body, the Council of the EU (the Council) includes ministers of member states and performs the EU's primary policy-making and legislative role.<sup>95</sup> The Council implements the EU's CFSP on the basis of the European Council's guidelines and

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<sup>89</sup> M. Kajinek, 'Prague Proposes to Amend Partnership Agreement with Beijing; Rejects "One China" Policy', *Epoch Times*, 17 January 2019, available at [www.theepochtimes.com/prague-proposes-to-amend-partnership-agreement-with-beijingrejects-one-china-policy\\_2769963.html](http://www.theepochtimes.com/prague-proposes-to-amend-partnership-agreement-with-beijingrejects-one-china-policy_2769963.html).

<sup>90</sup> R. Panizza, *The Treaty of Lisbon: Fact Sheets on the European Union* (2019), 1.

<sup>91</sup> For details see W. Shan and S. Zhang, 'The Treaty of Lisbon: Half Way Toward a Common Investment Policy', (2011) 21(4) *European Journal of International Law* 1049, at 1058–61; J. Chaisse, 'Promises and Pitfalls of the European Union Policy on Foreign Investment – How will the New EU Competence on FDI Affect the Emerging Global Regime?', (2012) 15(1) *Journal of International Economic Law* 51, at 57–9.

<sup>92</sup> Treaty on European Union (2007), Art. 24(1).

<sup>93</sup> *Ibid.*, Arts. 24(2), 24(3).

<sup>94</sup> Council of the European Union, *The European Union: Facts and Figures* (2017), at 5.

<sup>95</sup> *Ibid.*, at 6.

gives mandate to the European Commission, a supranational agency, to negotiate EU FTAs and BIAs.<sup>96</sup>

The Council also makes ‘co-decisions’ with the European Parliament in the legislative process.<sup>97</sup> While the Council and the European Commission’s approach to Taiwan has been cautious, their initiation and support for the BIA is pivotal. As the European Parliament represents EU citizens rather than states, its actions tend to reflect the ideological and moral values of the EU.<sup>98</sup> On the grounds of democracy and human rights, the Parliament has adopted a critical stance on China and functioned as Taiwan’s ‘best friend’ in the EU.<sup>99</sup>

As IR academics asserted, the struggle for recognition has both identity and status dimensions. While the two core elements are often intertwined, the former stresses the pursuit of prestige, and the latter focuses on dignity. The common positions of EU institutions on Taiwan demonstrate their emphasis on Taiwan’s status, which is the justice-based concept that ensures Taiwan’s equal participation in international organizations and pragmatic engagement with the EU. The Commission and the Council specifically recognize the status of Taiwan as distinguishable from that of Hong Kong and Macau. While these two institutions recognize Taiwan’s rights to have ‘technical’ co-operation with the EU, they remain ambiguous as to what such co-operation may entail. The Parliament’s recognition of Taiwan extends much further, as evidenced by the specific reference to official titles such as the ROC and the invitations extended to Taiwan’s government officials. These practices affirm the legal and IR stances that an unrecognized state can be recognized ‘as something else’, thus paving the way for the bilateral framework that results in legal effects within the space of non-recognition.

### 3.1.1 The European Commission

Taiwan was first identified in the European Commission’s ‘Towards a New Asia Strategy’ communication to the Council in 1994 when Taiwan was listed as a ‘country’.<sup>100</sup> As the first framework on EU-Asia relations, this communication sought to increase the EU’s economic presence in 26 ‘countries’, including China, Japan and Hong Kong.<sup>101</sup> In 2001, the Commission reviewed and updated the 1994 Asia Strategy by constructing a more ‘coherent, comprehensive and balanced strategic approach’.<sup>102</sup> While the EU pledged to ensure the autonomy of Hong Kong and Macau as China’s Special Administrative Regions (SARs), the EU recognized Taiwan as the EU’s third largest partner in Asia and ‘as a separate customs territory, but not as a sovereign state’.<sup>103</sup> Although this statement does not recognize the statehood of Taiwan, it highlighted the difference between Taiwan and China’s SARs. It also marks the first EU statement that alluded to the coexistence of recognition and non-recognition stances without detailing the extent of the EU’s engagement with Taiwan.

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<sup>96</sup> J. Li et al., ‘China-EU Political Relations’, in Hong Zhou (ed.), *China-EU Relations: Reassessing the China-EU Comprehensive Strategic Partnership* (2017), 35, at 47–8; European Council and Council of the European Union, ‘The Council of the European Union’, available at [www.consilium.europa.eu/en/council-eu/](http://www.consilium.europa.eu/en/council-eu/).

<sup>97</sup> European Council and Council of the European Union, *ibid.*

<sup>98</sup> Panizza, *supra* note 90, at 3.

<sup>99</sup> Lan, *supra* note 74, at 122–6; Lang, *supra* note 74, at 13.

<sup>100</sup> Commission of the European Communities, ‘Communication From the Commission to the Council: Towards a New Asia Strategy’, COM(94) 314 (1994), footnote 1, at 3.

<sup>101</sup> *Ibid.*

<sup>102</sup> Commission of the European Communities, ‘Communication from the Commission: Europe and Asia: A Strategic Framework for Enhanced Partnerships’, COM(2001) 469 (2001), at 5.

<sup>103</sup> *Ibid.*, at 23.

The elements of the one-China principle that Beijing outlined in 1975 formed the basis for EU-China diplomatic relations. In 2003, Beijing issued the first ‘EU Policy Paper’.<sup>104</sup> China demanded that the EU prohibit Taiwan’s political figures from visiting Europe; that it not support Taiwan’s accession to international organizations where statehood is required, as Taiwan’s WTO membership does not alter its ‘status as a part of China’; and that the EU not provide Taiwan with military commodities and technology.<sup>105</sup>

### 3.1.2 The Council of the EU

In 2006, the Council stressed its commitment to ‘its’ one-China policy at the Meeting on External Relations without echoing Beijing’s one-China principle.<sup>106</sup> The next year, the Council first explained the concrete steps underpinning the position that ‘the EU has a One China policy and supports the peaceful resolution of the Taiwan issue’ as part of the EU’s foreign and security policy in East Asia.<sup>107</sup> Other than encouraging cross-strait dialogues, the Council proposed that when Taiwan’s practical participation is significant to the EU and global interests, pragmatic solutions should be pursued to accommodate Taiwan in the specialized multilateral fora. The Council’s 2012 Guidelines further elaborated on its one-China policy and added that Brussels should ‘continue technical cooperation with Taiwan in the economic and cultural field.’<sup>108</sup>

The one-China policy and the Taiwan issue are not only reiterated in the EU’s external and East Asia policy papers, but also form essential elements of EU policy on the PRC. To realize the new strategy on China formulated in 2016, both the Council and the Commission reiterated that the EU ‘confirms its’ one-China policy and will continue to develop relations with Taiwan because of shared values.<sup>109</sup> This policy is distinct from the ‘One Country, Two Systems’ that the EU supports for Hong Kong and Macau. These policy commitments provide the political foundations for the EU-Taiwan BIA, which will deepen the relations by legalizing technical and economic co-operation.

Importantly, compared with the Parliament, the Council’s stance on the one-China policy is more cautious. For example, the Council criticized former president Chen Shui-bian of the DPP for ceasing the function of the National Unification Council and planning to hold a referendum on Taiwan’s UN membership.<sup>110</sup> To a certain extent, the Council aimed to prevent Taiwan’s ‘provocative’ measures that could have changed the status quo.

### 3.1.3 The European Parliament

Similar to domestic politics in most countries, the European Parliament has followed a very pro-Taiwan stance to reflect the EU’s ideological and moral values of people with less concern for national interests. From an IR standpoint, the Parliament has accorded Taiwan the highest level of

<sup>104</sup> China’s EU Policy Paper, 13 October 2003, available at [www.fmprc.gov.cn/mfa\\_eng/topics\\_665678/ceupp\\_665916/t27708.shtml](http://www.fmprc.gov.cn/mfa_eng/topics_665678/ceupp_665916/t27708.shtml).

<sup>105</sup> *Ibid.*

<sup>106</sup> Council of the European Union, 2771<sup>st</sup> Council Meeting: General Affairs and External Relations, 16291/06 (Presse 353) (2006), at 8.

<sup>107</sup> Lim and Winkler, *supra* note 69, at 184–5; Council of the European Union, Guidelines on the EU’s Foreign and Security Policy in East Asia (2007), at 8.

<sup>108</sup> Council of the European Union, Guidelines on the EU’s Foreign and Security Policy in East Asia, 11492/12 (2012), at 17.

<sup>109</sup> European Commission, Joint Communication to the European Parliament and the Council: Elements for a New EU Strategy on China, JOIN (2016) 30, at 5; Council of the European Union, EU Strategy on China – Council Conclusions (18 July 2016), 11252/16, at 3.

<sup>110</sup> Council of the European Union, Declaration by the Presidency on Behalf of the European Union on the Decision of the Taiwanese Leader Regarding the NUC, 66885/1/06 REV 1 (Presse 63) (2006), at 1; Council of the European Union, Declaration by the Presidency on Behalf of the European Union on Cross-Strait Relations, 7328/1/08 REV 1 (Presse 65) (2008), at 1.

identity and status among EU institutions. For instance, the Council and the European Commission have consistently addressed ROC presidents as ‘leaders’ rather than ‘presidents’.<sup>111</sup> While European External Action Service (EEAS) congratulated the ‘new President’ following Somaliland’s election, the statement on Taiwan’s 2016 election neither mentioned ‘president’ nor the nature of the election.<sup>112</sup> In comparison, the Parliament and Members of the European Parliament (MEPs) have frequently referred to the official titles, including ‘president’ and ‘the Republic of China’.<sup>113</sup>

It is incorrect to underestimate the role of non-binding resolutions of the European Parliament in political and economic arenas. When the ROC entered an era of diplomatic isolation after losing its UN seat in 1971, the European Parliament and the US Congress became the first and foremost institutions that supported Taiwan. At the suggestion of parliamentary members of Belgium, Taiwan has regularly invited MEPs to visit Taiwan since the 1980s.<sup>114</sup> In 1985, based on the report by MEP Jochen van Aerssen of Germany, the European Parliament passed the ‘Resolution on Trade with Taiwan’ to call for according Taipei appropriate rights and economic status and upgrading EU-Taiwan interactions.<sup>115</sup>

From an institutional perspective, ‘pro-Taiwan activism’ has been galvanized by the cross-party European Parliament-Taiwan Friendship Group, which Viviane Reding and her fellow MEPs founded in 1991.<sup>116</sup> This ‘Taiwan caucus’ has worked with similar groups in national parliaments in the EU. The passage of two subsequent reports by MEPs in 1993, Reding of Luxembourg and Michel J. Hindley of the UK, urged the EU to support Taiwan’s accession to the General Agreement on Tariffs and Trade (GATT), the WTO’s predecessor, and to consider setting up an EU office in Taipei.<sup>117</sup> Clearly contravening Beijing’s one-China principle that ‘bans’ the visit of Taiwanese government officials, the European Parliament’s Committee on Foreign Affairs also invited Taiwan’s Foreign Minister, Chang Hsiao-yen, to speak in 1997.<sup>118</sup> The president of Taiwan’s Legislative Yuan (Parliament) Wang Jin-pyng also visited the European Parliament in Strasburg and Brussels in 2002 and 2009.<sup>119</sup>

<sup>111</sup> Council of the European Union, Declaration by the Presidency on Behalf of the European Union on the Decision of the Taiwanese Leader Regarding the NUC, *supra* note 110, at 1; Council of the European Union, Declaration by the Presidency on Behalf of the European Union on Cross-Strait Relations, 9954/1/08 REV 1 (Presse 145) (2008), at 1; Speech on Behalf of the High Representative and Vice-President Federica Mogherini at the European Parliament Plenary Debate on the Latest Developments in the Cross-strait Relations between Mainland China and Taiwan [Mogherini’s Speech], 30 January 2019.

<sup>112</sup> Statement by High Representative and Vice-President Federica Mogherini on the Elections in Taiwan, 16 June 2016; Somaliland Election: Statement by International Partners, 21 November 2017.

<sup>113</sup> See generally, European Parliament Resolution on Taiwan, B5-0347, 0356, 0372 and 0388/2000 (2000); K. Göncz et al., Question for Written Answer to the Commission, Free Trade Agreement with the Republic of China, Taiwan E-001267-13, OJ C 361 E, European Parliament, 6 February 2013; Lan, *supra* note 74, at 123–8.

<sup>114</sup> 劉文彬 [W. Liu], 歐洲議會與中華民國立法院及中共全國人民代表大會關係之比較研究 [‘A Comparative Study between the Relations of the European Parliament with the Legislature and the National People’s Assembly (1975–2000)’], (2005) 34 台灣師大歷史學報 [Bulletin of Historical Research, National Taiwan Normal University] 137, at 167; M. Yu and W. Yen, ‘European Parliament Taiwan Friendship Group visits Taiwan’, Focus Taiwan, 17 February 2019, available at [focustaiwan.tw/news/aip/201902170014.aspx](http://focustaiwan.tw/news/aip/201902170014.aspx).

<sup>115</sup> Liu, *ibid.*, at 167; Tubilewicz, *supra* note 67, at 428.

<sup>116</sup> Lang, *supra* note 74, at 14.

<sup>117</sup> Liu, *supra* note 114, at 169–72.

<sup>118</sup> 章孝嚴在歐洲議會演說 [Chang Hsiao-yen Spoke at the European Parliament], CTS, 22 May 1997, available at [news.cts.com.tw/cts/general/199705/199705220003790.html](http://news.cts.com.tw/cts/general/199705/199705220003790.html); Wang, *supra* note 62, at 58.

<sup>119</sup> Ministry of Foreign Affairs, Republic of China (Taiwan), 王金平院長率團訪問歐洲議會 [President Wang Jin-pyng Led the Delegation to Visit the European Parliament], 3 July 2002, available at [www.mofa.gov.tw/News\\_Content.aspx?n=FAEEE2F9798A98FD&sms=6DC19D8F09484C89&s=ABA2441A081F7DB79](http://www.mofa.gov.tw/News_Content.aspx?n=FAEEE2F9798A98FD&sms=6DC19D8F09484C89&s=ABA2441A081F7DB79); 張福昌 [F. Chang], 台歐關係的基石：歐洲議會友台小組的建構與功能 [‘The Cornerstone of Relations between Taiwan and the EU – Constructions and Functions of the EP-Taiwan Friendship Group’], (2009) 27(4) 東吳政治學報 [Sochow Journal of Political Science] 55, at 62.

These instances illustrate the European Parliament's pivotal role as a catalyst for enhancing diverse forms of recognizing Taiwan under the EU's one-China policy. Substantive results include the European Commission's support for Taiwan's WTO accession in 2002 and the establishment of the EETO in Taipei in 2003.<sup>120</sup> In addition, the Parliament has also converged with the Council in expressing concerns about China's anti-secession law and supporting Taipei's observer status in the World Health Assembly.<sup>121</sup>

As for economic agreements, the European Parliament first identified Taiwan in its resolution on a strategic framework for enhanced partnership with Asia in 2002. The Parliament stressed that the Asia-Europe Meeting, a key EU-Asia political dialogue forum, should not exclude 'two democratic countries', India and Taiwan.<sup>122</sup> It also urged the Commission to initiate 'negotiation that will lead to an EU-Taiwan' FTA.<sup>123</sup> Nevertheless, the FTA issues were paused until 2013 when a series of discussions occurred. According to the Commission, Taiwan 'seems to show a preference for negotiating' FTAs with partners that have concluded similar agreements with Beijing.<sup>124</sup> Instead of responding to an MEP's question on whether an FTA contravenes the EU's one-China policy, the Commission stated that an FTA 'with Taiwan is not an immediate priority' based on EU interests.<sup>125</sup>

### 3.2 EU-Taiwan bilateral consultations and WTO interactions

Prior to recognizing the PRC in 1975, the European Community's contact with Taiwan was under the GATT framework and the 1971 bilateral cotton textile agreement, which imposed self-constraints on Taiwan's textile exports.<sup>126</sup> The ROC's initial observer status was granted by GATT Contracting Parties in 1965, but they decided to follow UN General Assembly Resolution 2758 in 1971.<sup>127</sup> The loss of the GATT observer status and the non-renewal of the three-year cotton textile agreement essentially rendered Taiwan invisible from the EU's diplomatic landscape.<sup>128</sup>

The support of the European Parliaments and EU states' reengagement with Taiwan prompted the EU to seek a pragmatic strategy. The ice-breaking event was the first informal 'Economic and Trade Consultation' meeting in London in 1981.<sup>129</sup> These annual consultations have been conventionally chaired by Taiwan's Vice Economic Minister and Deputy Director General of the

<sup>120</sup> Commission of the European Communities, Communication from the Commission to the Council and the European Parliament: The Development of the External Service, COM(2001) 381 (2001), at 9–10; European Commission Establishes European Economic and Trade Office in Taiwan, IP/03/347 (2003), at 1.

<sup>121</sup> Council of the European Union, Declaration by the Presidency on Behalf of the European Union Concerning the Adoption of the 'Anti-Secession Law' by the National People's Congress of the People's Republic of China, 7297/05 REV2 (Presse 62) (2005), at 1; European Parliament Resolution on Taiwan, P6\_TA(2006)0228 (2006); Council of the European Union, Declaration by the Presidency on Behalf of the European Union on the Occasion of the Participation of Taiwan as an Observer in the 62<sup>nd</sup> Session of the World Health Assembly, 9486/09 (Presse 123) (2009), at 1; Lim and Winkler, *supra* note 69, at 183.

<sup>122</sup> Europe-Asia Partnerships: European Parliament Resolution on the Commission Communication on Europe and Asia: A Strategic Framework for Enhanced Partnerships (COM(2001)469 – C5-0255/2002 – 2002/2120(COS)), P5\_TA(2002)0428 (2002).

<sup>123</sup> *Ibid.*

<sup>124</sup> Parliamentary Questions: Answer Given by Mr De Gucht on Behalf of the Commission, E-001267/2013, OJ C 361 E, 11/12/2013.

<sup>125</sup> Parliamentary Questions: Answer Given by Mr De Gucht on Behalf of the Commission, E-005503/13, OJ C 40 E, /2/2014.

<sup>126</sup> Lim and Winkler, *supra* note 69, at 178.

<sup>127</sup> Hsieh, *supra* note 75, at 1197–8.

<sup>128</sup> Lim and Winkler, *supra* note 69, at 178; C. Wu, 'Toward an EU-Taiwan Bilateral Investment Treaty', in J. Chaisse (ed.), *China-European Union Investment Relationships – Towards a New Leadership in Global Investment Governance?* (2018), 206, at 209.

<sup>129</sup> R. Ash, 'Economic Relations Between Taiwan and Europe', (2002) 169 *China Quarterly* 154, at 164; C. M. Dent, *The European Union and East Asia: An Economic Relationship* (1999), 165.



European Commission's Directorate General of Trade (DG Trade) in Taipei or Brussels.<sup>130</sup> These meetings subsequently covered political issues such as the removal of the restrictions on EU officials' visits to Taiwan and the establishment of an EU office in Taiwan.<sup>131</sup> From the first to the thirty-first consultation meeting in 2019, these regular interactions have provided the most high-level communication scheme in the absence of diplomatic ties.

Taiwan's re-application for joining the GATT in 1990 and bilateral market access negotiations with the EU have reinvigorated bilateral talks. In 1992, an EU official visited Taiwan for the first time. It was the visit by Martin Bangemann, the Vice-President of the European Commission, in his 'private' capacity as Chairman of the Friedrich-Naumann Foundation.<sup>132</sup> Subsequently, European Commissioner for Trade, Leon Brittan, met with Taiwan's Economic Minister at the 1994 GATT ministerial meeting and the 1995 WTO ministerial meeting.<sup>133</sup>

Following Taiwan's WTO membership, another milestone was its accession to the WTO Government Procurement Agreement (GPA) in 2009.<sup>134</sup> As a GPA observer, China contended that sovereign nomenclatures in Taiwan's offers that list central government institutions, such as the Office of President and the Ministry of Foreign Affairs, contravene Taiwan's WTO status.<sup>135</sup> To ease political obstacles to Taiwan's participation in the GPA, the EU and the United States prompted the parties to decide that the GPA nomenclatures do not 'have implications for sovereignty'.<sup>136</sup> The fact that China also softened its position after president Ma Ying-jeou of pro-China KMT was inaugurated in 2008 enabled Taiwan to join the GPA. At present, Taiwan and the EU are among 23 WTO members negotiating the Trade in Services Agreement, a critical WTO pact that aims to liberalize trade in services.<sup>137</sup>

Significantly, Taiwan and the EU are contracting parties to the WTO's first sectoral agreement, the Information Technology Agreement (ITA). In 2008, Taiwan, joined by Japan and the United States, brought the claim against the EU in the case of EC – IT Products.<sup>138</sup> Taiwan argued that as the ITA provided duty-free treatment to flat panel displays, set-top boxes with communication functions, and multifunction digital machines, the EU's imposition of 6–14 per cent tariffs violated the ITA and Article II of the GATT.<sup>139</sup> The WTO panel's decision marked Taiwan's first WTO litigation success against the EU. Moreover, Taiwan has consistently participated in the EU's WTO cases involving other members such as China.<sup>140</sup> The evolution from technical, informal consultations to formal WTO negotiations and disputes reinforces the EU's recognition of

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<sup>130</sup> 'Taiwan-EU Economic Consultation Meeting Wraps up in Brussels', Taiwan Today, 10 December 2018, available at [taiwantoday.tw/news.php?unit=2,6,10,15,18&post=146809](http://taiwantoday.tw/news.php?unit=2,6,10,15,18&post=146809); M. Okano-Heijmans et al., 'Cross-Strait Relations and Trade Diplomacy on East Asia: Towards Greater EU-Taiwan Economic Cooperation', (2015) Clingendael Report, at 21, 60.

<sup>131</sup> F. Laursen, 'The Politics and Economics of EU-China/Taiwan Relations: A European Perspective', (2006) Dalhousie EUCE Occasional Paper No. 1, at 7.

<sup>132</sup> Okano-Heijmans et al., *supra* note 130, at 60; Laursen, *ibid.*, at 7.

<sup>133</sup> Wang, *supra* note 62, at 57.

<sup>134</sup> World Trade Organization, Parties, Observers and Accessions, available at [www.wto.org/english/tratop\\_e/gproc\\_e/membos\\_e.htm](http://www.wto.org/english/tratop_e/gproc_e/membos_e.htm).

<sup>135</sup> See S. Winkler, 'A Question of Sovereignty? EU Policies Towards Taiwan's Participation in International Organizations', (2013) 11(1) Asia Europe Journal 1, at 7 (citing GPA/M/17 (2002)).

<sup>136</sup> *Ibid.*, at 8; Modalities of Accession to the Agreement on Government Procurement, GPA/87 (2006), at 1.

<sup>137</sup> European Commission, Trade in Services Agreement (TiSA), 14 July 2017, available at [ec.europa.eu/trade/policy/in-focus/tisa/](http://ec.europa.eu/trade/policy/in-focus/tisa/).

<sup>138</sup> Panel Report European Communities and its Member States – Tariff Treatment of Certain Information Technology Products, 21 September 2010, WT/DS377/R.

<sup>139</sup> T. Lin, 'Systemic Reflection on the EC-IT Product Case: Establishing an "Understanding" on Maintaining the Product Coverage of the Current Information Technology Agreement in the Face of Technological Change', (2011) 45(2) Journal of World Trade 401, at 403–14; H. Liu and S. Peng, 'Managing Trade Conflicts in the ICT Industry: A Case Study of EU-Greater China Area', (2016) 19(3) Journal of International Economic Law 629, at 641–3.

<sup>140</sup> For example, China – Duties and other Measures concerning the Exportation of Certain Raw Materials, WT/DS509; European Union – Measures Related to Price Comparison Methodologies, WT/DS516.

Taiwan's governmental capacity and results in a binding effect regardless of diplomatic recognition. In turn, these developments strengthened the legal and political impetus for the BIA.

#### 4. New political and legal dimensions for the EU-Taiwan BIA

The article contends that the EU-Taiwan BIA will buttress the process for the EU to accord Taiwan diverse forms of recognition in light of a policy of non-recognition. From IR and legal perspectives, the conclusion of substantive investment agreements will fortify Taiwan's identity construction because the agreements represent recognition of the legal competence to effectively exercise jurisdiction and represent nationals. Notwithstanding the titles of the signing authorities, any form of binding legal structure recognized by two governments, including dispute settlement and co-operative mechanisms, essentially bolsters Taiwan's status claim associated with sovereign equality in international affairs.

##### 4.1 The EU's 2015 'Trade for All' strategy and the China factor

To urge the European Commission to be more proactive, the European Parliament passed the 2013 resolution to express its favour for 'agreements on investment protection and market access with Taiwan' and such agreements 'should not be interlinked with' EU relations with Beijing.<sup>141</sup> This was the first resolution specifically on the EU-Taiwan BIA, which has a narrower scope and is less politically sensitive than a full-fledged FTA that may have caused concern to the Council and the Commission. Nevertheless, the Commission's stance remained conservative in expressing that it had 'no intention to start negotiations for an economic cooperation agreement with Taiwan'.<sup>142</sup>

New momentum was gained when the European Commission issued the 2015 'Trade for All' policy paper that outlines the EU's trade and investment agreement strategy.<sup>143</sup> Developing trade and investment agreements with Asian countries became the EU's priority. While the EU FTAs with Korea and Japan were concluded in 2009 and 2018, respectively, both agreements still lack investment chapters to be negotiated.<sup>144</sup> As for the Association of Southeast Asian Nations (ASEAN) countries, the EU signed separate FTAs and investment protection agreements with Singapore and Vietnam.<sup>145</sup> The EU is presently negotiating FTAs with Indonesia and the Philippines, as well as a BIA with Myanmar.<sup>146</sup>

The 'Trade for All' policy paper is also the Commission's first official paper that positively responded to the Parliament's request to negotiate a BIA with Taiwan. In particular, the Commission indicated that '[b]uilding on investment provisions under negotiation with China, the EU will explore launching negotiations on investment with Hong Kong and Taiwan'.<sup>147</sup> In the footnote, the Commission also identified Taiwan's capacity as a separate customs territory.<sup>148</sup>

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<sup>141</sup> EU-Taiwan Trade Relations: European Parliament Resolution of 9 October 2013 on EU-Taiwan Trade Relations (2013/2675(RSP)), P7\_TA(2013)0412, paras. 2–4.

<sup>142</sup> Parliamentary Questions, Answer Given by Mr De Gucht on Behalf of the Commission, E-012889/2013, OJ C 228, 17/07/2014.

<sup>143</sup> European Commission, *supra* note 7, at 31.

<sup>144</sup> European Commission, South Korea, 7 May 2019, available at [ec.europa.eu/trade/policy/countries-and-regions/countries/south-korea/](http://ec.europa.eu/trade/policy/countries-and-regions/countries/south-korea/); European Commission, EU-Japan Economic Partnership Agreement, 1 February 2019, available at [ec.europa.eu/trade/policy/in-focus/eu-japan-economic-partnership-agreement/](http://ec.europa.eu/trade/policy/in-focus/eu-japan-economic-partnership-agreement/).

<sup>145</sup> European Commission, Negotiations and Agreement, 25 July 2019, available at [ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/#\\_being-negotiated](http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements/#_being-negotiated).

<sup>146</sup> *Ibid.*

<sup>147</sup> European Commission, *supra* note 7, at 31.

<sup>148</sup> *Ibid.*, at 36.

China responded to the Commission's plan to start BIA talks with Taiwan by calling the EU to consider 'the overall interests of China-EU relations' and to 'refrain from having any form of official exchanges or signing any official agreement with' Taiwan.<sup>149</sup> Without addressing Beijing's 'warning', the Commission's 2017 report to the Council and the Parliament reiterated that it 'is preparing to launch investment negotiations with Hong Kong and Taiwan'. In 2018, Beijing's new policy paper on the EU specifically demanded that Brussels 'refrain from signing with Taiwan any agreement with sovereign implications or official in nature'.<sup>150</sup>

Compared with the Council and the Commission, the Parliament has adopted a much more proactive approach to the EU-Taiwan BIA. Since 2016, the European Parliament has addressed this issue three times. In 2016, the Parliament called on the Commission 'immediately to start negotiations on an investment agreement with Taiwan'.<sup>151</sup> In 2018, in its annual report on the common commercial policy, the Parliament again requested that the preparatory work be finalized in order to start negotiations 'as soon as possible'.<sup>152</sup> In the same year, the Parliament found 'it regrettable that no such negotiations have actually begun'.<sup>153</sup> Notably, in 2019, Anna Cecilia Malmström, European Commissioner for Trade, informed the Parliament that several EU-Taiwan Investment Working Group meetings had been held.<sup>154</sup> As investment negotiations require an impact assessment, 'no specific timeframe had been set by the Commission'.<sup>155</sup> The positive side effect of these meetings was to enhance Taiwan's systemic dialogues with the Commission and enable the EU to solicit Taiwan's views on cross-strait relations and Hong Kong protests.<sup>156</sup>

As EU institutions have somewhat different positions, what is the EU's common approach to the EU-Taiwan BIA? The key difference is that while the Parliament considers the EU-Taiwan BIA to be a separate issue from the EU-China BIA, the Council and the Commission regard these two BIAs as interlinked. In other words, while all EU institutions agree to accord Taiwan an additional degree of legal status without utterly 'complying with' Chinese demands, the Council and the Commission take into account more economic and geopolitical interests.

Tellingly, in 2015, Malmström commented at the European Parliament's Committee on International Trade meeting that the Taiwan BIA negotiation would commence 'only once the talks of the BIA with China would be done'.<sup>157</sup> China is now the EU's second largest trading partner only after the United States.<sup>158</sup> The statement that the EU would launch the EU-Taiwan BIA talks on the basis of the provisions of the EU-China BIA suggests that Brussels may adopt

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<sup>149</sup> Remarks by Spokesperson of the Mission of the People's Republic of China to the EU on European Commission's intention to explore launching negotiations on investment with Taiwan, 16 October 2015, available at [www.chinamission.be/eng/fyrjh/t1306697.htm](http://www.chinamission.be/eng/fyrjh/t1306697.htm).

<sup>150</sup> China's Policy Paper on the European Union, xinhuanet, 18 December 2018, available at [www.xinhuanet.com/english/2018-12/18/c\\_137681829.htm](http://www.xinhuanet.com/english/2018-12/18/c_137681829.htm). China indicated the same position against 'official' EU-Taiwan agreements in the 2014 policy paper on the EU.

<sup>151</sup> European Parliament Resolution of 5 July 2016 on a New Forward-looking and Innovative Future Strategy for Trade and Investment, P8\_TA(2016)0299, para. 48.

<sup>152</sup> European Parliament Resolution of 30 May 2018 on the Annual Report on the Implementation of the Common Commercial Policy, P8\_TA(2018)0230, para. 13.

<sup>153</sup> European Parliament Resolution of 12 September 2018 on the State of EU-China Relations, P8\_TA(2018)0343, para. 47.

<sup>154</sup> See answer given by Malmström on behalf of the European Commission, E-005498/2018, 16 January 2019 ('To date, the Working Group has met several times, most recently in May 2018, and [t]hese meetings allow to better understand each other's investment policies and to prepare the technical ground for possible future negotiations.').

<sup>155</sup> *Ibid.*

<sup>156</sup> The investment working group was established in 2017 and held five meetings, including two via video calls, by September 2019. M. Banks, 'Group of MEPs Throw Weight Behind EU-Taiwan Trade Agreement', *Parliament Magazine*, 25 February 2019, available at [www.theparliamentmagazine.eu/articles/news/group-meps-throw-weight-behind-eu-taiwantrade-agreement](http://www.theparliamentmagazine.eu/articles/news/group-meps-throw-weight-behind-eu-taiwantrade-agreement); interview with a Taiwanese diplomat in Brussels, 3 September 2019.

<sup>157</sup> See P. Kerneis et al., *Taiwan and European Union Trade and Economic Relations – the Case for a Deep and Comprehensive Bilateral Investment Agreement* (European Services Forum and Bureau of Foreign Trade (2016), footnote 63, at 44 (citing Malmström's statement, [www.europarl.europa.eu/ep-live/en/committees/video?event=201510150900-COMMITTEE-INTA](http://www.europarl.europa.eu/ep-live/en/committees/video?event=201510150900-COMMITTEE-INTA)).

<sup>158</sup> EETO, *supra* note 1, at 11.

the ‘China first, Taiwan second’ policy.<sup>159</sup> This practice has been followed by Beijing and Taipei’s GATT/WTO accession process.

The 1992 GATT Chairman’s statement declared that while China and Taiwan’s ‘working party reports should be examined independently’, the report and the protocol of Beijing will be adopted before those of Taipei.<sup>160</sup> This reluctant compromise made Taiwan’s WTO accession fall one day after China’s.<sup>161</sup> Also notably, the 2015 ‘Trade for All’ policy paper that grouped Taiwan and Hong Kong in BIA negotiations represents the Commission’s delicate political exercise to decrease Chinese opposition. The two Asian Tigers are the EU’s fifteenth and twentieth trading partners, respectively.<sup>162</sup> Nevertheless, the EU has already negotiated larger-scale FTAs with the Philippines and New Zealand, which are only the EU’s forty-second and fiftieth trading partners.<sup>163</sup>

The impact of EU-China relations on EU-Taiwan interactions is salient. The EU’s trade with China has escalated more than four times after both sides upgraded bilateral relations from the 1998 ‘comprehensive partnership’ to the 2003 ‘comprehensive strategic partnership’.<sup>164</sup> EU-China BIA negotiations commenced in 2013 and both sides held the twenty-first round of negotiations in 2019 with a focus on the most challenging market access issues.<sup>165</sup> The EU-China BIA is expected to be concluded in 2020.<sup>166</sup> Both sides envisioned that this BIA would form a basis for an FTA with a larger scope of trade liberalization.<sup>167</sup> The foreseeable finalization of the EU-China BIA is therefore, ironically ‘positive’ for Taiwan.

Yet, other critical trade and political developments that may affect the EU-China BIA cannot be ignored. Other than market access issues, trade tensions have arisen from the EU’s refusal to recognize China’s market economy status.<sup>168</sup> The EU position is perceived by China to violate WTO rules and discriminate Chinese products in anti-dumping proceedings. Moreover, Brussels has become more concerned about Beijing’s increasingly assertive ‘divide and rule’ strategy that has been applied to ASEAN. China has attracted 15 EU countries, including mostly Eastern European countries and Italy, to join the Belt and Road Initiative that facilitates infrastructure loans from Chinese banks.<sup>169</sup> Tellingly, akin to the role of Cambodia in blocking ASEAN’s statement on South China Sea issues, Greece prevented the EU statement at the UN human rights body from

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<sup>159</sup> European Commission, *supra* note 7, at 31; Wu, *supra* note 128, at 222–3.

<sup>160</sup> General Agreement on Tariffs and Trade: Minutes of Meeting, C/M/259, 27 October 1992, 3–4; S. Winkler, ‘Can Trade Make a Sovereign? Taiwan-China-EU Relations in the WTO’, (2008) *Asia Europe Journal* 467, at 475–6.

<sup>161</sup> Hsieh, *supra* note 75, at 1202–3.

<sup>162</sup> EETO, *supra* note 1, at 11.

<sup>163</sup> European Commission: Directorate General for Trade, Client and Supplier Countries of the EU28 in Merchandise Trade (value %) (2018, excluding intra-EU trade), at 1.

<sup>164</sup> Commission of the European Communities, Communication from the Commission, Building a Comprehensive Partnership with China, COM(1998) 181, at 1–3; Commission of the European Communities, Commission Paper for Transmission to the Council and the European Parliament, A Maturing Partnership – Shared Interests and Challenges in EU-China Relations, COM(2003) 533, at 3–5; C. Xin, ‘China-EU Economic and Trade Relations’, in Hong Zhou (ed.) *China-EU Relations: Reassessing the China-EU Comprehensive Strategic Partnership* (2017), 69, at 70–2.

<sup>165</sup> I. Ewert, ‘The EU-China Bilateral Investment Agreement: Between High Hopes and Real Challenges’, (2016) Egmont Institute Security Policy Brief, No. 68, at 2–3; European Commission, Joint Communication to the European Parliament, the European Council and the Council: EU-China – A Strategic Outlook, JOIN(2019) 5, at 6.

<sup>166</sup> European Commission, *ibid.*, at 6.

<sup>167</sup> European Commission, *supra* note 109, at 6; China’s Policy Paper on the European Union, *supra* note 150.

<sup>168</sup> European Parliament Resolution of 12 May 2016 on China’s Market Economy Status (2016/2667(RSP)), P8\_TA(2016) 0223.

<sup>169</sup> M. Johnson, ‘Why Would Italy Endorse China’s Belt and Road Initiative?’, *Financial Times*, 21 March 2019, available at [www.ft.com/content/f0af46b0-4b2d-11e9-8b7f-d49067e0f50d](http://www.ft.com/content/f0af46b0-4b2d-11e9-8b7f-d49067e0f50d); Country Profiles, BELT and ROAD, available at [beltandroad.hktcd.com/en/country-profiles](http://beltandroad.hktcd.com/en/country-profiles).

criticizing China in 2017.<sup>170</sup> The EU's concern is evidenced by the German Foreign Minister's remarks that called for unity of Europe and requested China to follow a 'one-Europe' policy.<sup>171</sup>

The EU's stance on China changed significantly in 2019 when the EU changed the status of China from a 'partner' to a 'systemic rival' and urged member states to stay in 'full unity' for their China policies.<sup>172</sup> This policy shift reflects Brussels' frustration over the substantive results of the 'partnership' at bilateral and global arenas where China has undermined the EU's strategic interests.<sup>173</sup> The new European Commission, led by President Ursula von der Leyen, has emphasized 'the European way' and is expected to continue an assertive stance on Beijing.<sup>174</sup> However, unlike the Trump administration that has played the 'Taiwan card' in trade conflicts with Beijing, it remains unclear if the EU will tie the Taiwan issue with the new 'rivalry' relations with China.

## 4.2 Taiwan's strategy and 2019 meetings of the European Parliament

The pursuit of the BIA with the EU can be perceived as Taiwan's pursuit of recognition of its economic power and sovereign status. Taipei's main strategy to affect Brussels' decision-making process is through the influence of the European Parliament. Taiwan President Tsai Ing-wen's confrontational stance on Beijing provided a further impetus for signing the BIA with the EU, as the investment pact will increase the legitimacy of her policy. She has stressed the importance of the BIA at various occasions, including the meetings with MEPs and Belgian Senate President.<sup>175</sup> In 2019, the European Parliament held two unprecedented meetings that focused on Taiwan.

At the Parliament's plenary session on cross-strait relations in January 2019, a representative on behalf of High Representative and Vice President Federica Mogherini, the EU's top diplomat, emphasized that the EU has 'an interest in developing closer relation with Taiwan'.<sup>176</sup> More specifically, the EU does 'engage with Taiwan even in the lack of diplomatic recognition' under the EU's one-China policy.<sup>177</sup> In less than a month after the plenary debate, ten cross-party MEPs convened the very first public hearing on EU-Taiwan trade relations with a focus on the EU-Taiwan BIA.<sup>178</sup> Those who were invited to testify included the head of Taiwan's Bureau of Foreign Trade, EEAS and DG Trade officials, and the EU's private sector representatives.

Crucial developments on the EU and Taiwan sides provided renewed momentum for the BIA. While the EU countries (particularly the Netherlands) remain Taiwan's largest foreign direct investment (FDI) source, Taiwan's outbound FDI to the EU has declined since 2016.<sup>179</sup> This decreasing investment trend continued after the drop from US\$1.1 billion in 2016 to US\$0.2 billion

<sup>170</sup> L. Poggetti, 'One China – One Europe? German Foreign Minister's Remarks Irk Beijing', *The Diplomat*, 9 September 2017, available at [thediplomat.com/2017/09/one-china-one-europe-german-foreign-ministers-remarks-irk-beijing/](http://thediplomat.com/2017/09/one-china-one-europe-german-foreign-ministers-remarks-irk-beijing/).

<sup>171</sup> *Ibid.*

<sup>172</sup> European Commission, *supra* note 165, at 1–2.

<sup>173</sup> J. Hoslag, 'The Exclusive Axis: Assessing the EU-China Strategic Partnership', (2011) 49(2) *Journal of Common Market Studies* 293, at 308–9; R. Maher, 'Europe's Response to China's Rise: Competing Strategic Visions', (2017) 15 *Asia Europe Journal* 133, at 142–3.

<sup>174</sup> Opening Statement in the European Parliament Plenary Session by Ursula von der Leyen, Candidate for President of the European Commission, 16 July 2019, at 4, available at [ec.europa.eu/commission/sites/beta-political/files/opening-statementplenary-session\\_en\\_fr\\_de.pdf](http://ec.europa.eu/commission/sites/beta-political/files/opening-statementplenary-session_en_fr_de.pdf).

<sup>175</sup> D. DeAeth, 'President Tsai Promotes EU-Taiwan Bilateral Investment Agreement', *Taiwan News*, 9 August 2018, available at [www.taiwannews.com.tw/en/news/3502922](http://www.taiwannews.com.tw/en/news/3502922); 'President Tsai Meets Belgian Senate President and Mrs. Brotschi', Office of the President ROC (Taiwan), 6 May 2019, available at [english.president.gov.tw/News/5733](http://english.president.gov.tw/News/5733).

<sup>176</sup> Mogherini's Speech, *supra* note 111.

<sup>177</sup> *Ibid.*

<sup>178</sup> Banks, *supra* note 156.

<sup>179</sup> EIAS Report, *Taiwan's Outward Foreign Direct Investment (OFDI) into the European Union: Quantitative Research* (2018), at 11–12; EETO, *supra* note 1, at 23–5.

in 2017.<sup>180</sup> Presently, only 3 per cent of Taiwan's FDI goes to the EU.<sup>181</sup> Investment is also intertwined with the job creation effect. As one of the most prominent examples, Taiwan-based Hong Hai (internationally known as Foxconn) has expanded information technologies' manufacturing plants by employing almost 6,000 people in the Czech Republic, Slovakia and Hungary.<sup>182</sup> In particular, the scale of the employment site in the Czech Republic presumably made the country adopt the most pro-Taipei stance in Central Europe.

Moreover, as the composition of private industry representatives at the Parliament's public hearing demonstrates, major EU wind power firms such as Orsted of Denmark and WPD of Germany are concerned about the progress of the EU-Taiwan BIA.<sup>183</sup> Due to public concerns over Japan's Fukushima disaster, Taiwan's DPP government aims to phase out nuclear power and increase wind projects by 2025.<sup>184</sup> The government's prospective investment up to USD 23 billion and its offer of a 20-year power purchase agreement for the auction made Taiwan Asia's 'battleground' for the wind power sector.<sup>185</sup> A BIA is thus, pivotal to ensure legal certainty and investment protection for EU companies.

A contextual understanding of Taiwan's overall FTA and BIA strategy is also essential to analyse the importance of having a BIA with the EU. As of 2020, Taiwan has concluded more than 30 FTAs and investment protection agreements irrespective of Westphalian sovereignty challenges.<sup>186</sup> The previous KMT government's China-friendly policy led to the 2010 Economic Cooperation Framework Agreement with China and eased political obstacles to Taiwan's 2013 FTAs with Singapore and New Zealand.<sup>187</sup> Both Singapore and New Zealand had existing FTAs with Beijing and do not diplomatically recognize the ROC. The fact that Taiwan adopted its WTO nomenclature, 'separate customs territory' or 'Chinese Taipei', for the two FTAs also helped decrease sovereign disputes.

Taiwan's FTAs with diplomatic allies, such as Paraguay and Eswatini, were motivated by more political considerations than economic interests. Although these FTAs were signed in the name of the ROC, they cover insignificant portions of Taiwan's foreign trade. Interestingly, while Panama and El Salvador switched recognition to Beijing, their FTAs remain in effect.<sup>188</sup> Modern FTAs mostly contain investment chapters akin to conventional BIAs. Different from FTAs that are under the auspices of the WTO, BIAs are stand-alone pacts that do not oblige parties to notify the WTO.

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<sup>180</sup> EIAS Report, *ibid.*, at 11.

<sup>181</sup> EETO, *supra* note 1, at 5.

<sup>182</sup> EIAS Report, *Taiwan's Outward Foreign Direct Investment (OFDI) into the European Union: Qualitative Research* (2018), at 10.

<sup>183</sup> Banks, *supra* note 156.

<sup>184</sup> S. Jacobsen, 'Offshore Wind Power Firms See Taiwan as a Battleground to Expand in Asia', Reuters, 30 April 2018, available at [www.reuters.com/article/us-taiwan-windpower/offshore-wind-power-firms-see-taiwan-as-a-battleground-toexpand-in-asia-idUSKBN1I11V](http://www.reuters.com/article/us-taiwan-windpower/offshore-wind-power-firms-see-taiwan-as-a-battleground-toexpand-in-asia-idUSKBN1I11V).

<sup>185</sup> *Ibid.*; E. White and L. Hook, 'Taiwan Offshore Wind Saga Rattles Global Investors', Financial Times, 11 February 2019, available at [www.ft.com/content/eb64a90a-260e-11e9-b329-c7e6ceb5ffdf](http://www.ft.com/content/eb64a90a-260e-11e9-b329-c7e6ceb5ffdf).

<sup>186</sup> FTAs/Economic Cooperation Agreements, available at [investtaiwan.nat.gov.tw/showBusinessPagechtG\\_Agreement04?lang=cht&search=G\\_Agreement04&menuNum=92](http://investtaiwan.nat.gov.tw/showBusinessPagechtG_Agreement04?lang=cht&search=G_Agreement04&menuNum=92) (in Chinese); List of Countries that Have Signed Agreements on the Promotion and Protection of Investments or Free Trade Agreements with Taiwan, available at [investtaiwan.nat.gov.tw/showBusinessPagechtG\\_Agreement01?lang=cht&search=G\\_Agreement01&menuNum=92](http://investtaiwan.nat.gov.tw/showBusinessPagechtG_Agreement01?lang=cht&search=G_Agreement01&menuNum=92); H. Ciurtin, 'A New Era in Cross-Strait Relations? A Post-sovereign Enquiry in Taiwan's Investment Treaty System', in J. Chaisse (ed.) *China's International Investment Strategy: Bilateral, Regional, and Global Law and Policy* (2019), 290, at 298–9.

<sup>187</sup> P. L. Hsieh, 'The Quest for Recognition: Taiwan's Military and Trade Agreements with Singapore under the One-China policy', (2019) 19 *International Relations of the Asia-Pacific* 89, at 106–7.

<sup>188</sup> Y. Bernal, 'Taiwan: FTA with Panama Still in Place Despite Diplomatic Rupture', Panama Today, 10 May 2018, available at [www.panamatoday.com/panama/taiwan-fta-panama-still-place-despite-diplomatic-rupture-6813](http://www.panamatoday.com/panama/taiwan-fta-panama-still-place-despite-diplomatic-rupture-6813); N. Renteria, 'El Salvador Top Court Suspends Scrapping of Taiwan Trade Accord', Reuters, 14 March 2019, available at [www.reuters.com/article/us-elsalvador-taiwan/el-salvador-top-court-suspends-scrapping-of-taiwan-trade-accord-idUSKCN1QU340](http://www.reuters.com/article/us-elsalvador-taiwan/el-salvador-top-court-suspends-scrapping-of-taiwan-trade-accord-idUSKCN1QU340).

As concluding an FTA with Taiwan is not on the EU's agenda, both sides aim to finalize an investment pact outside the WTO framework.

Currently, Taiwan has neither FTAs nor BIAs with EU member states. The Republic of Macedonia (now North Macedonia) is the only European Country that has a BIA with Taiwan, as the pact was concluded in 2019 when the two sides had diplomatic ties.<sup>189</sup> Taipei has signed instruments on investment co-operation and facilitation with eight EU states at national and regional levels. For instance, agreements with the German State of RheinlandPfalz and Germany's federal investment agency were concluded in 1990 and 2002, respectively.<sup>190</sup> These instruments usually contain primary principles and intentions without detailed binding obligations. In particular, the MoU on investment promotion with Spain specifies that the instrument 'is not intended to create any domestic or international legal obligations'.<sup>191</sup> In terms of legal stability and political weight, these instruments are much weaker than contemporary BIAs that encompass enforceable investment protection provisions.

### 4.3 The structure of the investment pact

From the 1980s, the EU has established diverse methods of recognizing Taiwan in economic and political arenas under the one-China policy. Non-recognition is often perceived as a disrespectful act that negates the identity and status of unrecognized entities. However, the flexibility and latitude of recognition within the space of non-recognition can facilitate stability and co-operation. As its engagement policy illustrates, the EU practice reinforces the IR view of recognition as a gradual process and evidences the legal position that unrecognized entities should not be regarded as a nullity. In particular, a comprehensive BIA will enhance the process of legal recognition in domestic and international laws.

From 2017 to 2019, Taiwan has updated BIAs with the Philippines, India and Vietnam.<sup>192</sup> It is expected that the new BIAs and the FTAs with Singapore and New Zealand will facilitate Taiwan's accession to the Comprehensive and Progressive Agreement for Trans-Pacific Agreement and the Regional Comprehensive Economic Partnership. Due to the limited progress in joining the two mega-regional trade agreements, a BIA with the EU emerged as Taiwan's trade and diplomatic priority. Taiwan's recent investment pacts and the investment chapters of FTAs, as well as the EU's recent investment protection agreements with Singapore and Vietnam, are the natural models for the EU-Taiwan BIA. The structure of a modern BIA subsequently leads to additional forms of legal recognition in diverse arenas.

First, the BIA increases the extent of the EU's recognition of Taiwan's governmental authority to enact international agreements and its effective representation of the territory and people. It also promotes the mutual recognition of governmental measures on investment protection, promotion and facilitation. Arguably, the requirement of the capacity to enter into relations with other states under the Montevideo Convention indicates 'a consequence of statehood, not a criterion for it'.<sup>193</sup>

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<sup>189</sup> List of Countries that Have Signed Agreements on the Promotion and Protection of Investments or Free Trade Agreements with Taiwan, *supra* note 186.

<sup>190</sup> Taiwan concluded five investment agreements with German authorities. List of ROC Cooperation and Facilitation Investment Agreements, *supra* note 5.

<sup>191</sup> Memorandum of Understanding on the Promotion of Bilateral Investment and Cooperation in Training Programs between the Taipei Economic and Cultural Office in Spain and the Spanish Chamber of Commerce in Taipei (2010), Art. 2.

<sup>192</sup> S. Tiezzi, 'Taiwan's "New Southbound Policy" Scores Win in the Philippines', *The Diplomat*, 9 December 2017, available at [thediplomat.com/2017/12/taiwans-new-southbound-policy-scores-win-in-the-philippines/](http://thediplomat.com/2017/12/taiwans-new-southbound-policy-scores-win-in-the-philippines/); 'Taiwan and India Have Signed Two Bilateral Agreements on December 18, 2018 to Further Boost Trade and Investment between the Two Countries', 18 December 2018, available at [www.roc-taiwan.org/inmaa\\_en/post/5095.html](http://www.roc-taiwan.org/inmaa_en/post/5095.html); 'Taiwan and Vietnam to Sign New Bilateral Investment Deal: Report', *Taiwan News*, 18 December 2019, available at [www.taiwannews.com.tw/en/news/3839797](http://www.taiwannews.com.tw/en/news/3839797).

<sup>193</sup> Crawford, *supra* note 34, at 61.

Indeed, from the IR viewpoint, Taiwan's capacity to conclude a BIA with the EU inevitably buttresses the claim for the independent identity and status of statehood at the international level.

The foremost issue for the EU-Taiwan BIA is to assess which institutions can be authorized by the respective authorities to negotiate and sign the pact. Taiwan's current agreements with EU institutions are rare and confined to technical issues. For instance, a confidentiality agreement was signed between Taiwan's Food and Drug Administration and the Council of Europe.<sup>194</sup> Taiwan's Representative Office also signed an administrative arrangement on industry cluster co-operation with the European Commission.<sup>195</sup> Based on the established practice of Taiwan's BIAs, the EU-Taiwan BIA is most likely to be concluded by the Taipei Representative Office in the EU and Belgium, and the EETO in Taipei. From Brussels' perspective, this mechanism enables the investment pact to decrease its sovereign implications, as it is signed between nongovernmental agencies. Nonetheless, the 'unofficial' nature by no means undermines the binding effect of the agreement.

Second, the BIA's dispute settlement provisions allow for state-to-state and investor-state disputes and therefore galvanize recognition of what Fraser called 'participatory parity' for Taiwan and Taiwanese investors in the international economic order.<sup>196</sup> As IR academics reasoned, this status dimension of recognition reflects the desire to demand dignity based on the normative standards of respect.<sup>197</sup> The absence of a mechanism to enforce rights in Taiwan's bilateral instruments and MoU with European states may be seen as status subordination. Thus, the BIA's state-to-state dispute mechanism establishes the equality structure for both sides to pragmatically settle frictions.

From the commercial aspect, investor-state dispute settlement (ISDS) is of more significance to EU and Taiwan businesses. Distinct from contemporary BIAs, none of Taiwan's investment protection agreements include International Centre for Settlement of Investment Disputes (ICSID) provisions. ICSID is a World Bank arbitral mechanism that deals with ISDS, but as a non-UN member and non-party to the ICSID Convention, Taiwan is unable to resort to this mechanism.<sup>198</sup> Detailed provisions under recent EU agreements, which create an 'Investment Court System' (ICS), could help fill the legal vacuum for Taiwan.

In 2015, the European Commission first proffered the ICS proposal in FTA negotiations with the United States as a step to address fairness of arbitrators and transparency issues that arise from conventional ISDS.<sup>199</sup> The ICS provisions, which set up a permanent tribunal of first instance and an appellate tribunal, are included in the EU's FTA with Canada and investment protection agreements with Singapore and Vietnam. In its 2017 decision, the Court of Justice of the EU held

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<sup>194</sup> Confidentiality Agreement between the Taiwan Food and Drug Administration of Ministry of Health and Welfare and the European Directorate for the Quality of Medicines and Healthcare of the Council of Europe (2014).

<sup>195</sup> Administrative Arrangement between the Taipei Representative Office in the European Union and Belgium and the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs of the European Commission on Cluster Cooperation (2018).

<sup>196</sup> For bilateral and international investment dispute settlement mechanisms involving Asian countries see generally W. Zhu, 'Some Considerations on the Civil, Commercial and Investment Settlement Claims between China and the Other Belt and Road Countries', in J. Chaisse and J. Go'rski (eds.), *The Belt and Road Initiative: Law, Economics, and Politics* (2018), 607; G. Matteucci, 'International Commercial Mediation, and Opportunity for the OBOR', *ibid.*, at 621; M. Dimsey, 'Central Asian Investment Arbitration and OBOR – Learning from the Current Investment Regime', *ibid.*, at 709. <sup>197</sup> Fraser, *supra* note 22, at 101; Wolf, *supra* note 9, at 106–7; Lindemann, *supra* note 8, at 210.

<sup>197</sup> Fraser, *supra* note 22, at 101; Wolf, *supra* note 9, at 106–7; Lindemann, *supra* note 8, at 210.

<sup>198</sup> Member states of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), see [icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx](https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx). Note that although Kosovo is not a member of the United Nations, it is a party to the Convention.

<sup>199</sup> European Commission, *Concept Paper: Investment in TTIP and Beyond – The Path for Reform, Enhancing the Right to Regulate and Moving from Current Ad Hoc Arbitration towards an Investment Court* (2015); A. Reinisch, 'The EU and Investor-State Dispute Settlement: WTO Litigators Going "Investor-State Arbitration" and Back to a Permanent "Investment Court"', in M. Bungenberg et al. (eds.), *European Year Book of International Economic Law* (2017), at 261.



that ISDS provisions do not fall within the EU's exclusive competence of the common commercial policy under the Treaty of Lisbon.<sup>200</sup> As the EU shares competence with member states with respect to ISDS, new EU BIAs will be subject to approval by the European Parliament and 28 national parliaments. Although the ruling will likely delay the ratification of the BIA, the approval from both, the EU and member states, reinforces the legitimacy of the Taiwan government and defeats the PRC's claim to represent Taiwan.

Compatible with the EU's ICS scheme, Taiwan's 2018 BIA with India includes an 'Appeals Facility' provision, under which both sides 'may establish an institutional mechanism to develop an appellate body or similar mechanism' for ISDS.<sup>201</sup> ISDS is key to foreign investors. Taiwan faced its first investor-state case in 2017 when Singapore's Surfeit Harvest Investment Holding filed a notice of arbitration to the Permanent Court of Arbitration.<sup>202</sup> The legal basis of the claim is the investment chapter of the Singapore-Taiwan FTA. The fact that Taiwan is addressed as the 'Republic of China (Taiwan)' as the defendant by an international court also illustrates a form of recognition from the IR and legal perspectives.<sup>203</sup> Similar consequences can be derived from the EU-Taiwan BIA because it will encompass the extensive cover of investment, such as shares, stocks and intellectual property rights, the detailed clause on fair and equitable treatment. For European enterprises, including wind power companies that have made significant investments in Taiwan, these provisions and the ICS will provide substantive and procedural guarantees.

Third, the provisions that require both parties to recognize the arbitral awards rendered under the BIA are critical to both the EU and Taiwan. In other words, while the conventional state-centric system establishes different treatment for states without recognition, economic agreements may overcome non-recognition by according rights under international treaties to them. Neither Taiwan nor the EU are parties to the ICSID Convention, which stipulates that awards based on the Convention should be binding and enforced 'as if it were a final judgment of a court in that State'.<sup>204</sup> Importantly, the enforcement of awards provisions in the EU's investment protection agreements with Singapore and Vietnam contain comparable obligations.<sup>205</sup> The inclusion of these provisions in the EU-Taiwan BIA will effectively address the enforcement issues due to Taiwan's inability to accede to the ICSID Convention. The provisions also affirm the authority of courts, and thus, buttress the argument that the BIA magnifies the degree of recognition in domestic and international laws.

Lastly, the institutional provisions of the BIA will mandate that the EU and Taiwan establish a joint committee to implement investment co-operation and conduct periodic reviews. Other than the implications for sovereign equality, these mechanisms can yield a constructive psychological effect for recognizing the prestige of contracting parties. It can be expected that the BIA will invigorate a wider scope of ministerial-level interactions irrespective of a policy of non-recognition. The European companies have requested to further expand the business scope of e-

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<sup>200</sup> See generally Opinion 2/15 of the Court (2017), available at [curia.europa.eu/juris/document/document.jsf?text=&docid=190727&doclang=EN](http://curia.europa.eu/juris/document/document.jsf?text=&docid=190727&doclang=EN); Reinisch, *supra* note 199, at 251–2; D. Kleimann and G. Kübek, 'The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU: The Case of CETA and Opinion 2/15', (2018) 45(1) *Legal Issues of Economic Integration* 13, at 38–42.

<sup>201</sup> Bilateral Investment Agreement between the Taipei Economic and Cultural Center in India and the India Taipei Association in Taipei (2018), Art. 28.

<sup>202</sup> C. Lo, 'Surfeit v. Taiwan, A Claim Too Ambitious? An Assessment of Taiwan's First Investment Treaty Case and Its Implications', (2019) 12(1) *Contemporary Asia Arbitration Journal* 73, at 75–9.

<sup>203</sup> *Surfeit Harvest Investment Holding Pte Ltd v. Republic of China (Taiwan)*, PCA, available at [www.italaw.com/cases/5929](http://www.italaw.com/cases/5929).

<sup>204</sup> ICSID Convention (1965), Art. 54(1).

<sup>205</sup> EU-Singapore Investment Protection Agreement (2018), Art. 3.22(2); EU-Vietnam Investment Protection Agreement (2019), Art. 3.57(2).

commerce in Taiwan's insurance industry and enhance regulatory certainty for wind energy development.<sup>206</sup>

The BIA committee will be capable of dealing with these requests from the private sectors. It will also be a point of contact for governments. In the long term, the BIA committee meetings will cover more comprehensive matters and involve additional government agencies than the current bilateral 'Economic and Trade Consultation' meetings. Moreover, the EU-Taiwan BIA helps provide a framework agreement modeled on those concluded between the EU and Canada and Korea, therefore, consolidating the consensus for a full-fledged FTA. These expected developments reinforce recognition as a gradual process with effects in domestic and international laws.

## 5. Conclusion

The article examined EU-Taiwan relations with the focus on political and legal issues surrounding the BIA as a unique case study in international law and IR. It argued that notwithstanding the oneChina policy, the EU has accorded diverse forms of recognition to Taiwan since the 1980s. Furthermore, as illustrated by the BIA, bilateral instruments will buttress the process of recognition premised on identity construction and status claims in IR. Such recognition also creates legal effects at the domestic and international levels. From a theoretical perspective, the article explained the IR concepts of recognition and non-recognition and their impact on the legal and policy implementation. By deciphering the EU practice of promoting engagement in line with a policy of non-recognition, the empirical research shed light on European states' pragmatic approach to Taiwan and the policy directions of key EU institutions. In particular, the initiation of bilateral consultations and interactions under the WTO framework have prompted the EU to recognize Taiwan as a separate customs territory and as an economic and commercial entity in international affairs.

The Treaty of Lisbon gave an extra impetus to the EU as a global actor, particularly in the field of foreign and security policy, and negotiations of trade and investment agreements. Motivated by the mandates from the European Parliament, the European Commission first indicated its plan to explore a BIA with Taiwan in the 2015 'Trade for All' policy paper that highlights the EU's trade and investment strategy toward the Asia-Pacific. The progress is also intertwined with the EU's BIA negotiations with China and the shifting position to perceive China as a systemic rival. Moreover, the structure of the prospective EU-Taiwan BIA is expected to be modeled after the EU's recent investment protection agreements with Singapore and Vietnam. The detailed ICS provisions and the co-operative mechanism will notably enhance investment relations and galvanize additional degrees of recognition. Hence, the analysis of the EU-Taiwan BIA enriched the understanding of the recognition theory from the IR and legal perspectives, as well as the EU's contemporary trade and investment strategy towards the Asia-Pacific.

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<sup>206</sup> European Chamber of Commerce, 2018 Position Papers: Clearing the Hurdles to Economic Progress (2018), at 16–44. Cite this article: Hsieh PL (2020). Rethinking non-recognition: The EU's Investment Agreement with Taiwan under the One China Policy. *Leiden Journal of International Law* 33, 689–712. <https://doi.org/10.1017/S0922156520000291>