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The Legal Status of Three Sino–US Joint Communiqués

Jerry Z. Li*

Abstract

Many would agree that the Sino–US relations are one of the most important bilateral relations in the world today, and the three communiqués signed by the two governments are the most significant agreements signed so far in managing their relationship. This article attempts to examine these joint communiqués against their contents and historical backgrounds, and tries to discern their legal status under both international law and US domestic law. It concludes that they bear features of treaties under international law and should be regarded as legally binding instruments on the international plane, and that their status under US law seems ambiguous in the absence of any court rulings up to date.

I. Introduction

More than 34 years have passed since the signing of the first Sino–US joint communiqué, the Shanghai Communiqué. In February 1972, US President Richard Nixon's historic visit to China ended the long-time hostility between the two countries, established high-level official contacts, and moved their relationship from confrontation towards collaboration in various areas. Over the subsequent years, however, the Sino–US relations have experienced cycles of progress and stalemate, crises and consolidation. The Shanghai Communiqué issued on 27 February 1971,[1] together with the Joint Communiqué on the Establishment of Diplomatic Relations on 15 December 1978[2] (hereinafter referred to as "the 1978 Communiqué") and the Joint Communiqué on 17 August 1982 on US Arms Sales to Taiwan[3] (hereinafter referred to as "the 1982 Communiqué"), has, to a great extent, provided the basic framework for the bilateral relations. To the Chinese, these communiqués are not just the foundations of the bilateral relationship, but, more importantly, constitute the US

* Attorney-at-Law in China, advising on international business transactions and mergers and acquisitions, as well as on international and China-specific public law issues (email: jerryz_li2000@126.com).

1 Full text, 66 Dept of St. Bull. No. 1708, 435 (20 March 1972).

2 Full text, 79 Dept of St. Bull. No. 2022, 25 (January 1979).

3 Full text, 82 Dept of St. Bull. No. 2067, 20 (October 1982).

commitments to the one-China policy and its position on the question of Taiwan. That is why the Chinese government reiterates the principles stipulated in these communiqués whenever incidents relating to the question of Taiwan occur. For instance, the three communiqués, especially the 1982 Communiqué, drew wide attention once again in the incident of 2001 where Taiwan planned to purchase advanced weapons from the USA, including destroyers carrying Aegis radar systems.[4] It was then reported that the Chinese side thought that such arms sales would be "a grave violation" of the 1982 Communiqué, which limits the US arms sales to Taiwan,[5] even thought it is seen as "a pledge no American administration has met".[6] From the ups and downs of the Sino–US relations during the past decades, it is obvious that the Taiwan question has been the major concern to both China and the USA, and presumably it will remain so in the years to come. As John K. Fairbank[7] correctly pointed out decades ago, Taiwan is the key to America's China policy in general. His view was echoed by the former Chinese President, Jiang Zemin, who added a warning that "mistakes on this issue could be costly for Washington, Beijing or Taipei".[8]

Regardless of their formalities, these communiqués are bilateral agreements between the two governments. Questions have been raised as to their legal status internationally. The Chinese side always treats them as "treaties", and has compiled them in its official treaty collections. It insists that the US government shall abide by them in the bilateral relations in general and the Taiwan question in particular. In contrast, the US government has repeatedly denied that these instruments have any legally binding force, and regarded them simply as political commitments outlining its future policies in the areas stipulated therein. In international law treatises in China, joint communiqués are normally defined as "international agreements announced after conclusions of bilateral or multilateral negotiations, which cover rights and obligations between parties concerned, such as the Sino–US joint communiqués."[9] Undoubtedly, it is a difficult task to judge the legal nature of international agreements in many cases,[10] but it is necessary to do so when there are disagreements or disputes over their legal characters. The purpose of this article is to examine these joint communiqués against their contents and historical backgrounds and tries to discern their legal status under both international law and the US domestic law.

4 Jane Perlez, White House Reveals Plans for New Taiwan Arms Sales, NY Times, 17 March 2001, at A3.

5 Paul E. Steiger, China Warns U.S. Against Arms Sale to Taiwan, Wall St. J. 21 March 2001, at A14; Mike Allen and Steven Mufson, U.S. No Threat to China, Bush Assures Official, Wash. Post, 23 March 2001, at A20; Stephen Fidler, Bush Positive on China Links, Fin. Times, 23 March 2001, at 8.

6 John Pomfret, Jiang Has Caution for U.S., Wash. Post, 24 March 2001, at A1.

7 John K. Fairbank, China: The People's Middle Kingdom and the U.S.A. 55 (1967).

8 Pomfret, supra note 6.

9 Zhu Qiwu, ZHONGGUO GUOJIFA DE LILUN YU SHIJIAN (International Law—Theory and Practice in China) 368 (Law Press, China, 1998); Cf. Wang Xianshu, GUOJIFA (International Law) 344–45 (China University of Political Science and Law Press, 1999); Zhao Jianwen, GUOJIFA XINLUN (New Theories of International Law) 409–10 (Law Press, China, 2000); Mu Yaping et al., DANGDAI GUOJIFA LUN (Modern International Law) 474 (Law Press, China, 1998).

10 Executive Agreements, 1976 DIGEST, at 264.

The Shanghai Communiqué, which consists of important statements of policy, still remains to be the bedrock of Sino–US understandings on the Taiwan issue today. The document identified the common interests of the two countries as opposing Soviet expansion in Asia, reducing the prospects of bilateral military confrontation, and expanding Sino–US economic and cultural relations. On the question of Taiwan, the USA implicitly abandoned its previous position held since 1950 that the status of Taiwan remained "undetermined", as recognized by the Chinese side in the Communiqué. Instead, the Americans declared: in the communique: "[T]he United States acknowledges that all Chinese on either side of the Taiwan Strait main- Q1 tain there is but one China and that Taiwan is part of China. The United States Government does not challenge that position". It also affirmed that its "ultimate objective" was the complete withdrawal of all American military forces from Taiwan, and that this goal could be realized if there were a peaceful settlement of the Taiwan issue by the Chinese themselves. In spite of the fact that both governments simply agreed to disagree by setting forth their respective positions without any attempt at compromise in a section of the communiqué regarding Taiwan, their differences on this issue became narrower. In addition, both parties agreed to some principles and that some actions be taken in conducting their future relations.

Later, both China and the USA used the Shanghai Communiqué as a platform for their bilateral relations. Based on the communiqué, China demanded further concessions from the USA over the Taiwan issue by setting three conditions for the normalization of its relations with the USA, as it did to Japan, which also had a complex relations with Taiwan at the time of normalization of its relationship with China: (1) termination of official US relations with Taiwan; (2) termination of the 1954 US–ROC Mutual Defense Treaty; and (3) withdrawal of American troops and military installations from Taiwan. After years of discussions and formal negotiations, a joint communiqué on the establishment of diplomatic relations was released on 15 December 1978. In it, the USA declared: "[The U.S.] recognizes the government of the People's Republic of China as the sole legal Government of China. Within this context, the people of the United States will maintain cultural, commercial, and other unofficial relations with the people of Taiwan". It further clarified, "The Government of the United States of America acknowledges the Chinese position that there is but one China and Taiwan is part of China". Thus, the Chinese thought that their preconditions set forth for the normalization had been fully satisfied.

However, after the establishment of the diplomatic relations, the USA continued to sell advanced weapons to Taiwan pursuant to its domestic law, Taiwan Relations Act of 1979 (hereinafter referred to as "the TRA"). The Chinese complained that the US arms sales were incompatible with the principles as outlined in the 1978 Communiqué. As a result, a series of serious bilateral negotiations of a new joint position on US arms sales to Taiwan led to the announcement of the 1982 Communiqué, in which the USA reaffirmed its acceptance of the principles of the 1979 normalization agreement that the PRC government was the sole legal government of China. It also acknowledged the Chinese view again that there was but one China and that Taiwan was part of China. Furthermore, the USA, after emphasizing the importance that it attached to Sino–US relations, reiterated that "it

has no intention of infringing on Chinese sovereignty and territorial integrity, or interfering in China's internal affairs, or pursuing a policy of 'two Chinas' or 'one China, one Taiwan' ''. The USA additionally said that it ''understands and appreciates'' China's fundamental policy of ''striving for a peaceful resolution of the Taiwan question''. Because of China's peaceful reunification policy, the USA noted that a ''new situation . . . has emerged with regard to the Taiwan question'', which created an environment in which the arms sales issue could be resolved. Thus, by linking arms sales to the level of Chinese military threat to Taiwan, the USA obligates itself to reduce weapons sales as long as China pursues peaceful reunification pursuant to the communiqué.

II. Legal status under international law

To discern the legal status of the three Sino–US joint communiqués under international law, we first turn to the Vienna Convention on the Law of Treaties, to which China is a party. Although the USA is not a party to the Vienna Convention, the US Department of State recognizes the Vienna Convention as ''the authoritative guide to current treaty law and practice''.[11] In addition, the Restatement (Third) of the Foreign Relations Law of the United States (hereinafter referred to as ''the Restatement'') ''accepts the Vienna Convention as, in general, constituting a codification of the customary international law governing international agreements''.[12] Similarly, the International Court of Justice (ICJ) has repeatedly held that the Vienna Convention ''may in many respects be considered as a codification of existing customary law on the subject''.[13]

Under the Vienna Convention, a treaty is defined as ''an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation''.[14] Since the Vienna Convention leaves ''international agreement'' undefined, commentators believe that it is almost impossible to actually define a treaty in a comprehensive manner according to the past experience in international law of treaties.[15] In the USA, criteria have been developed in deciding whether instruments are international agreements in the US sense. The criteria include form, identity and intention of the parties, significance of the arrangement, specificity, necessity for two or more parties, etc.[16] In our discussion here, we will attempt to cover all these key criteria, and expand a bit further to serve the purpose of our analysis.

11 S. Exec. Doc. L., 92nd Cong., First Session, at 1 (1971).

12 Restatement (Third) of Foreign Relations Law Part III, Introductory Note (1987).

13 See H.W.A. Thirlway, The Law and Procedure of the International Court of Justice, 1960–1989 (Part Three), 1991 Brit. Y.B. Intl L. 1, 3.

14 Vienna Convention on the Law of Treaties, 23 May 1969, Article 2 (1) (a), 63 Am. J. Intl L. 875, 876 (1969).

15 Jan Klabbers, The Concept of Treaty in International Law 8 (1996).

16 22 C.F.R. Section 181.2 (1995).

II.A. Forms and formalities

Under the Vienna Convention, the nomenclature of an instrument is not decisive in determining whether an instrument is a treaty or not. A treaty can bear different names as long as it is an international agreement contemplated by the parties concerned as legally binding. According to the Restatement, all agreements, whatever their designation, have the same legal status, except as their provisions or the circumstances of their conclusion indicate otherwise.[17] That is to say that international juridical effect of a treaty does not depend on the name given to the instrument.[18] Although the form of "joint communiqué" is not listed as one of the treaty forms in either the Vienna Convention or the Restatement, it does not necessarily mean that bilateral written instruments by the name of "joint communiqués" are completely excluded from treaty type of agreements under international law of treaties. In fact, although treaty registration pursuant to Article 102 of the UN Charter is not dispositive on the legal nature of international agreements, among those registered with the UN, agreements in the name of "communiqué" could be found in the first decade of the UN history.[19]

Although differences in form seem to be legally irrelevant, states, through their traditions and practice, have developed a preference for using certain terms for certain types of agreements.[20] In practice, among treaties and other legally binding international agreements to which China is a party, the form of "joint communiqués" is widely and consistently used. Between 1966 and 1973 alone, 60 joint communiqués were issued between China and other countries,[21] and most of them were duly signed,[22] showing China's consistent treaty practice in ascribing to communiqués a consensual character approximating the status of treaties to be legally binding on the parties concerned.[23] In addition, the Chinese government has taken instruments like unilateral declarations as being legally binding under international law. With respect to use of the form of joint communiqués with the USA, it seems that China purported to avoid a situation where the USA did not recognize unilateral declarations as legally binding international agreements,[24] because the "agreed announcement" issued by China and the USA in 1955 on the question of return of each other's civilians was denied by the USA as a treaty while China insisted on its legally binding nature. As a result, in its statement on 13 September 1960, China says, "To prevent the U.S. side from again violating the agreement, the Chinese side must take

17 Restatement, supra note 12, Section 301 cmt. a.

18 Hungdah Chiu, The People's Republic of China and the Law of Treaties 14 (1972).

19 Denys P. Myers, The Names and Scope of Treaties, 51 Am. J. Intl L. 574, 576 (1957).

20 H. Booysen, A Survey of Legal Relations Flowing from State Agreements, 1984 S. Afr. Y.B. Intl L. 56, 69; Juris A. Lejnnieks, The Nomenclature of Treaties: A Quantitative Analysis, 2 Tex. Intl L.F. 175, 176 (1966).

21 Hungdah Chiu, Agreements of the People's Republic of China: A Calendar of Events, 1966–1980 227 (1981).

22 Takakazu Kuriyama, Some Legal Aspects of the Japan–China Joint Communiqué, 1973 Japanese Ann. of Intl L. 42, 50.

23 James Chieh Hsiung, Law and Policy in China's Foreign Relations 178 (1972).

24 Wang Tieya, WANGTIEYA WENXUAN (Selected Works of Wang Tieya) 377 (Deng Zhenglai ed., China University of Political Science and Law Press, 1993).

the form of joint announcements of both sides, and no longer take that of statements issued by two sides separately".[25]

On the other hand, the US government also holds the same position as the Vienna Convention with respect to treaty forms. Its internal governmental regulation on international agreements provides that "if, however, the general content and context reveal an intention to enter into a legally binding relationship, a departure from customary form will not preclude the arrangement from being an international agreement. Moreover, the title of the agreement will not be determinative".[26] In *Weinberger v. Rossi*, 456 US 25, 29 (1982), the US Supreme Court held, "Under principles of international law, the word [treaty] ordinarily refers to an international agreement between sovereigns, regardless of the manner in which the agreement was brought into force". Accordingly, as one commentator notes, the USA appears to regard some memorandums of understanding as treaties, particularly in its inter-agency undertakings with foreign countries, while some states would consistently consider these agreements under the name of "memorandum of understanding" non-legally binding instruments in their treaty practices. This demonstrates, as the commentator concludes, the US practice is less consistent than it proclaims, and this results in some instruments bearing indeterminate status.[27] For instance, in the past four decades, the USA and the UK have entered into a great number of bilateral memorandums of understanding in the defense sectors alone, many of which were even registered with the UN.[28] In this regard, it is not surprising to see that the Shanghai Communiqué appeared later in the USA bearing the title of "Joint Statement".[29]

As the ICJ indicated in its consideration of the legality of a "joint communiqué" in the case brought by Greece against Turkey in 1978 concerning the delimitation of the continental shelf of the Aegean Sea, the Court opined that neither the form nor name of a document was decisive of its legal or non-legal character by stating, "it knows of no rule of international law which might preclude a joint communiqué from constituting an international agreement to submit a dispute to arbitration or judicial settlement".[30] Some commentators recognize from practice and the ICJ decisions that even some unilateral declarations can be legally binding international agreements under certain circumstances.[31] Hence, it is quite certain that "the form in which treaties are concluded does not in any way affect their legally binding force".[32]

In fact, State practice in treaty terminology is not widespread and far from unambiguous, therefore "whatever its particular disposition" under the Vienna Convention should be

25 Chiu, supra note 18, at 19–21.

26 22 C.F.R. Section 181.2(a)(5) (1995).

27 Anthony Aust, Modern Treaty Law and Practice 33 (2000).

28 John H. McNeill, International Agreements: Recent US–UK Practice Concerning the Memorandum of Understanding, 88 Am. J. Intl L. 821, 821–22 (1994).

29 Pub. Papers, 376 (27 February, 1972).

30 Aegean Sea Continental Shelf (Greece v. Turkey), 1978 ICJ 3.

31 Michael J. Glennon, The Senate Role in Treaty Ratification, 77 Am. J. Intl L. 257, 267–68 (1983).

32 Chiu, supra note 18, at 16.

construed to cover the broadest sense of international agreements without a blunt exclusion of "joint communiqués". Chinese international law scholars commonly also take the position that "international law does not strictly require treaties to be in certain forms; therefore any forms that clearly show what parties agree to should be accepted as treaties or legally binding international agreements".[33] Likewise, as Lord McNair states in his authoritative treatise, "International law itself prescribes neither form nor procedure for the making of international engagement, though the constitutional law of certain States frequently prescribes both. . . . [Therefore], [w]ritten declarations, either joint or separate, can constitute a valid agreement".[34] Some writers are of the opinion that treaties may be "expressed in detailed phraseology or they may be effected by exchange of notes or joint communiqués".[35] Thus, for our purpose here, it seems correct to conclude that the form of "joint communiqués" alone cannot be used to decide whether the three Sino–US agreements are legally binding international agreements.

On the other hand, it is well acknowledged that international agreements may be formal or informal, and so far "there is no legal distinction between formal and informal engagements".[36] Informal agreements can be legally binding international agreements as treaties in the formal sense,[37] and as a result, some articles, such as date of entry into force, termination and signatures, which are normally contained in treaties, can become insignificant in deciding the legality of an international agreement. In the *Aegean Sea Continental Shelf* case mentioned above, the lack of these articles certainly did not influence the ICJ to discern the legal character of the joint communiqué. In the *Maritime Delimitation and Territorial Questions* case, the ministerial minutes clearly did not contain those formal articles, however, they "constitute an international agreement creating rights and obligations for the Parties," as the ICJ concludes.[38]

With respect to formalities, treaties may be expressed in written documents or may not even be recorded at all. Some writers even go further to think that treaties can be made "practically anywhere at any time and in any form".[39] Having observed the development of more uses of informal agreements as treaties, one writer stated 30 years ago:

> "State practice has consistently evolved towards the acceptance of agreements in simplified form as treaties, and no legal distinction is drawn between them on the international plane. This development can be attributed to the general increase in international intercourse and the rapid universal development of international

33 Zhou Gengsheng, ZHOUGENGSHENG GUOJIFA LUNWENXUAN (Selected Works of ZHOU GENGZHENG on International Law) 113 (Wang Tieya and Zhou Zhonghai eds, Haitian Publishing House, China, 1999); Cf. Duanmu Zheng et al., GUOJIFA (International Law) 297 (Duanmu Zheng ed., Beijing University Press, China, 2nd edn., 1997).

34 Lord McNair, The Law of Treaties, 6–7, 10 (1961).

35 Amy M. Gilbert, Executive Agreements and Treaties, 1946–1973, 2 (1973).

36 Fuad S. Hamzeh, Agreements in Simplified Form—Modern Perspective, 1968–1969 Brit. Y.B. Intl L. 179, 185.

37 McNair, supra note 34, at 10–15.

38 Maritime Delimitation and Territorial Questions (Qatar v. Bahrain), 1994 ICJ, at 122.

39 K.I. Igweike, The Definition and Scope of "Treaty" under International Law, 28 India J. Intl L. 249 (1988).

> contacts, where speed and informality become of the utmost importance. It also arose from the necessity of alleviating the tedious and long-drawn constitutional procedures which hamper the prompt disposition of matters of considerable importance and of considerable political moments or of urgent character".[40]

He also pointed out that it was regarded as a well established rule that "agreements in simplified form are internationally just as valid as formal treaties. . . . [These simplified treaty forms] may deal with political acts of the utmost importance and they can no longer be considered as restricted to matters of secondary or minor importance. The decisive factor in ascertaining their legal nature is, [therefore], not their description".[41]

II.B. Consent and Intention

The key criterion, under the Vienna Convention, for distinguishing a treaty from non-legally binding instruments seems to be the consent of the parties to be bound by the agreement.[42] In practice, the criteria employed by the USA in deciding parties' intention provide that "[t]he parties must intend their undertaking to be legally binding, and not merely political or personal, effect. . . . In the absence of any provision in the arrangement with respect to governing law, it will be presumed to be governed by international law".[43] China also has long looked to the consensual intent rather than the specific modality or form of an agreement as the source of binding force of international agreements of various sorts.[44] In this regard, it seems that both countries use a very similar criterion. Some commentators also agree to the opinion that the phrase "governed by international law" in Article 2 (1)(a) of the Vienna Convention is explained to embrace the element of intention to create obligations under international law.[45] Oscar Schachter thinks that documents in the form of communiqués should be subject to the test of intent, and where the evidence indicates that they are meant to be legally binding, they should be treated as such.[46] That is to say, while determining whether an instrument is a legally binding international agreement, inferences as to such intent have to be drawn from the language of the instrument and the attendant circumstances of its conclusion and adoption.[47]

However, although acknowledging the importance of expression of intent for treaty making, we need to admit that the expression of intent itself is sometimes hard to be demonstrated or ascertained. In practice, "whether [the parties'] intention should relate to the creation of rights and/or obligations . . . or to establishment of a relationship or production of

40 Hamzeh, supra note 36, at 180.

41 Ibid., at 185–186.

42 Vienna Convention, Article 11, supra note 14, at 878.

43 22 C.F.R. Section 181.2(a)(1).

44 Hsiung, supra note 23, at 233.

45 Aust, supra note 27, at 17; 1 D.P. O'Connel, International Law 195 (2nd edn., 1970).

46 Oscar Schachter, International Law in Theory and Practice 98 (1991).

47 Oscar Schachter, The Twilight Existence of Nonbinding International Agreement, 71 Am. J. Intl L. 296, 297 (1977).

effects in law is not easy to say".[48] And at the same time, there are situations where not all international legal rights and obligations are intentionally created. International law may be created in many ways, some of which may not be traced back to an original intention of the parties to be legally bound by their commitments, and therefore "sometimes states may find themselves confronted with, quite literally, unintended consequences of their behaviors".[49] In this connection, we would agree that, without exaggerating or undermining the importance of expression of intent, it does play an important role in determining the legal status of an international instrument, but expression of intent alone should not always be considered to be decisive in distinguishing legally binding or non-binding international agreements.[50] Therefore, in addition to the factor of expression of intent, we need to examine other aspects of treaty-making, such as the seriousness of both parties to negotiate and conclude agreements, the significance to the parties, languages and terms of the instruments, and contexts of the documents, so as to find out whether there is consent to be bound or expression of intent to be bound thereby. In the ICJ's decision in the *Aegean Continental Shelf* case, the Court thought that it was necessary to conduct an analysis of the terms of the communiqué and the relevant circumstances surrounding it, rather from what the parties said afterwards was their intention.[51] In its decision in the *Qatar v. Bahrain* case in 1994, the ICJ applied the same criterion and decided that the form of ministerial minutes was irrelevant when the content thereof showed that the parties intended to be bound by it.[52] As one commentator correctly says, the only way to distinguish between treaties and non-treaty instruments is "to gauge the document by the characteristics inherent in a treaty".[53]

With respect to the three Sino–US joint communiqués, consent can be found to create rights and obligations of mutual cooperation in international relations in general and in the Taiwan question in particular. As Hungdah Chiu observed, in the years thereafter, both parties have stated repeatedly that their relations would be governed by the three joint communiqués, and therefore, despite the existence of the TRA, its implementation is severely restricted by the communiqués.[54] The instruments would not have played such an important role in the Sino–US relations if they were "only an expression of coinciding perspectives and policy intentions between two government leaders".[55] It is true that the whole idea of consent serves very powerful evidence that what parties have agreed is binding upon them.[56] If there were no "consent of a State to be bound by a treaty",[57]

48 Kelvin Widdows, What Is An Agreement in International Law?, 1979 Brit. Y.B. Intl L. 117, 121.

49 Klabbers, supra note 15, at 89.

50 Ibid., at 246.

51 Aegean Sea Continental Shelf, 1978 ICJ 3.

52 Maritime Delimitation and Territorial Questions, 1994 ICJ 112.

53 Myers, supra note 19, at 597.

54 Hungdah Chiu, Legal and Political Considerations in U.S.–ROC Relations, in U.S.–Taiwan Relations: Economic and Strategic Dimensions 43–44 (1985).

55 Robert L. Downen, To Bridge the Taiwan Strait 38 (1984).

56 John K. Setear, An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law, 37 Harv. Intl L.J. 139, 159 (1996).

there would be no need for both governments to negotiate and issue joint communiqués in addition to their unilateral statements thereafter. In fact, the purpose of Article 11 of the Vienna Convention could be seen "to cover cases where the parties had agreed to means of showing consent other than the orthodox ones such as signature, ratification and so on".[58] Therefore, "the necessity to show consent manifested by one of the methods cited was never mandatory" under Article 11[59] as long as there is "some positive indication of consent".[60] In order to discern the legal nature of the Sino–US joint communiqués, we need to further look into not only the "terms" but also the "relevant circumstances" surrounding them and their executions.

II.C. Circumstances of conclusion: negotiations, contents and significance

"The negotiation of agreements between States is as a rule a rather formal matter".[61] History has witnessed that all these Sino–US communiqués resulted from lengthy and difficult discussions and negotiations with direct involvements of Heads of States of both countries. In this connection, we would agree that there was consensus *ad idem*, and that the agreements reached reflected the joint wishes of the concerned parties.[62] In the case of the Shanghai Communiqué, for instance, notwithstanding the language therein, Ronald L. Ziegler, Press Secretary of the US President, disclosed that "the communiqué reflects 30 hours formal discussions" during their one-week visit to China.[63] It was after this long and intense negotiation process of give-and-take between the Chinese Premier and US President that the skillfully drafted Shanghai Communiqué came into being, which set an entirely new framework for,[64] and "served as the basic charter of the Sino–American relationship".[65] Initially, as Henry Kissinger said, two parties expected "an outcome in the conventional sense in which both sides tend to state general positions which they afterwards choose to interpret, each in their own way. ... [But] such an approach would make no sense. It would not be worthy of the purpose that were attempted to be served".[66] Therefore, because the leaders of both sides "found it beneficial to have this opportunity ... to present candidly to one another their views on a variety of issues" after their "reviewing the international situation in which important changes and great upheavals are taking place", as the Communiqué itself explains, they "expounded their respective positions and

57 Vienna Convention, Article 11, supra note 42.

58 Kelvin Widdows, On the Form and Distinctive Nature of International Agreements, 1981 Austl. Y.B. Intl L. 114, 116.

59 Ibid., at 117.

60 Ibid., at 120.

61 Detlev F. Vagts, Treaty Interpretation and New American Way of Law Reading, 4 Eur. J. Intl L. 472, 476 (1993).

62 Widdows, supra note 48, at 119.

63 Statement by Mr Ziegler, Shanghai, 27, February 1972, supra note 1, at 431.

64 Kuo-kang Shao, Zhou Enlai and the Foundations of Chinese Foreign Policy 206–07 (1996).

65 Charles W. Freeman, Jr, The Process of Rapprochement: Achievements and Problems, in Sino–American Normalization and Its Policy Implications 10 (Gene T. Hsiao and Michael Witunski eds, 1983).

66 News Conference of Dr Kissinger and Mr Green, Shanghai, 27 February, 1972, supra note 1, at 426.

attitudes by issuing this joint communiqué". In addition to stating their respective positions and attitudes, the two sides stated jointly their agreements on their bilateral relations and regional security by agreeing to a series of principles in international relations, and were "prepared to apply these principles to their mutual relations". As a result, Kissinger admitted, "Obviously neither side would have written this communiqué this way if it had been able to draft it entirely by itself".[67]

It is also widely known that during treaty negotiations, "language requires careful examination. Parties may agree, declare, undertake, recognize abstract or concrete propositions in a treaty, and may do these jointly, reciprocally or unilaterally".[68] In the Shanghai Communiqué, terms, such as "should", "affirm", "reaffirm", "undertake", "believe" and "agree" were used. As Ziegler said, "[t]his communiqué reflects the position of the United States and the People's Republic of China on various bilateral and international issues which were discussed during President Nixon's visit".[69] In the President's words himself as he toasted in Shanghai, "Our communiqué indicates, as it should, some areas of differences. It also indicates some areas of agreement".[70] Furthermore, in his remarks at Andrews Air Force upon his return to the US, President Nixon summarized what the two parties had agreed:

> "We made some necessary and important beginnings, however, in several areas. We entered into agreements to expand cultural, educational, and journalistic contacts between the Chinese and the American people. We agreed to work to begin and broaden trade between our two countries. We have agreed that the communications that have now been established between our governments will be strengthened and expanded.
>
> Most important, we have agreed on some rules of international conduct which will reduce the risk of confrontation and war in Asia and in the Pacific.
>
> We agreed that we are opposed to domination of the Pacific area by any one power.
>
> We agreed that international disputes should be settled without the use of the threat of force and we agreed that we are prepared to apply this principle to our mutual relations.
>
> . . .
>
> We have agreed that we will not negotiate the fate of other nations behind their backs. . .".[71]

Moreover, in a paragraph that both parties agreed to, the language used, such as peaceful co-existence, non-aggression, etc., is even surprisingly consistent with other Chinese documents addressing the five principles of peaceful coexistence that China proposed to guide

67 Ibid., at 427.

68 Myers, supra note 19, at 580.

69 Supra note 63.

70 Banquet Honoring President Nixon, Shanghai, 27 February 1972, supra note 1, at 433.

71 Remarks by President Nixon, 28 February, 1972, ibid., at 434–35.

inter-state relations. As one commentator acknowledges, the Shanghai Communiqué is a presidential executive agreement in the US sense, and each side states its points of view in one part and then both state what they agreed upon in the other.[72] Some observers therefore think that the Americans' willingness to accept such wording is one indication of the sincerity of their intentions in participating in drafting the communiqué.[73] Hungdah Chiu also commented that China's great interest in incorporating its five principles of peaceful coexistence in many treaties, joint communiqués and declarations indicates that China places great emphasis on the role of treaties as a source of international law.[74] In the renowned Lauterpacht–Oppenheim international law treatise, it states:

> "A mere general statement of policy and principles cannot be regarded as intended to give rise to a contractual obligation in the strict sense of the word. On the other hand, official statements in the form of Reports of Conferences signed by the Heads of States or Governments and embodying agreements reached therein may, *in proportion* as these agreements incorporate definite rules of conduct, be regarded as legally binding upon the States in question".[75]

In the ninth edition of Oppenheim's International Law, the editors echoed the similar view in this regard by saying:

> "A mere general statement of policy is unlikely to give rise to a contractual obligation in any strict sense, whereas official statements in the form of a report of a conference, signed by the principal representatives and embodying agreed conclusions may be regarded as legally binding on the states in question in so far as the conclusions incorporate definite rules of conduct".[76]

In this connection, it seems reasonable to conclude that "those parts of the Communiqué where there was agreement between the USA and the PRC are legally binding in international law".[77]

In March of 1977, the USA announced the beginning of formal negotiations aiming at normalizing relations between the two nations.[78] As a result of over one year of negotiations, a joint communiqué was issued on 15 December 1978, announcing the establishment of diplomatic relations effective 1 January 1979. After reading the communiqué in full himself in his address to the nation, President Carter described the document as an "historic agreement" that would "enhance the stability of Asia. . . . [And the] positive relations with China can beneficially affect the world in which we live and the world in which our children

72 Gilbert, supra note 35, at 161.

73 Grant F. Rhode and Reid E. Whitlock, Treaties of the People's Republic of China, 1949–1978: An Annotated Compilation, 190, (1980).

74 Chiu, supra note 18, at 3–4.

75 L. Oppenheim, International Law 873 (H. Lauterpacht ed., 8th edn., 1955) (emphasis added).

76 Oppenheim's International Law 1189 (R. Jennings and A. Watts eds, 9th edn., 1992).

77 Hungdah Chiu, Certain Legal Aspects of Recognizing the People's Republic of China 5 (1979).

78 Rhode and Whitlock, supra note 70, at 194.

will live. . . . The normalization of relations between the United States and China has no other purpose than this: the advancement of peace".[79] In his remarks to the reporters after his address to the nation, the President emphasized the significance of the communiqué by saying, "I believe this to be an extremely important moment in the history of our nation".[80] Unlike what they did in the Shanghai Communiqué to state their respective positions in the Taiwan question, the two governments jointly in this new document "emphasized once again" that "[t]he Government of the United states of America acknowledges the Chinese position that there is but one China and Taiwan is part of China", so that, from such language, it is reasonably inferred that "the legal status of Taiwan in the opinions of both countries was seen to be confirmed".[81]

In addition, unlike most of the joint communiqués between China and other countries regarding mutual recognition, the 1978 Communiqué contains not only the subject of recognition, but also agreements on common positions with respect to international security by emphasizing:

> "Both wish to reduce the danger of international military conflict.
> Neither should seek hegemony in the Asia-Pacific region or in any other region of the world and each is opposed to efforts by any other country or group of countries to establish such hegemony.
> Neither is prepared to negotiate on behalf of any third party or to enter into agreements or understandings with the other directed at other states.
> . . .
> Both believe that normalization of Sino–American relations is not only in the interest of the Chinese and American peoples but also contributes to the cause of peace in Asia and the world".

As a result, the US recognition of the PRC automatically denounced its official relations with Taiwan, and meant that its mutual defense treaty with Taiwan would be terminated and American troops totally withdrawn. It is perhaps reasonable to infer that, it is the great significance of the mutual recognition, as President Carter pronounced, that both parties decided to issue this communiqué in addition to their respective statements, which otherwise would suffice the general purpose of such mutual recognition. The two said statements announced by China and the USA, respectively, concerning mainly the Taiwan question could also show the importance of the Taiwan question in the normalization of their relations.[82] Therefore, although recognition is sometimes seen as "a confusing mixture of politics, international law and municipal law", and states are more influenced by political than legal considerations at the time of granting or withholding recognition, their acts do bear legal consequences.[83]

79 President Carter's Address, 15 December 1978, supra note 2.

80 President Carter's Remarks, 15 December 1978, ibid., at 25–26.

81 Chen Tiqiang, GUOJIFA LUNWENJI (Selected Works on International Law) 278 (Law Press, China, 1985).

82 Rhode and Whitlock, supra note 73, at 201–204.

83 Peter Malanczuk, Akehurst's Modern Introduction to International Law 82 (7th rev. edn., 1997).

Consequently, the 1978 Communiqué started to perform a key role to the Sino–US relations after its issuance. It has been frequently referred to by the two countries, especially when their relationship was at its low ebb because of the troubling Taiwan question. In his interview with the Time magazine in March 1981, Secretary of State Alexander M. Haig, Jr sought to clarify the new Reagan administration's China policy by saying, "[The President] visualizes continued efforts to normalize our relationship with the People's Republic. That is a fundamental strategic reality and a strategic imperative. It is of overriding importance to international stability and world peace. He also visualizes adherence to the [joint] communiqué associated with the normalization agreement with Peking. And he visualizes a non-official status with the people of Taiwan ...".[84] Again, in his letter to Deng Xiaoping, President Reagan promised, "The United States firmly adheres to the positions agreed upon in the Joint Communiqué on the establishment of diplomatic relations between the United States and China. There is only one China. We will not permit the unofficial relations between the American people and the people of Taiwan to weaken our commitment to this principle".[85]

Like the 1978 Communiqué, the1982 one was a product of long-time negotiations with direct involvements of President Reagan and Premier Zhao Ziyang, Secretary of State Haig and Foreign Minister Huang Hua. It is quite true that many of the executive agreements between the USA and other countries were simply protocols of extension or amendment of previous agreements.[86] The 1982 Communiqué indeed signifies this extension. In it, both sides reaffirmed the principles and agreements of the two previous communiqués, and "emphatically state that these principles continue to govern all aspects of their relations". In addition, the US Government explicitly states that "it does not seek to carry out a long-term policy of arms sales to Taiwan, ... and that it intends to reduce gradually its sales of arms to Taiwan, leading over a period of time to a final resolution. In so stating, the United States acknowledges China's consistent position regarding the thorough settlement of this issue". The communiqué therefore posed restrictions on the US arms sales to Taiwan, and thereby created an obligation for the USA to reduce its arms sales. As a result, from the US point of view, it is quite true to say that by avoiding getting into the legal argument of whether the TRA or the 1982 Communiqué takes precedence in international law, the USA has successfully managed to use both of them to govern its relations with Taiwan.[87] Therefore, because of the USA's new commitments with respect to its arms sales to Taiwan, any design for future arms sales to Taiwan "would, of course, be required to justify such a sale under the terms of the August 17, 1982 Joint Communiqué".[88]

84 Robert Suro and Gregory Wierzynski, An Interview with Haig, Time, 16 March 1981, at 24.

85 Letter from President Reagan, Appendix 3, China–Taiwan: United States Policy: Hearings Before the House Committee on Foreign Affairs, 97th Cong. 2nd sess. 36 (18 August 1982).

86 Gilbert, supra note 35, at 109.

87 Martin L. Lasater, The Future of U.S.–ROC Relations, supra note 54, at 36.

88 Ibid., at 39.

II.D. Subsequent practice

How the parties behaved later after issuances of these communiqués can also be seen as indications of legally binding force of these documents. Judging from this perspective, as Schachter suggests, "that a State will carry out specified measures in the future—may . . . be construed as a commitment to take the steps contemplated".[89] To be legally relevant, international agreements must in one way or another refer to future behaviour of the parties, and will therefore, in some ways, affect future relations between them.[90] And this is what happened with regards to the Sino–US communiqués.

After the Shanghai Communiqué, the USA did follow its commitments to the extent of working towards recognizing the PRC as the sole legal government of China and Taiwan as part of China, reducing trade restrictions to China, and withdrawing its forces and military installations from Taiwan. And, as agreed, both countries worked together to deter the Soviet Union from its military expansion in Asia, and to facilitate the further development of mutual contacts and exchanges in areas like culture, education and scientific research. In fact, the communiqué had served a strong base for both countries to contact and cooperate in the following years until the diplomatic relations was established in 1979. As one of the key decision makers at the time, President Nixon says, "In the Shanghai Communiqué of 1972, we recognized the fact that both Beijing and Taipei viewed Taiwan as part of China but unequivocally expressed our support for a peaceful settlement of the unification issue. . . . We should not alter the fundamental pillars of our policy".[91] President Ford also realized the significance of the Communiqué in US relations with China, and he expressed that he was committed to upholding the principles of the Shanghai Communiqué and to working to promote Sino–US relations. As the Boston Globe reported on 11 March 1976, President Ford had promised China that the USA would cut its military presence by 50% within the next year to 1100 troops. Also, the Department of State confirmed that on 23 June 1976 the USA removed its six military advisors from Quemoy and Matsu as part of US withdrawal from Taiwan under the terms of the Shanghai Communiqué.[92] On 29 June 1977, US Secretary of State Cyrus Vance summarized the position of the new Carter administration's China policy in a speech, saying, "Our policy toward China will continue to be guided by the principles of the Shanghai Communiqué, and on that basis we shall seek to move toward full normalization of relations. We acknowledge the view expressed in the Shanghai Communiqué that there is but one China".[93] In his address to the nation at the time of announcing the establishment of diplomatic relations, President Carter also mentioned the linkage between the present incident and the previous Shanghai Communiqué by saying that "most of the premises that were spelled

89 Schachter, supra note 46.

90 Klabbers, supra note 15, at 53.

91 Richard Nixon, Seize the Moment: America's Challenge in A One-Superpower World, 181, (1992).

92 Rhode and Whitlock, supra note 73, at 193.

93 77 Dept of St. Bull. No. 1988, 141–42 (1 August 1977).

out in the Shanghai communiqué 6 years ago or more have been implemented now".[94] This is in fact in line with his remarks one day earlier that "[full diplomatic relations with China] is something that we are pursuing in accordance with the Shanghai Communiqué".[95] Thus, later fulfillments of the obligations set forth in the communiqué suggest that both parties took what they had agreed seriously not only in its conclusion but also in its execution.

With respect to the 1978 Communiqué, based on the principle of one-China and the unofficial nature of its relations with Taiwan as set forth in the communiqué, the USA denounced its recognition of Taiwan, terminated the mutual defense treaty, and withdrew all its troops from the island. The USA therefore fulfilled its obligations as the result of its recognition of the PRC as the sole legal government of China. As to the 1982 Communiqué, although someone argued that it "seemed to promise more than would be delivered" by the USA,[96] it is noted that since the issuance of the 1982 Communiqué, US arms sales to Taiwan started to decline progressively by about US $20 million a year from $780 to US $720 million for fiscal year 1987.[97] It was also due to the US commitment in the communiqué to restrict the quality of arms sales to Taiwan that Taiwan and the USA had to agree to use military technology transfer as a partial substitute for arms sales restricted by the communiqué.[98] Taking the US "self-imposed proscriptions embodied in the Joint Communiqué" and its reduction of arms sales to Taiwan into account, it can, perhaps, hardly say that the communiqué just "constitutes little more than an executive pronouncement of intent".[99]

Against this background, it may well be argued that the three Sino–US communiqués outline rights and obligations for both parties to adhere to. The ICJ's decision in the *Case concerning the Right of Passage over Indian Territory* shows that the subsequent practice of the parties may be relevant to the very existence and validity of the earlier treaties in dispute between the parties.[100] Therefore, based on the ICJ decisions, Thirlway stated, "It has been an essential element of the principle of the relevance of subsequent practice as developed in the jurisprudence that the practice is taken as indicative or confirmatory of what the intentions of the parties to the treaty were at the time of its conclusion".[101] As Klabbers concludes, "any agreement which is concluded with an eye to being adhered to is by definition a legally binding agreement. One cannot escape the workings of the law by claiming that it was never meant to be a legal instrument".[102]

94 Supra note 80.

95 President Carter's Interview by Barbara Water of ABC, 14 Weekly Comp. Pres. DoC. 2261 (18 December 1978).

96 Nancy Bernkopf Tucker, China and America: 1947–1991, 70 Foreign Affairs 75, 87 (Winter, 1991/92).

97 Hungdah Chiu, The Taiwan Relations Act and Sino–American Relations, 33 (1990).

98 Ibid., at 28–29.

99 A. James Gregor, U.S. Interests in Northeast Asia and the Security of the Republic of China on Taiwan, supra note 54, at 16.

100 Case concerning the Right of Passage over Indian Territory (Portugal v. India), 1960 ICJ 36–40.

101 Thirlway, supra note 13, at 51.

102 Klabbers, supra note 15, at 249.

II.E. Specificity and political policies

Undoubtedly, there are imprecision and generalities in these communiqués. However, they should not hamper what the two states agreed to in these agreements. In his statement made in 1951, the Chinese Premier regarded the Cairo Declaration, the Yalta Agreement and the Potsdam Agreement as legally binding international agreements,[103] and this also suggests that his government considers agreements outlining general principles, like the cited documents, to have legally binding force as duly consummated treaties do. As Schachter says, "imprecision and generalities are not unknown in treaties of unquestioned legal force. If one were to apply strict requirements of definiteness and specificity to all treaties, many of them would have all or most of their provisions considered as without legal effect".[104] A Chinese scholar gives a similar view in his textbook of 1958 by stating that joint communiqués, like joint declarations in Chinese sense, are seen as documents which usually state or reaffirm general principles regulating international relations or certain norms of international law accepted by the parties as binding upon them, although in some cases a declaration could deal with more specific topics.[105]

Political elements of the Sino–US joint communiqués may not necessarily mean that they are only politically binding commitments and therefore lack legal character. Obviously, the three communiqués placed "far reaching political" importance to the two countries at the time.[106] To the Chinese on the one hand, what they cared most was the Taiwan question in which the USA had been politically and militarily involved for years. On the other hand, the communiqués well served the US strategic interests in resolving difficult regional and international conflicts with cooperation of China. To work with China, the first political question that the US faced was how to treat Taiwan, the most difficult issue between the two governments. As US Senator Edward M. Kennedy commented on the 1978 Communiqué, "Normalization of relations with China is good law and good policy. It is in our interest, in the interest of Chinese on both side of the Taiwan Strait, and in the interest of peace in Asia and the world".[107] From the past state practice in the law of treaties, it can be found that various terms of international agreements may carry differing degrees of political significance to the parties.[108] Since treaties have been traditionally used to denote legal compacts between states of political character,[109] some international agreements may have particular political significance because they shape the character of international society.[110] In fact, it is

103 Chiu, supra note 18, at 54–55.

104 Schachter, supra note 47, at 298.

105 Hsiung, supra note 23, at 235.

106 M.J. Peterson, Recognition of Governments Should Not Be Abolished, 77 Am. J. Intl L. 31, 34 (1983).

107 Edward M. Kennedy, Normal Relations with China: Good Law, Good Policy, 65 A.B.A. J. 194, 197 (February 1979).

108 Klabbers, supra note 15, at 43.

109 J.E.S. Fawcett, The Legal Character of International Agreements, 1953 Brit. Y.B. Intl L. 381, 384–85; John King Gamble, Jr, Multilateral Treaties: The Significance of the Name of the Instrument, 10 Cal. W. Intl L.J. 1, 22 (1980).

110 Louis Henkin, How Nations Behave 19 (2nd edn., 1979).

correct to say that "foreign relations law is a curious blend of politics and law".[111] As Louis Henkin states, "All international law and agreements are political in that they are part of foreign policy and affect political relations between nations. There are, however, laws and agreements whose political character is paramount, in particular those which involve international peace and stability, or the security, integrity, and independence of nations".[112] Thus, political nature of the joint communiqués does not necessarily undermine their legal nature, which is well reflected by what they agreed to therein. Therefore, it can well be argued that "one cannot intend to become politically bound without at the same time also becoming legally bound".[113]

II.F. Registration and publications

It is true that all these Sino–US joint communiqués have not been registered with the UN, although registration of treaties under Article 102 of the UN Charter is a positive obligation. However, this violation does not entail very serious consequences, and publication of treaties in national treaty series is not based on any general international obligation at all.[114] Moreover, neither Article 102 nor the regulations made under it define "treaty" or "international agreement" and do not require that such instruments shall be intended to create legal relations.[115] By the same token, neither Article 102 suggests that non-registered agreements are not legally binding.[116] In fact, states' obligation to register treaties is often ignored mainly due to their lack of concern and carelessness.[117]

With respect to publications, on the China side, these communiqués are all filed and published in Chinese as treaties in its official treaty collections, the *Compilation of Treaties of the People's Republic of China*, in line with its consistent practice in the law of treaties. In the USA, according to an act of the Congress, the *Treaties and Other International Agreements of the United States of America* series is competent evidence of the treaties and international agreements other than treaties in all the courts of law and public offices of the USA without any further proof or authentication thereof.[118] It is a matter of fact that the three communiqués are not published in either the US Congressional treaty collections or the Department of State treaty compilations. In addition, it is understood that different countries may have different views towards recognition of treaties or other legally binding international agreements, and generate different state practices as a result. However, "state practice is not widespread and far from unambiguous. More importantly, the existence of such state practice

111 Phillip R. Trimble and Alexander W. Koff, All Fall Down: The Treaty Power in the Clinton Administration, 16 Berkeley J. Intl L. 55, 69 (1998).

112 Henkin, supra note 110, at 80.

113 Klabbers, supra note 15, at 247.

114 Ibid., at 30.

115 Fawcett, supra note 109, at 389.

116 Klabbers, supra note 15, at 82.

117 R.B. Lillich, The Obligation to Register Treaties and International Agreements with the United Nations, 65 Am. J. Intl L. 771, 772 (1971).

118 1 U.S.C. Section 113 (1994).

does not in itself necessarily give rise to the creation of new legal concepts, replacing or supplementing the traditional treaty".[119] Therefore, as the Vienna Convention reads, "a violation of domestic norms is no excuse for non-performance of treaty obligation".[120] In other words, "if under international law the treaty has entered in force, lack of domestic publication has no effect on the situation".[121]

III. Legal status and effect under the US domestic law

Whereas there is international law governing relations between or among states, there are diversified domestic laws of Sovereign States to take care of their domestic affairs. How international law is incorporated into the municipal legal system varies from country to country. Depending on how domestic laws view international agreements, it is possible for an obligation to be legally binding in international law and have effect on the international plane while having no legal force in one or another municipal legal system because of some obstacles posed by the municipal laws.[122] The requirements for incorporating treaties and other international agreements into Chinese law had not been very clear. After these three Sino–US Joint Communiqués were made, the Standing Committee of the National People's Congress passed in 1990 the Law of the People's Republic of China on the Procedure of the Conclusion of Treaties. In 1992, the General Office of the State Council of China issued a Circular Concerning the Completion of Formalities Concerning Ratification and Approval of International Treaties and Agreements. In any event, the domestic legal status of those instruments under Chinese law has never been an issue. However, the domestic legal status of these instruments has been shrouded in controversy in the USA. Therefore, in the following pages this article will discuss only the domestic legal status of these communiqués within the US legal system.

III.A. Treaty power of the US President

Unlike most other countries, the USA allows its President a wide range of powers in conducting foreign affairs, including the power to negotiate and conclude international agreements. Generally speaking, this power of the President is derived from three sources for four different types of international agreements,[123] although the US law, like international law, provides no definition for "international agreement".[124]

The first type, Article II treaties, is based on Article II of the Constitution, which provides, "He [the President] shall have Power, by and with the advice and consent of the Senate to make Treaties, provided two thirds of the Senators present concur. . .". In addition, the President may conclude international agreements on behalf of the USA on the basis of

119 Klabbers, supra note 15, at 247.

120 Vienna Convention, Article 27, supra note 14, at 884.

121 Klabbers, supra note 15, at 85.

122 Mark W. Janis, An Introduction to International Law, 86 (3rd edn., 1999).

123 Barry E. Carter and Phillip R. Trimble, International Law, 175–76 (3rd edn., 1999).

124 Arthur W. Rovine, Separation of Powers and International Executive Agreements, 52 Ind. L.J. 397, 402 (1977).

congressional authorization, his independent constitutional authority to conduct foreign relations, or authorization contained in an earlier Article II-type treaty. The latter three types of international agreements other than the Article II-type treaties are generally referred to as ''executive agreements'', which have been used since 1817 when the Bush–Bagot Agreement was concluded with the Great Britain to limit naval forces to be kept on the Great Lakes.[125] And these three types of executive agreements are usually concluded under the following three situations:

(a) The President may conclude an executive agreement with a majority approval from both houses of the Congress (sometimes referred to as a ''congressional-executive agreement''). Such approvals may be delegated to the President by the Congress, or may be derived from prior congressional approvals on long-standing statutes for future conclusions of international agreements.
(b) The President may conclude an executive agreement based on one of his own constitutional powers (sometimes referred to as a ''presidential executive agreement''). To conclude this type of agreements, the President uses his express constitutional authority such as the commander-in-chief power, his obligation to see that the laws are faithfully executed, as well as his implied constitutional authority such as his power as chief executive to conduct foreign relations.[126]
(c) The President may conclude an executive agreement on the basis of express or implied authorization by a prior Article II-type treaty approved by the Senate (sometimes referred to as a ''treaty-based executive agreement''. All these four types of international agreements, no matter how they are termed in the USA, are generally regarded as treaties with equal weight on the international plane.

The Supremacy Clause of Article VI of the US Constitution provides:

> ''This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United Sates, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding''.

Apparently, the founding fathers of the USA did not foresee what has been developed by the courts in the following two centuries with respect to the treaty types created and their effects in the USA in connection with powers of the President and various US interests in conducting foreign affairs. Therefore, to a great extent, we could say that implementation of an international agreement as US domestic law, regardless of its treaty type, depends upon the nature of the agreement in the eyes of US courts, i.e. whether the agreement in question is ''self-executing'' or ''non-self-executing'', a judge-made doctrine that emerged in 1829 in the

125 Margaret A. Leary, International Executive Agreements: A Guide to the Legal Issues and Research Sources, Law Libr. J. 1, 1 (1979).

126 Craig Mathews, The Constitutional Power of the President to Conclude International Agreements, 64 Yale L.J. 345, 352–70, (1955).

opinion that Chief Justice John Marshall delivered for the Court in *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829). A self-executing treaty becomes a US law when the treaty enters into force so that courts will resort to it for the rule of decision in cases affected by its terms as they would to a statute.[127] A non-self-executing treaty, on the other hand, requires federal legislation to make them operative in the USA. As a result, it is the treaty's implementing legislation, rather than the agreement itself, that becomes the rule of decision in the US courts. However, criteria used by courts in determining whether a treaty is self-executing vary from case to case. The criteria that courts generally use to review the treaty in question include, but not limited to, intent of the parties to the treaty, susceptibilities of the treaty's language to enforcement, and any private rights of action that the treaty intends to create.[128]

Since "treaties" are regarded as "the supreme Law of the Land" pursuant to Article VI of the US Constitution, by virtue of this provision, an Article II-type treaty gains its legally binding status as federal law in addition to creating rights and obligations under international law. As such, it is superior over state law and displaces any state law to the contrary. Among the other three types of executive agreements, a congressional-executive agreement or a treaty-based executive agreement is normally treated as having the same legal effect as an Article II-type treaty due to involvements of the Congress through its prior approvals. As a result, where a conflict arises between an executive agreement of either form and a statute, the later-in-time rule prevails, just as it would be the case between two statutes, or between an Article II-type treaty and a statute. This principle was articulated in the US Supreme Court's decision in *Whitney v. Robertson*, part of which reads as follows:

> "By the Constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing".[129]

It is the presidential executive agreement that often poses questions with respect to its effect under the US Law. Generally speaking, the presidential executive agreement may invalidate state laws, but may not supersede any inconsistent prior federal statutes.[130] Of course, in any event, the treaty in question must not be applied in courts if it is found to be in direct conflict with the US Constitution.

In the USA, the constitutionality of concluding international agreements by the means of executive agreements is "strongly supported by a series of judicial pronouncement".[131]

127 Edye v. Robertson, 112 U.S. 580, 599 (1884).

128 Thomas Buergenthal and Sean D. Murphy, Public International Law in A Nutshell (3rd edn., 2002), 191–92.

129 Whitney v. Robertson, 124 U.S. 190, 194 (1888).

130 Restatement, supra note 12, Section 115, rptrs. note 5.

131 Honoré Marcel Catudal, Executive Agreements: A Supplement to the Treaty-Making Procedure, 10 Geo. Wash. L. Rev. 653, 669 (1941–1942).

According to the Attorney General's office, between 1945 and 1993, the USA concluded 732 Article II-type treaties and 12 968 other international agreements,[132] most of which fall into categories of congressional-executive agreements and presidential executive agreements. It was therefore repeatedly argued that the executive branch has entered into far too many significant international arrangements as executive agreements, and reserved the treaty route for relatively minor technical arrangements only.[133]

On the surface, the Sino–US Joint Communiqués should fall within the scope of presidential executive agreements, because they relate generally to international cooperation for world security, recognition of a foreign government, and reduction of arms sales to part of a foreign territory. In *United States v. Curtiss-Wright Corp.*, the Supreme Court ruled, "... the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers ... to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality". By the same token, "[I]n this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation".[134] In *Dames & Moore v. Reagan*, 453 U.S. 654 (1981), the Supreme Court held that the President has the power to make presidential executive agreements without involvement of the Congress. Thus, the authority of three US presidents in concluding the joint communiqués with China is unquestionably within the power that the President uses on his own to conduct foreign relations, as contemplated in both the US Constitution and case law. When this authority is applied as "the sole agency for foreign communications", their acts are "subject to international cognizance, and foreign states are not privileged to question the authority of the President, when he speaks or acts".[135]

III.B. Litvinov Assignment and the 1978 Communiqué

In both *United States v. Belmont* and *United States v. Pink*, the Supreme Court upheld the validity of a presidential executive agreement signed with the Soviet Union against the claim that Article II of the Constitution requires the participation of the Senate for the conclusion of such agreements. The court declared further that the executive agreement in question superseded the otherwise applicable state laws. At the time of their negotiations for the establishment of diplomatic relations, in addition to exchange of separate letters and the issuance of unilateral statements, representatives of the USA and the Soviet Union concluded several other agreements and understandings as part of the agreement on recognition and establishment of diplomatic relations, more known as the Litvinov Assignment. In the *Belmont* case, the USA sought to recover funds deposited with Belmont's bank by a private Russian

132 Carter and Trimble, supra note 123, at 214.

133 Rovine, supra note 124, at 398–99.

134 United States v. Curtiss-Wright Corp., 299 U.S. 304 318–19 (1936).

135 David M. Levitan, Executive Agreements: A Study of the Executive in the Control of the Foreign Relations of the United States, 35 Ill. L. Rev. Nw. U. 365, 392 (1940–1941).

company nationalized earlier by the Soviet Union. These funds were included in amounts assigned by the Soviet government to the USA in the Litvinov Assignment to be used to help satisfy outstanding claims of private American parties against the Soviet Union nationalization program. A treaty not of the Article II type was then challenged before the Supreme Court. Faced with the objection that the executive agreement was accomplished by an exchange of diplomatic notes with Maxim Litvinov, the Soviet Foreign Minister, to which the Senate had not given its consent, the Supreme Court held:

> "The recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between the two governments. That the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted. ... Government power over external affairs is not distributed, but is vested exclusively in the national government. And in respect of what was done here, the Executive had authority to speak as the sole organ of that government. The assignment and the agreements in connection therewith did not, as in the case of treaties, as that term is used in the treaty making clause of the Constitution (Article II, Section 2), require the advice and consent of the Senate.
>
> A treaty signifies "a compact made between two or more independent nations with a view to the public welfare." ... But an international compact, as this was, is not always a treaty, which requires the participation of the Senate. There are many such compacts, of which a protocol, a modus vivendi, a postal convention, and agreements like that now under consideration are illustrations. ...
>
> Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. ... And while this rule in respect of treaties is established by the express language of cl. 2, Art. VI, of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states".[136]

From Justice Sutherland's opinion for the Court, it is clear that to recognize a foreign government is indisputably the President's sole responsibility, and "for many it is an 'enumerated' power implied in the President's express authority to appoint and receive ambassadors".[137]

About five years later, based again on the Litvinov Assignment as in the *Belmont* case for purpose of recognition of the Soviet government and payment with the claimed assets to those American nationals whose property in Russia had been seized by the Soviets, the USA filed another suit, as successor to the Soviet government, to recover the assets of the New York branch of the First Russian Insurance Company, which were nationalized by

136 United States v. Belmont, 301 U.S. 324, 330–31(1937).

137 Louis Henkin, Foreign Affairs and the United States Constitution 220 (2nd edn.,1996).

the Soviets but then were in the possession of defendant, Pink, superintendent of insurance of the State of New York. Since such Soviet nationalization would arguably not be recognized by New York State courts because it would violate the state's public polity, in reversing the judgments of the state courts, Mr Justice Douglas recited and expanded Sutherland's reasoning in *Belmont*, and wrote for the US Supreme Court:

> "[The President's] authority is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition. Objections to the underlying policy as well as objections to recognition are to be addressed to the political department and not to the courts. . . . Recognition is not always absolute; it is sometimes conditional. Power to remove such obstacles to full recognition as settlement of claims of our nationals certainly is a modest implied power of the President. . . . Unless such a power exists, the power of recognition might be thwarted or seriously diluted. No such obstacle can be placed in the way of rehabilitation of relations between this country and another nation, unless the historic conception of the powers and responsibilities of the President in the conduct of foreign affairs is to be drastically revised. It was the judgment of the political department that full recognition of the Soviet Government required the settlement of all outstanding problems including the claims of our nationals. Recognition and the Litvinov Assignment were interdependent. We would usurp the executive function if we held that that decision was not final and conclusive in the courts".[138]

The Court further held that an international compact or agreement consisting of an assignment of claims by a foreign government to the USA is, like a treaty, a "law of the land", under the supremacy clause of the Constitution and therefore state law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement. Therefore a state is without power under the Constitution to reject a part of the policy underlying the recognition by the USA of a foreign government.[139]

If we compare the Litvinov Assignment with the Sino–US 1978 Communiqué, there exist several important parallels between the two cases. First, in both cases the recognition and establishment of diplomatic relations were achieved by written form of mutual consent, not by unilateral declarations, the way that the parties could have used. As we mentioned earlier, recognition involves creation of both rights and obligations under international law. By recognizing the PRC, the USA was required under international law to denounce its recognition of Taiwan as well as the mutual defense treaty. As Henkin says, "The United States could not meaningfully recognize the Queen of England as the government of China, it could not even continue indefinitely to insist that the government of China was Chiang Kai-shek; it could not recognize both the regimes at Peking and that at Taipei as the government of China".[140]

138 United States v. Pink, 315 U.S. 203, 229–30 (1942).

139 Ibid.

140 Henkin, supra note 110, at 16–17.

Second, in the Soviet case the agreement on recognition and diplomatic relations was predicated upon several conditions, such as the Soviet promise not to interfere in the internal affairs of the USA, to protect the legal rights of American citizens in the Soviet Union, and to settle claims and counterclaims. Similarly, in the Chinese case the agreement was achieved on the basis of US compliance with the three Chinese conditions for normalization, a compromise on the method of the US termination of the mutual defense treaty with Taiwan, and the US commitment to the legal status of the People's Republic, and particularly to the Clause of the USA maintaining unofficial relations with Taiwan, which could be seen as a right to the USA as well as its obligation to the Chinese.

Third, the Litvinov Assignment was a package of agreements for recognition and diplomatic relations, and was achieved through an exchange of diplomatic notes between President Roosevelt and Minister Litvinov, whereas in the Chinese case, the 1978 Communiqué was announced to the entire world by the heads of the two States. So far as can be determined, there is no procedural defect in the communiqué that may invalidate any part or the whole of the agreement. In fact, President Carter later used the judicial opinions of both *Belmont* and *Pink* to defend his authority to terminate the mutual defense treaty with "Republic of China" as part of his recognition power in order to remove an obstacle to the normalization of relations with the People's Republic. In *Goldwater v. Carter*, although the decision was later overturned by the Supreme Court for other reasons, the Circuit Court indicated that the treaty termination was ancillary to the President's recognition of the mainland government of China, and ruled, "[the action of recognizing the People's Republic of China as the sole legal government of China] made reference to 'the people of Taiwan,' stating that the people of the United States and Taiwan 'will maintain cultural, commercial and other unofficial relations'. This formulation was confirmed by the Taiwan Relations Act. . . . [D]iplomatic recognition of the ROC came to an end on 1 January 1979, and now there exists only 'cultural commercial and other unofficial relations' with the 'people of Taiwan' ".[141] In his dissenting opinion, Justice Brennan of the US Supreme Court opined that the "[a]brogation of the defense treaty with Taiwan was a necessary incident to Executive recognition of the Peking government".[142] Thus, the 1978 Communiqué serves very much the same purpose as the Litvinov Assignment, and therefore perhaps deserves the same treatment in the USA as a valid presidential executive agreement.

III.C. Attitudes of the US Department of State

The position of the Department of State on the exact legal nature of the three Sino–US joint communiqués is ambivalent and self-contradictory. With respect to the 1978 Communiqué, when questioned by Senator Frank Church, Chairman of the Senate Committee on Foreign Relations, whether the "agreement" with China would be transmitted to the committee according to the Case Act of 1972, Deputy Secretary of State Warren Christopher

141 Goldwater v. Carter, 617 F.2d 697, 706–07.

142 Goldwater v. Carter, 444 U.S. 996, 1007.

replied: "Yes; the communiqué will be transmitted although it is not formally an agreement".[143] Since the Case Act requires the Secretary of State to transmit to "the Congress the text of any international agreement, other than a treaty, to which the United States is a party as soon as practicable after such agreement has entered into force with respect to the United States by in no event later than sixty days thereafter",[144] to agree to transmit the communiqué could well mean that the Department of state regarded it as a recognized valid presidential executive agreement. But Mr Christopher's denial of its being a formal agreement brought doubts regarding its legally binding force. As we discussed earlier, formality generally plays no decisive role in determining whether an agreement is legally binding. Mr Christopher's answer therefore leaves room for different interpretations. However, if we put his relevant remarks during the same hearings together, the picture seems to be clearer. When the Chairman asked him about the "exact nature and legal standing" of the communiqué, Mr Christopher replied, "[T]he announcements that were made simultaneously on December 15 were announcements that carried the full weight of each of the two governments".[145] With respect to the question about the Chinese government's authority in ratification of the communiqué, Mr Christopher answered, "I believe that Peking authorities acted with full authority".[146] Arguably, at least during the hearings, the agreement was considered a treaty type of international agreement, even though its form was informal to some extent. Otherwise, questions of authorities and ratification would not have been raised.

Moreover, in its unilateral presidential statement released on the same day of the issuance of the communiqué, the US government stated, "The Administration will seek adjustments to our laws and regulations to permit the maintenance of commercial, cultural and other non governmental relations [with the people of Taiwan] in the new circumstances that will exist after normalization".[147] Senator Edward M. Kennedy also expressed his intention to join in sponsoring legislation that would facilitate the future non-government contact with Taiwan.[148] In his opening remarks at the House Committee on Foreign Affairs hearings on the Taiwan legislation, Chairman Clement J. Zablocki pointed out that the hearings were arranged "on the President's request for legislation to maintain commercial, cultural, and other relations with Taiwan. The President has asked that this legislation be enacted as promptly as possible in view of his decision ... to recognize the People's Republic of China as the sole legal Government of China and to drop such recognition of the Government of Republic of China on Taiwan".[149] Traditionally, as noted by Henkin, international

143 Taiwan: Hearings Before the Committee on Foreign Relations, 96th Cong., First Session, 23 (5, 6, 7, 8, 21 and 22 February 1979).

144 1 U.S.C. Section 112b (1976).

145 Supra note 143.

146 Ibid.

147 Supra note 2, at 26.

148 Kennedy, supra note 107, at 195.

149 Taiwan Legislation: Hearings Before the House Committee on Foreign Affairs, 96th Cong. First Session, 1 (7 and 8 February 1979).

agreements create obligations for nation states to be carried out by them through national institutions in their own ways and by their own means.[150] Therefore, "a major influence for observance of international law is the effective acceptance of the law into national life and institutions. When international law or some particular norm or obligation is accepted, national law will reflect it, the institutions and personnel of government will take account of it, and the life of the people will absorb it".[151] Therefore, the US action to adjust its domestic laws in compliance with the language of the communiqué is an indication of its binding force for the USA to fulfill its international obligations. Seeing the matter from another perspective, it can be found that the 1978 Communiqué, in spite of the fact that it is not listed in the official publications by the Department of State as presidential executive agreements, did require senatorial confirmation of the ambassadorial appointment, congressional appropriations for the establishment of an embassy, and the enactment of subsequent legislation for the implementation of the unofficial relations clause in connection with its relations with Taiwan. Moreover, it has nationwide effects on both federal and state laws in matters relating to China and Taiwan.

Although mistaking the 1982 Communiqué for "the Shanghai Communiqué of 1972", Marian Nash correctly states that the State Department's position toward the agreement is consistent.[152] In his statement to the House Committee on Foreign Affairs on 18 August 1982, Assistant Secretary of State John M. Holdridge said that the communiqué was a *modus vivendi* enabling both parties to continue the relationship and reaffirmed the fundamental principles which had guided the Sino–US relations since Nixon's visit to China. At the same time, he emphasized, "We should keep in mind that what we have here is not a treaty or agreement but a statement of future U.S. policy. We intend to implement this policy, in accordance with our understanding of it".[153]

The Restatement provides that all agreements have the same legal status, except as their provisions or the circumstances of their conclusion indicate otherwise.[154] Despite the fact that international law "places the principal emphasis on the intentions of the parties"[155] in concluding an international agreement, States rarely specify their agreements to be legally binding.[156] Therefore, arguably, intent, rather than having to be proven, should normally be presumed when states negotiate and conclude written agreements.[157] Moreover, when we talk about intention, it is perhaps a fair approach to take all parties interests and intentions into account. In this connection, it is debatable whether it is justified to determine an international instrument by simply using criteria or explanations of one party, since the

150 Henkin, supra note 137, at 229.

151 Henkin, supra note 110, at 60.

152 Marian Nash (Leich), Contemporary Practice of the United States Relating to International Law: International Acts Not Constituting Agreements, 88 Am. J. Intl L. 515, 517–18 (1994).

153 Holdridge's Statement, supra note 85, at 6.

154 Supra note 17.

155 Temple of Preah Vihear (Cambodia v. Thailand), 1961 ICJ 31.

156 Klabbers, supra note 15, at 109.

157 Ibid., at 249.

proclaimed intent of one party, after all, does not necessarily reflect the intentions of all the parties concerned. Instead of taking unilateral actions, states may choose to conclude an agreement with an express understanding that the agreement is not governed by international law and that it is not legally binding on the parties.[158] That is to say, "For if the parties wish to make a non-binding agreement they are free to do so by making that intention plain: from the intention flows the force of bindingness".[159] Therefore, as Widdows convincingly argues, the statements concerning the non-legally binding force of the agreement should preferably be joint statements of all the negotiating states at the time of conclusion because "the precise value of later views of the parties is hard to gauge". Especially if the agreement has already been concluded, unilateral statements run the risk of being viewed as self-serving. Therefore, "one must be a little wary when whole instruments are dismissed out of hand by one party as statements of intention, notwithstanding the inclusion of articles containing words of clear and specific obligation".[160] Fawcett also states, "the performance of inter-State agreements must be adequate to their terms; they must be performed according to the spirit rather than the letter of their terms; a party must not be evasive and must not seek by literal and narrow constructions to discharge his duty with half-performance, or to overreach another party".[161] Thus, whether the one-sided denial of the legal character of the Sino–US communiqués could eventually determine their legal nature remains questionable.

IV. Conclusion

Therefore, judging from the form, significance, terms and circumstances, and the parties' subsequent practices, we can see that there are legally binding elements in the three Sino–US joint communiqués under international law since they satisfy the requirements of being legally binding international agreements under the Vienna Convention and according to the criteria employed by both parties in their law of treaties theory and practice. The parties' subsequent performances after the issuances of the communiqués also suggest that the documents have binding force to the parties. However, criteria to discern the legality of informal international agreements, such as joint communiqués, are a grey area in which no international consensus has been reached.

It is clear that circumstances surrounding the conclusions of these communiqués have changed tremendously over time. The end of the Cold War and the lack of attendant need to maintain a coalition against a deadly enemy have made the common security interests at the time of the issuances of these communiqués disappear. However, the two countries still have the Taiwan question, among others, in common with respect to contents of these communiqués, which have played a significant role for the two parties to cooperate in their

158 Booysen, supra note 20, at 73.

159 Widdows, supra note 48.

160 Ibid., at 143.

161 Fawcett, supra note 109, at 397.

bilateral and international relations in the past 34 years. As such, these documents will certainly continue to contribute to a healthy future of the Sino–US relations.

If they are considered valid legally binding international agreements under international law, these joint communiqués should be categorized as presidential executive agreements under the US law. As such, they should be observed domestically by all the legislative, executive and judicial branches because they need to be treated as the Law of the Land. However, since US officials have repeatedly denied the legally binding force of these agreements, their legal status in the USA is still in question. In this connection, they do not seem to have any legally-binding characters in the USA. In light of the fact that their legality under the US law has not been challenged in US courts, it seems safer to say that their final legal status under the US law remains uncertain. Perhaps, it will be beneficial to both parties and their bilateral relations at large if both governments agree to use more formal forms in their future agreements relating to issues which are significantly important to them so as to avoid unnecessary misunderstanding, misinterpretation and possible disputes.